



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 719 OF 2015

JACQUILINE WANJA KIARIE

CLAIMANT

v

MY SCHOOL (MONTESSORI) LIMITED RESPONDENT

JUDGMENT

1. Jacqueline Wanja Kiarie (Claimant) was offered employment on a fixed term contract as a teacher by My School (Montessori) Ltd (Respondent) on 1 January 2009.
2. The contract was renewed severally, the last contract set to expire on 31 December 2015 (by this time the Claimant was serving as the Deputy Head Teacher).
3. On 11 February 2015, one of the Directors of the Respondent notified the Claimant that she was being relieved of the position of Deputy Head Teacher, and that she would revert to the position of class room teacher (at a reduced salary).
4. On 13 February 2015, the Claimant tendered a 1-month notice of resignation. The notice made reference to a meeting held on 11 February 2015.
5. Subsequently, the Claimant instituted legal proceedings against the Respondent on 29 April 2015 and she stated the Issues in Dispute as
 - i) Unlawful/unfair termination
 - ii) Failure to pay terminal benefits.
6. The Respondent filed a *Memorandum of Reply* denying that it had unfairly terminated the employment of the Claimant as well as a *Counterclaim* contending breach of contract on the part of the Claimant.
7. The Claimant filed a *Reply to the Response and Defence to Counterclaim* on 14 June 2015.
8. The Cause was heard on 4 November 2019. The Claimant and one of the Respondent's directors testified.
9. The Claimant filed her submissions on 22 November 2019 while the Respondent filed its submissions on 6 December 2019.
10. The Court has considered the pleadings, evidence and submissions.
11. In the view of the Court, the determinative question in this Cause is whether the Respondent's decision to relieve the Claimant of her duties as Deputy Head Teacher on 11 February 2015 repudiated and/or terminated the contract unfairly.

Unfair termination of employment

12. The Claimant, as already alluded to was serving the Respondent on fixed term contracts and the last effective contract was signed on 24 November 2014.
13. Under the contract, the Claimant was offered the position of *Deputy Head and Class Teacher* from 1 January 2015 to 31 December 2015.
14. It appears that the Respondent was not happy with the performance of the Claimant. On 11 February 2015, it called for a meeting which was attended by other staff members.

15. After the meeting, the Respondent wrote to the Claimant to inform her that she had been relieved of her position of Deputy Head Teacher, but would remain as a classroom teacher. On 13 February 2015, the Claimant tendered her resignation.

16. The substantive position of the Claimant by 11 February 2015 was that of the Deputy Head and Classroom Teacher.

17. The question therefore arises whether the 2 positions were exclusive.

18. In the view of the Court, the positions could not be severed as the contract specifically designated her as Deputy Head and Class Teacher.

19. Therefore, by relieving the Claimant of the position of Deputy Head Teacher on account of performance, the Respondent was repudiating the contract. It was bringing the contract to an end.

20. The Respondent should have given the Claimant notice of the termination of her contract as Deputy Head Teacher in terms of section 35(1)(c) of the Employment Act, 2007.

21. Since that was not done, the Court finds that the Respondent not only unfairly terminated the contract on 11 February 2015 but showed an intention to repudiate it.

22. And, if indeed there were concerns about the Claimant's performance, the Respondent did not prove such performance deficiencies as required by sections 43 and 45(1) & (2) of the Employment Act, 2007.

23. If the Court were wrong in the conclusion, it would still have held that the Claimant's resignation on 13 February 2015 was in the circumstances akin to *constructive dismissal*.

Counterclaim

24. The Court having concluded that it is the Respondent which repudiated and/or terminated the contract unfairly, finds the contention that the Claimant was in breach of contract by not serving the notice period as pleaded in the *Counterclaim* as unsustainable.

Compensation

25. The Claimant served the Respondent cumulatively for about 5 years and in consideration of the length of service, the Court is of the view that the equivalent of 5 months wages as compensation would be fair (gross wage was Kshs 44,400/-).

Pay in lieu of notice

26. The Respondent did not give the Claimant notice that it would terminate her contract as Deputy Head Teacher and the Court therefore concludes that she is entitled to 1 month pay in lieu of notice (basic salary was Kshs 38,609/-).

Earned salary for February 2015

27. The Claimant sought Kshs 22, 200/- being earned salary up to date of separation. The Claimant is entitled to the same as of right.

Service pay

28. On account of service pay, the Claimant sought Kshs 288,600/-.

29. A copy of pay slip produced by the Claimant show that she was registered with and making contributions towards the *National Social Security Fund*.

30. The Claimant is therefore ineligible for *service pay* pursuant to section 35(5) & (6) of the Employment Act, 2007.

Certificate of Service

31. A certificate of service is a statutory entitlement and the Respondent should issue one to the Claimant within 21 days.

Conclusion and Orders

32. The Court finds and declares that the Respondent unfairly terminated the Claimant's contract and awards her

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|---------------------------|----------------|
| (a) Compensation | Kshs 222,000/- |
| (b) Pay in lieu of notice | Kshs 38,609/- |
| (c) Earned wages | Kshs 22,200/- |

TOTAL **Kshs 282,809/-**

33. Respondent to issue certificate of service within 21 days.

34. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 24th day of January 2020.

Radido Stephen

Judge

Appearances

For Claimant Ms. Kimachia instructed by S.M. Chege & Co. Advocates

For Respondent Mr. Kigera instructed by R.W. Mbanya & Co. Advocates

Court Assistant Lindsey