



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 328 OF 2017**

**(Before Hon. Lady Justice Anna Ngibuini Mwaure)**

**EVANS WANJALA BARASA.....CLAIMANT**

**VERSUS**

**QUEEN OF APOSTLES SEMINARY, THE REGISTERED TRUSTEES**

**(sued as proprietors of Queen of Apostle Seminary School).....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant has brought a claim against the Respondent for unlawful and unfair termination of employment by the Respondent. He filed a statement of claim dated 16<sup>th</sup> February 2017.
2. The Respondent filed his defence and counter claim dated 27<sup>th</sup> April 2017.
3. The Claimant gave his evidence during the trial on 27<sup>th</sup> July 2021 and on 16<sup>th</sup> August 2021 the Respondent called the Rector and Principal Father Francis Mburu as its witness.

**The Claimant's Case**

4. The Claimant in his evidence in chief states that he was employed as a Teacher for Mathematics and business studies vide his contract of employment dated 8<sup>th</sup> January 2015. His monthly salary was Kshs.47,968/=.
5. The Claimant says that on 28<sup>th</sup> August 2016 during school vacation Father Francis Mburu the School Rector and Secretary of the Board called him and asked him to report to school on 29<sup>th</sup> August 2016.
6. The Claimant says that due to family crisis he informed Father Mburu that he could not report the following day. He says that he assured him he would report as soon as he could.
7. The Claimant further states that on 30<sup>th</sup> August 2016, the Claimant informed Father Mburu he was still not in a position to report to school and undertook to report at the earliest possible day.
8. The Claimant says that on 6<sup>th</sup> September 2016 he reported to work but Father Mburu handed him a dismissal letter later that day. The said letter was dated the same day.
9. The Claimant says he was asked to vacate the school house within 48 hours and pay Kshs.63,204/= he owed the school.
10. The Claimant contends the dismissal was unfair and unlawful and was as well procedurally wrong.
11. The Claimant also says the dismissal was in contravention of contract of employment, the Employment Act and the Kenya Constitution.

12. Further the Claimant says the dismissal has caused him and his family emotional and financial distress and psychological torture.

13. He prays for a declaration that the termination was unlawful and unfair and prays for: -

- (a) Kshs.47,968 for salary in lieu of notice.
- (b) 12 monthly equivalent as compensation being Kshs.575,615/=.
- (c) Costs
- (d) Certificate of service
- (e) Interest on (a) to (c) above
- (i) Any other relief as Court deems fair.

### **The Respondent's Case**

14. Father Francis Mburu, the Rector and the Secretary of the Board of the Respondent testified on behalf of the Respondent. The Respondent admits it had employed the Claimant as a Teacher by its contract of employment dated 8<sup>th</sup> January 2015.

15. The Claimant was to teach forms I – IV business studies and his basic salary as Kshs.47,968/=. He was also entitled to house allowance and medical allowance.

16. He was *inter alia* to work from 8 am – 5 pm and if he was to be absent from duty, he was to notify the Respondent within one hour.

17. The Respondent states that it was its practice that class teachers of classes having issues must meet the Principal a day before the beginning of term to map the way forward and try to resolve the issue. He says the meeting day for that third term of 2016 was to be on 29<sup>th</sup> August and class teachers including the Claimant were made aware of the same.

18. Respondent says the class teachers were informed of the said meeting and the Claimant confirmed he would attend but never attended.

19. Further, the Respondent states that the Claimant then sent a message on 30<sup>th</sup> August 2016 saying he would not report on duty and that the Respondent gave no valid reason why he would not attend the meeting.

20. The Respondent states that according to the employment contract it is provided that before a teacher absents himself from work, he is expected to obtain leave from the Rector and fill in a form. In case of emergency, he is supposed to inform the Respondent at least one hour before the due reporting time.

21. The Respondent says Claimant returned to work nine (9) days after the reporting day.

22. The Respondent further states that when the Claimant reported to school on 6<sup>th</sup> September 2016, he was asked to explain his absence but chose to keep quiet. He calls that behaviour of the Claimant "*utter insubordination and show of disrespect*".

23. The Respondent says that the Board of Governors dismissed the Claimant and explained the reason for the said dismissal. They also explained the process he was expected to take to clear with the school.

24. The Respondent states that the Claimant's dismissal was fair and lawful due to the foregoing reasons of absence from duty without reason, rudeness and showing insubordination **to his employer**.

25. He prays that the Claimant's claim be dismissed with costs to the Respondent

### **Counterclaim**

26. The Respondent had prayed for the refund of the salary paid to the new teacher for two months but has now dropped that claim of Kshs.60,000/= which he confirmed during cross examination by the Advocate.

27. Instead they claim for monies due to students and teaching staff and textbooks which the Claimant allegedly owed at the time of his dismissal. They include: -

- (i) Money owed to students Kshs.6,040
- (ii) Textbooks to various students
- (iii) Staff welfare Kshs.17,340

- (iv) Water bill Kshs.265
- (v) Electricity bill Kshs.306
- (vi) Milk Kshs.3,325
- (vii) House rent Kshs.1,500
- (viii) One month in lieu of notice Kshs.47,968
- (ix) Less house rent deposit (Kshs.7,500)

**Total Kshs.63,204**

28. In the counter claim the Respondent prays for compensation for : -

- (a) Financial loss
- (b) Special damages
- (c) Costs of the suit
- (d) Interest in a, b and c
- (e) Any other relief the Court may deem fit to grant

#### **Issues for Determination**

29. The issues for determination generally are whether the Claimant was lawfully and validly dismissed from employment.

30. Secondly whether he owed money and textbooks to students, teachers and the school and thirdly even if he owed the above did the Respondent have locus standi to raise a suit on behalf of the purported creditors.

31. Further is the Claimant entitled to 12 months equivalent salary compensation and one month's salary in lieu of notice plus certificate of costs.

#### **Claimant's Submissions**

32. The Court has considered the Claimant's submissions. The Claimant in his submissions substantiates that he did not desert work as alleged by the Respondent.

33. He quotes the case of **Felistas Acheha v Charles Peter Otieno [2018] eKLR** where it was held –

*“11. The law is therefore well settled that an employer claiming that an employee has deserted duty must demonstrate efforts made towards getting the employee to resume duty. At the very least, the employer is expected to issue a notice to the deserting employee that termination of employment on the ground of desertion is being considered.”*

34. Further in the Claimant's submissions and in reference to various case including the case of **Mark Wafula v Board of Management Friends Secondary School KIBISI (2018) eKLR** and others, the Claimant affirms he did not desert work as he kept the Respondent informed of the reasons for his absence from work. He says therefore his dismissal was callous and unfair.

35. To confirm that, he says his position was advertised by 2<sup>nd</sup> September 2016 while still an employee of the Respondent and by 9<sup>th</sup> September a new teacher was appointed to replace him.

36. He prays for maximum compensation of 12 months' salary.

#### **Respondent's Submissions**

37. The Respondent evidence is that the Claimant deserted his employment and when asked to explain his absence he refused to co-operate and walked out.

38. I will comment here on the Respondent's submissions which were brought to Court after the Court had written the judgment.

39. On 28<sup>th</sup> September 2021, the Court was notified that the Respondent had now filed submissions. The Deputy Registrar availed a copy of

the same which was undated but the forwarding letter emanating from James Nyiha Advocate, was dated 28<sup>th</sup> September 2021. By then the Court had already written and concluded its judgment.

40. Considering submissions were to have been filed before 15<sup>th</sup> September 2021, the Court cannot entertain such behaviour where submissions are filed two days before the date of delivering the same. The Respondent claimed the Advocate handling the matter was unwell. Given that Respondent have had since around 2<sup>nd</sup> September 2021 when the Claimant filed their submissions, and seeing they have not said when the Respondent's Advocate got unwell, I see no good reason to accept the submissions at this late point. No medical documents have been produced in Court to support the assertion that the Advocate is unwell and how long he has been unwell.

41. So the submission by the Respondent are overtaken by events since judgment is already written and is to be delivered on 30<sup>th</sup> September 2021.

#### **Findings on Issue of Desertion**

42. In the case of **Felistas Acheha Ikatwa v Charles Peter Otieno [2018] eKLR** it was held that an employer who alleges employee has deserted employment must demonstrate efforts made towards getting the employee to resume duty.

43. Also **Seabolo v Belgravia Hotel [1997] 6 BLLR 829 (CCMA)**, the Court found that a person who deserts his duties does so with no intention to return.

44. The Claimant absented himself from work for a few crucial days though he did attempt to keep the Respondent informed. That, in my considered opinion does not amount to abandonment of duty contrary to the Respondent's allegation.

#### **ANALYSIS AND DETERMINATION**

45. Section 45(1) and (2) of the Employment Act provides that:—

##### **45. Unfair termination**

**(1) No employer shall terminate the employment of an employee unfairly.**

**(2) A termination of employment by an employer 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.**

46. As regards reason for termination, Section 43(1) of the Employment Act requires employer to provide reason for termination and in default the termination is unfair within the meaning of Section 45 of the Act. Also Section 41 of the Act provides in mandatory terms that before terminating employee's employment, the employer must conduct fair hearing to the employee in the presence of another employee of his/her choice.

47. The instant case, the evidence on record, the Claimant was called on telephone by the Respondent to report to work in Nairobi on 29<sup>th</sup> August 2016. He says he was on vacation in his home village in Kakamega and he informed the Rector that he had a family crisis. He says that he informed him on 30<sup>th</sup> August 2016 that he would report to work as soon as possible via a text message.

48. The Respondent did not indicate when the school was to re-open and further that the Claimant deliberately refused to report to work. In fact the Claimant informed him on 30<sup>th</sup> August 2016 that he would report to work as soon as possible.

49. Further it is on record that by 2<sup>nd</sup> September 2016, the Respondent had already advertised for the Claimant's position. It seems like the Respondent had already decided to dismiss the Claimant without giving him an opportunity to be heard contrary to Section 41 of the Employment Act. By 9<sup>th</sup> September they already had replaced the Claimant.

50. The Claimant had worked for the Respondent from 8<sup>th</sup> January 2015 till August 2016 and for that period the Respondent does not report there was a disciplinary issue or a warning letter given to the Claimant.

51. I have carefully considered the text message correspondences and telephone calls which both parties have confirmed took place and I find there was no evidence that the Claimant was expected at work on 29<sup>th</sup> August 2016 and further I find the Claimant explained he had a family crisis. The fact that he delayed from 29<sup>th</sup> August 2016 to 5<sup>th</sup> September 2016 and he did not give reason would have constituted grounds for

warning but not summary dismissal on basis of desertion and furthermore without being heard.

52. The fact that the Respondent had already advertised the job by 2<sup>nd</sup> September 2016 definitely raises eye brows.

53. I find that the Respondent did not have a valid reason to terminate the Claimant's employment summarily.

### **Procedure Followed**

54. Section 41 of the Employment Act provides –

#### **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.**

55. To quote Father Mburu's witness statement, on 6<sup>th</sup> September 2016 when the Claimant reported to school, he immediately called him and asked him to explain his absence from school but he says that the Claimant did not respond. He was then served with the dismissal letter dated the said date.

56. In considering the cases of **Felistas Acheha Ikatwa v Charles Peter Otieno [2018] eKLR** and **Seabolo v Belgrania Hotel (1997) BLLR 829**, the charge of desertion of duty is not proved in this case.

57. The case of **George Muriithi Nderitu v Premier Academy ELRC No. 1556 of 2014**, the Court found that a Claimant whose employment was terminated upon being paid three months' salary in lieu of notice was dismissed in a callous manner and the Respondent filled the position a few months later.

58. In **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR**, the Industrial Court observed as follows –

*“An employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee and the employee has a proper opportunity to prepare and to be heard in the presence of a person of his choice.”*

59. The Claimant was deprived of that opportunity and so I must declare no valid reason was given to the Claimant and the procedure used to summarily dismiss the Claimant was flawed.

### **Reliefs Sought**

60. In view of the finding that the Claimant was unfairly and unlawfully terminated by the Respondent he is entitled to compensation under Section 49 of the Employment Act as follows –

(i) One month's salary in lieu of notice Kshs.47,968

(ii) The Claimant had worked for less than two years only and so I award him two months' salary as compensation Kshs.95,930

and which is fair compensation according to Section 49(a) and (c) of the Employment Act.

(iii) Costs plus interest at Court rates from the date hereof and subject to statutory deductions

(iv) Certificate of service.

### **Counterclaim**

61. The Court finds that there is no evidence to prove that the Claimant owed the students the amount alleged and the school. The letters alleged to be from the students claiming they are owed money are not proved were done by the students. The same were dated after Claimant's employment was terminated. Some of the said letters are undated. It is hard to prove the writer of the same. I also agree with the Claimant that such claims even if were legitimate are separate from the case and should be tried separately.

62. As for water, electricity and other dues, the salary pay slips produced by the Claimant indicate the alleged expenses were deducted from this salary up to and including August 2016, that is welfare, loan repayment, housing, electricity, HELB and water. The Respondent used to

deduct from the payslip.

63. The Court finds the prayers in the counterclaim have not been proved and declines to grant the same.

**Conclusion**

**64. The Respondent's prayers for counterclaim are dismissed forthwith and the Claimant is awarded Kshs.143,904/= plus costs and interest at Court rates from this date hereof and subject to statutory deductions.**

**65. Certificate of service to be issued forthwith.**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2021**

**ANNA NGIBUINI MWAURE**

**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 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 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.

**ANNA NGIBUINI MWAURE**

**JUDGE**