



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT MOMBASA**

**CAUSE 15 OF 2015**

**VINCENT MBOGA MACHOGU .....CLAIMANT**

**VERSUS**

**VISION INSTITUTE OF PROFESSIONALS LIMITED.....RESPONDENT**

**J U D G M E N T**

**Introduction**

1. This is a claim for terminal dues plus compensation for unfair and wrongful termination of the claimant employment by the respondent on 3.6.2014. The basis upon which the suit is brought is that he was dismissed without any sufficient reasons and without being given any chance to defend himself. In total he claims Ksh 2,280,000, certificate of service, costs and interest.
2. The respondent has denied liability for unfair and wrongful termination of the claimant employment as alleged in the suit. Instead she avers that she lawfully and fairly terminated the claimant's services after he committed a fundamental breach of the employment contract mainly through absenteeism and late class attendance. That he was also rude and disrespectful seniors and students. That the claimant was given chance to defend himself through a Show Cause letter of which he responded on 16.4.2014.
3. The suit was heard on 7.7.2015 when the claimant testified as Cw1 and the respondent called Mr Harrison Kiboi and Andrew Talam and Rw1 and Rw2 respectively. Thereafter both parties filed written submissions.

**Analysis and Determination**

4. There is no dispute that the parties herein were engaged in an employment relations between 1.7.2013 and 3.6.2014 and the terms of the said employment relationship were contained in the written contract dated 1.7.2013. There is also no dispute that the said contract was terminated by the respondent through her letter dated 2.6.2014 citing clause 2.1 of the contract. The issues for determination are whether the termination of the claimant was wrongful and whether the reliefs sought should be granted.

**Wrongful and Unfair Termination.**

5. The termination of the claimant's employment was communicated by the respondent's letter dated 3.6.2014 which accused the claimant of failure to reply to a show cause letter within the stipulated time and for failure to provide any acceptable reasons for his lateness and absenteeism from duty without permission . He was also accused of not showing any remorse and for being rude to his seniors. The letter further cited clause 2.1 of the employment letter as the basis upon which the contract was terminated. The said clause entitled either party to the contract to terminate

- the contract by serving one month notice or paying salary in lieu of notice.
6. The burden of proving unfair termination is placed on the employee by section 47 (5) of the Employment Act (EA). Cw1 explained that the reason for not responding to the show cause letter on the stipulated time was because the show cause letter was served on him late. He admitted lateness and absenteeism from duty but explained that the lateness was because of chaos by Muslims along Digo Road and Moi Avenue where the respondent's campus is located. That this reason for the absenteeism, that he had a sick child who required his company in the hospital. He denied ever being disrespectful to any of his seniors. That he had notified the Deputy Principal of his absence and when he returned to the campus he made up for the missed classes. He admitted that he was paid one month salary in lieu of notice.
  7. Rw1 contended that the reply to the show cause letter was considered by the respondent and was found to be unsatisfactory and unjustified. That Cw1 was not supposed to miss classes or be late without permission from the Deputy Principal Mombasa campus. That Cw1 never notified any one that he had a sick child. Rw1 maintained that make up classes were not provided for in the employment contract and as such Cw1 was bound to adhere to class time table.
  8. Under section 45 of the EA, termination of Employment is unfair if the employer fails to prove that it was founded on a valid and fair reason and that it was done after following a fair procedure. The reasons cited for the termination was misconduct within the meaning of section 44 (4) of the EA. The explanation given by the Cw1 for the delay in responding to the show cause letter is plausible in the opinion of this court and it was not rebutted by the defence witnesses. It was therefore not a valid and fair reason for terminating his employment. However absenteeism from work and lateness without permission were valid and fair reasons for terminating the claimant's services because he admitted the said offences.
  9. The court however take offence with the procedure followed in terminating the employment contract. Having cited misconduct as the reason for terminating the contract, the respondent was barred from following the termination clause in the contract as the procedure for termination. Clause 2.1 of the contract of employment was only available for use where the employer was not accusing the employee of misconduct under section 44 of the EA. In this case, the claimant was entitled to a fair hearing under section 41 of the EA by the employer before termination. Section 41 of the EA requires in mandatory terms that before an employer terminates an employee's employment for misconduct under section 44 of the EA, he shall first explain to the employee the reason for the intended termination in a language he understands and thereafter invite him and a fellow employee of his choice to air his defence. Only thereafter is the employee allowed to terminate the employment contract. The foregoing mandatory procedure was not followed and therefore the court finds on a balance of probability that the termination of the claimant's service was unfairly done by the respondent. Such unfairness could not be cured by payment of salary in lieu of notice.

### **Reliefs**

10. Under section 49 (3), of EA an unfairly terminated employee is entitled to reinstatement to employment or re-engagement by the same employer. The claimant has however not prayed for either reinstatement or re-engagement. Instead he has sought for damages under section 49 (1) of the EA. The power to award damages under the foregoing provision is however subject to section 49 (4) of the EA which binds the court to take into account several issues in deciding whether to award the damages. The court has decided to award damages under section 49 (1) of the Act because that is the wish of the claimant. Such wish is discernible from the pleading where he prayed for damages as opposed to reinstatement or re-engagement. He prayed for 24 months' salary as compensation for unfair termination. Section 49 (1) (C) of the EA provides for a maximum of 12 months gross salary. This court will however only award the claimant 3 months gross salary as compensation because he contributed to his termination through misconduct. The employer's offence was the breach of procedural fairness otherwise the employer had a valid and fair reason for termination. Consequently the claimant who was earning a monthly salary of Ksh 95000 is awarded Ksh 285,000 as compensation. He will also get a certificate of service as prayed. The claim for severance pay is however dismissed for lack of evidence and for the reason that the termination was not through redundancy.

**Disposition**

11. For the reasons stated above judgment is entered for the claimant by awarding him the sum of Ksh 285,000 and certificate of service. He will also get costs and interest.

Signed, Dated and Delivered at Mombasa this 13<sup>th</sup> day of November 2015.

**ONESMUS MAKAU**

**JUDGE**

13.11.2015

Coram

Before Justice Onesmus Makau

C/Assistant -

For the Claimant:

For the Respondent:

Court

Judgment delivered in their presence/absence in open court.

**ONESMUS MAKAU**

**JUDGE**