



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 21 OF 2019

HOWARD OMUKAMI.....CLAIMANT

- VERSUS -

THE AGA KHAN ACADEMY, MOMBASA.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 16th July, 2021)

JUDGMENT

The claimant filed the memorandum of claim on 10.04.2019 through Ngonze & Ngonze Advocates. The claimant prayed for:

- 1) Lost wages on account of unprocedural termination of the employment contract (16.05.2019 to 30.08.2039) Kshs. 71, 598, 535.19.
- 2) Notice pay Kshs.177, 913.00.
- 3) Maximum compensation for wrongful dismissal and unfair termination of employment Kshs. 2, 044, 956.00.
- 4) Certificate of service.
- 5) Costs of the cause.
- 6) Interest on (1) (2) and (3) above from the date of filing the cause till payment in full.

The respondent filed the memorandum of response on 16.05.2019 through Anne Babu & Company Advocates. The respondent prayed that the claim be dismissed with costs. The claimant filed on the reply to the response to the claim.

There is no dispute that the respondent employed the claimant to the position of Mathematics Teacher, Senior School, effective 01.10.2017 and as per the letter dated 28.09.2017. The gross remuneration was agreed at Kshs. 228, 000.00. Attached was a document titled "Full Time Kenyan Faculty Hire Teachers Assignment, Salary and Benefits Offer". The document stated the teacher's name as the claimant and on other responsibilities, it set out the roles of the Head of Department. By another letter also dated 28.09.2017 the respondent congratulated the claimant on his appointment as Head of Department, Mathematics, with effect from October 2017. The letter stated that the role placed the claimant on an Administrative Level 2 and qualified him to an allowance of Kshs. 7, 500.00 and duties would be discussed with the Senior School Principal. The claimant signed in acceptance.

On 15.02.2019 the claimant wrote an email titled "**RESIGNATION AS HEAD OF DEPARTMENT MATH**" and the claimant stated that he was tendering his resignation as HOD Math with immediate effect. He continued, "**I get stressed every day and this is adversely affecting my family life and ultimately my health. I would prefer to be an ordinary classroom teacher. Kindly give it a consideration.**" The email was replied to (on 15.02.2019) by one Kariuki Francis (the Principal and also Respondent's Witness - RW) who had received it for the respondent thus, "**Having taken time to consider this, I accept your resignation. Kindly note since you were hired as a Head of Department and there is no vacancy for classroom teacher in the department in our headcount, we take this to mean you are giving notice to leave.**" The claimant then wrote another email on 18.02.2019 to the said Kariuki thus, "**Thanks for your response. I thought I could drop down to teaching in the classroom. I have gone through my contract and realized that it was drafted for a head of department. Can I see you for a discussion? Please advise on the time.**" The said Kariuki replied thus, "**We can meet today at 1.30pm in Alison's office because I would like her to be involved in the discussion.**" Subsequently, the respondent wrote on 28.02.2019 confirming acceptance of the claimant's resignation per his email of 15.02.2019 and stating that the claimant's last working day would be on 12.04.2019 and he shall be paid the remaining one month in lieu of his notice.

Now the claimant filed the instant suit claiming that his termination offended sections 40, 49, and 50 of the Employment Act, 2007 and ILO

convention 158 on termination of employment and the claimant's case is that he should have been allowed to resign as HOD Maths and been retained as classroom teacher without extra HOD roles.

The respondent's case is that at the time of resignation, the respondent had no vacancy for a classroom teacher for Maths and separate from the position of the HOD Maths and which the claimant held and resigned from. The claimant was paid terminal dues and a certificate of service was issued. The respondent subsequently opted to advertise for the positions of a Maths Teacher and HOD Maths and the claimant was at liberty to apply but he failed to do so. His suit should therefore be dismissed.

Final submissions were filed for the parties. The Court has considered all the material on record. The Court makes findings as follows.

To answer the **1st issue**, the Court finds that the respondent employed the claimant by letters dated 28.09.2017 as a Maths Teacher and HOD Maths. The claimant by his own email of 18.02.2019 at 09.26AM confirmed that he did realize that the contract was drafted as such for the position of HOD, Maths. In the circumstances, the Court finds that the parties were clear in the letters forming the contract of service and the claimant confirmed in his testimony that throughout the service he had lesser lessons to teach by reason of having held the position of HOD, Maths. The respondent's submissions in that regard are upheld.

To answer the **2nd issue** for determination, the court finds that the claimant voluntarily resigned from employment. Parties met and discussed modalities and timelines for the separation on account of the claimant's resignation. The Court upholds the submissions as made for the respondent that there was no unfair termination as urged for the claimant. Further, it was true that the respondent subsequently advertised the positions of a Maths Teacher and HOD Maths as separate vacancies and as urged for the respondent, the respondent was entitled to exercise the prerogative in designing its affairs in that regard and it was open for the respondent to competitively recruit for the two positions. The Court considers that it was open for the claimant to apply for the position of Maths Teacher as was advertised and further, the claimant has not established a statutory or contractual obligation for the respondent to have allowed him to take up the position of a Maths Teacher consequential to his resignation as HOD Maths.

To answer the **3rd issue** for determination, the Court returns that the claimant has therefore failed to justify the claims and prayers as made. The claimant has failed to establish unfair or unlawful termination and has further failed to establish a thing attributable to the respondent to justify the prayer for loss of future earnings. As submitted for the respondent, the claimant resigned and is not owed the notice pay. The certificate of service was exhibited and is found to have been issued accordingly.

In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the suit with costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 16TH JULY, 2021.

BYRAM ONGAYA

JUDGE