



**Ndikamire v St Hannah's Preparatory School Limited (Cause 1093 of 2018)  
[2023] KEELRC 3182 (KLR) (5 December 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3182 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1093 OF 2018  
NJ ABUODHA, J  
DECEMBER 5, 2023**

**BETWEEN**

**MOSES INDIMULI NDIKAMIRE ..... CLAIMANT**

**AND**

**ST HANNAH'S PREPARATORY SCHOOL LIMITED ..... RESPONDENT**

**JUDGMENT**

1. The Claimant filed his statement of claim dated June 27, 2018 pleaded *inter alia* as follows: -
  - i. The Claimant was employed by the Respondent school situated at Karen Nairobi as a teacher on or about July 9, 2014 at a starting monthly salary of Kshs 39, 000/= but later adjusted to Kshs 44,000/=.
  - ii. The Claimant averred that he was assigned to teach Kiswahili from Form one to Form Four in one stream and was appointed the class Teacher form three East. That he used to work overtime from 5am to 7pm and 6 pm to 10 pm every day amounting to 6 hours a day. He also used to work during public holidays where he would work half day. He was never compensated for the same.
  - iii. The Claimant averred that he received letter of confirmation of employment on 9<sup>th</sup> March,2015 after serving six months' probation. He was given promotion to the position of Head of Department (H.O.D) Games and class teacher form four East. He also became the patron of the school of journalism and drama.
  - iv. The Claimant averred that he was rewarded by the Board of Directors of Respondent for posting good KCSE results of the year 2014 and in the year 2015 he posted better results where his class produced the best student in Kiswahili.



- v. The Claimant averred that he had a cordial relationship with the management and board of directors of the Respondent and for the entire period he worked as a teacher he never received any warning whether verbal or written. He did not have any disciplinary case.
  - vi. The Claimant further averred that he was shocked on March 2, 2017 to receive a termination letter dated February 27, 2017 signed by V.N Ndehi the Executive Director of the Respondent alleging that the Claimant was being terminated for unsatisfactory performance.
  - vii. The Claimant averred that he was aggrieved by the unsubstantiated allegations as the basis of termination as this was untrue, misleading and pure falsehood.
  - viii. The submitted that he served the Respondent with distinction for a period of three years with unreserved loyalty and fidelity to duty. That the Respondent did not advance any proper or valid reason for the termination of the Claimant's employment. His rights as an employee were grossly violated. He was never given a chance to be heard before the decision of terminating his services was made.
  - ix. The Claimant averred that his termination of employment was in flagrant violation of rules of natural justice, was wrongful, illegal, unlawful and unfair. He was deserving of payment of terminal benefits in full with compensation for unfair termination.
2. The Claimant in the upshot prayed for the following against the Respondent;
- a. Gratuity payment for 3 years Kshs 44,000 x 3= 132,000/=
  - b. Payment in lieu of Notice Kshs 44,000/=
  - c. Overtime worked and not paid
    - evenings 6.00pm to 10.00pm-4 hours
    - Mornings 5.00 am to 7.00 am-2 hours
    - Public Holidays, Labour day (1<sup>st</sup> May), Madaraka Day(1<sup>st</sup> June) Mashujaa day (20<sup>th</sup> October) worked half day-6 hours.
    - Double pay all total to Kshs 2,125,200.05
  - d. Compensation for wrongful and unfair termination
    - 12 months' salary Kshs 528,000.00
    - Total Kshs 2,829,200.05/=
  - e. Certificate of service
  - f. Costs of the suit and interests on present court rates.
3. The Respondent did not file any response despite service and the matter proceeded undefended.

### **Evidence**

4. The Claimant's case was heard on July 6, 2023 where he testified and adopted the pleadings and documents filed in court as his evidence in chief. The Claimant testified that he used to teach Kiswahili and CRE. That some time he would report at 5.00am especially when on duty. That in most cases he used to leave at 8.30 or 9.00 pm which depended on time allocated at the timetable. He did not attach his pay slips with the documents.



## Claimants' Submissions

5. The Claimant filed written submissions dated September 27, 2023 and submitted that he never received any warning or face any disciplinary proceedings in regard to his work performance. He relied on his recommendation letter dated February 14, 2017.
6. Despite Respondent being served with his demand letter they did not respond. It was his submission that the termination was wrongful and unfair as no reason was advanced, no notice was given, no disciplinary hearing was conducted.
7. On the issue of reliefs sought the Claimant submitted that he worked diligently and had a distinguished career with the Respondent for a period of 3 years without a single disciplinary case but dismissed unfairly. That the Respondent did not enter appearance nor file response to his claim. His evidence has therefore not been challenged hence his prayers should be allowed as prayed.
8. On the issue of costs, the Claimant submitted that section 27 of the *Civil Procedure Act* provides for the same and they follow the event and at the discretion of court.
9. On the applicable law the claimant relied on sections 41(1) (2) on the procedure of termination, 43(1) on the reason which must be fair/valid and 44(2) and (3) on summary dismissal.
10. On the Authorities the Claimant relied on the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* (2014) eKLR and *Gibson D. Mwanjala v Kenya Revenue Authority*(2015) eKLR on employer following provisions of Section 41 of the Employment on due process as a mandatory requirement and on reasons for termination as per provisions of section 43 of the *Employment Act* respectively.

## Determination

11. I have reviewed and considered the pleadings, testimony and submissions by Claimant in support of the case and further noted that the Respondent did not participate in these proceedings I proceed to make my analysis.
12. I have The court has stated previously that it is not within its jurisdiction tightly audit the reason for which employment has been terminated. The test usually is the reasonable test. That is to say, would a reasonable employer put in the circumstances dismiss"? If the answer be in the affirmative, the court will not interfere.
13. In this case the Respondent in its termination letter alleges to have terminated the Claimant for poor performance. The Claimant has rebutted this assertion that his performance was satisfactory. He has attached the KCSE results, letter of confirmation of his employment and recommendation letter. I find that the Claimant has satisfactorily proved that his performance was not questionable.
14. That notwithstanding the Respondent despite service of the claim and the demand letter did not enter appearance, file defence or participate in these proceedings to prove allegations of poor performance. There was no warning given to Claimant on account of poor performance and the Respondent had to prove this.
15. In the case of *Peter Kamau Mwaura and another v National Bank of Kenya* (2020) eKLR the court quoted *Jane Samba Mukala v Oltukai Lodge Limited* [2010] KLR 225 and observed that–  

“Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the *Employment Act*, 2007. The employer must



show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.

16. The respondent did not defend the claim hence there is no material before the Court to support the allegation of poor performance.
17. In conclusion I find that the termination of Claimant's service was unfair and he is entitled to compensation.
18. The prayer for service pay could only be allowed if the Claimant had attached his pay slip to illustrate that the respondent never remitted NSSF. He did not file the pay slip among other documents. This was his duty to provide such crucial documents. This prayer therefore fails on that account.
19. The prayer for one-month salary in lieu of notice is allowed since the reason for the termination of the Claimant employment has been found to be substantially unjustified and procedurally flawed.
20. The Prayer for overtime also fails for the reasons that the Claimant during hearing testified that sometimes he would report at 5 am more so when on duty. This means then it was not every day. He also testified that he would leave from 830-9.00 pm according to the timetable. The Claimant has not attached any timetable before this court to show he was working on those extra hours including holidays.
21. On the prayer for compensation for unfair termination the Court takes into account that the Claimant had worked for the Respondent for three years. The Court further notes that the respondent though served, never bothered to defend the claim. An award of 8 months' salary would adequately compensate the claimant. The Claimant is entitled to certificate of service as envisaged by section 51 of the *Employment Act*.
22. In conclusion the Court awards the Claimant
  - a. One month notice Kshs 44,000/=
  - b. 8 months compensation for unfair and unlawful termination Kshs 352,000/=Total Kshs 396,000/=

**DATED AT NAIROBI THIS 5<sup>TH</sup> DAY DECEMBER, 2023 DELIVERED VIRTUALLY THIS 5<sup>TH</sup> DAY OF DECEMBER, 2023**

**ABUODHA NELSON JORUM**

**JUDGE**

