



SUSHILA BAKHDAPLAINTIFF

V E R S U S

NAIROBI ACADEMY HOLDINGS LTDDEFENDANT

J U D M E N T

The Plaintiff herein, SUSHILA BAKHDA, has sued the Defendant, NAIROBI ACADEMY HOLDINGS LTD., for damages arising out of wrongful termination of employment. The Plaintiff's loss is particularized as follows in paragraph 10 of the plaint:-

- “(i) Sick leave under the standard terms of employment of teaching staff or payment thereunder.
- (ii) Loss of three months full salary in lieu of notice at KShs. 4,070,000/00 per annum.
- (iii) Balance of September to December 2001 salary KShs. 378,163/00.
- (iv) Loss of allowances and benefits including telephone, car allowance, medical, club allowance and air ticket benefits.
- (v) Refund on dentist's bill KShs. 81,000/00.
- (vi) Loss of gratuity at of total salary from 1991 to 2002 under clause 6.1 of the agreement.
- (vii) Loss of continuation of medical cover under clause 6.2 of the agreement.
- (viii) Gratuity on current contracts at 7.5% clause 6.3
(24 years service).”

The Plaintiff's case as set out in the plaint is as follows. The Defendant was at all material times the proprietor of a school called THE NAIROBI ACADEMY. The Plaintiff was employed as the school's deputy administrator in 1978 by the Defendant's predecessor in title “at a salary of about KShs. 7,000/00 plus allowances”. The Defendant purchased the school sometime in 1986 and retained the Plaintiff's services, but as principal of the school. Her employment was based on an oral agreement between her and the Defendant through its director, one MR. KIRUGU.

The Plaintiff has further pleaded that her contract of employment with the Defendant was subsequently reduced into writing by an agreement entered on 27th June, 2001 “at a salary of KShs. 4,070,000/00 per annum.”

The Plaintiff pleads at paragraph 6 of the plaint that she was also entitled to the following benefits nett of tax, statutory deductions or adjustments:-

- “(i) Club allowances to the limit of KShs. 75,000/00 per annum.

- (ii) Full medical scheme provided by AAR Medical Scheme as a gold card (holder).
- (iii) The Defendant's fully maintained car.
- (iv) One return air ticket Nairobi/London (annual).
- (v) One domestic telephone."

The Plaintiff has also pleaded that her contract of service further provided as follows:-

1. That her employment could be determined only by two (school) terms notice in writing by either party or payment of three month's salary in lieu thereof.
2. That her contract of service would be supplemented by the standard terms applied to teaching staff and such other terms as had generally applied to the Plaintiff's employment prior to execution of the written agreement.

Finally, the Plaintiff has pleaded that she was unlawfully and summarily dismissed by a letter dated 5th December, 2001 without notice or payment of salary in lieu of notice.

The Defendant duly entered appearance and filed a defence and counterclaim. It admitted owning The Nairobi Academy at the material time, but that it owned it since its inception and did not purchase it in 1986 as pleaded by the Plaintiff. The Defendant also admitted employing the Plaintiff. It further admitted that her employment as principal of the school was based on an informal oral agreement as she refused to take a formal written contract in 1987 when she took up the post.

The Defendant further admitted that the Plaintiff's contract of employment was reduced into writing on 27th June 2001 with annual cash emoluments of KShs. 4,070,000/00 comprising an annual basic salary of KShs 897,512/00 and an annual responsibility allowance of KShs 3,174,488/00. The particulars of benefits are also admitted, except that it is clarified that the medical scheme was "restricted to the AAR Gold Card benefit only", and that the domestic telephone benefit "included only local calls, not international calls". It is also pleaded that the Plaintiff's remuneration was subject to tax and statutory deductions.

The Defendant has also admitted that the Plaintiff's employment could be determined by either party by a two-term notice in writing or payment of three months' salary in lieu of such notice. It is also admitted that the Plaintiff's contract of service would be "supplemented by the standard terms applied to teaching staff and such other terms as had generally applied to the Plaintiff's employment prior to execution of the written contract of service".

Regarding the plea of unlawful termination of employment by letter dated 5th December 2001, the Defendant pleaded that "due to the Plaintiff's ill-health and irrational behavior, the Plaintiff was unable to continue with her duties at the school, and the Defendant therefore deemed the employment contract as frustrated and thus terminated". No particulars of the alleged illness or irrational behavior are given.

Regarding the Plaintiff's specific claims, the Defendant in paragraph 10 of the defence and counterclaim admitted some and denied the others. The admitted allowances and benefits are as follows:-

- (i) December housing allowance up to and including 5th

December, 2001;

- (ii) Club allowance and air ticket benefit reduced proportionately for the period 4th September, 2001 to 5th December, 2001 out of the 12 month academic year ending on 31st August, 2002;

(iii) Telephone benefits, excluding international calls, comprising actual local calls billed up to 5th December, 2001;

(iv) Medical Scheme benefit up to 5th December, 2001.

It further pleaded that the Defendant offered to pay the admitted claims but that the Plaintiff rejected the offer.

The Defendant's counterclaim is as follows:-

1. £12,000/00 Sterling, or an account thereof, **“being monies unaccounted for in the Defendant's bank account in London, which account was operated exclusively by the Plaintiff.....”**.
2. KShs 2,000,000/00 **“being monies lent to the Plaintiff by the Defendant at the Plaintiff's request, and payable...during the Plaintiff's employment ...”**.
3. KShs 469,318/58 **“being the loss caused by the Plaintiff as a result of releasing results and reports to school fee-defaulting parents against the specific written instructions of the school's management”**.
4. KShs 691,848/00 **“being charges payable to Telkom Kenya Ltd. under an unauthorized contract entered into by the Plaintiff on account of the Defendant”**.

In a reply to defence and defence to counterclaim, the Plaintiff denied frustration of her contract of employment by illness or irrational behaviour on her part. The Plaintiff also denied in terms the counter-claims made.

An agreed statement of issues dated 14th May, 2007 was filed. The issues as framed by the parties are as follows:-

- “1. During the Plaintiff's employment what benefits and emoluments was the Plaintiff entitled to and when were they due and payable?”**
- 2. Was the Plaintiff's employment with the Defendant terminated lawfully and or frustrated?**
- 3. Upon termination lawfully and or unlawfully or by frustration what was the loss and damage suffered by the Plaintiff, if any?**
- 4. Whether the Plaintiff's agreed benefits were net or inclusive of tax and other statutory deductions?**
- 5. Whether the Plaintiff exclusively operated an account in London and whether the Plaintiff accounted for the sterling pounds 12,000/00?**
- 6. Whether the Plaintiff borrowed KShs. 2,000,000/00 or at all from the Defendant to be repaid within the contract period?**
- 7. Whether the Plaintiff released the results to school fees defaulting parents and whether such sums are recoverable from the Plaintiff?**
- 8. Whether the telephone contract entered between the Plaintiff on behalf of the Defendant and Telekom Kenya Limited was authorized by the Defendant, or whether the Plaintiff had authority to execute the same?**
- 9. Who shall bear the costs of this suit?”**

Given the various admissions made by the Defendant in the statement of defence and counterclaim, I consider the following to be the main issues to be decided in this suit; and in answering them, all the issues as framed by the parties shall thereby have been answered:-

- 1. Were the Plaintiff's emoluments nett or inclusive of taxes and statutory deductions?**
- 2. Was the Plaintiff's contract of employment with the Defendant lawfully terminated?**
- 3. If the Plaintiff's employment was not lawfully terminated, what damages is she entitled to?**
- 4. Is the Defendant entitled to the counterclaims made?**
- 5. What order for costs should be made?**

At the commencement of the hearing, the bundle of documents contained in the Plaintiff's list of documents dated 27th September, 2002 was by consent admitted in evidence as **Exhibit P1**. Similarly, the Defendant's bundle of documents contained in its list of documents dated 5th July, 2006 was admitted in evidence as **Exhibit D1**. The bundle of documents contained in the Defendant's further list of documents dated 15th May, 2007 was also admitted in evidence by consent as **Exhibit D2**. In the course of the trial, the Plaintiff's supplementary list of documents dated 27th April, 2008 was also admitted in evidence by consent as **Exhibit P2**.

The Plaintiff testified for herself as PW1. She did not call any other witness. One **FRANCIS JOHN MWANGI KIRUGU**, a director and chairman of the board of directors of the Defendant, testified as DW1. The Defendant did not call any other witness.

I have considered the testimonies of these two witnesses in light of the various documents admitted in evidence. I have also considered the written submissions filed on behalf of the parties.

The following basic facts are not in dispute:-

- 1. The Plaintiff's contract of employment which was initially oral, was reduced into writing on 27th June 2001 (page 50 of Exhibit P1).**
- 2. This contract of service was for two years and was to be supplemented by the standard terms applied to teaching staff (pages 12 to 30 of Exhibit P1).**
- 3. The Plaintiff's contract of service provided for annual cash emoluments of KShs. 4,070,000/00.**
- 4. The contract of service provided for other benefits as follows:-**
 - (i) Club allowance of not more than KShs. 75,000/00 per annum.**
 - (ii) Medical scheme with AAR.**
 - (iii) Fully maintained car.**
 - (iv) One annual economy-class air ticket Nairobi/London/Nairobi.**
 - (v) One domestic telephone.**
 - (vi) Continuation of medical insurance after termination of employment for a period of 10 years on satisfactory completion of the contract of service.**
 - (vii) Gratuity at the rate of 7.5% of the gross cash emoluments on completion of the contract.**

5. The contract of service provided for termination by either party on giving “two terms notice or payment of three months’ salary in lieu” thereof.

6. The Plaintiff’s contract was terminated by letter dated 5th December, 2001 (page 53 of Exhibit P1) without notice and without payment of three months’ salary in lieu thereof.

It will be noted that the contract of employment dated 27th June, 2001 contains some alterations by hand. The penultimate paragraph of the contract is in the following words:-

“Please sign and return a copy of this note to signify your agreement to the contents thereof or endorse your proposed amendments, additions or deletions.”

The hand-written alterations comprise the Plaintiff’s proposed amendments, additions and deletions to the contract. There was no evidence tendered that these amendments, additions and deletions were acceded to by the Defendant. As the Plaintiff duly signed the contract, she thereby signified her agreement to the contents of the **unaltered** document. The contract between the parties therefore is the **unaltered typed document dated 27th June, 2001**. I so hold.

There is also the issue of the date of commencement of the contract of employment. The document itself is silent on this. The Plaintiff’s testimony was that the written contract would take effect on 1st September, 2001 when the school academic year was to commence. The academic year was to end on 31st August, 2002. These facts were not contradicted by DW1. The new written contract of service therefore commenced on 1st September, 2001 and was to expire after two years on 31st August, 2003.

I will now examine the issues in turn.

Issue No. 1

Were the Plaintiff’s emoluments nett or inclusive of taxes and statutory deductions?

According to the statement of defence and counterclaim at paragraph 5, the Plaintiff’s annual emoluments of KShs. 4,070,000/00 comprised an annual basic salary of KShs. 897,512/00 and an annual responsibility allowance of KShs. 3,174,488/00 (though these two items add up to a total of KShs. 4,072,000/00. But at paragraph 10 (d) (i) it is alluded that the annual emoluments may have comprised also an element of housing allowance. According to the testimony of DW1, the annual cash emoluments of KShs. 4,070,000/00 comprised of three components:-

- (i) Basic monthly salary of KShs. 74,626/00.
- (ii) Monthly house allowance of KShs. 40,000/00.
- (iii) The balance constituting a responsibility allowance for the year.

The Plaintiff’s own testimony was silent on how her annual cash emoluments of KShs. 4,070,000/00 were made up.

I accept the testimony of DW1 that the Plaintiff’s annual cash emoluments of KShs. 4,072,000/00 comprised the three components set out above, that is, an annual basic salary of KShs. 897,512/00 (KShs 74,626/00 per month), a monthly house allowance of KShs 40,000/00 and an annual responsibility of KShs. 3,174,488/00 or thereabouts.

Were these emoluments nett of taxation and other statutory deductions? DW1 testified that only the basic salary was taxed. The other allowances were not taxed. He conceded that the law did not permit this non-taxation of the other allowances. He further testified that the Defendant has since termination of the Plaintiff’s employment, been paying all the taxes that ought to have been paid upon the Plaintiff’s

emoluments.

The position in law, therefore, was that notwithstanding any unlawful under-the-table arrangements between the Plaintiff and the Defendant, all due taxes and statutory deductions ought to have been paid upon all her cash emoluments and other benefits. The answer to this issue therefore is that **the Plaintiffs' emoluments were inclusive of taxes and other statutory deductions.**

Issue No. 2:

Was the Plaintiff's contract of Employment with the Defendant lawfully terminated?

The letter of termination dated 5th December, 2001 reads as follows:-

"Having regards to what has transpired at our "meetings" with you during the last few days and taking into account the medical report from AAR the school considers your contract frustrated and consequently employment terminated.

In order to secure the future of the school I am now proceeding to make or confirm appropriate appointments at the school and advise the parent body and other interested parties accordingly.

You will proceed on leave on medical grounds as per standard terms of contract and your emoluments will be paid in accordance therewith. The accountant has been instructed to prepare your final account for agreement and settlement."

The medical report from AAR referred to in the letter of termination was a "to whom it may concern" document dated 27th November, 2001 (*page 52 of Exhibit P1*). It is signed by a **DR. N. MAINA** of AAR Sarit Centre. The document says:-

"REF: MISS SUSHILA BAKHDA MEMBERSHIP NO. C040333

The above-named has been an AAR member since 1996. She was seen in September, 1999 due to a four-month history of persistent headache not responsive to analgesics. She had X-rays of the sinuses, teeth and a CT scan of the head, which were all normal. In April 2000 and June, 2001 she developed low back pain for which she was sent for physiotherapy and put on analgesics.

She complained of insomnia, fatigability, crying and losing her temper easily since the beginning of the year. She has been taking valium to go to work. I last talked to Miss Bakhda on 30th November during which time she broke down. I do feel that she is going into a nervous breakdown mainly due to stress at work. I recommend that she take a break from work."

This then is the medical report that prompted the Defendant to summarily dismiss the Plaintiff. It is to be noted from the testimony on record that it was not the Defendant who had demanded that the Plaintiff undergo a medical test on account of her inability to perform her duties. It was the Plaintiff who went to see a doctor on account of feeling stressed due to a strained working relationship with DW1. The doctor diagnosed severe work-related stress and a risk of a nervous break-down. The doctor recommended a break from work.

Was this a diagnosis that indicated that the Plaintiff was unable to perform her duties, and that therefore her contract of employment was frustrated?

DW1's own testimony-in-chief on the Plaintiff's health was as follows:-

"..... A few months before the termination of the Plaintiff's employment we had a very tense relationship which did not augur well for the school. She brought to me a doctor's document saying that she was undergoing great stress and was on the verge of a nervous break-down. I formed the opinion that she was not in a position to continue working. I therefore terminated her

employment by letter dated 5th December, 2001 I considered the contract of employment frustrated by the Plaintiff's illness.....”

In cross-examination DW1 stated as follows:-

“I terminated the Plaintiff's employment on account of the doctor's report of her illness and my previous observations of her. I had not addressed her in writing about her apparent change of personality and inability to perform her duties..... I never received any written complaint from parents or teaching staff about the Plaintiff's conduct. The Plaintiff's contract of employment was frustrated because her illness was an involuntary external factor that made her unable to perform her duties.....

“At the termination the term was ending, and there was a school holiday coming up. It is true the doctor recommended that the Plaintiff take a break from work. I did not terminate the Plaintiff's employment. It was frustrated by her illness and thereby terminated.

“The Plaintiff's employment was to end as at the date of the letter (of termination), that is 5th December, 2001.”

The Defendant did not produce any evidence of the Plaintiff's extended previous illness or irrational behaviour. Apart from DW1's say-so, there was no independent evidence of her inability to perform her duties on account of illness, mental, emotional or physical. No particulars or evidence of what transpired in the “meetings” with the Plaintiff alluded to by DW1 were given. There was no complaint by anyone else of the Plaintiff's alleged inability to do her work. A “tense” working relationship with DW1 surely was not evidence of her inability to work. It could well have been DW1 himself who was unreasonable and causing the Plaintiff stress!

The doctor's note upon which the Plaintiff was dismissed did not state that the Plaintiff was so stressed up that she would no longer be able to perform her duties. It merely recommended a break from work. A school holiday was coming up. The Plaintiff could then probably have been able to take a break from work without undue disruption of any school activities.

Which hard-working employee of any organization does not require periodic rests by way of leave? It is a common thing for employees to occasionally be stressed up, especially when inter-personal relationships with their bosses are adverse. This does not necessarily indicate an inability to perform. It should not invariably lead to summary dismissal.

It is apparent from the evidence on record that there were personal problems, which were work-related, between DW1 and the Plaintiff. The Plaintiff was unable to take these problems too well, as a result of which she suffered severe work-related stress. As the doctor had recommended, a break from work would probably have cured it. Instead, DW1 took the opportunity to summarily dismiss her. It was an unlawful dismissal. There was no cause for summary dismissal.

It is to be noted that under the general or standard contract of employment applicable to teachers, even severe illness did not lead to immediate termination of employment. See page49 of Exhibit P1. In the event of prolonged illness, an employee was entitled to 4 weeks on full pay, another 4 weeks on half salary, and further absence from duty without pay.

The answer to this issue is therefore that **the Plaintiff's contract of employment with the Defendant was not lawfully terminated.**

Issue No.3:

If the Plaintiff's employment was not lawfully terminated, what damages is she entitled to?

I will look at the Plaintiff's claims in turn.

(i) 3 Months' Salary in lieu of Notice

The Plaintiff's contract of service was terminable by a two school-term notice or payment of three (3) months' salary in lieu of notice. No notice was given and the Plaintiff is therefore entitled to 3 months pay in lieu thereof. I have already found that her basic monthly salary was KShs. 74,626/70. She is therefore entitled to KShs. 223,878/00 as three months basic salary in lieu of notice.

(ii) Sick Leave

The Plaintiff simply cannot claim sick leave after her contract of service was terminated. She would have been entitled to sick leave only in the course of her employment, should it have become necessary. This claim cannot succeed, and I reject it.

(iii) Balance of September to 5th December 2001 salary

The Plaintiff's claim here of KShs. 378,163/00 was admitted in the defence, and I allow it.

(iv) Loss of Allowances and other benefits

Benefits like telephone, car, club and air tickets were attached to the Plaintiff's employment. Once her contract of service was terminated, albeit unlawfully, those benefits ceased. They could not be extended to a person who was no longer in the Defendant's employment. In any event, the written contract of service lasted just over three months before termination. Benefits like the annual air ticket had not yet been earned at the time of termination. I hold that the Plaintiff is not entitled to these benefits.

(v) Dentist's Bill of KShs. 81,000/00

This expense was incurred after the Plaintiff's contract of service was terminated, notwithstanding that she may have been treated during subsistence of the service. It is also not clear if the expense was covered under the AAR medical cover. No evidence was led in this regard. I will disallow the claim.

(vi) Loss of Medical Cover

It is to be noted that the continuation of full medical cover offered in clause 6.2 of the written contract of service would have been only upon **satisfactory completion** of the contract. There was no completion, satisfactory or otherwise, as the contract was terminated. This claim therefore must fail.

(vii) Ex-gratia payment

Under clause 6.1 of the written contract, this was to be "discussed and communicated not later than 31st March, 2002". There was no evidence that the same was "discussed and communicated". The contract of service was terminated long before that date. This benefit, if there was one, did not accrue or crystallize and is not payable.

(viii) Gratuity

Under Clause 6.3 of the written contract, the gratuity was payable "on the completion of the contract now offered". There was no completion of the contract on account of its termination on 5th December, 2001. The 2 year contract would have been completed on 31st August, 2003. Without this completion the gratuity is not payable.

The Plaintiff is thus entitled to 3 months basic salary in lieu of notice amount to KShs. 223,878/00 and the admitted balance of salary for September to 5th December, 2001 of KShs. 378,163/00, atotal of KShs 602,041/00. All the other claims of the Plaintiff are unproven.

Issue No.4:

Is the Defendant entitled to the counterclaims made?

Let us look at the counterclaims in turn:-

(i) £12,000/00 Sterling

Though the Plaintiff was running the London account exclusively, she testified that she fully accounted for all the money in the account to the school accountant. DW1 indeed admitted that the Plaintiff accounted for the money, but that he was not satisfied with the accounting. He did not state why he was not satisfied. The preponderance of evidence is that after every trip to London the Plaintiff would account to the accountant all the money used by way of handwritten notes and receipts. There are many of these notes and receipts **from page 31 to page 48 of Exhibit P1.**

The Plaintiff further testified that there was a little balance left in the London account. But it was being eaten away by bank charges, and the Defendant would not direct her what to do with it. The Plaintiff therefore transferred it into her own account and later paid it over to the accountant.

I accept the Plaintiff's testimony on this issue. She operated the London account in a fiduciary capacity on behalf of the Defendant. No evidence of pilfering of funds has been tendered by the Defendant. On the other hand there was a concerted effort on the part of the Plaintiff to account for every cent used after every London trip. The Defendant's claim for this sum is not proved to the required standard.

(ii) Loans of KShs. 2 million

The Defendant did not tender any evidence of any loans requested by the Plaintiff or extended to her. There was evidence, though, of some KShs. 2 million paid to the Plaintiff by way of vouchers. But these vouchers do not state that the sums so paid were loans. On the other hand, the Plaintiff testified that on 16th April, 1997 she received from the Defendant KShs. 1 million (page 1 of exhibit D2). She said this was not a loan or gift but her salary for the school term January to April 1997. It was a replacement cheque for one issued earlier. The voucher itself does not say what the payment was for.

The Plaintiff further testified that she received a further payment of KShs. 1 million on 20th May, 1997 (page 2 of Exhibit D2). This was another replacement cheque. Again the voucher does not state what the payment was for beyond saying that it was a replacement cheque for some previous cheque. The Defendant did not exhibit the payment vouchers for the original cheques.

The Plaintiff was categorical that she was not advanced any loans by the Defendant. She said, however, that she received a gift of KShs. 1 million to assist her purchase a house in Nairobi. There was evidence of other generosity extended to the Plaintiff by the Defendant, for instance in her handsome cash emoluments and the apparently very good price for purchase of her shares in the Defendant. So, it is not surprising that the Defendant could have extended to her a gift of KShs. 1 million in a time of need.

All in all, there is not satisfactory evidence tendered by the Defendant of any request made by the Plaintiff for loans of KShs. 2 million, or the advancement of the same to her. This counter-claim of the Defendant must also fail.

(iii) KShs. 469,318/58

This claim was pleaded as **“being the loss caused by the Plaintiff as a result of releasing results and reports to school fee– defaulting parents against the specific written instructions of the school’s management”**.

No evidence of these **“specific written instructions”** was tendered. There was also no evidence of the release of results by the Plaintiff to “school fee-defaulting parents”, and no evidence was led as to how

the sum of KShs. 469,318/58 was arrived at. This claim by the Defendant is remote and unproven. It must fail.

(iv) **KShs. 691,848/00**

This claim was stated to be “**charges payable to Telkom Kenya Ltd. Under an unauthorized contract entered into by the Plaintiff on account of the Defendant**”.

There was evidence that when these charges were incurred the Plaintiff was the chief administrator of the school. Part of her work was to promote the school, including by way of advertisement. The contract of advertisement complained of was for the benefit of the Defendant’s school. There was no evidence that the Plaintiff personally benefitted from the same.

I am satisfied from the available evidence that the Plaintiff, who was the administrative director of the Defendant at the time the expense was incurred, had authority to incur the expenditure on behalf of the Defendant. If there was breach of any internal rules, (and I am not satisfied on balance that there was) this would probably have attracted some other kind of disciplinary sanction, not a surcharge upon the Plaintiff. This claim is not proved to the required standard, and I reject it.

In the result the Plaintiff has proved on a balance of probabilities her claim only to the extent of the total sum of KShs. 602,041/00. I hereby award her this sum plus costs and interest at court rates. The Defendant’s counter-claims are not proved on balance, and the same are hereby dismissed with costs.

Those will be the orders of the court.

DATED, SIGNED AND PRONOUNCED IN OPEN COURT THIS 30TH DAY OF OCTOBER, 2009

H. P. G. WAWERU

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