REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO.166 OF 2010

NYAHURURU ELITE SCHOOLS LTD…....……..APPELLANT

VERSUS

DAVID CHEGE MURAYA……...…….RESPONDENT

JUDGMENT

1. The Respondent instituted a suit in the lower court (**Nyahururu PMCC NO.l7 of 2007**) seeking payment of Kshs.25,520 being unpaid salary for August, 2006 plus deductions effected from his salary for 11 months but which the appellant failed to remit to the National Hospital Insurance Fund (N.H.I.F).

2. It was the respondent's case that he was employed by the appellant from 16th August, 2005 to 1st September, 2006. The respondent testimony was to the effect that on 26.7.2006, in accordance with his contract of employment, he gave the appellant a one month (1) month resignation notice. By a letter dated 1.8.2006, the appellant accepted his resignation.

3. Despite the respondent having been in the employment of the appellant for the month of August, 2006 the appellant failed, refused and/ or neglected to pay his salary for that month, amounting to Kshs.22,000/=. The respondent also claimed Kshs.3,520/= being deductions effected from his salary for the period of his employment (11 months). However, during trial, he abandoned that claim.

4. It was the respondent's case that, even after tendering his resignation he continued working for the appellant. He explained that he supervised exams, marked the exams, entered marks in students' report forms, and attended the Christian Religious Education Department meeting. Despite having been promised by the school manager that his salary for August, 2006 would be paid through his bank account, that the promise was not honoured. Consequently, he wrote to the appellant demanding the unpaid salary and the amounts that the appellant had deducted from his salary but failed to remit to the National Hospital Insurance Fund.

5. In support of his case the respondent produced the contract of employment executed between him and the appellant (PEX 1); the appellant's letter of acceptance to his resignation (PEX 2); his clearance form (PEX 3); the payment advice for his terminal dues (PEX 4); the demand letter issued to the appellant by his advocate (PEX 5(a) and the registration slip attesting to that fact (PEX 5(b).

6. Because the appellant failed to respond to his demand, he filed the suit hereto to enforce his rights under the contract of employment.

7. Pointing out that the appellant in its acceptance to his resignation did not ask him not to work for the month of August, 2006, the respondent maintained that he worked for the appellant in the month in dispute (August 2006).

8. In further support of his case, the respondent called a colleague, Paul Mwaniki Kingori (P.W.2), who confirmed that the respondent worked for the appellant up to late August, 2006.

9. In its statement of defence, the appellant admitted that it received and accepted the respondent's one month resignation notice but contended that since the respondent was still under probation, when he gave the termination notice, he was not obligated to give the one month notice or receive a similar notice. Further that the respondent was not entitled to payment for the month of August, 2006 because upon acceptance of his resignation, he left the appellant's premises (school) immediately and did not render any services to the appellant for the whole of August 2006.

10. In support of its case, the appellant called its Deputy Principal at the time, Richard Muranguri (D.W.1).

11. Reiterating the appellant's contention that the respondent was not entitled to pay for the month of August, 2006, D.W.1, alleged that the respondent absconded immediately after tendering his resignation. He denied the allegations that the respondent performed some duties for the appellant namely, supervision of exams, marking exams and entering marks in students report forms. Instead he alleged that the respondent's work was assigned to somebody else. However, he neither named the person who was assigned the respondent's duties nor produced any document to prove that fact.

12. In support of the appellant's allegation that the respondent left immediately after he handed over his resignation, D.W 1 produced a delivery note (DEX 1) which showed that the respondent received the acceptance letter on 14th August, 20 14. He attributed the delay in collection of the acceptance letter to the respondent's unavailability in school. He also produced a notebook described- **"August Tuition Register: Teachers, 2006 as (DEX 2)"**. In that register the respondent's name is missing.

13. However, D.W.1 conceded that the respondent's resignation was to take effective from 1st September, 2006 and that the appellant's acceptance letter neither asked the respondent to resign with immediate effect nor stated the effective date of the respondent's release. He also conceded that for one to teach he had to be assigned work by the school (the appellant).

14. Upon considering the evidence presented before him the trial magistrate entered judgment in favour of the respondent for Kshs.22,000/= plus cost and interest at court rates.

15. It was that judgment which aggrieved the appellant and caused him to bring this appeal challenging on 6 grounds which can be summarized as follows:-

a) That the respondent's case was not proved;

b) That the learned trial magistrate failed to give any or any adequate consideration to the appellant's written submissions; and

c) That the learned trial magistrate failed to give adequate reasons for his judgment.

16. This being a first appeal, it is the duty of this court to consider and re-evaluate the evidence presented before the lower court in order to arrive at its own independent conclusion, bearing in mind that it neither heard nor saw the witnesses testify. See **Selle & Another** vs. **Associated Motor Co. Ltd & Others (1968) E.A. 123.**

17. It is common ground that the respondent was an employee of the appellant. It is also common ground that before the end of one year (probation period) the respondent tendered a resignation which was accepted by the respondent vide its letter dated 1st August, 2006 (PEX 2).

18. In its evidence, the appellant admitted that the respondent's resignation was effective from 1st September, 2006. However, it contended that the respondent was not entitled to payment for the month of

August, 2006 because he did not render any services to the appellant for that month.

19. In addressing that contention the trial court held: -

> **"...In any event, since the defendant opted to accept his resignation and ordered he leaves immediately, going by clause. 10 of the employment agreement, the defendant was ready to ... him for that one month since the hurried acceptance of the resignation and instead of taking it tentatively as said, ...they opted to have him leave before he changes his mind by 1st September, 2006. The defendant is hence bound by his employment agreement. If the plaintiff absconded, I would expect a few sample books for the class to have been produced to show that plaintiff did not enter the exams as required. The defence would have counter-claimed for the amount when he had absconded because the one-month notice had not lapsed and was expected to be on class."**

20. Since the parties herein had executed a contract to guide their relationship, the duty of the trial magistrate was limited to giving effect to the agreement the parties had entered into. See **Jiwaji & others v. Jiwaji & another (1968) E.A 547** where **Clement De Lestang, V.P**•observed:-

> "**The courts will not, of course, make contracts for the parties but they will give effect to their clear intention. In the present case parties made expression for the date of payment and the amount of first installment should the certificate not materialize in time. They never intended that there should be a gap of more than one year between each installment. They did not make similar provision for a second or subsequent installments because they never contemplated it would take so long to produce the certificate. I have no doubt, however, that if anyone had raised that point at the time of the agreement the answer of the parties would have been "but the certificate will be issued and if it is not, the provisional installments will continue until the accountants produce their certificate." For these reasons I agree with the learned trial judge that the defendants were in default."**

21. In the current dispute Clause 10 of the agreement signed between the respondent and the appellant allowed any of the parties to bring the agreement to an end by giving the other party one month notice in writing or by paying a one month salary in lieu of notice.

22. Although the appellant contends that the parties were not obliged to comply with that clause during probation, there is nothing in the contract of employment to that effect.

23.Although the appellants contends that under Section 42(4) of the Employment Act, No.11 of 2007, the respondent was only obligated to give seven days' notice, the contract hereto having being entered into way before that Act came into force, I find that section of the law to be inapplicable to this case.

24. Even if this court assumed that the parties did not wish the clause on termination to apply during probation (which is not the case), the parties herein would still be bound by the provisions of Section 14(5) of the Employment Act, Chapter 226 of the Laws of Kenya (now repealed). That section provides as follows:-

> **"14(5) Every contract of service not beinga contract to perform some specific work, without reference to time or to undertake a journey shall, if meant to be performed in Kenya, be deemed to be**
>
> **iii) Where the contract is to pay wages or salary periodically at intervals of or not exceeding one month, a contract terminable by either party at the end of the period of twenty-eight days next following the giving of the notice in writing.**
>
> **Provided that this subsection shall not apply in case of a contract of service whose terms provide for the giving of a period of notice of termination in writing greater than the period required by the provision of this subsection which would otherwise be applicable thereto."**

25. The contract hereto was entered into when the said section of the law was in force. As such it would have been applicable to the contract hereto if it had no termination clause. That is not the case.

26. In view of the foregoing, I reject the appellant's contention that the respondent's resignation took effect seven (7) days from 26.7.2006.

27. From the section of the lower court's judgment quoted above, it is clear that the trial magistrate gave reasons for believing the respondent's case and disbelieving that of the appellant. It is also clear that he considered the respective cases advances by the parties. For those reasons, grounds (b) and (c) of the appellant's appeal fails.

Did the appellant prove his case on a balance of probabilities?

28. My answer is in the affirmative. I say this because on proper construction of the resignation letter tendered to the appellant by the respondent, the respondent was still an employee of the appellant up to the date his resignation took effect. According to the evidence tendered in court, that resignation was to take effect on 1st September, 2006. Although there is evidence to the effect that the respondent cleared with the appellant as early as 15th August, 2006, the appellant having failed to assign the respondent duties for the reminder of the period, it should not be heard to claim that the respondent was not entitled to a salary for the days not worked. Besides, there is nothing in the appellant's case to prove that the respondent was in breach of the contract signed between him and the appellant.

29. In my view, the appellant's case would have been successful if and if only, there was evidence that following the alleged desertion of duty, it took the disciplinary measures contemplated under the contract of employment or the law. In the circumstances of this case, that was not the case.

30. For the foregoing reasons, the appeal has no merit and is dismissed with costs.

Dated, Signed and Delivered at Nakuru this 26th day of June, 2014.

H.A OMONDI

JUDGE