



REPUBLIC OF KENYA



**Sila v Principal Masii Secondary School & another (Cause 1484 of 2015)
[2022] KEELRC 12930 (KLR) (24 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12930 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1484 OF 2015
JK GAKERI, J
OCTOBER 24, 2022**

BETWEEN

SHADRACK SILA CLAIMANT

AND

PRINCIPAL MASII SECONDARY SCHOOL 1ST RESPONDENT

THE B.O.M MASII SECONDARY SCHOOL 2ND RESPONDENT

JUDGMENT

1. By a memorandum of claim filed on August 24, 2015, the claimant sued the respondent alleging unfair and unlawful dismissal from employment and miscalculation of service gratuity and terminal benefits due to him.
2. The claimant avers that he was employed as a music teacher as a Board of Governors BOG teacher in 1989 at Kshs 1,440/= per month and was registered by the Teachers Service Commission as a teacher in 2001, was moved to job group j and was earning Kshs 12,577/= and not receiving leave allowance, medical and commuter allowances as per his job group. That the employer was unresponsive to his pleas.
3. It is the claimant's case that according to wages and remuneration order in 2001, job group j attracted a salary of Kshs 29,918/= yet the claimant was receiving Kshs 12,577/= and was thus underpaid from the date of certification by the TSC.
4. The claimant avers that he was in the employment of the respondent until March 15, 2015 when his employment was terminated without notice or pay in lieu.
5. The claimant prays for;
 - a. Sum of Kshs 5,391,304/= comprising;



- i. One months salary in lieu of notice Kshs 29,918.00
- ii. Underpayment Kshs 3,047,160.00
- iii. Unpaid leave allowance Kshs 540,000.00
- iv. Unpaid house allowance Kshs 216,000.00
- v. Unpaid medical allowance Kshs 155,700.00
- vi. 12 months compensation Kshs 359,016.00
- vii. Service gratuity Kshs 747,950.00
- viii. Commuter allowance Kshs 295,560.00
- b. Costs of this suit.

Respondent's Case

6. The respondents filed a response to the memorandum of claim on November 18, 2015, admitting that the claimant was employed by the Board of Governors now Board of Management and accepted the terms of appointment as agreed upon.
7. That he was assigned duties of music teacher after probation and over the years the claimant became unproductive and the school standards in music declined and its participation in music festivals declined and the claimant refused to take responsibility.
8. That on October 8, 2014, the claimant wrote to the principal of the school alleging sabotage and interference by unnamed individuals and asked for computation of his dues including the remaining years of service. That the letter was a disguised resignation.
9. It is the respondent's case that March 9, 2015, the respondents invited the claimant to explain the contexts of his letter during which meeting he reiterated his lack of desire to work for the respondents for the benefits of the students.
10. On March 18, 2015, the 2nd respondent terminated the claimant's services and requested him to collect terminal dues after clearance and he was paid Kshs 305,080/= and acknowledged receipt.
11. The respondent avers that it paid medical and house allowance as per the claimant's pay slip.
12. The respondent states that the claim for leave was misapprehended as the claimant was on holiday when the school was closed.
13. That the claimant was an employee of the Board of Governors not the Teachers Service Commission (TSC) and the 2nd respondent determined the terms of service for its teachers.
14. The claim for service gratuity is denied on the ground that the claimant was a registered member of National Social Security Fund (NSSF) and deductions were remitted dutifully.
15. It is the 2nd respondent's case that the claim against the 1st respondent was misguided.

Claimant's Evidence

16. The claimant's written statement replicates the contents of the memorandum of claim in all respects.



17. In his oral evidence, the claimant testified being registered by the TSC meant he should have been paid as a TSC employed teacher since he was a member of Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA) from 2008 – 2011 and was claiming leave since 1999 because he did not proceed on leave and was not paid house or medical allowance.
18. The witness testified that his employment was terminated on March 16, 2015 without a hearing and was not paid the amount stated on the letter.
19. The respondents tendered no oral evidence and did not participate in the hearing slated for June 28, 2022.
20. The respondent's counsel on record did not formally withdrawal from acting for the respondents. They did not prosecute their application dated October 18, 2021 owing to their absence in court on October 21, 2021, December 6, 2021, January 26, 2022 and June 28, 2022 despite service of the hearing notice and an affidavit of service filed.

Claimant's Submissions

21. The claimant's counsel urges that the claimant is entitled to the reliefs sought as he was unfairly terminated from employment. Reliance is made on the Supreme Court decision in *Kenfreight (EA) Ltd v Benson K Nguti* (2019) eKLR.
22. As regards unfair dismissal from employment, the claimant relies on section 45 of the *Employment Act* to urge that the employer must discharge the burden of proof.
23. It is submitted that the claimant was not subjected to any disciplinary proceedings or action. That he was not allowed to explain anything at the meeting with the BOM, and was issued with a dismissal letter.
24. The decision in *Janeth Chepkemoi Machir & another v Laikipia University* (2021) eKLR is relied upon to urge that the provisions of section 41 of the *Employment Act* are mandatory.
25. It is further submitted that since the provisions of the Employment Act were not complied with, the claimant is entitled to maximum compensation of 12 months salary having served the respondent for 26 years.
26. That the claimant did not proceed on leave and thus entitled to leave allowance, salary in lieu of notice and costs.

Respondents Submission

27. The respondents did not file submissions despite service of notice to their counsel on record and an affidavit of service filed.

Determination

28. The issues for determination are;
 - i. Whether the claimant's employment was unfairly terminated by the respondent.
 - ii. Whether the claimant is entitled to the reliefs sought.
29. As to whether termination of employment was unfair, the starting point are the provisions of the Employment Act on termination of employment contracts.



30. Section 45(2) of the act provides that for a termination of employment to pass muster, it must be proved that the reason for termination was valid and fair and the termination was conducted in accordance with fair procedure.
31. It is the duty of the employer to prove that the reason(s) for termination was valid and fair as was the procedure. Section 41 of the act prescribes the procedure to be complied with in the termination of an employment contract. In *Pius Machafu Isindu v Lavington Security Guards Ltd* (2017) eKLR, the Court of Appeal emphasized that the process prescribed by section 41 of the *Employment Act* was mandatory.
32. In a nutshell, the provisions of the Employment Act are self-contained on matters germane to termination of employment.
33. Courts have elaborated these provisions to mean that for a termination of employment to pass muster, it must be substantively justifiable and procedurally fair. The sentiments of Ndolo J in *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR and the Court of Appeal in *Naima Khamis v Oxford University (EA) Ltd* (2017) eKLR are spot on.
34. I will now proceed to apply the provisions of the Employment Act and the propositions enunciated by courts to the facts of this case.
35. It is common ground that the claimant was employed by the Board of Management (BOM) of the Masii Secondary School effective May 1, 1989 at a monthly salary of Kshs 1,440/=. The offer letter was signed by the head master of the school, one D C K Mutuku and the claimant accepted the offer.
36. The letter stated that the appointment was subject to the terms of any agreement between the Ministry of Education and the Domestic and Hotel Workers Union for the time being in force, on terms and conditions of service of persons employed by Boards of Governors established under the Education (Board of Governors) Orders, or any other order establishing any other board of governing body of any institution established under the *Education Act* (cap 211).
37. Subsequently, the claimant obtained TSC registration as a teacher on January 5, 2001 which in essence meant that he could now be employed as a teacher in a public school. Before then, he was not qualified as a teacher.
38. By a letter dated February 13, 2015, the principal of the school communicated the BOM's decision to move the claimant to job group j on account of being a registered teacher.
39. It is unclear what his job group was before the move or the implications of the move. The letter makes no reference to a change in terms of service or personal emoluments.
40. The claimant completed the Kenya Certificate of Education (KCE)(O' Level) at the same school in 1983 after which he pursued courses in music examined by The Associated Board of the Royal Schools of Music and obtained a diploma in 1997. Thereafter he participated in in-house courses in music and participated in the National Symposium on Music Kenya Music Festival and the PTA award and was appointed as head of music, patron music club, class teacher (F2L) and housemaster general on February 7, 2011.
41. By a letter dated January 10, 2002, claimant and 2 others one, Rev Kimeu and Mr Oduor wrote to the principal of the school about salary arrears. The claimant wrote again on November 30, 2013 more than 10 years later raising the issue of underpayment.



42. Finally, by letter dated March 5, 2015, the respondents invited the claimant for a BOM meeting on March 9, 2015 at 10.00 am. This was in connection with a letter dated October 8, 2014 written by the claimant allegedly on his services as a music teacher at the school.
43. The claimant testified that he attended the meeting, was not heard and a termination of employment letter dated March 16, 2015 followed.
44. The letter read as follows:
 RE: Termination of service
 Refer to the full board of management meeting of March 9, 2015 in which you were invited and attended.
 The contents of your letter dated October 8, 2014 were discussed in details and the board unanimously decided to terminate your engagement with them.
 Your benefits have been calculated as follows;
 Date of employment May 1, 1989 to December 31, 2014 = 312 months
 $312 \times 10,520 \times 1/12 = 273,520.00$
 Plus three months pay in lieu of notice
 Totaling 276,150.00
 You are required to clear with the office and collect your dues from the undersigned.
 Signed
 Muthusi
 BOM secretary.
45. The claimant's lengthy letter dated October 8, 2014 *inter alia* catalogues the claimant's journey as a teacher and his success as a person and for the school. But what appears to have annoyed the BOM is that the claimant accuses unnamed individuals of sabotaging his work and achievements and perhaps the request for computation of his dues including allowances for the duration served.
46. This letter appears to have been the cause of the termination of employment as it was the only agenda of the BOM meeting slated for March 9, 2015.
47. Although the claimant thanks the principal and the BOM for being supportive, they do not appear to have been assuaged.
48. With no specific reason for termination of the claimant's employment, it is the finding of the court that the respondent has on a balance of probability failed to demonstrate that it had a valid and fair reason to terminate the claimant's employment.

Procedure of Termination

49. In *Postal Corporation of Kenya v Andrew K Tanui* (2019) eKLR, the Court of Appeal itemised the specific requirements of section 41 of the *Employment Act* as follows;

“Four elements must thus be discernible for the procedure to pass muster:-

- i. an explanation of the grounds of termination in a language understood by the employee.



- ii. the reason for which the employer is considering termination.
 - iii. entitlement of an employee to the presence of another employee of his choice when the explanation of the grounds of termination is made.
 - iv. hearing and considering any representations made by the employee and the person chosen by the employee.”
50. Other than the letter dated March 5, 2015 inviting the claimant to a full BOM meeting held on March 9, 2015, which does not purport to be a notice to show cause, there is no indication that respondent subjected the claimant to a disciplinary process before termination of employment.
51. The BOM meeting held on March 9, 2015 was not a disciplinary meeting and could not have been deemed as one. Relatedly, the respondent did not file minutes of the meeting as evidence of what transpired thereat.
52. Needless to emphasize, the respondent had not made any specific allegations against the claimant.
53. Finally, although the letter of termination of service makes reference to the board of management meeting held on March 9, 2015, it is reticent on what transpired or the decision made and on what grounds.
54. In a nutshell, it is clear that the respondent terminated the claimant’s employment without complying with the provisions of section 41 of the *Employment Act*, 2007.
55. For the reasons stated above, it is the finding of the court that termination of the claimant’s employment by the respondent by letter dated March 16, 2015 was unfair for non-compliance with the provisions of the *Employment Act*.
56. As to whether the claimant is entitled to the reliefs sought, it is essential to examine the issue of the claimant’s salary as it impacts on all the other prayers catalogued in paragraph 4 of the memorandum of claim.
57. The claimant testified that he was receiving a monthly salary of Kshs 12,577/=, but is claiming a sum of Kshs 29,918/= on the ground that he was placed by the BOM in job group j as evidenced by the BOM letter dated February 13, 2001. It is not in dispute that the letter made no reference to changes in the remuneration. If the BOM had intended to review his salary, it could have stated so expressly.
58. Further, the claimant relies on the Teachers Service Commission letter dated June 8, 2011 on implementation of the third phase of the negotiated teachers salaries. The letter was dispatched to public officers following an agreement between the Government of Kenya and the Kenya National Union of Teachers (KNUT) on January 29, 2009.
59. Paragraph 2 of the letter (TSC) provides that;
- “The new conditions of service apply to all teachers in the service on or after July 1, 2011 including those on terms pending retirement or final termination of appointment on or after the date.”
60. The Teachers Service Commission is a creation of article 237 of the *Constitution of Kenya*, 2010 and its functions inter alia include:
- a. To register trained teachers.
 - b. To recruit and employ registered teachers.



- c. To assign teachers employed by the commission for service in any public school or institution.
 - d. To promote and transfer teachers.
 - e. To exercise disciplinary control over teachers.
 - f. To terminate the employment of teachers.
61. As a state body, the Teachers Service Commission negotiates salaries with unions for its employees not for all teachers in Kenya. The claimant could not therefore use the TSC/KNUT negotiated salaries as a basis for his remuneration. Noteworthy, the claimant testified he was a member of KUDHEIHA from 2008 to 2011 but lead no evidence of the fact of membership.
62. The payslip for December, 2010 provided by the claimant has no union deduction. The use of a monthly salary of Kshs 29,918.00 is in the courts view without justification. This is because the claimant was not an employee of the TSC. The fact that he was registered by the TSC on January 5, 2001 did not constitute him an employee of the TSC. Registration by the TSC is a form of certification for the teaching profession. Only registered teachers qualify for engagement as teachers in Kenya.
63. The second document relied upon by the claimant as the basis of the salary claimed is letter reference DPM/16/4A VoL IX/(33) from the Office of the Prime Minister Ministry of State for Public Service dated August 13, 2008. The letter was sent to all Permanent Secretaries/accounting Officers, Controller and Auditor General and All Provincial Commissioners under deference harmonization of terms and conditions of service for public service: Review of salaries for civil service.
64. The letter had an appendix I on new salary scale for the civil service from job group a-j.
65. Paragraph 4 of the letter defines the scope in the following words;
- “The new salaries will apply to officers in the civil service in job group ‘a’ to ‘l’ with the exception of those salaries and wages are not directly related to members of the regular and permanent establishment but are determined on an ad hoc basis.”
66. Evidently, the salaries, the subject matter of the letter are for persons employed in the civil service.
67. For the foregoing reasons, it is the finding of the court that the claimant has not on a balance of probability demonstrated that his monthly salary was or ought to have been Kshs 29,918/=.
68. I will now proceed to determine the claimant’s entitlements as prayed.

a. One months salary in lieu of notice

69. From the evidence on record, it is clear that the respondent did not give the claimant notice of termination as provided by section 35 of the *Employment Act*.

The claimant is accordingly awarded one month’s salary in lieu of notice Kshs12,577/=.

b. Unpaid salary arrears

70. Having found that the claimant was not an employee of the TSC and the BOM had not equated his remuneration to the salary payable to TSC employees, the claim for salary arrears is unsustainable and is declined.



c. Unpaid leave allowance

71. The claimant testified that he did not proceed on leave since 1999 yet the secondary school was closed three times in a year.
72. He led no evidence on what he was doing during all the school holidays or the arrangement he had with the BOM if he worked during the school holidays. The fact that a suit is undefended does not reduce or minimize the claimant's duty to prove his case to the required standard. The claimant led no evidence of the specific activities he undertook during the school holidays since 1999 school music festivals were not held during every school holiday ie April, August and December.

The claim is declined.

d. Unpaid house allowance

73. The payslips provided by the claimant as evidence show that his monthly salary had an entry for housing allowance.

The claim for housing allowance is declined.

e. Unpaid medical allowance

74. The copies of payslips for December 2010, October 2007 and August 2008 have an entry of medical allowance.

The prayer is declined.

f. Damages for unlawful dismissal (equivalent to one (1) year salary)

75. Having found that termination of the claimant's employment was unfair for want of substantive justification and procedural propriety, the claimant is entitled to the relief provided by section 49(1)(c) of the *Employment Act*. This discretionary remedy is granted subject to observance of the provisions of section 49(4) of the act.

76. In this case, the court has considered the following;

- i. The claimant was an employee of the respondent from May 1, 1989 to March 15, 2015 a duration of about 26 years, which is a long period of time.
- ii. The claimant had no record of misconduct or warning letter. On the contrary, the claimant used his talent in music to elevate the school's profile to the national level and the school benefited immensely. He obtained many awards and received accolades during his period of employment. Puzzlingly, his requests for a salary adjustment by letter dated January 10, 2002 and November 30, 2013 were unresponded to.

The respondents treated the claimant unfairly.

- iii. The contents of the claimant's letter dated October 8, 2014 show that he did not wish to continue serving the respondent as a teacher. It is evident that by this time frustrations had set in and the claimant found himself helpless.

Finally, it does appear to the court that the contents of the letter influenced the Board of Management's decision to terminate the claimant's employment.

For these reasons, the court is satisfied that the equivalent of 12 months salary is fair, Kshs 150,924/=



g. Service gratuity

77. The claimant adduced no evidence of his entitlement to service gratuity. Neither the letter of appointment nor other document on record made reference to service gratuity. Relatedly, the claimant was a member of the NSSF and the respondents remitted contributions.

The prayer is declined.

h. Commuter allowance

78. The claimant led no evidence of entitlement to commuter allowance during his employment.

The prayer is declined.

79. In conclusion, judgment is entered for the claimant against the 2nd respondent as follows;

- a. One month's salary in lieu of notice Kshs 12,577/=
- b. Equivalent of 12 months salary Kshs 150,924/=
- c. Costs of this suit.
- d. Interest at court rates from date hereof till payment in full.

80. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 24TH DAY OF OCTOBER 2022

DR. JACOB GAKERI

JUDGE

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 15th March 2020 and subsequent directions of 21st 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 has 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.

DR. JACOB GAKERI

JUDGE

