

**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

**CAUSE NO. E058 OF 2024**

*(Before Hon. Lady Justice Agnes Kitiku Nzei)*

**PAULINE W. KAGWE.....CLAIMANT**

*VERSUS*

**THE BOARD OF MANAGEMENT  
OLERAI PRIMARY SCHOOL.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent herein vide a Statement of Claim dated 19<sup>th</sup> January, 2024 and sought the following reliefs:-

- (a) Leave days not taken since 2013.*
- (b) National Social Security Fund deductions that were deducted but not remitted between 1989 and 1992.*
- (c) Damages for unjustified termination of [employment], equivalent to twelve months' gross salary.*

- (d) *Costs of the claim.*
- (e) *Interest on the awarded amounts from the date of filing suit until payment in full.*
- (f) *Any other or further reliefs that the Court may deem fit and just to grant.*

2. The Claimant pleaded:-

- (a) *that she joined the Respondent as a teacher on probationary basis **in February 1989** at a salary of **Kshs.4,500/= per month**, pursuant to which a contract for a permanent position was to be drawn.*
- (b) *that on **25<sup>th</sup> February, 1992**, the parties herein entered into an employment contract whereby the Respondent employed the Claimant as a teacher on permanent terms. That on **7<sup>th</sup> August, 2013**, the Claimant accepted a promotion to the position of Headmistress, with a monthly salary of **Kshs.65,390/= per month**.*
- (c) *that following several salary reviews, the Claimant's salary increased to **Kshs.104,872/= as at April 2022**.*

(d) that **on 28<sup>th</sup> April, 2022**, the Respondent purported to **mandatorily and unilaterally retire** the Claimant from her employment position.

(e) that the purported retirement was **unfair and illegal as the notice period was too short**, the Claimant was not given an opportunity to be heard, **the Respondent had failed to establish a retirement policy within its establishment**, the reason for termination was **discriminatory** as no other person has been terminated using the same reason; and that there was no fair administrative action taken.

(f) that following the purported termination, the Claimant was coerced into executing a letter dated 6<sup>th</sup> May, 2022 that purported:-

(i) to reduce the amount of terminal benefits to **Kshs.474,530/=**.

(ii) to **waive** the Claimant's right to claim any further or other amounts from the Respondent.

3. The Respondent defended the Claimant's claim vide a Memorandum of Response dated 6<sup>th</sup> May, 2024, and denied the Claimant's claim. The Respondent pleaded, ***inter alia***:-

(a) *that the Claimant's employment was confirmed via a **contract dated 1<sup>st</sup> January, 1992**, which contract expressly indicated that the Claimant's employment contract **incorporated** the Teachers Service Commission Code of Regulation (the "**TSC Regulations**").*

(b) *that from the Respondent's records, the Claimant was born on 25<sup>th</sup> December, 1958, and that after review of its policies and the relevant laws, **particularly Regulation 161 of the TSC Regulations, which provides for mandatory retirement at the age of 60 years**, it was determined that the Claimant had already attained 60 years, and was lawfully retired from her employment with the Respondent.*

(c) *that vide a letter dated **28<sup>th</sup> April, 2022**, the Respondent gave sufficient and comprehensive notice of retirement, in the form provided in the TSC Regulations, to the Claimant, **and notified***

**her that her retirement would take effect from 6<sup>th</sup> May, 2022, and that she would be paid three (3) months' salary in lieu of notice.**

(d) that the letter also outlined the **final dues contractually payable to the Claimant**, and indicated that the Respondent had organized a Retirement Training Session for the benefit of the Claimant.

(e) that the Claimant's retirement was not a unilateral decision, as the Claimant was well aware that the TSC Regulations were incorporated in her employment contract.

(f) that the Respondent promptly settled the amount tabulated in the letter **dated 28<sup>th</sup> April, 2022**; and that Retirement/Provident Fund dues were paid separately to the Claimant, with the Respondent expediting the process.

(g) that the Claimant confirmed that she had read and understood the letter, **and voluntarily appended her signature thereon.**

- (h) that the Respondent started making deductions from the Claimant's remuneration **from 1992** when her employment was confirmed; and that before 1992, the Respondent had **not** attained the minimum employee threshold **(of 5 employees)** that was required for employers to mandatorily register for NSSF and to deduct and to make contributions to the NSSF on behalf of employees.
- (i) that the Claimant was entitled to annual leave of 21 days with full pay as per the Respondent's practice, which the Claimant took during school holidays when there was no ongoing business of the Respondent's school. That in this regard, the Claimant took an aggregate of between 33 to 59 working days as annual leave with full pay during each calendar year.

4. When the suit came up in Court for hearing before me **on 12<sup>th</sup> November, 2024**, Counsel for both parties **agreed** that as the issues involved in the matter were view and were basically not disputed, the suit could be determined by the Court pursuant to **Rule 59 of the Employment and**

## **Labour Relations Court (Procedure) Rules 2024.**

Accordingly, the Court ordered that the suit would be determined pursuant to Rule 59 of its said Rules of Procedure, and directed both parties to substitute their hitherto filed witness statements with witness affidavits; and to thereupon file and exchange written submissions, which they did.

5. Rule 59 of the Employment and Labour Relations Court (Procedure) Rules 2024 provides as follows:-

***“The Court may, either by an agreement by all parties, or on its own motion, proceed to determine a suit before it on the basis of pleadings, affidavits, documents filed and submissions filed by the parties.”***

6. Having considered the pleadings filed herein, witness affidavits and documents filed by both parties, issues that fall for determination, in my view, are as follows:-

***(a) Whether termination of the Claimant’s employment on account of alleged attainment of retirement age was unfair.***

***(b) Whether the reliefs sought by the Claimant can be granted.***

7. On the first issue, it was a common ground that the Claimant's employment was terminated by the Respondent on account of alleged attainment of retirement age **vide a letter dated 28<sup>th</sup> April, 2022**. The said letter states as follows, in part:-

***“Records held in this office indicate that you were born on 25<sup>th</sup> December 1958 and, therefore, you have already attained the retirement age of 60 years. Consequently, the company hereby gives notice to retire you from employment.***

***Kindly note that this takes effect on 6<sup>th</sup> May, 2022 therefore. Your last working date will be 6<sup>th</sup> May 2022 . . . . .”***

8. It is to be noted that the Claimant's contract of employment **dated 1<sup>st</sup> January, 1992**, duly executed by both parties, **did not state the contractual retirement age**. The Court has **not** been referred to any statute stating that employees, in both public and private sector, **must** retire

from employment upon attaining sixty (60) years of age. The Respondent's pleading that the Claimant's contract dated 1<sup>st</sup> January, 1992 expressly indicated that the Claimant's employment contract **"incorporated the Teachers Service Commission Code of Regulations" (TSC Regulations)** flies on the face of the record as all that the said contract states regarding TSC Regulations is:-

***"PROFESSIONAL ETHICS: The TSC Regulation is relevant and should guide you in observing all social and professional ethics."***

9. The contract did **not** state that the TSC Code of Regulations **would form part** of the Claimant's employment contract. Further, **the issue** of retirement age of employees **in the private sector is a matter of each employer's policy**, and differs and/or varies from employer to employer. The contracting parties usually include a clause on retirement in an employee's employment contract. An employer **cannot** purport to incorporate, wholesale or otherwise, another employer's/organization's policy/policies into its employees' employment contracts; without domesticating or customizing such policies to fit into its own policies and into

its organization's **peculiar** situation and/or nature. The Court was **not** told that the Respondent, **which is a private entity**, was governed by the TSC Regulations or that the Respondent's employees (including the Claimant) were employees of TSC and, had been seconded to it by the TSC; and were therefore subject to the TSC Regulations and/or **policies**.

10. The Black's Law Dictionary (Tenth Edition) defines **policy** as:-

***“A standard course of action that has been officially established by an organization, business, political party, etc.”***

11. The Claimant was not shown, by the Respondent, to have been **aware** of the provisions of the TSC Code of Regulations or **to have had access to the same**; either as amended from time to time or at all. In reference to contracts of employment, **Section 14 of the Employment Act provides** as follows:-

***“In Sections 11, 12 and 13, reference to a document or collective agreement which is***

***reasonably accessible to an employee are references to a document or collective agreement which:-***

***(a) the employee has reasonable opportunities of reading in the course of his employment, or***

***(b) is made reasonably accessible to the employee in some other way.”***

12. The upshot of all the foregoing is that it was **wrongful and unlawful, and indeed unfair**, for the Respondent to **ambush** the Claimant with a **six (6) days retirement notice** over a retirement **that the Claimant is not shown to have been aware of, to have anticipated at that time or to have been consulted over**. Retirement is **not** a walk in the park. It is a real time **shift** in life from a phase in life where a person works and earns a livelihood, to a phase where one, in most cases, earns **no** livelihood. Retirement requires adequate preparation, both psychological and otherwise. The Respondent terminated the Claimant's employment in the most **unfair** manner that anyone can think of. Payment of the equivalent of three

months' salary **"in lieu of notice"** did not, in my view, reduce the degree of unfairness visited on the Claimant by the Respondent. **The entire process of retiring the Claimant, who had served the Respondent for thirty years, was an unfair labour practice on the part of the Respondent.**

13. A teacher employed by the Teachers Service Commission knows, right from the date of employment, that he or she will retire at the age of sixty years; pursuant to **Rule 161(1) of The Teachers Service Commission Code of Regulations for Teachers, 2015**. As already stated in this Ruling, the Claimant was **not** a teacher employed by the Teachers Service Commission, and the TSC Code of Regulations 2015, or any other edition thereof, is **not** shown to have formed part of her employment with the Respondent.
14. The Claimant is **not** shown to have been accused of any misconduct by the Respondent before termination of her employment on ground of **alleged** attainment of retirement age.

15. The reason given by the Respondent for terminating the Claimant's employment **was not valid**, in view of all the foregoing, and the termination was **unfair** by dint of **Section 45(2)(a) of the Employment Act, 2007**.
16. On the second issue, and having made a finding that termination of the Claimant's **employment was unfair**, I **award the Claimant the equivalent of nine (9) months' gross salary, being compensation (damages) for unfair and unjustified termination of employment**. It was a common ground that the Claimant was earning a gross monthly salary of **Kshs.104,872/=** at the time of termination. The equivalent of nine months' salary is **Kshs.104,872 x 9 = Kshs.943,848/=**, which I award the Claimant. I have taken into account the number of years that the Claimant worked for the Respondent, the abrupt and unfair manner in which termination was effected, and the fact that an equivalent of three months' salary **"in lieu of notice"** was paid to the Claimant upon termination. I would have awarded the Claimant the equivalent of twelve

months' gross salary **save** for the said **purported** notice pay.

17. The claim for unpaid leave was not proved, and is declined. The Claimant, who is shown to have worked for the Respondent **for thirty years**, did **not** specify the years during which she did not take annual leave, and the number of leave days earned but not taken. Claims for unpaid/untaken leave days are in the nature of special damages, and must always be specifically pleaded and proved.
18. The claim for deducted but unremitted NSSF contributions was not proved, and is declined.
19. On the Respondent's pleading and submission that the Claimant confirmed that **"she has no further claims against the Respondent"**, I have seen the document **(tabulation)** said to have been signed by the Claimant on 9<sup>th</sup> May, 2022. The same reads as follows;-

***“I Pauline Waitherero Kagwe do accept that the above payment is my final dues owed to me by the school.***

***Further, I confirm that I have no further claims against the school, and neither does the school have a claim against me.”***

20. The foregoing acknowledgment/discharge, **as it clearly states**, related to **dues** payable to the Claimant by the Respondent at the point of termination (exit), but did **not** take away the Claimant’s right to sue the Respondent and to seek compensation **for unfair termination of employment.**

21. In sum, and having considered written submissions filed, Judgment is hereby entered for the Claimant against the Respondent for **Kshs.943,848/=** being compensation for unfair termination of employment. The awarded sum shall be subject to statutory deductions **as applied to the Claimant at the time of termination.**

22. The Claimant is awarded interest on the sum awarded, to be calculated at Court rates from the date of this Judgment until payment in full.
23. The Claimant is awarded costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS  
14<sup>TH</sup> DAY OF NOVEMBER 2025**

**AGNES KITIKU NZEI**  
**JUDGE**

**ORDER**

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable Court fees.

**AGNES KITIKU NZEI**  
**JUDGE**

Appearance:

Mr. Wena for the Claimant

Miss Mwaniki for the Respondent

ORIGINAL