



**REPUBLIC OF KENYA**

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

**CAUSE NO. 1987 OF 2014**

**(Formerly HCCCNo. 475 of 2006 at Nairobi Milimani Courts then transferred as HCCC No. 280 of 2009 at Nairobi)**

**JANE CHUNGI.....1ST CLAIMANT**

**PURITY MACHARIA.....2ND CLAIMANT**

**-VERSUS-**

**RUSINGA INVESTMENT COMPANY LIMITED.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 8th November, 2019)

**JUDGMENT**

The claimants filed a memorandum of claim on 25.08.2006 through J.W. Madahana & Company Advocates. The claimants prayed for judgment against the respondent for:

- a) Kshs.34,915,794.00.
- b) Interest on (a) from the date of filing the suit until final payment at commercial rate of 24%.
- c) Costs of the suit and interest thereof.
- d) Any other relief the Honourable Court may deem fit.

The amount claimed is on the headings of salary to 55 years; employer pension lost; employer NSSF lost; medical cover per annum; free tuition for the children; 80% reduction on children's transport; understated gross gratuity; leave not taken; and one year contract after retirement upon attainment of 55 years of age. The 1st claimant prayed for a sum of Kshs.14, 053, 074.00 and the 2nd claimant Kshs.20, 862, 720.00.

The statement of defence was filed on 13.09.2006 through Oraro & Company Advocates. The respondent prayed that the suit be dismissed with costs. The reply to defence was filed on 18.09.2006.

There is no dispute that the 2nd claimant was employed in 1994 and the employment was made formal on permanent terms by letter issued on 01.09. 1997. The 1st claimant was employed by the letter dated 31.08.2000. Thus the 1st and 2nd claimants had been in employment of the respondent's Rusinga School as teachers on permanent and pensionable terms for 6 and 12 years respectively. The other undisputed terms of service included:

- a) Termination after issuance of 2 warnings by the headmaster.
- a) Normal retirement upon attainment of 55years of age with one year contract after retirement.
- b) School fees concessions in respect of their children for up to 3 children and a reduction of transport costs for children.
- c) Medical benefits.
- d) A pension scheme to which the claimants and the respondent contributed.
- e) Outpatient medical cover of up to Kshs.50, 000.00 per annum.

The 1st claimant was terminated from employment by the letter dated 10.03.2006 and the 2nd claimant by the letter dated 06.04.2006. The termination was effective the respective dates of the letters and was upon the ground stated in each termination letter thus, termination on “**normal termination.**” The letter stated that terminal dues would be paid as per the letter of appointment and the School’s personnel policies and procedures.

The claimants’ case is that the termination was unlawful and wrongful and the respondent is liable to pay the lost benefits under the contract of service until the retirement age of 55 years and then one year of contract.

The **1st issue** for determination is whether the termination was unlawful and wrongful. Clause 16 on termination of the contract of service at the instance of the respondent provided, “**The school may at any time terminate your engagement by giving you notice in writing by paying you three months’ salary in lieu of notice. Such termination will normally follow 1st and 2nd written warnings from the Headmaster. Such warnings remain valid for 12 months. In exceptional cases, the school may terminate your services by giving you a written notice of three months or three months’ salary in lieu of notice.**”

The Court finds that the clause provides for termination of the contract of service by the respondent by giving a three months’ notice or pay of three months’ salaries in two instances. First, is where a 1st and 2nd warning have been served and 12 months within which the warnings must expire have not lapsed. The Court considers that a warning presupposes a misconduct requiring positive change or unsatisfactory performance demanding improvement but which was not the case in the instant case because the evidence is that the claimants had a clean record of service. The second instance is where exceptional circumstances exist. The 2nd claimant testified that at the time the claimants were terminated some teachers resigned and others were terminated.

The respondent’s witness was one Patricia Echesa Kariuki, the School’s Head Teacher, as at the hearing of the suit on 01.07.2019. RW testified that there must have been exceptional circumstances which warranted the termination but she had not seen the documented circumstances. RW further stated that the hidden reasons could not be seen. RW confirmed that as per the claimants’ evidence, each was paid the three months’ salaries in lieu of notice on 03.10.2006 long after filing of the suit on 25.08.2006. RW confirmed that as per the letter dated 26.07.2006 and RW testified that the retrenchment and restructuring was the unique issue but claimants were good employees.

The Court finds that by the claimants’ own evidence, several teachers resigned or were terminated. There was a restructuring or retrenchment notice for non-teaching staff. The Court returns the evidence is that the respondent was undergoing exceptional circumstances under which staff were resigning, being terminated or restructuring and retrenchment was underway. Thus the evidence is that the respondent was entitled to terminate the claimants upon payment of three months’ salaries in lieu of termination notice as was provided for in clause 16. To that extent the termination was not unlawful or wrongful.

The **2nd issue** for determination is whether the claimants are entitled to the remedies as prayed for. The claimants are seeking payment upon the enumerated headings on account that they lost the salaries and benefits under the contract of service for the remainder of the tenure of the service if they would have retired upon attaining the age of 55 years. The Court finds that the claimants have not established any factor attributable to the respondent which made each of the claimants to diminish the capacity to engage in alternative employment. Indeed the 1st claimant testified that she eventually improved herself and was teaching at Riara University even as at the time of hearing the suit. The 2nd claimant testified that she had revived her business networks and she was doing business. The claimants must be commended for their positive efforts to pick up and move on after the termination and the prayers for pay of allegedly lost salaries and benefits as made are not justified. The Court finds that as submitted for the respondent, once the contract was terminated, the salaries and other benefits flowing from the contract of service were thereby extinguished.

As submitted for the respondent the Employment Act, 2007 did not apply to the present cause of action and in any event the claimants did not plead for remedies under the provisions of the Act. Section 16 of the Employment Act, Cap 226 (Repealed) entitled the respondent to terminate the contract without notice upon payment of wages in lieu of notice.

The terms in the letter of termination were that the terminal dues under the contract would be paid and the evidence was that the three months in lieu of notice was subsequently paid. The Court has revisited the plaint and the three months’ salaries in lieu of notice are not part of the claims and prayers. The pay of wages in lieu of notice was belated and the Court considers that each party shall bear own costs of the suit.

In conclusion judgment is hereby entered for the respondent against the claimants for dismissal of the suit with orders the parties to bear own costs of the proceedings.

**Signed, dated and delivered in court at Nairobi this Friday, 8th November, 2019.**

**BYRAM ONGAYA**

**JUDGE**