



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 819 OF 2016**

**STANLEY OSEKO OGINDA.....CLAIMANT**

**VERSUS**

**ISLAMIA MADRASA SOCIETY.....1<sup>ST</sup> RESPONDENT**

**MUSLIM ACADEMY.....2<sup>ND</sup> RESPONDENT**

**BOARD OF GOVERNORS MUSLIM ACADEMY.....3<sup>RD</sup> RESPONDENT**

**JUDGEMENT**

1. The claimant instituted the claim herein on 10<sup>th</sup> May, 2016, through which he avers that he was employed by the 1<sup>st</sup> respondent as a teacher with effect from 2<sup>nd</sup> June, 2010 and that he was unlawfully terminated on 4<sup>th</sup> April, 2016 without justifiable cause. As a result, he seeks various reliefs against the respondents jointly and severally.

2. The respondents disputed the claim and filed a joint defence dated 15<sup>th</sup> July, 2016 through which they aver that there was justifiable cause to terminate the claimant's employment. The respondents further averred that the claimant rendered himself liable for termination on account of absence from duty without authorization, use of inappropriate language towards other employees, defiance, rudeness, and failure to take up assigned duty from his seniors. The respondents however concede that the claimant was entitled to one month salary in lieu of notice and gratuity.

3. The matter was initially set down for dismissal for want of prosecution but the claimant successfully opposed the Notice of Dismissal hence the court directed that the matter proceeds for hearing.

4. The matter was set down for hearing on 15<sup>th</sup> November, 2021 and the respondents were absent from court. The claimant told court that he had effected service of the day's hearing upon the respondents. To this end, he produced an Affidavit of Service dated 12<sup>th</sup> November, 2021 sworn by the one Francis Onguti through which he deponed that he effected service of the hearing notice dated 13<sup>th</sup> August, 2021 electronically upon the respondents' Advocates, through the email address info@chaudhriandassociates.com. Annexed to the said Affidavit, is a copy of the hearing notice and email printout.

5. The court noting that the email address was one disclosed by the respondents through the pleadings before court, was satisfied with the return of service, hence directed that the matter proceeds for hearing, pursuant to Rule 22 of the Employment and Labour Relations Court Rules (2016), the respondents' absence notwithstanding.

**Claimant's case**

6. At the hearing, the claimant took the stand and testified in support of his claim. He sought to rely on his witness statement which he asked the court to adopt as part of his evidence in chief. He also produced the documents filed together with his claim, as exhibits before court. He averred that he was employed by the 1<sup>st</sup> respondent as a teacher in the 2<sup>nd</sup> respondent institution, which was administered by the 3<sup>rd</sup> respondent. He stated that initially, he was earning a salary of Kshs 23,000/= but the same was later enhanced to Kshs 31,111/= on account of his excellent performance. To this end, he referred the court to the letter of recognition issued by the 1<sup>st</sup> respondent. He informed court that he was unlawfully terminated as he was handed the letter of termination without being accorded an opportunity to defend himself. He further told court that while in the employment of the 1<sup>st</sup> respondent, he was overworked as he served as a classroom teacher, discipline master from the nursery to the secondary section, and also sat in the wildlife and environmental committee. He thus prayed that his claim be allowed as prayed.

## Submissions

7. The claimant filed written submissions upon close of the hearing. He reiterated the averments contained in his claim, to the effect that his termination was unlawful. He further submitted that he had proved his case on a balance of probability hence was entitled to the claims sought.
8. The respondents did not tender any submissions for consideration by court.

## Analysis and determination

9. The issues arising from the pleadings on record, the evidence placed before court as well as the submissions can be distilled as follows;

**a) Whether the claimant's termination was unfair and unlawful?**

**b) Is the claimant entitled to the reliefs sought?**

### Whether the claimant's termination unfair and unlawful?

10. The claimant has alleged that his termination was unfair, hence it is necessary to consider the facts and circumstances presented herein vis a vis the relevant provisions of the Employment Act.

11. The starting point is **Section 43(1)** of the Employment Act (Act), which requires an employer to prove reasons for an employee's termination, failure to which such termination is deemed to be unfair. Further on in the Act under **Section 45 (2)**, a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and relates to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer. **Section 45 (2) (c)** of the Act, closely tied to this provision, as it requires an employer to prove that it complied with the requirements of fair process in undertaking the termination.

12. The specific requirements of fair hearing are espoused under **Section 41(1)** of the Act which mandates an employer to notify an employee of the intended termination. As such, the employee is to be notified of the reasons thereof in a language he or she understands and in the presence of another employee or a shop floor union representative.

13. The foregoing provisions condenses the legal threshold in respect of termination of employment. The same can be split into two portions, with the first limb being the justification of reasons for termination while the second limb constitutes the process applied in terminating the employment of the employee.

14. More importantly, it is noteworthy that the burden of proof lies with the employer. This was aptly captured by the Court of Appeal in the case of **Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eKLR** as follows; **"the burden on the employee is limited only to asserting that unfair termination has occurred, leaving the burden to show that the termination is fair to the employer."**

### (i) Substantive justification

15. As stated herein, substantive justification entails proving the reasons for which an employee's termination was effected. As was held in the case of **Walter Ogal Anure vs Teachers Service Commission (2013) eKLR**, substantial justice refers to establishment of a valid reason for termination. In this case, the reasons which led to the claimant's termination are ascertainable from his letter of termination which reads in part as follows;

*"RE: NOTICE OF TERMINATION OF EMPLOYMENT*

*...Your employment is being terminated because your attendance and your general conduct violate our school expectations and polices. You have so far received warning letters about unauthorized absence from school, insubordination and inappropriate language to both your colleagues and seniors. These letters were signed and acknowledged by you and are in your personal file. Since you have demonstrated a willingness to compromise these standards, we cannot in good faith accede to your continued employment with us. Having taken all the facts and circumstances into consideration, we consider that your actions constitute serious misconduct warranting dismissal..."*

16. It is notable from the wording of the letter of termination that the claimant was being accused of abscondment of duty, insubordination and use of inappropriate language. The claimant has denied the accusations as levelled against him. Indeed, these allegations are serious in nature and constitute grounds for summary dismissal under section 44(4) of the Act.

17. Pursuant to section 45 (2) of the Act, an employer is bound to prove that the reasons for an employee's termination are valid and fair. It is logical that validity and fairness of the reasons for termination can only be established upon analysis of the documentary and oral evidence presented by the employer during the trial process. Only then, can the court determine whether such reasons as advanced are valid and fair.

18. As stated herein, the respondents did not participate in the trial process hence the documentary evidence as attached to their joint defence could not be tested in cross examination. Further there was no oral evidence to back up the accusations against the claimant. Notably, there were no written statements from the claimant's colleagues and/or supervisors to support the claims of use of inappropriate language and insubordination. Similarly, there was no evidence to prove the allegations of abscondment of duty, for instance, an attendance/clock in register. Such evidence would have been necessary in determining whether the reasons for which the claimant was terminated were indeed

fair and valid. In absence of such evidence, the reasons for the claimant's dismissal have not been substantiated at all and for that reason, the same cannot be determined to be valid or fair.

19. In the circumstances, the respondents did not discharge the burden under sections 43 (1) and 45 (2) of the Employment Act.

**(ii) Procedural fairness**

20. The requirement for fair hearing is broadly encapsulated under section 45 (2) (c) of the Act. Section 41 (1) provides for the specific requirements to be complied with by an employer. It entails notifying the employee of the allegations leveled against him or her and granting him or her the opportunity to make representations in response to the said allegations.

21. The respondents averred in their joint defence, that the claimant was given notice prior to termination. However, no indication was given as to whether the claimant was granted a hearing prior to termination. In absence of such evidence, it can only be presumed that the claimant was not subjected to any process at all prior to his termination. Consequently, the burden of proof remains undischarged on the part of the respondents.

22. The above position was amplified the Court of Appeal in the case of **Kenfreight (E.A.) Limited v Benson K.Nguti, Civil Appeal No. 31 of 2015**, where it was held that;

**“Apart from issuing proper notice according to the contract (or payment in lieu of notice as provided), an employer is duty-bound to explain to an employee in the presence of another employee or a union official, in a language the employee understands, the reason or reasons for which the employer is considering termination of the contract. In addition, an employee is entitled to be heard and his representations, if any, considered by an employer before the decision to terminate his contract of service is taken”.**

23. The total sum of the foregoing is that the termination of the claimant cannot be said to be fair and lawful in terms of sections 43(1) and 45(2) of the Act and I so find.

24. Having found as such, what remedies then, avail to the claimant?

**Reliefs**

25. Having found that the claimant's termination was unfair and unlawful, I will award him six (6) month's gross salary as compensatory damages. This award is informed by the length of the employment relationship between the parties and the fact that the reasons for his dismissal from employment were not justified at all.

26. I further award the claimant one (1) month's salary in lieu of notice pursuant to the provisions of section 35 (1) (c) of the Act. As a matter of fact, the respondents have conceded that the claimant is entitled to one months' salary notice.

27. The respondents have also conceded to the payment of service gratuity in net amount of Kshs 67,413/= hence the claimant is awarded the same.

28. The claimant has prayed for transport allowance in the sum of Kshs 144,000/= for the entire period he was employed by the respondents. Section 90 of the Employment Act places a time bar on claims older than 3 years. As such, any claim that is actionable in this respect can only be with effect from 10<sup>th</sup> May, 2013 which is 3 years before the institution of the suit, till the date the claimant exited employment on 4<sup>th</sup> April, 2016. It is notable that the claimant was paid transport allowance for the month of February, 2016 thus, I take it that his entitlement is for 33 months only, that is from May, 2013 till January, 2016.

**Orders**

29. In the circumstances, I enter Judgment in favour of the claimant against the respondents jointly and severally as follows;

**(a) Compensatory damages in the sum of Kshs 186,666/= which sum is equivalent to 6 months gross salary.**

**(b) One month's salary in lieu of notice being Kshs 31,111/=.**

**(c) Gratuity in the net sum of Kshs 67,413/=.**

**(d) Arrears of transport allowance for 33 months being Kshs 66,000/=.**

**(e) The claimant shall have the costs of the suit.**

**(f) Interest on the amount in (a), (b) and (c) at court rates from the date of Judgement till payment in full.**

**DATED, SIGNED and DELIVERED at NAIROBI this 21<sup>st</sup> day of January, 2022.**

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**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant Mr. Ogeto

For the Respondent No appearance

Court assistant Barille Sora

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**STELLA RUTTO**

**JUDGE**