



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CAUSE NO. 134 OF 2018**

**AGNES NJOKI.....CLAIMANT**

**VERSUS**

**BOARD OF MANAGEMENT**

**CHINGA BOYS HIGH SCHOOL.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Board of Management, Chinga Boys High School and averred that the Respondent is an institution established under the Education Act (now the Basic Education Act). She averred that at all material times to the suit she was an employee of the Respondent from July 2012 as a farm manager. The Claimant averred that she served as such until 30<sup>th</sup> October 2017 when her services were abruptly terminated and that her dues remained unpaid to date. She averred that she was neither notified of the reasons for the dismissal nor given an opportunity to be heard prior to her dismissal. She averred that the dismissal was without any lawful cause and/or due process in contravention of the rules of natural justice. The Claimant averred that she was thus entitled to a declaration that the dismissal was unlawful, unfair and/or illegal and sought the issuance of a certificate of service and payment of the sums being 1 month's salary in lieu of notice – Kshs. 11,190/-, compensation for unlawful termination – Kshs. 134,280/-, leave pay dues – Kshs. 54,228/-, salary arrears under job group E for 60 months – Kshs. 428,400/-, rest days for 5½ years – Kshs. 196,944/-, severance pay – Kshs. 67,140/- and commuter allowance @4,000\* 6 years – Kshs. 24,000/-, all totaling Kshs. 967,432/-. She also sought costs and interest.

2. The Respondent's defence was that to the effect that no irregularities or illegalities occurred at all. It was averred that no members had been recruited from the Respondents college. The Respondent also averred that in response to para 8 of the memorandum of claim, no members had been recruited from the Respondent's college. The Respondent averred that they conducted the elections with due diligence and treated the Claimant as the Employment Act provides and as per the Union Constitution. The Respondent denied conducting the elections irregularly. It averred that the suit as taken out, drawn and filed offends the mandatory provisions of Cap 39 and Cap 40 of the Laws of Kenya and gave notice that it would raise and argue preliminary objection at the hearing hereof and have the suit dismissed with costs. The jurisdiction of the Honourable Court was admitted.

3. The Claimant was heard as was the Respondent's witness Ashford Kirimi M'Arachi the Principal of the Respondent. The Claimant testified that the Respondent employed her on its farm in July 2012 and worked till October 2017 when she was just dismissed. She stated that she was never issued with any other letter. She denied going on leave and testified that she was paid Kshs. 6,000/- a month and she sought an increment and she was dismissed. She stated that despite the letters she did not get a raise and that she worked from Monday to Saturday with Sundays as the only off days. She was cross examined and testified that she never received any warning letters in the 6 years of service. She stated that whenever she needed she would seek leave and that she was off once. She stated that she used to fill leave requests. She was shown a bundle of leave application forms filed by the Respondent and stated that she did not take the leave days indicated. She testified that she would take off each week as she had a child who had challenges and the child was hospitalized. She stated that she wrote a letter and gave thanks to the Respondent. She said that the headteacher told her she would be paid. She testified that milk production was at 100 litres and the tea production rose during her tenure. She stated that there were no letters written to her complaining about productivity. She admitted getting a warning letter for reporting late. On further cross-examination she stated that the letters at pages 12 and 13 on productivity were written as production of milk was low on some days and high on others. She stated that she was given the letters and that the work was done. She testified that the apologies were only 1 or 2 and did not relate to her mistakes. In re-examination she stated the permission sheets were hers and that the school gave her the termination.

4. The Respondent's witness testified that he was a teacher and the principal of the Respondent. He produced the documents the Respondent had attached to the reply to claim and adopted his statement filed. His statement was to the effect that the Claimant was a poor performer and she was dismissed after productivity fell and for causing the death of many livestock. He stated that she was frequently absent from work exacerbating the frequent absences. He stated that she was warned repeatedly and she would apologise for the mistakes made and promise never to repeat them. He was cross examined and he testified that he knows the labour laws governing employees and he believed that the procedure was followed by the Board of Management. He was shown the payslip filed by the Claimant and he stated he was not aware how the clusters were reached. He was shown the regulations governing the education sector and stated that he knew the regulations. He testified that he believed the employer honoured the terms. He was referred to Government circulars issued from time to time and he stated that he was not aware of the underpayment or arrears sought. In re-examination he stated that he was relying on information in the records at the school and that each employee had a personal file held by the Respondent. He stated that the employee left and was satisfied hence the letter she wrote appreciating the school. That marked the end of oral testimony and parties were to file written submissions.

5. The Claimant filed submissions in which she submitted that the letter of termination in its subject line showed that she was terminated on account of redundancy. The Claimant submitted that under Section 40(1)(e), (f) and (g) of the Employment Act makes provision that an employer shall not terminate a contract of service on account of redundancy unless the employer complies with the conditions set out in the said Section. The Claimant submitted that the Respondent had not demonstrated compliance with Section 40 and she thus urged the Court to find that she was unlawfully terminated from service and entitled to compensation in terms of Section 49(c) of the Act. She submitted that

she was entitled to the reliefs sought and in particular that she never went on leave and was entitled to leave in terms of Section 28 of the Employment Act. She submitted that her evidence on leave was not controverted. The Claimant submitted that the Respondent was the custodian of all employment records inclusive of leave forms pursuant to Section 74(1)(f) and that the Respondent was required to keep a written record of all employees and the record includes particulars of annual leave entitlements, days taken and days due specified in Section 28. The Claimant submitted that the Respondent has an obligation to prepare a leave form signed by the Claimant to confirm attendance and that in the absence of the same she urged the Court to find she never took leave. The Claimant submitted that she testified that she was earning Kshs. 6,000/- which was underpayment and that she had produced a payslip in the memorandum of claim and the attached payslip was in support of her claim. The Claimant submitted that Kenya Gazette Notice No. 56 of 3<sup>rd</sup> September 1993 under Regulation 4 provides for terms and conditions of employment for non-teaching staff and that regulation 4 provides that persons belonging to a professional cadre and employed by the Board shall be employed on such terms and conditions of service similar to those recommended for equivalent posts in the civil service and as per the applicable scheme of service. The Claimant submitted that a similar position is reflected in the Basic Education Regulations 2015 under regulation 18. The Claimant cited the case of **Dadson Maina & 33 Others v Board of Management, Nyeri Primary School [2017] eKLR** where Ongaya J. stated that there was no reason to impose disadvantageous terms and conditions of service upon persons employed by the Board. The Claimant cited the case of **KUDHEIHA v B.O.G Ngaru Girls Secondary School [2014] eKLR** where the only issue for determination was whether the grievant was an employee of the respondent's BOG or not and if so whether such employee would benefit from PSC circulars issued from time to time for employees in her cadre. The Claimant submitted that she was not paid in accordance with the circulars issued on 1<sup>st</sup> July 2012 by the Ministry of State for Public Service which provided the new structure for civil servants. She claimed arrears of Kshs. 428,400/- from July 2017 to November 2017 and Kshs. 51,250/- from July 2017 to November 2017 as per the circular dated 13<sup>th</sup> July 2017 issued by the Salaries and Remuneration Commission. The Claimant submitted that she was entitled to commuter allowance as per the regulations of Kshs. 216,000/- for the 6 years as she was entitled to commuter allowance of Kshs. 3,000/- each month. She sought compensation for working on Saturdays as well as severance pay in accordance with Section 40(1)(g) of the Employment Act.

6. The Respondent submitted that the Claimant testified that she was given the redundancy letter dated 30<sup>th</sup> October 2017 which was to the effect that her job description had been scrapped. The Respondent submitted that the Claimant failed to state the letter conformed to the provisions of Section 40(1)(b) as well as Section 40(1)(f) and 40(1)(g) of the Employment Act. The Respondent submitted that the claim that she was not contented with the termination was untrue as she wrote a letter dated 30<sup>th</sup> October 2017 appreciating the 6 years she had been working for the Respondent. The Respondent submitted the Claimant went on leave as demonstrated by the many permission sheets which showed she was off for 77 days in total. She also was allowed to be away when the school was closed which amounted to 4 months in a year. The Respondent submitted that the 4 months taken each year would enough to compensate her for her leave days. The Respondent submitted that its sole witness testified that the Claimant was often absent without leave which was itself grounds for misconduct and that the frequent absences affected production leading to huge losses making the position untenable. The Respondent submitted that the Claimants frequent absenteeism was sufficient to warrant summary dismissal but instead of going that route the Respondent decided to scrap her position. It submitted that the procedure was followed and that the Claimant had a burden to prove there was wrongful dismissal which she had failed to do. The Respondent urged the dismissal of the suit and relied on the cases of **Justus Miwani v Jiangxi & Hydro Power Construction Limited [2019] eKLR** and **Heritage Insurance Company Limited v Christopher Onyango & 23 Others [2018] eKLR**.

7. The Claimant articulated a different case at each stage. In her pleadings she asserted dismissal without cause and non-payment of her dues, in her testimony she alluded to agitation for a wage increase as the cause of her dismissal while in her submissions she asserted redundancy that was unprocedural. She thus did not prove her case at all as she testified that she received a salary of Kshs. 6,000/- a month which was contrary to her pleadings and documentary evidence indicating she was earning Kshs. 11,190/- a month. She also had penned a letter thanking the Respondent for her service which was contrary to the assertion that she was terminated without notice or warning. If indeed that was so, why did she thank the Respondent? Despite the Respondent answering a different claim in the defence filed, the statement of the sole witness for the Respondent and his testimony lined up. He stated clearly that the Claimant was not dismissed without notice and that she was warned severally before termination through redundancy. Whereas she had an obligation to demonstrate an unfair dismissal took place the Claimant engaged in falsehoods by stating she never went on leave yet the defence was replete with documents showing she took leave every week. In addition, being a school it was closed for some months in the year and she did not demonstrate she worked all through without breaks. She said she worked every day from Monday to Saturday yet her leave forms show she was off midweek on many an occasion. Her evidence on leave was controverted by the Respondent's documentation. As the custodian of all employment records inclusive of leave forms pursuant to Section 74(1)(f) of the Employment Act, the Respondent showed how she took many days off. Before the court and in her submissions and pleadings, the Claimant did not appear as a truthful witness and her claim was thus unproved on a balance of probabilities. Its fate is singular – dismissal. Suit is dismissed with no order as to costs.

It is so ordered.

**Dated and delivered at Nyeri this 21<sup>st</sup> day of January 2020**

**Nzioki wa Makau**

**JUDGE**