



**REPUBLIC OF KENYA**

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

**CAUSE NO 1760 OF 2015**

**LILIAN KHAYERE.....CLAIMANT**

**VERSUS**

**NEW DAY ACADEMY.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant’s claim brought by Memorandum of Claim dated 30<sup>th</sup> September 2015 and filed in court on 1<sup>st</sup> October 2015 is for unfair and wrongful dismissal. The Respondent filed a Memorandum of Response on 22<sup>nd</sup> February 2016.

2. When the matter came up for hearing the Claimant testified on her own behalf and the Respondent called Victoria Nduku Kitundu, Gaudencia Nanzala Wechuli, Rose Warue Ndwiga and Zubeida Athmani Ali.

**The Claimant’s Case**

3. The Claimant states that she was employed by the Respondent in September 2014, in the position of Head Teacher, at a monthly salary of Kshs. 45,000.

She adds that apart from performing her duties as Head Teacher, she prepared food for the pupils and also cleaned the school compound.

4. In March 2015, the Claimant notified the Respondent’s Director that she was pregnant. On 2<sup>nd</sup> March 2015, upon returning to work from attending a funeral, the Claimant was informed by the Director that that her services were no longer required. No further explanation was given.

5. The Claimant avers that there being no explanation as to why she was terminated, she believes that the Respondent terminated her employment mainly because she was pregnant. She states that the termination was unlawful and un-procedural. She adds that the Respondent’s action caused her a complicated pregnancy and delivery. The Claimant further claims that at the time of her dismissal she had accrued salary arrears.

6. The Claimant’s claim is as follows:

- a) Pay in lieu of notice.....Kshs. 45,000

- b) November 2014 salary balance.....15,000
- c) Salary for December 2014.....45,000
- d) Salary for January 2015.....45,000
- e) Salary for February 2015.....45,000
- f) House allowance for 6 months.....40,500
- g) 12 months' salary for unfair termination.....540,000
- h) Unfair termination on grounds of pregnancy.....1,500,000
- i) Certificate of service
- j) Costs plus interest

### **The Respondent's Case**

7. In its Memorandum of Response dated 19<sup>th</sup> February 2016 and filed in Court on 22<sup>nd</sup> February 2016, the Respondent admits having employed the Claimant as Head Teacher, at a monthly salary of Kshs. 45,000. The Respondent however denies issuing the Claimant with any letter of employment.

8. The Respondent states that the Claimant was employed on the recommendation of one Zaituni Mganga. She was employed pending production of a recommendation letter from her previous employer. The Respondent adds that the Claimant's probation was extended by three (3) months and that her confirmation was subject to production of the recommendation letter from her previous employer.

9. The Respondent accuses the Claimant of issuing an introductory circular to parents and guardians of the school without authority. The circular was produced by the Claimant as proof of her employment (Appendix 1).

10. The Respondent counters the Claimant's averment that she cooked for pupils and cleaned the school compound as the Respondent had employed cooks and cleaners. The Respondent further denies the Claimant's allegations that she was terminated because she was pregnant, and states that the Claimant absconded duty after being pressed to produce a recommendation letter from her previous employer.

11. The Respondent denies owing the Claimant any salary arrears and states that the Claimant was paid all her salary dues in cash or by mpesa. The Respondent also denies the claim for notice pay and avers that the Claimant failed to procure a recommendation from her former employer, Juhudi Academy, which was vital for her confirmation.

12. Regarding the claim for house allowance, the Respondent states that the Claimant earned a negotiated consolidated monthly salary of Kshs. 45,000.

### **Findings and Determination**

13. There are two (2) issues for determination in this case:

- a) Whether the Claimant has made out a case for unlawful termination;
- b) Whether the Claimant is entitled to the remedies sought.

### **The Termination**

14. The Claimant's employment with the Respondent is not in dispute. What is in issue is the mode of and reason for her termination. On her part, the Claimant states that she was terminated on account of her pregnancy.

15. While denying this assertion, the Respondent states that the Claimant was terminated because she failed to produce a recommendation letter from her former employer. In this regard, the Respondent pushed the argument that the Claimant was put on probation for initial three(3) months and a further 3 months, pending production of the recommendation letter from her former employer.

16. The argument that the Claimant was on probation up to the time of her termination does not sell, for the simple reason that under Section 2 of the Employment Act, 2007, a probationary contract must be in writing. The Respondent did not bother to reduce the terms of the Claimant's employment into writing as required by law. In the circumstances, the Court invokes Section 10(7) of the Act and adopts the Claimant's testimony on this account.

17. Moreover, the Respondent's witnesses, Victoria Nduku Kitundu, who is the proprietor of the School and Gaudencia Nanzala Wechuli, a teacher at the School, testified that the Claimant was terminated on phone. In *Violet Vugutsa Odenyi v Manoj Chudasama [2016] eKLR* this Court found a termination over the phone unlawful and unfair. In the instant case, there was clearly no evidence that the reason for the termination was ever communicated to the Claimant as required under Section 43 of the Employment Act, 2007.

18. Additionally, the Claimant was not afforded an opportunity to be heard prior to the termination, as required under Section 41 of the Act. The termination of her employment was therefore substantively and procedurally unfair and she is entitled to compensation.

## **Remedies**

19. In light of the foregoing findings, I award the Claimant three (3) months' salary in compensation for unlawful and unfair termination of employment.

In making this award, I have taken into account the Claimant's length of service and the Respondent's conduct prior to the termination. I further award the Claimant one (1) month's salary in lieu of notice.

20. The Claimant claims house allowance. Section 31 of the Employment Act provides as follows:

***31. (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.***

***(2) This section shall not apply to an employee whose contract of service-***

***(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or***

***(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).***

21. The Respondent's defence to this claim is that the Claimant earned a negotiated consolidated salary. There was no evidence of any such agreement between the parties. I therefore award the Claimant house allowance, at 15% of the basic salary and adopt the resultant figure of Kshs. 51,750 as the Claimant's salary for purposes of tabulating the compensation and notice pay due to the Claimant.

22. The Respondent did not produce any records to prove payment of the Claimant's salary and the claim

for salary arrears therefore also succeeds and is allowed.

23. There was however no proof that the termination of the Claimant's employment had to do with her pregnancy. Consequently, the claim for unfair termination on account of pregnancy fails and is dismissed.

24. Ultimately I enter judgment in favour of the Claimant in the following terms:

- a) 3 months' salary in compensation.....Kshs. 155,250
- b) 1 month's salary in lieu of notice.....51,750
- c) House allowance for 5 months.....20,250
- d) Salary arrears.....150,000
- Total.....377,250**

25. This amount will attract interest at court rates from the date of judgment until payment in full.

26. The Claimant is also entitled to a certificate of service and the costs of this case.

27. These are the orders of the Court.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 1<sup>ST</sup> DAY OF SEPTEMBER 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Miss Muhanda for the Claimant

Mr. Kubai for the Respondent