



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI**

**CAUSE NO. 192 OF 2018**

**DANIEL NDAIGA KAMANJA.....1<sup>ST</sup> CLAIMANT**

**JACKSON KUTSWA SHIRAKU.....2<sup>ND</sup> CLAIMANT**

**GEOFFREY KIRAGU KARIUKI.....3<sup>RD</sup> CLAIMANT**

**(Suing on their own behalf and on behalf  
of the 26 workers of the respondent)**

**-VERSUS-**

**BOARD OF MANAGEMENT,**

**HIGHWAY SECONDARY SCHOOL.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Thursday 9<sup>th</sup> April, 2020)

**JUDGMENT**

The claimants filed the memorandum of claim on 20.02.2018 through Masika & Koross Advocates. The claimants prayed for judgment against the respondent for:

a) A declaration that the respondent's conduct herein in particular the wilful failure, refusal, delay or neglect to implement Regulation 4 of the Education (Board of Governors) (Non-Teaching Staff) Regulations, 1993 and Regulation 18 of the Basic Education Regulations 2015 is unconscionable and amounts to flagrant breach and anticipatory breach of the employment agreement in terms of the stated regulations.

b) A declaration that the respondent's conduct herein in particular the wilful failure, refusal, delay or neglect to implement Directorate of Personnel Management Circulars of 29.08.2006, 13.08.2008, and 25.06.2012 respectively as issued by the Ministry of State for Public Service to raise or reflect on the salaries of the claimants herein is unconscionable and amounts to flagrant breach and anticipatory breach of the employment agreement in terms of the stated circulars.

c) An order of specific performance do issue to compel the respondent within such duration as the Honourable Court deems just to specifically perform its obligations under the stated circulars of 29.08.2006, 13.08.2008, 25.06.2012 and 13.07.2017 and in particular to pay the claimants amounts owing and outstanding.

- d) An order to issue directing the respondent to pay overtime dues and arrears thereof.
- e) The respondent to pay the claimants a sum of Kshs.14, 650, 923.68 being the sum of the monies to be paid by the respondent to the claimants jointly and severally as staged payments aforesaid to date plus interest thereon at court rates from the date of the circulars.
- f) An order that:
  - i. Claimants' pension fund be transferred to a company agreeable by claimants.
  - ii. The claimants' RBA or pension scheme be paid on time in default the respondent to pay the accrued interest rates.
  - iii. Dues remitted to the pension scheme be made at an agreed percentage between the claimants and the respondent.
  - iv. Claimants' SACCO dues be made on time in default the respondent to pay the accrued interest rates.
  - v. Claimants' NHIF dues be made on time in default the respondent to pay the accrued penalties.
- g) Costs and interest of the claim.
- h) Any other or further relief the Honourable Court may deem fit or just to grant.

The claimants' case is that the respondent employed the claimants at all material times and on diverse dates between 1988 and 2013 and the claimants serve in different capacities and departments in Job Groups C, D, E, F, G, H, J, K and L. The claimants serve on permanent and pensionable terms in the respondent's non-teaching service and it is their case that they are entitled to the same terms and conditions of service as their counterparts in the civil service because the respondent is a public school. By the circulars subject of the present case the Ministry of State for Public Service in Kenya ordered the respondent to realign salary structure for public servants. The respondent implemented the circulars partially but has refused or neglected to implement the circulars fully. In the process the respondent has subjected the claimants to unfair labour practices whose particulars of illegality or unlawfulness include:

- a) Late payment of pension scheme dues making claimants loose interest of up to 3 months.
- b) Dues remitted to pension scheme are not per agreed percentage.
- c) The SACCO dues are delayed making claimants incur interests.
- d) Claimants suffer penalties and accrual of interests due to failure to remit statutory deductions (NHIF).
- e) Claimant's pension fund was transferred to a different company without their consent.
- f) Underpayment and discrepancy in salaries contrary to the circulars issued by public service.
- g) Subjecting the claimants to excess working hours without compensation.
- h) Unfair labour practices by the respondent contrary to Article 41 of the Constitution 2010.

Despite service the respondent failed to enter appearance, to file a defence and to attend at the hearing. On 02.03.2020 and upon consent by the claimant's advocate it was ordered that the suit be determined on the basis of the pleadings, documents and final submissions. The claimants filed the final submissions.

The Court makes findings as follows:

**First**, there is no dispute that the claimants are employed by the respondent which is a public institution. The Court returns that the circulars in issue as prayed apply to the service of the claimant's in the respondent's employment. The material on record shows that the respondent has failed to fully implement the circulars with respect to the claimant's employment. Accordingly the Court finds that the declarations as prayed for will issue. While making that finding the Court follows its holding in **Dadson Maina & 33 Others –Versus- Board of Management, Nyeri Primary School [2017]eKLR**, thus,

**“The court has considered the designation and emplacement of the claimants into Job Groups. In absence of any other material on record, the court finds that the Job Groups applicable to the claimants and as applied to them can only mean and refer to the Job Groups as was implemented and invoked by the Government in the circulars as relied upon by the claimants. The claimants serve in the public school clearly established under the state department responsible for education and there is no reason to doubt that the claimants serve as part of the public service. In the findings of the court, the phrase “civil service” as applied in the circulars could only be interpreted to mean public service as envisaged by the Constitution. While the circular of 25.06.2012 referred to re-alignment of salary structure for civil servants, at paragraph 1 it specifically stated that it was meant to restore harmony and equity in the public service remuneration structure and banding system. The respondent has not showed that there existed a separate system and establishment upon which the claimants would be designated and emplaced in Job Groups and remuneration structure other than as was pleaded for the claimants. In the conclusive consideration, the court returns that the circulars applied to the claimants.**

**In any event, the court has considered that the circulars did not specifically exclude the claimants and further the respondent has not disputed the claimants' case that the respondent had already partially implemented the circulars.**

**The court has further considered section 28 (1) of the Basic Education Act, 2013 which provides that the Cabinet Secretary shall implement the right of every child to free and compulsory basic education and the court returns that the realisation of the provision must be embedded on the foundational position that the finances (including remuneration to the claimants who serve in a public school) would therefore be provided out of public funds provided by Parliament so that the claimants are clearly part of the public service within the constitutional definition. Thus section 88 (2) (a) of the Act states that the annual estimates (to be prepared by the Cabinet Secretary) shall make provision for the financial year and shall provide for the payment of salaries, allowances and other charges in respect of the staff of the department, and, (b), provision for the payment of pensions, gratuity and other charges in respect of retirement benefits which are payable out of the funds of the department. Thus the court returns that the claimants were clearly part of the public service as per the constitutional provisions and are entitled to full enjoyment of the provisions of the applicable circulars.**

**While making that finding the court returns and holds that remuneration, service benefits and pensions or gratuities or other retirement benefits for the non-teaching staff employed by pre-primary, primary or secondary school Board of Management are payable out of funds provided by the Parliament and the persons so employed are clearly public officers being part of the public service as defined in the Constitution.”**

Further the Court follows **Kudheihia –Versus- B.O.G Ngaru Girls Secondary School [2014]eKLR** where Abuodha J held thus, **“12.The terms of service were however subject to Legal Notice number 262 of 1993 issued by the Minister of Education pursuant to Section 33 of the Education Act.”**

To answer the **2<sup>nd</sup> issue** for determination, the material before the Court show that while the respondent had partially implemented the circulars, the circulars have not so far been fully implemented. Further the

Court has already found that the circulars applied to the claimants' service. Accordingly, declarations will issue as prayed for. The Court finds that the documents on record show that the respondent had delayed in remitting the claimant's statutory, pension and SACCO deductions and prayers will issue in that regard and as prayed for. As relates to the prayers for payment of Kshs.14, 650, 923.68, the Court returns that the same were liquidated damages and it is trite law that particulars are pleaded and the same are strictly proved. The Court finds that looking at the statement of claim the same were not specifically pleaded and no evidence was provided to strictly prove the claim and prayer. Accordingly the Court will decline the prayer as unjustified for want of proper pleading and strict establishment by way of necessary evidence. Similarly no particulars and evidence were provided on the prayer for overtime and which is declined.

In conclusion judgment is hereby entered for the claimants against the respondent for:

a) The declaration that the respondent's conduct herein in particular the wilful failure, refusal, delay or neglect to implement Regulation 4 of the Education (Board of Governors) (Non-Teaching Staff) Regulations, 1993 and Regulation 18 of the Basic Education Regulations 2015 is unconscionable and amounts to flagrant breach and anticipatory breach of the employment agreement in terms of the stated regulations.

b) The declaration that the respondent's conduct herein in particular the wilful failure, refusal, delay or neglect to implement Directorate of Personnel Management Circulars of 29.08.2006, 13.08.2008, and 25.06.2012 respectively as issued by the Ministry of State for Public Service to raise or reflect on the salaries of the claimants herein is unconscionable and amounts to flagrant breach and anticipatory breach of the employment agreement in terms of the stated circulars.

c) The order of specific performance hereby issued compelling the respondent to forthwith specifically perform its obligations under the stated circulars of 29.08.2006, 13.08.2008, 25.06.2012 and 13.07.2017 and in particular to pay the claimants amounts found owing and outstanding.

d) The declaration that:

vi. Claimants' pension fund be transferred to a company agreeable by claimants.

vii. The claimants' RBA or pension scheme be paid on time in default the respondent to pay the accrued interest rates.

viii. Dues remitted to the pension scheme be made at an agreed percentage between the claimants and the respondent.

ix. Claimants' SACCO dues be made on time in default the respondent to pay the accrued interest rates.

x. Claimants' NHIF dues be made on time in default the respondent to pay the accrued penalties.

e) In view that the respondent and the claimants are still in employment relationship and the respondent had partially implemented the circulars and did not oppose the suit, the respondent to pay the claimants' 50% of the costs of the suit.

f) In view of the prevailing COVID 19 pandemic and the Government budget cycle, there be stay of implementation or execution of the financial implications flowing from this judgment and the decree herein as may be necessary until 01.02.2021.

**Signed, dated and delivered in court at Nairobi this Thursday, 9<sup>th</sup> April, 2020.**

**BYRAM ONGAYA**

**JUDGE**