



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**CAUSE NO.670A OF 2014**

**ANNE NDUKU NGILA.....CLAIMANT**

**- VERSUS -**

**HWAOCK IM.....1<sup>ST</sup> RESPONDENT**

**SCHOOL OF THE NATIONS.....2<sup>ND</sup> RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 2<sup>nd</sup> November, 2018)

**JUDGMENT**

The claimant filed the memorandum of claim on 23.04.2014 through Joe N. Mwanthi & Company Advocates. She prayed for judgment against the respondent for:

- a) Kshs.559, 818.35 (Being Kshs. 300, 287.40 salary arrears for 01.02.2013 to 18.12.2013 at Kshs.28, 329.00 net per month; 3 months' salary in lieu of notice Kshs.84, 987.00; employer's pension contribution at Kshs.2, 100.00 per month for 10 months and 18 days Kshs.22, 260.00; leave due for 10 months and 18 days Kshs.25, 023.95; severance or service pay at 15 days' for each 7 years of service Kshs.105, 000.00.)
- b) Compensatory damages for unfair termination of employment.
- c) Interest on (a) and (b) at Court rates from the date of filing suit until payment in full.
- d) Costs of the suit.

The respondents filed the reply to the memorandum of claim on 26.05.2014 through N.K. Mbae Associates and subsequently changed their advocates to Ahmednasir Abdikadir & Company Advocates to act per the notice of change of advocates filed on 30.11.2015. The respondents filed amended reply to the memorandum dated 04.06.2014 and the reply thereto was filed for the claimant on 11.06.2014.

By consent order given on 02.07.2018 the case was to be determined on the basis of the pleadings and the documents on record together with final submissions which were subsequently filed for the parties.

The 1<sup>st</sup> respondent is the owner, proprietor, and principal of the 2<sup>nd</sup> respondent. The respondents employed the claimant as a teacher at a gross pay of Kshs. 37, 300.00 and the net pay of Kshs.28, 329.00 as at 18.12.2013. The employment was effective January 2006 to 18.12.2013. The 1<sup>st</sup> respondent verbally conveyed to the claimant the terms of the contract of service. The claimant's case is that each party was to contribute 7% in favour of the claimant's pension managed by Jubilee Insurance Company and termination was by giving 3 months' notice or 3 months' salary in lieu of notice. The claimant's case is that on 07.02.2013 without any just reason at all, the 1<sup>st</sup> respondent asked the claimant not to visit her work station unless otherwise communicated to by the respondents and the claimant says she complied in protestation.

The respondent's advocates wrote to the claimant the letter dated 20.03.2013. It was alleged that on 07.02.2013 during an inspection of the claimant's class, some school materials which had not been issued to the claimant officially were found in the cupboard. The claimant and her husband consented to a further inspection at the claimant's residence and more materials were found. Further, the letter stated that the claimant had failed to explain so that the employment was no longer tenable but prior to disciplinary action being imposed, the claimant had to reply to the accusations within 3 days. The claimant's advocates replied by the letter dated 21.03.2013 stating that the letter had not been signed and the duly signed letter had to be provided to enable a response thereto. It was also stated that the time allowed to reply was short.

The claimant's contract of service was terminated by the letter dated 18.12.2013 on account of her failure to answer the allegations. The termination was effective 07.02.2013 with payment of 3 months' salary in lieu of notice Kshs. 84, 987.00; 7 days' salary for February 2013 Kshs. 9, 912; and making a sum of Kshs.94, 899.00. She was to collect the relevant cheque, return any school property in her possession; and to conduct the service provider on her pension.

The **1<sup>st</sup> issue** for determination is whether the claimant's termination was unfair. While serving the claimant the due notice of the allegations by the unsigned letter of the respondents' advocates, the respondents failed to accord the claimant a hearing as per section 41 of the Employment Act, 2007. The claimant through her lawyers asked for a signed copy of the letter containing the charges. Instead of providing the letter the respondent proceeded to terminate on account that the claimant had failed to reply the show-cause letter. The Court finds that the reason for termination was not valid as per section 43 of the Act because the claimant had not refused to reply but had demanded a duly signed letter of allegations. Further the respondent did not call a witness in this case and the Court returns that the respondent failed to establish that the reason for termination was valid or genuine or justifiable as envisaged in sections 43 as read with section 47(5) of the Act. The Court returns that the termination was unfair in procedure and substance. The Court has considered that the claimant had served for a long time of 7 years and the tenure of the relationship was not known as the terms were not reduced into writing – but she desired to continue in the service. The Court has further considered the aggravating factor that for unexplained reasons the termination was to take effect retroactively. To balance justice in the case the Court awards the claimant maximum 12 months net salaries under section 49 in compensation for the unfair termination making Kshs. 28, 329.00 x 12 thus **Kshs.339, 948.00**.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to the other remedies as prayed for. The Court has considered the material on record and makes the findings as follows:

- a) Kshs. 300, 287.40 salary arrears for 01.02.2013 to 18.12.2013 at Kshs.28, 329.00 net per month will be disallowed because the same is not justified as the claimant was not at work and the termination had taken effect retrospectively in circumstances whereby on the material before the Court, it is difficult to decide whether the claimant was culpable or not culpable as was originally alleged against her. In any event the court has considered the retroactivity in the effective date of the termination as an aggravating factor in awarding maximum compensation under section 49 of the Act and the prayer will fail. Thus the Court considers that the maximum compensation for unfair termination sufficiently covers for the period that is claimed and which would otherwise amount to a period of unfair suspension without pay.
- b) The 3 months' salary in lieu of notice **Kshs.84, 987.00** was agreed upon as confirmed in the letter of termination and is hereby awarded.
- c) The employer's pension contribution at Kshs.2, 100.00 per month for 10 months and 18 days Kshs.22, 260.00 will fail because pension is earned and the claimant had been retroactively terminated and did not work at all. Similarly leave due for 10 months and 18 days Kshs.25, 023.95 will also fail because the leave was not actually earned as envisaged in section 28 of the Act. The prayers will fail as unjustified.
- d) The prayer for severance or service pay at 15 days' for each 7 years of service Kshs.105, 000.00 will fail because it was not a case of redundancy and severance pay is not due as envisaged in section 40 of the Act.

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

- 1) Payment of the sum of **Kshs. 424, 935.00** by 31.12.2018 failing interest to be payable thereon at Court rates from the date of this judgment till full payment.
- 2) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered in court at Nairobi this Friday 2<sup>nd</sup> November, 2018.**

**BYRAM ONGAYA**

**JUDGE**