



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1508 of 2010

KENYA UNION OF DOMESTIC, HOSPITALS, EDUCATIONAL

AND ALLIED WORKERS UNION..... CLAIMANT

VERSUS

BOARD OF GOVERNORS

ST. JOHN'S TEACHERS COLLEGE RESPONDENT

JUDGMENT

The Claimants filed their memorandum of claim in this court on 7th December, 2010. The issue in dispute is failure by management to pay terminal benefits arising from non-payment of medical risk allowance, uniform allowance, arrears of salary and underpayment at the time of retirement of M/s Mary W. Ndoria.

The claimants' case is that M/s Mary Ndoria was employed by the Respondent as a Nurse on 1st December, 1988 and confirmed on terms and conditions of service agreed between the claimant Union and the Ministry of Education at Job Group F at a starting salary of Ksh.2790. This is as per App. 2 and 3 herein.

That upon attainment of 55 years, the claimant retired and Respondent offered to pay the grievant service gratuity for the years worked as per app. 4. The Respondent never indicated to the claimant how the gratuity was to be calculated and so the claimant declined to collect the cheque to date. The claimant also demanded all other terminal benefits but the Respondent never paid. The claimant reported to her Union which also reported the dispute to the Minister for Labour. A conciliator was appointed who tried to convene several meetings but Respondent never turned up.

The claimant further avers that she wrote to the respondent asking that her terms of services be improved under App.10. The Permanent Secretary Ministry of Health wrote to the claimant and asked her to take up the issue of harmonizing her terms with Government scales with her employer as per App.1. The Respondent never paid the claimant as advised.

That subsequent to this, the claimant union negotiated a Collective Bargaining Agreement with the Government as per App.17. It was agreed that as per Legal Notice No.262 of 1993 all professionals employed by Board of Governors should be paid in accordance with Civil Service Scheme as per App.19. The claimant says that her last basic pay was Ksh.12,645/= as per App.20. Gross pay was 17,095/=.

The claimant now seeks this court to order that she be paid by the Respondent a total of Ksh.549,229/=

being her gratuity, risk allowance, uniform allowance and salary arrears. She also seeks costs of this suit.

The Respondent on the other hand filed their Memorandum of Reply dated 14th February, 2011 on 13th March 2011, through the firm of Njoroge Kugwa and Company Advocates. In their reply, the Respondents aver that the claimant was employed on temporary basis and this was subject to confirmation upon being interviewed by the Board of Governors. The Respondent further avers that the claimant's character was subject to endless discussions at the Principal's office as a consequence of which several warning letters were issued. They further contend that wherein the claimant was entitled to service gratuity, this was subject to terms to be computed by the Board of Governors as per appendix K2. The Respondent avers that they did issue the claimant with the breakdown on the computation of this service gratuity in terms of App.K2. The Respondent further admits that a Conciliator was appointed to arbitrate the dispute. One meeting was called but Respondent was unable to attend due to other commitments. The Respondents further indicated to the claimant that the review of her terms were to await final decision on the Nurse's package following the strike.

The Respondent contends that the amounts set out in the Memorandum of claim are contended and the claimant should be put to strict proof thereof.

Having considered the evidence of both parties and the submissions filed herein, It emerges that there is no contention that the claimant was an employee of the Respondent. In fact the respondent agrees that they employed the claimant as a nurse in 1988, but this was on temporary basis and subject to confirmation by Respondent Board of Governors. There is no proof that the claimant was ever officially confirmed by the Respondent despite this assurance. The law as it is that one cannot be in temporary employment indefinitely. When the claimant was employed, the Employment Act Cap 266 (now repealed) was the one subsisting. Under this Act an employee would not remain in temporary employment indefinitely. In fact the Collective Bargaining Agreement signed between the Claimant Union and the Ministry of Education, Science and Technology under which claimant fell dated 18th March, 1986 indicate that:

“The Board of Governors may employ persons on temporary basis for a period specifically advised to the employees and such period shall not exceed three (3) months”

Given that the period that claimant was employed exceeded the three months it can be assumed she was converted into a permanent employee.

The Collective Bargaining Agreement also had other terms of engagement for which the claimant was bound. Service gratuity was one of them and this was for employees who had served for 10 years of continuous service or those attaining 50 years of age or compulsory retirement age at 55 years. The claimant met this having served for over 18 years. Claimants Appendix 19, Legal Notice No.262 of 3rd September 1993 indicates that:

“Persons belonging to a professional cadre and employed by the Board shall be employed on such terms and conditions of service similar to those recommended for equivalent posts in the Civil Service and as per the applicable Scheme of Service”.

Though the grievant herein had been initially hired by the Board, she was now as per this Legal Notice subject to terms and conditions of service similar to those in Civil Service. Claimants App. II indicate some of the terms which claimant was entitled for as at 1995 July:-

1. Salary grade 2505 x 72 – 2577 x 111 – 3021 x 414 – 3435 x 129 – 3822 x 135 – 2297 x 165 – 4662 per annum.
2. Housing allowance Ksh.1235 per month.
3. Medical allowance – ksh.500 per month.

4. Medical risk allowance 200/= per month with effect from 1994 and thereafter adjusted to 400/= from 1st July 1995.
5. Uniform allowance of Ksh.12000/= per year.

A look at claimant's pay slip App.20 shows she was paid the salary, house allowance and medical allowance but was not paid medical risk allowance nor the uniform allowance. There were deductions for Union dues.

From this analysis, it emerges that indeed the Respondent did not pay claimant as expected. There is a contention that she was rude and kept quarrelling everyone. If that was the position, then the Respondent should have exercised their option under the Collective Bargaining Agreement to dismiss her. This they did not and it cannot be an excuse for not paying her as was expected.

Having found this, I find for Claimant and enter judgment for her as follows:-

1. Gratuity equivalent to 1 month salary for each year worked as per clause 31 of the Collective Bargaining Agreement

$$= 12645 \times 19 = \text{Ksh.}232,819/=$$

2. Risk allowance

From June 1994 – June 1995

$$= 200 \times 12 = \text{Ksh.}2400/=$$

From July 1995 – April 2003

$$= \text{Ksh.}400 \times 106 \text{ months} = \text{Ksh.}42,400/=$$

Less Ksh.3850/= paid in October 2003

3. Uniform allowance at Ksh.1200 per year

$$- 1200 \times 15 \text{ years} = \text{Ksh.}16,800/=$$

4. Salary arrears for 2 years

From July 2006 to June 2007

$$\text{Ksh.}12,645 - 11085 \times 12 = \text{Ksh.}18,720/=$$

From July 2005 to June 2006

$$\text{Ksh.}10085 - 9070 \times 12 = \text{Ksh.}24180/=$$

$$\text{TOTAL} = \text{Ksh.}43,000/=$$

GRAND TOTAL awarded Ksh.549,229/= less tax payable

5. The claimant will also be issued with a certificate of service.
6. Respondent will pay costs of this case.

Signed, dated and delivered in court at Nairobi this 10th day of December, 2012.

HELLEN WASILWA
JUDGE

Appearances:

No appearance

for Claimant

Mr. Gishamba holding brief for Otieno

for Respondent

Mr. David Kipsang

Court Clerk