



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 5 OF 2013

(Formerly Cause No. 1674 of 2011 at Nairobi)

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS,
HOSPITALS AND ALLIED WORKERS.....CLAIMANT**

-VERSUS-

BOARD OF GOVERNORS GILGIL DAY SECONDARY SCHOOL..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 4th October, 2013)

JUDGMENT

The claimant filed the memorandum of claim on 03.10.2011 on behalf of its member Margaret Wambui Kagima, the grievant. The claimant prayed for:

- a. **Three months pay in lieu of notice being Kshs.41,199.00.**
- b. **Gratuity for 28 years of service being Kshs.384,524.00.**
- c. **Salary arrears of Kshs.74,592.00.**
- d. **Underpayment for house allowance for 24 months being Kshs.16,800.00.**
- e. **Compensation for loss of employment.**

The respondent filed the statement of response on 28.05.2013 through Njeri Njagua & Company Advocates and prayed that the claimant's claim be dismissed with costs. Subsequently on 12.07.2013, the respondent appointed the Hon. Attorney General to act in the suit. The grievant gave evidence to support her case and the respondent's witness was Peter Mbugua Kibury, the respondent's secretary and principal.

The respondent employed the grievant as a copy typist from 15.10.1980 to 10.03.2011 when the respondent terminated her services as per the letter dated 17.02.2011, appendix 5(a) on the memorandum of claim. The letter informed the grievant that she was to retire in the public interest effective 10.03.2009. The grievant was a member of the claimant at all material times. A trade dispute was reported in view of the termination and the conciliator appointed by the Minister for Labour issued a certificate of unresolved dispute.

It was alleged by the respondent that the grievant was terminated for gross misconduct namely alleged admission of a form one student. The evidence before the court is that the allegations leveled against the grievant were not true because the grievant only issued admission instructions to the concerned parent and

not an admission letter.

The respondent's witness confirmed in his evidence that throughout the termination proceedings, the respondent failed to comply with section 41 of the Employment Act that prescribes for notice of misconduct as may be alleged and hearing of the grievant in view of the allegations. The court finds that the respondent did not establish a valid reason for the termination and the due process was breached. The termination was unfair and the court finds that the grievant is entitled to 12 months gross salaries for unfair termination being **Kshs.151,260.00** at her last monthly pay of Kshs.12,605.00.

The court finds that the claimant has failed to establish the basis for claiming the salary arrears, underpayments and gratuity as the respondent has shown that the collective agreement did not apply. The court finds that the grievant being a member of the claimant, the claimant was entitled to sue but only on the basis of the agreement between the respondent and the grievant. Prayers founded upon the collective agreement will therefore fail. The grievant admitted being paid Kshs.86,000.00 as a token for her long service. The court has considered that pay and her membership at NSSF and finds that her claim for gratuity will fail.

The court finds that the claimant was not given the due termination notice and she is entitled to one month pay of **Kshs.12,605.00** in lieu of the notice.

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

- a. A declaration that the termination of the grievant's employment was unfair.
- b. The respondent to pay the grievant **Kshs.163,865.00** by 1.12.2013, failing interest to be payable at court rates from the date of the judgment till full payment.
- c. The respondent to pay costs of the case.

Signed, dated and delivered in court at Nakuru this Friday,

4th October, 2013.

BYRAM ONGAYA

JUDGE