



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Suit 99 of 2007

LYDIAH WANGUI MACHIRA.....PLAINTIFF

VERSUS

THE BOARD OF GOVERNORS
MICHINDA BOARDING

PRIMARY SCHOOL.....DEFENDANT

JUDGMENT

This is a claim for damages for unlawful termination of employment. The plaintiff claims in her plaint that upon completion of her training on Institution Management at Kenya Polytechnic, she was, in May 1980 employed by the Ministry of Education as a cateress in Job Group D and posted to the defendant school. She rose through the ranks and by the time of the termination of her services after 25 and half years, she was in Job Group G earning a basic salary of Kshs.12,645/= plus house allowance of Kshs.2,300/= and medical allowance of Kshs.750/= per month as well as an annual uniform allowance of Kshs.800/=. On or about 4th October 2005, when she was only 46 years and 7 months old, in violation of her rights under both the **Constitution** and the **Employment Act** and without any justifiable excuse, the defendant unlawfully and maliciously terminated her employment. In the circumstances she claims a sum of **Kshs.2,021,257/=** being:-

1. Gratuity – Kshs.12645 (current salary) x 305
 (No. of months worked) divide by 12 = $\frac{12645 \times 305}{12}$
 = **Kshs. 321,393.75**
 2. Salary due at the rate of Kshs.12,645 x 12 months
 x 8 years plus Kshs.12645 x 7 months. = **Kshs.1,277,145.00**
 3. Salary underpayment for the period between 1997-2005
 = **Kshs. 139,804.00**
 4. Unpaid house allowance between the year 2000-2005:
 - (a) circular dated 21st June 2000
 automatic house allowance of Kshs.2100 per month x 12 months
 = Kshs.25,000.00
 - (b) circular dated 1st July 2001 for the period
 of July 2001 to October 2005:
 Kshs.2300 x 52 months = Kshs.119600.00
 Subtotal unpaid house allowance = **Kshs. 144,800.00**
 5. With held ½ salary for 10 months (from Jan. 2005 to Oct.2005)
 = **Kshs. 60,180.00**
 6. Unpaid uniform allowance between 1980-2005 = **Kshs. 20,000.00**
 7. Unpaid Medical allowance = **Kshs. 20,000.00**
 8. 3 months salary in lieu of notice = **Kshs. 37,935.00**
- TOTAL = Kshs.2,021,257.00**

In its defence, the defendant disputes the plaintiff's claim and avers that the plaintiff's services were properly terminated for dishonesty. It denies the plaintiff's special damages claim and in particular the claim for house allowance as the plaintiff was housed in the school.

Counsel for the parties did not file a statement of agreed issues. From these averments, however, it is evident that two main issues arise for my determination. One, whether or not the termination of the plaintiff's employment was lawful. Two, if not, what damages is the plaintiff entitled to.

In support of her case, the plaintiff testified and called one witness. The defendant on its part called two witnesses.

On the first issue, the plaintiff testified that in the year 2003, she was sent on compulsory leave on the ground that she had not previously taken her annual leaves. When it ended 6th August 2004, she was not allowed to perform her duties of cateress. Instead she was asked to stay in the kitchen and ensure that

the plates were not lost and serve the staff with tea. She protested vide her letter **Ex.11** to no avail. On 10th January 2005 she received the letter **Ex.12** summoning her to appear before the School Board of Governors and answer allegations of insubordination. In spite of appearing before the Board and explaining her case, she was, vide the defendant's letter dated 26th January 2005 **Ex. 13** interdicted until October 2005. During that period, she was paid half salary. After interdiction, her services were terminated allegedly on public interest.

For the defendant, its head teacher, Amos Kamuhi Gachuki, DW1, testified that the plaintiff was sent on compulsory leave because she failed to produce receipts for her son's school fees. While on compulsory leave, the school called for an audit of the kitchen records. The audit report disclosed various anomalies major of which was that the plaintiff was receiving supplies and issuing them to herself. Following the recommendation in that report, the Board separated the duties of cateress and supplies but the plaintiff rejected that separation and deserted employment for four months insisting on combining the two roles. She wrote to the Provincial Director of Education (PDE) complaining that she had been relegated to a mere cook. In the circumstances the Board interdicted her and later retired her on public interest.

Though I agree with counsel that the plaintiff should not have been blamed for the defendant's failure to employ a stores clerk and separate the duties of cateress and store keeping, when that was done after the audit report, the plaintiff, as is clear from her letter to the PDE **Ex.D3**, resisted leading to her interdiction. The audit report also noted that the plaintiff was using a defective weighing scale. Though it was the duty of the defendant to repair it, there is no evidence of the plaintiff having reported the defect to the defendant. As a qualified cateress it was her duty to report that faulty weighing scale and even refuse to use it. It was also her duty to keep a proper record of the supplies to the kitchen and their issue to the cooks but she failed to do that. The plaintiff also did not explain the discrepancies in the supplies and issue to the kitchen store enumerated by DW2 in his evidence in court and his audit report. In the circumstances, I find that the defendant was justified in terminating the plaintiff's services.

That brings me to the plaintiff's entitlement on termination of her services.

It is common ground that the plaintiff was employed by the Ministry of Education and deployed to the defendant school. The Ministry's letter of posting **Ex.4** makes that quite clear:-

“I am pleased to inform you that you are posted to Michinda Primary School to perform the duties of a Cateress/Caterer in the Services of Board of Governors of Michinda Primary school with effect from 1st May, 1980.

Your starting salary will be Kshs.665/- per month in the Salary Scale Job Group “D” i.e. &399 x 18 x-489 x 21 – 594 p.a.

Please note that your salary scale will be adjusted accordingly as soon as our results are published.

The Board of Governors of Michinda Primary School is authorised to issue you with an appointment letter as soon as you report on duty.”

The plaintiff was to be “in the services of the Board of Governors of Michinda Primary School,” which was authorized to issue her with a letter of appointment. Although the defendant erred in failing to give her a letter of appointment, on the evidence on record, I find that, other than the recruitment, the plaintiff was an employee of the defendant and not the Ministry of Education as she claimed. There is nothing on record to prove that had she retired normally she would have been paid pension by the Ministry of Education. In the circumstances I reject her claim that her salary was supposed to be reviewed as those of the Ministry’s employees. The circulars she produced, which in any case do not refer to her, are therefore irrelevant.

DW1 testified that based on the formula given by the Labour officer, the school determined the plaintiff’s terminal benefits as Kshs.168,077.40. He said the defendant is still willing to pay him that amount. That, however, is only gratuity. In her plaint the plaintiff also claimed Kshs.60,180/- being half monthly salary for ten months from January 2005 to October 2005 when she was under interdiction, unpaid uniform allowance between 1980 and 2005 of Kshs.20,000/- unpaid medical allowance of Kshs.20,000/- and Kshs.37,935/- being three months salary in lieu of notice.

The defendant having not contested these claims I find that the plaintiff is entitled to them. In addition to the gratuity of Kshs.168,077.40, the defendant shall therefore also pay to the plaintiff Kshs.138,115/- being the total of the above claims.

In the upshot, other than the said sum of Kshs.168,077.40 and Kshs.138,115/-, making a total of **Kshs.306,192.40**, I dismiss the rest of the plaintiff’s case. As the sum of Kshs.168,077.40 was offered to the plaintiff but she refused to take it, I hold that she is not entitled to interest on it. The defendant shall pay that sum to her without interest within 30 days failing which it shall attract interest at court rates. The plaintiff is, however, entitled to interest on the other sum of Kshs.138,115/- from the date of filing this suit. As to costs, I have already found that the defendant was at fault in not separating the duties of a cateress from those of a store keeper. It also failed to give the plaintiff an appointment letter spelling out her duties. In the circumstances I order that each party bears its own costs of this suit.

DATED and DELIVERED at Nakuru this 18th day of June, 2010.

D. K. MARAGA

JUDGE.