



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1666 OF 2012

MARY MAGERO CLAIMANT

VERSUS

REGISTERED TRUSTEES

WINDLE TRUST INTERNATIONAL – KENYA RESPONDENT

JUDGEMENT

1. The issues in dispute are the breach of dispute resolution mechanism, unfair termination of employment, notice and unpaid salaries.
2. The claim was filed on 17th September 2012 and a defence filed on 10th June 2013. In evidence the Claimant supported her case while the Respondent opted not to call any witness. At the close of the hearing each party filed their written submissions.
3. The claim is that the Claimant is a trained graduate teacher and was employed by the respondent, a non-governmental organisation based in Nairobi with programmes in Kakuma, Daadab. In 2010 the Claimant was appointed as an Education Programme Officer, Principal of Hagdera Secondary School in charge of secondary education at Daadab Refugee Camp and supervising 90 members of staff. The Claimant had previously worked in the same Camp with Care international – Kenya for 5 years. Her salary was kshs.73, 208.00 and this has since been increased to Kshs.83, 208.00 from February 2012.
4. On 17th October 2011 the Claimant was evacuated from her work station in Daadab Refugee Camp through a security operation undertaken by the police and the Respondent after a *fatwa* was issued against her based on false allegations. The *fatwa* has not been lifted and the claimant's life remains in danger and the Claimant has been unable to return to work a fact within the knowledge of the respondent. The Claimant has remained in touch with the Respondent through the Nairobi office and emails communication with a view to settle the matter. The Claimant has not been suspended or terminated but the Respondent has now withdrawn her salary without any justification.
5. The Claimant also states that the Respondent by withholding her salaries is in breach of her employment contract as failure to pay her salary can only be deemed as a dismissal and should be compelled to adhere to the contract terms by redeploying her and reinstating the salary. Despite notice of intention to sue, the Respondent has refused to oblige. The Claimant is seeking notice pay, compensation for unfair dismissal, all accumulated salaries from 1st February 2012 to date; and a claim for reinstatement to the pay roll and deployment to any other of the Respondent stations other than Kakuma,

Daadab Refugee camps. The Claimant is also seeking costs.

6. In evidence, the Claimant testified that she was employed by the Respondent from 1st May 2010 as the Principal of Hagdera Secondary School with a monthly salary of KShs.69, 000.00. In February 2012 she did not get her salary and this has not been paid to date. In 2011 the Claimant received death threats on her phone following a complaint by a Sheikh that she had abused their religion and was told to leave the place or she would be killed. A *fatwa* was declared on her being a declaration to kill her on sight. The Respondent held a meeting with the Sheikh where the Claimant was called and informed that her security could not be guaranteed in the region following the death threats. These were the leaders who were part of the management of the school and on 17th October 2011 the Claimant had to be evacuated from her place of work and went to her home in Kakamega. The issue between the community and the school was however never resolved, the Claimant called the Respondent to know what had been resolved, and the Respondent told her to go back to Daadab. The Claimant insisted that her security had to be guaranteed before moving back to the hostile community. The threats she received were serious and the Respondent failed to resolve the issue.

7. The Claimant also testified that she made a request to the Respondent to be deployed to a new station and this was not possible. A meeting was held on 20th December 2011, on 14th April 2012 and in May 2012 but there was no solution. The Respondent insisted that the Claimant had to go back to Daadab Refugee Camp but she could not return without her security being secured as she continued receiving death threats through her phone. On 5th January 2012, the Claimant received threats that she had committed blasphemy in Islam and she reported the matter at Kakamega Police Station. The police traced the number and the caller to Hagdera Refugee Camp. The threats escalated and the Claimant was threatened that the caller would use her people to kill her and they knew where she was.

8. On 14th May 2012 a meeting was held where the Claimant was made to sign the minutes before her issues could be addressed. She was told to talk to the refugees but she feared that these were the people who were threatening to kill her and meeting them without her security being secured was a risk she did not want to take and therefore declined to have such a meeting. From February 2012 no salary has been paid, there was no notice, warning or disciplinary case against the Claimant and has not been issued with any termination letter. The claim that she absconded duty is incorrect as she was available for work redeployment in any other station of the respondent. She has not been in any other employment since.

9. In cross examination the Claimant confirmed that in the meeting called for 14th May 2012 she was made to sign the minutes as a condition to being heard and did not agree to the condition that she would not be paid her salary unless she reported to Daadab. She needed her job and thus signed the minutes hoping her case would be positively addressed. She did not take new employment with the Danish Refugee Council but did a research job for 5 weeks in February 2012 and was given a token of appreciation in cash. The research project was not employment as this was in January to February 2012. She had a contract with the Danish Refugee Council for a temporary engagement. She also confirmed that she had obtained a sick off from 3rd January 2012 for 14 days the same time that coincided with the research period for the Danish Refugee Council project.

10. The Respondent in defence stated that the Claimant intentionally and negligently decided to abscond from official duty by failing to attend to her workplace since 19th January 2012 and such wilful failure to report to work without cogent reason amounted to desertion. The Claimant entered into another contract of employment with another employer, the Danish Refugee Council without or before terminating her existing contract with the Respondent and even before acknowledging her violation by signing a document stating the same on 14th May 2012 in the presence of the Respondent finance Manager and Human Resource Officer. The prevailing complaints by the Claimant could not be resolved as she remained uncooperative where the Respondent had acted in good faith and gratuitously maintaining the Claimant on the pay roll from Mid October 2011 to January 2012 while she was not performing her duties. There was no termination on the part of the respondent, the Claimant absconded duty. The claims outlined are not due as the Respondent could not issue notice to the Claimant who had absconded duty and this is not a case of unfair dismissal. There are no accumulated salaries in this case

and the Claimant cannot be reinstated and she chose to abandon her employment.

11. The Respondent did not call any witness.

Submissions

12. In submissions, the Claimant stated that circumstances leading her to leave her workplace in Daadab Refugee Camp are well within the knowledge of the Respondent and while she remained out of her place of work she was in constant communication with the Respondent but her salary was stopped in February 2012 without notice or warning. Instead of addressing the security concerns in issue, the Respondent opted to stop her salary. She has never been issued with a termination letter since and thus the relief sought are herein.

13. The Claimant therefore submitted that by stopping her salary, the Respondent was keen to dismiss her from their service without any justifiable cause and this amounted to constructive dismissal as held in **Benuel Mariera versus Awanad Enterprises Ltd (2014) eKLR**. Before taking action against the Claimant in stopping the payment of her salary, the Respondent failed to issue notice or ensure the human resource policy in place was followed as held in **Augustine Peter Obirika versus Card Centre Limited (2012) eKLR**. That the Claimant should be reinstated back to her position and deployed to a new station other than Daadab Refugee Camp.

14. The Respondent also submitted that the Claimant failed to report to work, absconded from duty, entered into a contract of employment with a different employer and constructively terminated her employment with the respondent. In cross examination, the Claimant admitted to having undertaken research work for another employer and was paid for it while she still claimed to have been an employee of the respondent. She had by her action effectively terminated her employment with the Respondent before opting to take up new employment with a different employer. The Claimant cannot claim any salaries from the Respondent while she knew she had terminated such employment. She failed to honour her contractual obligations as was held in **Attorney General versus Blake (1998) 2 WLR 805**. In this case the Claimant acted in bad faith and placed herself in a position antagonistic to the respondent. The Claimant submitted a medical report stating that she was unwell and thus needed sick leave but the truth was that she needed time off work so as to engage in active service with another employer. The Respondent was then not bound to remit any salary to the Claimant in view of her breach of her terms of employment as held in **Banking Insurance and Finance Union (Kenya) versus Barclays Bank of Kenya (2012) eKLR**. The claim should therefore be dismissed with costs to the respondent.

Determination

Whether the Claimant was terminated or absconded duty

Whether the reliefs sought are due

15. The claim by the Claimant is that she was evacuated from her place of work due to security concerns that the Respondent was aware of and was not able to report back until her secured was secured. The Respondent contention is that the Claimant absconded duty and could not return to work as she took up new employment with a different employer. The Claimant applied for sick leave but in essence was not sick she was at work with the new employer. The Respondent did not call any evidence while the Claimant testified in support of her claim was extensively cross examined by the respondent.

16. From the evidence of the Claimant she insisted that while she was out of work upon evacuation, she continued to received death threats and was forced to report the incident at Kakamega police Station. She had taken sick off in January 2012 and submitted the medical report to the respondent. She remained in communication with the Respondent all through while she was not at work and sought to be deployed in a new station other than Daadab Refugee Camp as she was not sure here security would be secured. However in cross examination, the Claimant confirmed to have been engaged by the Danish Refugee Council for a research job and was given a token of appreciation in cash. This was for a period of 5 weeks

from January to February 2012.

17. What is apparent from the claimant's evidence and cross examination is that after her evacuation from her place of work in Daadab Refugee Camp she took up new engagement with the Danish Refugee Council and while at it applied for sick off. While the Claimant remained and waited for the security concerns at her place of work to be addressed, she was engaged by another employer for a research project for which she received payment. This was a fundamental breach of the claimant's contract of her employment with the respondent. However, despite knowledge of such breach, the Respondent continued to engage the Claimant in emails exchange without taking any action with regard to the breach. On 18th April 2012 Edward njoroge wrote to the Claimant thus;

Dear Mary,

Further to our telephone conversation held on the evening of April 17th 2012, I await a written response from you regarding your position on returning to Daadab or otherwise.

The same was agreed to reach me by Friday April 20th 2012.

18. This is further taken forward on 2nd May 2012 when the same officer writes;

...

Dear Mary,

Apology for the delay.

After having the meeting with you held on April 12th 2012, I made a summary of the discussions we had with you, myself and Phyllis and shared the same with the Director.

We have made keen consideration on the suggestions of you working with the sister agencies in Uganda and Juba but the same take quite a long time to facilitate and also have steep financial implications such as getting the work permits and accommodation (for Juba) as you also appreciate.

...

We would therefore like to give you an opportunity to think about the above and our earlier discussions and let us know of how you would want to proceed.

...

19. As a follow up to the email communications, a meeting was agreed upon for 14th May 2012 where the Respondent was to cater for the transport and accommodation of the claimant. It is not clear as to the outcome of the meeting as the Respondent does not attach the contested minutes and there was no witness in regard to what transpired saves for the claimant's evidence that she was to force to sign the minutes so as to have her case addressed.

20. I take it then until the 14th May 2012; the Respondent was still keen to have the Claimant go back to her place of work at Daadab Refugee Camp as their employee. Despite knowledge of breach of her contract, employer/employee communications continued up and until the 14th of May 2012. Suggestions were made back and forth as to the need for the Claimant to resume her duties at Daadab Refugee Camp. There seem to have been suggestions that there were sister agencies that the Claimant could be placed with but this would take time and resources.

21. Section 44 of the Employment Act sets out instances where an employer is allowed to issue

summary dismissal to an employee where the employee absconded duty or neglects to perform their work. Such provisions were at the disposal of the Respondent in January 2012 when the Claimant took up new engagement with a new employer and also took sick off days to engage in such employment. Failure to apply the law in this case cannot justify the inaction of the Respondent as despite having the law on their side, I find there was a human resource manual which outline the disciplinary measures to be taken against any employee who neglected to do their work as assigned. The Respondent did not abide and still went off to entertain the Claimant in negotiations on her return to work.

22. Where the Respondent had knowledge of particulars of breach by the Claimant of her employment terms, such matters should had been brought to her attention, or a termination notice issued giving reasons of such breach. More fundamentally, a summary dismissal was still available for the Respondent to issue. Failure to bring such matters to the attention of the Claimant even where there was glaring misconduct is tantamount to entertaining the Claimant to continue in such misconduct. The Claimant effectively remained in the employment of the respondent. Failure to pay her salary can find no justification. The resultant effect of the inaction by the Respondent is that the Claimant remained an employee. Her salary is due.

23. The non-issue of any notice or letter of termination and leaving the Claimant in mental anguish as to her next cause of action is an unfair labour practice and tantamount to constructive dismissal. The Claimant however has admitted to taking new engagement with another employer and while at it sought sick off when indeed she was so engaged. To award compensation would be double benefit.

Remedies

24. On the salaries due, the Claimant testified that when she was at the meeting of 14th May 2012 she was made to sign minutes that gave a condition that she was to return back to her work place. She did not attend as directed. Despite such direction, communication as to what the Claimant did after this date is not clear. Salary due should therefore be pegged on the 14th of May 2012. The last salary earned by the Claimant is Kshs.73, 208.00. Such salary is due from February 2012 to 14th May 2012. The salary for the 3 months and 14 days is payable at kshs.256, 288.00.

25. Notice of any misconduct where not issued and the circumstances force an employee to remain out of work payment in lieu is due. The Claimant is awarded kshs.73, 208.00.

26. Compensation though claimed is a remedy only available for unfair termination of employment. This remedy is discretionary and on the finding that the Claimant was in a fundamental breach of her contract, the relief shall not be made available.

27. A claim for reinstatement, deployment and a return on the pay roll as orders in specific performance that the Court rarely grants. Such a remedies given in exceptional cases where there is a case of unfair termination. This is not one such case and shall not be awarded.

Conclusion

Judgement is entered for the Claimant in the following terms;

- a. **Salary due and amounting to kshs.256, 288.00;**
- b. **Notice pay at Kshs.73, 208.00;**
- c. **No orders as to costs.**

Delivered in open Court , dated and signed in Nairobi on this 10th day of June 2015.

M. MBARU

JUDGE

In the presence of

Lilian Njenga: Court Assistant

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