



**REPUBLIC OF KENYA**

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

**CAUSE NO.72 OF 2014**

**LYDIA NJERI**

**NG'ANG'A.....CLAIMANT**

**VERSUS**

**BOARD OF MANAGEMENT, BIRITHIA GIRLS SECONDARY  
SCHOOL.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 1<sup>st</sup> April, 2016)

**JUDGMENT**

The claimant filed the memorandum of claim on 12.06.2014 through Kariuki & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. The declaration that the respondent's termination of claimant's employment vide the respondent's letter dated 5<sup>th</sup> March 2013 is unlawful and improper.
- b. Salary for 1<sup>st</sup> to 5<sup>th</sup> March 2013.
- c. Three months' pay in lieu of notice.
- d. Service gratuity for period worked.
- e. Payment for work as school matron for the whole duration of employment.
- f. In the alternative to (d) above, payment of overtime from 4.00 am to 8.00am and 5.00pm to 9.00pm for the whole duration of employment.
- g. Uniform compensation for 1998 to 2009 and 2012.
- h. One year pay for loss of employment and opportunity.
- i. Certificate of service.
- j. Costs of the cause plus interest.

The respondent filed the memorandum of response on 24.06.2015 through F.O. Makori, Litigation Counsel, for the Attorney General. The respondent prayed that the claimant's memorandum of claim dated 11.06.2014 be dismissed with costs.

On 15.05.2015 the parties recorded in court a partial judgment by consent thus:

- a. The respondent to issue the claimant's certificate of service.
- b. The respondent to pay the claimant Kshs. 2,341.00 for 5 days' salary worked in March 2013.
- c. The respondent to pay the claimant Kshs. 33, 762.00 being 3 months in lieu of notice.
- d. The respondent to pay the claimant Kshs. 54,405 being gratuity pay. (But this order was set aside by consent of the parties on 15.07.2015).
- e. Total payable Kshs. 120,408.00.

The court, by consent of the parties, recorded the issues for parties' further compromise or for determination by the court thus:

- a. Whether the claimant is entitled to compensation for work as a matron or in alternative pay for overtime.
- b. Whether the claimant is entitled to uniform compensation for 1998 to 2009 and 2012.
- c. Whether the claimant is entitled to one year pay for loss of employment and opportunity.

The parties failed to reach a compromise and the outstanding issues are for determination by the court in this judgment.

The claimant was employed as a cateress on 01.09.1998 and worked until 05.03.2013. The claimant's duties included cooking and supervising cooking; kitchen work; to receive bulk food supplies and cleaning materials; supervising school's general cleanliness; assisting in nursing services when the school nurse was absent; and accompanying students to hospital. The claimant testified that as there was no store keeper, she performed the duties of the store keeper including receiving and issuing school kitchen supplies.

The claimant testified that a new principal reported in December 2009. Her evidence was that the new principal forced her to do irregular activities such as signing delivery notes for goods which had not been received at all. It was her evidence that the principal had at one time tried to forge the claimant's signature to achieve irregular transactions. On another occasion, the claimant testified that the principal had forced her to accept supplies of maize grain with high water content than was required; it was wet maize grain. She further testified that she had made a report of the said irregularities to the respondent's member one King'ori. The claimant worked with that new principal from 6.01.2013 to 05.03.2013. The principal gave her the dismissal letter and required her to leave the school housing accommodation the following day and she was evicted by the chief and police officers. She had served for 11 years without a warning letter and her service record was clean. The letter of 05.03.2013 stated that the claimant had been dismissed on account of gross insubordination being that on 01.03.2013 the claimant failed to supervise the non-teaching staff in the kitchen as instructed by the principal.

The respondent summoned the claimant on 30.07.2013 long after she had been dismissed. At that meeting the claimant and the union representative who was also present were not allowed to speak. The respondent's chairman summoned the claimant to respondent's meeting of 21.02.2014. However, she was not allowed into the meeting.

The **1<sup>st</sup> issue** for determination is whether the claimant is entitled to compensation for work as a matron or in alternative pay for overtime as prayed for. RW testified that the work of a store keeper, matron, and cateress were in the same category in the school's staffing establishment. The claimant did not plead the specific damages she would have been paid as a matron. The evidence was not clear on the agreement and overtime hours that the claimant claimed and prayed for. The overtime claims were not specifically pleaded. Accordingly the court returns that the claimant has failed to establish the prayers for pay as a matron or for overtime pay. The prayers will fail.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to 12 months compensation for unfair termination under section 49(1) (c) of the Employment Act, 2007. The court finds that the claimant was dismissed without a notice and a hearing as envisaged in section 41 of the Act. As was held in **Shankar Saklani –Versus-DHL Global Forwarding (K) Limited [2012]eKLR** a hearing and notification in cases of dismissal including summary dismissal are mandatory. The court returns that the termination was unfair. The court has considered the claimant's long service of over 10 years and the aggravating circumstances of the irregular transactions the principal forced the claimant to engage in. The respondent did not rebut the claimant's position that the main reason leading to her dismissal was about the forced irregular food supplies that she had resisted. The claimant reported the matter to a member of the respondent but no action was taken. The claimant desired to continue in employment. The court finds 12 months' salaries at **Kshs. 14, 049.00** making **Kshs.168, 588.00** will meet the ends of justice in this suit.

The **3<sup>rd</sup> issue** for determination is whether the claimant is entitled to uniform compensation for 1998 to 2009 and 2012. The claimant gave no evidence to support this claim and the court finds that the same will fail as it was not established.

The **4<sup>th</sup> issue** for determination is whether the claimant is entitled to gratuity under the provisions of the collective agreement. The parties had agreed as much but set aside the same due to the dispute whether the claimant served as a cateress or a matron. There is no dispute that the parties were bound by a collective agreement whose provisions entitled the claimant to gratuity. The claim for gratuity will therefore succeed.

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

- a. The declaration that the respondent's termination of the claimant's employment vide the respondent's letter of 05.03.2013 was unlawful and improper.
- b. The respondent to pay the claimant **Kshs.168, 588.00** for unfair termination.
- c. The respondent to pay the claimant service gratuity per the provisions of the relevant collective agreement.
- d. The respondent to pay the claimant the amount of money found due, in b and c above and per the partial judgment by consent of 15.05.2015, by 01.06.2016 failing interest to be payable thereon at court rates till the full payment.
- e. The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered in court at Nyeri this Friday, 1st April, 2016.**

**BYRAM ONGAYA**

**JUDGE**