



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

**CAUSE NO.134 OF 2014**

**(Formerly ELRC Cause No. 326 of 2014 at Nairobi)**

**PITYNASE MUTHONI KIRIGU.....CLAIMANT**

**VERSUS**

**THE BOARD OF MANAGEMENT,**

**CHOGORIA GIRLS BOARDING PRIMARY SCHOOL.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 14<sup>th</sup> October, 2016)

**JUDGMENT**

The memorandum of claim was filed on 26.02.2014 through Mugambi & Company Advocates. The response to the memorandum of claim and counterclaim was filed on 20.05.2015 through Kiautha Arithi & Company Advocates. The reply to defence and defence to counterclaim was filed on 06.06.2014. The amended statement of claim was filed on 10.03.2016. The claimant prayed for judgment against the respondent for:

1. A declaration that the claimant's employment services and suspension with the respondent were terminated wrongfully, unfairly and illegally.
2. Damages for wrongful dismissal being 25 months' salary.
3. One month's salary in lieu of notice of termination of employment at Kshs.16, 420.00.
4. Two years' leave not taken Kshs.32, 840.00.
5. Arrears of salary since the claimant was suspended without salary to date Kshs.432, 080.00.
6. An order that the respondent issue a certificate of service to the claimant.
7. Any other relief that this honourable court may deem fit and just to grant.

The amended defence to the claim and counterclaim was filed on 25.05.2016. The respondent prayed for judgment against the claimant for:

1. The claim to be dismissed with costs.

2. Refund of Kshs.594, 339.50.
3. Costs.
4. Interest on (a) and (b) at court rates.

The claimant was employed by the respondent on 01.01.1987 as an accounts clerk. As at the date of termination her monthly net pay was Kshs.16, 299.00.

The employment relationship was harmonious until 17.01.2013 when the claimant was put on a compulsory leave. The reasons for the leave were not disclosed in the letter on the compulsory leave.

The claimant received the respondent's letter dated 25.02.2013 inviting the claimant to report at the school on 27.02.2013 at 9.00 a.m. The invitation letter did not disclose the agenda. It is not clear if the claimant attended the meeting as scheduled. On 14.03.2013 the claimant was summoned by the respondent and the respondent informed the claimant that the school had lost money and the recovery of that lost money would be divided equally between the claimant and one Nanise Kaari Bundi, the persons who were said to be culpable for the loss because the two were the school's accounts clerks throughout the period of the lost money in issue. The amount to be recovered from the claimant was Kshs.594, 339.50.

The respondent has filed the minutes of the meeting for the respondent's executive committee held on 14.03.2013. The record shows that the claimant and the said Nanise admitted that they were jointly responsible for the loss of school money amounting to Kshs.1, 188, 679.00 and they each signed agreeing to pay half of the money being Kshs. 594, 339.50 each. The record shows that the claimant stated at the meeting thus, **"I'm so sorry from deep my heart and I humbly ask the board to forgive me. I have also agreed that I own the payment."** The minutes show that the claimant and the said Nanise agreed to write and they each willingly signed that they would refund the money to the school. The minutes further refer to the schedules of the money in issue. The claimant signed the handwritten letter dated 14.03.2013 agreeing to refund Kshs. 594, 339.50 over a period of 10 years. In that letter the claimant pleaded to continue in employment and to continue working honestly in view of the claimant's past failures. It appears that the claimant was then allowed to continue in employment but defaulted on the promise to refund the cash by monthly installments. In particular, the respondent summoned the claimant at the meeting of 04.04.2013 and asked the claimant to refund the full amount in three monthly installments and a letter was served upon the claimant to that effect. By the letter dated 04.04.2013, the claimant was suspended from duty without pay for 3 months within which the full refund was to be effected and after which the respondent would make further decision. After the suspension, the claimant failed to make the refund and the respondent made no further communication to the claimant.

The court has considered the pleadings, the evidence and the submissions. The court makes the following findings on the issues for determination.

The **1<sup>st</sup> issue** for determination is whether the claimant's employment was terminated. The court finds that the claimant failed to make the refunds as per the terms of her suspension in the letter dated 04.04.2013. The opportunity for the respondent to make a further decision as promised in that letter did not accrue in view of the claimant's failure to refund within the 3 months. The respondent never recalled the claimant. In view of the respondent's silence and in view of all the surrounding circumstances, the court returns that the claimant's employment was constructively terminated upon lapsing of 3 months from 04.04.2013 when she failed to refund the money and when the respondent went silent.

The **2<sup>nd</sup> issue** for determination is whether the constructive termination of the contract was unfair. The court returns that the constructive termination was not unfair because the claimant under her own hand signed the letter of 14.03.2013 admitting culpability and agreeing to refund Kshs.594, 339.50. The court returns that there were valid reasons as envisaged in section 43 of the Employment Act, 2007 leading to the termination and the termination was not unfair. The claimant suggested that she had been forced by the respondent's chairman Rev. Nicholas Kaburu Mpengu to write and sign her letter of 14.03.2013 but

the court returns that there was no evidence and basis of such alleged force as the same was not established by the claimant.

The **3<sup>rd</sup> issue** is whether the claimant is entitled to the remedies as prayed for. The court has found that the termination was not unfair. Thus the claimant is not entitled to the remedies as prayed for. The claimant is not entitled to pay during the period of suspension because the termination has been found to have been not unfair. While making that finding the court upholds its opinion in **Grace Gacheru Muriithi –Versus- Kenya Literature Bureau (2012) eKLR**, in which the court stated thus, **“The court considers that an employee on interdiction or suspension has a legitimate expectation that at the end of the disciplinary process he or she will be paid by the employer all the dues if the employee is exculpated. Conversely, if the employee is proved to have engaged in the misconduct as alleged and at the end of the disciplinary process the employee has not exculpated himself or herself, the court considers that the employee would not be entitled to carry a legitimate expectation to be paid for the period of suspension or interdiction. Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable. Accordingly, the court finds paragraph 6.2.4 of the respondent’s Terms and Conditions of Service to be unfair labour practice to the extent that the provisions deny the employees payment even in instances where they exculpate themselves at the end of the disciplinary process. To that extent, the provision offends Sub-Articles 41(1) of the Constitution; it is unconstitutional.”**

The court has found the circumstances of the constructive termination to have constituted a valid reason of termination of the contract of employment and the claimant was not unfairly treated. The court considers that in such circumstances the claimant is not entitled to pay during the period of suspension.

The **4<sup>th</sup> issue** for determination is whether the respondent is entitled to the remedies in the counterclaim. The court has found that the claimant voluntarily signed agreeing that she was liable and willing to refund the Kshs.594, 339.50. The court returns that the respondent is entitled accordingly.

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

1. The claimant to pay the respondent **Kshs.594, 339.50** by 31.12.2016 failing interest to be payable thereon from the date of this judgment till full payment.
2. The claimant to pay costs of the suit including the counterclaim.

**Signed, dated and delivered** in court at Nyeri this **Friday, 14<sup>th</sup> October, 2016.**

**BYRAM ONGAYA**

**JUDGE**