



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 942 of 2010

SAMUEL WAWERU MAINACLAIMANT

VERSUS

THE TRUSTEES OF SISTERS OF MARY

IMMACULATE, KENYA (being sued as proprietors of)

MARY IMMACULATE SECONDARY SCHOOL.....RESPONDENT

JUDGEMENT

1. This is a claim dated 12th August 2010 for wrongful termination of employment and withholding and non-payment of benefits arising under contract of service. The Respondent filed their response dated 27th September 2010 denying the total claim. Parties proceeded for hearing and written submissions at the close of the hearing and a highlighting of the same on 19th March 2013.
2. The Claimant submitted that he was employed by the respondent on 19th January 2003 as a Teacher and was on contract which was renewed after three years the last one expiring 31st December 2009. Under his contract the Claimant was paid kshs.13, 841.00 per month and was entitled to 21 leave days. That upon expiry of each contract, the claimant would continue working for the respondent awaiting preparation of a new contract and review by the Board. That on 12th April 2010 the claimant received his contract, signed and returned to the respondent officer, the school Principal. That there were subsisting issues between the Claimant and other teachers with the respondent touching on salary increment which was differed by the respondent awaiting a full Board meeting on 19th April 2010.
3. The claimant further stated that on 12th April 2010 he discussed the issue of his remuneration with the principal and agreed to continue working on previous contractual terms subject to the Board resolution on 19th April 2010 and on 16th April 2010 the Respondent terminated his employment on the grounds that he had failed to sign a new contract. That this termination was unlawful, grossly unfair and malicious noting that the reasons for termination were not valid, it was abrupt and without notice, disciplinary proceedings were not held and he was not given an opportunity to be heard. That together with other six (6) teachers were terminated on the grounds that the respondent did not require their services hence they were declared redundant without due process.
4. That the calculation of his dues were incorrect as he had 18 days of leave that were not paid, notice was not given or payment in lieu of notice, his salary and medical allowances for April 2010 was not paid and having not paid claims the same at 20% interest. He also claims general damages for unlawful and unfair

termination.

5. In evidence the Claimant stated that he is currently employed by Kiserian Junior Seminary School as a teacher after he left the respondent after termination on 16th April 2010. That he was on 3 years contract that was renewed upon expiry. His first contract was from 1st January 2004 to 31st December 2006 and before ending on 2nd November 2006 respondent asked him to reapply for renewal. A second contract was issued for 1st January 2007 to 31st December 2009. That the practice was upon lapse, teachers would continue serving until there was communication on a renewal. That on 31st December 2009 he waited for this communication but the Principal then Sr. Maryanne Mwaniki did not communicate. He however continued serving and on 12th April 2010 the secretary, Ms Priscilla, verbally indicated that the principal was concerned that teachers had not signed their contracts but gave the Claimant his contract which he signed, was witnessed by Mr. Thomas Gachanja, and returned it to Priscilla who refused to accept it and indicated that the Principal had to receive it. That the Principal demanded to know why the Claimant had taken so long to sign his contract, she refused to sing her part for the respondent. The Claimant noted that the practice had been to wait for communication from the respondent.

6. Complaints the same should be directed to the Author of the termination notice, that is the Respondent Superior General Sr. Mary Isaac Waithira. He was further required to clear from the school by 20th April 2010 that is in two days time. He vacated the school premises on 23rd April and cleared with the school on 29th April 2010.

7. On 19th April the Board met teachers and the Claimant was given audience where he was told that the school did not require his services and any grievances were to be addressed to the Superior General and hence on 20th April the team of six teachers terminated went to the Superior General but did not get an audience and then proceeded to the Church Bishop in charge of the Diocese but were told he does not handle school issues but Fr. Mutahi the Legal Counsel advised them to go back the respondent and negotiate for more time to vacate the school premises and payment of outstanding dues.

8. They also went to the Labour Officer who indicated that their termination was unfair and should be reinstated the dispute was resolved but they feared victimization and opted to seek their dues.

9. The Claimant therefore seeks to be paid his dues; he was not given a warning or a hearing and wants compensation and a Certificate of Service.

10. In cross-examination the Claimant confirmed that his contract had expired and for 4 months he worked without a contract and the practice had been one would continue working despite the contract not being signed. That after 31st December 2010, the respondent had promised to increase remuneration if form one class enrolment increased but in 2010 registration was poor. That several years had passed without an increase and they still did their work. That the ground for termination was not signing his contract and this was not a valid reason. He had met Mr. Mureithi the school chair of the Board over his pay increase. He further confirmed that the Labour officer arbitrated over the matter, other teachers were paid but Claimant opted to instruct his advocates over the matter.

11. On the other hand the Respondent stated that their relationship with the Claimant was through the contracts that were signed between the parties the last one ending on 31st December 2010. That a new contract was issued to fit with the Respondent's new school regulations and in conformity to the current labour laws which he declined to sign and made various demand which the respondent could not meet. Those negotiations for the new contract were ongoing from January to April 2010, the first term of the school where the claimant became increasingly belligerent and began inciting his colleagues not to sign their respective contract which were up for renewal. This caused his work performance to deteriorate as well as his relationship with the respondent and was thus forced to terminate his employment.

12. The Respondent further stated that in the circumstances of the Claimants termination his dues were computed based on the law applicable but refused to collect them. That other teachers in similar situation with the claimant were paid their dues upon arbitration by the Labor Officer and thus the Claim here is an abuse of the Court process. That the Claimant is only entitled to:

One month pay in lieu of notice at kshs.13, 341.00

Salary earned for 16 days in April 2010 at Kshs.7.615.20

Those other claims do not arise at all.

13. In evidence the Respondent called two witnesses Francis Mureithi Kariuki the chair of the Board and Sr. Maryanne Gathoni Ndirangu the Principal of the School the respondent herein. Mr. Mureithi stated that he knew the Claimant well as he was a teacher at the respondent school. As the chair of the Board he was aware that the school procedure with staff was they had to apply for renewal of their contracts when they expired and the Claimant failed to do so. He demanded a pay increase but the school was not doing well financially and so they could not increase salaries. That the Claimant and others changed their attitude and became hostile and respondent had to hire new teachers.

14. That in March the Board met the teachers the Claimant inclusive but the Claimant refused to talk to the Board and stated that the teachers had a representative who was to address their needs and respondent therefore decided that those who did not sign their contracts would be terminated. That they even formed a slogan that “no money no teaching” That by 16th April 2010 the Board had identified the agitators. That he used to go to the school regularly and was aware that the claimant had grievances of his remuneration.

15. Sr. Maryanne Ndirangu also stated that as the Principal of the respondent she issued new contracts to teachers whose contracts had expired in 2009 for renewal and the Claimant got his in January 2010 and refused to return insisting that he needed an increment and insisted to wait until the Board met to pass a resolution on their salaries. That the Board met and the issue of staff salaries was on the agenda but due to financial constraints it was not possible to increase them. The teachers continued to work reluctantly, drugging on duties as they waited for the Board to meet and for that Sr. Maryanne did not have peace. Before the Board meeting the chair of the Board came to the school on 5th march 2010 and wanted to listen to the teachers grievances.

16. That the school management met and agreed that the teachers who refused to sign their contracts should be terminated and thus termination letters were issued. The Claimant and others were thus terminated and they decided to go and see the mother Superior General and when they failed to do so they went to the media, Citizen Media and discussed their termination as they wanted to tarnish the name of the school. They also went to *Inooro media* alleging that the respondent was corrupt.

17. Those at all material times the respondent was willing to pay in lieu of notice, salary for days worked in April and the only challenge they had was they could not afford to increase salaries at this point. The matter went to the labor Officers but the claimant refused to attend but other claims were settled.

18. This witness further confirmed that on 7th April 2010 the respondent was forced to hire teachers for tuition for form four class and they got four (4) teachers for two weeks. That this was not to replace the Claimant but as a stop gap measure and all staff salaries for April were paid for days worked and those on leave.

19. That the termination of the Claimant was for the reason that he refused and or failed to cooperate with the respondent and thus did not sign his contract. That since January 2010 he was working. He also refused arbitration of the matter before the labour Officer.

20. It is now settled law under the Employment Act that a verbal contract is a contract that can confer rights and can be enforced.

8. The provisions of this Act shall apply to oral and written contracts.

21. Further that all employers should seek at the earliest opportunity to reduce oral contracts of employment into writing. This would help in spelling out the terms and conditions of engagement between the parties.

22. It is the duty of every employer to keep employee records. Whether the engagement is through oral or written terms, the duty rests with the employer to keep these records.

23. I find that, despite there not being a contract as between the parties herein at the time of termination, the Claimant continued to offer his services to the Respondent; this was for a period of over three months as contemplated under Section 37 of the Employment Act. by operation of Section 37(1) where one is continuously engaged continuously as a casual or without a contract and thus.

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

(B) performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more.

The contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service.

24. Thus the Claimant was an employee of the respondent as of 16th April 2010, and by this finding his termination was governed by Section 35 of the Act. Was this applied?

25. I note the letter of termination dated 16th April 2010 stated:

I regret to inform you that owing to your failure to sign new contract the management of Mary Immaculate Secondary School has decided to terminate your employment in accordance with relevant provisions of Employment Act. Since the expiry of your contract on 31st December 2009 you have been working on statutory terms. You are expected to clear with the school, return all the school property and vacate the school house by Monday 19th April 2010. ...

26. Thus the reason given for termination was failure of the Claimant to sign his contract. The Claimant stated that the practice of the respondent was to communicate to the teachers to sign their contracts, this would be delayed and once signed they would backdate them to reflect the term in effect. On the other hand Sr. Maryanne the Respondent principal stated that since January 2010 the new contracts were issued but due to disagreements on non-increase in salary, these contracts were not returned until 12th April 2010 when the Claimant taught from Priscilla the secretary that this issue was being discussed.

27. I find the Claimant was not honest in this regard; indeed it is highly likely that due to the issue of his salary not being agreed upwards as he had been promised he may have refused to sign the contract and waited until the Board met to approve an increase. This is further buttressed by the fact that when Priscilla alerted him, he quickly did everything possible to have the contract signed and returned. He seems to have enjoyed good relations with Priscilla the secretary who would share this critical information. Further, the fact that the Respondent was forced to hire new teachers to do tuition instead of the Claimant doing so is a confirmation that Sr. Maryanne as the Principal felt frustrated by the actions of the Claimant. The Claimant's insistence on his dues is also implied on his reaction to the negotiations at the Labour Office where he failed to attend.

28. The above notwithstanding, it is the duty of every employer to ensure due process before termination of an employee. The Employment Act, 2007 is clear on the procedure governing termination on the ground of poor performance. Subsection 41 (1) of the Act provides that before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity and the employer shall explain to the employee, in a language the employee understands, the reason for which the employer is considering the termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation. Subsection 41(2) requires the employer, before terminating the employment of an employee or summarily dismissing an employee under the section to hear and consider the employee's representations which the employee may have to make in view of the alleged misconduct or poor performance. In this case despite evidence that the School Chairman held a meeting with the Claimant and his colleagues it is not clear that this meeting addressed the issues pertinent to his termination. This Court was not given this record for consideration. Further there was no evidence that the proceedings before the Board or the management Committee were to address the issue in contention, that of salary increase and failure to sign new contracts. The Court did not have this record. Therefore, despite payment in lieu of notice to the Claimant, the respondent acted in

contravention of these clear provisions of the Act. The termination letter given to the claimant was a decision to terminate and not an intention by way of a request by the respondent or management to consider the termination.

29. Despite the bad conduct of the Claimant, procrastinating on his job, not giving the Principal peace, the duty rested on the Respondent to give him an opportunity to be heard before the termination under the law. This is due process at play. Where not followed the Court will declare termination as unfair. This is the finding herein that the termination of the Claimant was unfair.

30. In view of the findings of the court, the claimant is entitled to one month notice pay which the Respondent has admitted and due for him to collect.

31. Salary due in April is admitted and due for collection from the Respondent.

32. The claim for severance pay was not supported in any material way, the letter of termination was not based on redundancy and the Court declines this claim.

The court enters judgment for the claimant against the respondent for orders:

- 1. a declaration that the claimant's termination of employment by the respondent was unlawful;**
- 2. Sum of Ksh.13, 841.00 being gross salary for one month for unlawful termination.**
- 3. The respondent to pay costs of the case.**

Delivered in open court at Nairobi this 25th day of March, 2013.

Monica Mbaru
JUDGE

In the presence of

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Court clerk