



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT
AT MOMBASA
CAUSE NO. 108 OF 2014

BETHA CHIZI KATAMACLAIMANT

VERSUS

RICHARD LEWARESPONDENT

J U D G M E N T

INTRODUCTION

1. The claimant has sued the respondent claiming ksh.1,330,537.8 as terminal benefits plus compensation for unfair termination of her employment. The basis of the suit is that the claimant was given a maternity leave on 1/9/2013 and when she returned to work she was terminated. She was not paid any salary during her maternity leave plus a further salary arrears for May, June and July 2013. She averred that her employment was unfairly terminated through breach of the employment Act.
2. The respondent did not file any defence even after counsel was given leave to do so. The suit was therefore heard on 22/9/2014 when the claimant testified as CW1.

CLAIMANT'S CASE

3. CW1 told the court that she was employed by the respondent in January 2009 as an ECDE teacher at the respondent's Riperbi Academy. The contract was verbal and her starting salary was ksh.4000 per month which was increased to Ksh.6800 from 2012.
4. On 15/7/2013 CW1 applied for a one month maternity leave starting from 1/9/2013 through letter produced as Exh 1. As at that time she had not been paid her salary for May, June and July 2013. During her maternity leave she was not also paid any salary. She delivered on 22/10/2013 after the lapse of her one month maternity leave. She did not return to work until January 2014 because she sought permission from the respondent.
5. When she reported back to work in January, 2014 she demanded her salary arrears before she could resume her duties. According to her, the respondent told her to commence work pending payment of her salary arrears. When CW1 stood firmly in her demand for pay, the respondent told her to go back home and wait for her pay. CW1 complied but after some time the respondent told her that he had employed another teacher. According to her, the termination was unfair because she was never served with any notice or afforded any hearing. She therefore prayed for 12 months salary as compensation for the unfair termination. She also prayed for one month in lieu of notice. She also prayed for salary arrears for the month of May, June, July, September, October,

- November and December 2013.
6. CW1 further contended that during her service, the employer deducted NSSF money every month but failed to remit to the fund. She produced NSSF statements and payment vouchers as Exh 6 and 7 respectively. She therefore prayed for service pay for the 5 years worked. In addition she was deducted NHIF money by the employer but the same was never remitted as a result of which she did not benefit from the fund during his maternity in 2013. She prayed for refund of ksh.5000 which she paid for the maternity fee in the hospital. She also maintained that she was entitled to ksh23000 salary per month and not ksh.6800 she was earning.
 7. After the close of the hearing, the claimant filed written submissions urging the court to find in her favour. The court has carefully considered the pleadings, evidence and the submissions filed in making this judgment.

ANALYSIS AND DETERMINATION

8. It is not disputed that CW1 was employed by the respondent as an ECDE Teacher from 10/1/2009 until January 2014. There is also no dispute that CW1's salary was Ksh.6800 per month as at the time of her termination. It is also a fact that CW1 was stationed at Kaloleni Kilifi. It is also not disputed that CW1 applied for one month leave starting 1/9/2013 and that when she failed to delivered within the said one month, her employer extended her leave to December 2013. There is also no dispute that no reason was cited for the termination of the CW1's services by the respondent except that another teacher had been hired. Lastly it is common knowledge that the claimant was never paid her employment dues that accrued upon termination.
9. The issue for determination is whether the termination was unfair and whether the relief sought ought to issue.

UNFAIR TERMINATION

10. The court is not in agreement with the claimant on the alleged unfair termination. The termination was not on ground of misconduct, poor performance or incapacity to warrant the procedural fairness provided for under Section 41 and 45 of the employment Act. It was also not based on the reasons enshrined under Section 46 of the said Act. The termination was simply under Section 36 of the Act which requires that a notice be served before termination in default of which the breaching party must pay salary in lieu of notice. In this case the claimant was entitled to one month salary but the same was never served. The court therefore finds that the termination was not unfair but wrongful within the meaning of Section 36 of the Employment Act.

RELIEFS

11. In view of the finding that the dismissal was wrongful for breach of contractual obligation to serve termination notice, CW1 is awarded the prayer for one month salary in lieu of notice being ksh.6800. She will also get salary arrears for the 9 months of May, June, July, September, October, November and December 2013 as prayed being $ksh.6800 \times 7 = 47600$. The court has dismissed the claim for underpayment for lack of proof. No evidence was lead to prove that CW1 was receiving a salary less than the statutory minimum wage prescribed by the General Wage order applicable for Kaloleni in Kilifi County. CW1 will also get 3 years service pay because the respondent failed to remit NSSF dues for the year 2012, 2013 and 8 months between 2009 and 2011. This works to $ksh.6800 \times 15/30 \times 3 = ksh.10200$. The prayer for compensation for unfair termination, general damages for negligence in remitting NHIF dues and underpayment are dismissed. For the reasons stated above and also for lack of legal basis.

DISPOSITION

For the findings made above, judgment is entered for the claimant for ksh.64,600 plus costs and interest.

Orders accordingly.

Dated, signed and delivered this 5th December 2014.

O. N. Makau

Judge