



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 371 OF 2014

LUCIA MUTHONI MERIA .....CLAIMANT

VERSUS

ACADEMIC SERVICES [LTD] .....RESPONDENT

J U D G M E N T

INTRODUCTION

1. The claimant brings this suit against her former employer claiming accrued benefits for years served plus damages for wrongful termination of employment by the respondent on 23/7/2014. It is the claimant's case that on 21/7/2014, she was forcefully removed from her office by Junior officers of the respondent and barred from discharging her duties. Thereafter her services were unlawfully and wrongfully terminated by the respondent via email on 23/7/2014.
2. The respondent has on the other hand denied liability for the alleged wrongful termination of the claimants services, and averred that the claimant was lawfully dismissed on account of breach of condition of contract of employment and sabotage by calling parents to withdraw their pupils from the respondent's school, where she was employed as the Assistant Principal. It is the defence case that the claimant was terminated in accordance with her employment contract and as such she has no claim against the respondent.
3. The suit was heard on 9/12/2014 when the claimant testified as CW1 but the respondent called no defence witnesses. Both parties however filed written submission after the close of the hearing.

CLAIMANT'S CASE

4. CW1 is currently the principal of Wina complex Academy since September 2014. Previously she was employed by the respondent as a class teacher at the Coast Academy Junior School. She started working there on 29/8/2011 and earning Ksh.40000 per month (exh.1). On 4/1/2012 CW1 was promoted to be the Assistant Principal Junior School by a letter dated 19/12/2011 (exh.3). Her new salary was kshs.85000 per month plus various other fringe benefits. She was also entitled to 30 days annual leave, ksh.10000 bonus per year and gratuity after completing 2 years at the rate of 5% of the annual gross salary. Her salary was increased to ksh.89250 by letter dated 8/10/2013 (exh.7). She produced payslips for March 2014 to show that her gross salary was ksh.90250(Exh.4).
5. On 21/7/2014 CW1 reported to work as usual but after 5 minutes she was confronted by Mr. Wasike (Assistant Principal Senior School), Mr. Kinai (teacher), Rosemary Mwangi (teacher) and a security guard who wanted to know why she had entered the office. She was ordered by Mr. Wasike to hand over the office keys and vacate the school. CW1 contended that the said forceful

eviction embarrassed her and was indeed a breach of her employment contract. She explained that she was not served with a one month notice as provided for under her contract of employment dated 31/1/2012. CW1 further explained that on 23/7/2014 she received a letter dated 23/7/2014 terminating her services (Exh.9). She however admitted receipt of her pension plus certificate of service after filing this suit. She confirmed that after seeing the clearance forms filled with the defence to the suit, CW1 went and cleared with the school.

6. CW1 prayed for one month salary in lieu of notice, 12 months salary as damages for wrongful termination, services gratuity for 2 years costs and interest.
7. On cross examination by the defence counsel CW1 admitted signing the employment agreement on 16/1/2012 while the respondent signed it on 31/1/2012. She explained that she was given a letter of offer on 19/12/2011 (exh.9) and signed acceptance. She admitted that her payslip (Exh.4) reflected NSSF deductions. She admitted that she was also a member of a pension scheme where her employer was contributing to. She explained that after eviction from office, she lodged a complaint with the CEO of the respondent by phone.
8. CW1 explained further that as the Assistant Principal, she could remind parents about fees arrears wherever requested to do so by the Accounts Department. She concluded by clarifying that the dismissal letter she annexed to the claim herein was an email and that is the reason why it bears no signature.

### ANALYSIS AND DETERMINATION

9. Upon going through the pleadings, evidence and the submissions, there is no dispute that CW1 was employed by the respondent as a class teacher at the Coast Academy Junior School since 29/8/2011. There is further no dispute that from 4/1/2012 CW1 was promoted to be the Assistant Principal of the same school but under renewable fixed term contract of 2 years. There is also no dispute that CW1 was forcefully evicted from her office and thrown out of the school by a group of employees of the respondent and after reporting the matter to the respondent's CEO, he dismissed her vide email dated 23/7/2014. The issues in dispute are whether CW1's dismissal is unfair and wrongful and whether the reliefs sought in the suit should be granted.

### **Wrongful dismissal**

10. It is trite law that a fixed term contract of employment is breached when either party to the contract terminates the contract before the lapse of the fixed term or without complying with the terms of the contract regarding termination by notice or if the termination is not justified. In the present case, the parties agreed to be bound by the contract of service for a renewable 2 years fixed term upto 4/2/2014. However under clause 15 of the contract, the parties agreed that the contract could be terminated by a notice of one month in writing or payment of one month salary in lieu of notice. Termination notice however was not acceptable if it was to end during an academic term. The first term of 2 years lapsed on 4/2/2014 and the parties impliedly renewed the same for another 2 year term. The reason for the foregoing is that CW1 continued with the same duties and the respondent continued to pay her the same salary and remitting all statutory deductions after 4/2/2014. In this Court's view, when parties renew fixed term contract by conduct the same is renewed for the same fixed period as the expired contract. However if the parties continues with the contract beyond the said term after renewal, the contract is deemed to be for an indefinite period until termination on a reasonable notice or breach or operation of the law.
11. Under paragraph 3,5, and 6 of the respondent's defence, the claimant was dismissed on account of breach of contract, failure or neglect of her duties and sabotage of the respondent's business by calling parent to withdraw their pupils from the respondent's school. The respondent did not call any witness to justify the said reason for the dismissal. She did not also adduced any evidence to prove that a fair procedure was followed before dismissing the claimant for the alleged reason for the dismissal.
12. The court is therefore left only with the uncontested evidence from the claimant that she was forcefully evicted from her office and out of the school by the employees of the respondent including the Assistant Principal of the senior school on 21/7/2014 and later served with a termination letter on 23/7/2014. It was not contested that CW1 was never served with any notice

- before the termination. She was also not served with the reasons for dismissal and she was never accorded any hearing to defend herself for the reasons relied upon to dismiss her. She only learned the reasons for her dismissal through the respondent's memorandum of defence herein.
13. Section 41 of the Employment Act provides in mandatory terms that before an employer terminated the services of his employee on grounds of misconduct, physical incapacity or poor performance as in this case, he shall first explain to the employee the reason for the intended dismissal and thereafter accord the employee a chance to air his defence. The proceedings must be conducted in a language of the employee's understanding and in the presence of a shop floor union representative or co-employee of the accused employee's choice, who must also be accorded a hearing. That elaborate procedure was not followed here and it rendered the dismissal unfair and unjustified considering the fact that the reason for dismissal was not proved as required under Section 43 and 45 of the same Act.
14. Having found that the termination of the claimant was unfair and unjustified the court makes a finding that the purported termination of CW1's employment by the notice dated 23/7/2014 was not only mischievous but also the culmination of a concerted effort to terminate the fixed term contract wrongfully and unfairly before its due time. It is in this court's considered view that terminating a fixed term contract before its term for invalid reason or no reason at all amounts to breach of the contract. The first issue for determination herein above is therefore answered in affirmative.

### RELIEFS

15. The claimant has prayed for service pay, one month notice, 12 months salary for wrongful termination and a certificate of service. However it is trite law that damages for breach of a fixed term contract is the salary for the unexpired period of the contract. The contract herein was to expire on 4/2/2014 but through the conduct of the parties the contract was renewed for a further 2 years. By the time the contract was wrongfully terminated on 23/7/2014 the claimant had served for 5 ½ months under the renewed contract. The unexpired period was therefore 18 ½ months. The claimant has prayed for 12 months salary as compensation for the wrongful termination. The court therefore awards her the 12 months salary (ksh.1,083,000) for wrongful dismissal as prayed. The prayer for salary in lieu of notice is however dismissed on ground that CW1 has been awarded all the earnings she would have earned had she worked for the whole contract period. The prayer for service pay is also dismissed because the claimant was a contributor of NSSF and pension. CW1 admitted that she was issued with a certificate of service and as such prayer(c) is dismissed. The prayer for declaration that the termination was unfair is granted but reinstatement will not be ordered because that would undermine the freedom of contract.

### DISPOSITION

For the reasons stated above, judgment is entered for the claimant in the sum of ksh.1,083,000 plus costs and interest.

**Dated, signed and delivered this 23<sup>rd</sup> March 2015.**

**O. N. Makau**

**Judge**