



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT KERICHO**

**CAUSE NO. 89 OF 2016**

*(Before D. K. N. Marete)*

**PAUL KIPLANGAT CHEPKWONY.....CLAIMANT**

**VERSUS**

**KABIANGA HIGH SCHOOL.....1ST RESPONDENT**

**BOARD OF GOVERNORS KABIANGA HIGH SCHOOL.....2ND RESPONDENT**

**JUDGEMENT**

This matter was originated by way of a Claimant’s Claim dated 21st December, 2012. It does not disclose an issue in dispute on its face.

The respondents in a Respondent’s Memorandum of Response dated 30th November, 2016 deny the claim and pray that the same be dismissed with costs.

The claimant’s case is that on or about 1st January, 1997, he was employed by the 1st respondent as a Cook on permanent basis. He started on a salary of Kshs.4,568.00 but this was subsequently enhanced to Kshs.5,904.00.

The claimant’s other case is that he served with diligence, dedication and devotion until 9th October, 2008 when his services were terminated for undisclosed *serious allegations*. He was not awarded an opportunity to explain himself.

The claimant avers that the termination of his employment services was unfair, malicious, unprofessional and injurious to his life and career. He is not able to pursue alternative employment for want of a recommendation from the respondent.

Despite demand and notice of intention to sue, the respondent has not taken any action on this matter.

He prays as follows;

1. (a) Three months salary in lieu of Notice Kshs. 17,712.00

(b) 6 months x ½ 5,904                      Kshs. 17,712.00

(c) One year compensation                      Kshs. 70,848.00

(d) Leave days earned but not paid

4, 000 x 12 years                      Kshs. 48,000.00

**Kshs . . .106,272.00**

2. Any other relief that this court may deem fit to grant in the circumstances

The respondent’s case is wholly a denial of the claim. Apart from the descriptive paragraphs of the claim which are 1, 2 and 3, the

respondent denies the memorandum of claim as set out as though the same were set out and traversed seriatim.

This matter came to court variously until the 8th December, 2017 when the parties agreed on a determination by way of written submissions.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant wrongful, unfair and unlawful. The claimant has not filed any written submissions. The only way out is to rely on the face of the pleadings and documents presented in support of his case.

The respondents in their written submissions dated 5th April, 2018 posit and submits as follows;

7. ...the claimant had a meeting with the Special Committee of the B.O.G in the presence of the Principal and the Bursar of the school and cannot claim that he was not party of the proceedings as the letter dated 9<sup>th</sup> October 2008 that which the claimant relies on clearly states the aforementioned and the claimant has not disputed it.

This they submit a total compliance with section 41 (1) of the Employment Act, 2007 which provides as follows;

41 (1) Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

The letter of 9th October, 2008 comes out as follows;

**RE: SUSPENSIONS FROM DUTY**

Following, the meeting you had with the Special Committee of the B.O.G, in the presence of the principal and the Bursar of the school, You have been suspended from duty w.e.f today because of the serious allegation against you. Further investigations are going on and the final decision will come from the Full Board meeting when convened.

Yours faithfully,

**H.K LANGAT**

**SECRETARY BOG**

This letter does not an indicator of any proceedings, disciplinary or otherwise by the respondent. It does not disclose the reason(s) for suspension or even termination. It is therefore not a plausible defence for a case of violation of section 41 of the Employment Act, 2007 – substantive and procedural fairness.

This is a very interesting presentation of the defence case. From the onset, the claimant forments a case of wrongful, unfair and unlawful termination of employment on grounds of serious allegations alluded to in his suspension letter dated 9th October, 2008. The claimant's letter of termination dated 11th September, 2009 comes out as follows;

**RE: TERMINATION OF SERVICE**

The Board of governors met and determined your case. The conclusion, was you be terminated and be given 3 months salary in lieu of notice plus half salary for 6 months. Your basic salary was Kshs.5904.

6 months x  $\frac{1}{2}$  x 5904 = Kshs.17,712

3 months salary 5904 x 3 = Kshs.17,712

**Grand Total = Kshs.35,424...**

The respondents do not in the least demonstrate or tender evidence as to why and how the claimant's employment service was terminated. They merely deny the claimant's case as presented and end at that. They do not even disclose the reasons for termination of the employment of the claimant. This is not acceptable. Mere denial of a matter does not in law amount to substantial defence and therefore the respondent's case must be discarded for want of merit. It was a transgression of sections 41, 42 and 43 of the Employment Act, 2007 which provide for a

set out and communication of the reasons for termination and also employment of procedural aspects of determining a case of termination of employment. I therefore find a case of unlawful termination of employment and hold as such. This answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. The respondent in denial of the claimant's entitlement to the relief sought, the respondents relied on the authority of **Donald C. Avude v Kenya Forest Service [2015] eKLR** where the Honorable Court quoted the case of **Cabiakman V Industrial alliance Life Insurance Co. [2004] 3 S.C.R. 1995, 2004 SCC 55** and held as follows;

... administrative suspension is "a preventive measure which can be taken when the interest of the employer's business require it, even in the absence of an act made by the employee while working.

They further relied on section 36 of the Employment Act, 2007 as follows;

Either of the parties to a contract of service to which section 35 (5) applies, may terminate the contract without notice upon payment to the other party of the remuneration which would have been earned by that other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section Either of the parties to a contract of service to which section 35 (5) applies, may terminate the contract without notice upon payment to the other party, or paid by him as the case may be in respect of the period of notice required to be given under the corresponding provisions of that section.

In the penultimate the respondents sought to buttress their case by relying on the authority of **Paul Ngeno v Pyrethrum Board of Kenya Ltd [2013] eKLR**, where Ongaya J. observed as follows;

... Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings... Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable...

I find this submission against relief sought contradictory. This is because in the first place, the respondents awarded and made relief to the claimant as expressed in the letter of termination aforesaid. Two, they have failed *in toto* to demonstrate this, or at all. The respondents have desperately lost on a case of lawful termination of employment. They failed *in toto* to demonstrate this, or at all. The claimant is therefore entitled to relief albeit not in terms of his prayers as set out. This is because prayers (a) and (b) were met and paid out at the time of termination and departure from employment. Prayer (d) – leave days earned but not paid Kshs. 48,000.00 was not demonstrated in evidence or in any way proven.

I am therefore inclined to allow the claim and award relief as follows;

- i. 12 months salary as compensation for unlawful termination of employment Ksh. 70,848.00.
- ii. The respondent be and is hereby ordered to issue a Certificate of Service to the claimant in thirty (30) days.
- iii. The costs of this claim shall be met by the respondents.
- iv. The costs of the claim be and are hereby assessed at Kshs.48,000.00.

**Delivered, dated and signed this 16th day of May 2018.**

**D.K.Njagi Marete**

**JUDGE**

Appearances

1. M/s Ngetich instructed by Mitey & Company Advocates for the claimant.
2. Mr. Otieno instructed by Geoffrey Otieno & Company Advocates for the respondents.