



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 276 OF 2016

SUSAN MBITHE KITUMU.....CLAIMANT

VERSUS

THE B.O.M D.E.B PRIMARY SCHOOL KARATINA.....RESPONDENT

JUDGMENT

1. The Claimant herein sued the Respondent for unlawful/unfair dismissal from work. She averred that she was employed on 15<sup>th</sup> January 2009 as a cook and her services were terminated on 28<sup>th</sup> July 2016. She initially earned Kshs. 5,500/- a month which was increased to Kshs. 7,500/- by the time of her dismissal. She sought sick off on 13<sup>th</sup> July 2017 and pursuant to her going on sick off her father-in-law passed away causing her to be absent for a further week. She avers that she reported back to duty on 28<sup>th</sup> July 2016 whereupon she was asked to see the headteacher. She was asked to write an apology letter and obliged and thereafter was asked to write a letter seeking employment and she did so. She was then dismissed with no notice. She averred that she was not given any notice of the intention to dismiss her. She averred that she issued a demand and gave notice of intention to sue through her lawyers and there was no response hence the suit. She thus sought compensation for the unlawful dismissal, annual leave for the 7 years of service and costs of the suit.

2. The Respondent filed a defence in which it averred that the Claimant was not dismissed as alleged and that if there was any dismissal then the same was done following due procedure as laid down in the Employment Act. The Respondent averred that the suit taken out offended the mandatory provisions of Government Proceedings Act and that the suit should be dismissed with costs.

3. The Claimant testified as did the witness for the Respondent Bernard Ndegwa Hunda. The Claimant reiterated her claims and asserted that her termination was unlawful and unfair. The Respondent's witness stated that the Claimant was reprimanded by the headteacher and advised to await the directions of the BOM but instead went to the Labour Office and the Labour officer wrote a letter which sought payment of salary in lieu of notice which was done.

4. The parties filed written submissions and the Claimant submitted that she was accused of absconding yet she was not issued with a show cause notice. The Claimant submitted that the Respondent was a body corporate in terms of Section 1(a) of the Fourth Schedule of the Basic Education Act, 2013 and it was capable of being sued. The Claimant submitted that the dismissal did not accord with Section 41(1) of the Employment Act and the termination ought to have been with notice as per Section 35(1)(c) of the Employment Act. The Claimant relied on the case of **Wilfred Bukachi Opwaka v Ready Consultancy Company [2012] eKLR** where it was held that an employee who works continuously for more than one month was no longer a casual employee within the meaning of Section 37 of the Employment Act. The Claimant further relied on the case of **Boniface Wambugu Wachira v Diocese of Meru Trustees (Registered) T/a St. Theresa Mission Hospital – Kiirua [2017] eKLR** where Ongaya J. held that the disclaimer discharging the respondent upon receipt of some of the terminal dues was not thereby discharged from the claim for unfair termination. The Claimant urged that the court grants the prayers as sought.

5. The Respondent submitted that the Claimant did not produce any evidence that she was given off days after the passing on of her father-in-law. The Respondent submitted that the Claimant absconded duty for 15 days thus disrupting the smooth running of the school and therefore guilty of gross misconduct justifying summary dismissal. The Respondent submitted that the Claimant could be dismissed under the provision of Section 44(1) and (3) of the Employment Act as she had absented herself from work without leave or lawful cause. The Respondent cited the provisions of Section 41 and submitted that the Claimant was given an opportunity to defend herself and she wrote an apology letter and the next day went to the Labour Office. The Respondent submitted that the Claimant went and lodged a labour complaint and the outcome was the payment of salary in lieu of notice. The Respondent submitted that the Claimant was the author of her own termination. The Respondent argued that the conduct of the Claimant left no room for the Respondent to hold a meeting, deliberate and issue directions in terms of Section 41. The Respondent relied on the cases of **Kazungu Kenga Katana v Ready Consultancy Co. Ltd [2015] eKLR** and **Gilbert Kipngeno Sang v Ukwala Supermarket [2017] eKLR**.

6. The Claimant was a cook working for the Respondent for a number of years. The Claimant was given a sick note which recommended some rest days. The Claimant asserts that her father-in-law passed away and was therefore absent for a further week. She testified that she was given permission when she called to seek to be allowed time off. The Respondent on its part asserts that the Claimant was not dismissed and that she went on her own volition to the labour office for resolution of the dispute after she was asked to write an apology letter. The finding of the court is that there was no dismissal. The Claimant left her work place and went to report a labour dispute. This did not permit her to be heard by the Respondent in terms of Section 41. She was the author of her own misfortune and I find that she did not prove her case on a balance of probabilities. I therefore dismiss her suit with no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 20<sup>th</sup> day of November 2018

**Nzioki wa Makau**

**JUDGE**