



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NUMBER 22 OF 2011**

**GRACE ATIENO ONYANGO.....CLAIMANT**

**VERSUS**

**ST. HANNAH'S PREPARATORY SCHOOL LIMITED.....RESPONDENT**

**JUDGMENT**

1. The claimant in this suit was on 17<sup>th</sup> August, 2009 dismissed from employment on account of poor performance. She avers that she was never given any previous warning or an opportunity to contest her termination on this ground.
2. On termination she was told that she would be paid for the days worked in August 2009 plus one month's salary in lieu of notice but the respondent failed or ignored to do so.
3. The respondent on its part states that an assessment report of members of staff done on 9<sup>th</sup> June, 2004 found the claimant's performance to be poor and needed further improvement. She was furnished with a copy of the report. According to the respondent, the claimant was given sufficient opportunity to improve before her services were terminated but no significant improvement was noted in the claimants' performance.
4. Regarding payment of her dues, the respondent averred that the claimant was offered one month's salary in lieu of notice and salary for days worked in August 2009 but she declined.
5. In his final submission to the Court, Counsel for the claimant submitted that the claimant's services were terminated for no valid reason. Counsel argued that although low enrolment was within the claimant's knowledge, she was not accused of being the reason behind the low enrolment. Counsel further submitted that contrary to provisions of section 41 of the Employment Act the claimant was not afforded a hearing over the accusations against her prior to her termination. She was neither given any warning letter nor a notice to show cause against any accusations.
6. Counsel for the respondent on the other hand submitted that the performance report dated 9<sup>th</sup> June, 2004 pertaining to the claimant, indicated declining performance. According to the report, the claimant had failed to undertake her duties as highlighted in the report. According to Counsel, the claimant's performance in her role as head of nursery and pre-unit at the respondent's school was impacting on the retention of pupils and recruitment.

7. According to Counsel, the assessment report was meant to highlight the claimant's abilities and was a warning from the employer to improve her performance given her responsibility as head of pre-unit and nursery school. Counsel therefore submitted that the claimant was given sufficient time to improve her performance from the date of assessment in 2004 to the date of termination in 2009.
8. In a claim for wrongful or unfair termination of employment the Court is more concerned about the validity of reasons and justification for termination. In analyzing the validity of the reason or justification for the termination, the Court must guard against imposing its own opinion or perception of validity or justification on that of the employer. It suffices that a reasonable employer could for the reasons at hand justify the termination of services of the employee concerned. Further once the reasons and justifications are met, the termination must be done in accordance with a fair procedure as provided in the Act or natural justice generally.
9. In this particular case did this occur? According to the claimant although she was terminated on account of poor performance, she was never given any notice or warning concerning her poor performance. She however admitted in cross examination that her role as the head teacher was to ensure enrolment to the school was consistent and increasing. She further said that she was aware that enrolment declined during the time she was in charge of the school.
10. The respondent's witness, Mrs. Lucy Ndungu, on the other hand testified that the claimant being in charge of the pre-school was having a supervisory role and was supposed to ensure enrolment did not go down. According to Ms. Ndungu, the claimant initially performed well but by the time the assessment was done she had fallen in performance. Ms. Ndungu's evidence was that all assessment reports were availed to the teachers concerned and the claimant was availed her report.
11. The assessment report dated 9<sup>th</sup> June, 2004 and marked as annexure "B" in the respondent's memorandum of response was prepared by the headmistress V. N. Ndehi. She was never called to give evidence over this report. Further there is nothing on the report to show it was done in collaboration or co-operation with the claimant.
12. Section 41(1) of the Employment Act requires that before terminating the employment of an employee on the grounds of poor performance, the employer must explain to such employee, in a language the employee understands, the reason for which the employer is considering termination.
13. The purpose of the requirement for this explanation is to enable such employee give his or her reaction to the allegation of poor performance. It is a common human resource practice that employees performing below par are usually put on refresher training or close supervision and advice on ways to improve their performance. This is because poor performance at times is not necessarily a sign that an employee is incompetent but could be combination of several factors some of which may be beyond such employee's control.
14. In the case before me, I see no record of evidence that the performance assessment report was prepared, shared and discussed with the claimants prior to her dismissal.
15. Ms. Ndungu told the Court that the claimant's performance had previously been good. This was vouched for by appendix 3 attached to her memorandum of claim which was a certificate of appreciation for her long service to the respondent.
16. As observed earlier in this judgment, poor performance could be a function of several factors, some beyond the control of the employee. It is not necessarily a sign of incompetence. The poor performance of the claimant was based on low enrolment in the pre-unit section of the respondent's school. Whereas the claimant as the head of pre-unit school was responsible for ensuring enrolment did not drop, the drop in such enrolment could have been as a result of stiff competition from other schools offering the same services and parental choice in deciding which school to take their child. No evidence was tendered regarding any child or children that were removed after registering with the school due to the claimant's poor performance. To this extent the Court comes to the conclusion that the claimant's services were

unfairly terminated within the meaning of section 45 of the Employment Act.

17. In conclusion the Court orders that the respondent shall compensate the claimant as follows:-

**Kshs.**

- (a) One month's salary in lieu of notice  
of termination.....26,425.00
  - (b) 7 days salary for August, 2009.....852.00
  - (c) 10 months salary as compensation for unfair  
termination of service.....264,250.00
- 291,527.00

18. The claimant shall have costs of the suit.

19. The respondent shall issue the claimant with a certificate of service.

Dated at Nairobi this 6<sup>th</sup> day of March 2015

**Abuodha J. N.**

**Judge**

Delivered this 6<sup>th</sup> day of March 2015

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

**Abuodha J. N.**

**Judge**