



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MOMBASA**

**CAUSE NO 755 OF 2016**

**EFFIE ACHIENG OWINO.....CLAIMANT**

**VS**

**SYLVESTER AMONDO T/A GIBBS ACADEMY.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. Effie Achieng Owino, the Claimant in this case, was an employee of Sylvester Amondo, trading in the name of Gibbs Academy. Owino brought this claim by way of Memorandum of Claim dated 6<sup>th</sup> October 2016, seeking compensation for unlawful termination of employment and payment of accrued dues.
2. Amondo filed a Statement of Response and Counterclaim on 28<sup>th</sup> October 2016 to which the Claimant responded on 3<sup>rd</sup> March 2017.
3. The matter proceeded to full trial with the parties testifying on their own behalf. The Respondent also called Judy Ochieng, a Teacher at Bamburi Royal Academy. The parties further filed written submissions.

**The Claimant’s Case**

4. The Claimant states that she was employed by the Respondent as a Teacher at a monthly salary of Kshs. 9,000, effective 6<sup>th</sup> January 2009. She worked as such until August 2016 when her employment was terminated.
5. The Claimant’s case is that the termination of her employment was unlawful and unfair as no proper reason was assigned and she was not afforded an opportunity to be heard. Further, the Claimant was not paid her terminal dues.
6. The Claimant claims the following from the Respondent:

- a. Notice pay.....Kshs. 9,000.00
- b. Underpayments.....448,086.60
- c. 12 months’ salary in compensation.....108,000.00
- d. Costs plus interest

**The Respondent’s Case**

7. In his Statement of Response and Counterclaim dated 25<sup>th</sup> October 2016 and filed in court on 28<sup>th</sup> October 2016, the Respondent admits having employed the Claimant as a Teacher but denies that he unlawfully and unfairly terminated her employment.
8. The Respondent accuses the Claimant of leaving employment without giving 3 months’ notice as provided under the contract of service. The Respondent therefore counterclaims against the Claimant the sum of Kshs. 27,000 being 3 months’ pay in lieu of notice.

**Findings and Determination**

9. There are three (3) issues for determination in this case:

- a. Whether the Claimant has made out a case of unlawful termination;
- b. Whether the Respondent has proved a proper counterclaim against the Claimant;
- c. Whether the Claimant is entitled to the remedies sought.

#### **Unlawful Termination?**

10. In her testimony before the Court, the Claimant stated that sometime in the month of August 2016, the Respondent told her to leave the School premises and never to return as she had failed to follow instructions.

11. On his part, the Respondent testified that on 1<sup>st</sup> September 2016, the Head of Nursery Wing at Bamburi Academy, Caroline Masila requested for a meeting to discuss misbehaviour/lack of cooperation on the part of the Claimant.

12. A meeting was convened at which the Claimant admitted all the misdeeds levelled against her. The Respondent asked the Claimant to write an apology letter upon which she wrote one line on a piece of paper to the effect that she was sorry.

13. The Respondent insisted that the Claimant writes an official letter but the Claimant declined and instead asked to be issued with a termination letter. After this, the Claimant is said to have left never to return. The Respondent's testimony was corroborated by the testimony of Judy Ochieng.

14. Section 47(5) of the Employment Act, 2007 states as follows:

**(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.**

15. The burden of proof under Section 47(5) is on a balance probability. This does not however mean that the Court will take every word that proceeds from the mouths of the parties. What a party tells the Court must make sense and be believable.

16. The Claimant claims that her employment was unlawfully and unfairly terminated but in the same breath admits that she did not take up the Respondent's offer to go back to work as communicated in letter dated 7<sup>th</sup> September 2017 from the Respondent's Advocates.

17. An employee who rejects an offer to go back to work cannot complain of unlawful and unfair termination of employment.

18. For the foregoing reasons, the Court finds and holds that the Claimant has failed to establish a case of unlawful and unfair termination of employment. The claims for compensation and notice pay are therefore unsupported and are dismissed.

19. Regarding the claim for underpayment, which is in the nature of special damages, the only thing to say is that it was not specifically proved as required as no relevant benchmark was presented to the Court.

#### **The Respondent's Counterclaim**

20. By way of counterclaim, the Respondent claims from the Claimant the sum of Kshs. 27,000, being 3 months' salary in lieu of notice. This claim is premised on Clause 1 (i) of the Claimant's letter of appointment dated 6<sup>th</sup> January 2009. This Clause deals with termination by notice but there was no evidence to prove that this is the exit mode by which the Claimant left the Respondent's employment.

21. The Respondent's counterclaim against the Claimant was therefore unproved and is dismissed.

#### **Final Orders**

22. In the end, both the Claimant's claim and the Respondent's counterclaims fail and are dismissed.

23. Each party will bear their own costs.

24. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 24<sup>TH</sup> DAY OF OCTOBER 2019**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Okanga for the Claimant

Mr. Anangwe h/b Mr. Wachira for the Respondent