



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NYERI

CAUSE NO.6 OF 2012

(Formerly Cause No.30 of 2012 at Nairobi)

KUDHEIHA
WORKERS.....CLAIMANT

-VERSUS-

**DIOCESE OF MERU ST.PAUL PRIMARY BOARDING
SCHOOL.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 19th December, 2014)

JUDGMENT

The claimant filed the memorandum of claim on 03.02.2012 on behalf of its members George Mugambi, Ephantus Murangu, and Paul Gitonga (the 1st, 2nd and 3rd grievants respectively). The claimant prayed for judgment against the respondent for the payment of the grievants' terminal dues including underpayments, house allowance, public holidays, annual leave, pay in lieu of termination notice, service gratuity, long service and compensation for loss of employment all as computed in the memorandum of claim.

The respondent's defence to the statement of claim was filed on 07.12.2012 through Kinuthia Arithi & Company Advocates. The respondent's case was that the collective agreement did not apply to the grievants' service because it was dated 14.08.2009 long after the grievants had left the respondent's employment. The respondent prayed that the claim be dismissed with costs.

The grievants' employment was terminated by the respondent and the dispute was by order of the court subjected to the conciliatory proceedings. The report of the proceedings was filed in court on 17.09.2012 and is dated 14.08.2012. The conciliator made findings as follows:

1. The grievants were all employees of the respondent school.
2. That when Father Henry Rutuetto left the respondent, the incoming priest employed the grievants afresh without confirming whether the terminal dues for the years served had been paid.
3. The respondent's new management had not paid the grievants' years of service apart from the 2 months' notices.

The conciliator, having taken into account the parties' submissions, recommended that the grievants' termination be upheld but the grievants be paid by the respondent's management appropriate notice as per the collective agreement, pending leaves, underpayment of wages, leave travelling allowance, offs, public holidays and they be issued with the certificate of service. Further, it was recommended that each grievant

is paid 6 months' salary as compensation for loss of employment.

Despite service, the respondent failed to attend the hearing of the case on 10.12.2014. Each of the grievants gave evidence to support their respective cases.

The 1st grievant was employed as a cook in January 1995. He worked diligently and served the respondent until 3.4.2009 when his employment was terminated. At termination he was earning Kshs.4, 020.00 per month plus Kshs.1, 200.00 as house allowance being a gross of Kshs. 5, 220.00 per month.

The 2nd claimant was employed as a multipurpose and laundry worker on 1.04.1984 and terminated from employment on 28.05.2009 at a gross pay of Kshs. 5,220.00.

The 3rd grievant was employed by the respondent on 14.02.1996 as a cook and was dismissed on 3.07.2009 at a gross pay of Kshs.5, 220.00.

It was the grievants' case that they were not served any warnings or notices before termination and no reasons for termination were given. The grievants prayed for reinstatement or payment of terminal dues as set out in the memorandum of claim. The claimants relied on their memorandum of claim and documents filed on their behalf. The claimant's case was that the grievants left employment because the respondent's new management decided to terminate their services.

The respondent's pleadings are that the grievants were terminated on account of misconduct or poor performance but no evidence was provided to support the respondent's case. The respondent's further case, also devoid of any evidence, is that the grievants were paid all their terminal dues.

The only issue for determination in this case is whether the grievants are entitled to the remedies as prayed for. The court finds that the grievants have failed to provide the necessary evidence to justify the claims and prayers with respect to underpayments, house allowance, public holidays, annual leave, overtime and gratuity or payments based on the alleged collective agreement. In the circumstances, all the claims as enumerated will fail.

There is no dispute that the grievants were employed by the respondent over a period of many years. It is also clear that the grievants were terminated from employment and the court finds that taking the material on record into account, the termination was unfair because the reason for termination was not established as envisaged in section 43 of the Employment Act, 2007. The court finds that the respondent failed to establish the reasons for the termination and whereas the alleged reason was misconduct or poor performance, the respondent failed to invoke the procedure of due notice and a hearing as provided for in section 41 of the Act. Thus, the court finds that the termination was unfair. The court has considered the long service by the grievants and finds that each is entitled to 12 months' gross salaries for the unfair termination making **Kshs. 62,640.00**. The court further finds that each grievant is entitled to Kshs. **5,220.00** being pay in lieu of one month termination notice.

The claimant prayed for service pay. The respondent disputed the collective agreement as a basis for service pay or gratuity. The claimant failed to establish by submissions or evidence the basis of invoking the collective agreement and how the agreement applied to the grievants' cases. The court finds that claims for service pay based on the collective agreement will fail.

The court has considered its principal objective in section 3 of the Industrial Court Act, 2011 being the expeditious, just and proportionate determination of the disputes before the court. To meet ends of justice and there being no dispute that the grievants served the respondent for the years set out in evidence and pleadings, the court finds that each of the grievants is entitled to one month pay for each completed year of service as the reasonable pay for service. While arriving at that award, the court considers that there was no evidence to show that the grievants were members of a pension scheme or the National Social Security Fund. Thus, the 1st grievant is awarded 14 x 5220 making **Kshs.78, 300.00**; the 2nd grievant 25 x 5220 making **Kshs.130, 500.00**; and the 3rd grievant 13 x 5220 making **Kshs.67, 860.00**.

In summing up, the 1st grievant is awarded a sum of **Kshs.146, 160.00**; the 2nd grievant **Kshs.198, 360.00**; and the 3rd grievant **Kshs.135, 720.00**.

The claimant is awarded costs of the suit fixed at **Kshs. 40, 000.00**.

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

1. The respondent to pay the 1st grievant a sum of **Kshs.146, 160.00**; the 2nd grievant **Kshs.198, 360.00**; the 3rd grievant **Kshs.135, 720.00**; the claimant costs of **Kshs. 40, 000.00**; and to pay by 1.02.2015 failing interest to be payable at court rates from the date of this judgment till full payment.
2. The respondent to deliver to each grievant a certificate of service by 1.02.2015.

Signed, dated and delivered in court at **Nyeri** this **Friday, 19th December, 2014**.

BYRAM ONGAYA

JUDGE