



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET**

**CAUSE NO. 186 OF 2017**

**(Originally Nakuru Cause NO. 154 OF 2014)**

**DERRICK HAMISI TABWA.....CLAIMANT**

**VERSUS**

**LITTLE LAMBS COMPANY LTD.....RESPONDENT**

**JUDGMENT**

1. In a Memorandum of Claim lodged in Court on 19 May 2014, Derrick Hamisi Tabwa (Claimant) alleged that the termination of his contract on 14 January 2014 by Little Lambs Co. Ltd (Respondent) which runs Little Lambs School was unlawful and wrong.
2. The Respondent, in its Memorandum of Reply denied that the termination of employment was unlawful and contended that it was on medical grounds.
3. The Claimant replied to the Memorandum of Reply on 9 July 2014 and the parties filed documents to be relied on, on 18 July 2014.
4. The parties also filed witness statements, while *Agreed Issues* were filed on 15 December 2016.
5. The Cause was heard on 14 March 2017 and on 24 April 2017 after which submissions were filed.
6. The Court has considered the material placed before it and adopts for purposes of judgment the *Agreed Issues*.

**Whether Claimant was an employee of the Respondent**

7. It is not disputed that the Claimant was an employee of the Respondent. He was issued with an initial 5 year contract effective 1 June 2006 and a second one effective 1 March 2011.
8. In both contracts, the Claimant was designated as a cook.
9. What is in dispute is whether the Claimant should have been paid more on account of additional responsibilities, an issue the Court will examine under underpayments.

**Whether termination of employment was unfair**

10. In terms of clause 10 of the second contract, either party could terminate the contract by giving one month's notice or pay in lieu of notice.

11. The Respondent's director who testified admitted in cross examination that no show cause notice or hearing was conducted prior to the termination of employment, but nevertheless maintained the termination was in accord with contractual agreement.

12. The reason for termination of the Claimant's employment relate to *health* and therefore falls under the general category of *physical incapacity*.

13. In terms of section 41 of the Employment Act, 2007, a hearing ought to have been conducted, but there is nothing to suggest one was held or that the Claimant was formally notified that his employment would be terminated on account of medical grounds.

14. The termination therefore did not meet the standard envisaged by the statutory provision cited hereinbefore.

15. The Respondent also did not demonstrate that the Claimant was given one month notice or was paid in lieu of notice. The explanation by the Respondent that the Claimant had been allowed 3 months off with salary cannot substitute or excuse the failure to give notice or pay in lieu thereof.

16. The termination was therefore equally wrongful, and the Court finds that the Claimant is entitled to 1 month pay in lieu of notice and compensation for unfair termination of employment.

17. Considering the length of service, the Court would award the equivalent of 7 months wages as compensation (at time of separation Kshs 10,000/-).

### **Underpayment of wages**

18. The Claimant contended that he was underpaid, (for 2006 – 2008) for which he claimed Kshs 28,272/- and he sought cover under Legal Notice No. 38 of 2006.

19. The prescribed minimum wage (exclusive of house allowance) for a cook in a municipality in terms of the Legal Notice was Kshs 4,978/- while in 2006 the Claimant was getting Kshs 4,500/- as consolidated wage. In 2007, the wage was increased to Kshs 5,000/- while in 2008, the wage was Kshs 5,500/-.

20. The Court finds the Claimant was underpaid.

### **Responsibility allowance**

21. The Claimant was engaged as a cook but was given additional responsibilities of accompanying pupils while being picked up in the mornings and being dropped home after school.

22. However, the Claimant did not provide any evidential or statutory basis for this head of claim (payment of responsibility allowance) and it is declined.

### **Overtime**

23. The Claimant did not prove the contractually agreed working hours or the prescribed working hours within the sector the Respondent operated in, and the Court is therefore unable to conclude that he worked overtime.

24. The Employment Act, 2007 itself does not prescribe working hours, an issue which is governed by various Regulation of Wages Orders which are industry specific.

### **Rest days**

25. Although the Claimant pleaded that he was entitled to 4 rest days per month and did not get the same

for the 7 years he served the Respondent, his testimony in this respect was vague and wanting in particulars.

26. The head of claim therefore was not proved.

### **Annual leave days**

27. The Claimant contended that he did not get annual leave for the tenure of employment.

28. The Respondent's director asserted on the other hand that the Claimant and other employees took annual leave for 2 weeks during school holidays of April and August and completely during December holidays.

29. That work nearly comes to a halt during school holidays is a fact the Court can and does take judicial notice more so on the basis of the schedule/roster produced by the Claimant.

30. This head of claim is declined.

### **Breach of contract**

31. The Claimant sought Kshs 292,058/- on account of breach of contract.

32. The remedy provided for breach of contract in cases of unfair termination of employment under section 49(4) of the Employment Act, 2007 is clear and is generally referred to as *compensation*, and allowing further damages beside compensation (this head) would amount to double remedy.

### **Certificate of Service**

33. A certificate of service is a statutory right and the Respondent should issue one to the Claimant within 14 days hereof.

### **Limitation**

34. Before concluding, the Court notes that the Respondent introduced the question of limitation in its submissions. In the view of the Court, the Respondent should have made limitation part of the Issues for determination in good time to enable the Claimant respond appropriately thereto.

### **Conclusion and Orders**

35. The Court finds and holds that the termination of the Claimant's employment was unfair and awards him and orders the Respondent to pay him

(a) 1 month pay in lieu of notice Kshs 9,000/-

(b) Compensation Kshs 70,000/-

(c) Underpayments Kshs 28,272/-

**TOTAL Kshs 107,272/-**

36. Respondent to issue a certificate of service within 14 days of this judgment.

37. Claimant to have costs.

38. Because the cause of action arose in Eldoret and the Court has now opened a sub-registry in Eldoret, the Court directs that the Cause be assigned a new number in Eldoret and the file be archived therein.

**Delivered, dated and signed in Eldoret on this 28<sup>th</sup> day of July 2017.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant                      Mr. Kirwa instructed by Mwakio, Kirwa & Co. Advocates

For Respondent                    Mr. Angu instructed by Angu Kitigin & Co. Advocates

Court Assistant                  Nixon