



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2099'A' OF 2011

(Before Hon. Justice Hellen S. Wasilwa on 12th May, 2015)

JANE KABUNYI.....PLAINTIFF

VERSUS

BOARD OF GOVERNORS KAMIRITHU PRIMARY SCHOOL...RESPONDENT

JUDGMENT OF THE COURT

1. The Claimant herein filed her Memorandum of Claim on 13/12/2011 through the firm of M/S J. M. Njenga & Company Advocates. The 1st Respondent is the Executive Governing Body of Kamirithu Primary School.

Claimant's case

2. The Claimant avers that at all material times she was a permanent employee of the Respondent herein having been initially employed in 1987 as a Secretary but later on joined the teaching staff. She avers that during her period of employment, she was a diligent, loyal and dedicated employee and there was never any complaint regarding her conduct or performance of her work.

However on 1/12/2010, she was served with a letter of termination and unlawfully terminated on 30/11/2010. The reason for the termination was that the Respondent could no longer afford her salary. The termination letter is annexed as **Appendix 1** herein.

3. The Claimant now claims from the Respondent her service pay, 1 months salary for each year worked, severance pay being ½ months' salary for each year worked – 23 years and compensation for wrongful termination equivalent to one year gross pay for loss of employment all totaling 316,250/=. The case proceeded exparte, the Respondent having been served and having failed to enter appearance or file a defence.

Issues of determination

4. The issues for determination are:

(1). Whether the termination of the Claimant was lawful and fair.

(2). If not, if the Claimant is entitled to prayers sought.

5. On the 1st issue, it is apparent that the Claimant was terminated because the Respondent avers that they were unable to pay her salaries. The Claimant aver that the reasons is not a valid reason because the position she previously occupied still exists todote and somebody else was employed to take over the same. That the issue of Respondent not being able to afford her services was therefore not truthful and was outrightly malicious.

6. The procedure also used before termination was unfair as she was not given any hearing as envisaged under Section 41 of the Employment Act 207 which provides that:

“ (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

7. This being the position, this court finds that the termination was not just and fair.

8. What remedies is the Claimant entitled to?

Since she was not given any notice I awards her 1 months salary in lieu of notice being 5,500/=.

I also find that she is entitled to severance pay as provided for under Section 40 of Employment Act. This is because I treat this termination as an unlawful redundancy, the Respondent having alluded to their inability to pay salary:

= ½ salary x 23 years = 63,250/=

I also award claimant 12 months salary as compensation for unlawful redundancy being = **5,500 x 12 = 66,000/=**

TOTAL awarded = 134,750/= plus costs and interest

The Respondent will henceforth issue her with a Certificate of Service.

It is so ordered.

Dated and delivered in open Court this 12th May, 2015.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Claimant

No appearance for Respondent