



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1290 OF 2011

JUDITH ATIENO OMBOHO CLAIMANT

VERSUS

FAITH HOMES KENYA RESPONDENT

JUDGMENT

1. The suit is by way of an amended memorandum of claim dated 30th July 2012. The Claimant seeks compensation for wrongful and unlawful termination of employment and payment of terminal benefits to wit;

- (i) Pay in lieu of notice – Kshs.9,500.00;
- (ii) Salary for August 2010 – Kshs.9,500.00;
- (iii) Fifteen (15) days worked in September 2010 – Kshs.4,750; and
- (iv) Leave allowance for one (1) year – Kshs.6,650.00.

Facts of the case

2. The Claimant was employed as a teacher by the Respondent Faith Homes of Kenya on 7th January 2009 at a monthly salary of Kshs.9,500. She worked continuously until 16th September 2010 when the Employment was terminated by the Respondent.

3. The Claimant states that she served diligently but she was unceremoniously dismissed without notice and without payment of terminal benefits. That she did not take leave for the one year she worked and claims in respect thereof. Furthermore she did not receive the salary for August 2010 and fifteen (15) days served in September 2010 and claims the same.

4. The Claimant testified under oath in support of the particulars of claim and said that she was under probation for six (6) months and was confirmed on 1st July 2009. That she worked for one year and eight (8) months for the Respondent.

5. That on 16th September 2010, she reported to work late but had asked for permission from the head teacher. She reported to school normally at 7.30 but on the said day she reported at 11 a.m. The Claimant had called the head teacher at 6.30 a.m. in the morning to inform him of her predicament. The Head

teacher however did not pick the phone and the Claimant sent an SMS message to him.

6. When she reported at 11 a.m. the Claimant was asked to collect her salary for the previous month from the accounts office. The account's office told her to go back to the Head teacher to get clearance. The Head teacher gave her a note written 'cleared' and told her to go back to the accounts office.

7. The Administrative Secretary told her that she was not to be paid. The Claimant returned to the Head teacher who informed her that she would not be paid because she had applied for a job with the Teachers Service Commission (TSC).

8. The Claimant waited for the Director of the School Dr. Freed Nelson. The Claimant was unable to see him and came the following day but was again unable to see him.

9. The Director only authorized payment for fifteen (15) days served in September 2010 hence the outstanding claim for salary.

10. The Claimant added that she was entitled to twenty one (21) days leave per year. That she went on leave but claims for days worked during school holidays between 7.50 a.m. to 5 p.m.

11. The Claimant testified that she had received one warning letter for punishing a student and had written an apology in respect thereof. The Claimant states that the termination was wrongful and unlawful and claims accordingly.

Response

12. The Respondent filed a memorandum of reply on 13th September 2011.

13. The Respondent denies that it terminated the employment of the Claimant adding that the Claimant voluntarily and without coercion or duress terminated her services with the Respondent.

14. The Claimant further denies it owes the Claimant any terminal benefits stating that the Claimant did not give the Respondent one month's notice required under her contract of employment to terminate her employment with the Respondent. The Respondent confirms receiving the letter of demand.

15. The Respondent called RW1, Joyce Kariuki the Administrative Secretary to testify in support of its case. RW1 said she was in-charge of supervision of staff, general administration and running of the schools of the Respondent. That the Respondent had Children Homes, Schools and Churches. RW1 confirmed that the Claimant worked for the Respondent from 2009 January to September 2010.

16. That the Claimant absconded work on 15th and 16th September 2010. The Claimant had earlier reported she was unwell and took 4 – 5 days off. The Claimant came back when salaries were being paid. The Claimant then left employment. That the Claimant took leave during school holidays just like all other teachers. That staff usually do not take leave during the term. The leave was taken in April, August and December.

17. That the Claimant was temperamental and had a number of disciplinary issues. For example she had inflicted injury on a child.

18. RW1 admitted under cross examination that the Respondent feared the Claimant would leave because she had told the children that she would be employed by TSC in September 2010. That RW1 had reported the matter to the Head teacher.

19. RW1 denied that the Head teacher demanded that the Claimant cleared from school before she could be paid.

Determination

20. There are two issues for determination;

(i) Whether the Claimant absconded from work or her employment was terminated by the Respondent;

(ii) Whether the Claimant is entitled to the reliefs sought.

21. Section 43 of the Employment Act, 2007 provides that;

“in any claim arising out of termination of a contract, the employer shall be required to prove the reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45 (c).”

22. In this case, the Respondent has not provided any reason for the termination of the employment of the Claimant but instead states that the Claimant absconded from work.

23. The Claimant on the other hand states that her employment was terminated upon taking a sick-off and came late to work after duly informing the Head teacher that she would be late. She was also accused of applying for employment with TSC.

24. RW1 confirms that the Respondent was aware that the Claimant had applied for a job with TSC and RW1 had reported the matter to the Head teacher.

25. A document was produced by the Respondent showing that the Claimant had reported to the police, failure by the Respondent to pay her salary on 18th September 2010.

26. The circumstances of this case point to a summary dismissal of the Claimant by the Respondent without payment of August and September salary. The Court is satisfied that this was the case and that the Respondent was not candid in this respect.

27. The Respondent did not take kindly to the application by the Claimant to be employed by TSC and promptly took steps to dismiss her summarily.

28. Failure by the Respondent to pay the Claimant's salary and in lieu of notice are aggravating factors in this case. In addition the Claimant was not given any reason for the dismissal nor was she subjected to a disciplinary hearing. Accordingly, the summary dismissal of the Claimant was contrary to Section 43 as read with Section 45 of the Employment Act, in that, the dismissal was not for a valid reason and same was not effected in terms of a fair procedure.

29. The Claimant is entitled to compensation in terms of Section 49 (1) (c) as read with Section 49 (4).

30. Her employment was terminated without notice, for no valid reason, and without payment of any terminal benefits. She lost her means of livelihood and is entitled to six (6) months salary as compensation for the wrongful and unlawful dismissal from employment in the sum of Kshs.57,000.00

31. The Claimant admitted that she took leave contrary to the averments in her pleadings. This Claim is not proved and is dismissed.

32. The Claimant has proved on a balance of probabilities that she is entitled to the following terminal benefits;

(i) Kshs.9,500 in lieu of one month's notice;

(ii) Kshs.9,500.00 being salary for August 2010; and

(iii) Kshs.4,750 being fifteen (15) days salary for September 2010.

Total award is Kshs.80,750.00.

33. The award is payable with interest at Court rates from date of filing suit till payment in full.

34. The Claimant is entitled to the costs of the suit.

Dated and Delivered at Nairobi this 18th day of December 2015

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE