



IN THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KERICHO

ELRC. CAUSE NO. 12 OF 2020

**KENYA UNION OF DOMESTIC,
HOTEL, EDUCATIONAL INSTITUTION
AND HOSPITAL WORKERSCLAIMANT**

VERSUS

**BOARD OF MANAGEMNT MAKIMENY
SECONDARY SCHOOL.....RESPONDENT**

JUDGMENT

1. The Claimant is trade union registered under the Labour Relations Act and it brings the suit on behalf of Ms Martha Chepkoech (grievant) who was employed by the Respondent as a Matron from 1.5.2012. The claimant averred that the grievant went for maternity leave from 3.5.2018 to 30.7.2018 but when she reported back on 31.7.2018 she found a new School Principal who told her to go away because she was a stranger in the school. As a result the claimant brought this suit on 26.2.2020 seeking the following reliefs:

- (a) Declaration that the termination of claimant's employment was unfair, unlawful and illegal;
- (b) An order directing the respondent to pay the claimant the following as terminal benefits:
 - i. Salary in lieu of notice Kshs.33,480;
 - ii. Salary underpayments as per the DPM circulars upto 2018;
 - iii. Unpaid medical allowance DPM- 1995;
 - iv. Unpaid leave travelling allowance as per DPM 2006;
 - v. Maximum compensation for unfair termination;
 - vi. Withheld salaries for August 2018 to February 2019;
 - vii. Certificate of service;
- (c) Costs of the suit.

2. The respondent did not file defence within the required time and the court directed that the matter proceeds as undefended. The suit was heard on 4.10.2021 when only the claimant gave evidence and thereafter filed written submissions.

Claimant's Evidence

3. The grievant testified as CW1 and basically adopted her written statement filed in court on 26.2.2020. She told that court that she was employed by the respondent as a Matron on 1.5.2012 and she was given an appointment letter. Her starting salary was Kshsh.5,500 but later

it was increased to Kshs.9,176 per month. She was provided with a house in the school.

4. On 3.5.2018 she gave birth and she filled leave form for her maternity and it was approved to report back on 31.7.2018. While away on leave a new Principal was posted to the school and send the Secretary to call her to report back to work but she could not because she had just rested for three weeks delivery. When she reported back on 31.7.2018 as scheduled, the Principal told her to leave the school because she was a stranger.

5. She complied with the command by the Principal and returned the staff quarters where she was living. However, the following day the Principal sent the Bursar to tell her to leave the school compound and wait for BOM meeting. Her salary had been stopped from May 2018. She reported the matter to the BOM chairman but he also told her to stay away until further notice.

6. The employer never said a word to her again until she learned that her position had been advertised. She then reported the matter to her trade union on 25.1.2019 and attempts to resolve the dispute failed after the Principal refused to accord the union a hearing.

7. The union reported the dispute to the Ministry of Labour and conciliation was commenced. However, the matter was not resolved and a certificate to that effect was issued by the Conciliator. He prayed for the reliefs sought in the suit.

Issues for determination

8. I have carefully considered the pleadings, evidence and the submissions presented by the claimant. The claimant produced as exhibit her letter of appointment and contended that the grievant was housed in the school staff quarters. The court is therefore satisfied that the grievant was employed by the respondent. The said evidence and pleading that the grievant was dismissed by the respondent after reporting back from maternity leave was not controverted by the respondent.

9. Section 45 of the Employment Act bars the employer from terminating employee's contract of employment unfairly and places on the employer, the burden of proving that the reason for the termination is valid and fair, and that the procedure followed was fair. Consequently, the issues for determination herein are:

- (a) Whether the reason for dismissing the Clamant was valid and fair.
- (b) Whether a fair procedure was followed
- (c) Whether she is entitled to the reliefs sought.

The reason for dismissal

10. The grievant testified that the new Principal wanted her to report back to work 3 weeks after delivery but it was not possible and her salary was stopped. The foregoing violated section 29 (1) and (2) of the Employment Act which provides that:

“(1) A female employee shall be entitled to three months maternity leave with full pay.

(2) On expiry of a female employee's maternity leave as provided in subsection (1), the female employee shall have the right to return to the job which she held immediately prior to her maternity leave or to reasonably suitable job on terms and conditions not less favourable than those which would have applied had she not been on maternity leave.”

11. When she reported to work on 31.7.2018 as scheduled, the Principal told to go away because she was a stranger to the school. The following day the principal send the Bursar to tell to vacate the Staff Quarters.

12. Having considered the above facts, I find that the reason for dismissal of the grievant was either her pregnancy or because she took maternity leave. The employer stopped her salary after she failed to discontinue her maternity leave and when she reported back on the date scheduled by the previous principal, she was dismissed.

13. Section 46 of the Employment Act provides that the following do not constitute fair reasons for dismissal or for imposition of a disciplinary penalty:

“(a) a female employee's pregnancy, or any reason connected with her pregnancy;

(b) the going on leave of an employee, or the proposal of an employee to take leave to which he was entitled under the law or contract;”

14. Having found that the grievant was dismissed for going on maternity leave, I hold that the dismissal of the claimant was not grounded on a valid and fair reason and it was therefore unfair within the meaning of section 45 of the Employment Act. She was entitled to the maternity leave under section 29 of the Act and clause 16 of the CBA and therefore, terminating her employment for taking the leave was violation of section 46 (a) and (b) of the Act.

Procedure followed

15. The Claimant contended that she was never accorded a fair hearing before the dismissal. However, considering the reason for the dismissal, the issue of fair hearing does not even arise because termination for any of the reasons set out under section 46 of the Act renders termination unfair.

Reliefs

16. In view of the finding that the reason for dismissing the claimant was not valid and fair, I make a declaration that the dismissal was unfair, wrongful and unlawful within the meaning of Section 45 of the Employment Act.

17. Having found that the dismissal was unfair and wrongful, the claimant is entitled to damages under section 49 (1) of the Act. I allow the prayer for salary in lieu of notice and compensation for unfair termination. Clause 6 of the CBA provided for 3 months termination notice. The claimant submitted that the salary applicable is the one published for Civil Servants by the DPM in 2018.

18. However the claimant did not prove by evidence that the said salaries for the Civil Service applied to the School staff employment the Boards of Management. It also failed to prove by evidence that the salary of Kshs.9,176 which the claimant was being paid by the school was below the minimum wage gazetted for employee of her cadre in Sotik area where the grievant was working. Therefore the award herein will be assessed based on the salary of Kshs.9,176 plus house allowance being 15% of the basic pay (kshs.1,376.40) bringing the gross salary to Kshs.10,552.40.

19. Accordingly, I compute salary in lieu of notice as 3x Kshs10, 552.40= Kshs. 31,657.20. I further award her 10 months' salary being kshs. 91,760as compensation for the unfair termination. In awarding the said compensation, I have considered her long 5 years' service without any warning letter and the fact that she did not contribute to dismissal through misconduct.

20. The claim for salary underpayment, unpaid medical allowance and unpaid leave travelling allowance all based on the DPM Circulars lack particulars. There is also no evidence to prove that the said circulars applied to the grievant who was not a civil servant but an employee of a School BOM.

21. The claim for salary for August 2018 to February 2019 is not well founded because the grievant was dismissed on 31.7.2018 and therefore she was not entitled to salary after the separation.

22. Finally, the claim for certificate of service is allowed as prayed since it is a right under section 51 of the Employment Act.

Conclusion and disposition

23. I have found that the dismissal of the Claimant was unfair, and unlawful within the meaning of section 45 of the Employment Act because it was done for an unfair reason. I have further found that the claimant is entitled to damages as a result of the breaches by the respondent. Consequently, I enter judgment for the Claimant in the sum of Kshs. 123,417.20 less statutory deductions. The Claimant will have certificate of service, costs plus interest at court rates from the date hereof.

DATED, SIGNED AND DELIVERED IN NAKURU THIS 28TH DAY OF OCTOBER, 2021.

ONESMUS N. MAKAU

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE