



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MALINDI
CAUSE NUMBER 30 OF 2018

[Formerly Cause NO. 396 of 2015 at E&LRC Mombasa]

BETWEEN

HENRY RAMADHAN KAFEDHA.....CLAIMANT

VERSUS

THE BOARD OF GOVERNORS [BOARD OF MANAGEMENT]

MIDA SECONDARY SCHOOL.....RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Kenga & Company Advocates for the Claimant

The Attorney-General, for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 15th June 2015. This was subsequently amended. Further Amended Statement of Claim was filed on 12th July 2016. He states he was employed by the Respondent as a Teacher on 22nd November 2010, on a monthly salary of Kshs. 13,733. His salary was not paid regularly. As of 12th September 2013, he was owed salary arrears of Kshs. 70,000. He states that on 28th February 2014, the Respondent unfairly and unlawfully terminated his contract of employment. He was not paid salary for October, November, December 2013 and January, February 2014. In total the Respondent owed the Claimant Kshs. 138,665, in arrears of salary, as of the date of termination. He prays for Judgment against the Respondent for:-

- a) Arrears of salary at Kshs. 138,665.
- b) 1 month salary in lieu of notice at Kshs. 13,733.
- c) Annual leave pay over a period of 4 years at Kshs. 44,368.
- d) Service pay at 15 days' salary for each of the 4 complete years of service at Kshs. 31,692.
- e) 12 months' salary in compensation for unfair termination at Kshs. 146,796.

Total.....Kshs. 375,254.

- f) Interest on the sum above, from 28th February 2014.
- g) Costs.

2. The Respondent filed its Statement of Response on 8th August 2016. Its position is that the Claimant was a volunteer untrained Teacher. The former School Principal, Mr. Ngate, had been given the mandate to collect fees and pay all Teachers. The Claimant was paid all his salary, except for the months of December 2013, January and February 2014 when he was on suspension. The former Principal made Board Members sign blank documents. Appointment letter produced by the Claimant is a forgery. The Claimant's contract was terminated due to an act of gross misconduct. He showed gross misconduct before the Board of Management. He boycotted assigned duties and was a threat to the Students and the Institution at large. The Respondent prays the Court to dismiss the Claim with costs to the Respondent.

Claimant's Position

3. The Claimant gave evidence, and rested his case, on 10th October 2017. Board Treasurer, Suleiman Bakari Mae, gave evidence on 17th October 2017 and on 8th December 2017. Chairman of the School Committee, Benjamin Kitsao Katana, and Board Chairman between 2010 and 2013, Charo Ngumbao both gave evidence for the Respondent on 8th December 2017, bringing the hearing to a close. The matter was last mentioned on 16th March 2018.

4. Kafedha told the Court he was issued a letter of employment by the Respondent, dated 22nd November 2010. He was paid his salary in cash, and later, through Lengo Cooperative Society. He was owed arrears of salary of Kshs. 70,000 as of 12th September 2013. He was suspended on 29th November 2013. His contract was terminated by the Respondent on 28th February 2014.

5. There was an informal meeting on 18th November 2013. The Claimant had not formally been invited. He was at the time involved in supervision of exams. There was a second meeting held on 28th November 2013. The letter of invitation is dated 2nd November 2013. The Claimant was asked to explain, why he did not appear in the earlier meeting. He explained his position. Treasurer Suleiman Bakari, Chairman Charo Ngumbao and Principal Salim Zome were present at the meeting. The Claimant was not aware of any act of gross misconduct he engaged in, before the Board as alleged in the letter of termination. He was issued the letter of termination on 28th February 2014 by Salim Zome. The letter issued before the date the Claimant had been advised to report back to the School [3rd March 2014], in the meeting of 28th November 2013. The letter of termination referred to gross misconduct which took place on 18th November 2013. The Claimant did not attend a meeting on this date. He never went on annual leave. Claimant's exhibit 5 is a document which was generated by the Respondent, committing to pay Employees' dues as of 12th September 2013. There were letters from the School to Lengo Sacco, instructing Lengo Sacco, on payment of Claimant's salary. He did not know why his salary was reduced. He was repeatedly paid Kshs. 7,000 instead of the rate in the contract of Kshs. 13,733 monthly.

6. Cross-examined, Kafedha told the Court he was employed on 22nd November 2010. There were 7 Students at the end of 2010. There were 4 Teachers. The letter of appointment was issued by the Board. The Board indicated Claimant's position to fall in job group 'G.' The Claimant did not know about job groups. He applied for the job. There was no interview. The Board offered the Claimant a starting salary of Kshs. 5,000. This was Claimant's first salary. He was not informed about the meeting of 18th November 2013. He was invited to, and attended the meeting of 28th November 2013. He was suspended for 3 months, and asked to report back later. There was no meeting on 3rd March 2014. The letter of termination was issued to the Claimant by the Board on 3rd March 2014. The copy exhibited by the Claimant indicates 3rd 2014, omitting the month. He was not paid his salary during suspension. He was not paid his salary for other months in full, which resulted in arrears. He did not know that if on suspension, he would only be entitled to half salary. The letters requisitioning for salaries from Lengo Sacco, show salary for October and November 2013 was paid. School's record shows it was paid. The Claimant did not find the salary in his Account at Lengo. There was no agenda for the meeting of 18th November 2013, which was communicated to the Claimant. He explained his position in the meeting of 28th November 2013. He did not apply for annual leave.

7. Redirected, Kafedha told the Court he was paid a salary of Kshs. 5,000 in the first 6 months. This was raised to Kshs. 13,733 after 6 months. There is no letter showing the Claimant was invited to the meeting of 18th November 2013. He was not able to recall when termination letter was given to him. Both his copy and that exhibited by the Respondent, bear the signature of the Principal. Both copies are stamped and confirm the Claimant's contract was terminated by the Respondent, on the allegation that the Claimant was involved in an act of gross misconduct on 18th November 2013. The Claimant did not know what the meeting of 18th November 2013 was about.

Respondent's Position

8. Suleiman Bakari Mae told the Court the community wished to start a School. They held a meeting led by the Area Councilor. Ngate was a Pastor. He was made the School Principal. He would pay himself from school fees and donations. The other Teachers were to assist Ngate in setting up the School. There were no Students. There was no agreement on any monthly salary. Ngate recruited the other pioneer Teachers. The School was taken over by the Government. The Government introduced wage guidelines. This gave rise to the current dispute on salary arrears.

9. Kafedha's contract was not terminated unfairly. He was invited to the 1st Meeting and failed to attend. He attended the 2nd meeting. He explained that he and his Colleagues were supervising exams during the 1st meeting. The Board suspended Kafedha for 3 months. Salaries were paid through Lengo Sacco. The Claimant should ask about his arrears of salary from Lengo Sacco. Suleiman told the Court the Claimant and his Colleagues were not paid their salaries in full.

10. Cross-examined, Suleiman told the Court that the Building in which the School was to be set up, had been acquired from a former Mayor, some years before the community engaged the Principal Ngate. Suleiman did not recall when Kafedha was employed. He was paid salary irregularly. He stated he was supervising exams, when called by the Respondent to the meeting on 18th November 2013. It is true exams were ongoing. This explanation was understandable. He could not have engaged in an act of gross misconduct in the meeting, as he was not there on 18th November 2013. There was a meeting of 28th November 2013 which Kafedha attended. The letters of suspension and termination referred to gross misconduct of 18th November 2013. This is faulty, as the Claimant did not attend this meeting. He was

supervising exams and his absence from the meeting of 18th November 2013 would not be a valid reason for termination. Redirected, Suleiman told the Court that the Claimants' contracts were terminated because the Claimants failed to attend the Board meeting.

11. Benjamin Kitsao Katana confirmed Kafedha was employed by the Respondent as a Teacher. The School was taken over by the Government in 2013. Teachers' salaries were rationalized to meet Government salary guidelines. Some earned Kshs. 5,000, Kshs. 6,000, and others Kshs. 18,000- 20,000 monthly. Others, such as the Principal, earned between Kshs. 25,000 and Kshs. 30,000. Government advised only trained Teachers should earn more than Kshs. 18,000 monthly. The Claimant was not a trained Teacher. Not even the Principal was a trained Teacher.

12. Kafedha did not have a good reason not attend the meeting of 18th November 2013. He was suspended. His contract was terminated fairly. He never applied for annual leave. Salaries were paid through Lengo Sacco. In case Sacco failed to pay, the Employee would revert to the School. Cross-examined, Katana told the Court he was the Parents Teachers Association [PTA] Chairman. Exams were ongoing on 18th November 2013. Other Teachers attended the meeting. The Witness did not know whether Kafedha was supervising exams. Some other persons could have supervised the exams. Students could supervise. Redirected, the Witness told the Court termination was fair. The Claimant did not make any demand for salary while in service.

13. Charo Ngumbao was Chair of the Board between 2010 and 2013. Teachers were notified to attend the meeting of 18th November 2013. The Board did not know there were exams, before it scheduled the meeting. There was no agreement between the Parties on payable salary. The amount would be agreed upon as the School developed. Ngumbao signed the document showing what Employees were owed, at the time the Government came in. The amounts were to be discussed further. The Respondent did not disagree, it owed Claimants arrears of salary; but the Parties needed to discuss the level of Respondent's indebtedness.

The Court Finds:-

14. Henry Ramadhan Kafedha was employed by the Respondent as a Teacher. The letter of his appointment is dated 22nd November 2010. His salary is shown as Kshs. 13,733. The letter of appointment is signed by the Board Chairman Charo Ngumbao, and Treasurer Suleiman Bakari. It is not acceptable that these gentlemen would be appointed to lead a School Board, and sign documents creating legal obligations on the part of the School, then when called upon to meet those obligations, allege they did not know how to read, and the Principal duped them into committing the School. People who lead a learning Institution, in particular a Secondary School, should be in a position to read and write.

15. It is conceded in the evidence of Respondent's Witnesses that this amount was not paid to the Claimant in full, as agreed in the contract of employment.

16. As of 12th September 2013, Kafedha was owed arrears of salary of Kshs. 70,000. This is made clear in the document tabulating arrears of salary for teaching and non-teaching staff, signed by Ngumbao and Bakari for the Board. The document is categorical that the Board understood its indebtedness to the Employees, upon change of the School management. So why would the Employer continue to cling to an Employee's salary arrears which were ascertained as far back as 5 years?

17. It is also clear that the Claimant was not paid his salary for the months of October, November and December 2013; as well as for the months of January and February 2014. His contract was terminated in March 2014. He was still an Employee of the Respondent, until the date of termination. No law, or clause in the contract of employment, has been shown to the Court, justifying non-payment of Claimant's salary for the 5 months.

18. The Claimant has satisfied the Court that he was owed arrears of salary of Kshs. 138,665 as of the date of termination. ***The Respondent shall pay to the Claimant arrears of salary at Kshs. 138,665.***

19. ***Termination was without notice. The Respondent shall pay to the Claimant 1 month salary in lieu of notice at Kshs. 13,733.***

20. The Claimant prays for annual leave pay, over a period of 4 years served. The Court is not persuaded that this prayer is merited. The Claimant ought to have utilized his annual leave during the school vacations, so as not to interrupt learning. He must have taken a break when the Students were away during vacation.

21. The prayer for service pay has been established. The Respondent did not enlist the Claimant under the N.S.S.F or other Social Security Plans contemplated under Section 35 of the Employment Act 2007. The Claimant is eligible for service pay under Section 35[5], as read with Section 35 [6] of the Employment Act 2007. ***The Respondent shall pay to him service pay at the rate of 15 days' salary for 4 complete years of service at Kshs. 31,692.***

22. The Claimant was given 7 days by the Respondent, through a letter dated 22nd November 2013, to "explain why disciplinary action should not be taken against you, for gross misconduct you have portrayed before the BOG meeting held on 18th November 2013."

23. The Claimant attended the meeting of 28th November 2013. He was suspended for 3 months effective from this date. He was informed suspension was for gross misconduct portrayed before the Board on 18th November 2013.

24. Parties are in agreement that the Claimant did not attend the meeting of the Board scheduled for 18th November 2013. It is not possible that he would show an act of gross misconduct, in a meeting he did not attend.

25. The Respondent did however attempt to explain, though incoherently, that the act of gross misconduct involved the Claimant's absence

from the meeting, rather than any act he did in the meeting. Assuming this is what the Respondent meant by 'gross misconduct that you portrayed before the Board,' did the Claimant's absence from the meeting of 18th November 2013 amount to gross misconduct?

26. The Court does not think so. There is common evidence that the School was in the middle of exams. The Claimant was among Teachers who were supervising exams. It is inconceivable that Students would supervise fellow Students in an exam. It is mind-boggling for the Chairman of Parents Teachers Association, to suggest Students could supervise fellow Students in an exam. There was satisfactory reason why the Claimant was unavailable in the meeting of 18th November 2013. The Respondent should simply have rescheduled the meeting after exams, instead of creating such hue and cry over a minor issue. The absence of the Claimant from the meeting of 18th November 2013 was not an act of gross misconduct. There was no valid reason or reasons for the decision to terminate Claimant's contract, as required under Section 43 and 45 of the Employment Act 2007.

27. After the disciplinary hearing on 28th November 2013, the Claimant was suspended. He was suspended without pay. He was asked to return on 3rd March 2014. The Board met in Claimant's absence and decided his contract is terminated. The Court does not find procedure to have been fundamentally flawed, save perhaps that, 3 months it took for the Board to make its verdict known was too long, and the Claimant does not seem to have been accompanied to the disciplinary hearing by a Colleague of his choice, or a Trade Union Representative.

28. Termination was unfair. The Claimant is granted equivalent of 8 months' gross salary in compensation for unfair termination at Kshs. 109,864.

29. Costs to the Claimant.

30. Interest granted at 14% per annum from the date of Judgment till payment in full.

IN SUM, IT IS ORDERED:-

a) Termination was unfair.

b) The Respondent shall pay to the Claimant: arrears of salary at Kshs. 138,665; notice pay at Kshs. 13,733; service pay at Kshs. 31,692; and equivalent of 8 months' salary in compensation for unfair termination at Kshs. 109,864- total Kshs. 293,954.

c) Costs to the Claimant.

d) Interest granted at 14% per annum from the date of Judgment.

Dated and delivered at Malindi this 20th day of July, 2018.

James Rika

Judge