



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 32 OF 2014

STEPHEN O. OLUOCH.....CLAIMANT

VERSUS

BISHOP DICKSON OPIYATO [Heart Beat High School].....RESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a claim about unlawful termination of employment of an employee by the employer by which the claimant seeks to recover his accrued employment dues plus compensation for unfair termination. The gist of the claimant's case is that on 18/3/2013, he was assaulted, defamed and dismissed summarily from his employment by the respondent for alleged incompetence, improper performance of duty and gross misconduct. In his view, the dismissal was unfair and in breach of the law, both substantively and procedurally because the reasons cited for the dismissal were invalid and untrue, and that he was not given a chance to defend himself.

2. The respondent admits that he employed the claimant as a teacher and later promoted him to Deputy Principal and Principal of his school receptively, between September 2011 and 19/3/2013 when he deserted employment. The respondent has therefore averred that the claimant was never dismissed but deserted work after being questioned about his misconduct of defrauding student of their money.

3. The case was heard on 8/9/2014 and 15/10/2014 when the claimant testified as CW1 while the respondent testified as RW1 and called Sophia Mkamboi Opiyato as RW2. Before the hearing CW1 amended the date of the cause of action to read 18/3/2013 on all his documents filed. After the hearing both parties filed written submissions.

CLAIMANT'S CASE

4. CW1 is now a teacher at Kisumu Boys high School. Previously he was employed by the respondent as a school teacher, Deputy Principal, and Principal between September 2011 and 18/3/2013. His salary was ksh.12000 per month. He attributes the said promotions to his good character, performance and good relationship with students.

5. In January all the teachers in his staff including himself were issued with new contracts for one year in which RW2 signed on behalf of the employer. CW1's contract was dated 1/1/2013 (exh.1) and was to end on 31/12/2013. His witness in the contract was his fellow teacher Mr. Kuboi. CW1's duties included supervising performance by teachers and students and discipline.

6. On 18/3/2013, CW1 arrived at the school at 6.45 am and found the respondent, Deputy Principal (respondent's nephew) and when he greeted them, they ignored him. When the school assembly was called at 7.10am, it was not business as usual as the respondent assumed the protocol and solely addressed the students and dismissed the assembly. At 7.44 am the respondent called for a staff meeting where he accused CW1 of not being serious with work because CW1 did not report at 5 a.m. The respondent then told CW1 that he was useless and that he did not recognize him and demanded that he leaves the school.

7. CW1 pleaded with the respondent to discuss the matter in the school management but the respondent grabbed his shirt and tried to assault him but the other teachers intervened. CW1 left and the respondent threatened to cut his neck if he returned to the school. On 19/3/2013, CW1 wrote a letter in response to the verbal termination demanding for his dues but no response was given by the respondent. CW1 served further demand letters on 25/3/2013 and 28/3/2013 but no response was made. However on 21/7/2013, the respondent called CW1 to his office for his dues. CW1 travelled from Mombasa to the school on 22/7/2013 at a cost kshs.1300 but the respondent refused to talk to him.

8. CW1 blames the respondent for terminating the employment contract before the due date being 31/12/2013 and prays for salary for the unexpired period of the contract, salary for the 18 days worked in March 2013, one month salary in lieu of notice, refund of bus fare (ksh.1300) spent on 22/7/2013 and any other relief that the court may deem fit. He contended that RW2 was the accountant and the school manager and she was the one collecting all finances in the school. He denied ever writing any resignation letter.

9. On cross examination by the defence counsel, CW1 stated that he holds a Bachelor of Education Degree in Literature and History. He maintained that he joined the Respondent in September 2011 as a teacher, became Deputy Principal in March 2012 and School Principal in May 2012. His contract expired on 31st December 2012 but he continued as the Principal after the contract was renewed on 1st January 2013 by RW2 to end on 31st December 2013. CW1 worked upto 18th March 2013 when RW1 told him to leave the school or else he would cut off his head. CW1 confirmed that he was employed by Kisumu Boys High School in September 2013 for a salary of Kshs.17000.

10. CW1 denied having any problems with the students and denied ever receiving any money from the students for exam registration or at all. He maintained that it is RW2 who collected all finances in the school. He denied knowledge of the Money Refund Note dated 25th March 2013. He contended that on 25th March 2013, he was in Kisumu and as such the signature on the note besides his name was a forgery. He further denied receipt of the Respondent's letter dated 19th March 2013 which responded to his demand letter dated 19th March 2013. The letter was calling CW1 to collect his dues but none was paid. He denied that he deserted work due to the alleged unethical conduct with students and maintained that he fled after the Respondent tore his shirt and threatened to beat him up. He further explained that all the teachers witnessed the assault but they are afraid of testifying against their employer. He concluded by maintaining that he was not given a hearing before his dismissal.

DEFENCE CASE

11. RW1 is a Pastor and the Director of the Heart Beat High School and Heart Beat Home and Rescue Centre at Mwatate, Taita. He confirmed that he employed CW1 as a teacher, Deputy principal and Principal of the High School section for one year renewable contract. His salary was Kshs.12000 per month.

12. On 19th March 2013 RW1 received information that the students were planning to demonstrate against the misuse of their money by the CW1 who received it and failed to register the students for Qualifying Test (QT). The said QT was done by foreign students in order to qualify to seat for the Kenya Certificate of Secondary Education (KCSE). The students were also complaining that CW1 had borrowed their money and failed to pay. RW1 then summoned all the teachers including CW1 to inquire about the students' complaints but CW1 denied collecting any money for QT or having borrowed any money from the students. According to RW1, CW1 became very bitter, said that RW1 was embarrassing

him before the other teachers and walked away to his office as the students were demonstrating and singing “Biko must go.” He then told CW1 to go and look for money to settle the students' debts and QT levy for the foreign students.

13. CW1 left and wrote a letter dated 19th March 2013 demanding for payment of Kshs.24000 in order to part peacefully. The letter demanded for a reply before 5.00 p.m. of the same day and RW1 responded in writing admitting to pay the Kshs.24000 on condition that CW1 first settled the students' debt, in respect of QT and other debts. The Respondent came to the school on 25th March 2013 and paid some debts to students amounting to Kshs.4650 and signed a note to that effect which was also signed by his wife Mkiwa, Deputy Principal and the manager (D.Exh.3). He did not settle the QT money of Kshs.15000 and the foreign students did not seat for the test. CW1 never returned to the school ever since and according to RW1, CW1 deserted employment. He prayed for the suit to be dismissed but indicated his willingness to pay the Kshs.24000 to the CW1.

14. On cross examination by the Claimant's counsel, RW1 admitted that CW1 was employed for one year renewable contract but worked for 17 months from September 2011. He admitted that CW1 was earning a salary of Kshs.12000 per month. He further admitted that when CW1 wrote a demand letter complaining about dismissal from work. RW1 did not deny the dismissal in his response dated 19th March 2013 nor did he accuse CW1 of deserting work. Instead he admitted the Claimant's demand for Kshs.24000 being one month salary in lieu of notice and salary for March 2013. RW1 contended that he was ready to reinstate CW1 to work had he paid the debts to the students. He admitted that Mr. Julius Kuboi was his employee for 2 months. He further admitted that the Deputy Principal was his nephew while the Accountant and manager of the school was his daughter. He further admitted that he received 2 demand letters from CW1's lawyers but he never responded to any.

15. RW2 testified that she is employed by RW1 as the School Manager. She is also the daughter to the RW1. She confirmed that CW1 was employed by the RW1 but his contract expired in 2012 and it was not renewed. She denied validity of the contract produced by CW1 as Exh.1 and denied the signature thereon attributed to her. On 16th March 2013 some students reported to RW2 that CW1 had borrowed students' pocket and QT money. She then told the students to prepare a list of the creditors plus the amounts due. Thereafter, on a date she could not remember, CW1 deserted work and demanded payment of Kshs.24000 but he was not paid because he was asked to pay the students' debt of Kshs.4650 in form of pocket money plus Kshs.15000 for QT. CW1 came back to the school on 25th March 2013 and settled the students' debt of Kshs.4650 but refused to pay the Kshs.15000 for QT alleging that he had paid the money. He went to get the receipts but disappeared for good. RW2 therefore maintained that CW1 was never dismissed but left work voluntarily.

16. On cross examination by the Claimant's counsel, RW2 admitted that she was the sole collector of school fees and contended that CW1 was not allowed to receive any money from any person. She admitted that on Monday 18th March 2013, she arrived at the school after the assembly and she therefore did not know what transpired both at the school assembly and the staff meeting. She maintained that CW1 went to the school on 25th March 2013 to repay the students' pocket money. She admitted that CW1 was not given a hearing on the alleged debts. On re-examination, however, RW2 changed her earlier testimony and stated that after giving CW1 the list of creditors from the students, it is his wife paid the debt.

Analysis and Determination

17. After carefully considering the pleadings, evidence and the submissions, it is clear that CW1 was employed by the Respondent as a teacher, Deputy Principal and later as school Principal from September 2011 and March 2013. It is also obvious that CW1 was employed on one year renewable contract which ended on 31st December 2012 but was impliedly renewed for the same period by the conduct of the parties to end on 31st December 2013. There is also no dispute that on 18th March 2013 RW1 accused CW1 of borrowing pocket money from the students and also collected QT money from foreign students and failed to register them for examination. There is further no dispute that RW1 demanded that CW1

leaves the school to look for money to repay the students' debts. It is also not disputed that RW1 was willing to reinstate CW1 only if he repaid the students' debt. It is not disputed that on 19th March 2013 CW1 wrote a demand letter claiming payment of one month salary for termination of his employment without notice plus salary for the month of March 2013. It is also not in dispute that RW1 was willing to pay the said Kshs.24000 if CW1 repaid the students' debt in respect of picket money and QT. It is not disputed that the alleged debt of students' pocket money of Kshs.4650 was repaid by CW1's alleged wife. The issues for determination include firstly whether the contract of employment was terminated by Claimant through desertion or by the Respondent through wrongful and unfair dismissal of the Claimant and secondly whether the reliefs sought should be granted.

Desertion vs. wrongful and unfair dismissal

18. RW1 contends that CW1 became angry and deserted work after he was asked to repay financial debts he owed to the students in form of pocket money and QT levy saying that RW1 was embarrassing him before the other teachers. The defence has however contradicted itself when RW1 said that he told CW1 to go away and look for money to repay the students' debts and was only willing to reinstate him after repaying the debt. In addition RW1 confirmed that after receiving a demand letter from CW1 on 19th March 2013, he wrote back to him admitting to pay him one month salary for terminating his employment without notice. The defence further contradicted itself when RW1 said that CW1 repaid the students' pocket money on 25th March 2013 while RW2 said that the said debt was paid by CW1's alleged wife.

19. The Claimant on the other hand contends that on 18th March 2013 RW1 refused to accept his greetings and took over control of the school protocol at the school assembly. Thereafter RW1 called a staff meeting for all the teachers where he accused CW1 of borrowing debts from students and of receiving QT money from foreign students and failing to register them for exams. That when CW1 turned to plead with the RW1 to discuss the matter in a management forum, RW1 became furious, assaulted him and sent him away with a clear warning that he would cut off CW1's head if he dared return to the school. That when CW1 wrote demand letter to the Respondent one day after the dismissal, RW1 admitted to pay him one month salary for dismissing him without notice. CW1 denied ever deserting work and maintained that he was unfairly dismissed on false accusations and without being given a chance to defend himself.

20. After evaluating the facts presented before it, this court dismisses the defence argument that CW1 deserted work and instead accepts the Claimant's case that he was wrongfully and unfairly dismissed from work by the Respondent. The reason for the foregoing is that the testimony by the defence witnesses is tainted with material contradictions as demonstrated above. On a balance of probability, the court finds the Claimant's evidence consistent and believable.

21. Under Section 45 of the Employment Act, termination of employment is unfair if the same is founded on an invalid and unfair reason and if done without following a fair procedure. The burden of proving the reason and justifying the same is on the employer while the procedure for termination must be in accordance with Section 45 read with section 41 and 43 of the Employment Act. The said section 41 requires that before an employer dismisses an employee for misconduct and poor performance, like in this case, he must explain the reason for the dismissal to the employee and afford him a chance to defend himself in an oral hearing before the dismissal, such hearing must be done in the presence of another employee of the accused employee's choice and must be done in a language of the employee's understanding. In this case, that elaborate procedure was not followed and the alleged debts owed to the students including QT money was not proved before this court. The whole termination of the Claimant's services was therefore unfair within the meaning of Section 45 of the Employment Act. It was also wrongful and a breach of the fixed term contract of employment because it was prematurely terminated before 31st December 2013 which the parties impliedly agreed to be its end. Consequently the answer to the first issue for determination is that CW1 did not desert work but was wrongfully and unfairly dismissed by the Respondent from his employment on 18th March 2013.

Reliefs

22. In view of the finding that CW1's employment contract was wrongfully terminated by the Respondent through breach, this court further finds that CW1 is entitled to damages. It is trite law that damages for breach of a fixed term contract is the total remuneration the employee would have earned in un-expired period of the contract term. As earlier observed, the one year fixed contract was renewed in January 2013 when the Respondent allowed CW1 to continue working and CW1 accepted to continue serving the Respondent in the same terms that had been agreed under the expired contract. Were it not for the premature termination, the parties could have continued with their contract, at least ,till 31st December 2013. The unexpired period of the contract from March to December 2013 was therefore ten months.

23. In computing the salary for the un-expired contract period, the court must always consider any mitigations of losses done by the employee after the dismissal. In this case CW1 successfully sought for an alternative employment at Kisumu Boys High School which gave him even a higher pay of Kshs.17000 compared to the Respondent's Kshs.12000. He started his new employment in September 2013 meaning that he stayed without pay from March to August 2013. That was a period of 6 months for which CW1 is awarded Kshs.72000. In view of the foregoing award of salary lost due to the premature termination of the contract, the prayer for salary in lieu of notice and salary for 18 days worked in March 2013 is dismissed. The prayer for leave earned in the 17 months of service was not contested in evidence. CW1 will therefore earn 29.75 leave days for the 17 months served and he is awarded Kshs.11900.

24. The claim for Kshs.1300 being fare to the Respondent's school on 22nd July 2013 on the Respondent's invitation for settlement of the dispute herein is dismissed. The reason being that CW1 did not prove that, indeed RW1 invited him for settlement of his dues. The court also is of the view that the receipts for bus fare produced did not form any basis to prove that CW1 travelled to Mwatate on invitation by the Respondent. One cannot rule out the probability that CW1 had travelled for other businesses and not necessarily on invitation by the Respondent.

Disposition

25. For the reasons stated above, judgment is entered for the Claimant against Respondent declaring the termination of the Claimant's employment wrongful, unfair and unlawful, and awarding the Claimant Kshs.83900 plus costs and interest.

Orders accordingly.

Signed, dated and delivered at Mombasa this 27th day of April 2015

O.N. MAKAU

JUDGE