



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NO 300 OF 2018**

**JAPHETH OMOSA.....CLAIMANT**

**VS**

**OMAR SHARIFF ALI**

**YAYE SAID ATHMAN**

**ALI OMAR SHARIF**

**HABIB OMAR SHARIFF**

**T/A ISTIQAMA ACADEMY**

**AND TUITION CENTRE.....RESPONDENTS**

**JUDGMENT**

**Introduction**

1. On 7<sup>th</sup> May 2018, the Claimant filed a claim against the Respondents seeking compensation for unfair termination of employment and payment of final dues. The Respondents filed a Reply on 8<sup>th</sup> August 2018.
2. On 27<sup>th</sup> September 2019 and 6<sup>th</sup> February 2020, the parties presented their respective cases to the Court.
3. Thereafter, the Respondents sought leave to serve a third party notice, a move that was rejected by the Court in its ruling dated 17<sup>th</sup> September 2020. The Respondents were therefore directed to file final submissions to the main claim.

**The Claimant’s Case**

4. The Claimant states that he was employed by the Respondents in January 2014, in the position of Head Teacher.
5. The Claimant worked as such until December 2017, when his employment was terminated. At the time of termination, the Claimant earned a monthly salary of Kshs. 41,000.
6. The Claimant’s case is that the termination of his employment was unlawful and unfair. He therefore claims the following from the Respondents:

- a) Salary in lieu of notice.....Kshs. 41,000
- b) Leave pay for 4 years.....114,800
- c) Service pay for 4 years.....82,000
- d) 12 months’ salary in compensation.....492,000
- e) Overtime (2 hours daily) for 4 years.....349,866

f) Costs plus interest

### **The Respondents' Case**

7. In their Reply dated 23<sup>rd</sup> July 2018 and filed in court on 8<sup>th</sup> August 2018, the Respondents deny terminating the Claimant's employment and state that the contractual term was to be completed under a new management at the School.

8. The Respondents further state that vide an agreement dated 10<sup>th</sup> January 2018, they had handed over the management and employees of Istaqama Academy Likoni to the Board of Governors made up of Juma Boma, Sheikh Ali Idris, Salma Anwar and Ali Hussein with power to either sack or retain employees.

9. The Respondents add that the changes were communicated to the Claimant vide a letter dated 10<sup>th</sup> January 2018, which the Claimant accepted as a handing over to a new employer.

10. The Respondents aver that the contractual term was to be completed under the new management.

11. The Respondents' case is that having handed over the management and employees to the Board of Governors, they were not responsible for the termination of the Claimant's employment.

### **Findings and Determination**

12. There are three (3) issues for determination in this case:

- a) Whether there was an employment relationship between the Claimant and the Respondents;
- b) Whether the Claimant has established a case of unlawful termination of employment against the Respondents;
- c) Whether the Claimant is entitled to the remedies sought.

### **Employment Relationship?**

13. The Respondents' line of defence is that there was no employment relationship between them and the Claimant because the School where the Claimant served as Head Teacher had been handed over to a Board of Governors.

14. I will say three things regarding this line of defence; first, according to registration information availed to the Court, Istiqama Academy and Tuition Centre was registered as a business name with the Respondents as partners and the introduction of a Board of Governors did not change this basic fact; second, at the time the Claimant's employment was terminated the management handover agreement between the Respondents and the Board of Governors had not been executed; third, there was nothing in the said agreement to suggest that the Respondents' responsibilities to the Claimant as an employee had been passed over to the Board of Governors or to any other party.

15. From the foregoing, it is evident that at the time the Claimant's employment was terminated there existed a valid employment contract between him and the Respondents.

### **Unlawful Termination?**

16. The termination of the Claimant's employment was communicated by letter dated 1<sup>st</sup> December 2017 stating as follows:

*"Dear Sir,*

**RE: TERMINATION OF YOUR SERVICES**

*Following the restructuring of our human resources in the Istiqama Group of Schools, for effective management, the school has decided to take the above action.*

*We are so much grateful for your dedicated services for (sic) the school since the time of your employment.*

*Your termination is with immediate effect.*

*The school will organize how you are going to be paid your December salary.*

*We wish you success elsewhere.*

*Yours faithfully,*

*(signed)*

**OMAR SHARIF**

**DIRECTOR**

17. This letter cites ‘*the restructuring of our human resources in the Istiqama Group of Schools, for effective management*’ as the reason for termination of the Claimant’s employment. No details or particulars as to the extent and process of restructuring were provided.

18. In the final submissions filed on behalf of the Claimant on 21<sup>st</sup> February 2020, reference was made to the Court of Appeal decision in ***Kenafic Industries Limited v John Gitonga Njeru [2016] eKLR*** where it was held that an employer citing restructuring as a reason for terminating employment must prove the veracity of the alleged restructuring.

19. Restructuring or reorganisation that leads to loss of employment must be undertaken within the system provided in the Employment Act. If it is a redundancy, Section 40 is applicable and if it is a termination arising from misconduct, poor performance or incapacity, Section 41 kicks in.

20. It follows therefore that where an employer simply states that loss of employment was as a result of restructuring and does not demonstrate the system used in the restructuring, the ensuing termination is unfair within the meaning of Section 45 of the Employment Act.

21. In the circumstances of this case I find and hold that the termination of the Claimant’s employment was substantively and procedurally unfair and he is entitled to compensation.

**Remedies**

22. Consequently, I award the Claimant six (6) months’ salary in compensation. In arriving at this award, I have considered the Claimant’s length of service and the Respondents’ unlawful conduct in terminating the employment.

23. Although the termination letter is dated 1<sup>st</sup> December 2017, the Claimant told the Court and the Respondents did not deny that the said letter was served on the Claimant on 23<sup>rd</sup> December 2017. Seeing that the termination was to take effect immediately, the Claimant was not given the requisite one (1) month’s notice. I therefore allow the claim for notice pay.

24. In response to the claim for leave pay, the Respondents state that the Claimant took leave during school holidays.

25. In its decision in ***Brookhouse Schools Limited v Dorcas Njeri Gichuhi [2016] eKLR*** this Court stated the following:

***“schools, as a category of employers operate a set calendar where leave schedules for employees are set in advance. Lack of leave records cannot therefore be used as evidence that an employee is entitled to leave pay.”***

26. The Claimant himself told the Court that the School closed for holidays for three (3) weeks each in the months of April, August and December. He claimed to have been in school for two (2) weeks every holiday, issuing report forms and attending to parents. He did not however support this assertion with any evidence. Being a seasoned teacher with administrative capacity, the Claimant should have produced a log to show that he had actually spent his leave days serving the Respondents. In the absence of any such evidence, the claim for leave pay is disallowed.

27. In prosecuting his claim for overtime pay, the Claimant testified that he worked from 7.00 am to 8.00 pm. In support of this claim, he produced a copy of the school timetable running from 6.30 am to 5.45 pm on weekdays. He however did not identify which actual days he worked beyond normal working hours.

28. As held by my brother **Rika J** in ***Rogoli Ole Manadegi v General Cargo Services Limited [2016] eKLR*** an employee claiming overtime must establish the actual hours or days served in excess of the legal maximum.

29. The Claimant did not discharge this evidential burden and his claim for overtime pay therefore fails and is dismissed.

30. Having been a contributing member of the National Social Security Fund (NSSF), the Claimant is not entitled to service pay.

31. Finally, I enter judgment in favour of the Claimant as follows:

- a) 6 months’ salary in compensation.....Kshs. 251,850
- b) 1 month’s salary in lieu of notice.....41,975
- Total.....293,825**

32. This amount will attract interest at court rates from the date of judgment until payment in full.

33. The Claimant will have the costs of the case.

34. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 15<sup>TH</sup> DAY OCTOBER 2020**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Nyongesa for the Claimant

Ms. Khalifa for the Respondent