



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**

**CAUSE NO. 220/2013**

**(Before Hon. Lady Justice Hellen Wasilwa on 19<sup>th</sup> December, 2013)**

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATION INSTITUTION, HOSPITALS AND ALLIED WORKERS....**

.....CLAIMANT

**VERSUS**

**HOLY ROSARY GIRLS' BOARDING PRIMARY SCHOOL.....RESPONDENT**

**JUDGMENT**

The claimants herein filed their Memo of Claim on the 17.3.2012 through their Union Kenya Union of Domestic Hotels, Education Institution, Hospitals and Allied workers (KUDHEIHA). The claimants contended that they were all employees of the respondent but were unfairly terminated. 1st claimant Peter told court that he was employed by the respondent on 19.6.98 as a cook but he was sacked on 19.11.2010 when they were forced into signing fresh contracts which he refused to do. In December 2010 the school called for fresh interviews and replaced them. At the time of termination, his salary was Ksh 5,494/=. He told court that he was employed verbally and was never given an appointment letter.

The 2nd claimant Irene Wasike told court she was employed on 27.3.2005 as a home mother. In 2010/2011, she was asked to sign a fresh contract but she refused to do so because she was already a permanent employee. Her position was advertised on 15/12/2010 and when she reported in January 2011, her position had been filled up. At the time she was earning 3,885/= but was being housed in the school.

In cross-examination she told court she had been previously on contract and had signed four contracts before and used to be paid 16% gratuity at the end of each contract. She said she refused to sign the new contract as the terms were different.

CW3 Richard Rotich was employed on 3/5/2005 as a cook and was terminated in December, 2010. This was after he refused to sign a fresh contract because the school had a CBA with the workers. At the time he was earning 4,000/=.

CW4 Betty Okongo, told Court that she too was employed by the respondent on 4.2.2000 as a house mother. She had her children and the respondent didn't want her to stay in the school with her kids. This is as per her APP4. She was earning 4,200/= at the time and was housed in the school and didn't go for annual leave.

The respondents on the other hand filed their Memo of response on 16.5.2013 through the firm of Nyaundi Tuiyot and Company Advocates.

They called no witnesses but filed their submissions. Their case was that the claimants were their employees and they requested them to sign performance contracts which the claimants refused to do. They also denied persuading the claimants from leaving their union. They submitted that each claimant used to be employed on contract as per the contract documents annexed and at the end of the contract each Party was free to leave or renew the contract. In the case of the claimants they opted not to renew their contract and were always paid their gratuity at the end of the contract.

The issues for determination are as follows:—

1. ***Whether the action of the claimants in refusing to sign fresh contracts was justifiable.***
2. ***Whether the decision by respondent in replacing the claimants was justified.***
3. ***Whether the claimants are entitled to prayers sought.***

Evidence on record shows that all the claimants except CW1 were employed on yearly contracts which were renewed. They were paid gratuity at the end of the contract period. When they were asked to sign fresh contract for 2011, they declined. They all indicated that they were members of the union which is not contented. They aver that the issue of signing a fresh contract was against the CBA. They exhibited the CBA signed between the union and respondent in 1990 which however does not include a claim on signing of contracts.

Given that claimants had previously been on contract, their refusal to sign a fresh contracts was detrimental to them and they cannot lay blame to the respondents. This is in respect of 2nd, 3rd and 4th respondents. It therefore follows that the decision by respondents to replace the claimants for refusing to sign fresh contracts was justified.

However in respect of 1st claimant he was employed verbally and had not previously signed any contract with the respondents. After working for over 3 months his contract term became permanent and pensionable. This is as per the provision of Section 37(1) of the Employment Act 2007 which states as follows:—

***“Notwithstanding any provision of this Act, where a casual employee***

- a. ***Work for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month or***
- b. ***Performs work which cannot reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months or more.***

***The contract of service of the casual employee shall be deemed to be one where wages are paid monthly and Section 35(1) (c) shall apply to that contract of service.”***

Section 35 deals with termination notice in such a case as being 28 days. In the case of CW1 he was not given such notice and this contravenes the law. The CW1 would also in the circumstances be entitled to service pay equivalent of 15 days salary for each year worked. Each claimant told court how much they were each paid.

It is apparent that they were underpaid but they did not exhibit how much they were paid as against the existing rates. In their submission, they used dues in the CBA signed in 2011 which did not apply to them as their services were terminated in December 2010. They did not therefore prove their case on underpayment.

I therefore find that the 2nd, 3rd and 4th claimants cooked their own goose by refusing to sign fresh contracts and therefore they were the author of their own misfortune. I dismiss their case accordingly and to 1st claimant I find he was unfairly treated and I award him as follows:—

1. 1 Month salary in lieu of notice =Kshs 5,494/=

2. 15 days salary for each year worked w.e.f. 1995 to 2010

= 15YEARS X 2,747/= = 41,205/=

3. 1 Year salary for wrongful termination = 65,928/=.

Total 112,627/=.

Each claimant should be issued with a certificate of service. Each Party to bear its costs.

**HELLEN WASILWA**

**JUDGE**

**19.12.2013**

**Appearance**

Indimuli holding brief Akenga for respondent

Joseph Okwach for claimant

C/c- Wamache Sammy