



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 175 OF 2016

(Before Hon. Justice Mathews N. Nduma)

TOBIAS ADEMCLAIMANT

VERSUS

B.O.M KORU GIRLS' HIGH SCHOOL.....RESPONDENT

J U D G M E N T

1. The suit was filed vide a memorandum of Claim on 24th January 2016 seeking compensation for unlawful dismissal and terminal benefits to wit:

- (i) Three months' notice pay Kshs 45,000.
- (ii) Unpaid house allowance Kshs 120,000
- (iii) Salary underpayment at Kshs 129,100 and
- (iv) NSSF refund Kshs 10,440.

2. The facts of the claim are that the Claimant was employed by the respondent in the position of Biology/Chemistry teacher under the Board of Management from April 2014 earning a gross salary of Kshs 15,000 per month.

3. The Claimant was dismissed from employment by the Board on 9th May 2016 by a letter of the same date on grounds of negligence of duty by missing classes and making partial class attendance, skipping scheduled topics, failing to keep records of work and insubordination.

4. The Claimant was also reported to the police for threatening life of a fellow teacher, in charge of department records and immoral behavior with learners.

5. The Claimant denied these charges in his sworn testimony before court. The Claimant states that he responded to the show cause letter dated 24th March 2016 by a response dated 5th April 2016 stating that the allegations against him were vague and non-specific and he could not understand what wrong he had done. The Claimant states that he did not get any further communication from the respondent inviting him to a Board meeting.

6. The Claimant prays that the dismissal be declared unlawful and that he be paid the various terminal benefits set out in the Memorandum of Claim.

Response

7. The respondent filed a statement of defence on 8th July 2016 in which the claim is denied in its totality. The respondent states that the Claimant was employed on a two year fixed term contract renewable from April 2014 at a rate of remuneration set by the Teachers Service Commission for contract teachers.

8. The respondent called RW1 Emelda Oyumbe, the principal of the respondent school. RW1 testified that the respondent was a very difficult person to work with and, had many issues with both students he taught and his colleagues at work.

9. That the Claimant was charged with various offences set out in the Show Cause letter dated 24th March 2016. That the response by the

respondent was not satisfactory and he was summoned to appear at a disciplinary hearing before the board on 13th April 2016 but the Claimant failed to attend the meeting.

10. The Board deliberated the matter in the absence of the Claimant and found him guilty as charged and the Claimant was summarily dismissed from employment by a letter dated 9th May 2016.

11. RW1 testified that the dismissal of the claimant was for a valid reason and a fair procedure was followed in dismissing him from work.

12. RW1 testified that the Claimant is not owed any terminal benefits claimed or at all and puts the Claimant to strict proof thereof.

13. The respondent prays that the suit be dismissed with costs.

Determination

14. The issues for determination are:

(i) Whether the Claimant was dismissed for a valid reason and in terms of a fair procedure.

(ii) Whether the Claimant is entitled to the reliefs sought.

15. The court has carefully analyzed the testimony by the Claimant vis a vis that by the respondent and has come to the conclusion that the claimant has failed to prove his case on a balance of probabilities. The claimant was charged with various disciplinary charges set out in the notice to show cause.

16. The response by the Claimant to the notice to show cause dated 5th April 2016 did not answer satisfactorily the specific charges made against him. Furthermore, the claimant failed to attend the disciplinary hearing scheduled for 13th April 2016 to explain himself on the various charges levelled against him.

17. In terms of *Section 107 and 108 of the evidence Act as read with Section 47(5) of the Employment Act 2007*, the claimant bears the burden of proof to demonstrate that the dismissal was wrongful. The respondent then bears the onus of rebutting the evidence tendered by the Claimant to demonstrate that it had a valid reason in terms of *Sections 43, 45 and 47(5) of the Employment Act* to dismiss the Claimant from employment.

18. The Claimant has failed to discharge the burden of proof place on him on a balance of probabilities. To the contrary, RW1 demonstrated that there were valid reasons to dismiss the Claimant from employment. Furthermore, the respondent provided the Claimant opportunity to explain himself but the claimant failed in that respect.

19. The court finds the dismissal of the claimant from employment was lawful and fair.

20. Accordingly, the Claimant is not entitled to compensation and payment in lieu of notice.

21. With regard to the claim for underpayments and house allowance, the respondent produced the letter of appointment of the Claimant by the Respondent dated 6th September 2010, in which the terms of employment are clearly stated to be a salary of Kshs 15,000 per month. The contract was for a period of three (3) years with the option of renewal. The contract is silent on the qualification and category of the Claimant within the meaning of the Teachers Service commission (Remuneration of Teachers) Order 1997(as amended). However, the claimant became a graduate in the year 2015 with TSC NO. 687492.

22. The Claimant had the burden of proving on a balance of probabilities that he was underpaid and was entitled to payment of house allowance over and above the salary of Kshs 15,000 per month. Again the Claimant did not discharge the onus. The claims for underpayment and house allowance lack merit and are dismissed.

23. The only claim that has merit is one for refund of NSSF dues deducted and not remitted for a period of 12 months in the sum of Kshs 10,440.

24. Accordingly, the entire suit is dismissed except an award of Kshs 10,440 in respect of unpaid NSSF contributions. The Claimant is entitled to half ($\frac{1}{2}$) the costs of the suit.

25. The sum of Kshs 10,440 is payable with interest at court rates from date of filing suit till payment in full.

Judgment Dated, Signed and delivered this 7th day of February, 2019

Mathews N. Nduma

Judge

Appearances

P.D Onyango for Claimant

Siganga for Respondent

Chrispo – Court Clerk