



IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 55 OF 2014

GENTRIX N WANJALACLAIMANT

VERSUS

FORT JESUS ACADEMYRESPONDENT

J U D G M E N T

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

The claimant has sued the respondent accusing her of wrongful and unlawful termination of the claimants employment on 22/11/2013 and prays for accrued employment benefits and compensation for unfair termination. The total claim is for ksh.396,200 plus costs and interest. In response the respondent has denied liability for unfair termination. According to the respondent the termination was in accordance with Section 44 of the Employment Act because the claimant had grossly miscondacted herself by absenting herself from work without permission and by disobeying instruction from her employer.

In addition the respondent avers that she invited the claimant for a hearing but she declined and went away saying she was not a slave. Lastly the respondent avers that she paid to the claimant all her dues after her dismissal from employment. The suit was heard on 14/7/2014 when the claimant testified as CW1 while the respondent called Aisha Athmani, Maimuna Kalyan, Mumtaz Laving and Mathias Alal and RW1,2,3 and 4 respectively.

CLAIMANT'S CASE

CW1 stated that she was employed by the respondent on 1/5/2020 by letter dated 2/6/2010 as a school teacher for a starting salary of ksh.9500 per month. The salary was later increased to ksh.15000 per month due to her diligence service. On 22/11/2013 CW1 attended work as usual and signed the attendance register at the office but the secretary told her to wait for the Director outside the office. Shortly thereafter the Head teacher came to the office and told CW1 to wait outside the school compound and she complied. When the Director delayed CW1 told the Head teacher that she would hang around and requested him to call her after the Director comes. CW1 never returned to the school after the Head teacher failed to call her.

In the following week, the respondents secretary called CW1 and asked her to send her (CW1's)daughter to collect CW1's letter from the office. CW1 went personally for the letter on 27/11/2013 and noted that it was a dismissal letter dated 22/11/2013. The reason for the dismissal was that CW1 went for a trip on 16th to 19th November 2013 without permission.

CW1 however denied the alleged reason for the dismissal. According to her 16th and 17th November 2013 was Saturday and Sunday respectively and that she had secured permission from the Director to be away on 18th and 19th November 2013. The permission was sought and granted verbally as it was the usual procedure at the respondent. The permission was on condition that CW1 was to organize to cover up for the 2 days off.

According to CW1, she was not allowed to talk to the Administrator regarding the dismissal except to sign for November salary. CW1 never received any warning letter or even given any hearing before the dismissal. She prayed for compensation plus salary since the date of her dismissal.

On cross examination she admitted that she worked for about 3 ½ years. She further admitted that her salary included house allowance. She also admitted that 18th to 20th November 2013 was the time for end of year exams. CW1 maintained that after securing permission from the employer, she prepared the students before leaving. CW1 contended that on 15/11/2013, she went to the office of the Administrator to remind her that she was travelling that night as earlier permitted. She found RW2 at the Administrator office.

The Administrator told CW1 not to travel due to exams despite CW1 reminding her that she had granted her permission earlier and that every arrangement was complete for the family trip to Tanzania. CW1 confirmed that her letter of employment provided that leave was to be taken at convenient time upon agreement between employer and herself.

CW1 maintained that she spoke to her immediate boss RW4 before going to seek permission from the RW1. She told the court that on 20/11/2013 she went to work at 6.30am and the secretary told her to wait outside the office. However, RW4 and RW3 told her to wait outside the school compound which prompted CW1 to ask RW4 whether she was a slave to wait outside the school compound. CW1 never the less waited outside the school compound but there was no place to sit and she left after requesting the RW4 to call her after RW1 reported to work.

RW4 never called her and she never returned to work. CW1 admitted that she never worked on holidays. She also admitted that her son was in fees arrears which was recovered from her salary for November 2013.

DEFENCE CASE

RW1 is the respondent's Administrator. She explained how RW3 told her, on 15/11/2013 morning that CW1 was requesting for her son to do all his exams that day because CW1 was travelling with him on a family trip. That on the same day RW2 also confirmed that CW1 going on a trip. RW1 then called CW1 to her office and told her that she could not let her go away during exams period. RW1 denied that CW1 sought permission from her before the 15/11/2013. According to RW1, CW1 stormed out her office and reported to work on Saturday 16/11/2013. When RW1 called CW1 to go attend work or loss employment CW1 just respondent okay but never attended work. RW1 then asked RW4 to organize for another teacher to stand in for CW1.

On 20/11/2013, RW1 was alerted by her secretary on phone that CW1 had returned to work and in turn RW1 instructed the secretary to tell CW1 not to go to class but to wait for her at the office. When RW1 went to the office, CW1 had left and after consulting with the Head teacher they decided to dismiss the claimant from employment. RW1 instructed her secretary to call CW1 to come for the dismissal letter but instead, CW1 sent her daughter to the letter.

RW1 never conducted any disciplinary hearing for the CW1 because CW1 did not wait for her as instructed. RW1 contended that CW1 was paid all her dues less statutory deductions and her son's fees arrears. According to RW1, she dismissed the claimant for breach of her employment letter after failing to heed to the warning given on 15/11/2013.

On cross examination by the claimant's counsel, RW1 denied any earlier notice of CW1's trip prior to

15/11/2013. She contended that Saturday was a working day for the claimant but she did not attend work. RW1 however admitted that she never indicated how long CW1 was to wait for her at the office on 20/11/2013. She also admitted that she never issued any warning letter or suspension to CW1 before the dismissal because the offence committed was serious.

RW2 is a teacher at the respondent school since 1988. She was the class teacher for the CW1's son. On 5/11/2013 CW1 told her that she was going for her second honeymoon in Zanzibar with her husband but RW2 advised her to seek permission from RW1 because it was exam time. On 15/11/2013, RW3 told RW2 that CW1 requested that her son be given all his exams that day because they were going away. RW1 then send RW2 to call CW1 to RW1's office where at CW1 confirmed she was going on her trip. CW1 told RW1 that she had already informed her and that every thing was ready for the trip but RW1 denied that CW1 had earlier on notified her about the trip. According to RW2, RW1 told CW1 not to go for the trip.

On cross examination by the claimant's counsel, RW2 stated that when CW1 told her about the trip, she advised CW1 to seek permission. RW1 denied ever notifying RW1 about the CW1's trip immediately after learning from CW1. RW1 stated that there were 28 teacher working for the respondent and RW1 was the Principal. RW2 contended that in her written statement dated 8/7/2014 she stated that RW1 told Cw1 that she had not sought for leave.

RW3 is a nursery school teacher for the respondent. She confirmed that CW1 was a teacher and a parent at the respondent school. On 14/11/2014 RW3 received a telephone call from CW1 requesting that CW1's son be given all his exams on 15/11/2013 because she was travelling with him. RW3 declined the request unless authorized by RW1. CW1 then promised her that she would seek permission from RW1. On cross examination by CW1's counsel, RW3 confirmed that CW1 was to travel with her son.

RW4 is the Head teacher for the respondent's primary section. On 15/11/2013 at 3.45pm he was called by RW1 to her office. RW1 asked him whether he was aware that CW1 was travelling the following week. On 16/11/2013, CW1 never reported to work as usual and at 9.00am. RW1 called him to her office and instructed him not to expect CW1 on the following Monday. RW1 also instructed RW4 to arrange for an alternative teacher to take care of CW1's class. On 20/11/2013 at 7.20 a.m. RW1's secretary called him to alert him that CW1 was back and that Rw1 had asked her not to go to class but wait for RW1.

RW4 went to see CW1 and explained the RW1's instructions to her. CW1 however left after telling him that she was not a slave. RW4 denied ever telling CW1 to wait outside the school compound and contended that there is a place for waiting at the RW1's office. RW4 explained that before an employee in the primary section goes for leave, he first notifies him before applying for the leave in writing to the RW1. In the present case, RW4 stated that CW1 never notified him first.

On cross examination by the CW1's counsel, RW4 maintained that by his written statement filed on 9/7/2014, he stated that RW1 learned about CW1 going on trip before him. According to RW4, CW1 was stopped from going to class on 20/11/2012 by the secretary and himself.

After the close of the hearing, both parties were directed to file written submissions.

ANALYSIS AND DETERMINATION

The court has carefully considered the pleadings, evidence and submissions filed. It is not in dispute that CW1 was employed by the respondent and worked until 22/11/2013 when she was served with summary dismissal letter. It is also not in dispute that a disciplinary hearing as per Section 411 of the Employment Act was not accorded to CW1 before her dismissal from employment. It is also not in dispute that CW1 was paid her salary for the days worked in November 2013. The issue for determination the court's view are:

- a. **Whether the dismissal of the claimant amounted to unfair termination of her employment.**

b. Whether the reliefs sought ought to issue.

Unfair Termination

Termination of employment is unfair within the meaning of Section 45 of the Employment Act if the employer fails to prove that it was grounded on a valid and fair reason and that it was arrived at after a fair procedure.

According to the said Section 45 of the aforesaid Act, a fair reason for termination is one which relates to the employees conduct, capacity or compatibility and the operational requirements of the employer. The reason is valid if it existed at the time of the decision to terminate the contract and it must be related to the employees ordinary course of his employment.

The procedure for termination is fair if it is just and equitable as outlined under Section 41 of the said Employment Act. The said Section 41 of the Act provides in mandatory terms that before an employer dismisses an employee for misconduct, poor performance or incapacity, the employer shall explain the reason for the intended dismissal to the employee in the company of a co-employee of his choice and thereafter accord the two an opportunity to air their defence before a decision for dismissal is made. That exercise is what is otherwise called disciplinary hearing or inquiry which must be conducted in a language of the employee's understanding.

The court has perused the dismissal letter dated 22/11/2013. It is clear that the reason for the dismissal was refusal to obey lawful instructions. The letter states in part that on 15/11/2013, RW1 advised CW1 not to go for a trip because the pupils were sitting for their end term exams but CW1 went for the trip without permission. In the court's view, absenting herself from work without permission was gross misconduct which entitled the employer to terminate services under Section 44 of the Employment Act. The said right however is subject to provision of Section 41 and 45 of the said Act. The employer must accord the employee a fair hearing as contemplated under Section 41 of the Act. In the present case, even if there existed a fair and valid reason for dismissing the claimant, the law did not entitle the respondent to any discretion with respect to according CW1 a disciplinary hearing. The court believes the claimant's testimony that no hearing was given to her before dismissal.

Indeed according to the claimant, RW1 did not want to see or talk to her and that is why she requested CW1 to send her daughter to collect the dismissal letter. RW1 did not call her secretary as a witness to prove that she called the claimant for the dismissal letter but CW1 send her daughter instead. Consequently the court finds on a balance of probability that the dismissal of the claimant was unfair within the meaning of Section 45 of the Employment Act. The main reason for the foregoing finding is that the procedure followed in dismissing her was in breach of Section 41 of the said Act. The defence argument and submissions that the hearing was not possible after CW1 disappeared is not acceptable to this court because the respondent did not produce any evidence to prove that she invited CW1 to a disciplinary hearing and CW1 refused to attend. The waiver of the right to a hearing was therefore not proved in evidence by the defence.

RELIEFS

Section 49 of the Employment Act entitles an unfairly discharged employee to salary in lieu of notice, all the accrued employment benefits on termination plus 12 months gross salary compensation for unfair termination. The contract of employment provided for one month notice and as such the claimant is awarded one months salary in lieu of notice being Ksh.15000/-. The claimant is also awarded 3 months gross salary as compensation for unfair dismissal being Ksh.45000/-. In awarding the 3 months salary, the court has considered the fact that the respondent had a valid and fair reason for dismissing the claimant save that she did not follow a fair procedure in dismissing the claimant.

The claim for salary accruing after dismissal from employment is dismissed for lack of merits. Likewise the prayer for arrears in house allowance is dismissed because CW1 admitted in evidence that the salary of ksh.15000 was inclusive of housing allowance. The prayer for gazetted holidays worked is also

dismissed for lack of particulars and evidence.

DISPOSITION

For all the reasons stated above, the court enters judgment for the claimant for Ksh.60,000/ plus costs and interest.

Orders accordingly.

Dated, Signed and delivered this 5th September 2014

O. N. Makau

Judge