



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1266 OF 2015

(Before Hon. Justice Hellen S. Wasilwa 30th January, 2020)

FREDRICK OBIERO OWINO.....CLAIMANT

VERSUS

BRIDGE INTERNATIONAL

ACADEMIES LIMITED..... RESPONDENT

JUDGEMENT

1. The Claimant herein filed a Memorandum of Claim on 23rd July, 2015, seeking damages for unlawful and unjustified termination of employment from the Respondent's employment and the subsequent failure by the Respondent to pay terminal dues owed to him at the time of his separation.
2. The Claimant avers that he was employed by the Respondent herein, a limited liability company incorporated in Kenya by virtue of the provisions of the Companies Act authorised to provide education on or about 27th March, 2014 as an Academy Improvement Manager earning a monthly salary of Kshs. 55,000/.
3. He further averred that he performed his duties diligently and to the Respondent's satisfaction until 10th June, 2014, when he was summarily dismissed from his duties as communicated through its letter dated 10th June, 2014.
4. The Claimant further averred that the reason indicated in his termination letter was **"Failure to fulfil your job duties and failure to present yourself at important meetings in both Mbale and Shamakhokho."**
5. The Claimant further contended that he did attend the said meeting he is alleged of absconding and averred that the same failed to take off due to protests from angry parents who were protesting at the school following the actions by one of the teachers of using corporal punishment on pupils.
6. The Claimant further averred that the meetings had to be rescheduled from Saturdays to Wednesdays and that he attended. He further averred that the decision by the Respondent to terminate his services was very harsh and drastic, as the Respondent did not accord him an opportunity to be heard prior to his termination.
7. The Claimant further averred that the Respondent failed and/or refused to pay him his dues at the time of his separation with it contrary to the provisions of Section 18(4) of the Employment Act, 2007.
8. He further contended that his termination was unfair and unlawful as it failed to follow the mandatory provisions of Sections 36 and 41 of the Employment Act, 2007, Article 41 and 47(1) of the Constitution of Kenya, 2010.
9. Aggrieved by the decision by the Respondent to terminate his services the Claimant filed the instant Claim seeking the following reliefs:
 - a) *A declaration that the termination of the Claimant's employment by the Respondent was unlawful and unjust.*
 - b) *Terminal and contractual dues amounting to Kshs. 744, 333.00 as calculated in paragraph 8 above.*
 - c) *Costs of this suit and interest thereon at Court's rate.*

d) Any other relief that this Honourable Court may deem just and expedient to grant.

10. In response to the Memorandum of Claim the Respondent through the firm of Mungai Victor Kimani, filed its Response to the Memorandum of Claim dated 21st August, 2015 and filed in Court on 24th August, 2015, in which it admits having engaged the Claimant in the manner stated in the Memorandum.
11. The Respondent however, denied that it unlawfully and unfairly terminated the Claimant's employment with it as alleged.
12. It contended that the Claimant absconded duty on 17th May, 2014 when he was expected to hold a parents meeting at the Respondent's Mbale Academy for terminated teachers and was not reachable on his Company phone as the same remained switched off and calls to his personal line went unanswered.
13. It is on this basis that the Respondent contended that the Claimant failed to deliver on his job description as required of him. It is further the Respondent's contention that the Claimant further failed to respond to concerns raised by the Respondent regarding his performance as evidenced by the email dated 20th May, 2014 annexed to the Response as annexure "BIA 5".
14. The Respondent further contended that the Claimant also missed a crisis meeting at its Mbale Academy on 24th May, 2014 even after he was notified of the same and confirmed his attendance forcing the Respondent to reschedule the meeting for 28th May, 2014.
15. The Respondent avers that the Claimant's performance was not above board as alleged by the Claimant and that it had made several communications with him regarding his work ethics and his general performance.
16. It was the Respondent's position that the Claimant was grossly negligent in the conduct of his duties and that he demonstrated poor work ethics and was infact guilty of misconduct.
17. It was on this basis that the Respondent averred that it had reason to terminate the Claimant's services. It is further the Respondent's position that the Claimant is therefore not entitled to any reliefs sought in his Claim.
18. The Respondent further avers that at the time of his separation the Claimant was serving a probation period of six (6) months and therefore the provisions of Sections 36 and 41 of the Employment Act, 2007 do not apply to him.
19. In conclusion, the Respondent urged this Honourable Court to dismiss the Claim herein with costs.
20. The matter proceeded for hearing on 1st November, 2019 with the Claimant testifying on her own behalf and the Respondent calling one witness to testify on its behalf.

Evidence

21. The Claimant (CW1) requested to have his witness statement dated 25th June, 2015 and filed in Court on 23rd July, 2015 adopted as his evidence in chief. He also sought to produce as exhibits the bundle of documents dated 25th June, 2015 and filed in Court on 23rd July, 2015, requests that were allowed by this Honourable Court. In his statement, the Claimant reiterated the averments made in his Memorandum of Claim. He further urged this Court to allow his Claim in terms of the reliefs sought therein.
22. On cross-examination, CW1 stated that he did not report the incidence of the meeting at Shamakhokho & Mbale to the police. He further testified that he also did not call anyone at the Respondent's office to confirm the status of the said meeting.
23. On further cross-examination, CW1 stated he was unwell sometime on 2nd May, 2014 and that he had treatment notes to that effect. He however admitted that the said treatment notes were not produced as evidence in this matter.
24. CW1 further insisted that he was not on probation as alluded to by the Respondent herein at the time of his termination. He also admitted having received some money totalling to Kshs.31,351/= from the Respondent.
25. On re-examination, CW1 insisted that he was confirmed to his position after attending training. He further stated that the reports prepared were all in the Company tablet and were handed over to the Respondent at the time of his termination.
26. CW1 urged this Court to allow his Claim in terms of the reliefs sought therein.
27. The Respondent Witness (**Graffin Asiyu, RW1**) requested to have his witness statement filed in Court on 9th July, 2019 adopted as his evidence in chief. She also sought to produce as exhibits the bundle of documents filed alongside the Response on 24th August, 2015, requests that were allowed by this Honourable Court. In his statement, the RW1 reiterated the averments made in Memorandum of Response.
28. RW1 further testified that the Claimant at the time of his termination was on probation and had not finished six (6) months in employment. He further testified that the Claimant's performance was unsatisfactory and that he also failed to send daily reports to his supervisor as required by the terms of his engagement with the Respondent.
29. RW1 further averred that the Claimant was terminated for the reason that he absconded duty and that he was given a chance to be heard

prior to his termination. RW1 further contended that the Claimant did appeal the decision to terminate his services but the same was dismissed.

30. RW1 further testified that the Claimant was paid all his dues at the time of his separation and that the Respondent is therefore not indebted to him. He further urged this Court to dismiss the Claim filed herein with costs.

31. On cross-examination, RW1 confirmed that the Claimant was terminated due to his failure to attend to a meeting which he was expected to attend and that he (RW1) did write to the Claimant an email on the issue.

32. RW1 further contended that the offer letter issued to the Claimant was for purposes of the training and that he was to be given a contract following his successful completion of the probation period. He however confirmed that the offer letter did not contain any terms of probation.

33. The parties thereafter agreed to file and exchange their written submissions to the Claim.

Submissions by the Parties

34. It is submitted on behalf of the Claimant herein that having been issued with a letter of offer dated 27th March, 2014, which offer he duly accepted and was issued with the employee handbook, he was duly employed by the Respondent herein.

35. The Claimant further contended that upon successful completion of the training the employer confirmed his terms and that as per the said letter there was no condition that he was to serve on service probation.

36. It was therefore his submission that his probation period was the training period, which he successfully completed. He therefore submitted that in absence of any evidence from the Respondent herein he was duly confirmed after his training. To buttress this argument the Claimant cited and relied on the case of **Nancy Philemons Onaya Odeck Vs Technical University of Kenya (2014) eKLR** and **Peris Nyambura Kimani Vs Dalbit Petroleum Limited, Petition 63 of 2013.**

37. The Claimant further submitted that his summary dismissal was unfair as he was not accorded a hearing prior to her termination contrary to the mandatory provisions of Section 41 of the Employment Act, 2007.

38. He further submitted that his termination was done contrary to the provisions of Section 43 and 44 of the Employment Act, 2007. To buttress this argument the Claimant cited and relied on the case of **Agnes Yahuma Digo Vs Pj petroleum Equipment Limited (2011) eKLR** and **Rebecca Ann Maina & 2 Others Vs Jomo Kenyatta University of Agriculture and Technology (2014) eKLR.**

39. In conclusion, the Claimant submitted that having proved that his termination was procedurally and substantively unfair he is entitled to the reliefs as sought in his Claim therefore urging this Honourable Court to allow the same as pleaded.

Respondent's Submissions

40. The Respondent on the other hand submitted that the Claimant was on probation for six (6) months at the time of his separation with the Respondent having been issued with a copy of his contract, which he failed to return the signed copy that provided that the probation period shall be for six (6) months.

41. It is further the Respondent's submissions that this Honourable Court should be guided by the provisions of Section 42 of the Employment Act, 2007 that provides for termination of probationary contracts.

42. The Respondent further submitted that it was entitled to terminate the Claimant's services his performance having been below per.

43. The Respondent further submitted that the Claimant having been terminated during his probationary period cannot rely on Sections 41, 43 and 45 of the Employment Act, 2007. For emphasis the Respondent cited and relied on the Authority of **John Muthomi Mathiu Vs Mastermind Tobacco (K) Limited (2018) eKLR.**

44. It is on this basis that the Respondent herein submitted that the Claimant is not entitled to the reliefs sought in his Memorandum of Claim.

45. In conclusion, the Respondent urged this Honourable Court to dismiss the Claim in its entirety with costs to the Respondent.

46. I have considered all the evidence and submissions of both Parties. From the Claimant's evidence, he avers that he was employed vide a letter dated 27.3.2014. The letter indicated as follows:-

“Dear Fredrick,

RE: ACADEMY IMPROVEMENT MANAGER OFFER LETTER

Congratulations! I am thrilled to inform you that you have been selected as an Academy Improvement Manager, contingent on your performance during an Academy Improvement Manager Training Programme (“AIM Training”).

AIM Training shall be held from 17 March 2014 to 17 April 2014 at Good Samaritan Academy in Nakuru. During this time, you shall be training from Monday to Saturday every week (Sunday is a day off). Food, transport, and accommodation will be provided for.

You shall be paid a daily rate of Kshs.1,250 (gross during AIM training).

This offer is contingent on you successfully completing and meeting requirements and standards during AIM Training.

Should you successful complete AIM Training, the following shall apply:-

- *You shall be paid a gross monthly salary of Kshs.55,000/= and you will also become eligible for the AIM bonus starting in the month of May 2014.*
- *You shall relocate to a yet-to-be determined region in Kenya.*

If you are in agreement with the offer and all the terms contained herein please sign below and return to the Human Resources Department as soon as possible. We look forward to your favourable response.

Regards,

For: Bridge International Academies Limited

Signed

Christopher Suen

Human Resources & Administration Director”

47. From this letter, the employment of the claimant was contingent upon his performance during an Academy Improvement Manager Training Programme (AIM Training) which the Claimant attended hence his continued employment beyond March 27th 2014. There is no indication that the appointment was also subject to a probationary period of 6 months as contested by the Respondents.

48. Given that the Claimant was no longer on probation, he was subject to the provision of Section 41 of Employment Act 2007 before termination for any reason.

49. Section 41 of Employment Act 2007 states as follows:-

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”.

50. The Claimant was never subjected to any disciplinary hearing and neither were the veracity of the reason for termination tested in any disciplinary process. It is therefore my finding that the Claimant’s dismissal was unfair and unjustified and I declare it so. In terms of remedies, I award the Claimant as follows:-

1. 1 months’ salary in lieu of notice = 55,000/=

2. 10 months’ salary as compensation for the unlawful and unfair termination = 10 x 55,000 = 550,000/=

TOTAL = 605,000/=

3. The Respondent will pay costs of this suit plus interest as Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 30th day of January, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Thuo holding brief Matheka for Claimant – Present

Ogutu holding brief Ngira for Respondent – Present