



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1860 OF 2016

(CONSOLIDATED WITH CAUSE 1858, 1859, 1862, 1863 and 1864 ALL OF 2014)

THOMAS OUNDO PAMBA

ELIZABETH NDINDA MUTHOKA

GEOFFREY WANGA KACHISA

EVANS OTIENO

JACOB WAMALWA WERUNGA

JULIANA NDANU MUENDO

VINCENT BIRUNDU OMURWA.....CLAIMANTS

VERSUS

BEVERLY SCHOOLS OF KENYA LIMITED.....RESPONDENT

JUDGMENT

1. The Claimants instituted separate suits against the Respondent, but on 29.9.2016 the suits were consolidated. Each claimant accused the respondent of wrongful and unfair termination of their employment and prayed for:

a) A declaration that the Respondent's dismissal of the Claimants from employment was un-procedural and improper and the Claimants are entitled to payment of their terminal dues and compensatory damages as pleaded.

b) An order for payment of the Claimants terminal dues and compensatory damages.

c) That the Respondent do immediately release the Claimants properties/belongings withheld in its possession.

d) A certificate of service be issued to each of the Claimants.

e) An order for the Respondent to pay costs of this suit plus interest thereon.

2. The Respondent filed its Response to Claim on 13th October 2016 denying that she unfairly dismissed the claimants and that she is liable to pay them the damages sought. She averred that the Claimants lacked professionalism and failed to execute their duties as required, which saw them receive several warning letters. She further averred that the Claimants, with the exception of ***Elizabeth Ndinda Muthoka***, had staged a sit-down strike in the school premises for reasons unknown to the Respondent and subsequently, exited its premises through the gates without authority, contrary to the school policy and refused to heed to instructions via phone call to report back to duty. She further averred that the reason for the termination was explained to the claimants before they were issued with termination letters, including ***Elizabeth Ndinda Muthoka*** whose contract was not confirmed.

3. On the other hand, the Respondent averred that she is duly registered as a Tax Payer, and has religiously remitted all statutory dues and that she approached the relevant statutory bodies to clarify the discrepancies for the months of April to June 2016 and resolve the same at that level. She further undertook to pay the claimants their respective employee pension contributions upon approval by her Board and upon regularizing the accounts with the Octagon Pension Scheme. With regards to the Co-operative Society, she averred that the same should be dealt with by the Co-operatives Tribunal and not this court. Finally, she contended that claimants cleared and she paid the them all their dues

and prayed for the suit to be dismissed with costs.

4. During the hearing, the claimants gave evidence but the respondent did not. Likewise, after the hearing only the claimant filed written submissions.

Claimants' case

5. Mr. Thomas Oundo Pamba testified Cw1 on behalf of all the other claimants. He adopted his written statement and produced the documents filed with the claims as exhibits. In brief, the claimants' case is that they were employed by the Respondent on diverse dates as Teachers in the institution and their monthly salary ranged between Kshs. 27,000/= and Kshs. 38,000/=.

6. The Claimants averred that in June 2016, the Respondent paid only part of their salaries and further failed to pay their salaries for the months of July and August 2016 without any explanation. Despite promise to pay the arrears, the Respondent never paid the same until 18th August 2016 when they each received an SMS from the Respondent's school principal, Mr. Akide while on holiday requiring them to urgently meet him at a café along Nairobi's Loita Street the next day to collect an important mail.

7. Despite the short notice, the claimants travelled to Nairobi and assembled at the said café but the principal then asked them to meet him at the Loita Parking where he handed them letters in an unsealed envelope. That upon discovering that the letters were terminating their services, they refused to sign them and demanded for an explanation but none was given to them. Instead, they were directed to clear with the school on Monday 22/08/2016 and vacate the staff quarters. They contended that the dismissal was done in breach of mandatory provisions of the law, the principles of natural justice and the constitutional rights to fair labour practices as no hearing ever took place before the decision to dismiss them was reached.

8. On 20/08/2016, Mr. Akide sent them another message changing the clearance date to 21/08/2016 'without fail' and that they collectively decided not to go because they had no money to travel to the school or relocate from their property. Further, the notice was too short for them to organize for the travel. However, their plea for more time to get funds to go and collect their belongings failed as the principal became adamant that they would not receive their pay nor collect their belongings.

9. They contended that the respondent failed to pay their salaries for three months and further that the tax deductions from their salaries to KRA were never remitted since the Respondent was never registered with KRA. They further contended that they were registered with Octagon Pension Services Limited but the contributions deducted from their salaries were never remitted to the said pension scheme. Finally, they contended that the Respondent deducted contributions from their salaries to a Co-operative Society called E-Kenya, whose existence was only known to the Respondent. Consequently, they computed their claims for damages as follows:

Thomas Oundo Pamba:

- a) Salary balance for the month of June 2016.....Kshs 25,000/=
 - b) Salary for July 2016.....Kshs 35,000/=
 - c) Salary for up to 19th August, 2016.....Kshs 22,167/=
 - d) Salary in lieu of NoticeKshs 35,000/=
 - e) Damages for unfair premature termination

of contract equivalent to 3 months' salary.....Kshs 105,000/=
- Total.....Kshs 222,167/=**

Elizabeth Ndinda Muthoka:

- a) Salary balance for the month of June 2016.....Kshs 20,000/=
 - b) Salary for July 2016.....Kshs 30,000/=
 - c) Salary for August 2016.....Kshs 30,000/=
- Total.....Kshs 80,000/=**

Geoffrey Wanga Kachisa:

- a) Salary balance for the month of June 2016.....Kshs 19,500/=
- b) Salary for July 2016.....Kshs 38,000/=

c) Salary for up to 19th August, 2016.....Kshs 24,066/=

d) Salary in lieu of NoticeKshs 38,000/=

e) Money remitted to Octagon Pension Scheme as at May 2016.....Kshs. 44,400/=

f) Money remitted to E-Kenya Co-operative society as at May 2016.....Kshs. 3,000/=

g) Service pay.....Kshs. 19,000/=

h) Damages for unfair premature termination of contract (6 months' salary)Kshs. 228,000/=

Total.....Kshs 413,966/=

Evans Otieno:

a) Salary balance for the month of June 2016.....Kshs 27,600/=

b) Salary for July 2016.....Kshs 38,000/=

c) Salary for up to 19th August, 2016.....Kshs 24,066/=

d) Salary in lieu of NoticeKshs 38,000/=

e) Money remitted to Octagon Pension Scheme as at May 2016.....Kshs. 44,400/=

g) Money remitted to E-Kenya Co-operative society as at May 2016.....Kshs. 4,000/=

h) Service pay.....Kshs. 19,000/=

i) Damages for unfair premature termination of contract equivalent to 6 months' salary.....Kshs. 222,000/=

Total.....Kshs 417,066/=

Jacob Wamalwa Werunga:

a) Salary balance for the month of June 2016.....Kshs 17,000/=

b) Salary for July 2016.....Kshs 27,000/=

c) Salary for up to 19th August, 2016.....Kshs 17,100/=

d) Salary in lieu of NoticeKshs 27,000/=

e) Money remitted to Octagon Pension Scheme as at May 2016.....Kshs. 30,000/=

g) Money remitted to E-Kenya Co-operative

society as at May 2016.....Kshs. 19,000/=

h) Service pay.....Kshs. 27,000/=

i) Damages for unfair premature termination
of contract equivalent to 6 months' salary.....Kshs. 162,000/=

Total.....Kshs 326,000/=

Juliana Ndanu Muendo:

a) Salary balance for the month of June 2016.....Kshs 15,000/=

b) Salary for July 2016.....Kshs 25,000/=

c) Salary for up to 19th August, 2016.....Kshs 15,833/=

d) Salary in lieu of NoticeKshs 25,000/=

e) Money remitted to Octagon Pension
Scheme as at May 2016.....Kshs. 26,700/=

f) Money remitted to E-Kenya Co-operative
society as at May 2016.....Kshs. 13,000/=

g) Service pay.....Kshs. 12,500/=

h) Damages for unfair premature termination
of contract equivalent to 6 months' salary.....Kshs. 150,000/=

Total.....Kshs 283,033/=

Vincent Birundu Omurwa:

a) Salary balance for the month of June 2016.....Kshs 17,000/=

b) Salary for July 2016.....Kshs 27,000/=

c) Salary for up to 19th August, 2016.....Kshs 17,100/=

d) Salary in lieu of NoticeKshs 27,000/=

e) Money remitted to Octagon Pension
Scheme as at May 2016.....Kshs. 30,000/=

f) Money remitted to E-Kenya Co-operative
society as at May 2016.....Kshs. 23,000/=

g) Service pay.....Kshs. 27,000/=

h) Damages for unfair premature termination
of contract equivalent to 12 months' salary.....Kshs. 324,000/=

Total.....Kshs 492,000/=

Claimants' Submissions

10. The Claimants submitted that the Respondent failed to comply with the provisions of **Section 41 of the Employment Act** and terminated their services unfairly. For emphasis they relied on **Industrial Cause No. 146 of 2012-Alphonse Maghanga Mwachanya vs. Operation 680 Limited** where Radido J states;

".....in order for an employer to meet the legal requirements of procedural fairness section 41 of the employment act, it should meet or show as a matter of factual evidence that it did the following;

- i. Explained to the employee in a language the employee understood the reason why it was considering the termination.*
- ii. Allow a representative of the employee, being either a fellow employee or a shop floor representative to be present during the information/explanation of the reason.*
- iii. Heard and considered any explanation by employee or his representative*
- iv."*

11. The further, relied on **Lilian Nyaboke Nyaribo vs. Wireless Innovations Nairobi Limited**, Marete J cited with approval **Kenneth Njiru Njorani vs. Dodhia Packaging Limited** where Ongaya J held that:

"In making this finding, the court recognizes termination has a constitutional basis as provided in article 47(1) of the constitution which states that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Managerial decisions by employers are properly administrative actions within the province of Article 47 of the constitution on the right to fair administrative action. The constitution breaks the curtains and it does not matter whether the employer is in the public sector or private sector. The constitution in article 10 clearly states that the National values and principles of governance apply to all and the principles and values include human rights. Thus, in the instant case, the Respondent was bound to accord the Claimant the right to affair administrative action through observation or the Rules of Natural Justice and as expressly envisaged in Section 45(5) of the Employment Act"

12. The Claimants submitted that they are entitled to salary in lieu of notice since none of them was given sufficient notice as required under **Section 40(f) of the Employment Act**. They further submitted that they are entitled to service pay because the respondent remitted NSSF on their behalf. They further claimed refund of the unremitted Pension and cooperative contributions deducted from their salaries. Finally, they submitted that the Respondent failed to comply with the procedures set by law in terminating their services and prayed for damages for the unfair and unlawful dismissal.

Issues for determination and Analysis

13. There is no denial that the claimants were all employees of the respondent and they were dismissed on 18.8.2016. The issues for determination are:

- i) Whether the Claimants were unfairly and unlawfully dismissed from employment by the Respondent.
- ii) Whether the Claimants are entitled to the orders sought.

Unfair termination

14. Under section 45(2) of the Employment Act, termination of employee's contract of service is unfair if the employer fails to prove that it was grounded on a valid and fair reason and that fair procedure was followed. In this case the respondent pleaded in her defence that the claimants were dismissed for staging an illegal strike and leaving the school without permission contrary to school policy. However, she did not adduce any evidence during the hearing to prove that the alleged reason for the dismissal was valid and fair as required by section 43 and 45 of the Act.

15. The respondent did not, also adduce evidence to rebut the evidence by Cw1 that she dismissed the claimants without according them any hearing. Section 41 of the Employment Act provides that: -

(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 reason 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 on 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 subsection (1) make."

16. In the case of **Mary Chemweno Kiptui -v- Kenya Pipeline Company Limited [2014] eKLR** Mbaru J held:

“Invariably therefore, before an employer can exercise their right to terminate the contract of an employee, there must be valid reason or reasons that touch on grounds of misconduct, poor performance or physical Incapacity. Once this is established the employee must be issued with a notice, given a chance to be heard and then a sanction decided by the respondent based on the representation made by the affected employee. It is now established best practice to allow (or an appeal to such an employee within the internal disputes resolution mechanism and with due application of the provisions of section 5(7) (c) of the Employment Act. Where this procedure is followed an employer would have addressed the procedural requirements outlined under section 41 and any challenge that an employee may have would be with regard to substantive issues only.”

17. Again **Industrial Cause No. 146 of 2012-Alphonse Maghanga Mwachanya vs. Operation 680 Limited** where Radido J states;

".....in order for an employer to meet the legal requirements of procedural fairness section 41 of the employment act, it should meet or show as a matter of factual evidence that it did the following;

i. Explained to the employee in a language the employee understood the reason why it was considering the termination.

ii. Allow a representative of the employee, being either a fellow employee or a shop floor representative to be present during the information/explanation of the reason.

iii. Heard and considered any explanation by employee or his representative

iv. ..."

18. Having gathered support from the law and precedents, above, I must now hold that the termination of the claimants' employment by the respondent on 18.8.2016 was unfair and unlawful within the meaning of section 45 of the Employment Act because she has failed to prove on a balance of probability that there was valid and fair reason for dismissing the claimants and that a fair procedure was followed.

Reliefs

19. In view of the foregoing holding, I make a declaration that the Respondent's dismissal of the Claimants from employment was unfair and unlawful. Accordingly, the Claimants are therefore entitled to salary in lieu of notice plus compensation for unfair termination under **Section 49 of the Employment Act** except Ms Elizabeth Ndinda Muthoka (Cause 1861 of 2016) who did not pray for the same. The contracts of service provided for termination notice of one month after probation and I therefore award them one of them one month salary in lieu of notice. I further award them 2 months' salary considering that they had served for a short period and their contracts were for a fixed term.

20. The claimants are also awarded the claim for salary arrears for June, July and 18 days in August 2016.

21. The claim for service pay is dismissed because the claimants were beneficiaries of NSSF and Pension contribution by the employer and they have not proved that the contributions were not remitted. Consequently, they are disqualified from claiming service pay under section 35(6) of the Employment Act.

22. Finally, the claimants are entitled to Certificates of Service as under **section 51 of the Employment Act**.

Conclusion and disposition

23. I have found that the claimants' services were unfairly terminated by the respondent on 18.8.2016 and they are entitled to damages. I therefore enter judgment for them as follows:-

Thomas Oundo Pamba:

f) Salary balance for the month of June 2016.....Kshs 25,000/=

g) Salary for July 2016.....Kshs 35,000/=

h) Salary for up to 18th August, 2016.....Kshs 22,167/=

i) Salary in lieu of NoticeKshs 35,000/=

j) Damages for unfair terminationKshs 70,000/=

Total.....Kshs 187,167/=

Elizabeth Ndinda Muthoka:

d) Salary balance for the month of June 2016.....Kshs 20,000/=

e) Salary for July 2016.....Kshs 30,000/=

f) Salary upto 18th August 2016.....Kshs 20,769.23/=

Total.....Kshs 70,769.23/=

Geoffrey Wanga Kachisa:

i) Salary balance for the month of June 2016.....Kshs 19,500/=

j) Salary for July 2016.....Kshs 38,000/=

k) Salary for up to 18th August, 2016.....Kshs 24,066/=

l) Salary in lieu of NoticeKshs 38,000/=

m) Damages for unfair terminationKshs. 76000/=

Total.....Kshs 195,566/=

Evans Otieno:

j) Salary balance for the month of June 2016.....Kshs 27,600/=

k) Salary for July 2016.....Kshs 38,000/=

l) Salary for up to 18th August, 2016.....Kshs 24,066/=

m) Salary in lieu of NoticeKshs 38,000/=

n) Damages for unfair termination.....Kshs. 76000/=

Total.....Kshs 203,666/=

Jacob Wamalwa Werunga:

j) Salary balance for the month of June2016.....Kshs 17,000/=

k) Salary for July 2016.....Kshs 27,000/=

l) Salary for up to 18th August, 2016.....Kshs 17,100/=

m) Salary in lieu of NoticeKshs 27,000/=

n) Damages for unfair terminationKshs. 54,000/=

Total.....Kshs 142,100/=

Juliana Ndanu Muendo:

i) Salary balance for the month of June 2016.....Kshs 15,000/=

j) Salary for July 2016.....Kshs 25,000/=

k) Salary for up to 18th August, 2016.....Kshs 15,833/=

l) Salary in lieu of NoticeKshs 25,000/=

m) Damages for unfair termination.....Kshs. 50,000/=

Total.....Kshs 130833/=

Vincent Birundu Omurwa:

- i) Salary balance for the month of June 2016.....Kshs 17,000/=
 - j) Salary for July 2016.....Kshs 27,000/=
 - k) Salary for up to 19th August, 2016.....Kshs 17,100/=
 - l) Salary in lieu of NoticeKshs 27,000/=
 - m) Damages for unfair terminationKshs. 54,000/=
- Total.....Kshs 142,100/=**

24. The above awards are subject to statutory deductions but in addition to costs plus interest at court rates from the dates hereof. The claimants will also be issued with certificates of Service.

Dated and delivered at Nairobi this 23rd day of July 2020.

ONESMUS N. MAKAU

JUDGE