



REPUBLIC OF KENYA

High Court at Nairobi (Milimani Law Courts)

Cause 706 of 2009

JOHN KIMANI MUCHIRI.....CLAIMANT

VS

**THE BOARD OF GOVERNORS
OF GITHIGA HIGH SCHOOL.....RESPONDENT**

AWARD

Introduction

1. By a Memorandum of Claim dated 10th November and filed in Court on 17th November 2009 the Claimant sued the Respondent for terminal benefits. The Respondent filed a Reply on 5th July 2010 and the matter was heard on 27th March 2013 with Mr. Mandala instructed by Kamau Githui & Co Advocates appearing for the Claimant and Mr. Fedha instructed by the Attorney General appearing for the Respondent. The Claimant testified on his own behalf and James Maina testified for the Respondent. Both parties filed written submissions.

The Claimant's Case

2. The Claimant was employed by the Respondent as a Bursar on 2nd May 1997 at an initial salary of Kshs. 5,035. The Claimant's salary was progressively increased up to Kshs. 14,430 as at June 2006. The Claimant kept raising concern about unfavourable working conditions.

3. On 20th August 2009, the Respondent terminated the Claimant's employment on allegations of failure by the Claimant to perform his duties on time. The Claimant told the Court that prior to his termination, he had been forced to go on leave in July 2009. He resumed duty in early August 2009 and was terminated on 21st August 2009. It was the Claimant's case that he was not given any opportunity to respond to the allegations against him. The Claimant admitted having received a disciplinary memo in 2008.

4. The Claimant therefore claimed the following:

a) Salary underpayment

July-December 2006.....	Kshs. 12,132
January-June 2007.....	12,384
July-December 2007.....	28,320

January-June 2008.....	29,190
July-December 2008.....	64,110
January-March 2009.....	30,885
April-August 2009.....	43,925
b) Leave allowance for 12 years @ Kshs. 10,000 per year.....	120,000
c) Annual leave for 3 years @ Kshs. 25,895.....	155,370
d) 3 months' salary in lieu of notice.....	77,685
e) Service pay for 12 years @ 1 month's pay per year.....	310,740

The Respondent's Case

5. In its Memorandum of Reply, the Respondent stated that the Claimant was employed on Board of Governors terms and not on Public Service terms. The Claimant was therefore not entitled to the salary increments set out in the Public Service terms of service. The Respondent denied that the Claimant was working under unfavourable conditions and that the termination of the Claimant's employment was wrongful.

Findings and Determination

6. The first issue for determination in this case has to do with the Claimant's actual terms and conditions of service. The Claimant was employed in Job Group G by letter dated 17th April 1997. The letter stated *inter alia*:

“Your appointment is subject to the terms of any agreement between the Ministry of Education, Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers for the time being in force on the terms and conditions of service of persons employed by the Board of Governors established under the Education Act (Cap 211).”

7. All seemed to be working well until 2006 when the Respondent began experiencing financial difficulties that rendered it incapable of meeting its commitments to the Claimant and other Board of Governors employees. The Respondent therefore wrote to these employees on 20th November 2007 as follows:

“The Board noted that members of this cadre have continued to make certain demands in relation to the terms and conditions of their employment, especially their remuneration. In view of the above the Board resolved that a number of aspects in respect of this subject should be clarified to all members of staff in this cadre as follows:

a) That you are employed under the terms and conditions of

Githiga High School Board of Governors not of the civil service.

b) Any consideration of salary increment shall be subject to

availability of funds in the relevant vote head.

c) At the discretion of the Principal/Secretary, Board of Governors you

may, if need arises, be deployed to perform other duties other than those stipulated in your letter of

appointment.

d) Your employment shall be subject to regular performance

appraisal.”

8. The affected employees were required to signify their agreement to these terms by appending their signature on the letter. According to the Respondent, all the affected employees except the Claimant duly signed the letter. The Claimant did not controvert the Respondent's averment in this regard. The Claimant admitted in cross examination that he was employed by the School Board of Governors.

9. The Respondent explained that its move to adjust the terms of service was driven by severe financial constraints and the need to keep the School afloat. None of the accrued employee benefits were interfered with. The Court finds the action by the Respondent reasonable in the circumstances. The Claimant is therefore estopped from claiming any salary underpayment for the period after 30th November 2007 being the date of the letter. He is however entitled to the salary underpayments occasioned before 30th November 2007.

10. I will now deal with the manner in which the Respondent terminated the Claimant's employment. According to the termination letter dated 20th August 2009, the Claimant was terminated for dishonesty, poor performance and dissatisfaction with his salary.

11. Section 43(1) of the Employment Act, 2007 provides that:

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

12. Apart from the Claimant's dissatisfaction with his salary, the Respondent failed to prove the allegations of dishonesty and poor performance. At any rate, the Respondent did not follow the disciplinary procedure set out in Section 41 of the Act. I therefore find the termination of the Claimant's employment unfair within the meaning of Section 45 and award him 3 months' pay in compensation. I also award him notice pay at the rate of 15 days pay for each completed year of service. The Respondent did not produce any leave records to prove that the Claimant had taken all his leave. I therefore allow the claim for annual leave.

13. The Court found no basis for the claim for leave allowance and 3 months' salary in lieu of notice. These claims are therefore dismissed .In computing this Award, I have adopted the salary the Claimant would have earned under the civil service terms as at 30th November 2007, being Kshs. 19,540.

14. Thee final effect of this Award is as follows:

a) Salary underpayment

July-December 2006.....Kshs. 12,132

January-June 2007.....12,384

July-November 2007.....23,600

b) 3 months' salary in compensation.....58,620

c) Annual leave for 3 years (19,540x21x3).....41,034

d) Service pay for 12 years @ 15 days per year.....117,240
Total.....265,010

The Respondent will pay the costs of this case.

Orders accordingly.

DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 30TH DAY OF MAY 2013

**LINNET NDOLO
JUDGE**

In the Presence of:

.....**Claimant**

.....**Respondent**