



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NUMBER 628 OF 2017

BETWEEN

JOSEPHINE NZAU NZILUCLAIMANT

VERSUS

BOARD OF MANAGEMENT RASUL AL AMIN

PREPARATORY SCHOOL.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

IRB Mbuya & Company, Advocates for the Claimant

Khalid Salim & Company Advocates for the Respondent

JUDGMENT

1. The Claimant filed her Statement of Claim on 3rd August 2017. She states, she was employed by the Respondent School as a Cook, between 7th January 2001 and 4th January 2017 when the Respondent terminated Claimant's contract.

2. The Claimant was underpaid salary for the period 2009 to 2017. She was not allowed to go on annual leave. Termination was without notice and valid reason. She prays for Judgment against the Respondent for:-

- a. 1 month salary in lieu of notice at Kshs. 7,765.
- b. Annual leave for 16 years at Kshs. 86,973.
- c. Underpayment of salary for the period 2009- 2017 at Kshs. 219,141.
- d. 12 months' salary in compensation for unfair termination at Kshs. 93,184.

Total...Kshs. 407,064.

e. Certificate of Service to issue.

f. Any other suitable order.

g. Costs.

h. Interest.

3. The Respondent filed its Statement of Response on 29th May 2018. It concedes to have employed the Claimant in the position and for the period, stated in the Claim. Her salary was Kshs. 4,500 initially. It was subsequently raised to Kshs. 5,500 net monthly. The Respondent deducted school fees for the Claimant's 3 Children, who were Pupils at the Respondent School, from the Claimant's gross pay. She utilized her annual leave when the School was closed thrice in a year. She engaged in acts of gross misconduct including: reporting to work late; neglecting her work; selling food to the School Children; and leaving Nursery Pupils in the Washrooms unattended. She was given a hearing and conceded the allegations against her. Her Certificate of Service is ready for collection. The Respondent prays the Court to dismiss the Claim with costs.

4. The Claimant, and the Headmaster Ali Were, gave evidence for the respective Parties on 14th October 2019. They adopted as their oral evidence, the Pleadings and Witness Statements on record.

5. On cross-examination, the Claimant testified that there were no allegations against her. She was not aware of any disciplinary meeting convened by the Respondent. She did not sell food to School Children. She conceded she reported to work late, on certain occasions. She had 3 Children at the School- Peter, Joshua and Samuel. The staff had a bursary. The School closed 3 times a year. She would close for 1 week and go back to cook for Teachers. She was paid while on holiday. Redirected the Claimant told the Court she did not sign the minutes indicated as capturing a disciplinary hearing. She was not invited to any disciplinary hearing. There was no agreement that the School deducts fees from her salary.

6. The Headmaster testified on cross-examination that there was no register showing the Claimant missed duty on any occasion. Board meetings were ordinarily reduced to writing. There was no minutes of the Board exhibited before the Court. The Claimant did not sign record shown to comprise disciplinary hearing, exhibited by the Respondent. She was not invited to any hearing accompanied by a Colleague or Trade Union Representative. There was no holiday tuition at the School. The School remained closed over the holidays. Teachers would stay back at the School for no more than 2 weeks. The Respondent alleged that the Claimant left Children unattended in the Washrooms. The allegations were not put to the Claimant in writing. There was no notice to show cause why she should not be disciplined, issued to the Claimant. Redirected, the Headmaster reaffirmed that the School remained closed over the holidays. The Claimant used to admit allegations against her. The reporting time was 7.30 a.m. and closing time 4.00 p.m. The Claimant would report at 9.30 a.m. There was no policy on salary deduction.

The Court Finds: -

7. The Claimant was employed by the Respondent School as a Cook, between 2001 and 2017.

8. Her contract was terminated by the Respondent, on various allegations, captured at paragraph 3 of this Judgment.

9. She claims her salary was underpaid. In her List of Documents on record, she refers to Wage Orders in support of her prayer for underpayment.

10. No Wage Orders are attached. There is a bare allusion to Wage Orders. The allusion is with regard to the years 2011 to 2017. There is no reference to any Wage Orders of 2009 -2010. No Wage Orders for any period have been availed to the Court. There are Statements of Account from Imarika Sacco and a letter of demand, attached to the List of Documents. Where are the relevant Gazette Notices? The Claimant has not established what she was paid over the years in salary, and what she ought to have been paid, in accordance with Wage Orders. Furthermore, her Children were schooling without direct payment of fees. The Respondent was entitled to take into account this benefit, in setting the rate of Claimant's monthly salary. The prayer for underpayment of salary is rejected.

11. Schools within the Republic of Kenya, ordinarily close for holidays thrice a year. They go for extended vacation of close to 2 months in November and December each year. In addition, they have at least 3 weeks in April and August each year. Teachers and non- teaching staff would be expected to utilize their annual leave during the school vacation. The Claimant must have utilized her 63 days of annual leave when the Children were away on holiday. It is not reasonable to compel the Respondent to pay annual leave in arrears of the entire period worked, while the Claimant did not work in continuity, without break, over that period. The prayer is rejected.

12. There were multiple accusations against the Claimant, leading to dismissal. None was specifically put to the Claimant, and explanation sought in writing, through the mode of notice to show cause. There were no charges and no testing of the allegations, at a structured disciplinary forum. There was no register of attendance, showing when the Claimant absented herself from duty. Why would she sell food to School Children, while her own Children were part of the Children? Why sell food, while her duty was to cook food, and feed the School? Why was she accused of leaving Children unattended in the Washrooms, while her work was to cook? A properly structured disciplinary process, would have assisted in answering some of these questions. The Respondent did not discharge its obligations under Sections 41, 43 and 45 of the Employment Act 2007.

13. Termination was unfair.

14. The Claimant had worked for 17 years. Her record was fairly unblemished. She would not survive 17 years cooking for the School, if she was given to disciplinary lapses of a grave nature. She did not disclose how old she was on termination, and how long she expected to go on working. She did not say if she made attempt at securing comparable job. She had the benefit of long service as a Cook. She does not appear to have received any terminal benefits, her long years of service notwithstanding. She did not contribute significantly to the circumstances leading to her dismissal. ***She is allowed the prayer for compensation for unfair termination, equivalent to her 12 months' salary at Kshs. 78,000.***

15. She is granted 1 month salary in lieu of notice at Kshs. 6,500.

16. Certificate of Service to issue.

17. Costs to the Claimant.

18. Interest granted at 16 % per annum from the date of Judgment till payment is made in full.

IN SUM, IT IS ORDERED:-

a. Termination was unfair.

b. The Respondent shall pay to the Claimant compensation for unfair termination at Kshs. 78,000 and notice at Kshs. 6,500- total Kshs. 84,500.

c. Certificate of Service to issue.

d. Costs to the Claimant.

e. Interest allowed at the rate of 16% per annum from the date of Judgment till payment is made in full.

Dated and delivered at Mombasa this 14th day of February 2020.

James Rika

Judge