



**Ogutu v St. Kevin Hills School (Cause 334 of 2018)
[2022] KEELRC 12934 (KLR) (28 April 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12934 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 334 OF 2018**

**AK NZEI, J
APRIL 28, 2022**

BETWEEN

PAUL OGUTU CLAIMANT

AND

ST. KEVIN HILLS SCHOOL RESPONDENT

JUDGMENT

1. The suit herein was instituted by the Claimant on 21st May 2018 vide a statement of claim dated 18th May 2018. The Claimant pleaded, inter-alia,
 - a. that he was employed as a teacher by the Respondent in or about August 2009, earning a salary of ksh.19,050 at the time of termination.
 - b. that in or about August 2017, the Respondent transferred the Claimant to a new work station at St. Kevin Hill School Nyali where the Claimant dutifully reported.
 - c. that on 28th August 2017, the Respondent terminated the Claimant's employment on ground that the Claimant was not trained and therefore not qualified to work as a teacher.
 - d. that the Claimant was unfairly and without justifiable cause dismissed from employment by the Respondent contrary to Sections 35,41,43,45 and 49 of the Employment Act 2007 and without payment of his terminal and contractual dues.
2. The Claimant sought the following reliefs:-
 - a. one month salary in lieu of noticeksh.19050
 - b. unpaid salary for the months of May, June and July 2017 (19050x3)ksh.57,150



- c. service pay (15 days x732 x 8).....ksh.87,480
 - d. NHIF not remitted (240x84 months)ksh.20,160
 - e. NSSF not remitted (200x84 months).....ksh.16,800
 - f. compensation for unfair termination (19,050x12 ,months).....ksh.228,600
- Total ksh.429,600
3. The Claimant also filed his written witness statement dated 18th May 2018 and a list of documents dated the same date, listing some five documents. The documents listed and copies thereof filed with the claim documents included the Claimant’s identity card, the Claimant’s NHIF and NSSF statements/data summary, the Claimant’s letter of transfer from Magongo Station to St. Kevin Nyali (dated 28th August 2017), demand letter dated 11th January 2018 and the Claimant’s bank statements.
 4. On 29th June 2018, the Respondent filed a Response to the Claimant’s Memorandum of Claim. The Respondent denied the Claimant’s claim and pleaded, inter-alia:-
 - a. that if there was any contract between the Claimant and the Respondent, which the Respondent denied, then the same was null and void abnatio because the Claimant was not qualified to work as a teacher.
 - b. that in the alternative and without prejudice, the Claimant did not make material disclosure on his lack of qualification, which is an offence punishable in law, and which material non-disclosure made any teaching contract between the Claimant and the Respondent void abnatio.
 - c. that the Claimant’s claim was scandalous, frivolous, vexatious and otherwise an abuse of the Court’s process.
 5. The Respondent did not file any witness statements or list of witnesses, and did not file any list of documents intended to be produced in evidence.
 6. The suit came up for mention before me on 15th November 2021 for purposes of fixing a hearing date, and in the presence of counsel for both parties, the suit was fixed for hearing on 31st January 2022. On the hearing date, however, both the Respondent and its Advocate did not attend Court, and the hearing proceeded ex-parte. The Claimant adopted his recorded witness statement as his testimony in chief, and further produced in evidence the documents referred to in paragraph 3 of this Judgment. The said witness statement gives a detailed account of the Claimant’s eight years’ service as a teacher in the Respondent’s employment, before his employment was finally terminated by the Respondent on 28th August 2017 as pleaded in the Claimant’s Memorandum of Claim, without being paid his dues which included salary for the months of May, June and July 2017.
 7. The Claimant further testified that on being employed, he was asked for his identity card and Form Four academic and leaving certificates and was not asked for any other qualifications. The Claimant prayed that judgment be entered in his favour as prayed in his statement of claim. The Claimant then closed his case.
 8. There being no appearance on the part of the Respondent, the Respondent’s case was also marked as closed, and the Claimant was directed to file and serve written submissions. The Claimant’s Counsel was further directed to serve a Mention Notice on the Respondent for 22nd February 2022 when the



suit would be mentioned in Court for purposes of fixing a date for judgment. This was done, and an affidavit of service was duly filed in Court on 17th February 2022.

9. Having considered the pleadings filed and the evidence adduced by the Claimant, which evidence was not in any way rebutted and/or controverted by the Respondent, issues that fall for determination are:-
 - a. whether the Claimant was employed by the Respondent.
 - b. whether termination of the Claimant's employment was unfair.
 - c. whether the Claimant is entitled to the reliefs sought.
10. On the first issue, the Claimant testified and demonstrated that he was, indeed, employed by the Respondent. NSSF and NHIF statements/data summary produced by the Claimant (exhibits 2 and 3 respectively) clearly show that the Claimant was an employee of the Respondent. The Respondent's letter dated 28th August 2017 transferring the Claimant from Magongo work Station to St. Kevin Nyali work station is proof enough that the Claimant was employed by the Respondent, not to mention the Claimant's bank statement (exhibit no.5) which shows payments by the Respondent into the Claimant's bank account. The Respondent did not controvert this evidence. I find and hold that the Claimant was, indeed, employed by the Respondent as pleaded in the Claimant's Memorandum of Claim.
11. On the second issue, Section 41 of the Employment Act provides the procedure that must be adopted by every employer intending to terminate employment of an employee. Section 41 of the Employment Act is couched in mandatory terms, and provides:-
 - “(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, the 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 ground of misconduct or poor performance, and the person, if any chosen by the employee within subsection (1) make.”
12. It was not shown that the Respondent complied with the provisions of Section 41 of the Employment Act in any way. The Respondent chose not to participate in the hearing and did not demonstrate, therefore, that it complied with the said mandatory statutory provisions.
13. I find, hold and declare that termination of the Claimant's employment by the Respondent was unfair.
14. On the third issue, I allow the Claimant's claim for one month salary in lieu of notice, and the claim for May, June and July 2017 salary. Further I award the Claimant ten months salary being compensation for unfair termination.
15. The claim for unremitted NSSF and NHIF payments (contributions) is declined. This is because once deducted, statutory deductions cease to be the property and/or right of an employee from whose earnings the deductions are made. Such deductions become the entitlement and/or property of the statutory body in whose favour or for which the deductions were made. The statutory bodies (NSSF



and NHIF) are mandated by their parent statutes to recover such deductions from an employer who does not remit them as by law required. Such mandates are backed up by prosecutorial powers which can be invoked by the statutory bodies against such employers. The Claimant's claim for unremitted NHIF and NSSF deductions and/or payments must therefore fail, and is declined.

16. Likewise, the claim for service pay is declined as the Claimant was a member of NSSF. Section 35(5) of the *Employment Act* excludes the Claimant from claiming service pay.

17. Finally, judgment is hereby entered in favour of the Claimant against the Respondent as follows:-

- a. One month salary in lieu of noticeksh19,050
- b. Salary for May, June and July 2017.....ksh.57,150
- c. Ten months' salary being compensation
for unfair terminationksh.190,500
Total ksh.266,700

18. The Claimant is also awarded costs of the claim and interest at Courts rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 28TH DAY OF APRIL 2022

AGNES KITIKU NZEI

JUDGE

ORDER

In view of restrictions on physical Court operations occasioned by the COVID-19 Pandemic, this Ruling has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of Court fees.

AGNES KITIKU NZEI

JUDGE

Appearance:

Miss Oloo for Claimant.

N/A for Respondent

