

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA AT MERU

CAUSE NO. 33 OF 2018

(Formerly Nyeri ELRC Cause No. 91 of 2018)

DEBORAH MAKENA MUGAMBI.....CLAIMANT

VERSUS

THE B.O.M MUTARANGA PRIMARY SCHOOL.....RESPONDENT

JUDGMENT

1. The Claimant herein sued the Respondent for her alleged unlawful/unfair dismissal from work. She averred that she was employed on 4th September 1995 as a pre-school teacher at a salary of Kshs. 2,500/- which was later increased to Kshs. 4,500/-. She averred that she was terminated from her employment on 2nd January 2018 verbally and that prior to her termination, the Respondent did not prove any misconduct nor serve her with a reasonable notice prior to the dismissal. The Claimant averred that she was thus unlawfully dismissed and was entitled to maximum compensation being 12 month's salary, one month's salary in lieu of notice, salary underpayment and costs of the suit.

2. The Respondent in its defence averred that the Claimant was a teacher in the Early Childhood Section (ECD) of the Respondent. It was averred that she was a casual worker and her employment was year to year as a stopgap measure as no ECD teacher had been posted to the institution by the Government. The Respondent averred that the Claimant's salary was paid by the parents of the ECD children as negotiated and passed during successive PTA meetings based on needs assessment. The Respondent averred that the grievant was a member and participant of the PTA and actually attended meetings where the issues of the salary and the retainer were discussed. It was averred that the teacher was aware that her salary and retainer were paid from contributions from parents and was pegged to the number of ECD students admitted or enrolled. The Respondent averred that in 2015 the county Government of Tharaka Nithi finally decided to employ and post a teacher for ECDE to the school a post or which the grievant duly applied. The Claimant applied but was unsuccessful as she did not possess the required qualifications. The Respondent advised her to take up adult classes for her to attain KCSE certificate for her to be recommended for appointment by the Respondent and that she was issued with a regret letter which notified the Claimant of the school's intention not to retain her services come January 2018. The Respondent paid her salary up to the end of the term and in addition paid her salary for November and December despite there being no services rendered. The Respondent stated that while tendering her last pay in January 2018, the Respondent advised the Claimant that the school BOM meeting would discuss and propose a send-off package but instead of waiting, the Claimant rushed to court which preempted the Respondent from discussing her send-off package as the matter was now in court. The Respondent averred that the Claimant never served a demand prior to the institution of the suit.

3. The Claimant testified as did Mary Mutugi and Ruth Mugao for the Respondent. The Claimant stated that she had served as an ECD teacher at the Respondent before she was told her services were terminated in January 2018. She stated that she was not paid her dues. The Claimant was cross-examined and she stated that she was not invited to the PTA meeting. She testified that she did not recall any discussions about the hire of another teacher. She stated that the Respondent spoke of hiring another teacher as she did not have a Form 4 certificate. She stated that the teacher hired was by the BOG not the county. She was not informed of the send-off and was dismissed in front of students. The Respondents witnesses stated that the Claimant sought an increase in payment and the Respondent could not pay extra money to the Claimant before the BOM sanctioned the increase. She stated the Claimant was in attendance at the meetings the Respondent held and that she was paid for the month of October, November and December despite there being no school. She stated that the Claimant was notified and was expected to be feted at a send-off. She testified that the parents were bitter about the suit. In cross-exam she stated that there was to be a send-off that was planned and that the Claimant had come for her salary on opening day and was paid. She stated the Claimant was notified of the termination because she did not have qualifications. The second witness for the Respondent stated that she was a member of the BOG and that the Claimant did not have the qualifications and so was not considered for employment as ECD teacher. She stated that there was a send-off that was planned but the suit was filed before the plan was executed. She stated that the Claimant was not dismissed. In cross examination, she stated that she was not required to carry school records and that there was a token planned for the Claimant but the Claimant did not wait. She stated that there was no need to offer settlement as the Claimant is the one who came to court.

4. The Claimant filed submissions in which she asserts that she was dismissed without adherence to the procedure in Section 41 of the Employment Act. The case of **Felister Nduku Nzaku v Joyce Wairimu Gitau [2018] eKLR** was cited in support of the submissions of the Claimant. She submitted that the Respondent did not prove that there were valid grounds for the termination in terms of Section 43, 45 and 47 of the Employment Act. The Claimant submitted that she was entitled to compensation as well as the prayers in her claim. The Respondent did not file submissions.

5. The Claimant's dismissal was from all accounts after she failed to meet the entry requirement for a teacher under ECD upon the takeover by the County Government in ECD in 2018. The Claimant was a Std. 8 leaver and was asked to get a KCSE certificate to permit her to get a recommendation for the ECD recruitment. She spurned a send-off that was proposed for her by the parents and the Respondent. It is indicated in minutes exhibited as evidence and which the Respondent's 2 witnesses confirmed as true that the Claimant was present at the meeting where her matter was discussed. She however denied this. She came across as a dishonest person who sought to reap where she had not planted. She was given notification of the changes and was even advised on what to do in order to remain relevant at the Respondent but she did not heed the advice. She rushed to court thinking that it was a safer bet than negotiating an exit package from the Respondent. Her employment was casual and could be terminated on month to month basis. She was not retained come January 2018 and she therefore

received her last pay in January 2018 marking the end of her service at the Respondent. She was paid a salary based on the number of students she taught. She failed to prove the dismissal was without notice or capricious to warrant the remedies she enumerated in her claim. The suit is devoid of merit and is dismissed but with no order as to costs.

It is so ordered.

Dated and delivered at Meru this 8th day of February 2019

Nzioki wa Makau

JUDGE