



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**  
**CAUSE NO. 127 OF 2016**

*(Before Hon. Lady Justice Maureen Onyango)*

**VINCENT NDEGWA SHIVONJE.....CLAIMANT**

*VERSUS*

**LITTLE LAMBS COMPANY LIMITED**

**(LITTLE LAMBS CHIDDEN CENTRE).....RESPONDENT**

**JUDGMENT**

Vide his memorandum of claim filed on 19<sup>th</sup> May 2016 the claimant avers that he was employed as a teacher by the respondent, a private school in Eldoret, on fixed term contract on 1<sup>st</sup> September 2008 at a salary of Kshs.10,000. The salary was increased to Kshs.12,000 in 2009, Kshs.12,900 in 2010 and Kshs.18,000 in 2011. The salary was further increased to Kshs.20,000 in 2012, Kshs.26,000 on 1<sup>st</sup> November 2014 and Kshs.82,935 in 2015.

The claimant’s last fixed term contract was for 3 years from 1<sup>st</sup> November 2014 and was to expire on 31<sup>st</sup> September 2017. He avers that he served with loyalty, diligence and full dedication and commitment. The claimant avers that in breach of the contract, his contract of employment was terminated by the respondent on 1<sup>st</sup> December 2015.

The claimant avers that the termination of his employment was based on unsubstantiated allegations of dishonesty, possession of undisclosed property and gross misconduct, particulars whereof were not disclosed. He avers that the termination was unlawful, unfair and unprocedural and the respondent refused to pay his terminal benefits. He prays for the following remedies –

a)... A declaration that the claimant was unlawfully, unprocedural from employment;

b)... The sum of Kshs.2,417,319.07/- as set out herein below –

1... One month pay in lieu of notices

(Basic Salary + House allowance)..... Kshs.32,935

2... 12 months’ gross pay as compensation for unfair termination of employment. The claimant served the respondent for 7 continuous years.

Kshs.32,935 x 12 months..... Kshs.395,220

3... Breach of contract of Employment

Renewed on 1/11/2014 for a period of 3 years the same was to end 31<sup>st</sup> September 2017.

Terminated on 1/12/2015 leaving a balance of 19 months

Gross Pay x 19 months

32,935/- x 19 months..... Kshs.625.765

4... Leave dues:- one month salary

5... Leave dues for the year 2015..... Kshs.32,935

6... Leave due dues for the year:

2008 = Kshs.10,000

2009 = Kshs.12,000

2010 = Kshs.12.900

2011 = Kshs. 18,000

2012 to 2013 = Kshs.40,000..... Kshs.92,900

7... Unpaid overtime.

The claimant worked from 7 am to 8 pm, 6 days per week.

The overtime dues per day is one 4 hours, multiply by the number of days worked.

24 hours per week x 4 weeks = 96 hours per month.

i).. For the year 2008

Hourly rate is 41.66/- (calculations based on 30 days a month)

41.66 x 96 x 1.5 (1½ rates for overtime) x 12 months Kshs.71.988.48

ii). For the year 2009

Hourly rate is 50/- (calculations based on 30 days a month)

50 x 96 x 1.5 (1½ rates for overtime) x 12 months. Kshs.86,400

iii) For the year 2010

Hourly rate is 53.75/- (calculations based on 30 days a month)

53.75 x 96 x 1.5 (1½ rates for overtime) x 12 months Kshs.92,880

iv) For the year 2011

Hourly rate is 75/- (calculations based on 30 days a month)

75 x 96 x 1.5 (1½ rates for overtime) x 12 months Kshs.129,600

v). For the year 2012 to the year 2013

Hourly rate is 83.33/- (calculations based on 30 days a month)

83.33 x 96 x 1.5 (1½ rates for overtime) x 24 months Kshs.287.988.48

vi) For the year 2014 to 1/12/2015

Hourly rate is 137.23/- (calculations based on 30 days a month)

137.23 x 96 x 1.5 ((1½ rates for overtime) x 23 months Kshs.454,505.70

8... Terminal benefits (Service pay). Calculations based on internal memo dated 30 March 2015.

i).. Benefits for the year, 2008

7% of the annual salary x (10,000 x 12 months)..... Kshs.8,400

100

ii). Benefits for the year, 2009

7% of the annual salary x (12,000 x 12 months).... Kshs.10,020

100

iii) Benefits for the year, 2010.

7% of the annual salary x (12,000 x 12 months).... Kshs.10,836

100

iv) Benefits for the year, 2011

7% of the annual salary x (18,000 x 12 months).... Kshs.15,120

100

v). Benefits for the year, 2012 and 2013.

7% of the annual salary x (12,000 x 12 months).... Kshs.16,800

100

vi) Benefits for the year, 2014 and 2015

7% of the annual salary x (12,000 x 12)..... Kshs.53,025.35

100

**TOTAL KSHS. 2,417,319.07**

- c) Cost of this suit and Interests at court rates from time of filing the suit until payment in full;
- d) A certificate of service as per section 51 of the Employment Act and
- e) Any other further and better relief the court may deem just and fit to grant.

On 18<sup>th</sup> July 2016, the respondent filed an Answer to Claim in which it admits employing the claimant but denies that the termination of his contract of employment was unfair. The respondent prays that the claim be dismissed with costs.

At the hearing the claimant testified on his behalf. The respondent called one witness, DOLLY ANJILI, the CEO who testified on its behalf. The parties thereafter filed and exchanged written submissions.

#### **Claimant's Case**

The claimant testified that he was employed by the respondent as a teacher from 1<sup>st</sup> September 2008. His last salary was Kshs.32,935 as confirmed by his payslip. He was summarily dismissed on allegations of dishonesty, unauthorised possession of school property and insubordination. That prior to being dismissed he was not given particulars of the charges against him or a letter of notice to show cause. He further testified that he was not invited to a disciplinary hearing or given an opportunity to be heard.

The claimant testified that he did not commit any of the offences cited in the letter of dismissal. He further testified that he did not attend the disciplinary hearing and was not issued with a copy of the investigation report.

The claimant testified that he was given compulsory leave on 30<sup>th</sup> October 2015 on allegations that he was found with the school projector, which he was taking out of the school.

He prayed for compensation for breach of contract, leave from 2008 to 2015, overtime and other prayers as claimed.

During cross-examination, the claimant stated that he joined Teachers Service Commission (TSC) in October 2015 during the period he was undergoing disciplinary process by the respondent. He stated that had he not been dismissed he would have terminated his employment with the respondent as he had given notice to the respondent.

### **Respondent's Case**

RW1, DOLLY ANJILI, the Chief Executive Officer of the respondent, testified that the claimant was an employee of the respondent from 1<sup>st</sup> September 2008 to 1<sup>st</sup> December 2015 when he was summarily dismissed. The reason for dismissal was that on 24<sup>th</sup> October 2015 the claimant was found with the school projector. When he was called, he first denied but when threatened that the askari on duty would be called he admitted and asked for forgiveness.

She testified that the school did not forgive the claimant but instead sent him on compulsory leave.

That on the eve of KCPE the claimant gained entry into the school and started talking to the pupils, a matter that cause a lot of tension and concern.

Ms Anjili testified that the claimant was called for a disciplinary hearing, that at the hearing the charges were read to him. She testified that the claimant was not paid notice because he was summarily dismissed. She testified that the dismissal was fair as the respondent was not in breach of any contract. She testified that the claimant used to go on leave as soon as school was closed, although the school did not introduce leave forms until 2014. She testified that all staff went on leave as soon as the school closed. That she had produced the school register in court to enable the court confirm that no one signed the register when schools were closed as all staff were on leave.

On the claimant's prayer of overtime, she testified that there was no agreement to pay the claimant the same. That his workload was reduced from 28 to 10 lessons a week and he taught another 8 lessons outside working hours of 8 am to 4 pm for which he was paid an allowance of Kshs.1,200 a week. If there was a lesson on Sunday the claimant was paid Shs.1,340 a week.

On terminal benefits RW1 testified that the claimant was entitled to 6% per month while 7% was interest which would have been paid had he not been dismissed as the same was not payable to an employee who had been summarily dismissed.

She testified that the claimant joined TSC on 27<sup>th</sup> October 2015 before the disciplinary process but did not alert the respondent, that he is therefore not entitled to the claim for the 19 months unexpired period of his contract.

Under cross examination Ms. Anjili stated the claimant had a warning letter. She testified that he was not issued with a notice to show cause but was issued with an invitation letter for the disciplinary hearing on 19<sup>th</sup> November 2015 which the claimant was not asked to sign. She testified that the claimant appeared before the disciplinary committee on 20<sup>th</sup> November 2015.

She testified that prior to the disciplinary hearing the respondent carried out investigations but the report was not issued to the claimant.

### **Determination**

Having considered the pleadings together with the documents filed therewith, the evidence adduced by the witnesses and the submissions, the issues arising for determination are whether the summary dismissal of the claimant was justified, whether he was subjected to a fair procedure and if he is entitled to the remedies sought.

### **Whether summary dismissal of the claimant was justified**

The claimant's letter of summary dismissal gives the reason for summary dismissal as –

1. *"Dishonesty*
2. *Unauthorized removal of school property.*
3. *unauthorized possession of school property.*
4. *Gross misconduct/negligence.*
5. *Gross subordination or blatant disrespect to management"*

The letter of compulsory leave states as follows –

*30<sup>th</sup> October 2015*

*Mr. Vincent Ndegwa Shivonje*

*P.O. Box 6305*

Eldoret

**“via Hand Delivery”**

Dear Mr. Vincent Ndegwa Shivonje

RE: COMPULSORY LEAVE

*It has been reported to me that on or about the weekend of 24<sup>th</sup> October 2015, you were found with our school projector which you were taking out of the school without authorization.*

*You are aware that such actions are unacceptable and therefore you are expected to take compulsory leave for two weeks effective today 30<sup>th</sup> October 2015 to pave way for investigations.*

*You will be expected to say away from school exercises during this time and report to the Director at the expiry of the said period.*

Yours Faithfully

SIGNED

Dolly Anjili

Director”

In the minutes of the disciplinary hearing of 20<sup>th</sup> November 2015, it is stated that–

**“Mr Shivonje's case**

*Mr Shivonje had been summoned to appear before the Committee following his entry into the school (Wareng) on the night of 10<sup>th</sup> November 2015 at 8.45 p.m. while being on compulsory leave for yet another offence of having been found in possession of and removing a school projector from the Premises without lawful authority. The Committee was therefore considering the two cases against him.”*

During the disciplinary hearing the charges read to the claimant were –

*“Mr. Shivonje came in and the charges were read out to him as follows:*

- 1) Being in possession and removing the school projector from school as contained in the memo dated 26<sup>th</sup> October 2015 from the Director-Wareng.*
- 2) On 10<sup>th</sup> November, he entered the school compound while he was on compulsory leave for Count No. 1 when he knew very well he was not allowed on school premises until his case had been heard and determined.”*

The claimant’s response to the charges according the minutes of the disciplinary hearing was as follows –

- 1. “He had been called by Mr Otenyo on phone, to give driver Wachira a text book. He decided to take the opportunity to go and wish his pupils success in the KCPE exam.*
- 2. He said that Mr Onyiego and Mr Mokamba had given him permission to see his pupils, and that he only took 2 minutes with them.”*

The claimant’s responses are confirmed by the statements of Mr. Otenyo and Mr. Mokamba as recorded in the minutes of the disciplinary hearing.

The conclusions and recommendations of the Disciplinary Committee are as follows –

**“Deliberations**

*The Committee then deliberated upon these submissions and found that:*

**Mr Shivonje:**

- 1) Did not consistently follow instructions of Management in terms of lesson attendance and personal conduct as laid down in his contract. This led to him being demoted.*

2) He blatantly contravened policy by coming to school at night while he was on compulsory leave and not allowed into the school premises.

Committees Recommendations:

The Committee considered the foregoing and Mr Shivonje's admission that he –

- 1) Was in possession of school property and was taking it out of school without authority and
- 2) Entered school premises while on compulsory leave and knowing very well he was not allowed to and he went further to engage a candidate class

The Committee was not satisfied with his explanation and therefore **RESOLVED** that he be **SUMMARILY DISMISSED** from the services of the school with immediate effect for the following reasons which are contrary to the school policy:

- 1) Dishonesty
- 2) Unauthorized removal/possession of school property
- 3) Gross misconduct/negligence
- 4) Gross insubordination and blatant disrespect to Management.”

It is clear from the foregoing that there was a disconnect between the reasons for the claimant's compulsory leave, the deliberations at the disciplinary hearing and the reasons for the summary dismissal. All the grounds in the summary dismissal were not either brought to the attention of the claimant to enable him respond to the same, or proved by the evidence adduced during the disciplinary hearing.

Further, there is no evidence that the claimant was in the letter inviting him to the disciplinary hearing, informed of the charges against him. According to RW1, the invitation was given to the claimant on 19<sup>th</sup> for hearing of 20<sup>th</sup> November 2015, clearly not sufficient time to adequately prepare for the hearing. No mention was made by either the claimant or respondent whether the claimant was made aware of his right to be accompanied to the disciplinary hearing by a colleague of his choice. I however find that the claimant was present at the disciplinary hearing although in his evidence he denied the same the grounds that his name was not on the attendance list in the minutes.

For the foregoing reasons, I find that there was no valid reason for summary dismissal of the claimant as required by Section 43 of the Employment Act, nor did the respondent fully comply with fair procedure in Section 41. The disciplinary process was thus not compliant with statutory provisions of the Employment Act. The summary dismissal was therefore unfair in terms of Section 45(2) of the Employment Act, which provides that–

**(2) A termination of employment by an employer is unfair if the employer fails to prove—**

**(a) that the reason for the termination is valid;**

**(b) that the reason for the termination is a fair reason—**

**(i) related to the employee's conduct, capacity or compatibility; or**

**(ii) based on the operational requirements of the employer; and**

**(c) that the employment was terminated in accordance with fair procedure.**

I therefore declare the summary dismissal unfair both substantively and procedurally.

**Remedies**

The claimant having been unfairly dismissed is entitled to pay in lieu of notice in terms of Section 49(1) of the Employment Act and Clause 3(a) of his contract. I award him Kshs.32,935 being one month's salary in lieu of notice.

He is further entitled to compensation which I award him at 7 months' salary, taking into account the manner in which he left employment, the length of service and all other relevant circumstances as set out in Section 49(4) of the Employment Act.

The claimant is not entitled to payment for the unexpired period of his contract as this is covered by the compensation for unfair termination.

On the prayer for leave, it is not clear from the Work Attendance Register produced in court that teachers took leave during school holidays. This is not a matter that can be treated as a presumption. The respondent is under a duty under Section 10 and 74 of the Act to keep and produce all employment records among them leave entitlement, number of days taken and number of days an employee is entitled at any time during or at the time of termination of employment. Section 10(7) is explicit that where an employer fails to keep such records or to

produce the same in any legal proceedings it will be the burden of the employer to disprove the averments of the employee. On this basis, I find that the respondent has failed to prove that the claimant was given or took annual leave during his employment and award him 154 leave days being 1.75 days per month worked. Based on claimant's basic pay of Kshs.28,533, this works out to Kshs.169,015.

On the prayer for overtime, I am satisfied with the respondent's explanation that the claimant was given less lessons so that he could have sufficient time to teach the extra lessons for which he was paid an allowance as reflected in his payslip. The prayer for overtime is thus rejected. The prayer for service pay also fails as the claimant was a member of both NSSF and the respondent's Pension Fund held with Madison Insurance.

### **Conclusion**

In conclusion, I declare the summary dismissal of the claimant by the respondent unfair and award him the following –

1. Pay in lieu of notice    Kshs.32,935
2. Compensation            Kshs.230,545
3. Annual leave             Kshs.169,015

**Total            Kshs.432,495**

4. The respondent shall pay claimants' costs of this suit.
5. The decretal sum shall attract interest at court rates from date of judgment.

**DATED AND SIGNED AT NAIROBI ON THIS 29<sup>TH</sup> DAY OF APRIL 2019**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 20<sup>TH</sup> DAY OF MAY 2019**

**MATHEWS NDERI NDUMA**

**JUDGE**