



**REPUBLIC OF KENYA**

**High Court at Nakuru**

**Cause 5 of 2013**

**KENYA UNION OF DOMESTIC, HOSTELS, EDUCATION INSTITUTIONS, HOSPITALS AND  
ALLIED WORKERS.....CLAIMANT**

**VERSUS**

**B. O. G. GILGIL GIRLS SECONDARY SCHOOL.....RESPONDENT**

[Before Hon. Justice Byram Ongaya on 12th February, 2013]

**JUDGMENT**

The Claimant is the **Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers** suing on behalf of the grievant, **Margaret Wambui Kagima**. The Respondent is **Gilgil Day Secondary School**.

The Memorandum of Claim was filed on 03.10.2011. The Respondent was properly served with the Memorandum of Claim and summons but did not enter appearance or file the memorandum of response.

The matter came up for hearing on 11.02.2013. The respondent did not attend court despite being served with the hearing notice. The grievant testified to support her claim. The grievant is a member of the Claimant Trade Union which has concluded a recognition agreement with the respondent. The conciliation process under the Minister for Labour was invoked by the Claimant but the process did not result into an amicable settlement of the dispute, hence, the filing of the Memorandum of Claim.

The respondent employed the grievant as a Copy Typist with effect from 15.10.1980 as per the letter marked appendix 6 on the Memorandum of Claim. She served the respondent for 28 years, her salary rising from Kshs.400/= to Kshs.12,605/= per month. The grievant testified that she was not issued with any payslips but upon payment of the monthly salary, she would sign payment vouchers which were in the possession of the Respondent.

The grievant testified that sometimes in February 2009, it was a period for form one admissions. Parents would visit the school and request for details relating to the form one vacancies. In the circumstances, she was assigned to avail a form showing the requirements for form one admission for use by the parents making such inquiries. The form was available at the visitors' bench in the school. On the material day, a parent stole the copy and subsequently appeared with it relying on it as an admission form for the child to join form one in the school. Infact, the form only indicated the requirements for joining form one and did not bear the other pages including the Principal's stamp and signature.

In the circumstances, the grievant was served the letter at *folio 4(a)* of the Memorandum of Claim which

stated as follows:

**“GROSS MISCONDUCT**

**Explain in writing why disciplinary action should not be taken against you. For gross misconduct, explain the following;**

- 1. Where you got the admission form.**
- 2. Who gave the authority to admit form one students.**
- 3. Insubordination.**

**Explain how the school should trust you with any property/items/information of the school and how you expect to fit in Gilgil Day Community.**

**Yours faithfully,**

**SIGNED**

**PRINCIPAL  
GILGIL DAY SECONDARY SCHOOL”**

The grievant replied by her letter dated 12.02.2009 marked 4(b) on the memorandum of claim. She explained that it was her duty to type the admission forms and she had availed only a single paper for parents to read the requirements for a new student. Further, she did not admit any new student because the one paper showing the requirements did not amount to an admission letter.

By the letter dated 17.02.2009 being Appendix 5(a) on the Memorandum of Claim, the Respondent addressed the grievant as follows:

**“LEAVE**

**You are hereby advised by the Board of Governors that you started your leave on 10th February, 2009 pending retirement on public interest. You should report to the institution on 9th March, 2009 at 10.30 a.m. for any other benefit agreed by the Board of Governors. Your retirements will start on 10th March, 2009.**

**Yours faithfully,**

**SIGNED**

**MBUGUA KIBURY  
B. O. G. SECRETARY”**

The grievant testified that on 9th March, 2009 she reported at the Respondent's School Office and was advised that she would be informed about her terminal dues. To-date, she had not received any communication in that regard. She further testified that she believed she had been victimized by the respondent because she had served as the Naivasha Branch secretary of the Claimant, and as Treasurer for over ten years. In that capacity, she had recruited members to the Claimant Union and which was the likely cause of her victimization.

It was submitted for the Claimant that since the respondent had not filed the Memorandum of Response, there was an admission of the Claimant's case and the court should order the prayers as sought in the memorandum of claim. In addition, it was submitted that the Claimant be awarded twelve months statutory compensation for unfair dismissal of the grievant, costs and interest at court rates.

The Claimant has prayed for:

1. **Three months pay in lieu of notice being Kshs.41,199/= at Kshs.13,733 per month as per Appendix 8 being Government new salary scales for civil servants.**
2. **Retirement gratuity for 28 years being Kshs.384,524 at Kshs.13,733 per year.**
3. **Salary arrears for July, 2007 to June 2008 and July 2008 to June 2009 being Kshs.74,592/=.**
4. **Under payment of house allowance arrears for 24 months from June, 2007 to July 2009 being Kshs.16,800/=.**
5. **Compensation for loss of employment under section 12(3)(v) of the Industrial Court Act, 2011.**

In view of the evidence, pleadings and submissions, the court makes the following findings:

1. The grievant was entitled to a notification and a hearing before removal or termination from employment as envisaged under section 41 of the Employment Act, 2007. The grievant was not accorded such notice and hearing as the Respondent contravened that express provision of the statute. The reason for removal, namely, irregular admission of a new student by the grievant was not genuine taking into account the evidence of the grievant. In the circumstances, the court finds that the termination of the grievant's employment was unlawful and unfair as it was in contravention of sections 41, on notice and hearing and section 43, on proof of reason for termination, both being sections of the Employment Act, 2007. The court finds that the grievant is entitled to Kshs.151,260 at the rate of her monthly gross salary of Kshs.12,605/=.

2. The grievant did not testify and construct a foundation for the claims of salary arrears and underpayment of house allowance as claimed. Further, no submissions were made in that regard. Accordingly, the court finds that the claims of salary arrears and house allowance are not justified. In addition, the court finds that no submissions and evidence was made to justify the application of the new Government salary structure in Appendix 8 of the Memorandum of Claim.

3. The Claimant has prayed for gratuity in view of the Claimant's long service of 28 years. **Section 35(8) of the Employment Act, 2007** provides that an employee whose contract of service has been terminated shall be entitled to service pay for every year worked, the terms of which shall be fixed. Clause 31 of the collective agreement being appendix 7 on the Memorandum of Claim provides thus,

**“payment of service gratuity for the employees employed by board of Governors Institutions who retire or retired, shall be paid at the rate of one twelfth of each completed months of service based on his or her current salary.”**

The grievant having served for 28 years, the court finds that she is entitled to Kshs.352,940/= at the rate of Kshs.12,605 per year of service.

4. Clause 6(a)(ii) of the Collective Agreement provides thus,

**“For any employee who has completed five years continuous service or more three months notice or three months pay in lieu of notice.”**

The court finds that the grievant was not accorded the contractual three months notice and is entitled to Kshs.37,815/= being payment in lieu of the notice.

In conclusion, judgment is entered on the Claimant against the Respondent for:

- (a) a declaration that the termination of the grievant's employment by the respondent was unfair and unlawful;
- (b) the respondent to pay the grievant a sum of Kshs.542,015/= plus interest at court rates from the date of this judgment till full payment; and
- (c) the Respondent to pay costs of the cause.

Signed, dated and delivered in Court at Nakuru this 12th day of February, 2013.

**BYRAM ONGAYA**  
**JUDGE**