



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 67 OF 2015

DENIS OKORA MAGIO.....CLAIMANT

VERSUS

GREENWOOD GROOVE ACADEMY.....RESPONDENT

J U D G M E N T

INTRODUCTION

1. This is a Claim for terminal dues and compensation for unfair termination of the Claimant's employment by the Respondent in December 2014. The basis of the Suit is that the Claimant's rights as an employee have been breached and/or trampled by the Respondent's failure to pay his lawful terminal dues amounting to Kshs. 560000.

2. The Respondent has denied liability for the alleged unfair termination of the Claimant's employment. Instead, she has blamed the Claimant for terminating the employment contract without prior notice through desertion in the month of November 2014. That such desertion amounted to gross misconduct under Section 44(4) (a) and (c) of the Employment Act (EA) which justifies a dismissal. The Respondent has therefore counter claimed against the Claimant Kshs. 40000 being one month salary in lieu of notice.

3. The Suit was heard on 13.7.2015 when the Claimant testified as CW1 and the Respondent called Mr. Samuel Maithya Nzioka and Mr. David Mithamo as RW1 and Rw2 respectively. Thereafter both parties filed written submissions.

Analysis and Determination

4. There is no dispute that CW1 was verbally employed by the Respondent as a teacher from September 2014 for a monthly salary of Kshs. 40,000. There is also no dispute that CW1 worked well between September and October 2014 and was paid all his salary. There is further no dispute that CW1 absented himself from work during the month of November 2014 and a dispute arose as to how much salary he was to get for the said month as a result of which the contract of employment was terminated. The issues for termination are:-

- a. Whether the termination was by the Claimant through desertion or by the Respondent through unfair dismissal of the Claimant.
- b. Whether the Claimant is entitled to the reliefs sought.
- c. Whether the Counterclaim should be allowed.

Desertion vs. Unfair Termination

5. CW1 told the Court that he attended work regularly until 29.11.2014 when he was barred from entering the school gate by security guard who told him to return on 2.12.2014 to meet the school Principal (RW2). On 2.12.2014, CW1 went to see the Principal accompanied by his wife and son. That the Principal told him that he was not giving him any salary because of his demand for a written contract and also because he had reported the school to the NSSF. That he was also told to hand over all the text books to the Head of Science Department. That he complied and was told to collect his termination letter on 3.12.2014 but when he returned to the school on 3.12.2014, he was denied entry by the watchmen. Without any other option, CW1 instructed his lawyer on the same day and served a demand letter on 4.12.2014. That the Respondent replied to the demand letter on 18.12.2014 alleging that CW1 had deserted work and his whereabouts was unknown. The letter also instructed him to show cause why he should not be dismissed. CW1 never responded to the said show cause letter. He however, denies that he deserted work and maintains that he was unfairly dismissed for demanding a written contract of employment and contribution to the NHIF. He admitted that he was still on probation.

6. The Respondent has denied that she dismissed the Claimant. According to both RW1, who is a Director of the Respondent, CW1 was still on probation after working only in September and October 2014. That he absconded duty after working for 5 days in November 2014 and only returned on 2.12.2014 accompanied by his wife and son to claim his salary for November 2014. That the claimant had also absconded duty for 2 days in October 2014 prompting issuance of a warning Memo dated 31.10.2014. That during the time of desertion of work, CW1 never picked phone calls from RW1 and the Principal. He denied that he instructed the watchmen to bar CW1 from accessing the school on 29.11.2014 at all. RW1 explained that the school had just started in September 2014 and as such the issue of NHIF and NSSF was still being addressed before the Claimant deserted work in November 2014. According to him the Claimant terminated his own services after he refused to respond to the Show Cause letter dated 18.12.2014. RW1 could not however, prove with records that CW1 had absconded work in November 2014.

7. RW2 the Principal of the Respondent also contended that CW1 worked for about 5 days in November 2014 and thereafter absconded duty before marking the exams. That during his absence from work, RW2 tried in vain to reach CW1 forcing him to send SMS. That CW1 only returned to the office on 2.12.2014 accompanied by his wife and son to demand his salary. That CW1 refused to take the salary for the 5 days worked and demanded for the pay for the whole month. That the reason Cw1 gave for his absenteeism from work was that he was managing business. That RW2 then told him to choose between working for the school and managing his business. That RW2 did not serve a show cause letter to Cw1 on 2.12.2014 because he came to the office without prior notice. RW2 maintained that Cw1 was never dismissed from work but he deserted the work.

8. After careful consideration of the evidence before it, the Court finds on a balance of probability that the claimant was never dismissed by the employer. Instead, the court finds that the claimant is the one who voluntarily deserted work. He did not prove that he was barred by the security guards from entering the school on 29.11.2014. He even did not prove that he went to school on 29.11.2014 which was a Saturday according to the calendar for that month. Even if this court was to believe that Cw1 was asked to meet the Principal on 2.12.2014, which has not been proved to be true, this court wonders why Cw1 had to attend such meeting in the company of his wife and son. If at all he wished to meet the Principal in the company of another person, he should have chosen a fellow employee as provided for under section 41 of the E.A.

9. In this court's opinion, the conduct of the claimant on 2.12.2014, namely going to the office on a working day, accompanied by his wife and son was not consistent with that of an innocent employee going to work. The conduct demonstrated by the claimant was consistent with that of a proud, rude and disrespectful employee who is asking the employer, "so what? I have have everything that a man needs including a family and a business". In fact his explanation of his absenteeism to RW2 on 2.12.2014 was that he was managing his business.

10. This Court therefore find merits in the defence tendered by RW1 and RW2. The Claimant never rebutted the defence evidence that he absconded duty after working for only 5 days in November 2014. He did not rebut the evidence that he missed classes and failed to mark exams. If Cw1 was truthful in his evidence, he would have tendered documentary evidence or called witnesses from among his colleagues, teachers or even students or former students to support his allegation that he never absented himself from work even for one day in November 2014. In the Claimant's pride, he refused to respond to Show Cause letter.

RELIEFS

11. In view of the foregoing finding that it is the Claimant who terminated his employment through desertion, the Court declines to declare that he was unlawfully dismissed. Consequently, the prayer for salary in lieu of notice and compensation for unfair termination is dismissed. The claimant is however awarded salary for only 7 days worked in November 2014 being Kshs. 9333.35. The reason for awarding salary for 7 days is because both defence witnesses testified that Cw1 worked for 5 days excluding weekends. Consequently, the court has awarded salary for 7 days including 2 days for the first weekend.

Counter Claim

12. In view of the finding that the Claimant terminated his employment contract without notice, the court allows the Respondent's Counter Claim by awarding her salary for 7 days in lieu of notice being Kshs. 9333.35. The reason for the foregoing award is that both Cw1 and Rw1 agreed in the testimonies that the contract was terminated while CW1 was still in his probation. Under section 42(4) of the E.A, a party to employment contract may terminate it during probation period by serving not less than 7 days' notice. In this case, the Court has not been shown why a notice of more than 7 days was warranted.

DISPOSITION

13. For the reasons stated above judgment is entered for both the Claimant and the Respondent in the sum of Kshs. 9333.35. The upshot of this judgment is that each party will retain what is due from him to the other party. Likewise each party will bear his or her costs. It is so ordered.

Dated, Signed and delivered this 13th day of November 2015.

O. N. MAKAU

Judge