



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

CAUSE NO. 419 OF 2013

LOISE WAMBUI.....CLAIMANT

v

THE SCHOOL MANAGEMENT COMMITTEE,

LARMUDIAC PRIMARY SCHOOL.....RESPONDENT

JUDGMENT

1. Loise Wambui (Claimant) was employed by the School Management Committee, Larmudiac Primary School (Respondent), allegedly in 1999, and through a letter dated 30 October 2003, the Respondent ratified her employment as a school secretary.
2. Through a letter dated 7 March 2012, the Respondent terminated the services of the Claimant. On 2 December 2013, the Claimant filed legal proceedings against the Respondent in a needlessly verbose pleading stating the issues in dispute as *unfair termination* and *gross under payments*.
3. From the pleadings, evidence and submissions (Claimant filed her submissions on 10 December 2014 while the Respondent filed submissions on 11 December 2014), the Court has identified the issues for determination as, *when the initial employment relationship commenced, whether the termination of the services of the Claimant was unfair and appropriate relief*.
4. On 27 November 2014, the parties entered consent in regard to the Claim for underpayments. The parties agreed that the Claimant be paid Kshs 7,387/-.
5. The Court will narrate each party's case under the identified issues.

Commencement of employment relationship

6. The Claimant pleaded that she was initially employed as a copy typist in January 1999. In testimony, she stated that she was employed as a secretary in January 1999 and that she received a letter dated 30 October 2003, confirming her employment.
7. The Respondent, in the Response to the Claim denied that the Claimant was employed in 1999. It contended that she was employed on 30 October 2003.
8. The Claimant was not questioned on her testimony on the commencement of the employment relationship.
9. The letter dated 30 October 2003 makes reference to *decision was reached to ratify your employment as a school secretary*. This passage in the letter can only suggest that there was an existing employment relationship between the parties as of the date of the letter.
10. Further, the Claimant's testimony on the commencement of the employment relationship was uncontroverted and the Court finds that the Claimant was employed in January 1999 as a copy typist.

Whether termination of services was unfair

Procedural fairness

11. An employer is under a statutory obligation to follow a fair procedure when terminating the services of an employee on the grounds of *misconduct, poor performance or physical incapacity*. That is the import of section 41 of the Employment Act, 2007. The reason given for the termination of the services of the Claimant was *refusing to invite the School Management Committee Members to attend a meeting as directed by the Headmaster*. This is misconduct and therefore section 41 of the Act is implicated.
12. According to the Statement of Claim, the Claimant was given warning letters dated 9 September 2011, 6 October 2011 and the termination letter referenced third warning and dated 7 March 2012 on the same day, i.e. 19 March 2012.
13. In testimony, the Claimant stated that she resumed duty from maternity leave on 5 March 2012, and was redeployed to a smaller office to make room for a senior teacher. On 6 March 2012, the Headmaster sent a Mr. Kamau to request her to prepare invitation letters to members of the School Committee to attend a meeting on 7 March 2012.
14. The Claimant stated she was unable to prepare the invitation letters because she did not have typing papers and the Headmaster who had custody of the papers was away. On 7 March 2012, the Headmaster called her seeking explanations and she explained.
15. The Claimant further stated that the next Monday, 12 March 2012, she was called to a School Committee meeting and asked to write an apology letter to the Headmaster. She went to her office and wrote a letter and submitted it to the Committee, which told her to wait outside. Thereafter, the Committee members took away her office keys and sent her away.
16. The Claimant stated that on 19 March 2012, she was called and met with 5 members of the School Committee and was given an envelope and inside the envelope were 3 letters dated 9 September 2011, 6 October 2011 and 7 March 2012. She was also given Kshs 10,500/-.
17. In cross examination, the Claimant was shown minutes of the School Committee meeting held on 19 March 2012, and she denied being issued with any letter on 7 March 2012. She further denied going to work after 12 March 2012, until she was called on 19 March 2012.
18. The Claimant admitted that conciliation was undertaken before the Labour office and she was paid Kshs 50,730/-.
19. The Respondent pleaded that the Claimant was served with verbal and 3 written warning letters prior to dismissal on the dates appearing on the face of the letters, and that it followed due process and observed equity.
20. The Respondent also pleaded that the Claimant was called to discuss the allegations that led to the termination of contract and was asked to apologise and request for forgiveness but she failed. According to the Respondent, the termination of contract was fair and in accordance with the provisions of the Employment Act, 2007.
21. The Respondent called two witnesses. I will narrate only part of their testimony as relates to the process followed culminating in the termination of the services of the Claimant.
22. The first witness was the Respondent's Headmaster at the material time. He stated that the Claimant was given warning letters on 9 September 2011 and 6 October 2011.
23. On the immediate cause of the termination, the witness stated that on 5 March 2012, he instructed a Mr. Kamau to inform the Claimant to prepare invitation letters for School Management Members meeting scheduled for 7 March 2012 but the Claimant declined to prepare the letters.
24. The witness stated that on 7 March 2012, he called the Claimant in the presence of the Deputy Headteacher and sought an explanation. The Claimant explained that she did not have typing paper but became emotional and asked for a dismissal letter and thereafter did not report to work on 8th and 9th March 2012.
25. The witness further stated he called a Committee meeting for 12 March 2012, where the Claimant's conduct was discussed (minutes produced). The Claimant was summoned before the Committee and was asked to write an apology but wrote a grievance letter instead. The Committee also resolved to indefinitely suspend the Claimant.
26. Another Committee meeting was held on 19 March 2012, and Claimant's conduct was discussed (minutes produced). Claimant was called to the meeting and she declared she was not ready to work with the Headteacher and the meeting resolved to dismiss her.
27. The witness stated that the Claimant was given a dismissal letter dated 7 March 2012 on 19 March

- 2012, and she was paid Kshs 10,500/- and later Kshs 50,730/- after conciliation before the Labour office.
28. In cross examination, the witness admitted that the minutes of the meeting of 12 March 2012 did not mention the charges the Claimant faced.
29. The Respondent's second witness was the current Headteacher. She mostly testified on the reasons for the dismissal. Her testimony on the process was brief and it was that she took minutes of the Committee meeting on 19 March 2012. She further stated that the Claimant was called to the meeting and that she refused to apologise and the Committee resolved that she be dismissed.
30. That is the narration of the parties' cases. The facts as asserted must now be weighed against the statutory test in section 41 of the Employment Act, 2007.
31. Section 41 of the Employment Act, 2007 provides for procedural fairness. The section has majorly given statutory acceptance to what for long has been referred to as the *audi alteram partem* rule (the audi rule) in natural justice.
32. The ingredients are that a party should be heard before a decision which may be prejudicial is taken. The hearing need not be oral, it could as well be conducted through correspondence.
33. But whether oral or documented, the employee must be informed of the allegations or charges to confront. Under our statutory framework, the employee must also be informed that dismissal is contemplated.
34. The Claimant was dismissed for failing to obey the instructions of the Headmaster to prepare invitation letters to school Committee members to attend a meeting. The Respondent has not shown either from the minutes or testimony that the Claimant was informed that her dismissal was under consideration.
35. An employee is also entitled to defend herself. I have looked at the minutes of 12 March 2012. The material portion relate to Claimant's conduct and theft that had occurred. The minutes show a decision was taken to suspend the Claimant pending further discussions on 19 March 2012.
36. These minutes do not demonstrate that the Claimant was informed that her dismissal was under consideration.
37. On 19 March 2012, according to the minutes, the Committee decided to relieve the Claimant of her duties and the Headmaster to write her a letter stating the reasons as, that she was sabotaging the school committee meetings, lying that she had not been paid for 6 months (she told this to the AEO twice). Certain accusations were noted in the minutes against the Claimant and these were *disobedience, false allegations and sabotaging*.
38. The Committee resolved that the Claimant be relieved of her duties with effect from 19 March 2012. However, the dismissal letter issued and given to the Claimant was dated 7 March 2012. The Respondent's first witness admitted that he had made the decision to dismiss the Claimant on 7 March 2012, and this was a personal decision.
39. Two conclusions emerge from this scenario. By 7 March 2012, the Committee had not informed the Claimant of the allegations contemplated for her dismissal and had not afforded her a hearing. An attempt was made on 12 March 2012. Equally, a decision had been taken by the Headmaster to have the Claimant dismissed on 7 March 2012. The dismissal letter she was given was written before the decision to dismiss was taken by the appropriate authority.
40. The Court can only conclude that the dismissal was procedurally unfair.
41. With the conclusion reached, it is not necessary for the Court to consider either the fairness or validity of the reasons for the dismissal of the Claimant and whether the Respondent has proved the reasons.

Appropriate relief

42. The Claimant in her pleadings had sought about 4 substantive reliefs. The relief for underpayments was compromised in the course of proceedings.

Certificate of service

43. No reference was made in the course of testimony or in the submissions on the claim for house allowance or Certificate of Service.
44. A Certificate of Service is a statutory right and the Claimant is entitled to one.

Compensation

45. The equivalent of not more than 12 months gross wages is one of the primary remedies where the Court finds unfair termination. The remedy is discretionary and the statute has outlined the factors the Court ought to consider.
46. The Claimant served the Respondent for about 13 years. She was paid some dues on dismissal. Considering the length of service and the payments made, the Court is of the view that the equivalent of 4 months' gross wages would be fair.
47. The Claimant did not prove her wages in evidence. But she had alleged underpayments which claim was compromised. Pursuant to Legal Notice No. 64 of 2011, the minimum wage for a copy typist was set at Kshs 9,450/- exclusive of house allowance. Factoring 15% house allowance, the gross wage was Kshs 10,867/-. The 4 months gross wages would therefore be Kshs 43,470/-.

Conclusion and Orders

48. The Court finds and holds that the termination of the services of the Claimant was procedurally unfair and awards and orders the Respondent to pay her

- a. 4 months wages compensation Kshs 43,470/-
- b. Costs Kshs 10,000/-

TOTAL **Kshs 53,470/-.**

49. The Respondent to issue the Claimant with a Certificate of Service.

Delivered, dated and signed in Nakuru on this 6th day of February 2015.

Radido Stephen

Judge

Appearances

For Claimant Mr. Otieno instructed by Geoffrey Otieno & Co. Advocates

For Respondent Ms. Kariuki, Litigation Counsel, Office of the Attorney General