



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.172 OF 2015**

**KUDHEIHA WORKERS UNION .....CLAIMANT**

**VERSUS**

**SALIENT SECONDARY SCHOOL.....RESPONDENT**

**JUDGEMENT**

Issues in dispute

1. Service gratuity
2. Salary underpayments
3. Underpayment of house allowance
4. Unpaid leave for the year 2008, 2009 and 2010

The claimant is a trade union representing domestic, hotel, educational institutions and hospital workers. The respondent is an educational institution registered under the Basic Education Act. the parties have a Recognition Agreement and Collective Agreement setting out terms and conditions of employment.

The claim relates to the claimant member, Rachel Alice Nungari Wanjiru, the grievant.

The grievant was employed by the respondent as a copy typist/secretary on 15<sup>th</sup> May, 2000 at a consolidated wage of Ksh.4, 220.00 per month. Upon confirmation of employment the grievant was given Ksh.330.00 per month in house allowance.

By letter dated 28<sup>th</sup> February, 2007 the grievant wrote to the respondent seeking a salary review and again on 30<sup>th</sup> September, 2008.

By letter dated 15<sup>th</sup> November, 2010 the grievant resigned from her employment which the respondent accepted.

By letter dated 30<sup>th</sup> July, 2011 the respondent confirmed the grievant was entitled to gratuity for 10 years of service and this would be paid by the board of management. The matter was then reported to the claimant. There was no agreement at the shop floor and the matter was reported to the Minister and a conciliator invited the parties but there was no agreement.

The claim is that the respondent has refused to comply with clause 31 of the CBA and section 35(6) (b) of the Employment Act on the payment of gratuity and terminal dues.

The claimant is seeking for orders that the grievant should be paid her gratuity, the underpayments, unpaid leave allowances and costs of the suit.

*1. Underpayments*

*July, 2007 to June, 2008 at Ksh.16, 258 – 3370 = 12,888 x 12 = Ksh.154, 656.00*

*July 2008 to April, 2009 due Ksh.147, 765.00*

*July 2009 to June due Ksh.127, 092.00*

2. *Gratuity - Ksh.18,403 x 10 + 184,030.00*

3. *Leave unpaid for 3 years Ksh.18,403 x 3 = Ksh.55,030.00*

4. *House allowance underpayments for 33 years 200 x 3 + Ksh.7,200.00*

The grievant testified in support of the claim. Upon employment by the respondent as a copy typist she resigned to seek greener pastures and expected to be paid her terminal dues which the respondent has failed to pay. The respondent alleges there was a cheque issued but this is not correct. What was tabulated in terminal dues was less than due. On 20<sup>th</sup> February, 2012 the respondent wanted to pay ksh.104, 209.00 but the grievant refused to collect this cheque. The service pay was low, there were leave days due and not included and the underpayments were not put into account.

The grievant also testified that her salary was inclusive of house allowance. The salary was reviewed in the year 2007, 2008 and 2009. During school holidays she would be at work. The service pay due should comply with the Civil service scheme of service setting out the wage due to a copy typist.

## **Defence**

The defence comprise mere denials.

The respondent attached a long list of work records.

No witness was called by the respondent.

The hearing closed and both parties filed written submissions.

The claimant in submissions restated its case and the claims made.

The respondent submitted that the grievant resigned from her employment and her terminal dues calculated all amounting to Ksh.122,883.00 being 10 years gratuity pay; unpaid leave; and unpaid annual increment. The total was paid less due deductions all being Ksh.104, 209.00 but the grievant refused to collect the cheque.

The grievant last salary was ksh.7, 812.00 per month and the due gratuity is conceded as due all being Ksh.78, 120.00. the claim for 3 years annual leave due is also conceded and based not on the monthly wage is Ksh.26, 436.00. there is an unpaid annual increment all being Ksh.14, 710.00. such totals to ksh.119, 266.00 less notice pay, an overpayment made in December, 2010 and grant total due should be ksh.100, 592.00.

## **Determination**

It is common cause that the claimant and the respondent's relationship is governed by a CBA. Such sets the terms and conditions of employment for the claimant members including the grievant.

The claim herein is premised on claims for gratuity pay, underpayments, annual leave pay and underpaid house allowance. The basis is that there was a scheme of service for civil servant which the respondent should have used to tabulate the wage due to the grievant.

The claimant has attached the CBA subject between the parties. Such CBA is acceptable as the core document regulating the grievant's employment as required under section 59 of the Labour Relations Act, 2007.

The claimant has relied on the *New Salary Scales for Civil Servants* issued by the *Office of the Prime Minister, Ministry of State for Public Service* and where new wage guidelines are issued for civil servants. However, the relationship between the parties herein is regulated by a CBA and the same cannot be reviewed, revised and or changed otherwise save by agreement by the parties to it. To rely on other third party material would require the parties to the CBA herein to agree and have the changed terms and conditions of employment reduced into new CBA and which must be registered with the court as required under section 60 of the Labour Relations Act, 2007 for it to take effect and be enforced by the parties.

The grievant having resigned from her employment with the respondent, the terms applicable were those under the subject CBA. Her dues were calculated accordingly as conceded by the respondent. the defence and the work records attached are clear to the extent that the grievant was entitled to Ksh.122, 883.00 in terminal dues inclusive of gratuity, annual leave and unpaid increment. Such tabulation cannot be changed at the submission stage noting the respondent did not call any evidence.

The due terminal dues were to be paid less notice pay, and an overpayment made in December, 2010. the claimant and the grievant did not contest these deductions in any material way. The court takes it that the grievant resigned without serving the notice period and that she had been overpaid in wages in December, 2010.

In this regard, the due terminal dues are as tabulated by the respondent all being ksh.104, 209.00.

Upon direction by the court, the grievant submitted her bank account details and the statement with regard to the period of 2012 when the

respondent alleges to have paid her terminal dues. these details testify to non-payment or deposit of any cheque by the respondent. the terminal dues stand unpaid to date. A deposit of such funds into the grieving's account would have aided the respondents case. The respondent has denied the grievant the use of such terminal dues from such time. However, the grievant is equally to blame. Upon being issued with the cheque and declined to accept the same on the basis that it was too low. Nothing prevented the grievant from accepting what was paid and then urge her case.

On the findings above that the paid amount as assessed by the respondent is correct, upon the payment of Ksh.104, 883.00 the matter is resolved.

**Accordingly, the court finds and enters judgement that the grievant is entitled to the payment of ksh.104,883.00 in full and final settlement of terminal dues. each party shall meet own costs.**

Delivered in open court at Nakuru this 11<sup>th</sup> July, 2019.

**M. MBARU JUDGE**

In the presence of:

Court Assistants: ..... & .....

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