



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT

AT NAIROBI

CAUSE NUMBER 1548 OF 2013

BETWEEN

KUDHEIHA WORKERS.....CLAIMANT

VERSUS

THE B.O.G NZAMBANI SECONDARY SCHOOL....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

KUDHEIHA represented by Disputes Officer Mr. Ombima.

No appearance by the Respondent

JUDGMENT

1. This Claim is brought by the Claimant Union on behalf of its Member Eusebia Luusa [hereinafter called the Grievant]. The Claim was filed on 20th September 2013.
2. Eusebia was employed by the Respondent School as a Cateress, with effect from 14th July 2009. She earned an initial basic monthly salary of Kshs. 5,515, house allowance of Kshs. 2,300 and medical allowance of Kshs. 495. Her last salary was Kshs. 11,817.
3. She was suspended by the School Principal/Secretary to the Respondent B.O.G, through a letter dated 26th October 2011. There were various allegations made against the Grievant: she was said to have differed with the Deputy Principal on conduct of the catering role, resulting in delayed meals for the Students; she incited Students to riot; she incited Cooks to boycott cooking and to pretend that they were sick; she gave incorrect quantity of rice to be prepared for Students, occasioning insufficient meals for the Students; she asked a Colleague not to fetch firewood for preparation of meals for the Students; and alleged the Principal gave a Colleague of the Grievant free airtime to spy on other Staff.
4. The Grievant replied through a letter dated 2nd November 2011. She stated that she had noted the contents of the suspension letter; that she was hardworking and honest; and promised to continue working hard.
5. The Respondent issued to the Grievant a letter of summary dismissal dated 29th December 2011. The letter indicates that the Grievant appeared before the Executive B.O.G on the same date the letter issued, and Members, “ *observed the following: gross misconduct, ignorance of earlier several warnings, absence without permission, negligence of duty, incitement and insubordination.*” The letter advised the Grievant that it had been resolved the Grievant is summarily dismissed without notice or pay in lieu of notice with effect from Thursday, 29th December 2011.
6. The Claimant states that the Grievant was not heard at the B.O.G meeting of 29th December 2011. It is questionable how the Respondent sat, heard the Grievant, deliberated and made a resolution on the same date. The Claimant urges the Court to find termination was unfair and give an order for reinstatement. Alternatively the Claimant prays for compensation for unfair termination; notice pay; salary for November and December 2011; and underpayment of salary for the period 2009-2011, all totaling Kshs. 352,372.

7. There are various Affidavits of Service, indicating the Respondent was served with the Statement of Claim, Notice of Summons, Mention and Hearing Notices. The Respondent filed nothing in response to the Claim, and did not appear in Court at any one time. The matter was heard in the absence of the Respondent on 17th April 2018 during the Court's Service Week. The date was fixed by the Court, and Parties notified by the Court.

8. The Grievant gave evidence restating the contents of the Statement of Claim as summarized above. She adopted documents annexed to the Statement of Claim, marked appendix 1 to 13, as part of her evidence.

The Court Finds:-

9. The Claimant has shown that the Grievant was employed by the Respondent as a Cateress, on 1st September 2009. It has also been shown that the Grievant's contract was terminated by the Respondent, through a letter of summary dismissal dated 29th December 2011.

10. There were various allegations made against the Grievant as captured in the letter of suspension. The Respondent did not give any evidence before this Court, and show that the accusations against the Grievant had any justification. The letter of summary dismissal contains generalized observations, rather than findings and conclusions based on established facts. There are no minutes of the disciplinary hearing to show that indeed a disciplinary hearing took place, and that the Grievant was at all heard. The B.O.G purports to have met, heard the Grievant, deliberated and made resolution to dismiss the Grievant on the same date. This meeting, if it ever took place, appears to have prejudged the Grievant. The Respondent disregarded standards of substantive and procedural fairness, established under Sections 41, 43 and 45 of the Employment Act.

11. Termination was unfair.

12. ***The Grievant is allowed the prayer for 2 months' salary in lieu of notice under the applicable CBA, at Kshs. 23,634.***

13. ***She is granted equivalent of 12 months' gross salary in compensation for unfair termination at Kshs. 141,804.***

14. ***The prayer for unpaid salary for the months of November and December 2011 is allowed at Kshs. 23,634.***

15. The Claimant did not explain to the Court how the Circular issued by the Ministry of State for Public Service, on 1st July 2008, on New Salary Scales for Civil Servants, applied to the Grievant. Was the Respondent aware about this Circular on recruiting the Grievant? Was the Respondent aware of the existence of a CBA placing the Grievant in Job Group F? The Claimant pleads that the Grievant was in Job Group F. The Grievant herself said nothing about the Civil Servants' Circular of 1st July 2008. The Grievant and her Employer the B.O.G appear to have agreed on the salary payable to the Grievant at the time of recruitment of the Grievant. The letter of appointment does not show any awareness about the presence of a CBA or Circular, placing the Grievant at any Job Group, and requiring she is paid the amounts claimed in underpayment of salary. This is a Secondary School in a rural set-up, dedicated to uplifting of education standards among the rural community, which should not be burdened with demands for arrears of salaries, demands which are based on implementation of minimum wage standards applicable to Civil Servants in the core Public Service. The Grievant accepted the terms offered by the School on appointment. She would perhaps, with the passage of time, enter core Public Service and rightfully demand terms and conditions of service applicable to other Civil Servants. If she was indeed in Civil Service, she had not entered Civil Service in the conventional way, so as to immediately demand same employment standards applicable to core Civil Servants. She was not recruited by the Public Service Commission of Kenya. There is no adequate material on record to support the prayer for underpayment of salary. The item is rejected.

16. The prayer for reinstatement is wholly unsustainable, impracticable and unreasonable, granted that it is over 7 years today, since Cateress Eusebia left Nzambani Secondary School.

IN SUM, IT IS ORDERED:-

a) The Respondent shall pay to the Grievant through the Claimant: 2 months' salary in lieu of notice at Kshs. 23,634; equivalent of 12 months' salary in compensation for unfair termination at Kshs. 141,804; and salary for November and December 2011 at Kshs. 23,634- total Kshs. 189,072.

b) No order on the costs and interest.

Dated and signed at Mombasa this 5th day of July 2018.

James Rika

Judge

Dated, delivered and signed at Nairobi this 31st day of July 2018

Onesmus Makau

Judge