



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU
CAUSE NO. 202 OF 2012
(Originally Nairobi Cause No. 4 of 2012)

KEZIAH NDUTA KIEMA	1 st CLAIMANT
PRISCA LUBYA	2 nd CLAIMANT
MARY MBONE SHISUNGU	3 rd CLAIMANT
ACLEAN CHEPKEMOI RONO	4 th CLAIMANT
EMA VALENTINE WAIYAKI	5 th CLAIMANT
RHODA CHEPNGETICH KOECH	6 th CLAIMANT
DOROTHY FLORENCE SHISUNGU	7 th CLAIMANT
AMITABAN ASHOKUMAR PATEL	8 th CLAIMANT
SHALIN WASON	9 th CLAIMANT
MARY OGADA	10 th CLAIMANT
JOYCE KEMUNTO OIRA	11 th CLAIMANT

V

LIONS NIRU SHAH
(CHAIRMAN, LIONS SCHOOL MANAGEMENT BOARD) RESPONDENT

JUDGMENT

Background

1. The 1st to 4th Claimants and 7th to 11th Claimants filed a Memorandum of Claim against the Respondent in Nairobi on 5 January 2012. They pleaded that they were employed by the Respondent on diverse dates as nursery school teachers except for the 7th Claimant who was a Head Teacher.
2. The Claimants were seeking that the Court finds their dismissals on 24 November 2011 unfair and

- wrongful and awards of terminal benefits. The Respondent was served and it filed a Response on 30 January 2012.
3. On 4 July 2012, the Respondent filed a List of Documents.
 4. On 21 December 2012, the firm of Prof Tom Ojienda & Associates replaced the firm of Odhiambo & Odhiambo as Advocates for the Claimants.
 5. On the same day, the Claimants filed an Amended Statement of Claim. This was pursuant to leave granted by Marete J on 11 December 2012. Two of the notable amendments were to join *Joyce Kemunto Oira* as a Claimant and formalize the coming on board of Prof Tom Ojienda & Associates as Advocates for the Claimant. It is not clear why *Joyce Kemunto Oira* was being added as a Claimant when her name was among the initial Claimants.
 6. On 9 July 2013, the firm of Odhiambo & Odhiambo filed a Notice of Change of Advocates from the firm of Prof Tom Ojienda & Associates.
 7. On 31 July 2013 the Respondent filed an Amended Statement of Response pursuant to directions by Ongaya J on 17 July 2013.
 8. On 19 May 2014, the Respondent filed another List of Documents and on 3 July 2013 the Claimants filed a Supplementary List of Documents.
 9. I have taken the liberty to set out the background because it is not clear from the record how *Emma Valentine Waiyaki* and *Rhoda Chepngetich Koech* (4th and 5th Claimants) became Claimants in the instant Cause. The names first appear in the Respondent's List of Documents filed in Court on 4 July 2012.
 10. With no formal order on record for the joinder/addition of the 4th and 5th Claimants, I do expunge the names of these two persons as Claimants in this Cause.
 11. This Cause was partly heard by Ongaya J on 2 April 2014, 30 June 2014, and 31 July 2014. He took the Claimants case. I took the Respondent's case/witness testimony on 14 October 2014.

Claimants' case

12. The Claimants pleaded case is rather straight forward. The Claimants, though employed on different dates were all informed of the termination of their services through letters dated 24 November 2011 signed by the Respondent.
13. For the sake of clarity, I will set out the relevant portions of the termination letters

We regret to inform you that your employment with lions Schools has been terminated with immediate effect on the grounds of gross professional mis-conduct, contrary to your terms and conditions of employment:

1. You have continued to engage in the habit of soliciting and receiving unauthorized coaching fees from parents of children under your care on monthly bases.

2. You have failed to respect, protect and care for learners by meting out corporal punishment and the use of abusive language to the young learners under your care.

These malpractices went on despite management caution and have adversely eroded public confidence in our institution and severally dented our reputation.

On November 15th 2011, The School management Board held a dialogue meeting with parents of top class at which the gravity and levels of unethical malpractices by you were expressed with displeasure.

These unacceptable conduct warrants summary dismissal without any benefit to you but the Board on humanitarian grounds will pay your November and December 2011 salaries.

14. The Claimants complaint is that there was no prior notice of the intended dismissals nor were they afforded a fair hearing. According the Claimants, there was no justification for the dismissals and

- the same were wrongful.
15. The Claimants contention is that the only meeting they had with the Respondent's Board was on 25 November 2011 during a staff end of year meeting where the dismissal letters were handed over.
16. The Claimants seek the prayers outlined in the Amended Statement of Claim.

Respondent's case

17. The Respondent's pleaded case is that the Claimants were its employees and that it entered into new contracts providing for termination by the giving of one month notice or pay in lieu of notice. The Respondent further admits terminating the services of the Claimants on the ground that they engaged in malpractice. The malpractice, it is pleaded eroded public confidence in the Respondent's schools.
18. The Respondent also pleaded that the dismissals were factually founded, procedurally fair and justified and that the Claimants were verbally and in writing warned prior to termination and contended that the contracts did not provide for giving of notice in situations of summary dismissal.
19. The Respondent also denied the Claimants were entitled to salary, pay in lieu of notice or gratuity.
20. The Respondent called its trustee, Ramesh Maganlal Thakar to testify.
21. On the reasons for the terminations, the witness stated that in 2011, the Respondent received complaints from parents that the Claimants were demanding tuition fees for extra tuition from the parents. Further, some parents complained that the Claimants were caning the pupils.
22. On the process, the witness stated that on receipt of the complaints, a meeting with the teachers was called and the allegations were put to them and that they were given an opportunity to make representations but they opted not to say anything and the decision was taken to dismiss them in October 2011 and that they were paid wages for November and December 2011 on humanitarian grounds.
23. According to the witness, notice was not necessary, and that because the Claimants were contributors to the National Social Security Fund, gratuity was not payable. He also stated only those who had served for more than 3 years were entitled to gratuity.
24. In cross examination, the witness stated that about 70 parents complained and that he could not give the name of any specific child who was caned or any specific teacher who caned a pupil.

Issues for determination

25. From the pleadings, testimony, evidence and submissions (Respondent's submissions were filed on 20 November 2014, only a day before judgment and outside the agreed timelines), the Court has identified the issues for determination as, whether the dismissals were unfair and whether the Claimants have made a case for an award of the remedies prayed for.

Whether the dismissals were fair

Procedural fairness

26. Prior to the commencement of the Employment Act, 2007 on 2 June 2008, an employer was free to dismiss an employee for a bad reason, a good reason or for no reason at all without affording him a hearing unless there was a contractual or specific requirement for a hearing. An employer could dismiss without cause provided requisite notice or pay in lieu of notice was made.
27. But that statutory framework no longer obtains. The harsh effects of that regime have been ameliorated by the Employment Act, 2007. The statutory framework, as embodied in section 41 of the Employment Act, 2007 is that before dismissing an employee on the grounds of *misconduct, poor performance or physical incapacity*, an employer must inform the employee of the reasons for the contemplated dismissal and afford the employee an opportunity to make representations. A colleague of the employee or union official may be required to be present as necessary.
28. And when it is a case of summary dismissal, the employer must hear and consider the representations made by the employee.

29. The cases under consideration involved both alleged misconduct for which the Claimants were summarily dismissed. The burden of demonstrating that procedural fairness, as it is called in employment law or natural justice in public law is placed upon the shoulders of the employer.
30. The process of hearing may be oral or conducted through correspondence. Where the process is documented it is a straight forward matter. The employer normally informs the employee of the charges through what is called a show cause letter. The show cause letter would request the employee to give explanations as to why disciplinary action should not be taken. But it becomes a little tricky where the process is not documented.
31. The Respondent's witness testified that the Claimants were called to a meeting and informed of the complaints raised by the parents. No documentation was produced or referred to.
32. In circumstances such as this, the Court must examine each case on its peculiar circumstances. A good rule of thumb is to ask the *WHAT, WHO, WHEN* and *HOW* questions. May be with time, the rule of thumb might become a general rule.
33. The *WHAT* question relates to what allegations were put to the employee. The *WHO* question concerns the person who confronted or put the allegations to the employee. The *WHEN* question relates to the dates and times when the confrontation and affording the employee the opportunity to make representations took place. The *HOW* question on its part relates to how the hearing took place and who was present and whether witnesses were called.
34. In the instant case, Mr. Thakar who testified on behalf of the Respondent stated

We listened to the complaints from the parents and called a meeting of the teachers.

We lodged the grievances to them and afforded them an opportunity to say what they wanted to say.

The teachers did not say anything and the Respondent decided to dismiss them summarily.

35. If my rule of thumb can pass legal muster, then it is obvious that no explanation has been given of *what* charges the Claimants were confronted with, *who* confronted them, *when* the confrontation took place and *how* it took place.
36. The uncontroverted evidence before Court is that the Respondent summoned the Claimants for a meeting on 25 November 2011. The termination letters had already been prepared and dated the previous day. The Respondent had also caused a vacancy announcement to put in the Daily Nation of 25 November 2011. The Claimants were handed over the termination letters.
37. Even the termination letters do not suggest that a hearing was held. The letters only refer to a meeting with parents on 15 November 2011. The Claimants are not marked in the minutes as either present or in attendance.
38. The Court finds as a fact that the Claimants were only summoned to the staff meeting on 25 November 2011 to be issued with dismissal letters written the previous day. The decision to dismiss had been taken before hearing the Claimants.
39. In my view, the Respondent has failed to discharge the statutory burden placed upon it by section 41 of the Employment Act, 2007 to show that it complied with the procedural fairness safeguards granted to employees.
40. I therefore find that the summary dismissals of the Claimants were procedurally unfair.
41. Section 41 of the Employment Act, 2007 protects employees from procedurally unfair termination/dismissal. It is mandatory that an employee is heard if the termination is on the basis of *misconduct, poor performance or physical incapacity*. Because of the mandatory nature of the process, it is not necessary for the Court to embark into an inquiry as to whether the Respondent has proved the reasons for dismissal as required by section 43 of the Act or that the reasons were valid and fair reasons as expected by section 45 of the Act.

Appropriate relief

Salaries for November 2011

42. It is not disputed that the Claimants were dismissed through letters dated 24 November 2011.

They were paid wages for November and December 2011. The Respondent deemed this as payment on humanitarian grounds.

43. Considering the payments, and the nature of the Respondent not being a profit organisation, the Court is of the view that this head of relief should be declined.

Pay in lieu of Notice

44. Pursuant to sections 35(1)(c) and 36 of the Employment Act, 2007 and the finding that the dismissals were unfair, the Court finds that each Claimant is entitled to one month pay in lieu of notice.

Gratuity

45. The Claimants sought gratuity calculated at the rate of one month pay for each completed year of service.

46. The Claimants did not anchor or lay any statutory grounding for this head of claim. The Court must therefore examine the contractual terms between them and the Respondent to determine whether this claim is merited.

47. All the Claimants voluntarily entered into new contracts from 2010 to 2012. The contracts provided that the Claimants would be entitled to service gratuity after 3 years of service. They were all dismissed before serving the minimum 3 years.

48. I am afraid I cannot look at the Claimants with a merciful eye as implored in the written submissions or look back at what had happened in the previous contracts. There was no evidence that they were coerced or forced to sign the new contracts or that the contracts were unconscionable. The claim for gratuity must therefore fail.

General damages for wrongful and unlawful termination

49. Section 49(1)(c) of the Employment Act, 2007 has provided the equivalent of not more than twelve months gross wages as an award where the Court finds there was unfair termination or wrongful dismissal. The statute has not labeled the award as damages, but it is generally taken even in comparative jurisdictions such as South Africa that the award is compensation.

50. The award is discretionary and the Court is enjoined to consider any, some or all of the factors outlined in section 49(4) of the Act.

51. In this respect, a party wishing the Court to consider any of the factors should clearly bring out such factor(s) so that the Respondent may also address the Court on the appropriateness of the factor(s), otherwise the Court risks exercising its discretion arbitrarily or capriciously.

52. Nearly all the Claimants served the Respondent for slightly less than 10 years save for the 3rd Claimant, Mary Mbone Shisungu who was employed in 1976.

53. Considering the length of service and the *ex gratia* amounts paid to the Claimants, I would award the Claimants save for the 3rd Claimant the equivalent of 4 months gross wages as compensation.

54. I would award the 3rd Claimant the maximum 12 twelve months gross wages as compensation.

Conclusion and Orders

55. In conclusion, the Court finds and holds that the summary dismissal of the Claimants was procedurally unfair and awards them and orders the Respondent to pay them as follows:

i. Keziah Nduta Kiema

- | | |
|--------------------------------------|---------------|
| a. One month pay in lieu of Notice | Kshs 16,016/- |
| b. 4 months gross wages compensation | Kshs 64,064/- |

TOTAL

Kshs 80,080/-

ii. Prisca Lubyia

a. One month pay in lieu of Notice	Kshs 17,282/-
b. 4 months gross wages compensation	Kshs 69,128/-
TOTAL	Kshs 86,410/-

iii. Mary Mbone Shisungu

a. One month pay in lieu of Notice	Kshs 26,176/-
b. 12 months gross wages compensation	Kshs 314,112/-
TOTAL	Kshs 340,288/-

iv. Aclean Chepkemoi Rono

a. One month pay in lieu of Notice	Kshs 18,121/-
b. 4 months gross wages compensation	Kshs 72,484/-
TOTAL	Kshs 90,605/-

v. Dorothy Florence Shisungu

a. One month pay in lieu of Notice	Kshs 17,282/-
b. 4 months gross wages compensation	Kshs 69,128/-
TOTAL	Kshs 86,410/-

vi. Amitaban Ashokumar Patel

a. One month pay in lieu of Notice	Kshs 18,151/-
b. 4 months gross wages compensation	Kshs 72,604/-
TOTAL	Kshs 90,755/-

vii. Shalin Wason

a. One month pay in lieu of Notice	Kshs 43,500/-
b. 4 months gross wages compensation	Kshs 174,000/-
TOTAL	Kshs 217,500/-

viii. Mary Ogada

a. One month pay in lieu of Notice	Kshs 23,658/-
b. 4 months gross wages compensation	Kshs 94,632/-
TOTAL	Kshs 118,290/-

ix. Joyce Kemunto Oira

a. One month pay in lieu of Notice	Kshs 21,980/-
b. 4 months gross wages compensation	Kshs 87,920/-
TOTAL	Kshs 109,900/-

56. The Court awards the Claimants costs.

Delivered, dated and signed in open Court in Nakuru on this 21st day of November 2014.

Radido Stephen

Judge

Appearances

For Claimants Mr. Biko instructed Odhiambo & Odhiambo Advocates

For Respondent Mr. Kimatta instructed by Kimatta & Co. Advocates