



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1159 OF 2012

MAUREEN A. HOMENCLAIMANT

VERSUS

**THE BOARD OF GOVERNORS, ARYA VEDIC PRIMARY AND SECONDARY SCHOOL...1ST
RESPONDENT**

ARYA STRI SAMAJ2ND RESPONDENT

Mr. Mbugua for the Claimant

Mr. Mwangi for Respondent

JUDGMENT

1. The Claimant filed the suit via a Statement of Claim on 9th July, 2012 seeking the following reliefs;
 - a. three months' salary in lieu of Notice
 - b. payment of gratuity in the sum of Ksh.1,208,728.00
 - c. payment of Acting Allowance for 3 years and 9 months in the sum of Ksh.1,930,803.00.

2. **Claimant's Case**

The Claimant was employed by the Respondent as a teacher on 14th February, 2002 earning a monthly salary of Ksh.45,000.00.

3. In terms of the letter of employment, termination of the contract by either party was by giving three months' notice or payment in lieu thereof, subject to summary dismissal for misconduct.

4. She was in terms thereof entitled to gratuity calculated at 15% of the basic salary after completing 60 months continuous service.

5. On 13th July, 2005, the Claimant was appointed by the 2nd Respondent as an Acting Headmistress of the 1st Respondent's primary and secondary schools.

6. The Claimant acted in that capacity for 3 years and 9 months between 29th July, 2005 to 5th August, 2009. The Claimant was not paid any Acting Allowance for the entire period.

7. By a letter dated 7th September, 2009, the 2nd Respondent demoted the Claimant from the position of Acting Headmistress to the position of a Senior English Teacher.
8. On 9th September, 2009, the Claimant wrote a letter of demand to the Respondent for payment of Ksh.857,480.00 being unpaid gratuity for seven (7) years and three (3) months.
9. By a letter dated 16th November, 2009, the Respondent purported to have scrapped gratuity with effect from August, 2004 and same was replaced by a provident fund scheme.
10. By a letter dated 4th June 2010, the 2nd Respondent informed the Claimant that the Board had agreed to clear the backdated pension contributions to the scheme from September, 2004 to May, 2009 by contributing a lumpsum transfer of Ksh.553,802.00.
11. The Claimant was requested to write a cheque in favour of Apollo Insurance Company Limited for the sum of Ksh.553,802.00. The Claimant sent the cheque for the amount to the Respondent and receipt was acknowledged.
12. On 2nd December, 2009, the Claimant demanded payment of gratuity and Acting Allowance.
13. By a letter dated 5th August, 2010, the Respondent stated that the Claimant was compensated for the acting position by a salary increase. The claimant states this was a normal salary increase.
14. By a letter dated 12th August, 2010, the Respondent dismissed the Claimant from employment for making "false claims against the School Board of Management" with regard to the payment of Acting Allowances in the position of Acting Headmistress. The letter was produced in court.
15. The Claimant states that the dismissal was malicious, unlawful and unfair and prays for the reliefs set out in the Statement of Claim.

16. **Response**

The Respondent filed a Statement of Defence on 25th July, 2012 in which particulars of employment of the Claimant set out in paragraphs 4 and 5 of the Statement of Claim are admitted.

17. The Respondent however, denies the following;
 - a. that the Claimant was not paid allowance for the Acting Headmistress position
 - b. that the Claimant was demoted, and states that the Respondent found a suitable person to occupy the position of Headmistress
 - c. that there was agreement to pay the Claimant Ksh.1,930,803.00
 - d. that the termination was unlawful and unfair stating that the same was for misconduct in that the Claimant made false allegations of non-payment of acting allowances.
18. Furthermore, the Respondent admitted that on 8th October, 2002, it reduced the percentage of gratuity payable from 15% to 12% due to financial constraints and this was communicated to the Claimant. The Respondent adds that the Claimant did not refuse the new terms of service. She is therefore entitled to gratuity calculated at 15% per annum for the period 14th February, 2002 to 8th October, 2002 which was already paid.
19. The Respondent admitted all the pleadings set out under paragraphs 10, 11, 12, 14 and 16 of the Statement of Claim with regard to payment of Lumpsum Pension contribution in favour of the Claimant in the sum of Ksh.553,802.00.
20. In conclusion, the Respondent states that any gratuity and pension contribution the Claimant was

entitled to has been fully paid. The Respondent prays the court to dismiss the claim with costs.

21. The Respondent relied on the bundle of documents filed on 28th January, 2013 and marked exhibit R1 to R10.

22. **Determination**

From exhibit R10, it is clear that the gratuity scheme was replaced by a contributory pension scheme with effect from 1st September, 2004. Gratuity earned until 30th August, 2004 was to be paid as and when due as per the terms and conditions of service. A salary increment of 20% was effected with effect from 1st January, 2004 for all staff who had completed one year service on 31st December, 2003.

23. The letter of appointment dated 9th January, 2002 provided for gratuity at 15% of the basic salary after completing 60 months continuous service. The contract also provided for three months termination notice or payment in lieu thereof.

24. The letter dated 8th October, 2002, reduced the gratuity percentage from 15% to 12% and same was signed by the Claimant and the letter reads that the Claimant had understood the said amendment to the letter of appointment. The letter is exhibit R1.

25. On 1st June, 2004, when the Claimant was promoted to Deputy Headmistress, her terms did not change as per R2. It is common cause that she did not get any extra emolument for the position of Acting Headmistress. It is also common cause that she received a general salary increment like the rest of the staff without any consideration of the acting position. Exhibit R4 confirms that she took over as Acting Headmistress from 29th July, 2005.

26. It is self-evident that the Claimant's employment was terminated for raising a grievance about her terms and conditions of service. Every employee has got an inherent right to pursue better terms and conditions of service in a lawful manner.

27. Raising an internal grievance regarding non-payment of the acting allowance cannot be a valid reason to summarily dismiss the Claimant from her employment.

28. This is exactly what the Respondent did.

29. In dismissing the Claimant, the Respondent did not give her notice at all in disregard of her express terms of employment. The Claimant was not given a show cause letter nor was she subjected to a disciplinary process.

30. The dismissal was in violation of the express provisions of the **Employment Act, 2007** to wit **Section 35** on notice and **Section 41** on the right to be heard.

31. The Respondent has failed to discharge the onus placed on it under **Section 43** as read with **Section 47(5) of the Employment Act** to demonstrate that the reason for dismissal was valid and that the dismissal was effected in terms of a fair procedure.

32. This being the case, the summary dismissal of the Claimant was unlawful and unfair in terms of **Section 45(1)** as read with **Section 45(2)(a) and (c) of the Employment Act, 2007**.

33. The Claimant is entitled to compensation in terms of **Section 49** of the **Act** therefore and the court so finds.

34. The Claimant has in this respect claimed three months' salary in lieu of Notice. This is expressly provided for in her letter of appointment and the court awards her Ksh.339,681.00 in lieu of three months' notice.

35. **Acting Allowance**

The Claimant has established on a balance of probabilities that she acted as Headmistress for a period of three(3) years and nine(9) months. The acting allowance is the difference between the substantive basic salary for the acting position and the basic salary for the position she held substantively. The amount as set under paragraph 24 of the Memorandum of Claim totals Ksh.1,930,803.00. The court awards the Claimant accordingly.

36. **Gratuity**

The Gratuity Scheme at 15% of the basic salary was replaced with a pension scheme with effect from 1st September, 2004. The Respondent has satisfied the court that it duly paid out in arrears, the pension contributions for the Claimant.

37. The court is however not satisfied that the Claimant was paid gratuity for the period 15th February, 2002 to 30th August, 2004 and awards the Claimant for the period in sum of Ksh.226,881.00.

38. The Claimant did not pray for compensation for the unlawful and unfair termination other than payment of three months' salary in lieu of Notice. The court will not award that which has not been pleaded.

39. In the final analysis the court makes a total award of;

a. Notice Pay	-	Kshs.339,681.00
b. Acting Allowance	-	Ksh.1,930,863.00
c. Gratuity	-	<u>Ksh.226,881.00</u>

Total award Ksh.2,497,425.00

40. The award is payable with interest at court rates from date of Judgment till payment in full.

41. The Respondent to pay the costs of the suit.

Dated and Delivered at Nairobi this 13th day of March, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE