



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 525 OF 2014**

**(formerly HCT CC No.1238 of 2003)**

**(Before Hon. Justice Hellen S. Wasilwa on 9<sup>th</sup> July, 2018)**

**GLADYS N. MUCHENA..... CLAIMANT**

**VERSUS**

**AGA KHAN EDUCATION SERVICE, KENYA.....RESPONDENT**

**JUDGEMENT**

1. The Claimant in this case initially filed her Complaint in High Court at Nairobi as CC No. 1235/2008. The Complaint was filed through Messrs Machua & Company Advocates on 28/11/2003.
2. In the Complaint the Claimant averred that she is a trained teacher having acquired a Diploma in Education at the then Kenyatta College in 1969 and subsequently acquired a Bachelor of Education Degree in 1981 at the University of Exeter in UK. She therefore acquired a Masters of Education Degree at the University of Exeter in the UK in 1998.
3. She has indicated how she started her teaching career in 1970 at Mbooni Girls High School till she went to Aga Khan High School from 1.9.1988.
4. She avers that sometimes in January 2002, the Respondent and others were informed by the TSC and the Aga Khan School (before Respondent became a private institution) that the Respondent was in the process of becoming a private institution and in the circumstances the Plaintiff and other teachers were given an option either to stay with the New Management of Aga Khan High School or be deployed by the Teachers Service Commission (TSC).
5. In order for Plaintiff to make up her mind, the Defendant wrote a letter to all the teachers spelling out details of its salaries, benefits and other terms and conditions of service which would be applicable to the teachers who choose to remain with the Respondent's New Management.
6. The Plaintiff avers that she considered the salary, benefit and other terms and conditions of the New Management to be attractive as they were 70% higher than previously offered by the Teachers Service Commission (TSC). That earlier on she had been sponsored for her Master Degree at Exeter University in the UK by the Defendant on condition inter alia that she would continue teaching in the Defendant's Institution for a minimum of 5 years after the completion of her study.
7. Owing to this bonding, which was to expire on 27/2/2002, the Plaintiff avers that she chose to stay with the Respondent's New Management.
8. Sometimes on/about 15<sup>th</sup> April 2003, the Defendant wrote a letter to the Plaintiff purporting to terminate her employment with effect from 14.4.2003.
9. The Plaintiff contends that this termination was not only illegal and unlawful but also in breach of contract and malicious in the extreme and also spiteful.
10. This letter was written during the April School holiday. The Plaintiff avers that she had not been warned of poor performance if any, or given prior notice of the termination.

11. The Plaintiff avers that she had believed she would serve the Respondent until her bond expires. She avers that due to the Respondent's action, she suffered loss, damage, humiliation, mental agony and physical torture and seeks damages for wrongful dismissal and loss of income. She also seeks costs -of this cause.

12. The Respondent filed their Defence on 16.1.2004 through the firm of Njoroge Regeru and Company Advocates. They deny the Claimant's claim and aver that they do not know why the Plaintiff chose to stay in their employment. They deny bonding the Claimant to remain in its service. They aver that the Claimant made a conscious decision to remain in the Defendant's employment without coercion or force and that she freely exercised her option.

13. They admit terminating the Claimant's services but deny any malice, illegality, breach and spite. They aver that the Claimant was only entitled to 1 months' notice to terminate their service. They therefore ask this Court to dismiss the Claimant's case with costs.

14. Vide a ruling of this Court, R N Nambuye J (as she then was) on 12/3/2010 the Plaintiff were allowed to amend their Plaint. In the Amended Plaint, the Plaintiff introduced prayers for salary that would have been earned by the Plaintiff to retirement age of Kshs.8,440,730/= for 10 years. She therefore prays for compensation for loss of retirement and leave benefits aforesaid.

15. The Respondent also filed an Amended Defence where they denied that the Plaintiff is entitled to the additional remedies sought.

16. The Claim was duly transferred to this Court by an Order of 18/3/2014 (Ougo J).

17. When the matter came up for hearing, the Claimant gave her sworn evidence and reiterated the averments in her Plaint and Amended Plaint.

18. The Respondent also called 1 witness who indicated that Kshs.252,501.17 was deposited in Court at High Court case No. 1238/2003 on 23/1/2004. She also reiterated the averments in the Defence and Amended Defence.

19. In cross examination, she admitted that the Claimant was bonded by the Respondent for 5 years after graduation. She also states that the graduation was on 25/11/1998 and if Claimant left before the end of the bond, she was expected to refund the cost of the training.

20. I have examined all the averments and submissions of the Parties. The Claimant has submitted that she was unfairly terminated before the bond period of 5 years was completed. The Respondent's witness admitted that the Claimant had been bonded for 5 years after graduation and that she graduated on 25/11/1998. The 5 years were therefore to end on 25/11/2003.

21. The termination was therefore done when the bond was still subsisting and had 8 months to go. This was in breach of the bond terms wherein the Claimant had been assured of employment upto 28/11/2003.

22. Other than this breach, the contract of employment between the Claimant and the Respondent had indicated that it could be terminated by giving 3 months' notice or 3 months pay in lieu. The Respondent failed to give the Claimant the said notice as envisaged and so breached the terms of the contract.

23. It is my finding that the Respondent breached the Claimant's contract and cut short her career. Whereas under Cap 226 there was no mandatory provision for the respondent to issue reasons to the Claimant before termination, the Respondent opted to give reasons, which were not tested through a fair hearing process. I find the Claimant has established her claim against the Respondent and I award her as follows:-

**1. 3 months' salary as notice pay as the contract of employment =  $3 \times 70,975 = 212,925/=$ .**

**2. Salary for the unexpired period of the bond period being 7 months 10 days = 520,483/=.**

**3. The Claimant is also entitled to her pension earned upto 25/11/2003 for which the parties can agree upon or submit to the Court figures for continuation if there is no agreement.**

**4. I also award the Claimant damages equivalent to 12 months' salary for wrongful termination =  $12 \times 70,925 = 851,100/=$ .**

**TOTAL = 1,584,508/=**

**Less statutory deductions**

**5. In terms of interest. I award interest on the above amount at Court rates with effect from the date of judgement until payment in full.**

**6. The Respondent will pay costs of this suit.**

**Dated and delivered in open Court this 9<sup>th</sup> day of July, 2018.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Wanjiku Kamau for the Respondent – Present

Kilonzo holding brief for Machira for Claimant – Present