



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1425(N) of 2010

JASWINDER KAUR GHATAAURACLAIMANT

VERSUS

NAREDRASING R. MAHIDA 1ST RESPONDENT

**NAIROBI SOUTH NURSERY,
PRIMARY AND SECONDARY SCHOOL 2nd RESPONDENT**

JUDGEMENT

This is a claim dated 14th November 2010 and a Supplementary Claim dated 24th August 2011 by the claimant Jaswinder Kaur Ghataaura for illegal and unlawful termination of her employment by the respondents Naredrasing Mahida and Nairobi Nursery, Primary and Secondary School. The respondents filed their response dated 20th January 2011 and an Amended Defence dated 11th July 2012 where they admitted that the claimant was their employee but that she voluntarily resigned her position with them and is not owed any dues.

In the Claim the Claimant stated that she was employed by the 1st respondent on 19th February 1989 as a teacher in the primary section of the 2nd respondent the property of the 1st respondent. That she was assigned general duties of a teacher within the 1st resident schools the 2nd respondent on a monthly salary of kshs.20, 000.00.

That as a teacher of the respondents, she began at the pre-primary section for 3 years and eventually moved to the primary section. That on 5th July 2010 the 1st respondent wrote to the claimant raising false accusations against her and threatened her with dismissal. That she was accused falsely of meting corporal punishment on a student on 2nd July 2010 but no medical report had been issued. That the 1st respondent verbally assaulted her and caused her to resign under coercion to evade summary dismissal without benefits. That this conduct was illegal and unlawful as against the Employment Act, the Constitution and rules and natural justice and other provisions of the law.

That the Claimant had put a lot of dedication to her work throughout the 22 years she was with the respondent. That her problems started on 5th July 2010 when the 1st respondent wrote to her accusing her falsely that she had assaulted a student and without giving her a chance to defend herself threatened her with dismissal and later forced her to resign or be summarily dismissed. That her resignation was coerced. That during her employment, school holidays were treated as normal working days by the respondents as the students would attend school for holiday coaching which required the presence of the claimant and therefore did not enjoy more leave days. That her NSSF dues were not adequately paid for. That she deserves to be paid her gratuity/service, leave, notice and compensation for unlawful termination

and computation of her claim for:

1. Gratuity/service, at the rate of 30 days pay per year at kshs.20,000/= X22 all being kshs.440,000.00
2. Payment in lieu of notice at one month salary being Kshs.20,000.00
3. Payment in lieu of leave from 2010 one month salary being kshs.20,000.00
4. Compensation for illegal and unlawful termination
5. Costs of the suit and advocates fees at kshs.50,000.00 and court attendance costs at kshs.5,000.00
6. Any other relief the court may grant

In her evidence the claimant stated that for the 22 years she worked for the respondents since 19th February 1989 she was appreciated by all teachers and students. However on 5th July 2010 she was forced to sign a letter which had allegations that she did not agree with after the head teacher accused her of using corporal punishment to two (2) students. That she had on 2nd of July 2010 punished a student which was against the school regulations and later refused to give apology. That for the 22 years she was with the respondents she had taught many students who turned to well. She was verbally told that if she did not sign the letter she was to face consequences yet she was not given evidence of the alleged assault on the student nor was she called when the students' parent lodged a complaint against her.

That when she went home she discussed the issue with her family and decided to resign which she did the following day. On 7th July 2010 she resigned from her position with the respondent. That the respondents refused to accept her resignation. She was never called for a meeting to discuss her resignation. She has never been paid her benefits for the 22 years service and since she has never heard from the management.

It was her evidence that on 5th July 2010 she had taken her students to the Nairobi National Park and on return she was issued with a letter accusing her of assaulting students. That a complaint had been lodged by Mrs. Njoka but she was never called to appear before her to defend herself or summoned at the District Education office or called by the police to record a statement.

She was deducted NSSF by the respondents but this was not regularly submitted. She therefore claimed for her gratuity/service, benefits for 22 years and compensation for unlawful termination.

On the other hand the respondent denied that the claimant was employed on 19th February 1989 as a Primary School Teacher. That the 2nd respondent was started as a Nursery/Kindergarten and registered in 1989 and as such the claimant could not have been employed as a Primary School Teacher which was non-existent then and it was not until after 3 years that the 2nd respondent developed the primary section and finally to secondary school.

That on or about the 5th July 2010 a parent Mrs. Mariam Njoka, mother to a student, Ahmed Yussuf Wanjugu came to the school and lodged a complaint to the Headmistress, primary section about corporal punishment being administered in the school by the claimant whereas the ministry of Education through an amendment to the Education Act had outlawed corporal punishment in schools. That this matter was referred to management and the claimant was served with a Warning letter dated 5th July 2010. That the same parent went to the District Education Office and lodged a formal complaint against her respondents.

On 6th July 2010 the claimant out of her own volition or without discussion with management wrote a letter of resignation which was delivered to the respondent on 7th July 2010 by a third party. That all matters that were raised by the claimant about verbal abuse, coercion, illegal conduct are spurious, frivolous and baseless as the respondent letter dated 5th July 2010 was clear as a warning and not a coercion to resign.

That at the time of her resignation, the claimant was earning kshs.23,234.00 gross salary inclusive of

allowances and a net salary of Kshs.20,925.00. that due to the nature of running schools including school holidays in April, August, and December of every year, the claimant as a Teacher enjoyed more leave days than the amount permitted and by April 2010 she had taken 24 days leave for the year 2010 and was not entitled to any further leave. That she was not coerced to resign, she did not personally deliver the letter of resignation to the respondents thus terminated her own employment by resignation. That she was not entitled to any leave, gratuity or notice pay as these were not due at the time of her resignation. Service was not payable as all her NSSF dues had been remitted.

That her suit should be dismissed.

In the Amended Reply, the Respondents have counterclaimed for notice not issued to them by the Claimant that was supposed to be for one or one month salary in lieu of notice. That the claimant having tendered her resignation should have given notice or served her notice period or paid in lieu of notice.

In evidence the respondents called 3 witnesses, Sajan Mahida, Mrs Miriam Ahmed Njoka and Narendra Singh Mahida. Sajan was the Headmistress of the 2nd respondent, had worked with the claimant in their employment and knew each other well. That on 5th July 2010, a parent in the school came to see her that her student son had been punished by the claimant. This was Mrs. Miriam Ahmed Njoka. That her son had been hit on the head by the claimant and subsequently hit the desk and upon this report she asked the parent to accompany her to see the claimant. Claimant was called to the door and asked about the incident but denied ever punishing her child and that she was not going to give this student any instructions in class. The parent reported that other parents had complaints about the same teacher, the claimant but did not want to report. She was told this by her son while at home. Three (3) other students in this class were called and did confirm that the claimant used to hit them on the head.

The witness further stated that the parent wanted an apology from the claimant but she refused which cause the parent to demand that action is taken. That as the headmistress it was decided that the claimant should be given a warning letter and said that she needed time to go home and read it. The next day the respondents received the claimant resignation letter and office keys delivered by the husband to the claimant.

That after the parent complained, she also reported the issue to the Education office that wrote to the respondents on 20th July 2010. That they called the claimant to come to the school to address the issues raised but failed to attend. She resigned on her own volition.

The second witness was Mrs. Miriam Mohamed Njoka that she was the mother to Ahmed Yusuf Wanjugu. That her son used to complain about the claimant when he indicated that he could not see the blackboard, that he was hit on his head and hurt him against the desk. That on several occasions her son came home and reported to having been punished by the claimant for not having all his text books. She therefore requested that he be moved to another class. That this assault happened on 2nd July 2010, she reported the issue to the respondents on 5th and also lodged her complaint to the education office on 20th July 2010. That the claimant was called but denied assaulting her son. Other students were randomly called and confirmed that the witness' son had been assaulted.

The third witness was Narendra Singh Mahida, the Manager of the 1st respondent. That he was responsible for staff leave, payments and registered staff for NSSF when the 2nd respondents got registered in 1993 and all dues have been remitted. That the claimant earned Kshs.20, 000.00 per month. Those respondents employees got leave when schools closed and had 28 days but got more;

3 weeks in April,
3 weeks in August, and
6 weeks in December.

That all their teachers were never called back during vacation to teach. That by 5th July 2010 the claimant had taken 24 days of leave; in 2010 she had in total taken 44 leave days, 2009 she had taken 30 days and 23 days. That claimant resigned on 6th July 2010 after she had received a caution about corporal

punishment of the students. She did not agree to this and when she left the respondent, she never came back. Her resignation letter was submitted by her husband.

She did not give notice before resignation or pay the respondents in lieu of notice. Her claim for leave is wrong as she had already taken more days than were due. The claim for service is wrong as she was covered by NSSF which was fully paid. That no gratuity was due in the claimant case as she resigned without giving notice.

A party to an employment contract can terminate it as set out under section 35 of the Employment Act;

35. (1) A contract of service not being a contract to perform specific work, without reference to time or to undertake a journey shall, if made to be performed in Kenya, be deemed to be—

(a) ...

(b) Where the contract is to pay wages periodically at intervals of less than one month, a contract terminable by either party at the end of the period next following the giving of notice in writing;

In law, either party can give notice to terminate the employment relationship but there are conditions to such notice. The notice must be in writing and the same given within the required time period. Under a contract where payment for the service is made periodically at the end of every month, a notice of not less than 28 days must be given or a payment in lieu of such notice made. What is important to note also is that whichever party decides to terminate such a contract, such a party must give reasons for such termination. This applies to both parties to such a contract. An employee is therefore under a statutory duty to give their employer the required termination notice or payment in lieu of such notice and reasons for termination. Equally an employer who wishes to terminate a contract must give notice and reasons for termination.

These requirements are meant to ensure that labour relations are conducted in a manner that is fair and equitable and that no party in an employment relationship is forced to serve or be served by the other by force even where their relationship has broken down. This part is also meant to protect the rights of an employee who for reasons that are not valid, just or reasonable, their employer decides to terminate them and make them desperate. The duty to ensure work relations are done in a procedurally fair and just manner and that administratively the parties do not frustrate each other is both to an employer as well as to the employee.

The Court must therefore look at the circumstances of the claimant's resignation and whether her resignation was coerced and hence forced to tender her resignation letter effectively terminating her employment with the respondents as an unfair practice. Equally the Court must look at the reliefs sought in the circumstance of this case.

In this case the claimant gave evidence that she was served with a Warning letter that she considered to be a caution and did not agree with it since she was accused of punishing a student by corporal punishment. From this letter she refused to admit the accusation and took the threat very seriously. That she went home to have her family read it with her, which she did and upon consultations with her family, she decided to tender her resignation as she was being falsely accused. On the following day she sent her husband to submit her resignation letter to the respondents.

The claimant then claimed that she was coerced to resign and that she was unfairly accused, verbally abused and forced to resign.

Where an employee receives a notice that she does not understand, the duty rests with the employer to explain that notice to the employee in a language that the employee understands. Where the notice is done in writing, and the employee does not understand it, it must be explained orally to such an employee in a language that she understands well.

I note the letter written to the Claimant by the respondents dated 5th July 2010 very important as this is the letter that seems to have set in motion this claim. The letter addressed to the claimant was referenced as follows:

Re: CORPORAL PUNISHMENT TO YOUR CLASS PUPIL AHMED YUSUF WANJOGI

....

Hence, we wish to caution you against giving this type of punishment, to the students. Corporal punishment is not allowed in schools. We hope you are aware.

Otherwise, we will be left with no other option but to immediately dismiss you from your job. As we do not have any intention of seeing police, at school in such matters. Thus dragging the school to court.

[Signed for the school].

It was the claimant's evidence that when she read this letter she felt she was being falsely accused and that she was being threatened. She however decided to go home and consult her family on the matter. It was also the claimant's evidence that she was employed as a teacher; she started at the lowered classes and progressed to the primary section. I take it as a teacher she understood the contents of the letter issued to her by the respondents and did not require further explanation to be done orally or in a language other than the language of the letter. Even if this was not done, it was her evidence that when she read the letter, she decided to consult her family over the matter.

Subsequent to the issuance of this letter, on 6th July 2010, the claimant wrote to the respondents:

Re: RESIGNATION

Herewith, please find my resignation. Due to the circumstances currently, I am unable to continue working at the school.

I would like to thank you for the opportunity and appreciation I have received over 22 years at your school.

I hope the best for you and the school.

Thank you.

[Signed for claimant].

Was the claimant therefore forced to resign under coercion? Did she resign voluntarily?

I find the letter issued to the claimant dated 5th July 2010 was not a termination notice. It was however a caution to the claimant based on the reasons indicated therein. This is a normal work related warning or caution where employers for good reasons find it necessary to communicate to the employees on matters they find of importance based on the circumstances of each case. It is an administrative action that ensures employees are well supervised and where there is a mistake, in law a warning can be issued and in most cases such warnings give the possible sanctions that may be taken if the warning is not heeded by the employee. I find this a good practice for an employer to communicate to their employee on good reason as unlike a case of summary dismissal even on a matter where an employee should have been cautioned and proceed to undertake their duties. In any event, such a warning and caution can only last for a fixed period if not repeated. Therefore the caution here was only valid for one year and the claimant had that opportunity to continue serving and the warning and caution would have automatically lapsed after one year.

I also find that the claimant had time to consider the warning letter and caution carefully, she did not write her resignation letter immediately, she went home and from her evidence she confirmed that she discussed the matter with her family and on the following day wrote her resignation letter. Was she then

coerced to resign? This assertion was highly farfetched. She had time to consider her resignation notice, it was done in the safety of her home in consultation with e family and indeed her husband delivered the letter of resignation to the respondent on her behalf. She cannot therefore be found to have been coerced to write that letter. I find she voluntarily resigned her position with the respondents and proceeded to thank them for the opportunity given to her to work at the school.

Whether the claimant agreed with her warning letter and the caution did not warrant her to terminate her employment contract with the respondents. That act had consequences in law. Such a notice should have been given putting in mind the time applicable of 28 days or payment in lieu of serving such a time. The claimant in her haste to resign failed to do either.

On the reliefs sought, where termination is on the instance of an employee who does not comply with the laid down procedures and the applicable law, she is only entitled to any unpaid time served. The claimant resigned on the 6th of July 2010, she was on duty from 1st of July to the 5th and was at her place of work. This time served was due to her. She was owed 5 pay for the 5 days worked in July 2010. An amount of Kshs.3, 870.00 should have been paid, but equally the claimant owed the respondents the sum of Kshs.23, 234.00 in lieu of notice and hence owed Kshs.19,451.00. This is an amount still outstanding unpaid from the claimant to the respondents.

Service pay is due where there is proof that the employee was not a member of a registered pension or provident scheme under the Retirement Benefits Act. Based on the evidence on record, the claimant was registered with the NSSF. This claim is declined.

The claimant resigned without notice. Notice pay is declined.

No leave days were due as at the time of claimant's termination of her employment. This claim is therefore declined.

I note from the respondents defence that they were not given termination notice by the claimant nor were they paid in lieu of notice. This comes out very clearly in the respondent's evidence. However there is no counter-claim for this relief. There is a fundamental difference between a defence and a counter-claim. There was no counter-claim on the part of the respondents against the monies owed to them from the claimant.

A counterclaim is a fresh suit where a claimant should be be given a chance to reply. It is an independent action by the respondent as against the claimant. It is a cross-claim and the principles of pleadings which govern a counter-claim are substantially the same as those, which would apply to a statement of claim in a cross-action brought by the respondent against the claimant. Where a claim must comply with the Rules of the Industrial Court or in the case where Order VII, rule 1(2) of the Civil Procedure Rules, then by parity of reasoning a counter-claim must equally comply with the mandatory provisions of Order VII and the relevant rules therein.

Based on the reasons above, I find there was no unfair termination of the claimant's employment and dismiss the claim in its entirety.

Costs to the Respondents.

Delivered in open Court this 9th day of May the year 2013.

**M. Mbaru
Judge
In the presence of:**

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Court Clerk: