



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT MOMBASA

CAUSE NUMBER 928 OF 2015

BETWEEN

KAREN NYABATE MORIASI.....CLAIMANT

VERSUS

KEFA KEVIN NYONGESA t/a

ST. KEVIN HILL ACADEMY SCHOOLS .....RESPONDENT

*Rika J*

*Court Assistant: Benjamin Kombe*

*Marende Necheza & Company Advocates for the Claimant*

*Mogaka, Omwenga & Mabeya Advocates for the Respondent*

**JUDGMENT**

1. Through the Amended Statement of Claim filed on 7<sup>th</sup> September 2015, the Claimant avers she was employed by the Respondent as a Nursery School Teacher, on 7<sup>th</sup> April 2008. Her teaching contract was terminated abruptly by the Respondent, on 7<sup>th</sup> April 2015, after 7 years of teaching. She was not accorded fair hearing. Her last salary was Kshs. 10,000 monthly. She prays for Judgment against the Respondent for:-

- a) Salary for March 2015 at Kshs. 10,000.
- b) 1 month salary in lieu of notice at Kshs. 10,000.
- c) Service pay for 7 years worked at Kshs. 35,000.
- d) 12 months' salary in compensation for unfair termination at Kshs. 120,000.
- e) Costs.
- f) Interest.
- g) Any other suitable relief.

2. The Respondent filed his Statement of Response on 18<sup>th</sup> November 2015. He concedes that the Claimant was employed by the Respondent as a Nursery School Teacher, at Bombolulu, Mombasa, initially earning a monthly salary of Kshs. 8,000. She regularly absconded, on the ground that she had an ailing Child. In 2010 she deserted to go and take care of her Child. The Respondent made fruitless efforts to find her. She reappeared later the same year, and sought to be employed by the Respondent once again. She was employed in the same capacity at the School's Likoni Branch, on a monthly salary of Kshs. 10,000. She continued to abscond. She deserted once again. She returned, saying she was experiencing financial difficulties. She was absorbed as a floating Nursery School Teacher at Mkomani Branch. In 2014 she was moved to Majengo Mapya in Likoni, in the same capacity. She was extremely harsh and cruel to the Children and left them uncared for. She was

supposed to prepare mark lists and report books at the end of 1<sup>st</sup> term in 2015. She failed to do so. She was suspended pending disciplinary hearing. She deserted and did not subject herself to disciplinary hearing. She was spotted at a neighbouring school where she teaches to-date. The Respondent has always been ready to pay Claimant's salary for March 2015. Other prayers are denied. The Respondent prays the Court to dismiss the Claim.

3. The Claimant gave evidence, in the absence of the Respondent, and closed her case on 13<sup>th</sup> February 2018. The Respondent was notified of the hearing date but opted to keep away. The Claimant was directed to file her Closing Submissions within 14 days. On 2<sup>nd</sup> March 2018 the Claimant confirmed filing of Submissions. The Respondent, now represented by a new Counsel, was given 14 days to file Closing Submissions. By 25<sup>th</sup> July 2018 no Submissions had been filed by the Respondent. The Respondent was allowed another 10 days to comply. Parties confirmed filing of Submissions at the last mention in Court, on 19<sup>th</sup> September 2018.

4. The Claimant reaffirmed the contents of her Pleadings and Witness' Statement, in her oral evidence. She was employed by the Respondent as a Nursery School Teacher. She was frequently transferred. She used to relieve other Teachers who were on annual leave, in different stations. Her contract was terminated on 7<sup>th</sup> April 2015 by the Respondent. She was alleged to have failed to report to work during school holiday. She told the Respondent she had already prepared her report books during the holiday. She was referred to the School Manager at Nyali, Mombasa. She was not heard. It is not true that she was a habitual absentee. She never had any warning letters. She had commendation for good work done. She did not persistently abscond, and reapply for work. She was not harsh or uncaring with the Children. Parents used to invite her for their Children's birthdays. She exhibited photos of herself in the company of smiling, happy and well-cared-after looking Children. She never received a suspension letter, and did not receive termination letter.

#### **The Court Finds:-**

5. The Respondent did not give evidence contesting the position taken by the Claimant. There are Witness Statements filed by the Respondent, but no Witness gave evidence, to breathe life into these bare Statements. There are many allegations made against the Claimant by the Respondent in the Witness Statements and in the Statement of Response. The Claimant was alleged to be a serial absentee. She absconded, but was always welcomed back by the Respondent when she reappeared. She deserted and was seen working for another School. She was harsh and uncaring with the Kids. She exhibited photos of herself in the company of happy-looking Kids. She was said to have declined holiday work. She explained she had already prepared her reports during the holiday.

6. The allegations were never put to the Claimant in writing. She was never warned. She was not asked to show cause why, she should not be disciplined, for any offence. She was not heard in a disciplinary platform. She was a good Teacher who had received commendation from the Respondent. She did not receive suspension letter. There was no letter of termination.

7. The Court is satisfied that the Claimant has established her Claim to the required standard. The Respondent states he has always been ready to pay Claimant's March 2015 salary. He does not say what has prevented him from paying this salary from March 2015. Notice pay is merited under Section 36 of the Employment Act. There was no evidence that the Claimant was actively subscribed to the N.S.S.F or any other Social Security Plan. A Provisional Member Statement of Account from the N.S.S.F exhibited by the Claimant, shows payment of contributions at zero sum. The Court has stated in the past, that bare registration to N.S.S.F, does not in itself, disentitle an Employee from receiving service pay under Section 35[5] of the Employment Act. The question must always be whether the Employee is actively subscribed to the N.S.S.F, and whether N.S.S.F offers superior social security to the service pay regime. The prayer for service pay is allowed at Kshs. 10,000 divide by 26 working days = Kshs. 384.60 x 15 days = Kshs. 5,769.20 x 7 years = Kshs. 40,384. Termination was unfair. The Claimant is allowed the prayer for compensation the equivalent of her 12 months' salary, under Sections 49 and 50, of the Employment Act and Section 12 of the Employment and Labour Relations Court Act. She is allowed the prayer for costs and interest.

IT IS ORDERED:-

***a) Termination was unfair.***

***b) The Respondent shall pay to the Claimant: salary for March 2015 at Kshs. 10,000; 1 month salary in lieu of notice at Kshs. 10,000; service pay at Kshs. 40,384; and equivalent of 12 months' salary in compensation for unfair termination at Kshs. 120,000- total Kshs. 180,384.***

***c) Costs to the Claimant.***

***d) Interest allowed at 14% per annum from the date of Judgment till payment is made in full.***

**Dated and delivered at Mombasa this 23<sup>rd</sup> day of November, 2018.**

**James Rika**

**Judge**