

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 525 OF 2017

JOHN NDERITU WAHOME.....CLAIMANT

VERSUS

TRUSTEES, MT. KENYA BAPTIST SCHOOL.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent seeking relief alleged underpayment and failure to pay the remainder of his contract, gratuity, one year's salary in lieu of notice and other dues. He averred that the Respondent employed him as a teacher on 2nd January 1996. The Claimant was promoted to deputy head teacher in 2005 and on 17th May 2017 the acting school manager Andrew Lettsome called him to inform him of the Trustees' decision to terminate his services because of the drop in school enrolment. He averred that it was not a term of the contract that the Claimant's duties included school enrolment as the Claimant's only role was to advertise through the school bulletin of vacancies in classes and that the decision of whether to enroll a child or not was a decision left for parents. He averred the acting school manager took the laptop containing all the school information. He asserts that he was called by the Trustees for a meeting on 11th June 2017 whose agenda was the Claimant's resignation and the Claimant declined to sign the resignation letter drafted by the Respondent. He was earning Kshs. 34,500/-. He averred that he was never given a chance to defend himself against the accusations and he thus sought payment of the differences between the TSC pay and the actual pay he received from 2015 till 2017, service gratuity, certificate of service, costs of the suit plus interest.

2. The Respondent filed a defence in which it averred that the Claimant's attention was drawn to the poor enrolment in the school attributable to his poor performance as the CEO of the school and suggested to him that he may resign if he could not improve his performance which he promptly did and snubbed the Respondent's offer to retain him for another month. The Respondent submitted that the TSC salary structure does not apply to the Claimant and do not bind the Respondent. The Respondent averred that the contract of employment did not provide for gratuity independently of the Employee's Pension Plan which applies to the Claimant. The Respondent averred that the Claimant was not entitled to the remedies sought as he resigned from his employment.

3. The Claimant as well as the Respondent's witness Andrew Lettsome testified. The Claimant stated that he was informed by the Respondent's witness of the spoke to him indicating the intention of the Respondent to relieve him of his duties come the end of the month. He says that he accepted the suggestion and wrote indicating his desire to be separated from the Respondent. He asserts that the Respondent's manager took his laptop on 31st May and told him to go home and await being called by the founding trustee pastor Jerry Daniels. He stated that he wrote a report and not a resignation letter and that it was the Respondent who had drafted a resignation letter which he was given to read and sign. He declined to sign it and was terminated. He testified that he was not served with any allegations of poor performance. In cross-examination he stated that he had several meetings with the trustees whose subject was not poor performance. He was unaware of their dissatisfaction with his performance. He said there was no letter terminating his services and that teachers withdrew due to poor pay thus affecting enrolment. He testified that when the experienced teachers leave and the young inexperienced teachers are brought there is a slag. He stated that the TSC scales were applicable to him due to his level of experience. He stated that the trustees violated the contract between him and the Respondent.

4. The Respondent's witness testified that he was a missionary working with the Respondent and that at the time in question was the acting manager. He stated that the meetings the Claimant had with the trustees was on the issue of performance. The trustees were concerned by the poor enrolment and poor leadership. He stated that the Claimant preferred to stay in his office than move around and so concerned parents found it easier to approach the acting manager. He testified that the Claimant did not take the efforts to bring up the performance to heart and instead prompted more meetings. He stated that the Claimant resigned and turned in the laptop after being allowed to remove all personal documents. He testified that the laptop was surrendered after resignation. He stated that the Respondent was a private school and the TSC scale did not apply to it and the Claimant had annual contracts. In cross-examination he testified that he had not looked at the current enrolment. He stated that the Claimant was always required to improve in his performance and that he took the letter the Claimant wrote as a resignation. He stated that he called the Claimant and asked him to come and clear and accept an appreciation from the school but he never came. He testified that the Claimant gave notice and was paid salary for May.

5. The parties filed submissions and the Claimant submitted that the dismissal did not accord with the provisions of Section 43, 45 and 41 of the Employment Act. He submitted that the case of **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** applied to his case as there was no procedural or substantive justification for the termination. The Claimant also cited the case of **Nicholas Muasya Kyula v Farmchem Ltd [2012] eKLR** where the court held that it is not sufficient for the employer to make allegations of misconduct against an employee and that the employer is required to have internal systems and process of undertaking administrative investigations and verifying the occurrence of the misconduct before a decision to terminate is arrived at. He thus urged the grant of the prayers in the claim.

6. The Respondent submitted that damages for breach of contract are meant to put the innocent party in the same position as if the contract had not been breached. The Respondent asserts that from the pleadings it was clear the Claimant was employed on a fixed term contract due to expire in the month of January 2018 and the Respondent was not under any obligation to employ the Claimant beyond that date. The Respondent submitted that there was no law in force that obligated the Respondent to pay its teachers according to the Teachers Service

Commission scales. It was further submitted that there was no intention to terminate the Claimant's services and that the letter he wrote to the Respondent only indicated an intention that the Respondent had of relieving him of duties as a head teacher. The Respondent submitted that the Claimant was not entitled to the remedies he had sought in the claim.

7. The letter that severed the contract of employment was written by the Claimant on 25th May 2017. In the letter, the Claimant made his intention clear. In the letter, there was no indication that the departure was forced. There is no allegation that the Respondent forced him to resign. It is the Respondent's evidence that it prepared to issue him with the terminal dues but he declined to receive them. In the matter before the court, the Claimant sought to vary his contract as the terms on his salary were not indicated to be *pari passu* those of the Teachers Service Commission. Indeed, the TSC scales are not the indicator of salaries paid to teachers. The Claimant had bargained for the terms he took and could not post termination of the contract rewrite it. The Claimant did not prove the elements requisite for him to obtain any relief from this court in terms of any remedies. The suit is thus dismissed and each party will bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 14th day of February 2019

Nzioki wa Makau

JUDGE

I certify that this is a

true copy of the Original

Deputy Registrar