

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 378 OF 2017

CHARLES FUNDI NJIRU.....CLAIMANT

VERSUS

THE BOARD OF MANAGEMENT

BARICHO HIGH SCHOOL.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent and averred that he was a BOM teacher. He averred that he was employed on or around 1st May 2013 on contractual basis for 2 years from 1st May 2013 to 1st May 2015. He averred that he was paid a salary of Kshs. 16,320/- and that his contract was prematurely terminated by the BOM Secretary one Mr. Isaac Wachira on 9th March 2015. He averred that the termination was verbal and without cause. The Claimant averred that his demand and notice of intention to sue the Respondent had been ignored. He thus sought recompense being maximum compensation for loss of income totaling Kshs. 195,840/-, one month's salary in lieu of notice – Kshs. 16,320/-, unpaid salary for the months of March, April and May 2015 totaling Kshs. 48,960/- as well as costs of the suit plus interest. In support of his claim the Claimant attached his letter of appointment dated 29th May 2013, bank statements for the year 2015 as well as demand letter dated 13th September 2017.

2. The Respondent averred in its defence that it was a stranger to the Claimant's averments that he was employed on a 2 year contract from 1st May 2013 to 1st May 2015 or that his services were prematurely terminated by the BOM Secretary Mr. Isaac Wachira. The Respondent averred in the alternative that if any termination took place then it was in accordance with the procedure laid down in the Employment Act. The Respondent averred that the Claimant absconded from work from 14th January 2015 and that he even took off with 3 students pocket money totaling Kshs. 2,200/-. The Respondent averred that the suit as drawn and taken put offends the mandatory provisions of Cap 39 and Cap 40 Laws of Kenya. The Respondent averred that no demand or notice of intention to sue was issued or given and urged the dismissal of the suit with costs to the Respondent and further, that the Claimant refunds students pocket money totaling Kshs. 2,200/-. The Respondent annexed a witness statement, letters issued to the Claimant as well as minutes of a BOM meeting held on 20th March 2015 and documents that indicated that the Claimant was summoned on 6th March 2015 to give an explanation as to why he had absconded work from 14th January 2015, failure to respond to a summon to the Principal's office despite being informed to do so, locking the computer room making it inaccessible as well as failure to surrender money collected from Form 1 students without approval of the school administration.

3. The Claimant adopted his statement of 6th October 2017 and testified that he was employed by the Respondent. His statement was to the effect that he was employed on 1st May 2013 as a BOM teacher earning Kshs. 16,320/- and was issued with a letter of employment on 29th May 2013. He stated that his appointment was on contractual basis for 2 years, that is from 1st May 2013 to 1st May 2015. He stated that sometime on 9th March 2015 the BOM Secretary one Isaac Wachira terminated his employment verbally and that in all the decisions by the Respondent he was not afforded an opportunity to be heard and failed to understand why the decision by the Respondent was arrived at sequentially from a mere verbal communication as he was not given enough time to defend himself. He testified that he was on duty on the date the Respondent asserts he absconded duty and that he was not aware of the Board meeting held in March 2015. He was cross-examined and testified that he was not given the letter for negligence of duty. He stated that he was at work on 9th March 2015 and was called to the Principal's office where he was dismissed verbally. He stated that he was asked to return the key and leave. He denied receiving the letter issued by the Respondent and stated that he was verbally dismissed and thus sought the salary for March to May as his contract had not ended. In re-examination he testified that he was employed in May 2013 and his contract was to end in May 2015.

4. The Respondent's witness John Kuria the Principal of Baricho High School testified on 23rd June 2020 through the video link in place to mitigate against the effects of Covid 19 since in-person appearances in open Court had been suspended by the Chief Justice. He adopted his statement and produced the documents in the Respondent's bundle. He testified that the BOM Secretary wrote a letter to the Claimant after he absconded duty. He stated that the Claimant never appeared before the BOM. There were no questions from the Claimant's counsel as he was absent at the hearing despite having been notified by the Registry ELRC of the date for further date for hearing via the video link.

5. That marked the end of oral testimony and the parties were to file written submissions. The Claimant's counsel filed submissions in which it was submitted that from the Respondent's minutes of a meeting held on 20th March 2015 at the School Boardroom, it was clear on the second page of the minutes that the Respondent had decided to transfer the Claimant for alleged absenteeism. The Claimant submitted that the Respondent had decided to transfer him from the school during the April holidays as a disciplinary measure. The Claimant submitted that the above resolution is therefore at variance with the Respondent's secretary to terminate the Claimant's services altogether. The Claimant submitted that was unfair labour practice and the same could just not be wished away. The Claimant submitted as the impugned decision to terminate the Claimant's services had been undertaken unfairly, the Claimant was therefore entitled to maximum compensation in terms of Section 49(1)(c) of the Employment Act, one month's salary in lieu of notice in terms of Section 35(1)(c) of the Employment Act as well as salaries for March, April and May 2015. In support of his claim he cited the case of **Shadrack Mwaniki Ngari v Aegis Construction**

Limited [2018] eKLR where the Superior Court had awarded the claimant in that case 8 month's salary as compensation for unlawful termination.

6. The Respondent submitted that the Claimant never responded to any of the letters written to him seeking an explanation for his absenteeism nor did he attend the disciplinary meeting called. The Respondent submitted that the Claimant never responded to any of the allegations leveled against him and neither did he return to work nor attend the BOM meeting where he would have defended himself. The Respondent submitted that the Claimant of his own volition had decided not to return to work nor respond to the allegations made against him by the employer. The Respondent submitted that Section 4(a) of the Employment Act made it clear that an employee who without leave or lawful cause absents himself from the workplace or the performance of his work amounts to gross misconduct that justifies summary dismissal. The Respondent submitted that the evidence of absconding work was never rebutted by the Claimant in either his evidence or even the submissions. The Respondent submitted that the Claimant willfully left employment without notice and he therefore was not entitled to any damages whatsoever. The Respondent submitted that the Claimant had failed to discharge his burden under Section 47(5) of the Employment Act and cited the case of **GMK v Kenyatta National Hospital [2020] eKLR** in support of its case and urged the dismissal of the case with costs to the Respondent.

7. The Claimant asserts he was verbally dismissed while the Respondent asserts the dismissal was for cause. The Claimant was summoned for a disciplinary hearing after he failed to respond to a letter in which he was required to defend himself against some allegations levelled against him. The letter accusing the Claimant of absconding duty is dated 15th January 2015 while the letter inviting the Claimant to the disciplinary hearing is dated 6th March 2015. The letter to the Claimant dated 15th January 2015 was to the effect that the Claimant had until 22nd January 2015 to give an explanation and failure to do so would elicit further action. The letter of 6th March 2015 seemed to be the further action the initial letter triggered. The Claimant was required to appear before the BOM and defend himself. The letter was addressed to the Claimant and was marked for posting to Nthagaiya Parish PO Box 67 Runyenjes. The Claimant did not disown the postal address as his own. An employee who makes a claim for unfair termination of employment or wrongful dismissal has a statutory burden to discharge under Section 47(5) of the Employment Act. The Section provides as follows :-

47(5). For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

A reading of the Section is that an employee has the burden of proving that an unfair termination of employment has occurred while the employer's burden is to justify the reasons for such termination. An employee who fails to attend a disciplinary meeting called cannot turn around and claim he was not heard or that he was not afforded an opportunity to defend himself. As the Claimant failed to discharge his statutory burden under Section 47(5) of the Employment Act, the suit is dismissed albeit with no order as to costs.

It is so ordered.

Dated and delivered at Nyeri this 23rd day of September 2020

Nzioki wa Makau

JUDGE