



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 597 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

KUDHEIHA WORKERS.....CLAIMANT

VERSUS

THE PRINCIPAL, MAKUENI COUNTY

TECHNICAL TRAINING INSTITUTE.....RESPONDENT

JUDGMENT

1. The Claimant is a trade union registered under the Labour Relations Act to represent employees in the sectors set out in the membership clause of its constitution. It has a recognition agreement with the Respondent and has negotiated several CBAs with the Respondent.
2. The Claimant has filed this suit on respect of the grievants who are its members.
3. Vide its Memorandum of claim filed in Court on 28th March, 2017, the Claimant avers that the grievants’ employment was unlawfully, wrongfully and unfairly terminated by the Respondent.
4. The Claimant maintains that the grievants were employed by the Respondent on diverse dates and served in different carders as follows:

No.	Name of grievant	Date of Employment	Position
1.	Dorothy Kasisi Matheka	1 st July, 1987	Home Economics, Grade II Instructor
2.	Milkah Koki Kioko	6 th May, 1999	Dressmaking Instructor

5. The Claimant further maintains that the grievants worked diligently, faithfully and to the Respondent’s satisfaction until 1st June, 2015 when their employment was illegally and unlawfully terminated by the Respondent as per termination letter dated 27th May, 2015.
6. The Claimant contended that the termination of the employment of the grievants was illegal and unfair as they were neither given reasons for the dismissal nor accorded a chance to make their representations (if any) prior to the termination, which is contrary to the signed CBA between the Claimant and the Respondent herein.
7. In the instant claim, the Claimant seeks that the Respondent be compelled to pay terminal benefits as indicated below:

DOROTHY MARTIN

a. Four months’ notice

15,600 x 4 months Kshs.62,400

b. Terminal gratuity for 26 years

15,600 x 26 years x Kshs.338,000

c. Housing Allowance 14 months

1,100 x 14 months Kshs.15,400

d. Medical Allowance 14 months

475 x 14 Kshs.6,650

e. Salary Arrears 14 months

(15,600 – 7,550) = 8,050 x 14 Kshs.112,700

f. Leave travelling allowance Kshs.1,200

TOTAL Kshs.536,350

MILKA KIOKO

a. Three months' notice

19,550 x 3 months Kshs.58,650

b. Terminal gratuity for 15 years

19,550 x 15 years x Kshs.224,375

c. Housing Allowance 14 months

1,100 x 14 months Kshs.15,400

d. Medical Allowance 14 months

475 x 14 Kshs.6,650

e. Salary Arrears 14 months

(15,600 – 7,100) = 12,450 x 14 Kshs.174,300

f. Leave travelling allowance Kshs.1,200

TOTAL Kshs.500,575

8. The Respondent despite being served with the Summons and the Memorandum of Claim failed to enter appearance or to file its defence in this matter. The matter therefore proceeded as an undefended claim and was disposed by way of the Claimant filing its Witness Affidavits and written submissions as directed by the Court.

Claimant's Case

9. This Court takes note that the Claimant only filed a Witness Statement by Dorothy Kasisi Matheka and proceeded to file written submissions on her behalf and will therefore treat the Claim by Milka Koki Kioko as abandoned.

10. In her statement, Dorothy Kasisi Matheka states that she was employed by the Respondent on 1st July, 1987 in the position of Home Economics, Grade II instructor.

11. She further states that she worked continuously and diligently for the Respondent until 1st July, 2015 when her employment was unlawfully and unfairly terminated.

12. She averred that she did not receive any house and medical allowances from the Respondent during the subsistence of her employment and is therefore claiming payment of the same.

13. In conclusion the grievant urged this Court to allow the Claim in terms of the reliefs sought therein.

Claimant's Submissions.

14. In its submissions the Claimant maintained that the termination of the grievants' employment was unfair and unlawful as it was done contrary to the provisions of the employment laws and the principles of fair labour practices as read together with the CBA signed between the Claimant and the Ministry of Education.

15. The Claimant relied on the Memorandum of Claim and the documents attached thereto and Witness Affidavit filed by Dorothy Kasisi Matheka in support of its Claim against the Respondent herein.

16. In conclusion the Claimant urged this Court to allow its Claim with respect to Dorothy Kasisi Matheka as prayed in its Memorandum of Claim.

Determination

17. Having considered the pleadings, evidence, submissions and authorities cited by the Claimant, the following are the issues for determination:

(i) Whether an employee-employer relationship existed between the Claimant and the Respondent herein;

(ii) Whether the termination of the Claimant's employment by the Respondents was wrongful, unfair and unlawful;

(iii) Whether the Claimant is entitled to the reliefs sought.

Whether an employee-employer relationship existed between the Claimant and the Respondent herein

18. The determination of all the heads in the Memorandum of Claim as advanced by the Claimant will depend on whether the Court finds that there was an employment relationship in existence between the Grievant and the Respondent as contended by the Claimant.

19. The Claimant maintained that the grievant, Dorothy Kasisi Matheka was under the Respondent's employment from 1st July, 1987 until 1st July, 2015 when she unfairly and unlawfully terminated.

20. It further submitted that the reason given by the Respondent for the termination of the grievant's employment was that the course she was teaching is non-examinable, which reason the Claimant maintained was not a valid reason and therefore her termination was unlawful and unfair.

21. Section 47(5) of the Employment Act provides as follows –

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

22. It was thus the burden of the Claimant to prove the existence of an employment relationship between the grievant and the Respondent herein and the unfair termination thereof.

23. In the case of **Monica Kanini Mutua v Al-Arafat Shopping Centre & another [2018] eKLR**, the Court held that in an undefended claim, it is trite that the Claimant establishes all the facts of the claim and must establish the existence of an employment relationship with the Respondent as a preliminary issue before establishing the alleged unfair termination of the employment.

24. Further, in the case of **Herman Ilangarwa Shidakwa v Armati Security Solutions Limited [2019] eKLR**, the Court noted that the Respondent had failed to enter appearance or file a defence despite being served with summons and held that the Claimant had proved his employment relationship with the Respondent through bank statements, which fact was not contested by the Respondent. The Court proceeded to make a finding in that case that the Claimant had been unfairly terminated.

25. In the instant case the Claimant has in support of its case availed the letter of termination dated 27th May, 2015, in which the Respondent terminates the employment of two persons:

(i) Miss Gladesia Makau

(ii) Mrs. Dorothy Martin

26. The Witness Statement and Submissions filed by the Claimant refer to the grievant as one **Dorothy Kasisi Matheka**. There is no indication by the Claimant that **Mrs. Dorothy Martin** and **Dorothy Kasisi Matheka** refer to one and the same person.

27. In the circumstances the Claimant has failed to prove the existence of an employer-employee relationship between the grievant in the claim, Dorothy Martins, the person who is named in the witness affidavit, Dorothy Kasisi Matheka and the Respondent herein. Since the other claims are anchored on the existence of an employment relationship between the grievant Dorothy Martins and the Respondent, this claim lacks feet on which to stand on and is accordingly dismissed.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 5TH DAY OF NOVEMBER 2021

MAUREEN ONYANGO

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MAUREEN ONYANGO

JUDGE