



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC CAUSE NUMBER E009 OF 2021

TITUS MURIUKI NDIRANGU.....CLAIMANT

-VERSUS-

BEVERLY SCHOOL OF KENYA LIMITED.....RESPONDENT

(BEFORE HON. JUSTICE DAVID NDERITU)

JUDGMENT

I. INTRODUCTION

1. The Claimant herein approached this court vide a Memorandum of claim dated 1st March, 2021 seeking the following prayers against the Respondent:-

(a) A declaration that the termination of the Claimant was unfair, wrongful, unlawful and illegal.

(b) Find that the Claimant is eligible for payment of:-

(1) One month's salary in lieu of notice – Kshs.100,000.00

(2) Unpaid Wages between 2nd January, 2018 to 13th February, 2019 - Kshs.701,492.60

(3) Severance pay - Kshs. 50,000.00

(4) 12 months compensation as per Section 49(c) of Employment Act - Kshs.1,200,000.00

TOTAL - Kshs.1,951,492.00

(5) Costs of this claim

2. As expected, the statement of claim was accompanied by a verifying affidavit, list of witnesses, list of documents and copies of the said documents.

3. The court issued notice of summons dated 10th March, 2021 and the same was served upon the Respondent together with the other court process as per the Affidavit of service by **OCHIEL FREDRICK AWICH** sworn on 12th March, 2021.

4. However, the Respondent did not enter appearance and did not file a response/defence to the claim and on 11th May, 2021 the court (Lady Justice Wasilwa) fixed the matter for formal proof on 15th November, 2021.

5. On 15th November, 2021 the Claimant testified alone in support of his cause and produced the nine (9) documents annexed to the claim as exhibits and closed his case. Written submissions were filed by Claimant's counsel on 1st December, 2021.

II. CLAIMANT'S CASE

6. The Claimant's case based on the Memorandum of claim, witness statement, and oral testimony in court, the nine (9) exhibits produced in court, and the written submissions filed by his counsel is that he was engaged by the Respondent as Deputy Principal and a teacher of mathematics on 2nd January, 2018 at a monthly gross salary of Kshs.100,000/=.

7. The Claimant alleges that the Respondent failed, refused, and/or neglected to pay the said monthly salary as agreed and instead made staggered and irregular payments. The Claimant further stated that he demanded payment of the accrued salary arrears on numerous occasions but the Respondent did not yield.

8. The Claimant testified that on 13th February, 2019 he was called to the office of the director of the Respondent and he was issued with the letter of termination dated Monday, 13th February, 2019. The said letter in paragraph 2 stated as follows:-

“Beverly school has had to make the tough decision to release you due to the fact that student recruitment and new admissions have remained below the necessary thresholds to sustain your continued employment at the school.”

9. In paragraph 3 of the said letter signed by ALICE MUDIRI, Executive Director, she stated in part:-

“I hereby terminate your services immediately. All dues accrued shall be calculated with you and the Accounts office and paid out in agreeable instalments.”

10. The Executive Director further states in the said letter that:-

“The first instalment is due on the 5th of March, 2019.”

11. This court has extensively and in verbatim quoted the letter of termination above as the same shall become very relevant when dealing with issues of the nature and reason for termination, and the dues payable to the Claimant, if any.

12. The Claimant testified that the termination was unfair, unlawful, and discriminatory. He alleges that he was not subjected to fair hearing and that the reason given for termination was false as the situation and circumstances of students enrolment and recruitment was robust. The Claimant further stated that if the reason given for his termination as above was genuine other teachers ought to have been affected as well and the fact that he was the only one terminated gives credence to his argument that the termination was discriminatory, unfair, unreasonable, and unlawful.

13. The Claimant further testified that his dues were assessed with the accounts office and he communicated to the Executive Director of the Respondent over the issue vide a letter dated Thursday, 28th February, 2019 which the Claimant tendered in court as **exhibit 4**.

14. The Claimant further produced as **exhibit 3** a schedule of payments made to him by the Respondent for the entire period of employment, January 2018 to February 2019, totaling to Kshs.304,500/=.

15. The Claimant testified that after the Respondent failed or refused to settle his dues he approached the Kenya National Union of Private School Teachers wherein he is a member and the union demanded settlement of his dues vide a **letter dated 12th March, 2019** which the Claimant produced as **exhibit 5**. The matter was thereafter escalated to the Ministry of Labour and Social Protection as evidenced in correspondences dated **12th November, 2019, 10th December, 2019, 16th January, 2020, and 25th February, 2020** which the Claimant produced in court as **exhibits 6, 7, 8, and 9**. The Claimant testified that instead of the Respondent settling the matter the Executive Director became hostile and at that point the Claimant decided to file the claim in court.

16. As stated in an earlier part of this judgment, although properly served the Respondent did not enter appearance or file defence/response to the claim.

III. ISSUES FOR DETERMINATION

17. Flowing from the foregoing parts I and II of this judgment the following issues manifest for determination:-

- (i) What were the terms of employment for the Claimant by the Respondent?
- (ii) Was the termination of the Claimant by the Respondent unfair and unlawful?
- (iii) If (ii) above is in the affirmative, is the Claimant entitled to the reliefs sought?
- (iv) Who meets the costs of this cause?

IV. EMPLOYMENT

18. It is undeniably clear that the Claimant was an employee of the Respondent as evidenced in the letter of termination dated Monday 13th February, 2019 by the Executive Director of the Respondent addressed to the Claimant. However, that letter does not disclose the terms and conditions of the employment.

19. The only evidence available in regard to terms of the employment relationship is the evidence, oral and documentary, as adduced by the Claimant. The Claimant's evidence is that he was engaged by the Respondent on 2nd January, 2018 on permanent terms at an agreed gross salary of Kshs.100,000/=. He was terminated on the 13th February, 2019 vide a letter of the same date. As stated elsewhere in this judgment this letter of termination confirms the employment relationship between the Claimant and the Respondent.

20. This court has no reason to doubt the evidence by the Claimant that he was on a gross monthly salary of Kshs.100,000/=:, all inclusive. Of course this salary is subject to statutory deductions and the Claimant alleges that his net salary after statutory deductions stood at Kshs.74,887.75. However, since there is no evidence as to what deductions were made, this court shall base its judgment on the gross monthly salary of Kshs.100,000/=:.

21. In the circumstances, and in view of there being no available contradictory evidence, this court finds and holds that the Claimant was Respondent's employee as deputy principal and teacher of mathematics on permanent basis at an agreed gross monthly salary of Kshs.100,000/=: for the period from 2nd January, 2018 to 13th February, 2019.

V. TERMINATION

22. The letter of termination dated Monday, 13th February, 2019 has been analysed in an earlier part of this judgment. As noted there the termination was allegedly based on low student recruitment and new admissions. For all intents and purposes this situation is what is defined as redundancy under **Section 40** of the **Employment Act (the Act)**. The Respondent in this letter states that it terminated the Claimant due to lack of enrolment and recruitment of adequate students to continue in need of the services of the Claimant.

23. **Section 2** of the **Act** provides that:

“Redundancy” means the loss of employment, occupation, job or carrier by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.”

24. If indeed the Claimant was terminated on the basis of redundancy the question becomes whether the Respondent had good reason for declaring the Claimant redundant and whether the Respondent adhered to the law in terminating the Claimant on the alleged ground of redundancy.

25. The importance of both substantial and procedural fairness in all forms of termination has been emphasized by this court in a variety of decisions including **Mary Chemweno VS. Kenya Pipeline Company Limited (2014) eKLR**; **Walter Ogal Anaro VS. Teachers Service Commission (2013) eKLR**; and **Janet Nyandiko VS. Kenya Commercial Bank Limited (2017) eKLR**.

26. Courts have also made decisions specifically on fairness in redundancy including **Kenya Airways VS. Aviation & Allied Workers Union and 3 Others (2014) eKLR**; **Geoffrey Adabasa Abashiro VS. Coconut (K) LTD (2019) eKLR**.

27. Essentially, the **Act** allows an employer to terminate an employee. However, the said right is subject to **Sections 40, 43, and 45 of the Act**. **Section 40** specifically places obligations and conditions that an employer must meet before declaring an employee redundant.

28. An employer who wishes to terminate an employee on redundancy ought to ensure the following:-

(i) Where an employee is a member of a union the employer shall issue one month's notice to the union and the area labour officer, notifying of the intended declaration of redundancy.

(ii) Where the employee to be affected is not a member of a trade union the notice shall issue to the employee and the area labour officer.

(iii) In arriving at the decision on the employee to be affected by redundancy the employer has to consider seniority in time and skill, ability and reliability especially of the employee to be affected.

(iv) An employer ought to ensure that even an employee who is not a member of a trade union does not lose benefits under any subsisting collective bargaining agreement.

(v) Any pending leave shall be paid for in cash before an employee terminated on redundancy is let to go.

(vi) The employer shall pay the employee on redundancy severance pay at the rate of not less than 15 days for each completed year of service.

29. The above paragraph clearly demonstrates that declaration and implementation of redundancy is a process as opposed to an event. Further, an employee to be declared redundant is entitled to fair hearing in accordance with the rules of **Natural Justice, Administrative Actions Act, Article 47** of the **Constitution of Kenya**, and **Sections 43 and 45** of the **Employment Act**.

VI. SUBSTANTIVE FAIRNESS

30. The Claimant testified that even though the letter of termination dated 13th February, 2019 alleged that there was low enrolment and recruitment of students by the Respondent, the Respondent was doing well financially and that the enrolment and recruitment of students was normal. The Claimant further alleges that he is the only one who was terminated on alleged redundancy and he views the same as discriminatory, unfair, and unlawful.

31. **Section 43 of the Act** places a burden on the Respondent to demonstrate and prove the reason of termination based on the facts, matters, and circumstances that existed at the time of termination. As stated elsewhere in this judgment, the Respondent did not defend this cause and as such the evidence by the Claimant that there was no lawful reason the existed as at the time of his termination on redundancy stands uncontroverted and unchallenged.

32. Inevitably, based on the evidence adduced by the Claimant this court finds and holds that the Respondent had no lawful reason for terminating the Claimant on redundancy or in any other manner or ground.

VII. PROCEDURAL FAIRNESS

33. The procedure to be followed in declaring and terminating an employee on redundancy is as provided for in **Section 40 of the Act** and the same has been discussed in foregoing paragraph of this judgment hence there is no need of reproducing the same here. It is by now evidently clear that the Respondent did not follow and apply the same in terminating the Claimant. There is no evidence of notices issued by the Respondent to the Claimant, the union, and the area labour officer; there is no evidence of payment of Claimant's dues; no payment of terminal dues, or any other form of settlement.

34. This court has said enough to demonstrate that the termination of the Claimant by the Respondent on the alleged redundancy was unfair, unreasonable, and unlawful both in substance and procedure and this court finds and holds as such.

VIII. RELIEFS

35. The remedies/reliefs that the Claimant is seeking have been set out in the first page of this judgment as extracted from the Memorandum of claim. **Section 49 of the Act** provides for the remedies that this court may grant or award for unfair termination or wrongful dismissal. The

said remedies are further affirmed in **Section 12(2) of the Employment and Labour Relations Court Act No. 20 of 2011.**

36. In respect of Prayer (i) this court has already found that the termination of the Claimant by the Respondent on the alleged account of redundancy was unfair, unreasonable, and unlawful and the same is declared as such.

37. On Prayer (ii) the court proceeds as hereunder.

38. There is no dispute that no notice was issued to the Claimant by the Respondent leading upto the termination and as such the court grants one (1) month's salary in lieu of notice:-

Kshs.100,000/= X 1 =Kshs.100.000.00

39. On unpaid salary arrears for the period between 2nd January, 2018 and 13th February, 2019 the same is calculated as follows:-

(i) January, 2018 to January, 2019 -

– **Kshs.100,000/= X 13 months = - Kshs.1,300,000/=**

(ii) Salary for 13 days of February, 2019 –

- **Kshs.100,000/30 X 13 days =**

- **Kshs. 43,334/=**

(iii) **TOTAL - Kshs.1,343,334/=**

(iv) Less paid as per schedule of

Payment produced as exhibit

3 by the Claimant - **Kshs. 304,500/=**

(v) Balance due - **Kshs.1,038,834/=**

This is gross salary arrears and hence subject to statutory deductions.

40. Severance pay is to be paid at the rate of not less than 15 days for each completed year of service as per **Section 40(1) (g)** of the **Act**. The Claimant completed one (1) year in service of the Respondent between January 2018 and January, 2019 and severance pay is:-

Kshs.100,000/= X 15/30 X 1 = Kshs.50,000/=

41. **Section 49(1) (c) of the Act** caps the maximum compensation for wrongful dismissal or unfair termination at twelve months gross salary subject to statutory deductions.

42. **Further Section 49(4)** provides for the factors that this court should consider when making an award under this head. Counsel for the Claimant has requested for the maximum award of 12 months gross salary majorly on the ground that the Respondent was grossly unfair in the manner and style in which it handled the Claimant denying him both substantive and procedural fairness.

43. This court notes that the Claimant worked for the Respondent for a short period of one year and one month; the termination was grossly unfair both in substance and form; and the Claimant did not contribute to the termination. The Claimant has not sought reinstatement or re-engagement and he did not inform the court whether he has found a new job and how long it took him to find a new job, if he has found one.

44. However, this court takes judicial notice that there is a high demand for professional teachers and as such the Claimant should not experience prolonged joblessness if he was looking for a job.

45. In the circumstances, taking into account the above factors and doing the best that this court can do, an award of six (6) months gross pay as compensation for the unfair termination is a fair and reasonable award.

The same is calculated as:

Kshs.100,000/= X 6 months = Kshs.600,000/=

This amount is subject to statutory deductions.

46. Costs follow event and the Claimant is awarded costs of this cause based on the award.

IX. CONCLUSION

47. In disposal of this cause this court grants the following orders:-

(a) A declaration be and is hereby issued that the Claimant's termination by the Respondent on account of redundancy was unprocedural, unfair, and unlawful.

(b) The Claimant is awarded the following against the Respondent:-

(i) One month's salary in lieu of notice- Kshs.100,000/=

(ii) Gross salary arrears for the period between January, 2018 to 13th February, 2019 as Per paragraph 39 above - Kshs.1,038,834/=

(iii) Severance pay - Kshs. 50,000/=

(iv) Compensation for unlawful termination - Kshs. 600,000/= TOTAL -Kshs.1,788,834/=

(c) The Claimant is awarded costs of this cause.

DATED AND DELIVERED VIRTUALLY AT NAKURU THIS 14TH DAY OF FEBRUARY, 2022.

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DAVID NDERITU

JUDGE

In the presence of:-

Opar for the claimant

No appearance for the respondent

Court Assistant - Lesinge