



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE. NO.148 OF 2015**

**GEORGE KIMITI KIGURU.....CLAIMANT**

**VERSUS**

**THE BOARD OF MANAGEMENT,**

**BAVUNI SECONDARY SCHOOL.....1<sup>ST</sup> RESPONDENT**

**THE PRINCIPAL,**

**BAVUNI SECONDARY SCHOOL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Claimant filed this suit on 22<sup>nd</sup> May, 2015 claiming to have been employed by the Respondent on 9<sup>th</sup> May, 2011 until 28<sup>th</sup> April, 2015 when he was allegedly unfairly dismissed on allegation of inciting four students, poor teaching skills and insubordination. That he was not paid his terminal dues and he therefore sought for the following remedies:

- a) One-month salary in lieu of Notice.**
- b) Underpayments.**
- c) Compensation based on section 49(1) (c) of the Employment Act.**
- d) Costs of suit to be borne by the Respondent.**

2. The Respondent entered Appearance on the 29<sup>th</sup> June, 2015 and filed a response to the claim on 2<sup>nd</sup> November, 2015 admitting that it employed the Claimant in the year 2011 as one of its Board of Management (BOM) teachers but denied that it unfairly dismissed him from service. On the contrary it averred that the Claimant was caught up in three incidents of insubordination, inciting students and lecturing mathematics instead of teaching them practically, informing its decision to summon him for discussion on way forward however that the Claimant failed to hid the summons and the board did not have any other option but to summarily dismiss him.

3. The suit proceeded to hearing on the 5<sup>th</sup> October, 2021 and 15<sup>th</sup> December, 2021 when both parties gave evidence and thereafter filed written submissions.

**Claimant's Case**

4. The Claimant testified as CW-1 and basically adopted his witness statement filed on 5.5.2016. In summary he stated that he is currently a Management Consultant and that previously he was employed by the Respondents on 9<sup>th</sup> May, 2011 as a teacher for mathematics and Chemistry at a salary of Kshs 16,600 which duties he performed till May, 2015 when he was dismissed without Notice. He then denied the allegation of misconduct, incitement and insubordination levelled against him.

5. On cross examination by **Mrs. Cheruiyot Advocate**, the Claimant testified that he is a holder of Bachelor's degree in Chemistry and mathematics however that he was not a trained teacher, neither did he have a Teachers Service Commission(TSC) number therefore that he was not a qualified teacher. He then stated that he was still underpaid in the circumstances. He also denied receiving any text message or summons from the principal on the alleged meeting to discuss his conduct.

**Respondent's Case.**

6. The Respondent's, former Principal, **Mr. Zachary Thiongo** testified as **RW-1**. He also adopted her witness statement of 2.11.2015 and the documents filed therein. He testified that he is currently the principal of Kirangari Boys High School however during the material time, he was the Principal of the Respondent. He stated that the Claimant was employed by BOM. That the Board of management sets the salary payable to BOM teachers which salary cannot be on the scale with Teacher Service Commission employed teacher. He then stated that the Claimant was issued with several verbal warnings and when summoned by the principal to discuss his conduct he failed to appear informing his dismissal. The witness then stated that the Claimant was not given Notice neither was he paid any terminal dues because this suit was filed before the Respondent could finalize dues payable to him.

7. On cross examination by **Juma Advocates**, RW-1 testified that he joined the Respondent in 2014 and found the Claimant in the said school teaching. He stated that Form Four students' complaint about how he was teaching Mathematics. Consequently, that he summoned him through a text message which the Claimant failed to show up escalating the issue to BOM for further action.

#### **Claimant's submissions.**

8. The Claimant submitted that the termination of his employment was not done in accordance with procedure provided for under section 41 of the Employment Act neither was there any reason given for the dismissal as per section 43 of the Employment Act. It was argued that the Respondents' failure to subject the Claimant to disciplinary hearing for him to defend himself made termination unfair as provided for under section 45 of the Employment Act. In support of this argument, the Claimant cited the case of **Rashid Jeneby V Prime Bank Limited[ 2015] eklr** and the case of **Sikuku Nzuvi Ngii V Gacal Merchants Limited[ 2015] eklr**

9. Accordingly, that the allegation that the Respondent texted the Claimant summoning him to a disciplinary hearing cannot stand in light of lack of evidence of production of the said summons.

#### **Respondent's Submission.**

10. The Respondent on the other hand submitted that the Claimant's conduct had become wanting as complained by students on how he was lecturing Mathematics subject instead of practically doing calculation. That it's this conduct that informed the principal to summon him to a meeting which he ignored as well as the meeting with the Board of the Respondent. It was argued that, the actions of the Claimant amounts to gross misconduct that was have ordinarily dismissed summarily under section 44(3) & (4) of the Employment Act without any Notice , nevertheless that the Claimant was given an opportunity to redeem himself which he thwarted.

11. On whether the Claimant was underpaid, it was submitted that, the Claimant was not a qualified trained teacher neither was he registered by TSC as admitted during cross examination. The pay given to the Claimant was mutually agreed between him and the 1<sup>st</sup> Respondent who employed him and therefore that the Claimant cannot claim to have been a civil servant when he was not first a trained teacher and secondly an employee by Teacher Service Commission. In support thereof the Respondent relied on the case of **Ignas Karingo Mghona & 4 other V Star of Hope International Foundation [2016] eklr**. where the Court stated that;

**“The Teachers in public service have their structures of wage adjustment. Teachers have the option of seeking employment in the private or public sectors. Once in the private sector, they are not guided by the structures in the public sector. They do not have a Trade Union which negotiates collectively. They are not covered under a specific wage order. They negotiate their own terms and conditions of employment with their Employers, and provided what they have agreed does not breach the minimum wage law set by the Government across the industries, they cannot be heard to lament that what they are earning is too little. The two Claimants do not say they were paid below the general minimum wage; they allege they should have been earning a certain amount as Nursery School Teachers. They did not focus the attention of the Court on any specific wage instrument, affording them the higher rate they demand. It was submitted for the two Claimants that the Court should at the very least consider the two Teachers ‘General Labourers’ and find they were underpaid considering the rate availed to General Labourers under the Wage Order. The Court understood this to mean that the two Claimants were paid below the general wage floor, as General Labourers occupy the bottom of the pile. The Regulation of Wages [General] [Amendment] Order 2012, set the basic, minimum monthly wage for General Labourers on monthly contracts, in Mombasa, at Kshs. 8,579. Teachers are not ‘General Labourers,’ but to answer their submission, they accepted and earned Kshs. 9,000 monthly, above the basic pay for General Labourers.”**

12. Accordingly, it was submitted that the termination was proper in the circumstances and that Claimant is not deserving of the Reliefs sought.

13. I have examined the evidence and submissions of the parties herein. There is evidence that the Claimant had been employed by the Respondent as an untrained teacher under BOM terms.

14. The terms are not explained as no appointment letter was exhibited before this Court. The Claimant has however indicated that his salary was kshs.16,600/= per month.

15. The Claimant served the Respondent from May 2011 to April 2015 a span of 4 years.

16. The circumstances leading to the Claimant's services are however not clear. The Claimant avers that he was unfairly terminated.

17. The Respondents on their part aver that the Claimant was lawfully terminated on the grounds that he incited students against the school and had poor teaching methods.

18. The Respondents also averred that they summoned the Claimant for a disciplinary hearing and he failed to attend. The RW1 testified

that he sent the Claimant a text message to attend the meeting.

19. The RW1 did not however exhibit the said text message before Court. There is no indication that the Claimant was given notice of the termination nor subjected to any disciplinary hearing.

20. This in essence contravenes the law. Section 41 of the Employment Act 2007 which states as follows;

***“41. Notification and hearing before termination on grounds of misconduct***

***(1) Subject to [section 42\(1\)](#), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.***

***(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under [section 44\(3\)](#) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within [subsection \(1\)](#), make”.***

21. The Respondent have not demonstrated before this Court the validity of the reason leading to the Claimant’s termination.

22. I therefore find that the Claimant was unlawfully and unlawfully terminated as envisaged under Section 45 (2) of the Employment Act 2007 which states as follows;

***“45. (1).....***

***(2) A termination of employment 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***

***(c) that the employment was terminated in accordance with fair procedure”.***

23. Given that the Claimant was unlawfully terminated, I find that he is entitled to the following remedies;

**1. 1 month’s salary in lieu of notice**

**= 16,600/=**

**2. 10 months salary as compensation for the unlawful termination**

**= 10 x 16,600/=**

**TOTAL – 182,600/=**

**Less statutory deduction**

**3. The claim for underpayment is rejected in that the Claimant was a BOM teacher who accepted a job from the Respondent at the salary offered to him at the time.**

**4. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this Judgment.**

**DATED AND DELIVERED IN OPEN COURT THIS 31ST DAY OF MARCH, 2022.**

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**IN THE PRESENCE OF:**

**JUMA HOLDING BRIEF FOR KORONGO FOR CLAIMANT – PRESENT**

**NGIRA FOR RESPONDENTS - PRESENT**

**COURT ASSISTANT - FRED**