



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KERICHO**

**CAUSE NO. 113 OF 2018**

**JANE GESARE MASESE.....CLAIMANT**

**VERSUS**

**THE BOARD OF MANAGEMENT NAIKURU PAGPRIMARY SCHOOL.....RESPONDENT**

**JUDGMENT**

1. The claimant brought this suit alleging discrimination, unlawful dismissal and withholding of her gratuity. The suit seeks the following reliefs:-

- a. General damages for discriminations, mental and psychological anguish and defamation.
- b. One month salary in lieu of notice
- c. 12 months gross salary for loss of employment
- d. Gratuity
- e. Compensation for unlawful dismissal at the equivalent of twelve (12) months gross salary.
- f. Loss of future earnings
- g. Reinstatement of employment thereof
- h. Costs of this claim
- i. Interest of the above at court rates
- j. The Honourable court do issue such orders and give such directions as it may deem fit to meet ends of justices

2. The Respondent filed defence on 27.2.2019 denying the alleged unlawful dismissal and averred that the allegation is wild and false. It further averred that it does not employ ECDE teachers and stated that only County Education Board has the mandate to employ such teachers. Therefore, it prayed for the suit to be dismissed with costs.

3. The suit was heard on 6.10.2021 when only the claimant gave evidence and thereafter filed written submissions.

4. The claimant testified that she was employed by the respondent as an ECDE teacher on 3/2/2003 and continued until 2019 when she was dismissed. Her starting salary was Kshs 500 per month but later it was increased to Kshs 3500 per month. She was not registered with the NSSF or the NHIF.

5. In 2014, she appeared before the area Sub county Education Board for interview and emerged one of the successful candidates who attended in induction course at Kari – Kisii. After succeeding in the interview, she was told to go back to her workstation and wait for an appointment letter.

6. In January 2018, she reported to work at 8.00 a.m. but the Head Teacher told her to go back home and wait until the school committee tells her the offence she committed. The committee never called her to inform the reason for the dismissal.

7. She denied any wrong doing and maintained that she had no problems with the Head teacher and she had not been served with any warning letter before the termination. She was also not served with any notice before the termination or accorded any hearing before the termination.

8. She sought the intervention of the respondent but all was in vain as another person was given her position. In her view, the termination was malicious and it exposed her to untold suffering. Therefore, she prayed for reliefs sought in the sit contending that she served for 15 years without going for annual leave, and without being paid medical and house allowance.

9. In her written submission, she urged that the termination violated her right to fair Administrative action as guaranteed by Article 47 of the constitution. She further contend that the termination was contrary to section 41 of the Employment Act which requires that an employee be accorded a hearing before termination of employment.

### **ISSUES FOR DETERMIANTION**

10. Having considered the pleadings, evidence and submissions filed, the following issues arise for determination:-

- a. Whether the claimant was employed by the respondent.
- b. Whether the employment was unfairly and unlawful terminated.
- c. Whether the reliefs sought are merited

### **Employment relationship**

11. The claimant produced letter of appointment dated 27/1/2003 appointing her as ECDE teacher for the Naikuru PAG primary school. The letter was signed by the School's Head teacher and as such I find and hold that the claimant has proved evidence that shed was indeed employed by the respondent.

### **Termination**

12. Section 45 (1) and (2) of the Employment Act makes the following provisions regarding unfair termination of employment—

**“(1) No employer shall terminate the employment of an employee unfairly.**

**(2) A termination of employment by an employer 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.”**

13. In this case the claimant testified that she was send away from work by the Head Teacher without being told the reason, and without being accorded any hearing. Thereafter her job was given to someone else and thereby sealing the termination. She was not paid any dues after the separation.

14. The above evidence was not rebutted by the respondent and therefore. I find and hold that the claimant has discharged the burden of proving unfair termination of her employment by the respondent. On the other hand, I find that the respondent has failed to discharge the burden of proving a valid and fair reason for dismissing the claimant. It has also failed to prove that a fair procedure was followed.

15. I gather support from **Kenfreight (EA) Limited V. Benson K. Nguti [2016] eKLR**, where the Court of Appeal held that:-

**“It is considered unfair to terminate contract of service if the employer fails to demonstrate that the reason for the termination is valid and fair, that reason related to the employee's conduct, capacity and compatibility or is based on the operational requirements of the employer. The employer must also prove that the termination was in accordance with fair procedure.....”**

**Apart from issuing proper Notice according to the contract (or payment in lieu of Notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service”.**

16. Having found that the respondent has not proved the reason for the termination and that a fair procedure was followed, I proceed to hold that the dismissal of the claimant was indeed unfair and unlawful within the meaning of section 45 of the employment Act.

**Relief**

17. The claimant prayed for general damages for discrimination, mental and psychological anguish and defamation but no evidence was tendered to support the said claim and therefore it is dismissed.

18. The prayer for reinstatement is also declined because three years have lapsed since the separation in January 2018. Section 12 of the ELRC Act bears reinstatement after the lapse of 3 years from the date of separation.

19. In view of the foregoing, the appropriate relief to grant the claimant is an award of damages under section 49 (1) of the Employment Act. I award to her one-month salary in view of notices being Kshs 3500 and plus 12 months' salary as compensation for unfair termination being Kshs 42000, considering the long service of 15 years and the fact that she did not cause her dismissal through misconduct.

20. The claim for future earnings is rejected for lack of legal or contracted basis.

21. In conclusion I enter judgment for the claimant in the sum of Kshs 45500 plus costs and interest at court rate from the date hereof. The award is subject to statutory deductions.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 9<sup>TH</sup> DAY OF DECEMBER, 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 15<sup>th</sup> 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**