



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 190/2013

(Before Hon. Justice Hellen Wasilwa on 28th February, 2014)

ELIZABETH KWAMBOKA KHAEMBA CLAIMANT

-VERSUS-

THE BOG CARDINAL OTUNGA HIGH

SCHOOL MOSOCHO 1ST RESPONDENT

NYARIKI ZACHARY 2ND RESPONDENT

JEREMIAH NYAKUNDI 3RD RESPONDENT

JUDGMENT

The claimant herein filed her Memo of Claim on 10.7.2013 through the firm of Onyony & Co. Advocates. She later filed an Amended Statement of Claim on 13.11.2013 through the firm of H. M. Wasilwa & Co. Advocates. The claimant gave evidence before this court that she was employed by the respondent on 30.8.2007 as a cateress at a salary of Ksh 6,750/=. She annexed her appointment letter as annexure 8 as proof of this employment. At the time of termination on 1.6.2013 however, her salary was now Ksh 10,560/=.

It is claimant's case that on 28.2.2013 she was send on three months leave by the respondent's secretary to the Board. She was never informed of the reasons as to why she had to proceed on leave. Upon completion of the compulsory leave, she reported back to work on 1.6.2013 and was served with another letter (Annixture 3) which read in part that:-

“In line with your duties as school cateress, you are hereby advised to take up a supervisory role in the cleanliness of the boarding area forthwith. Please ensure that high standard of cleanliness in line with Public Health and Sanitation needs are kept.

You will be granted the necessary support you need in this respect by the relevant offices.

signed

Nyariki Zachary Mr

Secretary – B.O.G.”

It is claimant's contention that the new letter substantially altered her terms of employment and redesignated her to new terms and conditions of employment a role that she did not apply to her training professional competency and unfaulted experience. The claimant further avers that she had never applied for a supervisory position related to cleanliness of the boarding and had never sought a change in her terms and conditions of employment. She contends that her entry into employment as a cateress was preceded by an advertisement, application and an interview to her job on 20.8.2007. She therefore avers that the material alteration and swapping of the terms and conditions from a cateress to a cleaner was unexplained, and uncalled for and legally untenable and a violation of service. She told court that her responsibilities and duties of cateress issued on 12.5.2009 (Annexure 5) did not provide for the responsibilities directed under the new supervisory role.

It is apparent that the claimant treated this change of role as a termination and proceeded on 7.6.2013 to write to the respondents through her advocate demanding her terminal benefits and entitlements. In their reply, the respondents through their advocates admitted that in fact the respondents had actually terminated the claimant's employment and she should therefore be thankful that she was being returned to employment.

The claimant averred that the termination and subsequent reinstatement to a new supervisory role which was inferior to her position was driven by malice and unfair consideration. It is therefore claimants contention that she was unfairly terminated without being accorded a right to be heard and therefore prayed that the court finds so and awards her terminal benefits as tabulated in her memo of claim.

The respondents on the other hand filed their response and counter claim on 26.7.2013 through the firm of Masore Nyangau and Co. Advocates.

The respondents response is that indeed the claimant was sent on compulsory leave in February 2013 after she received unauthorized stock, a job reserved for the storekeeper. That the compulsory leave was therefore necessary to facilitate an in dept investigation which revealed impropriety on her part. They however deny terminating claimant's employment in June 2013 as there was no letter of termination issued to her and her salary was not stopped but paid to her back. The respondents contends that the claimant absconded duty. The respondents further deny that changing the claimant's duties amount to termination of employment.

The respondent have also counter claimed against the claimant stating that she absconded her job and therefore unlawfully terminated her employment with the 1st respondent. They also aver that in her job description, she was always expected to do **“other duties assigned by the head teacher”** and taking up supervisory role was part of duties assigned by the head teacher.

I have considered the evidence of the parties and their respective submissions. The issues for determination are as follows:-

1. **Whether the respondents' action in issuing the claimant with new roles amounts to termination of contract.**
2. **Whether the claimants services were terminated by the respondents.**
3. **Whether the claimant is entitled to prayers sought.**

The claimant was employed on the 30.8.2007 as a Cateress. This was after a competitive recruitment process. Her letter of appointment (App 8) indicates that she applied and was subsequently interviewed on 20th August 2007 for the post of Cateress. She was then appointment as Cateress in the service of the Board of Governors of the respondents with effect from 1.9.2007. She was on probation for 6 months and subsequently confirmed.

Duties of a Cateress are enumerated in App 5 which range from preparation of budget estimates for foodstuffs and other kitchen requirements, preparation of the menu for students, supervision and guidance of all kitchen staff, preparing and serving meals during school functions e.g Board and PTA meetings, visitors etc, checking the quantity and quality of goods supplied to the kitchen, control of food stores,

proper storage of foodstuffs, keeping of proper and upto date records of foodstuffs received/consumed, preserving food for students taking part in activities out of school, maintenance of high standard of cleanliness in the dining hall/kitchen, reporting any breakages/damages to kitchen/dining hall equipment preparation of duty roster for kitchen staff and doing other duties assigned by the head teacher. The respondents contend that the head teacher assigned the claimant the duty of cleaning supervisory in boarding area because of the last item enumerated in App 5 stating duties of a Cateress as;

“doing any other duties assigned by the head teacher”

The question then is whether a Cateress's duties go hand in hand in cleaning boarding areas which is basically a house keeper's duty. A look at the entire list of a Cateress duties shows that she was confirmed to the kitchen and kitchen area and could do all duties related to the kitchen. It is clear that the framers of those duties intended that the claimant who was a Cateress would do work related to food, the kitchen and dining hall areas.

According to Blacks Law Dictionary, 4th Edition at pg 684, in applying the rule of *ejusden generis* in construction of these duties, it is also clear that the framers intended that:-

“Such general words are not to be constructed in their widest extent but are to be held to be applying only to persons or things of the same general kind or class as those specifically mentioned”

The contention by the respondent that the claimant was allocated duties that were hers is therefore not true. The respondents have in their defence also insinuated that indeed the claimant was being investigated for some wrong doing and that is why she was send on forced leave. The allocation of supervision duties in boarding area was therefore a culmination of these alleged discipline against claimant inflicted without due process and therefore unfair and unjustified.

The letter to the claimant allocating her new duties as supervisor in cleaning area also offends the provision of Section 10(5) of Employment Act which states that:-

“10(5) Where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.”

The key position is that the employer cannot alter the employees employment contract without **consulting** the employee. The wording of the section is couched in mandatory terms an indication that the employer cannot unilaterally revise the contract unless there is consultation. In the current case there was no consultation and the decision to change the duties and position of the claimant was made and is shrouded, in malice as an extension of the **“disciplinary”** process instigated against the claimant.

The end result of changing the claimants contract without consultation with her is tantamount to terminating the existing contract and therefore amounts to an unfair and unjustified termination.

On the second issue, the respondent had contended that the claimant deserted duty for no apparent reason. The respondents even counter claimed against claimant asking that the court orders her to pay them damages for the same plus one months salary in lieu of notice. This contention is unfounded from my above analysis and I find that the respondents are the ones who terminated the claimants services. They never accorded the claimant any hearing as envisaged under Section 41 of Employment Act which states that:-

“(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reasons for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within sub – section (1) make.”

The respondents also never explained to claimant why they chose to terminate her services as envisaged under Section 43 of Employment Act which also states that:-

“43(1)In any claim arising out of termination of a contract, the employer shall be required to prove the reason or 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.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”

On 3rd issue, the claimant has sought several prayers from this court as enumerated in her memo of claim. This court finds for claimant and makes orders as follows:-

- 1. The termination of claimant by respondent was unfair and unjustified and I convert it to a formal termination.**
- 2. The unilateral alteration of the claimant's contract of employment was unfair and unjustified and amounted to an unfair termination.**
- 3. The claimant be paid 1 month's salary of Ksh 10,500/= in lieu of notice.**
- 4. The claimant be paid 12 months salary as damages for unlawful termination = 10,500 X 12 = 126,000/=**
- 5. The claimant be paid 15 days salary as terminal benefits for each year served = ½ of 10,500 X 6 = 31,500/=**

TOTAL PAYABLE

168,000/=
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The claimant had prayed to be paid for leave not taken and underpayments. She has not shown to court that she applied for and was denied leave and neither has she demonstrated to court what her payment was as against the statutory minimum. These prayers are therefore not proved and are not awarded.

The respondents counter claim is dismissed with costs. The respondent will meet costs of this suit. The respondents will also issue claimant with a certificate of service.

HELLEN WASILWA

JUDGE

28/2/2014

Appearances:-

Lore h/b Masore Nyangau for respondent present

Mr. Chepkwony h/b Henry Wasilwa for claimant present

CC. Wamache