



Nyali Academy Service Limited t/a The Mombasa Academy v Muli (Cause E082 of 2022) [2023] KEELRC 2041 (KLR) (27 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 2041 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE E082 OF 2022**

**M MBARÚ, J
JULY 27, 2023**

BETWEEN

**NYALI ACADEMY SERVICE LIMITED T/A THE MOMBASA
ACADEMY CLAIMANT**

AND

BENARD KIOKO MULI RESPONDENT

JUDGMENT

- 1 The issue in dispute is the failure by the respondent to comply with the terms of his employment contract
- 2 The claimant is a limited liability company operating as The Mombasa Academy, a school in Nyali within Mombasa county. The respondent is a male adult and was employed by the claimant as the Accounts/Business studies teacher from 1st September 2016 on a fixed term contract.
- 3 The claimant employed the respondent on a two-year contract running from 1st September 2019 to 30 June 2021.
- 4 On 1 March 2021 the claimant school head teacher received a text message from the respondent that he would not be reporting to work on that day since he had travelled to Nairobi for an emergency. On the same day, the claimant called the respondent but he ignored the call.
- 5 On 2 March 2021 the head teacher of the claimant called the respondent with regard to his blatant ignoring his contract but he stated that he had terminated his employment contract immediately. At the time the respondent as earning Ksh.125,000 per month.
- 6 Upon termination of employment without notice or giving any reason, the claimant was forced to hire another teacher to take up the subjects the claimant was teaching and for these reasons, the claimant is seeking the following dues;



- a. A declaration that the respondent wrongfully terminated his employment contract;
 - b. 3 months notice pay at Ksh.375,000;
 - c. Costs of the suit and interests of the awards made.
- 7 In evidence, the claimant called Carey Yiembe the head teacher who testified that the respondent had been employed under various contracts the last dated 6 June 2019 for two years ending 30 June 2021 but on 2 March 2021 the respondent terminated his employment without notice or giving any reasons. He had asked for permission to travel to Nairobi from Mombasa and without any prior indication of absence, he refused to take all calls made to him. The claimant later learnt that the respondent had travelled to Nairobi for an interview with the Kenya Revenue Authority and secured new employment and without giving notice terminated his employment. This forced the claimant to hire a new teacher and incurred costs.
- 8 Mr Yiembe also testified that in March 2020 due to COVID pandemic most schools and institutions were affected. The school decided to do online classes but some parents refused to pay school fees leading to a suit at the High Court Mombasa and parents were allowed to pay 50% of the schools fees. This affected operations since all income arose out of school fees payments. Due to this development, the claimant agreed with the teachers for a 70% pay in May and June 2020 and later this reduced to 50% since the claimant could no longer be able to pay. the final judgment of the High Court was on 17 November 2020 and parents directed to pay the full school fees but at the time majority of parents had moved their children out of the claimant's school and hence the financial position did not improve.
- 9 By the time the respondent asked to travel to Nairobi on 26 February 2021 he did not give notice and his contract required 3 months' notice before termination which is due.
- 10 In response and counter-claim
- 11 In response, the respondents case is that his last employment contract was fixed for the period of 1 September 2019 to 30 June 2021 at a gross salary of Ksh.125,000.
12. The communications made before employment terminated was done in good faith following frustrations and dissatisfaction with the working environment and prompt payments and forcing him to resign from his employment.

Counter-claim

13. In counter-claim, the responder's case is that in April 2020 following COVID pandemic, the claimant made arrangements with the parents that would pay 90% of the fees but the parents disagreed and a suit was filed at the High Court on 13 May 2020. The claimant informed the teachers including the respondent that only 70% of their salary would be paid and a dispute arose with the teachers.
14. In July and August 2020 the claimant without any consultations reduced the salary due to 50%.
15. Following the High Court decision on 17 November 2020 directing the parents to pay school fees, the claimant through letter dated 18 November 2020 instructed the parents to pay fees arrears and hence was able to recover unpaid schools fees and the salary cuts should have been settled.
16. The counter-claim is for Ksh.350,000 of unpaid salaries May 2020 pay cut of 30% Ksh.37,500;
17. June 2020 pay cut of 30% Ksh.37,500; July 2020 pay cut of 50% Ksh.62,500; August 2020 pay cut of 50% Ksh.62,500;



18. September 2020 pay cut of 30% Ksh.37,500; October 2020 pay cut of 30% Ksh.37,500; November 2020 pay cut of 30% Ksh.37,500; December 2020 pay cut of 30% Ksh.37,500;
19. The claimant failed to issue the respondent with a revised contract upon change of terms in accordance with Section 10(5) of the [Employment Act](#) and he is entitled to the counter-claim with costs.
20. The respondent did not attend hearing.
21. At the close of the hearing, parties filed written submissions which are analysed and the issues which emerge for determination are whether the respondent wrongfully terminated his employment; whether there counter-claim is justified and who should pay costs.
22. The employment of the respondent by the claimant is not contested. There was a two years contract ending 30 June 2021 at a salary of Ksh.125,000 per month.
23. It is also not in dispute that in March 2020 COVID- 19 was declared a pandemic and it affected many sectors including schools and other institutions of learning and including court operations and this is evidenced by the parents of the claimant's school filing High Court – VS & 43 others (acting on their behalf and also acting as parents and next of friend of students learning at the Mombasa Academy v Nyali Academic Services Limited t/a Mombasa Academy & another [2020] eKLR. the parents were challenging the requirement to pay full school fees.
24. The claimant's case is that school fees is the only source of income and could not pay the teachers and hence, the pay was reduced. The claimant has filed letter dated 20 May 2020 by several teachers protesting the salary reduction without consultation. The teachers, including the claimant, noted that there was an ongoing suit with parents and would have impact with regard to collection of school fees. The teachers proposed that;
 - ... what we are therefore requesting for is that any salary reduction be considered as deferred pay and not lost earnings on the part of the teachers, subject to the court ruling.
 - We have taken this step of writing an official letter to you sir, because there has been no official communication in writing from the management to the staff indicating the road map ahead for the coming months, which has resulted in a lot of anxiety. ...
25. It seems the respondent continued to work until what he terms as his resignation on 2 March 2021 prompted by frustration and dissatisfaction with the working environment an inconsistent salary payments by the respondent. The respondent has hence counter-claimed for unpaid salaries from May to December 2020. Noteworthy, nothing is claimed under the period just prior and leading to alleged frustration and dissatisfaction with the working environment.
26. The respondent has not filed any written notice terminating employment on the noted grounds of frustrations and dissatisfaction of work environment.
27. Section 36 of the [Employment Act](#), 2007 (the Act) requires an employee seeking to terminate employment without notice to pay in lieu of notice;

36. Payment in lieu of notice

Either of the parties to a contract of service to which section 35(5) applies, may terminate the contract without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by



him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section.

28. A claim that the respondent felt frustrated and dissatisfied with his work environment is not sufficient cause to abandon his employment without good cause however justified he felt under the circumstances. The law exists to protect both the employer and employee at the shop floor. To allow a practice that a dissatisfied employee would result to abandonment of employment at will would cause chaos at the shop floor.
29. The notice of 20 May 2020 by the teachers taken into account, such then alerted the claimant, faced with a suit by the parents and the teachers cognisant that indeed the COVID pandemic had affected operations, the respondent went through this phase until after the end of it in February 2021 only for him to abandon his employment without notice or giving any reasons.
30. The respondent cannot justify his inaction in this case. He should and ought to have given the claimant notice of his exit or payment in lieu thereof.
31. Under the fixed term contract, the respondent was required to issue notice of termination of employment in terms of clause (6) that is by giving of a term's written notice.
32. The term's written notice is not defined. The application of 3 months is without any basis based on Section 35 and 36 of the Act and a month notice pay is hereby found due from the respondent to the claimant all at Ksh.125,000.
33. On the counter-claim, in employment and labour relations, any employer who is faced with a financial challenge and is unable to pay salaries is insulated under Section 10(5), 13 or 40 of the Act. The employer is allowed to invite the affected employee to agree to change of employment terms and conditions and the employee must consent in writing to such changes. A record of the changed terms must be kept by the employer. Where the employee fails to give such consent, the motions of Section 40 of the Act are available to the employer. Such is lawful and in terms of Section 45(2)(b) where there is an operational need leading to termination of employment, this is lawful;
 - (2) A termination of employment by an employer is unfair if the employer fails To prove—
 - a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason—
 - i. related to the employee's conduct, capacity or compatibility; or
 - ii. based on the operational requirements of the employer; and ...
34. Hence, an employer has a legal duty to ensure adherence to the law even where there is a pandemic such as the case was in the year 2020. The claimant ought to have secured its rights by having the respondent consent to reduced salaries and in the alternative, apply redundancy provisions. The letter and notice of teachers on 20 May 2020 was such an invitation to enter into a dialogue for either deferred payments but there is no response by the claimant as the employer and hence the opportunity was lost.
35. The respondent is entitled to his salaries under the fixed term contract as counter- claimed. Due to the inaction by the claimant to secure itself within the legal parameters permissible, lack of funds and payment of school fees from the parents and the suit filed as a result is not a justification to deny the respondent his salaries.



36. With regard to costs, the claim successful and the counter-claim successful, each party shall meet own costs.

Accordingly, the claimant is hereby awarded notice pay at Ksh.125,000.

The counter-claim is hereby awarded at Ksh.350,000 and shall be offset from what is owed.

Each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 27 DAY OF JULY 2023.

In the presence of:

Court Assistant: Japhet Muthaine

M. MBARÚ JUDGE

..... and

