



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1038 of 2012

KUDHEIHA.....CLAIMANTS

VERSUS

B.O.G. LUGULU GIRLS HIGH SCHOOL.....RESPONDENT

ISSUE IN DISPUTE

“Wrongful dismissal of Mrs. Ressa Nekesa Wanyonyi”

JUDGEMENT

By a letter dated 2nd February 2010, the claimant union reported the above dispute to the Minister for Labour under Section 62 of Labour Relations Act. The Minister accepted the dispute and appointed Mr. G.T. Tsimuli of Bungoma Labour Office as conciliator under Section 65[1] of Labour Relations Act by letter dated 3rd May 2010. Mr. Tsimuli invited the parties for a conciliation meeting on 22nd June 2010 but there was no agreement prompting the claimant union to file this dispute.

The Memorandum of Claim dated 22nd May 2012 was filed in Court on 18th June 2012. The parties were invited for mention or directions on 26th July 2012 when the claimant appeared but the Respondent was absent. The case was fixed for hearing on 18th September 2012 and the claimant directed to serve a hearing notice upon the Respondent.

On 18th September 2012, the claimant was present but the Respondent did not appear. After confirming that there was proper service and that an affidavit of service had been filed to confirm service, the Court proceeded to hear the case *ex parte*.

Mr. Mwai Stephen Njiru who appeared for the claimant informed the Court that he would rely entirely on the memorandum of claim and exhibits as filed in court.

The claim of the claimant union, is for re-instatement of the grievant to her former job with no loss of benefits or in the alternative that the summary dismissal be reduced to retirement on public interest and payment of terminal benefits in accordance with the collective bargaining agreement signed between the claimant union and the Ministry of Education, Science and Technology on 18th March 1986 and salary as revised by circulars on new salary scales in civil servants effective 1st July 2007 and 1st July 2008 respectively from the Ministry of State for Public Service. Copies of the collective agreement, circular

for 2007 and circular for 2008 are annexed to the claimant's memorandum of claim as appendices 11, 12 and 13.

The claimants case is that the grievant **MISS RESSA NEKESA WANYONYI** was employed as a cateress/house keeper by the Respondent on 1st October 2005 at a salary of Kshs.7,370 per month. She was housed at the school by the Respondent. On 23rd September 2009 the grievant was suspended on allegations that she had on 12th and 15th September 2009 colluded with others to invite, entertain and authorize a witch doctor to perform ungodly activities in the school. On 30th September 2009 while on suspension she received another letter from the Respondent asking her to show cause why disciplinary action should not be taken against her. She replied on 1st October 2009 and apologized to the board and explained that she was driven to resort to the acts complained of following an incident that took place on 10th September 2009 when she was molested by a gang of thugs which traumatized and confused her thus tempting her to participate in the act. She asked for forgiveness. She received a letter of summary dismissal on 14th September 2009. She was granted 14 days to appeal to the Chairman of the Board of Governors. She submitted the appeal on 19th October 2009 but was informed by letter dated 31st May 2011 that her appeal had been rejected. Efforts by the claimant to intercede for her bore no fruit. The claimant was left with no alternative but to report the dispute.

Before summarily dismissing an employee an employer is required to comply with Section 41 of the Employment Act which reads as follows:-

(1) Subject to Section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

In the present case the Respondent disregarded the procedure provided for under Section 41 of the Employment Act and dismissed the grievant without giving her a hearing. The respondent also disregarded the provisions for termination of employment in the collective bargaining agreement signed between the claimant union and the Ministry of Education, Science and Technology. For these reasons I find that the dismissal of the grievant Miss. Ressa Wanyonyi was unfair. I however cannot order reinstatement as it is now more than 3 years since she was dismissed. The dismissal is therefore reduced to normal termination.

The claimant has asked for payment of the following:-

1. **Underpayments**

I have looked at the documents relating to salary review for the salaries of civil servants and I am satisfied that the claimant has proved the claim for under payments. I accordingly award Shs.153,270 [one hundred and fifty three thousand, two hundred and seventy only].

2. **Notice**

The grievant is entitled to 2 months notice as provided for in the collective bargaining agreement. The claimant is therefore granted Shs.28,838 (twenty eight thousand, eight hundred and thirty eight only)

3. **Annual Leave**

The claimant was by her contract of employment entitled to 30 days annual leave. There has been no evidence to show that she had not taken annual leave. This claim for leave on account of retirement cannot be granted as the claimant did not retire from employment. This claim is therefore rejected.

4. Service Gratuity

The claimant is not entitled to service gratuity as she had not worked for 10 years and was not retired in public interest.

Judgement is therefore entered for the claimant in the sum of Shs.182,108 as claimed in item 1 and 2.

Orders accordingly.

DATED AND DELIVERED IN NAIROBI THIS 23RD DAY OF OCTOBER 2012.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE.

For Claimant_____

For Respondent_____