



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**CAUSE NO.1533 OF 2013**

**MARY WANGECHI KINGORI.....CLAIMANT**

**- VERSUS -**

**THE RIARA GROUP OF SCHOOLS LTD.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 26<sup>th</sup> October, 2018)

**JUDGMENT**

The claimant filed the memorandum of claim on 25.09.2013 in person. The amended memorandum of claim was filed on 20.04.2017 through Wesonga, Mutembei & Kigen Advocates. The claimant prayed for judgment against the respondent for:

- a) An order the claimant was on permanent employment from the date the last contract expired on 31.07.2012 to the time she was terminated on 19.08.2013 which was a whole year.
- b) That the respondent contravened the express provisions of the Employment Act and that the claimant suffered wrongful and unfair termination and she should be compensated accordingly.
- c) One month salary in lieu of notice.
- d) Salary for the days worked in August 2013.
- e) Leave earned and not taken in 2013 of six and half days.
- f) General damages for injuries sustained while working for the respondent.
- g) Special damages amounting to Kshs. 126, 184.00 being refund of the medical expenses.
- h) Cost of future medical treatment.
- i) Exemplary and aggravated damages.
- j) Either the release of the personal items belonging to the claimant or their monetary value (stated in paragraph 31 of the memorandum of claim).
- k) Costs of the claim and interest at Court rates.

The respondent's case is based upon the amended statement of reply filed on 23.10.2017 through Nyachoti & Company Advocates. The respondent prayed that the suit be dismissed with costs to the respondent.

At the hearing the Court ordered thus, **“By consent the claimant at liberty to pick her belongings from school as claimed. Relevant report to be filed by claimant by hearing date. By further consent hearing of suit on 17.07.2018....”** The Court made a further order thus; **“By consent all claims on injury be handled by the Director per WIBA.”** A further order by consent was recorded thus, **“By consent a certificate of service be issued by 18.07.2018 noon and delivered to claimant's advocates accordingly per section 51 of Employment Act.”** Thus some of the prayers made were determined in those terms.

The evidence is that the respondent employed the claimant as a kindergarten teacher effective January 2011. Her employment was terminated on 19.08.2013 on account of redundancy. The termination letter addressed to the claimant and signed by the respondent's Human Resources Manager stated in part, "**Further to our discussion on the above subject, this is to confirm the management's decision that effective 15.08.2013 the position of a floater teacher at Riara Road Kindergarten will be declared redundant. The decision is guided by some critical business considerations and consequently being the holder of this position and taking into account that we currently do not have any vacant position in the group in which you can be considered, your services will terminate effective the same date.**" The letter further stated that the management will pay her one month's salary in lieu of notice and another one month's pay as severance pay for the two years the claimant had served the respondent.

By the letter dated 27.08.2013 the claimant acknowledged receipt of the termination letter. The claimant lamented that whereas she had served with dedication for 2 years and 8 months, the termination on account of redundancy had been abrupt and conveyed to her for the first time in the letter of termination. She stated that the termination was a most unfair practice and in breach of the terms of employment so that she held the respondent liable to pay the following:

- a) Salary for August 2013 from 1<sup>st</sup> to 19<sup>th</sup> August 2013.
- b) Leave days outstanding.
- c) Severance pay.
- d) 3 months pay in lieu of notice.
- e) 12 months' pay for unfair termination.

The respondent replied the claimant's letter by its letter dated 03.09.2013 and stated that there had been a round table meeting prior to the termination letter at which the respondent had explained to the claimant that there was no vacant position for her continued service at the school. The respondent then stated as follows on the claimant's demand for payment:

- a) Salary for 1<sup>st</sup> to 19<sup>th</sup> August 2013 would be paid.
- b) Outstanding 6.5 l annual leave days would be paid.
- c) For each completed year of service 15 days' pay will be made as per the law and for the 2 years served, it was one month salary in severance pay.
- d) One month pay in lieu of notice will be paid as prescribed in law.
- e) The termination had been lawful and 12 months pay for unfair termination would not follow because, "**Section 45(2) ii of the Employment Act 2007 states that an employer can terminate the employee based on the operational needs of the employer. We held a round-table discussion and clearly explained the need for this cause of action. The 12 months pay for unfair termination is therefore not applicable.**" The letter computed the final dues at **Kshs.114, 143.00** upon the stated and admitted headings.

The Court has considered the material on record. The only and main issue for termination is whether the claimant is entitled to the residual prayers in view of the orders by consent of the parties. The Court makes findings as follows:

- a) The respondent acknowledged in the letter of 03.09.2013 that the claimant had 2 complete years of service and it is therefore not in dispute that she was on permanent service. The Court returns that she is entitled to an order that the claimant was on permanent employment from the date the last contract expired on 31.07.2012 to the time she was terminated on 19.08.2013 which was a whole year.
- b) The Court returns that the claimant is entitled to the order that the respondent contravened the express provisions of the Employment Act and that the claimant suffered wrongful and unfair termination and she should be compensated accordingly. In particular the Court returns that the respondent did not serve the one month notice under section 40 of the Employment Act, 2007 upon the claimant and upon the area labour officer. Thus the claimant was entitled to lament that she was suddenly terminated from employment without preparation or any notice. The Court has considered that the claimant desired to continue in employment, she did not contribute to her predicament, and she had a clean record of service. The Court has considered the aggravating factor that as at termination the claimant had been injured and the respondent had failed to meet the full medical expenses as per section 34 of the Act and had failed to cooperate to enable the claimant to access the due compensation as provided under the Work Injury Benefits Act, 2007. Taking into account all those factors the claimant is awarded 12 months' compensation under section 49 of the Act at Kshs. 40,050.00 per month making **Kshs.480, 600.00** and as submitted for the claimant.
- c) One month salary in lieu of notice; salary for the days worked in August 2013; severance pay; and leave earned and not taken in 2013 of six and half days are not in dispute and are awarded at **Kshs.114, 143.00** and parties recorded consent accordingly during the hearing of the suit.
- d) The claimant prayed for Special damages amounting to Kshs. 126, 184.00 being refund of the medical expenses but there was no evidence or submissions in that regard and the prayer will fail. Similarly, cost of future medical treatment was not established and the prayer will fail. It was submitted that the doctor's fees for attending court be refunded but the Court considers that such would be

costs the claimant has incurred in prosecuting the suit subject to be dealt with in accordance with the final Court's order on costs of the suit.

e) The claimant prayed for exemplary and aggravated damages on account of the respondent's interference in the claimant's prospective employment after she was terminated and on account of threats to withdraw suit after she was terminated. The Court considers that any such threats would amount to an aggravating factor in awarding maximum compensation under section 49 of the Act and which has already been awarded. Second, the claimant testified that she had no documentary evidence on employment opportunities that came up after termination and were not secured due to the alleged respondent's adverse reference reports. Thus the Court returns that the prayer for exemplary damages will fail.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

- a) The declaration that the claimant was on permanent employment from the date the last contract expired on 31.07.2012 to the time she was terminated on 19.08.2013 which was a whole year.
- b) The declaration that the respondent contravened the express provisions of the Employment Act and that the claimant suffered wrongful and unfair termination and she should be compensated accordingly.
- c) The respondent to pay the claimant **Kshs.594, 743.00** by 01.12.2018 failing interest to be payable thereon at Court rates from the date of the judgment till full payment.
- d) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nairobi** this **Friday 26<sup>th</sup> October, 2018.**

**BYRAM ONGAYA**

**JUDGE**