



**REPUBLIC OF KENYA**

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

**CAUSE NO. 117 OF 2015**

**EPHRAITH MUTHONI MUGO.....CLAIMANT**

**VERSUS**

**B.O.M KIANAMU PRIMARY SCHOOL.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 27<sup>th</sup> May, 2016)

**JUDGMENT**

The claimant filed the memorandum of claim on 16.07.2015 acting in person. The claimant prayed for judgment against the respondent for Kshs.468,539.20 being 12 months' salaries for compensation for unfair termination, overtime worked and not paid, underpayment and one month pay in lieu of the termination notice.

The respondent filed the memorandum of response on 09.10.2015 through F.O. Makori, Litigation Counsel, for the Attorney General. The respondent prayed that the memorandum of claim filed on 11.07.2015 be dismissed with costs.

The respondent employed the claimant as a class teacher effective 04.02.2010 and served up to May 2015. At initial appointment the claimant was deployed to teach in class three. Over time she was promoted because her salary was increased and she was assigned to teach the upper preparatory classes. At termination she taught Kiswahili in class 7, Social Studies in class 4 and Christian Religious Education in class 6. The claimant was paid Kshs.6,000.00 per month and it was her case that she was underpaid in view of the wage orders. The claimant testified that the salary as paid was agreed upon but she expected some salary increment.

The claimant testified that there was an agreement with the head teacher that she would be paid Kshs.400.00 per day for work done after 5.00pm on account of overtime and she was not paid 105 hours overtime in 2012 and 2014.

On 5.05.2015 the claimant testified that she reported on duty and before she went to class the curriculum co-ordinator one Nyagah summoned her and told the claimant that the claimant was going to have a rest at home until further notice. She was not given a termination letter. The deputy head teacher confirmed to the claimant that she had to leave employment and that the claimant had to leave without disrupting the school's tranquility. The claimant then left employment on that day.

The respondent's case was that the claimant was a holder of mean grade D plain at KCSE and therefore was terminated for failing to meet the minimum qualifications of C plain at KCSE prescribed by the Ministry of Education.

The court has considered the pleadings, the evidence and the submissions and makes findings as follows:

1. There is no dispute that the claimant was employed by the respondent as a teacher and the claimant served for more than five years.
2. The claimant did not by way of evidence establish the days she says she worked overtime and did not establish that there was a grievance about unpaid overtime while the contract of employment subsisted. The claimant has claimed 105 hours of overtime and stated that Kshs.400.00 per day was the agreed pay for overtime. The court finds that the pay per day would be inconsistent with the claim in hours and taking all the circumstances and evidence into account, the claimant has failed to coherently establish the claim. The claim for overtime will therefore fail.
3. The claim for underpayment was based on wage orders but which have not been shown to have applied to teachers like the claimant. The prayer for underpayment will therefore fail.
4. The claimant served as a teacher for over 5 years and was employed upon an agreement whereby qualifications were not an issue. Section 10(7) of the Employment Act, 2007 vests upon the respondent the burden of proving or disproving an alleged term of employment. The respondent has failed to show that it was a term of employment of the claimant that the claimant would hold C plain at KCSE level of education and the respondent has failed to show that it was a term of contract that the claimant would whimsically leave employment if the claimant failed to show that she held C plain at KCSE level of education. Section 10(5) of the Act required the respondent to consult the claimant for any change in the terms of employment and to notify the claimant in writing of any such change but the respondent failed to act in accordance with that provision. The court finds that the respondent could not unilaterally vary or introduce the issue of qualifications as a term of contract for the continued employment of the claimant. The court finds that the reason for termination was invalid and the termination was unfair under section 43 of the Employment Act, 2007. Further, the issue of qualifications is directly founded upon performance and in the opinion of the court the respondent should have given the claimant a notice and a hearing as envisaged in section 41 of the Act for removal on account of poor performance for want of the alleged higher academic qualifications but which was not done. The court returns that the termination was unfair. The claimant is entitled to one month pay in lieu of the termination notice being **Kshs.6,000.00** and 12 months' salaries for the unfair termination being **Kshs.72,000.00**. While making that award the court has considered that the claimant did not contribute to her termination, she was keen to continue in employment and the respondent had acknowledged that she was a good worker throughout her considerably long service of over 5 years. The claimant is accordingly entitled under section 49(1) (c) of the Act.
5. As the claimant has substantially succeeded in her claim she is hereby awarded the costs of the suit fixed at **Kshs. 40,000.00** all inclusive.

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

1. The declaration that the respondent's termination of the claimant's employment was unfair.
2. The respondent to pay the claimant **Kshs.118,000.00** by 01.08.2016 failing interest to be payable thereon at court rates from the date of this judgment till full payment.

**Signed, dated and delivered** in court at Nyeri this **Friday, 27<sup>th</sup> May, 2016**.

**BYRAM ONGAYA**

**JUDGE**