



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 138 OF 2015

PAULINE MUTHONI MWAI..... CLAIMANT

VERSUS

KENYA METHODIST UNIVERSITY.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 3rd June, 2016)

JUDGMENT

The claimant filed the memorandum of claim on 12.08.2015 through Nderi & Kiingati Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the claimant was not a casual employee of the respondent and an order spelling out her terms of service on a permanent basis.
- b. An order of reinstatement to her position at the respondent's establishment at the terms above.
- c. An order of payment of salaries for the period she has been out of employment till her reinstatement.
- d. In alternative and without prejudice:
 - i. An order regarding her lawful salary and an order for payment of arrears of underpayment.
 - ii. Two months' salary in lieu of notice.
 - iii. Payment of all leave days for the period worked.
 - iv. Damages under section 45 of the Employment Act, 2007.
 - v. Payment of gratuity at the rate of one month salary for every year worked.
 - vi. General damages for discrimination and unfair labour practices.
 - vii. Refund of all sums deducted on behalf of NSSF and NHIF.
 - viii. Costs of the suit and interests.

The response to the claim was filed on 31.03.2016 through M.M. Kioga and Company Advocates. The respondent prayed that the claim be dismissed with costs.

The respondent employed the claimant as an auxiliary staff effective 2011 to May 2015. The claimant's job was to prepare and serve tea and snacks for the staff at the respondent's Nyeri Campus.

In April 2015 the respondent advertised for a position of tea and meetings service requiring qualifications in catering. The advertisement was not open but it was internal and the claimant was not notified. The claimant did not meet the qualifications and she was not considered for the job. The claimant's daily wage rate was Kshs. 298.16; she worked Monday to Friday or to Saturday and she was paid at the daily rate on monthly basis. It was the claimant's case that she was deducted NSSF but the money was not remitted.

The claimant was dismissed on 15.05.2015 after inducting the new appointee to replace her. The respondent's director one Mugambi summoned the claimant to his Nyeri Campus office and conveyed to the claimant that her employment had come to an end. The director told the claimant not to report at work effective the next Monday. The director gave the claimant no reason for the termination and upon the claimant asking for the reason the director told her that the decision to terminate had been made at the respondent's head office in Meru.

The claimant was dissatisfied with the decision of the Labour Officer at Nyeri in the grievance she reported to the Officer about her termination and she filed the present suit.

The **1st issue** for determination is whether the claimant was unfairly terminated from employment. The respondent employed the claimant as an auxiliary staff effective January 2011 to May 2015. The service was without a break. The court returns that the claimant's otherwise casual employment converted to employment subject to minimum terms under the Employment Act, 2007 as provided for in section 37 of the Act. The service was not casual and the court returns as much. The service was for performance of a permanent job for which a permanent employee was subsequently employed and the job required continuous performance beyond a month. The claimant had served for a long period of time of over 4 years. The court returns that the minimum statutory terms applied.

The respondent did not serve the claimant any notice or afford the claimant a hearing as envisaged in section 41 of the Employment Act, 2007; that is, if the claimant's performance was poor for want of the qualifications that the respondent came to unilaterally attach on the position the claimant held. As relates to the unilateral introduction of new qualifications, the court upholds its opinion in **Ephraith Muthoni Mugo –Versus- B.O.M. Kianamu Primary School [2016]eKLR** thus **“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 court has considered the circumstances of the case. The termination has been found unfair. The claimant had served with dedication for over 4 years. She was willing to continue in employment. She was subjected to a discriminatory removal in terms of section 5 of the Employment Act, 2007. The claimant was willing to continue in employment. The court returns that the claimant is entitled to 12 months' wages plus one further month pay in lieu of the termination notice (under section 35(1) (c) of the Act) at 30 days per month making 390 days at Kshs.432.45 per day (as minimum pay under the relevant wage order L.N. No. 197 of 2013 effective January 2014) making **Kshs.168, 665.50**.

The **2nd issue** for determination is whether the claimant is entitled to the other remedies as prayed for.

The court makes findings as follows:

- i. The claimant has confirmed that another person has been employed in her place and in view of the compensation under section 49(1)(c) of the Employment Act, 2007 found due, the court returns that the claimant is not entitled to reinstatement.
- ii. The claimant prayed for an order regarding her lawful salary and an order for payment of arrears

- of underpayment. The Labour Officer found that the claimant was underpaid for the period of 16 months and 15 days since under the relevant wage order L.N. No. 197 of 2013, effective January 2014 the claimant was entitled to Kshs. 432.54 and not Kshs.298.16. The court finds that the claimant is entitled to **Kshs.67, 145.00** found due by the Labour Officer and as the undisputed claim in this matter as admitted by RW in his evidence.
- iii. The claimant prays for payment of all leave days for the period worked. The claimant established that she worked without a break from January 2011 to May 2015 being 4 years of complete service. She is entitled to the statutory 21 leave days for each year served at flat statutory rate of Kshs. 432.54 per day that prevailed at termination making **Kshs.36, 333.40**.
 - iv. The claimant prayed for payment of gratuity at the rate of one month salary for every year worked. The claimant has established that NSSF was deducted but not remitted. The court considers that the pay of gratuity as prayed for would therefore be reasonable and just in view of the claimant's service per section 35(5) of the Employment Act, 2007 being 30 days times Kshs. 432.54 by 4 years making **Kshs.51, 904.80**.
 - v. The claimant prayed for refund of all sums deducted on behalf of NSSF and NHIF. As the court has made an award on gratuity as found due, refund for NSSF dues deducted and not remitted is declined. The evidence is that NHIF was deducted and remitted and the prayer will fail in that regard.
 - vi. As the claimant has substantially succeeded in her claims and prayers, she is entitled to costs of the suit.

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

1. The declaration that the termination of the claimant's employment by the respondent was unfair.
2. The respondent to pay the claimant a sum of **Kshs.324, 048.70** by 01.08.2016 failing interest to be payable thereon at court rates from the date of this judgment till full payment.
3. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 3rd June, 2016**.

BYRAM ONGAYA

JUDGE