



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 271 OF 2017

ROSE NGII MWANZIA.....CLAIMANT

VERSUS

KENYA WATER INSTITUTE.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent alleging unfair labour practices and unlawful termination of her contract of service. She averred that she worked as a cook earning Kshs. 15,414/- which was enhanced during her service and she was earning Kshs. 22,998/- at the time of dismissal. The Respondent did not make regular contributions to NSSF and NHIF and she averred that on 6th July 2016 she was demoted from cook to toilet cleaner for no apparent reason. She averred that she was dismissed via SMS and she suffered mental anguish on account of her dismissal. The Claimant averred that she sought the intervention of the Labour Office at Kitui but the conciliation meeting that took place did not result in any resolution. The Claimant averred that the Respondent was therefore liable to pay her salary arrears for one month – Kshs. 22,998/-, compensation in lieu of leave for 5 years – Kshs. 229,980/-, house allowance for 55 months – Kshs. 189,733/-, service pay – Kshs. 17,248/-, compensation for the unlawful dismissal from employment – Kshs. 275,976/- and a certificate of service.

2. The Respondent filed a defence in which it averred that the Claimant was a casual and that her NSSF and NHIF contributions were diligently remitted. It averred that contrary to her averments she quit her job on her own volition. The Respondent asserted that the Claimant was therefore not entitled to any payment and the suit should therefore be dismissed with costs.

3. The Claimant testified as did Mr. James Karisa Mweni for the Respondent. The Claimant reiterated that she was not given any prior notification that she would be dismissed. She said that she was sent an SMS by the acting principal Margaret Kasuki. She was cross-examined and she stated that she commenced working on 12th January 2012 and that she worked as a casual all through. She stated she had no running contract when she was dismissed by the acting principal. She said the payment was computed daily but the cash would be paid after 30 days. Upon her re-designation from cook to toilet cleaner her salary did not change. She testified in re-examination that she was called a casual but was paid after 30 days and that she worked without a contract for many months.

4. The Respondent's witness testified that he was the acting human resource manager for the Respondent and that he knew the Claimant. He stated that the Claimant was a casual on 2 month contracts. He said that the Claimant was reassigned and not demoted and she left after he contract expired. He testified that she did not reapply and stated that she would be on holiday during the 3 holiday periods at the institution. In cross-examination he testified that the Claimant was not dismissed and that a bulk SMS used at the institution was sent calling on the staff to report. He understood that there were financial constraints and that there were contracts for 2016 but they had only availed the ones up to December 2015. He stated that he was not aware of any proposal to pay.

5. The parties were to file submissions and the Claimant submitted that the Respondent did not accord her the safeguards under Section 41 of the Employment Act. She submitted that the Respondent also contravened the law by failing to conduct the hearing that is provided under Section 41(2) of the Act. She cited the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** on the requirement for substantive and procedural fairness. The Claimant submitted that her contract converted into a monthly contract in terms of the Employment Act Section 37(3) as she served continuously for over 2 months. The Respondent did not file any submissions despite directions to do so 14 days after service upon it by the Respondent.

6. The contract of the Claimant was stated to be a 2 month contract yet the last batch of contracts was not availed. She therefore at the time of dismissal was not serving on contract but was on an indeterminate period of hire much similar to the one contemplated under Section 37(3) of the Employment Act. She was entitled to some safeguard under Section 41 as held in the case of **Walter Ogal Anuro v TSC (supra)**. The Claimant was therefore entitled to recover her unpaid dues which included her leave pay, the notice period as well as salary arrears. She is therefore entitled for judgment for:-

- a. Kshs. 22,998/- one month notice,

- b. Kshs. 137,988/- payment lieu of leave for 3 years,
- c. Kshs. 124,188.87 – house allowance for 36 months,
- d. Kshs. 17,248/- as service pay,
- e. Kshs. 114,990/- being 5 compensation for the unlawful dismissal from employment
- f. Certificate of service
- g. Costs of the suit.

It is so ordered.

Dated and delivered at Nyeri this 30th day of January 2019

Nzioki wa Makau

JUDGE

I certify that this is a true

copy of the original

DEPUTY REGISTRAR