



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAKURU**

**CAUSE NO. 40 OF 2018**

**MUTUA MARY MWIKALI.....CLAIMANT**

**VERSUS**

**BOARD OF MANAGEMENT**

**SOBRA STAR SCHOOL.....RESPONDENT**

**JUDGEMENT**

1. The Claimant filed her Memorandum of Claim on 13<sup>th</sup> February, 2018 contending that she had been unfairly terminated by the Respondent and claiming compensation for the said unfair termination and for underpayment together with house allowance pay for all the time she worked for the Respondent. The Claimant prays for the following remedies: -

**a) Payment for;**

- i. one-month salary in lieu of Notice,**
- ii. Annual leave due for one year**
- iii. Underpayment of wages**
- iv. Underpayment of house allowance**
- v. Compensation for unlawful termination.**

**b) General damages**

**c) Costs of this suits and interest herein above.**

**d) Any other or further relief that this Honourable Court may deem fit and just to grant.**

2. The Respondent filed a response to claim on the 27<sup>th</sup> March, 2018 contending that the claimant was dismissed lawfully for participating in unlawful strike that cause unrest in the school.

**Claimant's Case**

3. The claimant avers that she was employed by the Respondent in January, 2016 earning a monthly salary of Kshs. 6,000 however on holidays of April, August and December the claimant received a salary of Kshs. 3,000 per month.

4. On 20<sup>th</sup> July, 2017 the claimant received a text message from the Respondent director via mobile phone number 0718611018 dismissing her from employment without setting out the reason for the said dismissal.

5. Aggrieved by the Respondent's Actions, the Claimant approached her Union being Kenya National Union of Private School Teachers who intervened and an agreement was arrived at dated 27.7.2019 that the claimant was to be paid terminal dues of Kshs. 116,600 however the

claimant was only paid Kshs. 25,000 and the balance were never remitted to her to date.

6. Despite frantic follow up, the Respondent declined to remit the said dues to the claimant.

7. The claimant alleged that she was underpaid throughout her employment with the Respondent and did not take her annual leave for the financial year 2016/2017.

8. During hearing the claimant testified that the circumstances leading to the termination is that she was advised by the Head teacher Ms. Irene who was in charge of ECD section not to administer an exam till their salary issue was sorted out. The Respondent's director then learned of the said action and ordered her to leave the school immediately and later on she received a message terminating her services. She maintained that there was no strike in the school as alleged.

9. Upon cross examination she admitted that the school had holidays being April, August and December however that during the said months they could teach pupils on tuition and after tuition she could carry out marketing of the school till 1.00pm every day of the week.

10. She maintained that she never received any warning letter at any point in her employment with the Respondent.

### **Respondent's case**

11. The Respondent admits to employing the claimant and also admits summarily dismissing the claimant however that the reason for the dismissal was communicated to the claimant, which was for participating in an illegal strike that caused unrest in the school and disrupted learning.

12. The Respondent also admits to signing the agreement with the Kenya National Union of Private teachers dated 27<sup>th</sup> July, 2017 however that she was coerced into signing the agreement therefore that the agreement is unenforceable.

13. It is the Respondent's case that the claimant never worked diligently as alleged and received several verbal warnings.

14. During hearing the Respondent called two witnesses, Sophia Barasa (RW-1), the director of the Respondent who adopted her statement dated 5.4.2018 and in addition averred that she never agreed with the claimant on alleged pay rise after probation period neither did she agree to give the claimant 3 months notice before termination. She added that there were no tuitions during holidays.

15. Upon cross-examination, RW-1 testified that there was a verbal employment contract between the Respondent and the claimant and the pay was of Kshs. 6,000 for all untrained teachers which was paid throughout the year. She testified that she terminated the services of the claimant for gross misconduct of causing an illegal strike that disrupted learning in the school.

16. The Respondent second witness, Irene Bonareri, RW-2, was the Respondent's ECD head teacher. She adopted her witness statement dated 5.4.2018 and in addition testified that a strike occurred which was caused by the Claimant and her efforts to calm down the claimant and the entire situation did not bear any fruits. She testified that salary review was always at the discretion of the employer pursuant to satisfactory performance.

17. She also testified that the claimant had been issue with 3 warning letters.

18. On cross examination, she testified that the warning was given verbally for talking badly about the school however that the director who gave the said warnings was not in the school and could only communicate the said warning to her. She maintained that she did not instruct the claimant not to administer exams as alleged, neither did she participate in the strike that led to the claimant's termination.

### **Claimants Submissions**

19. The claimant submitted from the onset that no reason was given for the said termination. She argued that the termination was not preceded by a disciplinary hearing as envisaged under section 41 of the Employment Act therefore failing on procedural fairness. In this she cited the case of **Francis Mukhwana Tsama V Kwale International Sugar Co. Limited [2015] eklr.**

20. The claimant then urged this Court to find in her favour and allow the claim as prayed.

### **Respondent's Submissions**

21. The Respondent on the other hand submitted that the claimant was summarily dismissed for gross misconduct of causing an illegal strike in the Respondent disrupting learning therefore that her dismissal was justified in the circumstances.

22. With regard to underpayment claimed, it was submitted that the claimant has not demonstrated which wage order she was relying on in justifying the said underpayment and submitted further that the claimant ought to have annexed a copy of the wage order to guide this Court in the said claim. In this, she cited the case of **Patson Musembi Kitolo V Kin Jin Lee [2015t5] eklr.**

23. On the leave pay sought, it was submitted that the claimant was teaching kindergarten who never attended any tuition rather enjoyed three month leave in a year therefore the leave claim is not warranted.

24. I have examined the evidence and submissions of the parties herein. From the claimant's evidence, she was terminated through text and no reason for the termination were given.

25. The respondents have not produced any letter indicating the reasons for the termination but only indicate that the claimant was terminated for participating in an unlawful strike.

26. Section 43 of the Employment Act 2007 states as follows;

***“43. Proof of reason for termination***

***(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of [section 45](#).***

***(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee”.***

27. The law envisages that in any termination, reason for termination must be given but in case of the claimant no such reasons were given. The claimant had also worked for the respondent since January 2016. She was never issued with any appointment letter as envisaged by Section 6 (confirm) of the Employment Act.

28. Section 41 of the Employment Act 2006 also states as follows;

***“41. Notification and hearing before termination on grounds of misconduct***

***(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 of 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”.***

29. In the case of the claimant, she was never invited for any disciplinary process and so provisions of Section 45 (2) of the Employment Act 2007 which states as follows were flowed.

***“45. (1).....***

***(2) A termination of employment is unfair if the employer fails to prove-***

***(a) that the reason for the termination is valid;***

***(b) that the reason for the termination is a fair reason-***

***(i) related to the employee's conduct, capacity or compatibility; or***

***(ii) based on the operational requirements of the employer; and***

***(c) that the employment was terminated in accordance with fair procedure”.***

30. It is therefore apparent that the termination of the claimant was unfair and unjustified.

31. In terms of remedies I find for claimant and award him as follows;

**1. I month salary in lieu of notice = 13,309.80/=**

**2. Annual leave due for 1 year = 13,309.80/=**

**3. Unpaid house allowance being 15% of salary**

**= 15 x 13,309 x 18 months = 35,934.30/=**

**4. Under payment of salary as pleaded**

= 119,401.40/=

**5. Compensation equivalent to 10 months salary for unlawful and unfair termination**

= 10 x 13,309 = 133,090/=

**TOTAL = 315,045.30/=**

**Less statutory deductions**

**6. The respondent will also pay costs of this suit plus interest at court rates with effect from the date of this Judgment.**

Dated and delivered in open Court this 18<sup>TH</sup> day of JANUARY, 2022.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Kamau for claimant – present

Kabalika for respondent – present

Court Assistant - Fred