



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 693 OF 2012

SHIBANI SARKAR.....CLAIMANT

VERSUS

ARYA SAMAJ EDUCATION BOARD.....RESPONDENT

JUDGMENT

1. The claimant herein was employed by the respondent on 1st September, 2003 as a teacher and worked until 28th September, 2011 when her services were terminated and according to her the respondent refused to pay her terminal dues and issue her with a certificate of service.
2. According to the claimant, by a letter dated 26th February, 2008, the respondent increased her salary from Kshs.28,000/= to Kshs.44,000 which according to her was a manifestation that she was diligent and industrious in the performance of her duties. The claimant was therefore shocked by the reasons advanced by the respondent as a basis for her dismissal as she enjoyed a harmonious relationship with the respondent.
3. The respondent on the other hand averred that the claimant's contract already stated that he was expected to work hard and maintain high educational standards. The claimant was further expected to be punctual, regular and perform her duties diligently to the complete satisfaction of the Board.
4. According to the respondent, the claimant breached all those terms of her contract despite several warnings leaving the respondent's Board with no option but to terminate her services. According to the respondent, the claimant reported to work late and left the school compound before time on several occasions without permission of the Principal, missed several lessons, behaved in a manner insulting to her immediate boss and would constantly pick fights with the Principal.
5. In her evidence in Court, the claimant further stated that she used to be late due to the construction works along Thika Road. She denied missing classes and that she explained her lateness. She further denied receiving a notice to show cause why her contract should not be terminated.
6. In cross examination she admitted being late on several occasions and on occasions when she left early she was attending Arya Samaj work which was part of her job. She denied shouting at the principal and

further stated that she endured a heart attack and was still on medication.

7. The respondent on its part called as witness, a Mr. Thomas Xavier. It was his evidence that the claimant was unable to produce results as she was constantly late and never used to go to class unless reminded to do so. He further stated that the claimant could shout at him in front of students an act that amounted to insubordination.

8. In his closing submissions counsel for the claimant stated that the respondent's burden was to prove that it followed due process in terminating the claimant's employment however in pleadings as well as oral testimony it was clear that the respondent did not discharge the burden. During cross-examination, Mr. Xavier admitted that they never accorded the claimant a hearing before dismissing her.

9. Counsel further submitted that the warning letters that the respondent used as a basis to claim the termination was lawful could not amount to notification and hearing envisioned by section 41 of the Employment Act.

10. On the issue of misconduct, counsel submitted that apart from several warning letters, the respondent did not go further to substantiate the allegations. No witness was called to corroborate what the respondent was alleging regarding the claimant's misconduct.

11. The respondent's counsel on the other hand submitted that the claimant's termination was fair because the respondent confronted the claimant about her misconduct, arriving late at work and her early departure but she failed to give an explanation. The respondent's witness Mr. Xavier stated that the claimant was always reluctant to give an explanation for her behaviour often blaming traffic.

12. Counsel relied on extracts from Habsbury's Law of England stating that in adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts. According to counsel, in this case, the claimant deserved to be summarily dismissed but the respondent out of respect terminated her services normally.

13. The admission by the respondent that the claimant was dismissed without being taken through a disciplinary hearing automatically makes her dismissal contrary to fair procedure as stipulated under section 45(2) (c) of the Employment Act.

14. The requirement to be heard prior to dismissal even if the reasons for dismissal are overwhelming is anchored on the principle of natural justice that no person should be condemned unheard on his defence against accusations against him.

15. The claimant in her pleadings and evidence before Court stated that the construction works along Thika Road were a contributory factor to her lateness. The claimant further stated that she had a sick husband and further that she endured a heart attack at some point and was on medication. These were reasonable distractions to the claimant's performance and punctuality which the respondent ought to have heard her on to fully appreciate her personal circumstances. If this happened perhaps the respondent could have considered counselling or reassignment of duties for the claimant and termination may not have been the best sanction in her case.

16. To this extent the Court finds the claimant's termination unfair and awards her as

follows:-

Kshs.

- (a) One month's salary in lieu of notice.....44,000.00
- (b) Seven month's salary as compensation

for unfair dismissal.....308,000.00

352,000.00

(c) Costs of the suit

(d) Certificate of service

17. This award shall be subject to statutory deductions and any payment which may have been made to the claimant on account of terminal dues upon her dismissal.

18. It is so ordered.

Dated at Nairobi this 31st day of July 2015

Abuodha J. N.

Judge

Delivered this 31st day of July 2015

In the presence of:-

.....for the Claimant and

.....for the Respondent.

Abuodha J. N.

Judge