



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU
CAUSE NO. 131 OF 2013

PHILICE MATENDECHERE.....CLAIMANT

-VERSUS-

THE BOARD OF TRUSTEES OF LIONS PRIMARY SCHOOL.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 29th November, 2013)

JUDGMENT

The Claimant **Philice Matendechere** filed the memorandum of claim on 21.05.2013 through Wamaasa & Company Advocates. The claimant prayed for:

- a. **A declaration that the Claimant's services were unlawfully terminated contrary to the Employment Act No. 11 of 20017.**
- b. **Sixteen months salary as damages for unlawful termination of services in the sum of Kshs.141,008.00.**
- c. **Two months' salary in lieu of notice in the sum of Kshs.17,626.00.**
- d. **Costs of the suit.**
- e. **Interest on (b) and (c) above at court rates.**
- f. **Any other relief the honourable court may deem fit to grant.**

The respondent filed the statement of defence on 20.06.2013 through Kimatta & Company Advocates. The respondent prayed that the suit be dismissed with costs.

The case was heard on 24.09.2013 and 4.10.2013. The claimant gave evidence to support her case and the respondent's witness was Phanuel Imbusi, the respondent's headmaster (**RW**).

The claimant was employed by the respondent on 1.07.1995 as a cleaner and lunch programme assistant.

On 15.07.2011, the claimant had concluded her duties at the respondent's school premises. She testified

that she was directed to go to one of her workmate's premises, one Juma, and to perform cleaning duties. She complied and in the process of cleaning that house, she suffered an accident entailing slipping and falling on the slippery floor and sustaining injuries. She was admitted for treatment at the Nakuru Provincial Hospital and was on a sick off until 25.01.2012 when her doctor recommended that she be assigned light duties.

She reported at work but her supervisor, the said Juma, declined to assign her light duties. A manager called Dodhia advised her not to come to duty anymore because she would not be paid as per the directives by the respondent's Chairman known as Amu. She further testified that on that day RW called her to the office and conveyed to her to go back home. She left for her home and was never recalled. The claimant further testified that she was last paid Kshs.8,813.00 in December, 2011 as her last full monthly pay. At the time of the hearing, the claimant was 63 years old and her Kenya National Identification Card No. 1366913 showed that she was born in 1950. She had attained 60 years of age. Her testimony was that she had recovered, used crutches, and was able to work as recommended by her doctor.

RW testified that he never wrote a letter to retire the claimant from the respondent's employment; he never terminated the claimant's employment and did not know why she did not report on duty because Juma, her supervisor knew about her case.

The claimant's written submissions were filed on 10.10.2013 and the respondent's on 18.10.2013.

The issues for determination are whether the claimant was unfairly terminated and whether the claimant is entitled to the remedies as prayed for.

It is the respondent's submission that the claimant was not employable because she had attained the mandatory retirement age of 60 years as per the respondent's alleged provision of the law. The respondent has further submitted that the claimant was medically unfit to work. Further, it was submitted for the respondent that the Employment Act, 2007 did not apply in cases whereby the employee had attained the mandatory retirement age.

For the claimant, it was submitted that the claimant's employment was constructively and illegally terminated without notice and valid reason.

The court has taken into account the evidence and the submissions made for the parties. The claimant's evidence is that the respondent's managers and her supervisors informed her to go home as she would not be retained in employment. The court finds that the respondent's submission that the claimant was not employable on account of medical unfitness and because she had attained a mandatory retirement age as ungrounded.

First, **section 41 of the Employment Act, 2007** prescribes the procedure to be followed where the employee is to be terminated on the ground of ill-health. Secondly, there is no generally prescribed constitutional or statutory retirement age. Thus, in absence of such prescription, the court holds that retirement age is a term of the contract of employment to be agreed between the parties. In the present case, there was no such agreement and the court finds that retirement age as a ground for termination was unfounded and was an invalid reason for termination. There is no reason to doubt the claimant's account that she was orally terminated. The court finds that the termination was unfair because it was without due process and a valid reason.

The second issue for determination is whether the claimant is entitled to the remedies as prayed for. The court makes the following findings:

1. The claimant is entitled to the declaration that the termination was unfair.
2. The claimant is entitled to 12 months pay for the unfair termination being **Kshs.105,756.00** at Kshs.8,813.00 per month.
3. The claimant is entitled to **Kshs.8,813.00** being payment in lieu of a month's termination notice.

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

1. A declaration that the claimant's employment was unfairly terminated by the respondent.
2. The respondent to pay the claimant **Kshs.114,569.00** by 1.1.2014, failing interest to be payable at court rates till full payment.
3. The respondent to pay costs of the suit.

Signed, dated and delivered in court at Nakuru this Friday, 29th November, 2013.

BYRAM ONGAYA

JUDGE