



**REPUBLIC OF KENYA**

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

**CAUSE NO.496 OF 2017**

**JAIRUS OCHIENG OJWANG .....CLAIMANT**

**VERSUS**

**BRIDGE INTERNATIONAL ACADEMIES LTD .....RESPONDENT**

**JUDGEMENT**

Background – the claimant filed his Memorandum of Claim on 18<sup>th</sup> December, 2017. There was no appearance, defence or attendance by the respondent and when the matter came up in court for hearing directions on 19<sup>th</sup> July, 2018 the respondent's representative attended and requested for time to file defence out of time. The court gave the respondent 21 days to file defence, statements and work records.

The respondent complied on 3<sup>rd</sup> September, 2018.

A hearing date was allocated by consent for 21<sup>st</sup> January, 2019. The respondent was absent and the claimant was heard on his case.

**Claim**

The claimant was on 1<sup>st</sup> November, 2012 employed by the respondent who operates a group of schools under the Bridge Internal Academies. The claimant was employed in the position of a Teacher and issued with a written contract until April, 2015. In May, 2015 the claimant was promoted as Academy Manager, Nakuru and earning Ksh.9, 103.00 per month and which was reviewed upon promotion to Ksh.12, 850.00.

The claim is that the claimant was underpaid by the respondent as a Teacher. There was no house allowance paid or housing provided.

The claimant worked diligently until 30<sup>th</sup> October, 2017 when he was issued with a letter terminating employment on allegations of stagnant academic growth which was a mere fabrication given the fact that he was not given notice or a hearing to state his defence over the allegations made and which were not true.

The claimant is seeking notice pay, underpayments and compensation for unfair termination of employment.

The claimant testified that as a registered Teacher he was employed by the respondent on contract with effect from 1<sup>st</sup> December, 2012. He was promoted to Academy Manager at Nakuru in April, 2015 and paid Ksh.12, 800.00 per month without any other benefits. On 30<sup>th</sup> July, 2017 he was issued with notice terminating employment on the grounds of alleged poor performance, stagnation of growth and failure to engage the staff, parents and the community. There were however no policy guidelines in this regard ad to help assess performance in this respect.

On 2<sup>nd</sup> November, 2017 the respondent called the claimant to explain the reasons leading to termination of employment but such decision had been taken without notice, hearing and the reasons given were not valid.

The claimant also testified that in the defence, the respondent alleges that he was involved in an infraction at work and had been issued with warnings but there is no evidence off such infractions and the alleged warnings were never issued to him. the warnings produced are not singed in acknowledgement and have been issued to damage his work record.

**Defence**

I response, the respondent has denied all the allegations made by the claimant and that the claimant was an employee as a teacher but not at the same level as a caretaker clerk. The claimant was later promoted to Academy Manager and teachers in the private practice are not covered by any Regulation of Wages or General Orders. The salary is negotiated and the alleged underpayments are not correct. The applicable scale is that f a general labourer as held in **Ignas Karingo Mghona & 4 others versus Star of Hope International Foundations**

**[2016] eKLR.**

The defence is also that the claimant was issued with several warnings while in the employment of the respondent mainly due to allowing pupils in class despite not paying the due school fees. Such pupils were also allowed to take examinations and failing to appreciate salaries and other school expenses were paid from the collection of such fees. Such actions caused the respondent huge revenue loss and despite these matters being brought to his attention there was no change.

On 30<sup>th</sup> March, 2017, 14<sup>th</sup> June, 2016, 21<sup>st</sup> July, 2<sup>nd</sup> and 10<sup>th</sup> October, 2017 the claimant was issued with written warnings. These warnings related to noncompliance with policy, poor record keeping, absence from duty without permission.

On 2<sup>nd</sup> November, 2017 a hearing was conducted where the claimant and the supervisor Lillian Momanyi, Paul Ndungu who was chairman parents association, a parent Gloria Calhoun and board secretary Githumbi Maina was allowed to give his defence. Following appraisal, a decision was taken to dismiss the claimant. His performance was found wanting and the resulting termination of employment was justified.

No evidence was called for the respondent. as noted above the respondent opted to be absent.

By letter dated 30<sup>th</sup> October, 2017 the claimant was terminated in his employment by the respondent on the grounds of poor performance. in the letter, the respondent stated as follows;

*... as discussed in the October 23 2017 announcement of the 2017 Academy manager performance review poor performances would result in termination of employment. Based on the poor results of your 2017 Academy manager performance Review ... we will be terminating your employment with Bridge International Academies Limited and end your contract as an Academy Manager. Please note you are expected to work until 30<sup>th</sup> October, 2017.*

Termination of employment on the grounds of poor performance is regulated under section 41 of the Employment Act, 2007 as follows;

*41.(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

The employer is required to explain to the employee the reasons of the poor performance before termination of employment. The employee must be given a hearing and be allowed to call another employee of his choice at the hearing. Such motions must be undertaken before employment can terminate.

Under paragraph 7(m) of the respondent's response to the claim, the averments that on 2<sup>nd</sup> November, 2017 the claimant was called for a hearing before the direct supervisor, chairperson of parents association and the representative of the board only occurred after termination of employment had taken effect on 30<sup>th</sup> October, 2017.

The provisions of section 41(1) of the Act are mandatory. The motions of the law are not mechanical to be taken so as to sanitise a decision taken retrogressively. To the contrary, hearing of the employee on the matters which may lead to termination of employment and comprising poor performance must be addressed with the employee before such action is taken to give the employee a fair chance to urge his defence.

**In Jane Samba Mkala versus Oltukai Lodge Limited Cause No.823 of 2010** the court held as follows;

*Where poor performance is shown to be reason for termination, the employer is placed at a high level of proof as outlined in section 8 of the Employment Act, 2007. The employer must show that in arriving at the decision of noting the poor performance of an employee, they had put in place an employment policy or practice on how to measure good performance as against poor performance.*

*It is imperative on the part of the employer to show what measures were in place to enable them assess the performance of each employee and further, what measures they have taken to address poor performance once the policy or evaluation system has been put in place, it will not suffice to just say that one has been terminated for poor performance as the effort leading to this decision must be established.*

*Beyond having such an evaluation measure, and before termination on the ground of poor performance, an employee must be called and explanation on their poor performance shared where they would in essence be allowed to defend themselves or given an opportunity to address their weaknesses. In the event a decision is made to terminate an employee on the reasons for poor performance, the employee must be called again and in the presence of an employee of their choice, the reasons for termination shared with the employee.*

In this case, where the claimant was found of poor performance, the respondent failed to adhere the mandatory provisions of section 41 of the Employment Act, 2007. Such resulted in an unfair termination of employment under the provisions of section 45 of the Act and compensation is due in accordance with section 49 of the Act.

In the letter terminating employment the respondent has offered to pay for notice pay. Such is lawfully due under section 35 of the Employment Act, 2007.

The claimant was employed as a Teacher and then Academy Manager and not clerk as he has set out in the assessment of underpayments. Indeed in the private sector schools there are no wage guidelines and the claimant was paid in accordance with the contract of employment and which under clause 16 provided for a consolidated wage.

Putting to above into account and noting the unfair termination of employment, compensation is hereby assessed at ten (months) gross pay all at Ksh.123, 800.00 based on the last wage paid at ksh.12, 380.00.

Notice pay is due where not paid at Ksh.12, 380.00.

**Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;**

**(a) Compensation Ksh.123,800.00;**

**(b) Notice pay Ksh.12,380.00;**

**(c) Certificate of Service be issued; and**

**(d) Costs of the suit.**

Delivered at Nakuru this 7<sup>th</sup> day of February, 2019.

**M. MBARU**

**JUDGE**

In the presence of: .....