



IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 425 OF 2013

ALICE GESARE MONINDACLAIMANT

VERSUS

NICOLUS MBUYA

GABRIEL DOLAN

PENINAH KAMAU

FRANKLIN FAIDA

PIUS MUTHOKA (*sued as the trustees of the Goodlife Ophanage*)...RESPONDENTS

J U D G M E N T

I N T R O D U C T I O N

1. The claimant has brought this suit alleging that she was unfairly dismissed from employment by the respondent on 30/9/2013. she consequently prays for ksh.236000 being her accrued employment benefits plus compensation for unfair termination of her employment.
2. The respondents have denied liability to pay the sum claimed by the claimant and averred that they dismissed the claimant for gross misconduct and failure to adhere to the disciplinary process. They have further averred that they paid to the claimant all her lawful dues on termination and as such she is not entitled to further dues as prayed.
3. The case was heard on 17/6/2014 and 21/7/2014 when the claimant testified as CW1 while the respondents called Mercy Nyandzua Mbigu, Nicholus Mbuya and Khode Hemed Jumaa as RW1, RW2 and RW3 respectively.

CLAIMANT'S CASE

4. CW1 was employed by the respondent (Good life Ophanage) on 1/5/2009 vide a letter dated the same day (Exh. 1). Her job title was House Mother and her duties included washing and caring for the children. She was in charge of 12 children who she would attend church with using the respondents vehicle.
5. On 28/9/2013, CW1 went to church alone after the RW1 told her that the children were to remain to meet visitors who were coming to the orphanage. When CW1 returned to the orphanage at 6pm as usual the children ran to meet her joyfully but RW1 called her to the office where she also found RW3.

6. After exchange of greetings, RW1 told CW1 that the children under CW1's care among them Papa went to Kevin Muguire (Founder of the Orphanage) crying and reported that CW1 was beating them. RW1 then told CW1 to pick her belongings and leave the orphanage immediately.
7. At 8.00pm RW1 gave CW1 a vehicle to transport her belongings. She also send to CW1 a suspension letter dated 28/9/2013 (exh 2). The reason cited for the suspension was the children were not comfortable with her because she was beating them with firewood every 5.30am for bed wetting. The suspension was indefinite. On 30/9/2013 CW1 was served with a certificate of service stating that she had served the orphanage from 1/5/2009 to 30/9/2013. (exh 3.). According to CW1, the certificate issued to her meant that she had been dismissed.
8. On 3/10/2013, CW1 reported the matter to the labour office Kilifi who in turn served a letter to the orphanage. In response RW2 called CW1 by phone to attend a meeting on 18/10/2013 to discuss her case with the trustees of the orphanage. On the same date the respondent wrote to the labour officer informing him of the said meeting scheduled for 18/6/2013.
9. She attended the meeting with the trustees as summoned on 18/10/2013. She went alone because she was not advised to be accompanied by co-worker of her choice. Mary, one of the founders of the orphanage explained to CW1 that while she was away CW1 was beating the children and the report had been confirmed by RW1. Mary then asked CW1 to defend herself on the accusation of beating the children. CW1 denied the charges and complained about the mistreatment she received when she was chased away from the orphanage at night. CW1 requested for the complaining children to be called to give evidence but the request was declined. CW1 blamed her problems on the bad relationship with RW1 who did not like CW1's church attendance on Saturday which was according to her faith.
10. According to CW1 the hearing was an afterthought because she had already been dismissed on 30/9/2013. In her own view the said dismissal was unlawful and unfair because she should have been heard together with the complaining children first before the dismissal. She contended further that she should have been allowed to call witnesses but the respondent had not told her that she has the right to be accompanied at the hearing by a co-worker.
11. CW1 stated that she was not paid her lawful dues and prayed for bonus of ksh.2000 for 53 months served being ksh.106,000. She contended that under the contract of service she was earning ksh.2000 per month as bonus which was to be received after 5 years successful service. That the respondent unfairly dismissed her after 4 ½ years in order to deny her the accrued bonuses.
12. She prayed for ksh.10,000 being one month salary in lieu of notice as per the contract of service. According to CW1 her salary had been increased to ksh.10000 per month from ksh.7000.
13. CW1 further prayed for salary for 21 leave days not utilized plus 12 months salary as compensation for unfair termination. She denied ever receiving warning letters dated 4/10/2012 and termination letter dated 18/10/2013. She denied ever admitting the offence of beating children during the meeting with the trustees. According to CW1 the charges were framed up and blamed RW1 for her woes.
14. On cross examination by defence counsel, CW1 admitted that she went for 30 days leave in 2013 but that was for 2012. She further admitted that the letter of appointment provided for payment of bonus if she completed 5 years service. She admitted that she did not complete 5 years in the service.
15. She confirmed that the appointment letter provided for summary dismissal for gross misconduct. She agreed that it is wrong to beat children especially in an orphanage where its licence is pegged on the ability to protect the children and confirmed that RW1 told her that Moses and Caleb are the children who went crying to Kevin to complain that CW1 was beating them. After that brief from RW1, she was suspended verbally and a suspension letter was served on the following day.
16. CW1 later attended a meeting with 9 trustees on 18/10/2013 where CW1 denied the allegation of beating children in the report prepared by RW3. She contended that the alleged beating were never reported to any one early enough and that the report was had material contradiction.
17. After the meeting with the trustees, CW1 was allowed to eat with the children and thereafter she was given papers to sign but she refused because she was being paid only ksh.36000 as her final dues.
18. On re-examination CW1 maintained that she was innocent and contended that the children were reporting immediately for any wrong done to them and at no time did they report her alleged beatings.

DEFENCE CASE

19. RW1 is the assistant manager for the respondent orphanage. She admitted that CW1 was working with her but was dismissed on 18/10/13 for assaulting children in the home.
20. On 28/9/2013, the children reported to Kevin that CW1 was assaulting them which prompted her to issue CW1 with a suspension letter and a certificate of service on the following day. RW1 gave the certificate upon request by the CW1 to help her secure employment at the Mombasa Polytechnic.
21. On the 3/10/2013, CW1 brought a letter from the labour office alleging that she had been dismissed without her dues. RW1 responded the letter on 4/10/2014 saying that CW1 was only on suspension and that the case was for hearing on 18/10/2013. She denied that the hearing was scheduled after receiving the letter from the labour office.
22. RW1 attended the trustees meeting on 18/10/2013 where CW1 admitted the offence of beating the children before the social worker (RW3) was employed. RW1 however insisted that even on 28/9/2013, CW1 assaulted a child with a moppr stick and the child reported to the founder. CW1 breached the child protection policy which she had signed. After the hearing CW1 was allowed to eat lunch with the children in the house she was working.
23. In the meanwhile a termination letter was done given to CW1 together with calculation of her dues totaling to Ksh.40000. CW1 however refused to take the money alleging that it was less bonus. She contended that CW1 had exhausted her leave upto 2012 and the one for 2013 had not yet matured.
24. RW1 produced appointment letter dated 1/5/2009 (Exh.d-1), letter from labour office dated 4/10/2013 (Exh.d.2), warning letter dated 4/10/2012 (Exh.d.3), termination letter dated 18/10/2013 (Exh.d.4), minutes dated 18/10/2013 (Exh.d.5), report by social worker dated 16/10/2013 (Exh.d.6), suspension letter dated 28/9/2013 (Exh.d.7), payment schedule (Exg.d.8) and child protection policy signed by CW1 (exh.d.9). RW1 concluded by saying that CW1 was paid her salary for September 2013 while she was on suspension.
25. On cross examination by the claimant's counsel, RW1 confirmed that CW1 worked for about 4 years without any complaint from children until the one made on 28/9/2013. She admitted that she never took the child assaulted with mopepr stick on 28/9/2013 to hospital.
26. RW1 admitted that CW1 did not go to church with the children on 28/9/2013 because there were guests visiting the children's home.
27. She admitted that CW1 was never served with any letter to attend the hearing on 18/10/2013 and that she did not tell CW1 to be accompanied by another employee of her choice. She also admitted that CW1 did not admit beating any child. She further admitted that the children who complained about the beating did not give evidence at the hearing on 18/10/13.
28. She explained that the 30 days leave between 16/7/2013-15/8/2013 included 9 holidays CW1 had worked during easter.
29. She admitted that CW1 returned from church at 6pm on 28/9/2013 and suspended her immediately in order to protect the children.
30. RW2 is a trustee for the orphanage. He was called by CW1 after suspension complaining that she had been dismissed. RW2 verified the position and called back to tell her that she had only been suspended until disciplinary hearing was done.
31. He confirmed that she was given a hearing and dismissed after which she was paid ksh.40000 as her dues but she refused to take demanding for her bonus. RW2 explained that CW1 was not entitled to the bonus because she had not completed 5 years service. He denied that the ksh.2000 bonus per month was part of CW1's salary. That the bonus money was kept by Kevin Maguire.
32. He explained that CW1 was dismissed for assaulting children which was reported by the children to Mr. Kevin. RW2 was not however present when the children reported to Kevin.
33. RW2 clarified that the house where CW1 was in charge was next to other houses which could hear children screaming from CW1's house if at all the children were beaten. He however contended that CW1 admitted the alleged beating of children during the hearing on 18/10/1013. He also referred to the social workers report (Exh.d.6) and said that the social worker stated that the children had made contradicting allegations. RW2 never signed the minutes of the hearing.
34. RW2 also interviewed the children separately (date not specified) and they confirmed the alleged beating which were allegedly done in the absence of the social worker and aunt. RW2 confirmed

- however that he has not before received any report on the child beatings.
- 35.RW3 is the social worker for the respondent. He prepared the report dated 16/10/2013 (Ex.d.6) and signed it.
- 36.On cross examination by the claimant's counsel, RW3 admitted that one child called Rama confirmed that he was beaten but he did not record the date for the alleged beating. He confirmed that the children gave contradicting information possibly due to pressure. He confirmed further that before the report made in September 2013 he had not noticed any anomaly in the behaviour of the children.
- 37.RW3 was present when the children reported to Kevin about their beatings by CW1. One child reported that CW1 beat with a mopper stick on the same day 28/9/2013 but RW3 never indicated that complained in his report (exh.d.6). On further cross examination, he admitted that the boy did not indicate the date when he was beaten with a mopper stick. He stated however that Moses Barak and Caleb Babu were both crying when they went to report to Kevin. He did not take the boys to hospital after they reported the beatings on 28/9/2013.
- 38.After the hearing the two sides filed written submissions.

ANALYSIS AND DETERMINATION

- 39.After carefully perusing and considering the pleadings, evidence and submissions, it is clear that the employment relationship is not in dispute. There is also no dispute that the said relationship was terminated on ground of gross misconduct on the part of the claimant after the children CW1 was caring for reported that she was habitually beating them with wooden objects including a mopper stick.
- 40.What is in dispute revolves around the date and the fairness the the dismissal on the one hand, and the dues payable if any to the claimant on the other hand.

The court had therefore summarized the issues as follows:

- (A) Whether CWS1 was dismissed on 30/9/2013 or 18/10/2013.**
- (B) Whether the dismissal was unfair.**
- (C) Whether the reliefs sought ought to issue.**

Date of Dismissal

- 41.It is without any doubt the CW1 was suspended from work on 28/9/2013 until further notice . It is also not denied that CW1 was issued with a certificate of service on 30/9/2013 by the employer. The certificate indicated that CW1 had served the respondent from 1/5/2009 to 30/9/2013.
- 42.After evaluating the evidence above, the court is of the view that the CW1 was dismissed on 30/9/2013. Had the CW1 not reported the matter to the Labour officer the hearing by the trustees on 18/10/2013 would not have occurred. The reason for the foregoing is that the suspension letter dated 28/9/2013 did not indicate that any hearing was to be held in future. It only stated that CW1 was suspended until further notice. The only other communication or notice which went to the CW1 was the Certificate of Service delivered to her by the driver send by RW1. According to CW1, RW1 was her enemy due to matter spiritual, a fact which was not denied by RW1. She wanted to have CW1 dismissed as quickly as possible in order to "***protect the children***". The court therefore finds that the hearing held on 18/10/2013 after the dismissal on 30/9/2013 was just window dressing.

Unfair dismissal

43. Under Section 45 of the employment Act, termination of employment is unfair unless the employer proves that it was founded on valid and fair reasons and done through a fair procedure.
44. In the present case the reason was assault (beating) of children on diverse dates since she was employed until 28/9/2013. No medical report was shown to support the alleged assault and no one in the neighboring houses in the orphanage heard any child scream as a result of the alleged beating. The report by RW3 who investigated the assaults admitted that the children made contradicting reports. Consequently the court finds that the reason for the dismissal was not valid. It was also not fair considering that the alleged dates of the offence was not known and the respondent deliberately failed to take the children to hospital or report to the police.
45. In addition to the foregoing it is already decided above that the dismissal was done on 30/9/2013 before according the claimant any hearing. The dismissal was therefore in breach of Section 41 of the Employment Act which entitles an employee to a fair hearing before dismissal for any misconduct under Section 44 of the said Act. Considering the aspects of fairness under Section 45 of the Act, the court finds on a balance of probability that the dismissal was unfair both substantively and procedurally. The matters were made worse when her dues were not paid on termination which prompted her to report to the labour office. The court refuses to believe that a reasonable employee would request her employer for a certificate of service to be delivered in confidence before her dismissal. Who would she be hiding the letter from?

Reliefs

46. Under Section 49 of the Employment Act, an unfairly dismissed employee is entitled to pay in lieu of notice, accrued employment benefits plus compensation for unfair dismissal. The court awards her ksh,10000 as salary in lieu of notice.
47. She is also awarded leave earned between 1/5/2013 and 30/9/2013 on prorata basis which is equal to $1\frac{3}{4}$ days per month hence $8\frac{3}{4}$ days leave earned. She is therefore awarded Ksh.3,461.50 in lieu of the approximately 9 leave days not taken.
48. The claimant is also entitled to ksh.2000 bonus per month for the 53 months served. The termination of her services was not to blame on her. It is the employer who threw her away at night and later condemned her unheard and issued a certificate of service without pay. There is no written evidence to prove that she resigned before the said certificate was issued. The court dismisses the defence allegation that the ksh.2000 was not yet claimant's money until she completed 5 years of service. On the contrary the court is of the view that the ksh.2000 was earned at the end of every complete month served only that it was to be kept in trust for her until the end of 5 years continuous service. It follows therefore that if the contract was to be terminated by the employer before the 5 years time, the claimant was to receive her accrued bonuses. The court therefore awards the prayer for kshs.106,000 being her accrued bonuses.
49. The court awards CW1 ksh.60000 being 6 months gross salary as compensation for unfair termination. In so awarding the court believes that CW1 could have secured another equally paying employment within 6 months.
50. The prayer for service pay is dismissed for reason that CW1 was a member of NSSF according to the uncontested evidence of RW2 to that effect.

DISPOSITION

51. For the reasons and findings made above, judgment is entered for the claimant against the respondents jointly and severally for ksh.179,461.50 plus costs and interest.

Dated, Signed and delivered this 26th September 2014

O. N. Makau

Judge

