



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NYERI

CAUSE NO. 29 of 2013

(Nairobi Cause No. 523 of 2012)

GRACE WANGUI MUNYAKACLAIMANT

Versus

BOARD OF GOVERNORS

NYERI BAPTIST HIGH SCHOOLRESPONDENT

JUDGMENT

The claimant in this suit seeks from the respondent:-

1. *A declaration that the respondent action to terminate the claimant's employment was unlawful.*
- 2.
3. *An order for payment of all under payments as tabulated at appendix 18 in the memorandum of claim totaling Kshs.540,841.*
- 4.
5. *An order for payment of 12 months salary as compensation for wrongful loss of employment Kshs.29,066.50 x 12 = Kshs.348,798.*
- 6.
7. *Interest on (2) and (3) above at court rates.*
- 8.
9. *Any other relief the court may deem fit and just to give.*
- 10.
11. *Cost of this suit.*
- 12.

By her memorandum of claim filed on 28th March, 2012, she avers that she was employed by the respondent on or about 3rd September, 2002 as an English/Literature teacher at a monthly salary of Kshs.11,182/50 plus a house allowance of Kshs.5,200 and a medical allowance of Kshs.1542. The initial employment was subject to a probationary period of 24 months which according to her lapsed in August, 2004 but she continued to work for the respondent.

According to her memorandum of claim, the respondent on 4th July, 2006 issued her with a letter with the reference: "Terms of Contract" which provided for a fixed contract of 3 years renewable and which provided for a salary at TSC scale plus 5% on top and 25% of monthly salary as gratuity. This contract was backdated to take effect from September, 2004 when her probationary period lapsed.

It is the claimant's position that she was a 'permanent employee' from 3rd September, 2002 and this

according to her was attested to by the respondent through issuance of a letter from the respondent's deputy principal to the branch manager Co-operative Bank Nyeri attached to her memorandum of claim and marked appendix 3.

The claimant further avers that the letter of 4th July, 2006 was issued after she insisted on being issued with a confirmation letter and was forced to sign it since the period had expired and it was only for record purposes. However according to her, upon the expiry of the 3 years, she was never issued with a renewal letter but continued to work.

In March, 2011, the claimant averred she was issued with yet another back dated letter to sign, which reviewed her terms of employment. When she sought clarification of this letter she was told by the respondent to first sign the letter and apologise for not signing it earlier. According to her the apology was turned into her defence which was subsequently rejected and her employment terminated.

It is the claimant's view that her termination was wrongful and unlawful in that she was not given an opportunity to defend herself as provided in section 41 of the Employment Act, 2007. She therefore seeks an order of this court to so declare and award her compensation as set out earlier in this judgment.

The respondent for its part does not admit the claimant was a permanent employee as alleged but that she was on contract and that the same was terminated when she refused to sign a new contract upon expiry of the old contract. According to the respondent the claimant's dismissal was therefore lawful and that upon termination of the claimant's employment for gross insubordination she was paid her notice period provided under the contract plus all her gratuity which had been deposited and fell due with CFC Life Insurance Pension Department.

According to the respondent, the claimant's salary was pegged to existing TSC scale as at the date of the contract and not on day to day, month to month and year to year TSC scales.

At the trial of the action both parties maintained their respective positions. The claimant testified that upon expiry of her probationary period she asked for confirmation letter but was told one was being drafted and was asked to wait. On her persistence, she was given the three year contract which she was asked to sign just for documentation and assumed that her terms of service would not change despite the signature. She signed the document and worked until March, 2011 when she was given another contract of Employment to sign which was backdated to January, 2011. According to her this contract had been reviewed in several aspects such as the salary scale was put as for Nyeri Baptist High School teachers yet her letter of appointment indicated TSC rates plus 5%. The letter further introduced an award scheme for teachers who excelled in their work and the duration of the contract was placed at one year.

According to the claimant the letter of March of March, 2011 lacked in content as for instance she had no clue what the scale for teachers of Nyeri Baptist was. She asked for it and was not given instead she was told the documentation was clear and there was no need for additional documents.

It was her testimony that in April when the holidays were ending she followed up on the issue but was instead asked to apologise for not signing the document which she did stating that all she wanted prior to signing the document was clarification. She was subsequently given a termination letter and asked to vacate the house she occupied by virtue of her job immediately.

She requested for indulgence to look for alternative accommodation and also asked for one month salary in lieu of notice. She further asked to be issued with a certificate of service to enable her look for another job but was instead given a recommendation letter and one month's salary in lieu of notice.

According to the claimant when she was employed in 2002 by the respondent, her pay was TSC salary and 5% on top. She was initially employed as an untrained teacher and that her house allowance at that level ought to have been Kshs.5000. When she completed her training and obtained a diploma in education hence a trained teacher, her salary was adjusted to match TSC scales and her house allowance adjusted to Kshs.6000.

The respondent called as witness, its principal Mr. Fredrick Gachau. He confirmed that the claimant was the respondent's employee and joined its services as an untrained teacher. Her salary at the time of joining was TSC J level 7. It was his evidence that the claimant's salary would only change when the BOG gave a general increment or when a person was promoted. According to him TSC scales are only applicable at the time of employment and that the respondent never used to give a pay rise simply because TSC had done so. The TSC scales were mere reference points. It was his evidence that the claimant's salary as at the time of leaving employments was Kshs.29,000 and was pegged on TSC job group J plus annual increment approved by the Board. According to him migration from one job group to another was a promotion and could only be done by the BOG and communicated to the person concerned. It was his evidence that the claimant was not promoted to job group K and that the salary increment was not a promotion.

The witness testified that the BOG decided to retain teachers on the same level on contract as they formulated new scales of service. It was his evidence that the TSC scales were higher than the respondent's budgetary allocation hence all teachers were required to sign. The BOG decided to remove reference to TSC. The claimant did not sign the contract like the rest and she communicated this fact to BOG which decided to terminate her services. According to him therefore, the claimant's termination was not unlawful as she could not continue to work without a signed contract.

On cross-examination by the claimant he stated that the claimant did not produce any document to the respondent to show she had attained a post-graduate diploma. According to him salary adjustment was done to everyone in accordance with the decision of the BOG in order to harmonise salaries between trained and untrained teachers in order to remove the distinction.

From the pleadings, evidence during the trial and submissions, it is clear that the claimant was employed on 3rd September, 2002. Her letter of appointment attached to her memorandum of claim as appendix 1 reads as follows:-

3rd September, 2002

ATTENTION: Mrs Grace Gichuki

RE: LETTER OF OFFER OF EMPLOYMENT

Following your application for the post of English/English Literature teacher, I am pleased to offer you the post. The terms of offer are:

Salary – TSC Job group J level 7, Kshs.11182/50

House allowance – Kshs.5200

Medical allowance – Kshs.1542

There is a probation period of 24 months. After successfully completion of the probation period, you shall join the teacher's pension scheme.

Please sign below if you accept this offer.

ACCEPTANCE

Mrs Grace Gichuki

PRINCIPAL – Mr. Fred Gachau

This letter made provision for 24 months probationary period which would have been unlawful under the Employment Act, 2007 but for the fact that the contract was entered into prior to 2007 when the old

Employment Act applied. This letter would have expired on 3rd September, 2004 when the respondent would have had the liberty to confirm the claimant's employment or not.

The claimant was however not issued with a letter of confirmation of employment but continued to work all the same. What was not clear was whether upon expiry of the probationary period the claimant continued to work under the same terms as detailed in the letter dated 3rd September, 2002.

On 4th July, 2006 the claimant was issued with a new letter which was more comprehensive than the initial letter she was given at the time she was being hired. On salary however, apart from merely stating that the claimant would be paid "TSC plus 5%", the letter does not delve into the actual figure of the salary. This letter contains an endorsement that it would take effect from September, 2004, the time when the claimant was supposed to have been confirmed after completing her probationary period. Both the claimant and the respondent do not deny the existence of this letter. In fact it is signed by both parties. The claimant on her part however has a quarrel with the fact that it reduced what in her opinion was a 'permanent job' to a 'contract job' for 3 years renewable. She claimed that she was not consulted before the same was issued. She however continued to work for the respondent under the terms of the said letter well past 2007 when the letter expired. To this extent the claimant by her own conduct cannot turn around and claim she was never consulted before the letter was issued. In fact the claimant by her own conduct accepted the said letter except that she was not comfortable with the "3 year renewable" clause since according to her she was a 'permanent employee'. But is there any such thing as permanent employment? Employment relationships are by their very nature contractual and usually contain clauses how this relationship is entered into and how it can be brought to an end. The notion of permanency of employment is therefore false and a distortion of the concept of 'open ended' contracts of employment as opposed to fixed term contracts. Whereas an open ended contract continues from month to month until brought to an end in accordance with stipulations in the contract, a fixed term contract is in essence predetermined in that it is time bound. It will terminate by effluxion of time and unless provided for, notice of its termination is not necessary.

In the above context, the letter dated 3rd September, 2002 issued by the respondent's principal to Co-operative Bank stating that the claimant was a permanent employee ought to be understood in that light. In any event that letter was not only addressed to a third party who had no employer-employee relationship with the respondent but also did not conform to the requirements of letter of appointment as stipulated in the Employment Act, 2007 hence could not modify the claimant's letter of appointment issued on 4th July, 2006 under which she served until her job came to an end in 2011.

Assuming September, 2004 was the date of reckoning for the claimant's 3 year contract, she was due for consideration for renewal in September, 2007, for the first time, September, 2010 for the second and September, 2013 for the third time.

The respondent did not offer her any renewal but continued with her in their employ until April, 2011 when she was offered a backdated renewal just like was the case in 2006. It may therefore be assumed that the 2006 contract continued to be renewed by operation of law. It is this backdated renewal that the claimant claimed she sought clarification on certain aspects prior to signing. This was not taken kindly by the respondent who insisted it be signed and demanded an apology from the claimant for failing to do so when asked the first time. The claimant in her apology letter explained that her intention was not to disregard the contract but to seek clarification of some of the clauses in the contract. The respondent however for its part rejected reasons given by the claimant for not signing the contract and proceeded to decline to renew her contract and informed her that her contract would come to an end on 30th April, 2011.

Under normal circumstances the claimant's contract ought to have ended on September, 2013 subject to termination by one month's notice or salary lieu thereof. By the time of refusal to renew the claimant's contract she still had approximately two years three month's under her September, 2010 contract. The issue of its renewal in April, 2011 was therefore anomalous.

The respondent having exhibited glaring dilatoriness in making available renewal contracts for its

employees cannot be heard to show sudden urgency simply because an employee has sought clarification on terms of a contract made available several years behind schedule. In any event as at April, 2011 when the respondent purported to decline renewal, there was no contract due for renewal the current one having been renewed by the conduct of the parties and by operation of law. If the respondent wanted the claimant services terminated nothing would have been easier than to do so invoking the provisions of the contract entered into on 4th July, 2006 and which it kept the claimant working under without any formal renewal. In the circumstances the court deems the letter dated 29th April, 2011 purporting to decline the renewal of the claimant's contract as a letter of irregular and unfair termination of employment. It is irregular in the sense that there was no contract due for renewal hence declination to renew was improper and it is unfair in the sense that the claimant was not unreasonable to seek clarification prior to signing a contract and considering the respondent had taken too long to make one available.

The letter purporting to decline the renewal of the claimant's contract did not disclose which matters had been stated clearly to her by the Principal and she still insisted on more clarification.

In this regard the court comes to the conclusion that the claimant's employment was unlawfully and unfairly terminated.

The court therefore reduces the termination to a normal termination with notice or salary in lieu of notice as per the contract as provided under section 35 of the Employment Act. The claimant had been given one month's salary in lieu of notice and is therefore entitled to no more under this head.

Concerning unfair termination, the court considers an award of 6 month's salary as reasonable compensation for unfair termination of services. The calculation of this part of the award shall be pegged on the claimant's exit salary as at April, 2011.

This award shall be subject to statutory deductions.

The respondent is further ordered to issue the claimant with a certificate of service. It is so ordered.

Dated at Nyeri this 13th day of August 2013.

Nelson Abuodha J.

Judge

Delivered in open Court in the presence offor the Claimant and in the presence of for the Respondent.

Nelson Abuodha J.

Judge