



**REPUBLIC OF KENYA**

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

**CAUSE NO 5 OF 2018**

**JAMES MWAMURE CHANGAWA.....CLAIMANT**

**VS**

**THE BOARD OF MANAGEMENT**

**JIMBA-GEDE SECONDARY SCHOOL.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The Claimant's claim against the Respondent brought by a Memorandum of Claim dated 22<sup>nd</sup> January 2018 and filed in court on 29<sup>th</sup> January 2018 is for wrongful dismissal.
2. In spite of due service, the Respondent did not file any response. The matter therefore proceeded by way of formal proof.

**The Claimant's Case**

3. The Claimant, who is a teacher by profession, states that he was employed by the Respondent at a monthly salary of Kshs. 14,000 effective 13<sup>th</sup> September 2016. On 4<sup>th</sup> May 2017, he was appointed as a Class Teacher and Head of Department, Academics.
4. The Claimant worked until 1<sup>st</sup> November 2017 when his employment was terminated on allegations of refusal to make changes in the school timetable.
5. The Claimant states that on 25<sup>th</sup> September 2017, the School Principal found some students studying unsupervised in the school laboratory. The Principal summoned the Claimant and asked him to make changes to the timetable. He adds that he was unable to change the timetable as directed for two reasons:
  - a) Classes were scheduled and amending the timetable would result in total overhaul of the school programme that was in place at the time thus causing administrative breakdown;
  - b) As the per the school operations, change of class timetable was the responsibility of the Deputy Head of Department, Academics.
6. The Claimant pleads that he brought these concerns to the attention of the Principal. On 28<sup>th</sup> September 2017, he was issued with a letter asking him to show cause why disciplinary action should not be taken against him.
7. In his response, the Claimant explained that he was unable to carry out the instructions issued by the Principal within the required timeline given the tedious task of harmonizing the lessons from Form 1 to Form 4. He also pointed out that he had no authority to amend the timetable.
8. On 30<sup>th</sup> October 2017, the Claimant was invited to appear before the Respondent's Board which invitation he honoured. However, he was not heard; instead he was issued with a termination letter dated 24<sup>th</sup> October 2017.
9. The Claimant avers that the Respondent had made a preconceived decision to terminate his employment even before hearing his side of the story. His case is that there was no valid reason for the termination and the laid down procedure was not followed.
10. The Claimant states that he was not paid house allowance throughout the entire period of his employment with the Respondent. Further,

he was not paid his salary for the month of October 2017.

11. The Claimant's claim against the Respondent is as follows:

- a) Notice pay.....Kshs. 14,000.00
- b) Withheld salary.....14,000.00
- c) House allowance for 14 months.....65,333.33
- d) 12 months' salary in compensation.....168,000.00
- e) Costs plus interest

### **Findings and Determination**

12. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

### **The Termination**

13. On 24<sup>th</sup> October 2014, the Respondent wrote to the Claimant as follows:

**"RE: TERMINATION OF SERVICE**

*Pursuant to your response letter dated 02/10/2017, I am directed by the Board of Management to remove your name from the payroll with effect from 01/11/2017 for the following reason(s):*

- *You willfully refused to make changes to the school timetable even after changing the school programme.*

*I draw your attention to part 5 section 63(7) which provides that a teacher will carry out any other relevant duties as may be assigned.*

*On behalf of the board, I take this opportunity to thank you for the devoted service, which you have rendered to the school. I wish you all the best in your future endeavours.*

**SECRETARY**

**B.O.M**

*(Signed)"*

14. The termination letter was preceded by a notice to show cause dated 28<sup>th</sup> September 2017. The Claimant testified that he responded to the show cause letter giving two reasons as to why he had not adjusted the timetable within the given timeline; first, he cited the tedious nature of the task and second, he stated that he was not the authorized person to change the timetable.

15. The Claimant further told the Court that he was invited to appear before the Board on 30<sup>th</sup> October 2017 but was not heard; instead he was issued with a termination letter dated 24<sup>th</sup> October 2017. The Respondent did not contradict the Claimant's testimony in any way and there was no evidence that the Claimant's representations were ever considered.

16. At any rate, it would appear that the decision to terminate the Claimant's employment was made long before the date he was scheduled to appear before the Board. The Court was referred to the decision in **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** where my sister **Mbaru J** restated that in a claim for unfair termination of employment, the burden is on the employer to demonstrate compliance with the procedural fairness requirements set out under Section 41 of the Employment Act, 2007

17. It seems to me therefore that the reasonableness of the charges made against the Claimant was not tested at the shop floor. The Claimant was denied an opportunity to defend and exonerate himself and his termination was substantively and procedurally unfair. He is therefore entitled to compensation.

### **Remedies**

18. In light of the foregoing findings, I award the Claimant four (4) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service and the Respondent's conduct leading to the termination. Additionally, I award the Claimant one (1) month's salary in lieu of notice as well as salary for October 2017.

19. The Claimant also claims house allowance. Section 31(1)and(2) of the Employment Act provides that:

**31. (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.**

**(2) This section shall not apply to an employee whose contract of service-**

**(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or**

**(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).**

20. From the evidence on record, there was no evidence that the Claimant's salary was inclusive of house allowance. I therefore allow the claim thereon and adopt the resultant figure of Kshs. 16,100 as the Claimant's salary for purposes of this claim.

21. I therefore enter judgment in favour of the Claimant as follows:

a) 4 months' salary in compensation.....	Kshs. 64,400
b) 1 month's salary in lieu of notice.....	16,100
c) Salary for October 2017.....	16,100
d) House allowance for 13 months.....	<u>27,300</u>
<b>Total.....</b>	<b><u>123, 900</u></b>

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

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

24. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MALINDI THIS 11<sup>TH</sup> DAY OF FEBRUARY 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Nyasimi for the Claimant

No appearance for the Respondent