



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 200 OF 2017

(Before Hon. Justice Dr. Jacob Gakeri)

WILLIAM MUREGI MWANGI

CLAIMANT

VERSUS

HIGHRIDGE SECONDARY SCHOOL

RESPONDENT

JUDGMENT

1. The Claimant filed a statement of claim on 3rd February 2017 alleging that he was unlawfully, wrongfully and unfairly terminated by the Respondent on 6th December 2016 and prays for –

- (a) Declaration that the termination of employment was unlawful
- (b) Salary for the months of November and December Kshs.40,000
- (c) One month in lieu of notice Kshs.20,000
- (d) Gratuity Kshs.14,000
- (e) Accrued leave for 2016 at Kshs.3,000 per day Kshs.63,000
- (f) Damages for wrongful termination
- (g) Costs and interest
- (h) Any other relief the Court may deem just to grant.

2. The Respondent did not participate in the proceedings in any way even though summons and the statement of claim were served on 7th February 2017 and a subsequent hearing notice dated 4th September 2017 for the hearing scheduled for 30th January 2018. The hearing notice was served on 5th September 2017.

3. From the evidence on record, the last notice, was served by the Deputy Registrar electronically on 9th June 2021 for a mention on 28th June 2021 to fix a date of hearing. Counsel for the Claimant prayed for a hearing date and undertook to serve the hearing notice. There is no record that service took place. From the documents on record, the Principal of the Respondent avoided being served with Court documents and her Secretary did not append her signature on the documents perhaps for fear of victimisation. The hearing was scheduled for 23rd September 2021 and proceeded as envisioned from 11.08 am.

4. The Claimant adopted the witness statement dated 27th January 2017 and filed on 3rd February 2017 as well as the list of documents filed on the same day as his evidence in the case and reiterated the reliefs set out in paragraph 33 of the statement of claim.

Claimant's Case

5. That Claimant avers that he is a qualified and registered teacher TSC No. 679270 and that he was employed by the Respondent on or about 12th January 2016 as a Mathematics and Physics Teacher and the employer did not give him a written contract. That at the time of termination on 6th December 2016, his monthly salary was Kshs.20,000 payable on or before the 30th of every month. That he was assigned Mathematics in Form two, three and four and was the Class Teacher for Form Two North. He also avers that he discharged his obligations

diligently and devotedly.

6. It is further averred that sometime in September 2016 the Teachers Service Commission invited applications for teachers in public secondary schools, the Claimant applied and was recruited by the Commission to teach Mathematics and Physics at Gathaiti Secondary School. That he promptly informed the Principal of the Respondent school. He had not by then received his appointment letter and avers that they agreed with the Principal that the letter would be issued later. That he had not informed the Principal that he would be taking up the position. The Claimant avers that he was subsequently appointed as a Supervisor for the Kenya National Examination Council, Kenya Certificate for Secondary Education for November 2016 at Hospital Hill High School effective 7th November to 30th November 2016. A copy of the letter of appointment was provided to the Court.

7. That for unexplained reasons, his relationship with the Principal became frosty and his November 2016 salary was delayed or withheld. He enquired from the Principal who directed him to the Board of Management. He wrote to the Board of Management on 1st December 2016 but received no response. The Teachers Service Commission County Officer advised him to seek legal redress in Court.

8. The Claimant further avers that on 13th December 2016 he visited the Respondent to ascertain whether his letter of appointment by the Teachers Service Commission had been received since he had used the Respondent's postal address. He found a termination letter dated 6th December 2016. The Claimant alleges that the letter had been written two months earlier.

9. The Claimant contends that he was still an employee of the Respondent since he had worked for the months of November and December and had not resigned. That he was not given any reason for termination nor had he been summoned for any disciplinary hearing. That he suffered serious financial challenges.

10. The Claimant finally avers that the termination was unlawful as it was in violation of the employment law and fair labour practices, that it was effected in bad faith, arbitrary, capricious, unreasonably and unfair against the principles of natural justice. He prays for accrued terminal dues and damages for unfair termination.

Evidence

11. The Claimant's statement regurgitated the averments in the statement of claim.

12. The Claimant did not file submissions.

Analysis and Determination

13. From the pleadings and evidence on record, the issues for determination are: -

- (a) Whether the Claimant was an employee of the Respondent and the terms of engagement;
- (b) Whether the Claimant's termination was unfair;
- (c) Whether the Claimant is entitled to the reliefs sought.

14. On whether there was a contract of service between the Claimant and the Respondent, the Claimant avers that he was employed by the Respondent on 12th January 2017, signed no document and was not given a letter of appointment. Other than the termination letter dated December 2016 and the letter dated 1st December 2016 demanding the November salary from the Board of Management of the Respondent, the Claimant had no other documentation on his contractual relationship with the Respondent. Whereas the letter of termination evidences a contract of service, the terms were undefined. He however testified that he was the Physics and Mathematics teacher for Form Two, Three and Four and Class Teacher for Form Two North. In the absence of evidence to the contrary, the Court will rely on the evidence of the Claimant that his salary was Kshs.20,000 per month.

15. From the evidence on record, it does appear that the Claimant and the Respondent had a contract of service.

16. Other than the monthly salary of Kshs.20,000, the Claimant does not disclose any other terms(s) of the contract including notice period, leave entitlement or gratuity which is one of the reliefs prayed for.

17. On whether the termination of employment was fair, the Claimant avers that it was unfair because he was not given the reason(s) for termination and there was no disciplinary hearing.

18. Sections 35, 40, 41, 42, 43, 44 and 45 of the Employment Act set out the substantive and procedural requirements attendant to a lawful and fair termination.

19. Specifically, under Section 45 of the Act, a termination of employment fails the fairness test and is thus unfair unless the employer establishes that –

- (i) The reason for the termination is valid
- (ii) The reason for the termination is fair

(iii) The reason relates to the employee's conduct, capacity or compatibility or based on the operational requirement of the employer

(iv) Employment was terminated in accordance with fair procedure.

20. The termination must meet the substantive and procedural fairness test as was held in **Walter Ogal Anuro v Teachers Commission [2013] eKLR**.

21. Section 43 of the Employment Act makes provision for notification and hearing before termination on grounds of misconduct.

22. In this case, the termination letter dated 6th December 2016 gives no reason for termination other than the Claimant's recruitment by the Teachers Service Commission, a fact the Claimant had disclosed to the Principal in September 2016. He had neither received the appointment letter by the Teachers Service Commission nor made a decision to quit the Respondent's employment, a fact he had to communicate formally.

23. The insinuation by the Principal's letter dated 6th December 2016 that the Claimant's appointment meant that he would leave employment is not supported by any evidence.

24. Taking in to account all the circumstances of this case, the Court finds that the Claimant's termination on 6th December 2016 was unfair for want of substantive and procedural fairness.

Reliefs

25. Having found that the Claimant's termination was unfair and unlawful, I now turn to the reliefs sought –

(a) Salary for the months of November and December

The sum of **Kshs.40,000** is awarded.

(b) One month's pay in lieu of notice

The sum of **Kshs.20,000** is awarded.

(c) Gratuity

The Claimant led no evidence of entitlement to gratuity. The claim is **rejected**.

(d) Accrued leave for 2016

It is unclear to the Court how the sum of Kshs.63,000 was arrived. In addition, the Claimant led no evidence of his leave entitlement. The claim is **rejected**.

(e) Damages for wrongful termination

Having found that the Claimant was unfairly terminated, the Claimant is entitled to the reliefs provided by Section 49(1) of the Employment Act, 2007. Considering that that Claimant worked for the Respondent for only 11 months and joined the Teachers Service Commission as a Teacher at Gathaiti Secondary School almost immediately, the Court is of the view that the equivalent of one month's salary compensation is fair. The sum of **Kshs.20,000** is awarded.

26. **In the upshot, judgment is entered for the Claimant for Kshs.80,000 with costs.**

27. **Interest at Court rates from the date of judgment till payment in full.**

28. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 27TH DAY OF OCTOBER 2021

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