

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 186 OF 2017

RACHAEL GITHIGIA MACHARIA.....CLAIMANT

VERSUS

B.O.M NGANGARITHI SECONDARY SCHOOL.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent seeking to recover for the recovery of terminal dues. She avers that she was a secretary/lab assistant/store keeper/ bursar since 2012 to 2016. She asserts that she received a letter on 1st November 2016 deploying her from the secretarial position to the kitchen department to carry out cooking related duties on a contractual basis for 3 months to commence from 7th November 2016. She wrote back complaining about the deployment to the kitchen asserting the deployment was unfair and discriminatory as she was a qualified secretary. She was locked out of the premises on 7th November 2016 after she declined to sign the contract of employment deploying her to the kitchen. She sought the payment of her one month's salary in lieu of notice – Kshs. 11,000/-, leave days unpaid Kshs. 55,000/-, maternity leave days unpaid – Kshs. 33,000/-, 31% of gratuity for the years worked – Kshs. 204,600/-, overtime worked – Kshs. 170,322/-, interest on the sums at court rates as well as costs of the suit.

2. The Respondent filed a defence in which it asserts that the suit offended the mandatory provisions of Cap 39 and Cap 40 of the Laws of Kenya. It was averred that the Respondent was a stranger to the averments of the Claimant and in the alternative asserts that if the Claimant was dismissed from work then the same was done following due procedure as laid down in the Employment Act, 2007.

3. The parties were to file submissions so that the court could determine the suit in terms of Rule 21 of the Employment and Labour Relations Court (Procedure) Rules 2016 but none were filed. The determination is therefore on the basis of pleadings and the evidence availed by the Claimant through her memorandum of claim. The Claimant was the secretary of the Respondent as shown by the letters written by the Principal on 30th May 2014 and 7th January 2015. She worked both as secretary and store keeper and from 1st March 2016 she was offered a contract as a lab assistant. The contract exhibited was not signed and on 8th August 2016 the Principal wrote seeking to receive the contract by close of business on 9th August 2016 failing which it would be deemed that she had forfeited her employment. On 9th August 2016 she wrote a letter requesting for 7 days leave between 23rd August 2016 to 31st August 2016. The letter made no mention of the contract she was expected to execute. On 4th October 2016 she was given a letter indicating she was to proceed to annual leave from 5th October 2016 to 26th October 2016 whereupon she was to resume her duties on 27th October 2016. On 1st November 2016 she was issued a letter indicating that she was deployed to the kitchen and was to sign the contract by 4th November 2016 with a reporting date of 7th November 2016 in her new department to carry out cooking duties. The contract attached was for appointment as a cook and storekeeper. The contract was unsigned and on 3rd November 2016 she wrote a letter protesting her deployment to the kitchen as unfair. The Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers (KUDHEIHA) wrote a letter on 4th November 2016 protesting the deployment terming it as discriminatory. The Union requested the withdrawal of the letter and an offer of a contract on the lines she had worked previously being secretary/storekeeper/lab assistant. She was quite clearly placed in an awkward position where she had to descend into cooking duties from the position she held at the school as a secretary and storekeeper. She even worked as a lab assistant. In my view, the deployment to the kitchen was demoralizing and discriminatory and the constructive dismissal it generated wholly the fault of the Respondent. She was not entitled to all the leave dues she claims as she went on leave as per her evidence and even was compelled to go on leave by the Respondent at times. She did not prove she as entitled to maternity leave either as no records were availed of the period she worked while expected to be on maternity leave. She was not able to show that she was entitled to any overtime. She was dismissed without notice and she is entitled to one month's notice. The manner of her dismissal was so pale as to compel the award of the maximum compensation for 12 months. The Respondent did not even pretend to offer some modicum of fairness as prescribed under Section 41 of the Employment Act. She will also have costs of the suit. She had no provision for the payment of gratuity in her contract and is therefore not entitled to gratuity. NSSF dues were paid on her behalf disentitling her to any service pay as well.

4. In the final analysis I enter judgment for the Claimant against the Respondent as follows:-

- i. One month's salary as notice – Kshs. 11,000/-
- ii. 12 month's salary as compensation – Kshs. 132,000/-
- iii. Costs of the suit
- iv. Interest at court rates on the sums in i) and ii) above from date of judgment till payment in full.

It is so ordered.

Dated and delivered at Nyeri this 18th day of March 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar