



**Kilei v The Registered Trustees of Education for Life and Board of  
Management Tumaini Timbwani High School (Cause E009 of 2023)  
[2023] KEELRC 1670 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1670 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA  
CAUSE E009 OF 2023**

**M MBARŪ, J**

**JUNE 29, 2023**

**BETWEEN**

**RUTH MUNYIVA KILEI ..... CLAIMANT**

**AND**

**REGISTERED TRUSTEES OF EDUCATION FOR LIFE AND BOARD OF  
MANAGEMENT TUMAINI TIMBWANI HIGH SCHOOL ..... RESPONDENT**

**JUDGMENT**

1. The claimant is a female adult and a registered teacher with a degree in education from Mount Kenya University and holds a Masters Degree in Art, Project Planning and Management from the University of Nairobi. The respondent is a non-governmental organisation running schools with its registered office in Mombasa.
2. The respondent employed the claimant as a High School Principal through letter dated 19<sup>th</sup> January 2017 with terms and conditions agreed with the respondent's agents Glyn Davies, Dane Davies, Maureen Clayton and Benedictor Petti. The monthly salary was agreed at Ksh.120,000.
3. The claim is that the respondent allocated the claimant additional duties of Headteacher and managing Tumaini Timbwani Primary School which she accepted because the school was faced with management crisis although this was not part of her job description.
4. The respondent increased the salary to Ksh.130,525 due to good performance but on 8<sup>th</sup> November, 2022 the claimant was issued with notice of summary dismissal on the grounds that on 5 August 2022 she was allocated teaching duties in the primary school and she declined which was tantamount to refusal to take lawful institutions and directions.
5. The claim is that the allocation of teaching roles was not part of the employment contract, this was without prior consultations or notice and or due regard to the duties and roles the claimant was already



- undertaking as the Principal of the High School and the Headteacher of the primary school. The claimant declined to take additional roles since she was already overwhelmed and had not given her approval to take such duties outside her contract.
6. The claimant was also accused of abdicating her roles by directing the Education Officer, Ruth Mwangi to a junior officer of the respondent, Brenda Kanyasi instead of dealing with the said officer as the Principal.
  7. The claimant was issued with a notice to show cause why her employment should not be terminated on gross misconduct dated 7 October 2022 and on 13 October 2022 she replied and gave her reasons leading to the visit by the education officer and the school registration documents were being handled by the officer through Brenda Kanyasi acting manager in the absence of the Centre manager who was on leave. The allegations made that she had abdicated her duties were false and had she been given a chance to explain, all these matters would have been addressed but instead she was issued with a letter of summary dismissal.
  8. The claim is that termination of employment by summary dismissal was unfair, the respondent disregarded the employment contract and issued directions for additional work without consulting the claimant and the claim is for the following dues;
    - a. Notice pay Ksh.130,525;
    - b. House allowance for 54 months at 15% Ksh.1,311,776.25;
    - c. Unpaid leave 21 x 4 x 67 months Ksh. 456,855;
    - d. Unpaid holidays Ksh.108,775;
    - e. Compensation for unfair termination of employment at 12 months Ksh.1,566,300;
    - f. Service pay for 5 years Ksh.326,312.50; and
    - g. certificate of service with costs.
  9. The claimant testified and supported her claims that she was called by the respondent officers and taken through her role as Principal which was purely administrative and never agreed to carry out teaching duties. Due to the respondent having management challenges at its primary section, she agreed to assist as the Headteacher as the respondent looked for a replacement. As the Principal, she offered to teach in some classes as an interim measure subject to the respondent hiring teachers.
  10. As the Principal, the claimant had her roles outlined under the contract and for administration roles, the respondent had a Centre Manager. On 15 September 2022 the education officer visited with regard to the school registration into the new curriculum and required school records which were in the custody of the Centre Manager but at the time he was on leave and the one acting was Ms Brenda where the claimant referred the officer.
  11. Later the respondent directed the claimant to start teaching 9 classes in the primary section after some teachers were recruited by the TSC. This allocation of additional duties was without regard that the claimant was still on her substantive role as Principal High School and had agreed to serve as Headteacher, primary sector and had all along been teaching in some classes. She declined the additional 9 classes since she had made it clear that she was employed as the principal and in any event, there was no consultations before these changes were effected.
  12. The claimant testified that she was issued with a notice to show cause why her employment should not be terminated for refusal to take lawful directions and instruction and for abdicating her duties



to a junior officer and she replied in details but instead of being given a hearing, her employment was terminated for alleged gross misconduct which was unfair and her claims should be awarded. There was no notice issued or payment for her annual leave she she could not have taken due to the nature of her duties and which required her to work overtime to ensure the school programmes were completed in time.

13. In response, the respondent case is that the entity sued as the respondent has no legal capacity and the suit is a nullity. Under the Education for Life, there are different learning institutions which operate under the umbrella of Tumaini Timwani Schools including a high school and a primary school.
14. The claimant as a trained teacher whose main profession is to teach students was employed by the respondent through letter dated 19 January 2017 as the Principal of Tumaini Timwani Schools which includes the primary and high schools. In her letter of application, the claimant described her qualification as teaching and during her interview, it was made clear that the respondent could allocate her duties within the Tumaini Timwani Schools.
15. Although the claimant was designated as the Principal of the high school, there was a mutual understanding that she would be assigned any role in any of the schools within her roles as a teacher and her contract hence allowed to allocation of any other duties deemed by the employer to be reasonable. In this regard, the claimant took up the role of headteacher in the primary section without objections since this was as expected and part of her envisaged duties.
16. As a teacher, the respondent requested the claimant to take up teaching duties and lessons as a reasonable expectation and within her job description but she declined contrary to the Staff Handbook which permitted the respondent to assign the claimant duties as part of her employment. Such refusal to take up teaching duties was in breach of the employment contract and gross misconduct which justified summary dismissal. The claimant also was in breach of her employment when she abdicated her responsibility to a junior employee when the education officer visited the school she delegated her duties to a junior staff.
17. On 7 October 2022 the respondent issued the claimant with a notice to show cause for gross misconduct and she responded on 13 October 2022 but this was found unsatisfactory and invited to an oral hearing on 31 October 2022 when she attended with Ben Ngotho and Salim Wamii as her representatives although they were not her union representatives.
18. On 8 November 2022 the claimant was issued with letter of summary dismissal and allowed 14 days right of appeal.
19. Employment was terminated lawfully and for justified reasons. The claimant had no satisfactory response as to why she failed to undertake reasonable duties allocated by the employer and why she abdicated her duties by delegating to a junior employee and under Section 44(4) of the [Employment Act, 2007](#) summary dismissal was justified. Notice pay or compensation is not due in this case and the claimed house allowance was paid and allocated in the payment statements every month. The claimant took all her annual leave during school holidays and the claimant holiday payment are not due. the respondent remitted to the NSSF and NHIF and service pay is not due.
20. In evidence, the respondent called Benedictor Ambalwa Petti the Centre Manager who testified that the respondent is not a legal entity and under the Education for Life different learning institution operate under Tumaini Timwani Schools including the primary and high school. The claimant was employed under contract as a teacher and assigned duties at the high school with an understanding that as a Geography and Kiswahili teacher she could be assigned other duties within the respondent schools and in this regard she was allocated duties as Headteacher primary school and would have



taken up classes. In 2022 she was assigned lessons in the primary school but she declined contrary to her employment contract which was in breach. On 13 September 2022 the education officer visited the respondent as part of teaching duties and instead of the claimant addressing the issue at hand she delegated the same to a junior staff which was in breach of her duties.

21. Mr Pitti testified that for these breaches, the claimant was issued with a notice to show cause, her responses were found unsatisfactory and was invited to a hearing where she brought two persons and even though they were not from the union or fellow employees, the respondent respected her rights and a decision was then taken that she was of gross misconduct and terminated her employment through letter dated 20 October 2022. This was lawful and justified.
22. At the close of the hearing, both parties filed written submissions which are analysed and the issues which emerge for determination are whether there was unfair termination of employment and whether the reliefs sought should issue.
23. At the heart of the claim is the claimant's contract of employment dated 19 January 2017.
24. The employer is Education for Life for the job of Principal at Tumaini Timbwani High School. The claim is filed against The Registered Trustees of Education for Life and Board of Management Tumaini Timbwani High School.
25. In the Response filed on 28 April 2023 paragraph 2 thereof address the issue directly. The entity sued does not have the requisite legal capacity.  
The claimant did not take the cue.
26. With advantage of legal representation, the claimant notified that the employer was Education for Life ought to have stopped and done the needful. She did not take heed.
27. This is not a proper claim. Without legal capacity, the claim cannot hold against the respondent as currently defined.
28. The claim is that the claimant was unfairly dismissed from her employment, under the employment contract between the claimant who was employed as the Principal at Tumaini Timbwani High School and was issued with a job description which included taking responsibility for ensuring that each class was operating under the syllabus, be updated on education developments, and work with management team and fundamentally to carry out duties, deemed by the employer to be a reasonable request.
29. The response that the respondent was part of a group of entities which include the high school and primary schools is not in dispute. Indeed, the claimant testified that she agreed to address the management challenges at the primary section and became the Headteacher while undertaking the substantive role of Principal at the high school. Under such conglomerate, the employer had issued a job description that required the claimant to undertake duties deemed to be a reasonable request.
30. Indeed the claimant testified that on different times she went into class for lessons when the respondent had shortage of teacher. This was however on condition that the respondent would hire teachers to relieve her of such roles since she was the Principal at the high school.
31. The claimant was therefore under the direction and instructions of the employer to undertake such duties as were given and reasonable in accordance to her employment. Being a school Principal allowed the claimant to appreciate the gaps and stepped in whenever there was a shortage of teachers to take up some lessons. This was not a strange expectation. It was part of her duties to ensure overall responsibility for the academic performance of the schools. She cannot extricate herself from the duty to be a principal and overall learning at her school which includes taking up lessons.



32. The other matter was the allegations that the claimant abdicated her duties by delegating to a junior officer. The job description defines the claimant's role to work with management as a team. The visit by the education officer on 13 September 2022 was for registration of the schools taking into account the new curriculum over which the claimant was the overall person responsible.
33. The delegation of such work to a Ms Brenda was a direct academic duty and indirect administrative role. The respondent did not call Ms Brenda to explain her exact role save, Mr Pritti testified that she was sitting on his seat whenever he was on leave. As Centre Manager, he failed to clarify what 'sitting on his seat' meant in these proceedings with regard to contestations by the claimant that this was the officer who would liaise with such an officer whenever the Centre Manager or the directions were absent.
34. To claim that the claimant abdicated her duties by placing another junior officer to undertake such duties without proof does not support the response.
35. Ultimately, the claimant was invited to show cause why her actions were not of gross misconduct. the claimant admitted that she is a teacher and was employed on the basis that her background was in education and with her further education, she was conversant with management and was ready to take up the role of Principal.
36. The allocation of some lessons in the primary section was therefore part of her qualifications as P1 teacher. Not far removed from her area of expertise.
37. An employee who is alleged to be of gross misconduct must be taken through the due process of the law in terms of Section 41(2) of the *Employment Act*, 2007 which directs that even where the employee is in breach of the employment contract or has committed gross misconduct, the employer must allow the employee to defend herself as held in *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR. this is given emphasis in the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR this Court had the following to say on the burden of proof:-

There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the *Evidence Act* and the *Civil Procedure Act*/Rules. Finally the remedies for breach set out under section 49 are also fairly onerous to the employer and generous to the employee. But all that accords with the main object of the Act as appears in the preamble:

38. The claimant was invited to show cause which she did and further invited to attend hearing at the shop floor in the presence of her representatives of choice and she brought in non-employees who were not her union representative. The respondent indulged the claimant to this extent.
39. At the hearing, the claimant was allowed to argue her case in defence by asserting that she was employed as the Principal and not as a teacher. As outlined above, such view was misguided. Whether the refusal to take class lessons was because of the workload already allocated or not, the claimant remained under the direction and instructions of the employer for the hours required to be at work each day, week and school terms. Refusal to take reasonable instructions and directions from the employer during the



course of employment is a serious breach of the employment contract and which justified the sanction of summary dismissal.

40. The remedy of notice pay and compensation are not available to the claimant.
41. On the claim for a house allowance at 15% of the paid salary, of the gross salary paid at Ksh.130,535 the basic pay was Ksh.113,500 an house allowance was Ksh.17,025. These records are filed by the claimant as part of her supporting documents.
42. On the claim for unpaid leave, the court takes judicial notice that every school approved and registered operates within the ordinary school calendar with a school term and school holidays. Within such framework, annual leave is taken into account. To claim over and above such allocation is seeking unjust enrichment.
43. This is appreciating that teachers working in private schools are not regulated under any given Wage Orders and rely solely on the written contracts issued by the employer with an outline of terms and conditions of service as held in *George Kimiti Kiguru v Board of Management Bavuni Secondary School & [2022] eKLR*. where the contract does not have conditions and terms of employment, the basic terms of the *Employment Act*, 2007 apply.
44. In this case, the claimant had her house allowance paid as evidenced by the payment statement.
45. Unpaid holiday is claimed without an outline as how such arise. School holidays are gazetted and taking into account that after every school term session the claimant was on school breach, a claim for holiday pay is not justified. Even in a case of working during public holidays, these are specific days gazetted and cannot be claimed wholesome without details for assessment and allocation.
46. Service pay is only due where the employer is not compliant with Section 35(5) and (6) of the *Employment Act*, 2007. The payment statement filed demonstrate that the respondent was compliant in this regard.
47. The claim having been filed against a non-entity should have been addressed instantly in that regard. The respondent well is of such fact did not address this legal issue instantly. Each party should therefore bear own costs.

The merits of the claims gone into, the claim is without merit.

48. Accordingly, the claim is found without merit and is hereby dismissed. Each party shall bear own costs.

**DELIVERED IN OPEN COURT AT MOMBASA THIS 29 DAY OF JUNE, 2023.**

**M. MBARŪ**

**JUDGE**

**In the presence of:**

Court Assistant: Japhet

..... and .....

