



**REPUBLIC OF KENYA**

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

**CAUSE NO. 1764 OF 2016**

**(Originally Nairobi High Court Civil Case No. 1052 of 2006)**

**FELISTAS NJERI WAWERU .....CLAIMANT**

**v**

**THE CHAIRMAN,**

**BOARD OF GOVERNORS, KAIRI**

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

**JUDGMENT**

1. Felistas Njeri Waweru (Claimant) was employed by the Board of Governors, Kairi Secondary School (Respondent) on 27 December 1991 as an Accounts Clerk. She rose to the position of Bursar.
2. On 14 April 2005, the Claimant applied for maternity leave.
3. On receipt of the application, the Secretary of the Respondent wrote to the Claimant on 14 May 2005 to inform her that the Board had rejected the application for maternity leave and directed her to report back to work on 16 May 2005 without fail.
4. The Claimant did not report back, and on 20 May 2005, the Secretary of the Respondent wrote to her instructing her to appear before the Board on 24 May 2005.
5. The Claimant attended the meeting and 25 May 2005, the Respondent informed the Claimant that it had been decided that she be summarily dismissed.
6. The reasons given for the dismissal were  
  
You are very negative in your attitude towards the employer and the work you do.  
  
You deserted your duty/negligence of duty. Frequent absenteeism and lateness despite several warnings/cautions from the Employers Secretary – the Principal.  
  
You in subordinated the employer – Board of Governors by failing to take lawful orders especially on resumption of duty after absconding. You are in subordinating the Secretary to the Board and you do not regard his caution or consultation/Office.  
  
You hold the Board into contempt and even trying to incite/divide the workers.  
  
NB. This is gross misconduct on your part and hence **SUMMARILY DISMISSED** from the services of the Board of Governors.
7. On 4 October 2006, the Claimant instituted proceedings in the High Court alleging that her rights as a woman had been contravened.
8. The Claimant further sought salary arrears, house allowance, medical allowance, service gratuity, accumulated unpaid leave and 12 months' salary in lieu of notice.
9. The Claimant filed Issues for Determination on 24 July 2007.

10. Although served, the Respondent did not enter appearance or file a Defence and on 19 September 2007, the Claimant applied for Interlocutory Judgment. The judgment was entered on 23 February 2007, but was set aside on 14 January 2008.
11. On 9 May 2013, the Claimant applied again for Judgment in Default of Appearance. The judgment was entered on 14 May 2013.
12. Because the Cause had not been prosecuted for long, a Notice to Show Cause was issued and because there was no attendance, the Cause was dismissed on 9 April 2015.
13. The Claimant successfully moved the Court to vacate the dismissal on 10 May 2016.
14. On 9 March 2017, Abuodha J directed that the Cause be set down for hearing (formal proof).
15. The hearing proceeded on 20 April 2018 when the Claimant gave sworn testimony. She filed written submissions on 18 May 2018.
16. The Court has considered the pleadings, evidence and submissions and has come to the conclusion that although the Claimant identified 10 questions as arising for determination, the same can be condensed into 5 being

(i) *Whether the summary dismissal of the Claimant was unfair*

(ii) *Whether the Claimant's rights were breached/violated*

(iii) *Whether the Claimant was discriminated against*

(iv) *Whether the Respondent breached Claimant's contractual rights*

and

(v) *Appropriate remedies.*

#### **Whether dismissal was unfair**

17. *Unfair termination* of employment as a concept was given statutory underpinning in this country through the Employment Act, 2007.
18. At the time of the Claimant's dismissal in 2006, dismissals were addressed under the *common law* and under that regime, an employer could dismiss an employee for *no cause, a good cause or a bad cause* provided notice in accordance with the terms of contract was given.
19. If no notice was given, then an equivalent pay in lieu of the notice period would become payable. Where there was no notice period, the Court could determine a reasonable notice period.
20. The Claimant was taken through a process in which she participated. She was summarily dismissed thereafter.
21. She contended that she was absent because of a problematic pregnancy and she produced medical reports to show that she was admitted into hospital on 7 April 2005, had a premature delivery on 14 April 2005 and was discharged on 18 April 2005. She also produced a medical report detailing her pregnancy medical history from 2004 to 26 May 2005.
22. The Employment Act (now repealed) provided for maternity leave.
23. The Claimant applied for maternity leave on the day she had a premature delivery. She was denied the leave through a reply which came about a month later.
24. Maternity and or medical reasons constituted lawful cause and still does constitute lawful cause for an employee to be absent from work.
25. The Court therefore finds that the Claimant had lawful cause to be away from work.
26. And if the Court is wrong on that conclusion, it is of the view that at the very least, the Claimant was entitled to convalescence from the premature delivery which was through a surgical procedure.
27. On the other allegations, the Respondent did not appear in Court to shed light on the same.
28. In the view of the Court, the dismissal of the Claimant was wrongful, and for that she is entitled to the equivalent of 1 month salary.

#### **Breach/violation of rights**

29. Maternity leave was a statutory right in 2005.

30. The Claimant applied for maternity leave but that request was denied.

31. That was a violation of a statutory entitlement and which denial directly led to the dismissal of the Claimant.

32. For the breach of that statutory entitlement which consequently led to wrongful dismissal, the Court is of the view that the Claimant is entitled to a remedy.

#### **Discrimination**

33. The Claimant contended that she was discriminated against but she did not disclose the nature of discrimination and whether the Respondent had treated other women in her position differently.

34. The Court therefore is unable to concede to the Claimant's contention that she was discriminated on account of her gender or reproductive health.

#### **Breach of contractual rights**

35. The Claimant anchored her claims for breach of contractual rights/entitlements (salary arrears, house allowance, medical allowance, service gratuity, unpaid leave) on the supposition that she was a *civil servant* and therefore entitled to benefits/entitlements available to other civil servants through Circulars being, *New Conditions of Service for the Kenya Civil Service 1994* (7 July 1994); *New Conditions of Service for the Kenya Civil Service* (29 August 1997); *New Salaries for the Kenya Civil Service* (27 October 1997) and *New Salary Scales for Civil Servants* (1 July 2004).

36. To strengthen the contention that she was a civil servant, the Claimant drew the attention of the Court to the case of *Dadson Maina & 33 Ors v Board of Management, Nyeri Primary School* (2017) eKLR.

37. However, in the view of the Court, the Claimant was not a *civil servant* for she was not an employee of the *Public Service Commission*.

38. The *Dadson* decision cannot help the Claimant's case as it was predicated on the Constitution, 2010. The Claimant left service long before the promulgation of the Constitution.

39. The Claimant was an employee of the Respondent and served under the terms agreed with it and any specific terms and conditions gazetted and or made expressly applicable to other employees in her status. She did not demonstrate that the Respondent was in breach of contract as far as remuneration was concerned.

40. These claims therefore are untenable.

#### **Appropriate remedies**

##### ***Pay in lieu of notice***

41. The Claimant was earning Kshs 10,951/- at the time of separation. She is entitled to an equivalent as pay in lieu of notice.

##### ***Damages***

42. The Claimant was not only denied a statutory entitlement under circumstances where she deserved the leave, but she lost her job.

43. The Respondent's conduct and decision was more than reprehensible, and the Court is of the view that the sum of Kshs 300,000/- as damages would be appropriate.

#### **Conclusion and Orders**

44. The Court finds and holds that

- (a) The summary dismissal of the Claimant was wrongful.
- (b) The Claimant's right to proceed on maternity leave was violated.

45. The Court awards the Claimant

- |                           |                       |
|---------------------------|-----------------------|
| (i) Pay in lieu of notice | Kshs 10,951/-         |
| (ii) Damages              | Kshs 300,000/-        |
| <b>TOTAL</b>              | <b>Kshs 310,951/-</b> |

46. Claimant to have costs.

**Delivered, dated and signed in open Court in Nairobi on this 21<sup>st</sup> day of May 2018.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant                      Mr. Kariuki instructed by Jesse Kariuki & Co. Advocates

Respondent                        did not participate

Court Assistant                 Lindsey