



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2630 OF 2016

MAURICE OMONDI ANGUKA.....CLAIMANT

v

LIGHT ACADEMY.....RESPONDENT

JUDGMENT

1. Maurice Omondi Anguka (Claimant) was employed by Light Academy (Respondent) in 2010 as a teacher on a fixed term contract. The last contract was dated 1 July 2014 and was to run for 3 years.
2. On 30 June 2015, the Respondent issued a *notice of termination of employment* to the Claimant. The notice informed the Claimant that his last day of service would be 1 September 2015.
3. The Claimant was aggrieved and sought legal advice and his advocates made a formal demand alleging unlawful termination of employment.
4. Attempts by the Claimant's advocate and the Respondent to resolve the matter amicably did not succeed and on 23 December 2016, the Claimant instituted the instant proceedings alleging unlawful termination of employment and breach of contract.
5. The Respondent filed a *Memorandum of Response* on 8 February 2017 contending that the termination of the Claimant's contract was lawful and was due to his failure to fulfil the obligations of his contract, and poor performance.
6. Pursuant to leave of Court, the Claimant filed an *Amended Memorandum of Claim* on 24 March 2017 and the Respondent filed an *Amended Memorandum of Response* on 22 May 2017.
7. The Claimant joined issue with the *Amended Memorandum of Response* on 31 May 2017, and the Cause was heard on 5 March 2019, 28 March 2019 and 2 July 2019.
8. The Claimant testified and called one other witness while the Respondent called its Deputy Principal and an Academic Coordinator to testify on its behalf (the witnesses also adopted their filed witness statements).
9. The Claimant filed his submissions on 30 July 2019 while the Respondent filed its submissions on ...
10. The Court has considered the pleadings, evidence and submissions.

Unfair termination of employment

11. Section 35(1)(c) of the Employment Act, 2007 contemplates a *written notice of termination of employment* of at least 28 days if the employee is paid by the month.
12. The Claimant's contract provided for termination notice of 2 months.
13. The Respondent issued a *notice of termination of employment* to the Claimant on 30 June 2015, and the effective date of separation was indicated as 1 September 2015.
14. The Court finds that the notice was in tandem with both contractual and statutory prescription on notice.
15. Apart from the written notice, section 41 of the Employment Act, 2007 obligates the employer to afford the employee an opportunity to

be heard if the termination of employment is on account of *misconduct, poor performance or physical incapacity*.

16. The hearing contemplated by the aforesaid section may be triggered by a *show cause notice* setting out the allegations against the employee and requiring his response.

17. In this regard, the written notice of termination envisaged by section 35(1)(c) of the Employment Act, 2007 may serve a dual purpose, including as a *show cause*.

18. The Respondent's first witness was the Deputy Principal. She stated that she handled human resource docket.

19. The witness testified that she received severally complaints against the Claimant in 2014 and she instructed the second witness, the Academic Coordinator to follow up as a result of which he called the Claimant and verbally warned him. One such session was in April 2015.

20. According to the witness, the Claimant did not change and she requested the Academic Coordinator and the Librarian to make formal complaints to the Head Teacher and they did so in March 2015.

21. The witness further stated that she made a written complaint with the Head Teacher about the Claimant's late reporting to work on 15 June 2015 and consequently a notice was issued on 30 June 2015.

22. The Court has already found that the notice issued to the Claimant on 30 June 2015 met the statutory threshold for a written notice as contemplated by section 35(1)(c) of the Employment Act, 2007.

23. However, the said notice did not set out the reasons which had prompted the Respondent to consider terminating the Claimant's contract and to ask for him to make representations thereto.

24. The Respondent's first witness seemed to suggest that the sessions she held with the Claimant were informal because she feared the Claimant risked dismissal if the formal route was followed.

25. The Respondent, or at least the Head Teacher should have formally set out the aggregated allegations against the Claimant after receiving the complaints in writing, and made a request the Claimant to respond.

26. The Respondent filed in Court what appeared to be minutes of a meeting held with the Claimant on 16 June 2015 in the presence of the Deputy Head Teacher.

27. It is instructive that the Deputy Head Teacher did not make any reference to such a meeting in the witness statement or during oral testimony. The Court will not give any weight to the document.

28. It appears that the Respondent made a decision to terminate the Claimant's contract before affording him an opportunity to make representations. The Respondent did not afford the Claimant a hearing as prescribed by section 41 of the Employment Act, 2007.

29. The Court finds in the circumstances, that the termination of the Claimant's employment did not pass the legal test. It was procedurally unfair.

Substantive fairness

30. With the conclusion on procedural fairness, it is not necessary for the Court to consider whether the Respondent discharged the burden imposed upon it by sections 43 and 45 of the Employment Act, 2007.

Discrimination

31. Although pleading discrimination, the Claimant did not plead and/or seek any remedy for the alleged discrimination.

32. Nevertheless, the Claimant alleged that he was discriminated against because his contract was initially terminated in January 2015 for failing to register as a teacher with the Teachers Service Commission while other teachers who had not registered with the Teachers Service Commission were not subjected to similar treatment.

33. The Claimant, however, failed to discharge the evidential burden expected of him by showing that expatriate teachers and a Mr. Were did not have Teachers Service Commission registration (certificates) were treated differently.

34. In fact, the Respondent demonstrated that out of 3 teachers who had not complied with the Teachers Service Commission registration requirements, one was dismissed while the other 2 were given ultimatums to register.

Whether Claimant was forced to sign Discharge voucher

35. Upon termination of employment, the Claimant executed a Discharge Voucher.

36. The Claimant was issued with a notice of termination in June 2015. He signed the Discharge in September 2015. Despite contending that he was tricked, coerced and manipulated to sign the Discharge, the Claimant did not disclose who coerced him or how he was coerced to sign the Discharge.

Appropriate remedies

Compensation

37. The Claimant was on a 3 year fixed term contract and was on the verge of being transitioned into permanent and pensionable terms. He stated that he had such an expectation. The contract had a balance of about 2 years to run.

38. Considering the above factors, the Court is of the view that the equivalent of 8 months' gross wages as compensation would be appropriate (gross salary at separation was Kshs 92,500/- according to pay slip for September 2014)

Reinstatement

39. The Claimant sought reinstatement.

40. In the view of the Court, reinstatement would not be an appropriate remedy considering that more than 3 years have lapsed since separation.

Lost income

41. The Claimant sought Kshs 1,984,500/- being the remuneration he would have earned had he served the full tenure of the contract.

42. The Court will decline to award this head of relief and would endorse as sound law the legal proposition by the Supreme Court of Uganda in *Bank of Uganda v Tinkamanyire* (2009) 2 EA 66 where the Court held that the contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law.

Certificate of Service

43. A certificate of service is a statutory entitlement and the Respondent should issue one to the Claimant within 15 days if one was not issued.

Conclusion and Orders

44. The Court finds and holds that the termination of the Claimant's employment was procedurally unfair and awards him

(a) Compensation **Kshs 740,000/-**

45. The Claimant to have costs.

46. Court regrets it could not deliver this judgment on the scheduled date due to other official engagements.

Delivered, dated and signed in Nairobi on this 11th day of October 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Njiru instructed by Mumia & Njiru Advocates

For Respondent Mr. Odhiambo instructed by Sachdeva, Nabhan & Swaleh Advocates

Court Assistant Lindsey