**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL NO. 666 OF 2011**

**B LIMITED...........................................................APPELLANT**

**VERSUS**

**A M Y...........................................................1ST RESPONDENT**

**F I................................................................2ND RESPONDENT**

**(Being an appeal from the Judgment delivered on 9th December, 2011 by Hon. Mr. D. Ole Keiwua (PM) Milimani Commercial Courts in CMCC No.8229 of 2007)**

**JUDGMENT**

1. The Appellant sued the Respondent's for breach of contract for suddenly and without notice withdrawing their child from the Appellant's school. The claim was for Ks.97,586.36 being one term's fees in lieu of notice

2. The Respondent's in their statement of defence denied the claim. The Respondent's averred that it was the Appellant who breached the agreement by exposing the child to a destructive environment to wit poor discipline, bulling and lack of spiritual guidance and growth. It was further averred that any clause in the contract that penalizes parents for transferring a child when it comes to the best interest of the child is illegal and contrary to public policy.

3. The Appellant filed a reply to the defence and reiterated the contents of the plaint. It was stated that the defence has no merits and is an afterthought and an abuse of the court process.

4. During the hearing of the case, the Appellant's Head Teacher, J M G testified. Among the documents produced as exhibits is a copy of the application form, the school philosophy and the code of conduct. Her evidence was that no notice was given to the school before the child was withdrawn. That the child was admitted in the school in January 2006 in class 9 and failed to report in September 2006. It was further stated that the school does not profess any faith but the school has a pastoral programme and philosophy. That the school also has a school curriculum that deals with any issues arising in school and if the child had any issues, she could have raised them with the class teacher or the head teacher.

5. DW1 F I Aand DW2 A M Y the child's parents testified. The evidence of the mother is that she took the child to the school in January, 2006. That there were no problems during the first term but that in the second term the child complained of being bullied. That the child who was then 16 years old complained of being teased by the boys. That the mother spoke to a male teacher about it who said he would observe

and report to the school.

6. The child continued complaining. The child would also attend parties and come home late. There were also delays in the school transport. The school was a day school. That the child's character started changing negatively to conform with peer pressure. The child become badly behaved, started substance abuse and no longer respected the Muslim culture. The parents took the child for treatment for drug abuse, looked for another school and transferred the child. The parents blamed the school for not having a conducive learning environment.

7. In the judgment of the lower court the trial magistrate held that the parents acted in the best interests of the child as provided for under Article 53(2) of the Constitution and dismissed the case. The Appellant was aggrieved by the said judgment and appealed to this court on the following grounds:

> **"1.That the learned magistrate erred in law and in fact in dismissing the plaintiff's suit.**
>
> **2.That the learned magistrate erred in law and in fact by failing to record correctly or all pertinent evidence adduced by the witnesses, particularly but not limited to:**
>
> **(a) PW1 – J K's clear indication that the teacher who taught the child was no longer at the school and whose whereabouts were not known.**
>
> **(b) DW1 F I's testimony during her evidence in chief and cross examination that during the child's stay at the plaintiff school, the witness had very little time to attend to the child's welfare as she was deeply engaged in official duties particularly traveling abroad,**
>
> **(c) The Defence witnesses' evidence in cross-examination that there was no medical report to confirm their allegations and the causes and that they were really unhappy about the lifestyle at the plaintiff's school,**
>
> **(d) DW2 A M's evidence that the child was actually being treated for a bi-polar condition which the school couldn't have been responsible for.**
>
> **3.That the learned magistrate erred in law and in fact by failing to find that the plaintiff's evidence was the only true factual account and the defendants' reasons for withdrawing the child from school were not proven to the required standards or true or believable but a fabrication and an afterthought.**
>
> **4. That the learned magistrate erred in law and in fact by effectively or impliedly finding that the child had been bullied, harassed, was subjected to drug abuse or her welfare was compromised while attending the plaintiff's school and that the plaintiff was the cause or liable for the same and not attributable to other cause.**
>
> **5. That the learned magistrate erred in law and in fact by failing to appreciate that the alleged child's negative behavioral changes or problems (if any) as an adolescent, a conservatively bled Muslim girl and a day scholar occurred more likely from sources and reasons independent of the plaintiff's school.**
>
> **6. That the learned magistrate failed in law and in fact in failing to find that the evidence adduced by the defendants even if it was true were otherwise irrelevant in the circumstances.**
>
> **7. That the learned magistrate failed to appreciate that the plaintiff's claim was a mere contractual/pecuniary consequence of the breach of contract by the defendants and did not in any way conflict with Article 53(2) of the Constitution 2010 or any other part of the law or at all.**
>
> **8. That the learned magistrate failed to find that the whole defence is a sham, unmeritorious,**

> **vexatious, embarrassing, and frivolous and an abuse of the court process only meant to evade compliance with the terms of contract on the part of the Respondents.**
>
> **9. That the learned magistrate failed in law and in fact by taking into account extraneous and irrelevant matters in her findings and judgment.**
>
> **10. That the learned magistrate erred in law and in fact by failing to find that the plaintiff had proven her case on a balance of probabilities."**

8. During the hearing of the appeal the parties opted to file written submissions. I have considered the said submissions.

9. This being a first appeal, this court is duty bound to re-evaluate the facts afresh and come to its own independent findings and conclusions. See for example the case of **Selle v Associated motor Boat Co. & others [1968] E.A. 123** where it was stated as follows:-

> **"An appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)".**

10. It is not in dispute that the child was withdrawn from the school without any notice. It is not denied that the admission form was signed by the mother to the child. The said admission form requires that payment of one term's fees be paid if there is no notice of withdrawal of a child from the school. No such notice was given by the Respondents or any payment made *in lieu* of notice.

11. The Respondent's contention is that the school environment exposed the child to negative behavioural changes hence the transfer of the child to another school. The Head Teacher who testified on behalf of the Appellant had not interacted with the child or her parents. The child's class teacher or any other teacher who had interacted with the child were not called to testify. There is therefore no evidence from the school to show how the child was coping with the school. The evidence of the head teacher is based generally on school regulations, curriculums and philosophy without expounding on the same in relation to the subject child. My view of this case is that the school had to meet it's obligations to the students. On the other hand the parents had a contractual obligation to give a notice of withdraw of the child from the school or pay one terms fees *in lieu* of notice. The evidence on record from the parents side reflects concern over their child's welfare. The Appellant's failed to adduce any evidence that reflects whether the child was coping in school and what efforts were made to remedy the situation if at all. Thus the school cannot demand for notice or payment *in lieu* of the same without establishing that they played their role properly in providing a conducive learning environment.

12. A contract to give notice or pay *in lieu* of notice cannot be termed as illegal or contrary to public policy. Such a contract would be enforceable. However, in the circumstances of this case the parents of the child cannot be penalized for their endeavor to ensure that the best interests of the child were taken into account. The evidence of PW1 that after the child failed to report to the school the school did not follow up as it was the duty of the parents to call but proceeded to demand one terms fees for *in lieu* of notice does not reflect a caring attitude towards their student's welfare. The contractual obligation of the parents cannot be looked at in isolation without considering the obligations of the school regarding the welfare of it's students.

13. The Appellant's side has contended that the trial magistrate failed to correctly record the evidence adduced by the witnesses e.g. the evidence of PW1 that the teacher who taught the child was no longer at

the school and the defence evidence that the mother (DW1) admitted that she had very little time to attend to the child and that there was admission that the child was being treated for a bi-polar condition which the school could not have been responsible for. This court can only consider the evidence on record. There was no application made for admission of any other evidence as provided for under Order 42 rule 27 of the Criminal Procedure Code.

14. For the above stated reasons. I find no merits in the appeal and dismiss the same with costs.

Date, signed and delivered at Nairobi this 27th day of April, 2017

**B. THURANIRA JADEN**

**JUDGE**