



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 319 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**CATHERINE KANAIZA ARADI.....CLAIMANT**

**-Versus-**

**LITTLE LAMBS COMPANY LIMITED**

**(LITTLE LAMBS CHILDREN CENTRE).....RESPONDENT**

**JUDGMENT**

The Claimant CATHERINE KANAIZA ARADI filed this suit against the Respondent, Little Lambs Company Limited, her former employer who runs a school in Eldoret, alleging constructive termination of her employment by the Respondent. She prays for the following orders-

(a) Declaration that the claimant’s services were unprocedurally, unlawfully and unfairly terminated;

(b)

1. Leave dues

21 Days \* years worked \* basic + house allowance. 26 days

21 Days \* 10 years \* 23885.5 26 days Kshs.192,921.34

2. Overtime dues

45 hrs. Pwk

10hrs \*6 days=60hrs-45hrs=15hrs OT

15hrs \* 4wks=60hrs p.m

60hrs \* 1.75 \* 11700/195=5400 p.m.

5400 \* 120 months Kshs.756,000.00

3. 19 days salary for March 2014

19 days * Gross pay/30days	
19 * 23885.5/30 days	Kshs. 15,127.48
4. Responsibility Allowance	
5000 Each month * months worked	
5001 * 120 months	Kshs.600,000
5. Compensation for unfair termination	Kshs.249,240
6. Savings	Kshs. 10,800
7. Underpayment of wages labour relation act 2007	
i) Legal notice No, 36 of 2004	
9925.65 – 5000 =4925.65 * 12	Kshs. 59,107.8
ii) Legal notice No.42 of 1 <sup>st</sup> May 2005	
11326 – 5000 = 6326 * 12	Kshs. 75,912
iii. Legal notice No.38 of 1 <sup>st</sup> May 2006 – 1 <sup>st</sup> May 2008	
Basic + house – current pay	
12685.65 – 7500 =5185.65 * 24	Kshs.124,455.6
iv. Legal notice No.69 of 1 <sup>st</sup> May 2009	
Basic + house all – current pay	
14969 – 9400 = 5569.555 * 12	Kshs. 66,834.6
v) Legal notice No.98 of 1 <sup>st</sup> May 2010	
Basic + house all – current pay	
14319 + 2147.85 – 8200 + 1200=9466.85*12	Kshs.113,602.2
vi) Legal notice No.98 of 1 <sup>st</sup> May 2011	
Basic + hse all – current pay	
16109+2416.35-8200+1200=11525.35*12	Kshs.138,304.2
vii) Legal notice No.98 of 1 <sup>st</sup> May 2012	
Basic + hse all – current pay	
18319.3+2732.89-10700=1200=11452.19*12	Kshs.137,426.28
viii) Legal notice No.98 of 1 <sup>st</sup> May 2013	

Basic + hse all – current pay

20770+3115.5-11700+1200=13385.5\*10

Kshs.133,855

**TOTAL CLAIM**

**KSHS.2,673,586.50/-**

8. Certificate of service.
9. Cost of this suit and Interest at court rates from the time of filing the suit until payment in full and
10. Any other further and better relief the Honourable court may deem just and fit to grant.

In the Answer to Claim filed on 9<sup>th</sup> December, 2014 the Respondent denies terminating the employment contract of the Claimant and avers that the Claimant refused to subject herself to evaluation for purposes of renewal of her employment contract which had expired. The Respondent states that instead the Claimant elected to resign from her employment. The Respondent prays that the Claim be dismissed with costs.

At the hearing of the Case the claimant testified on her behalf. The Respondent called its Managing Director and Chief Executive Officer, DOLLY ANJILI who testified on its behalf. The parties thereafter filed and exchanged written submissions.

### **Claimant's Case**

The Claimant testified that she was employed by the Respondent as a secretary on 1st January 2004 and worked up to 19th March 2014 when she resigned. She signed an employment contract for 5 years which was renewed verbally upon expiry in 2009. The contract was further renewed for a further term of 5 years in 2009. The Claimant testified that during her employment she performed the duties of cashier and cleaner. She also received and receipted payment of school fees.

The Claimant testified that while in the employment of the Respondent she enrolled to study, first at Kenya Institute of Management and later at Kisii University. She testified that the Respondent was aware about her studies and at one time paid part of her fees. She testified that every time she was sitting for examinations she sought and was granted leave.

The Claimant testified that on 18th March 2014 she asked for study leave from Dolly Anjili who informed her that she will have to sign a form as things had changed. She testified that Ms. Anjili's exact words were "Catherine, you are used to asking for permission each and every time to sit your exams. This *Tabia*\* of Julius I am not going to tolerate it". She testified that Julius was an accountant who had been sacked. The Claimant testified that Ms. Anjili informed her that she would have to report to work whenever she was required including on Saturdays and Sundays. She testified that this meant that she had to quit studying.

The Claimant testified that around the same time she noticed that Ms. Anjili had removed files which she previously used to handle from her cabinet and handed them over to Ms. Anjili's sister. She testified that her passwords were also withdrawn and given to other people with authority of Ms. Anjili. The persons given the passwords were Mr. Omondi, a fellow employee and Ms. Ruth Naomi. She testified that she would arrive at the office and find that the system had been tampered with in her absence, that all these people were working on the system and things were chaotic. She testified that she realised things were bad the day she went to ask for permission. It is then that she wrote her letter of resignation. After that she went and sat for her examinations then went back to the Respondent to ask for her terminal dues.

The Claimant testified that when she went to collect her terminal benefits Mr. Anjili did not greet her but told her to go to the Respondent's advocate Mr. Angu. She looked for directions to the advocates office but when she met him he told her that the Respondent had not given him any instructions in respect of her

case. He promised to call her later but did not.

The claimant testified that during the period she worked for the Respondent she did not take annual leave. According to her contract she was entitled to 30 days every year. She was informed by the Director Ms. Anjili that only teachers go on leave when school is closed. She testified that the only leave she took was when she was sitting for her examinations.

The Claimant further testified that she worked overtime for which she was not paid. She testified that she reported to work at 6 am and left work between 6 and 6.30pm. She testified that she did not have any break for lunch as lunch was served in the office. She testified that she was the only secretary.

The Claimant testified that she worked for 19 days in March 2014 which was not paid for. She further claimed for responsibility allowance. Her justification for the same is that she worked as secretary, cleaner, cashier, receptionist and many other tasks. She testified that whenever any employee left she would take over the work of such employee and that she was promised a responsibility allowance. She testified that the work she did was more than she was employed to do.

The Claimant further testified that she was seeking compensation and underpayments. She testified that she was underpaid as set out in her prayers.

The Claimant denied that she refused to subject herself to an evaluation as pleaded in the Respondent's Answer to her Claim and first saw the Claim in the papers filed in court.

The Claimant testified that she did not receive any invitation from the Respondent to collect her terminal dues. She prayed for orders as set out in her Claim.

Under cross examination the Claimant denied that the extra duties she undertook was part of her normal duties. She testified that she joined Kenya Institute of Management in 2012 and attended class from 5 or 6 pm to 9pm on weekdays and from 8am to 5pm on Saturdays and Sundays. She admitted that the Respondent at one time paid part of her fees in the sum of Kshs. 35,000. She stated that the school deducted NSSF and NHIF from her salary.

The Claimant testified that she resigned from her employment and gave several reasons for resignation. She admitted that she did not state that she was under psychological torture in the letter of resignation. She stated that she was working under pressure and was told to sign a leave form which she was not given. She stated that she was tortured when she was made to choose between her studies and her work.

The Claimant stated that there were times she went for Christmas but was recalled without compensation.

The Claimant stated that she did not lose anything at the school. She stated that she was never summoned to Eldoret Police station over any loss at the school.

## **Respondent's Case**

**Ms. Dolly Anjili, RW1** testified that the Claimant was employed as secretary to the school from 2003 to 2014 on 5 year renewable contracts. Her last contract was for the period 2009 to 2013. Her salary was Kshs 9,900 consolidated. The salary was increased annually and at the time of termination of her employment she was earning a salary of Kshs. 13,400. She testified that the Claimant resigned from employment in March 2014. In the letter of resignation the Claimant stated that recent changes had made her not feel like working at Little Lambs.

She testified that the school was originally a sole proprietorship but was registered as a limited company in 2011. That in 2013 the school was putting in place systems that necessitated a different approach.

Ms. Anjili testified that she accepted the Claimant's resignation on 19th March 2014.

She testified that staff went on leave for at least 3 months in a year. She denied owing the Claimant any leave. She also denied that the school owed the Claimant any overtime. She testified that staff left school at 4.30 pm latest. Ms. Anjili testified that she was aware the Claimant was undertaking further studies and could not afford to work late.

On the Claimant's claim for Responsibility allowance Ms. Anjili testified that the work the Claimant had referred to as extra was part of her normal ancillary duties such as receipting cash, doing banking and cleaning the office. With respect to the savings claimed by the Claimant she testified that it was for a welfare fund managed by the workers. She denied underpaying the Claimant. She testified that the claim was not valid as the Claimant was paid what was agreed. She further testified that the Respondent was not liable for compensation as the Claimant had resigned.

Under cross examination Ms. Anjili admitted that the Claimant's contract provided for 30 days annual leave. She further stated that she did not take leave during school holidays and that the Claimant worked for the school principal who also did not take leave during school holidays. She further testified that the school carried out holiday tuition and that there were visitors who came to the school during holidays but the Claimant was not necessarily the one who served the visitors.

On overtime Ms. Anjili admitted that the school kept attendance registers. She however stated that the Claimant was in an executive office and did not sign the register. She testified that the Claimant's duties involved opening the office and ensuring it was clean. She issued receipts, typed letters, did photocopying and distributed letters. She testified that these duties were indicated in the Claimant's job description and in the event of extra work for teachers the Claimant was paid. She stated that the Claimant shared the office with the accountant.

She testified that Morris was employed as office administrator a few months before the Claimant resigned and he was in the process of taking over some of the files previously in the Claimant's custody when the Claimant resigned. She stated that Morris had previously worked for the school as a management consultant before he was employed. She denied that there was reduction of the Claimant's work. She explained that the school was changing from a more informal organisation to a formal system and was introducing a lot of paperwork. She stated that when the Claimant joined the organisation it was a small organisation without a registry and the Claimant was keeping the files, but at the time she left there were about 700 students and 50 members of staff. She admitted reporting to the police that the Claimant had lost some files.

## **Determination**

I have carefully considered the pleadings and evidence adduced and also the written submissions filed by the parties. The issues for determination are whether the Claimant voluntarily resigned or was hounded out of office by the Respondent making her resignation involuntary. The other issue is whether the Claimant is entitled to any of her prayers.

## **Involuntary Resignation**

Involuntary resignation occurs where an employee is forced to resign from employment due to conduct of an employer that make it extremely difficult for the employee to continue working. An employee forced by an employer to resign in such circumstances is deemed to have been constructively terminated by the employer. Although this is not provided for expressly by the employment legislation in Kenya such a situation may be deemed to be unfair labour practice that is prohibited by Article 41 of the Constitution which provides that-

### ***41. (1) Every person has the right to fair labour practices***

In the case of **Coca Cola East & Central Africa Limited v Maria Kagai Ligaga [2015] eKLR** the Court of Appeal cited with approval the case of **Western Excavating (ECC) Ltd v Sharp [1978] 1 CR 222** where Lord Denning held:-

*If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or alternatively, he may give notice and say that he is leaving at the end of the notice.*

Again in the recent decision of the Court of Appeal in **Kisumu Civil Appeal No. 55 of 2015 The Board of Governors Cardinal Otunga High School Mosochi & 2 Others v Elizabeth Kwamboka Khaemba** the Court held that

*"...the Appellants' action of unilaterally assigning the respondent new duties amounted to significant breach that went to the root of the employment contract. The respondent was right in treating herself as discharged from any further performance of her duties as cateress. She cannot be said to have absconded duty. This is a classic case of constructive dismissal of the respondent by the appellants. The respondent was rightly entitled to damages for unfair termination of her employment under section 49 of the Employment Act."*

In that case the respondent who was a cateress was first sent on an unexplained 3 months compulsory leave and upon resuming duty, she was served with a letter directing her to take up a supervisory role in the cleanliness of the school boarding area, duties that were outside her professional competence. She treated that as termination of her employment as cateress and through her advocate sent a demand letter to her employer demanding terminal dues.

For an employee to prove constructive termination of employment the employee must therefore prove breach of their employment contract by the employer that would justify the employee treating the contract as terminated.

In the present case has the Claimant demonstrated that her resignation amounted to constructive termination of her employment? To answer this question the court must consider the circumstances under which the Claimant resigned.

She testified that she asked for leave for purposes of sitting for examinations and was told to fill a form. She further testified that before that some work had been withdrawn from her and given to other employees among them a sister to the Managing Director. In her letter of resignation the Claimant states as follows-

**"REF: RESIGNATION**

*I would like to inform you that I am resigning from my position as The Secretary of Little Lambs School effective from 19<sup>th</sup> March, 2014; I will assume this is satisfactory unless otherwise noted. Circumstances are such that I will no longer be able to come into the office and please accept this letter as a notification that I am leaving my position due to personal reasons.*

*While I greatly appreciated most of my time with your institution, recent changes in the institution have made me feel unable to continue working at Little Lambs School. However I appreciate the opportunities I have been given at the institution and your professional guidance and support. I wish both you and the institution much success in the future.*

*Please let me know what to expect as far as my accrued services and my final pay.*

*If I can be of assistance during this transition, please let me know. I hope I can rely on you for a positive reference in the future."*

The wording of the letter does not express anguish at the Respondent. The Claimant states that her

reasons for resignation were due to personal reasons. She cites "recent changes in the institution" that made her feel unable to continue working. She thanks the Respondent for professional guidance and support and offers to assist during the transition.

I do not read anguish in the tone of the letter. The letter does not express any involuntary cause for the resignation. The reasons stated in the Claimant's testimony do not in the view of the court, present grounds for constructive dismissal. I therefore do not find proof of constructive termination of employment.

## **Remedies**

### **1. Leave Days**

The Claimant prayed for leave days. Section 10(3)(a)(i) provides that-

*(3) The statement required under this section shall also contain particulars, as at a specified date not more than seven days before the statement, or the installment containing them, is given of—*

*(a) any terms and conditions relating to any of the following—*

*(i) entitlement to annual leave, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated);*

Further section 74(1)(f) provides-

*(1) An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars—*

*(a) ....*

*(b)....*

*(c) ....*

*(d) ....*

*(e) ....*

*(f) of an employee's annual leave entitlement, days taken and days due specified in section 28;*

No records have been produced by the Respondent in respect of leave taken and leave due to the Claimant. As provided in section 10(7), it is the employer's burden to disprove what the employee alleges. The Respondent has not discharged the burden and as a consequence must be presumed not to have given the Claimant leave.

RW1 testified that the school was not closed during holidays and the principal and herself worked during holidays. Her contention that all employees took leave during school holidays was not true for the Claimant. I find that the Claimant is entitled to annual leave for the period worked.

### **2. Overtime Dues**

The Claimant testified that she attended class from 5 or 6 pm to 9pm on weekdays and from 8am to 5pm on Saturdays and Sundays. Her contention that she worked overtime up to 6 or 6.30 pm cannot therefore be true. I find no proof that the Claimant worked overtime and dismiss the Claim.

### 3. Salary for 19 days Worked in March 2014

The Respondent did not deny that the Claimant was not paid salary for days worked up to the date of resignation. I award the Claimant Kshs.10,031.10 based on Statutory minimum wage for 2013 for days worked up to 19th March 2014.

### 4. Responsibility Allowance

The Claimant did not prove that she was promised responsibility allowance or that she undertook any work that was not ancillary to her work as secretary. I therefore dismiss the claim for want of proof.

### 5. Compensation for Unfair termination

Having found that the Claimant resigned voluntarily she is not entitled to compensation for unfair termination. The prayer is dismissed.

### 6. Savings

As stated by RW1 savings was undertaken through a welfare association managed by the employees. The Respondent is therefore not liable for the same. Nevertheless the Respondent is directed to ensure that the welfare which is managed by its employees refund the Claimant what is due to her.

### 7. Underpayments

The Claimant prayed for underpayments from 2004 to 2013. Under the general order the Claimant would be categorised as *general clerk/copy typist/telephone operator/receptionist* grade and was entitled to payment accordingly. The Respondent denied that she was underpaid and stated that she was paid what was agreed.

Under section 48 of Labour Institutions Act and section 26 of the Employment Act no employer is allowed to apply terms that are less favourable than the minimum terms prescribed by law and the Court is required to read into the contract those minimum terms. For this reason the Claimant was underpaid.

However it would not be fair to backdate the underpayments to the dates when the Claimant was employed when she only submitted her last contract from January 2009. I therefore award the Claimant underpayments from January 2009 to March 2014 as follows

May 2009	8632+15%	(9926.80-9400) x 12=	6321.60
May 2010	9495+15%	(10919.25-9400) x 12=	18231.00
May 2011	10682+15%	(12284.30-11525) x 12=	9111.60
May 2012	12081.10+15%	(13893.27-11525) x 12=	28419.30
May 2013	13772.70+15%	(15,838.60-11700) x 8=	33108.80
Jan-Feb 2014	13772.70+15%	(15,838.60-13385) x 2=	49072
<b>Total Underpayments</b>			<b>Kshs.144264.30</b>

### Conclusion

In conclusion I make the following orders

#### 1. I declare that resignation of the Claimant was voluntary

**2. I award the Claimant the following**

**(i) Pay in lieu of Annual leave from January 2009 to February 2014 (108.5 days) Kshs. 57,282.90**

**(ii) Salary for 19 days Worked in March 2014 Kshs. 10,031.10**

**(iii) Underpayments Kshs. 144264.30**

**3. The Respondent will ensure the Claimant is paid her staff welfare savings**

**4. The Respondent will pay Claimant's costs and interest shall accrue from date of judgment.**

**Dated and signed and delivered this 27th day of July, 2017**

**MAUREEN ONYANGO**

**JUDGE**