



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT KISUMU

CAUSE NO. 251 OF 2013

(Before Hon. Justice Hellen S. Wasilwa on 30th October, 2014)

ANTHONY NABENDE.....CLAIMANT

-VERSUS-

THE MANAGER, MANAGEMENT COMMITTEE, JALARAM ACADEMY.....RESPONDENTS

JUDGMENT

The claimant herein filed his memo of claim on the 6.9.2013 in person. The claimant's case is that in the year 2011 he was employed by respondents and started to work on 1.1.2012 as an English Teacher at a salary of Kshs 25,000/= per month all inclusive. He produced his employment letter as *App JA 1*. He avers that he performed his duties diligently until 31.7.2012 when respondents unlawfully terminated his services without giving him reasons for the termination nor a hearing.

It is the claimant's case that he was a member of respondents Staff Development Group and even took a loan of Kshs 100,000/= to pay fees for his son at the University but was dismissed when the loan was not completely paid and this puts at risk his shares with the group and he is unable to support his family. He now seeks for compensation for unlawful termination and loss of employment. He also wants the court to order him reinstated to work, or in the alternative payment of his terminal dues inclusive of unpaid salary; notice pay and service pay.

The respondent on the other hand filed their response on 25.9.2013 through the firm of L. G. Menezes Advocates. It is their defence that the claimant was lawfully terminated as his work fell short of expectations as per his letter of appointment and he was terminated by the management as his performance failed to improve. That further, there were several complaints against him by students where the students complained that he scorned them publicly exhibited extreme arrogance and used abusive and vulgar language against them.

The respondents also aver that upon his termination he was paid his July 2013 salary and his NSSF dues remitted as per his pay slips attached. It is the respondents case that the claimant was terminated fairly and procedurally and that he has no claim. They asked court to dismiss his case with costs.

Upon hearing the parties herein and upon considering their submissions, the issues for determination are as follows:-

1. Whether there were valid reasons to dismiss the claimant.

2. Whether due process was followed before his termination.

3. What remedies if any the claimant is entitled to.

On 1st issue, the reasons respondents aver caused them to terminate claimant are contained in **App 2**; abusiveness, awarding low marks, using vulgar language etc. These reasons must be reasons the respondents believed existed as provided under S. 43 of Employment Act – 2007 which states:-

“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.”

The meeting was apparently held on 27.1.2012. The claimant was terminated on 31.7.2013. Did these reasons exist as at 31.7.2013. We are not informed of this and there was no revisiting of this reasons and it is the finding of this court that no valid reasons existed to warrant termination of claimant. On 2nd issue, even if there were proper reasons, there is no indication that claimant was given a hearing before his dismissal on 31.7.2013. This is contrary to S. 41 of Employment Act which states:-

“(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.”

And also Article 50(1) of Constitution on right to be heard and rules of natural justice were flouted.

It is therefore apparent that the dismissal was unjustified and unfair and I declare it so. What remedies is the claimant then entitled to. He sought to be reinstated. But given the nature of engagement, I would find this remedy not appropriate as provided under S. 49 of Employment Act. I therefore award him as follows:-

1. 1 month salary in lieu of notice Ksh 25,000/=

2. 12 months salary as damages = 25,000 X 12 = 300,000/=

TOTAL = KSHS 325,000/= Less statutory deductions.

He is not entitled to payment of service pay as he was contributing to NSSF and this is prohibited under S. 35(6) (d) of Employment Act 2007. The claimant should also be issued with certificate of service.

HELLEN S. WASILWA

JUDGE

30/10/2014

Appearances:-

Claimant present

Miss Onyango for respondents

CC. Wamache