



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1377 OF 2012**

***(Before Hon. Lady Justice Maureen Onyango)***

**JOHNSON MAKAU MUTUA.....CLAIMANT**

**VERSUS**

**ARYA SAMAJ EDUCATION BOARD...RESPONDENT**

**JUDGMENT**

The Claimant, Johnson Makau Mutua filed a Memorandum of Claim dated 13<sup>th</sup> August 2012 alleging wrongful and/or unfair dismissal by the Respondent, Arya Samaj Education Board. He avers that the Respondent employed him on 2<sup>nd</sup> October 1998 as a Cleaner/Messenger with a gross salary of Kshs. 2,690/= which was increased to Kshs.3,000/= on 18<sup>th</sup> December 1998 vide an internal Memo dated the same day. That he was appointed by the Respondent as an Accounts Clerk vide a letter dated 22<sup>nd</sup> September 2003 with a salary of Kshs.11,100/= and that he worked for the Respondent diligently and loyally for more than 12½ years during which time he received many commendations and promotions for his good work. That on 24<sup>th</sup> February 2011, the Respondent without lawful excuse and without notice terminated his services. At the time he was earning Kshs.25,400/=. He avers that the respondent did not pay him his terminal dues.

That despite demand and notice of intention to sue, the Respondent has failed, refused and/or neglected to respond hence this Claim. The Claimant prays that:

1. The Court do declare that the purported termination of the Claimant's employment vide the termination letter dated 24<sup>th</sup> February 2011 was arbitrary, without any basis, unlawful, null and void ab initio.
2. 3 months' salary in lieu of notice Kshs.76,200
- Service Pay (25,400 x 12 months) Kshs.304,800
- Unpaid Annual Leave Pay (25,400 x 12.5) Kshs.317,500
- Total Kshs.698,500
3. General damages for breach of contract, violation of Claimant's Constitutional rights, and/or wrongful/unfair dismissal.
4. Costs of this claim.
5. Interest on 2, 3 and 4 above.
6. Any other and further relief this Court may deem fit and just to grant.

The Respondent filed a Statement of Response dated 2<sup>nd</sup> October 2013 admitting it employed the Claimant. It avers that the claimant's letter of appointment provided for, amongst other terms the timings for reporting to work, the procedure for termination of services and the people the Claimant would take orders from. That during the period of employment, the Claimant breached all these contractual terms despite several verbal and written warnings annexed as demonstrated by the warning letters at annexure **ASEB 1**. That annexures **ASEB 2**, **ASEB 3** and **ASEB 4** prove how he breached his contract. That it lawfully terminated the claimant's employment by giving him a month's notice in writing after his attitude towards his work started changing, deteriorating from bad to worse. That the claimant would occasionally request

for leave and off days from school on short notice. That the constant absenteeism from work started affecting his general output and that the Respondent had exercised extreme patience with the claimant and never at any time violated his rights.

That during the Claimant's tenure as the Accountant, the School received several complaints from parents and students that they were paying school fees in cash to him but were not being issued with receipts. That these payments did not reflect in the books or statement of accounts nor were there banking slips for the same. The respondent avers that it received correspondence from the Ministry of Labour and Human Resource Development seeking reasons as to why the Claimant's services had been terminated and it replied citing gross financial misconduct (page 133 of respondent's bundle). That it wrote to its bankers requesting for confirmation on various transactions and also wrote to the Claimant asking him to account for the irregularities. The Respondent avers that despite the Claimant's actions, it is willing to issue him with a Certificate of Service and good conduct. It prays that the Statement of Claim be dismissed with costs.

## Evidence

CW1, the Claimant testified in court and produced a copy of his payslip referring (the Claimant's Document 6). That the letter of termination stated the reason for his termination as restructuring and that he prays for judgment as prayed. On cross-examination, he stated that his working hours were from 7.45 am to 12.45 pm and from 1.30 pm to 4.30 pm, Monday to Saturday. That he never took leave while in employment, that he had on occasion requested for off days which he was given but the office requested him to forfeit his leave. He testified that he was on occasion given permission to proceed for annual leave and referred to the Respondent's bundle at pages 90, 91 and 92, which show he went on leave in 1999, 2001 and 2002. That he did not go on leave for other years. That his job entailed taking bank slips but he did not receive cash for school fees. He conceded that he did not respond to several letters written to him on account of missing school fees. He stated that he was not paid one month's notice and that he worked in the month of February 2011 up to 24<sup>th</sup> February 2011 before proceeding on leave. He confirmed to the court that his last salary was for February 2011, which was paid in full.

For the respondent, RW1 KAMAL BUSHAN the Chairman of Arya Samaj Nairobi, testified that the claimant was absent may times. He made reference to *pages 77-126 of the Respondent's bundle*. He also referred to *page 11* which is a schedule showing the Claimant was late by almost one hour every day during the month of January 2010. That on 14<sup>th</sup> October 2011, there was a lot of missing school fees from the cash the Claimant was handling. That the procedure was to issue receipts and deposit the money in I & M Bank. That they enquired from the bank for details of receipts and amounts from 3<sup>rd</sup> May 2010 until 30<sup>th</sup> September 2010 when they discovered that a total amount of Kshs.869,490/= was never deposited although receipts for payment of fees were issued (page 128 of Respondent's bundle). That the Claimant was given one month's notice and which he acknowledged with his signature as shown at page 21 of *Respondent's bundle*, that the claimant was given annual leave every year like all employees. On cross-examination, he stated that the letter dated 24<sup>th</sup> February 2011 was to take effect on 1<sup>st</sup> March 2011 when the notice would start and end on 31<sup>st</sup> March 2011, that the reason for terminating the Claimant's employment was due to lateness in reporting to work. He confirmed that he did not have the letter written to the Claimant about the loss of Kshs.869,000/=. In re-examination he referred to *page 21 of Response* which shows that the Claimant was sent on terminal leave during the notice period.

## Claimant's Submissions

The Claimant submits that failure by the Respondent to adopt its bundle of documents or produce the same or mark them as exhibits is a fatal error that goes to the root of the Respondent's case and that this being a court of records, the same should not be referred to as they are of no probative value. That while the Respondent has imputed on him financial impropriety, no criminal charges have ever been preferred against him, that no OB was produced, that no complaint was made to the police against him for the same and that it remains an allegation not backed by evidence.

That he did not cause the Respondent's restructuring and thus ought not to have been terminated and that the terms of employment the Respondent alleges in its Response that he breached were not captured in his termination letter. That the said reasons are therefore an afterthought. That Section 119 of the Evidence Act embodies the doctrine of spoliation or suppression of evidence which doctrine provides that it is the duty of the party to lead the best evidence in their possession which could throw light in the issue in controversy; that where such material is withheld, the court may draw adverse inference (as per Woodroffe's Law of Evidence, 9<sup>th</sup> Edition at page 811-816). That he was therefore unlawfully terminated and this Court should declare so.

He submits that under Article 47 of the Constitution of Kenya, he was entitled to the right to an administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair. That he therefore ought to have been given: prior and adequate notice; an opportunity to be heard and make representations; notice of a right to a review or internally appeal against the decision; a statement of reasons; notice of the right to legal representation; information and materials to be relied upon by the Respondent in making its decision; a chance to cross-examine persons giving adverse evidence against him; an opportunity to request for an adjournment of the proceedings where necessary so as to ensure a fair hearing. That the Respondent failed to adhere to all these and further to Article 41 of the Constitution which embodies the right to fair labour practices. He prays for an award of Kshs.5 Million for the violation of his constitutional rights. He relies on John Wairimu Mathenge (Petitioning on behalf of the Estate of Adam Mathenge Wangombe) –v- Attorney General [2017] eKLR where the claimant was awarded Kshs.5 million for violation of his right to inter alia fair hearing.

He submits that he was given a 5 days' notice as opposed to the one month's notice envisioned in his employment contract and that he was never issued with a show cause letter outlining the allegations he was to respond to. That the Respondent did not meet the minimum statutory requirements envisaged by Section 41 of the Employment Act and that the Respondent therefore failed to be substantively and procedurally fair. That under Sections 43 and 45 of the Act, the employer ought to prove the reasons for terminating employment of an employee, which reasons should be valid and fair. That the Respondent failed to discharge this burden of proof in evidence. He opines that 12 months' gross salary being (Kshs.25,400 x 12) = Kshs.304,800/= would be appropriate as compensation for his wrongful/unfair dismissal. Further, that since costs follow events, he prays for costs and interests thereon, that he has made out a case for the reliefs he seeks.

## Respondent's Submissions

The Respondent submits that as far as it is concerned, it produced its documents as evidence in court and if not, the Court should exercise its discretion as per Articles 159, 162, 165 of the Constitution and Section 12 of the Employment and Labour Relations Court Act since it heavily relied on the said documentation in its case.

It submits that so that an employee is not victimised for mild eccentricities, courts have required the employer to show that the employee's conduct has resulted in irreparable breakdown of the relationship. That the court in *Wright -v- St. Mary's Hospital* 1992 [ILJ] 987 ICJ described incompatibility as "the inability on the part of the employee to work harmoniously with fellow workers or managers, or failure by the employee to fit with the corporate culture." It continues to submit that the rules of natural justice do not apply in simple contracts of employment unless the parties themselves provide for their application in the contract and that so long as an employee is given notice or paid salary in lieu of notice in accordance with the contract of employment the termination would be valid. That under Section 44(1) of the Employment Act, an employer can terminate the employment of an employee without notice or with less notice than that which the employee is entitled to and that the employee can be summarily dismissed when he fundamentally breaches his obligations under his contract by conduct. Further, that Section 50 of the Act also requires the ELRC to consider similar factors such as the circumstances in which the termination took place including how the employee contributed to it. It relies on the case of *Linus Barasa Odhiambo -v- Wells Fargo Limited* (2012) eKLR on the matter of summary dismissal under Section 44 of the Act.

The Respondent submits that it informed the Claimant of his actions through a letter dated 23<sup>rd</sup> March 2011 at page 135 of its bundle. That it also explained to the labour officer that it had fully paid the Claimant's dues. It relies on Cause No. 837 of 2011: *Miriam Siwa -v- Postbank Limited* [2014] eKLR where the court held that the claimant failed to exercise her supervisory role properly resulting in huge financial loss occasioned to the employer and that the employer was justified in holding her accountable.

It submits that since the Claimant did not provide any evidence showing he was entitled to 3 months' notice pay which was not the case as per his contract of employment, he is not entitled to the same. That service pay is only payable under Section 35(5) of the Employment Act to employees not covered under the different social security mechanisms elaborated under Section 35(6) and since the Claimant was a member of NSSF with deductions being remitted by the Respondent, he is not entitled to the same. That according to the documents in its annexure ASEB6, it has demonstrated that the Claimant used to go on annual leave and that the express provision of the law is that compensation which falls under Section 49(1)(c) of the Employment Act is subject to statutory deductions. On this, it cites the cases of *Louise W. Muiruri -v- Paramount Universal Bank Limited* [2016] eKLR and *Republic Deputy Commissioner for Labour & 2 Others Ex-Parte Kevin Ashley & 2 Others* [2016] eKLR. That the Claimant has neither stated which constitutional rights were violated and how they were violated as was provided in the case of *Anerita Karimi Njeru -v- Republic* (No. 1) (1979) KLR 154. That this court should thus not entertain such requests. That the Claimant has not proved his case and his Claim should be dismissed with costs.

#### Determination

The issues for determination are the following –

- (i.) Whether the claimant's bundle of documents are properly on record
- (ii.) whether the Claimant was wrongfully/unfairly terminated from his employment by the Respondent and
- (iii.) whether the Claimant is entitled to the reliefs sought.

Rule 14 of the Employment and Labour Relations Court Act provides for filing of documents with pleadings and there is no requirement to again produce the documents during the hearing once they are on record. The claimant's bundle is therefore properly on record.

Section 47(5) of the Employment Act provides that the burden of proving unfair termination rests upon the employee while the burden of justifying the grounds for the termination of employment rests with the employer. The Respondent has pleaded that its reasons for terminating the Claimant include perennial lateness and absenteeism. However, in the termination letter served on him, the respondent simply stated that it was undertaking restructuring, that resulted in the said termination. Although the several warning letters and even explanations given by the Claimant would suffice to prove of valid ground for termination, the same was not communicated to him in the termination letter dated 24<sup>th</sup> February 2011 annexed as ASEB5 in the Respondent's response.

It is clear that the Respondent did not adhere to due process under Section 41 of the Employment Act as it did not accord the Claimant any disciplinary hearing or give him adequate notice before terminating his services. The Respondent has tried to persuade the court in its submissions that it summarily dismissed the Claimant under Section 44 of the Employment Act. This contradicts the testimony by RW1 in court that the termination letter which also served as notice was to run from 1<sup>st</sup> March 2011 to 31<sup>st</sup> March 2011. In *AMM -V- Spin Knit Limited* [2013] eKLR the Court in upholding the Claimant's claim held that the Respondent had decided not to follow the clear provisions of Section 41 of the Employment Act by not according the Claimant a hearing hence the termination was unfair for want of due process.

In the instant suit, the respondent had valid reason to terminate the employment of the claimant. It however did so without regard to the procedural requirements under Section 41 of the Employment Act.

The evidence of RW1 was at variance with the letter of termination which gave the reason or termination as restructuring. It is therefore evident that although the claimant's employment was terminated on grounds of misconduct, the respondent camouflaged it as a restructuring, but without compliance with Section 40 of the Employment Act, which would be the proper procedure.

For the foregoing reasons, I find and declare the termination of the claimant's employment procedurally unfair.

#### Remedies

The claimant prayed for 3 months' salary in lieu of notice. His letter of appointment provided for only one month's notice which was given to him in the letter of termination. He is thus not entitled to the same. I have however noted that there is no proof that the claimant was paid March salary while he was serving which I therefore award him Kshs.25,400 being March 2011 salary.

He further prayed for service pay. His payslip at appendix "JMM4" of the claim shows he was a member of NSSF. He is thus not entitled to service pay under Section 35(5) as read with 35(6) of the Employment Act.

The claimant further prayed for unpaid annual leave calculated as  $(25,400 \times 12.5)$  Kshs.317,500. The claimant did not explain how he arrived at the calculation. Further, from the respondent's bundle of documents, it is evident that the claimant took leave and many off days. I therefore find that the claimant has not proved that he is entitled to any leave.

The claimant prayed for damages for breach of his contract. Having been unfairly terminated, he is entitled to compensation. I have however taken into account the fact that the respondent had valid reasons for termination and only the procedure in Section 41 of the Employment Act was not complied with. I have further considered his long service of 12 years. It is my opinion that 10 months' salary as compensation is reasonable in the circumstances. I thus award him Kshs.254,000. The claimant has not proved that he is entitled to general damages in addition to compensation as he did not prove violation of any of his constitutional rights.

In conclusion, the claimant is awarded –

1. Salary for March 2011 – Kshs.25,400
2. 10 months' compensation – Kshs.254,000

**Total Kshs. 279,400**

The respondent shall pay claimant's costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21<sup>ST</sup> DAY OF JUNE 2019**

**MAUREEN ONYANGO**

**JUDGE**