



**REPUBLIC OF KENYA**

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

**CAUSE NO.89 OF 2014**

**MARY WANGECHI MAINA.....CLAIMANT**

**VERSUS**

**BOARD OF GOVERNORS MOI NYERI COMPLEX PRIMARY SCHOOL.....  
RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 19<sup>th</sup> June, 2015)

**JUDGMENT**

The claimant filed the memorandum of claim on 21.07.2014 in person. She prayed for judgment against the respondent as follows:

- a. That her termination was without any legal and factual basis consequently it was illegal and unlawful.
- b. An order for payment of one year salary Kshs. 16, 011 x 12 being Kshs. 192, 132.00 with interest from the date of termination.
- c. Damages for unlawful termination.
- d. Payment of leave for 147 days making Kshs. 78, 453.90.
- e. Unlawful deduction from salary Kshs. 2,000.00.
- f. Respondent to issue claimant's certificate of service.
- g. Costs of the suit and interest at court rates.
- h. Any other or better relief that the court may deem fit to grant.

The defendant filed the statement of defence on 21.08.2014 through Grace Mukuha & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

The claimant was employed by the respondent on 29.08.2005 as a cateress. The letter of appointment showed that the claimant was entitled to annual leave. The claimant testified that she took leave only in 2007 and 2008 but was not allowed to go on leave in 2005, 2006, 2009, 2010, 2011 and 2012 as per the documents on record.

The claimant testified that she was dismissed in 2012. The circumstances were that she went on off duty for 2 days and upon return her inventory showed that 100 spoons were missing from the kitchen store. She reported the case to the respondent's principal and subsequently the principal deducted from the claimant's salary Kshs. 2000.00 to recover the cost of the lost spoons. The deduction was shown in the claimant's pay slip as miscellaneous deduction. The head cook called John Ndung'u later informed the claimant that the 100 spoons had been given to a teacher who travelled on a school trip to Mombasa and the cook retrieved the 100 spoons from the school bus. Despite the retrieval the principal refused to refund the claimant's Kshs. 2000.00 as earlier deducted in that regard and the claimant reported the

grievance to the school chairman. It was the claimant's case that the report to the chairman annoyed the principal and the relationship between the principal and the claimant started to go sour.

Subsequently the principle alleged that the claimant had failed to prepare special lunch for school visitors as instructed by the principal. The claimant's evidence was that in fact the cook called Mugambi who was required by the principal to convey the relevant instructions to the claimant confirmed to the principal that he had in fact failed to do so. Thus, it was not the claimant's fault that special lunch had not been prepared. The principal nevertheless issued a letter stating that the claimant had failed to prepare special lunch as instructed.

A week later it was a Saturday and the claimant was at her housing accommodation provided within the school premises and the claimant was performing her domestic duties as she was on her regular off day. The principal summoned her by asking her co-employee to call her from her house. The claimant took some while to groom up then she went to see the principal as summoned. The principal on that Saturday was insensitive as per the claimant's testimony and alleged that she had disobeyed the summon because she had taken an hour to arrive whereas she had in fact taken about 30 minutes in view of the time taken to groom. The principal that day issued a warning letter then later a termination letter dated 15.10.2012 was issued. The termination letter stated that at the Board of Governors' meeting of 15.10.2012 it was unanimously decided that the claimant's services be terminated with immediate effect on account of neglect of duty and gross misconduct.

The respondent's witness (RW1) was the principal one Kanyingi Machira. It was his testimony that the reason for termination was that the claimant had failed to implement instructions to prepare the special lunch. He admitted that the termination letter did not state the specific reason for termination. RW1 said the instructions reached the claimant but he could not recall the messenger or person he had asked to relay the instructions to the claimant. RW1 admitted that the relevant leave forms had been filed but that the claimant would go on leave during school holidays. RW2 James Mahu Kiberenge, the respondent's bursar gave contradictory evidence that he filled leave forms even when he went on leave during school vacations and also that during such vacations staff like the claimant did not need to complete relevant leave forms. RW3 John Ndungu Muthui testified that he did not know if the claimant worked during school vacations.

The **1<sup>st</sup> issue** for determination is whether the claimant's dismissal from employment was unfair. The court finds that it was unfair under section 43 of the Employment Act, 2007 because the respondent did not assign any specific reason in that regard. Further, there was no notice and hearing as provided for in section 41 of the Act. The evidence showed that the claimant had a valid grievance about the unfair deduction then failure to refund Kshs. 2000.00 with respect to the 100 spoons which in fact were not showed to have gone missing as they were recovered in the school bus by the head cook. Such was a valid grievance that could not constitute a valid reason for termination as provided for in section 46(h) of the Act. Thus the termination of the claimant's employment was unfair both procedurally and in substance. The court finds that the claimant is entitled to a declaration accordingly.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to the other remedies as prayed for. The court makes findings as follows:

- a. The record shows the relevant leave forms completed by the claimant. The leave form was the respondent's design of the leave system. The respondent's evidence did not at any rate render the claimant's claim for leave days improbable. The court finds that the claimant has established the outstanding leave days as prayed for and is entitled to the pay as claimed.
- b. The claimant has established that the termination was unfair and the respondent failed to address her valid grievances but instead dismissed her without due process. The court finds that the claimant is entitled to the one year salary as prayed for being compensation for the unfair termination under section 49 of the Act.
- c. The claimant has showed that she was unfairly deducted the Kshs. 2000.00 and the same was not refunded and she is accordingly awarded as prayed for.
- d. The claimant is entitled to a certificate of service as per section 51 of the Act.

As the claimant has succeeded in her claim she is entitled to the costs of the suit now fixed at Kshs. 25,000.00 only.

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

- a. The declaration that the termination of the claimant's employment by the respondent was without any legal and factual basis and consequently it was illegal and unlawful.
- b. The respondent to pay the claimant **Kshs.297, 585.90** by 1.09.2015 failing interest at court rates to be paid thereon from the date of this judgment till full payment.
- c. Respondent to deliver to the claimant a certificate of service by 1.07.2015.

**Signed, dated and delivered in court at Nyeri this Friday, 19<sup>th</sup> June, 2015.**

**BYRAM ONGAYA**

**JUDGE**