



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 199 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 10th June, 2015)

CAROLYNE EGGLY KHABUTSI.....CLAIMANT

VERSUS

BOARD OF GOVERNORS

CHURCH ON THE ROCK ACADEMYRESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein Carolyne Eggly Khabutsi filed her Memorandum of Claim on 12/2/2013 through the firm of Mudeshi Muhanda & Company Advocates. The issue in dispute is the alleged wrongful and unfair termination of the Claimant’s services and failure by the Respondent to adequately compensate the Claimant.

Claimant’s case

2. The Claimant’s case is that on 23/1/2009 she was employed by the Respondent as a member of the teaching staff in the Pre-school Section at an initial monthly salary of Kshs.9,000/= as per her appointment letter **Appendix 1**.

3. She avers that she performed her duties with loyalty, respect and diligence and was thus promoted from the initial position of a Pre-school teacher to a Primary school teacher earning Kshs.19,000/=.

She further avers that on 29th November 2012, the school had a close of year staff meeting where she was commended for her good work through the year and given her duties and responsibilities for the following year which she was to prepare for before the next term commences – **Exhibit 2** is the said list of her duties and responsibilities.

4. However, the Claimant’s case is that on 2/12/2012, she was served with a letter terminating her services on grounds of redundancy - (**Exhibit 3**). However the letter stated other grounds for the termination. It is the claimant’s averment that the mode of her termination was improper and had adverse effects on her family. She also avers that she had already collected all the material necessary and prepared the syllabus for standard one as had been allocated to her.

5. The Claimant referred to an incident where she had travelled to attend her daughter’s parent’s day in school and had sought permission from the relevant authorities. This incident was however

used against her as being absent from school.

It is also the Claimant's case that mandatory provisions of law on dismissal on grounds of redundancy were not followed nor principles of natural justice adhered to. She contends that she was not given any hearing nor due process and she therefore seeks for prayers as per her claim all totaling 383,000/= plus a declaration that the dismissal was unprocedural and unfair. She also seeks for costs of this suit.

The Respondent's case

6. The Respondents filed their Memorandum of Defence on 7/3/2013 through the Federation of Kenya Employers (FKE). They admit that the Claimant was their employee having been employed on 7/1/2009 as a Pre-school teacher and later promoted in 2010 to a primary school teacher at a consolidated salary of Kshs.19,000/= per month.

7. They however deny unlawfully terminating the Claimant. They aver that the Claimant's performance went downhill in 2010 and was lackluster, poor and wanting in commitment towards quality. It is their position that in 2010 she was moved to the Pre-school Section with the hope that the elevation of Claimant and salary increment would motivate her to be more committed to her work.

However, they contend that the expected improvement was not realized and parents complained to the Respondent about the deteriorating academic standards in Class 2 where she had been moved to. That the issue was put to the complainant and she went berserk which led to a demand from parents that she be dismissed or be withdrawn from teaching class 2.

After this complaint, a senior teacher was put in place to monitor the class but the Claimant shouted at the teacher in front of the students and the incident was reported to the school management. The Claimant was severally admonished over this wild, unruly, uncooperative and erratic character. The Respondent annexed copies of the apology letters written by Claimant apologizing over various mistakes.

8. It is also Respondents position that the Claimant was invited to a meeting severally to try and address the issue but constantly threatened to undress all her clothes whenever she was reproached or reprimanded. That she also failed to report to work or stayed away from work without permission which caused a lot of strain on the relationship between the Respondent and the parents. She was even served with a warning letter concerning her absenteeism – **Appendix 3**.

9. The Respondent avers that contrary to the Claimants assertion, the Claimant was invited to a disciplinary hearing on 1/12/2012 vide a letter dated 29th November 2012. She however refused to acknowledge receipt of the said letter of invitation (**Appendix 4**). She also failed to turn up for the disciplinary hearing on 1/12/2012. The meeting proceeded in her absence. The members present deliberated on the issues arising out of the Claimant's erratic character and unanimously resolved that the Claimant be relieved of her duties on 1/12/2012, her services were then terminated from Respondents employment and she was paid all her terminal dues.

10. The Respondents deny that the Claimant was given a distribution of duties and responsibilities list and assigned class 1 for the following year 2013. They also deny that the Claimant had commenced her work or began the assignment given to her to prepare for plans and schemes for the following year by the time her services were terminated.

On payment of house allowance the Respondent aver that the Claimant was paid a consolidated sum equivalent to her qualifications being grade C- at form 4 the level of P2, P3 or P4. They want the Claimant's case dismissed.

Issues for determination

11. Upon considering the submissions of the parties, the issues for determination are as follows:

- a) *Whether there were valid reasons to terminate services of the Claimant.*
- b) *Whether due process was followed before her termination.*
- c) *What remedies if any, the Claimant is entitled to.*

12. On the 1st issue, the letter terminating the Claimant reads as follows:

“Saturday December 1st 2012

Dear Caroline

RE: REDUNDANCY

Following a series of events of which you have been warned either verbally or in written, and which you have shown no remorse, Church On The Rock Academy feels that you don't share the same vision, hence service delivery not to our expectations.

This letter is mean to serve as a notice to you that we will no longer need your services as from January 1st 2013.

You are therefore required to submit back the following before you are cleared:

- 1. Text books and other writing materials issued to you for preparation of schemes and lesson plans.*
- 2. Your work identification badge.*
- 3. All previous schemes of work and lessons plans books.*
- 4. Any other items that might have been assigned to you during your normal day to day duties.*

Yours faithfully

Church On The Rock Academy

Rock Fellowship Ministries/Christian Ministries In Africa

Church On The Rock

Signed

F.M. Galoba

Administrator “

13. On the face of it, the reason for termination is redundancy. Termination on account of redundancy is governed by provisions of Section 40 of Employment Act 2007 which provides as follows:

“(1) An employer shall not terminate a contract of service on account of redundancy unless the employer

complies with the following conditions:-

(a) Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;

(b) Where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;

(c) The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;

(d) Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;

(e) The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;

(f) The employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and

(g) The employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.

(2) Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part VIII in which case that Part shall be applicable.

(3) The Minister may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an unemployment insurance scheme operated either under an established national insurance scheme established under written law or by any firm underwriting insurance business to be approved by the Minister."

14. There is no evidence that the above provisions were followed in case of the Claimant herein nor that the reasons for termination was as a result of redundancy or restructuring of the organization.

15. In the body of the letter of termination however, other reasons for the termination are stated including some series of events which are stated but not explained. The real reason whether for a "series of events" or "redundancy" are not explicitly stated nor explained. This is contrary to provisions of Section 43 of Employment Act 2007 which provides that reasons for termination must be given and must exist at the time of termination.

16. That being the position, redundancy cannot be the reason for this termination. On the allegations that, the claimant was always unruly and a non-performer, evidence of her no-performance was not adduced. There is however evidence that the Claimant may have been absent from work at one time and apologized over the same. On another occasion, there is evidence that she had some misunderstanding with a senior teacher while on a school trip day and also with some teachers.

Whether these are the reasons for the termination is also not clear as the termination letter does not mention that effect. The reason of the termination is therefore not clear.

17. On the issue of due process, the Respondents aver that they summoned the Claimant for a disciplinary hearing and she refused to attend so the meeting went on and deliberated on her case and decided to terminate her services. There is no proof that the Claimant was invited for any disciplinary committee meeting though the Respondents Appendix 4 is a letter inviting her to a disciplinary committee hearing. Even if she was invited there is also no proof that she received the said invite.

Given this omission, it is evident that the Claimant was not accorded a fair hearing as anticipated under Section 41 of the Employment Act 2007 which states that:

“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2). Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

18. That being the position and coupled with the fact that the process on redundancy was also not follow, I find that the termination of the Claimant was unfair and unjustified and I declare it so.

19. Given the above scenario, I award the Claimant as follows:

(1) 1 month salary in lieu of notice = 19,000/=

(2) 12 months salary for compensation for unfair and unlawful termination = 19,000 x 12 = 228,000/=

**(3) House allowance for 3 years worked but not paid for = 15% of salary x 3
= 15%/100 x 19000 x 36 months = 102,600/=**

TOTAL DUE = 349,600/=

Less statutory deductions

Plus costs

Read in open Court this 10th day of June, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Muhanda for Claimant - Present

Miss Kamau holding brief for Molenje for Respondent