



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MALINDI
CAUSE NUMBER 32 OF 2018

[Formerly Cause NO. 203 of 2015 at E&LRC Mombasa]

BETWEEN

JAMES KAHINDI KOMBE alias NGATE.....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

Attorney-General for the Respondent

JUDGMENT

1. The Claimant filed his original Statement of Claim on 10th April 2015. He made subsequent amendments. His Further Amended Statement of Claim was filed on 12th July 2015. He states he was employed by the Respondent as a Teacher on 15th August 2009, earning a monthly salary of Kshs. 25,000. He was not regularly paid. As of 12th September 2013, he was owed salary arrears of Kshs. 420,000. His contract was terminated by the Respondent on 29th September 2013. He states, termination was not in accordance with his contract and the law. He was denied salary for the Month of October and November 2013. As of the date of termination, he was owed a total of Kshs. 480,000 in arrears of salary. He asks the Court to grant him Judgment against the Respondent in the following terms:-

- a) Salary arrears at Kshs. 480,000.
- b) 1 month salary in lieu of notice at Kshs. 30,000.
- c) Annual leave pay over a period of 4 years at Kshs. 96,923.
- d) Service pay at 15 days' salary for a period of 4 complete years of service at Kshs. 69,231.
- e) Compensation for unfair termination at Kshs. 360,000

Total ... Kshs. 1,036,154.

- f) Interest from 29th November 2013 till payment is complete.

g) Costs.

2. In its Response to Further Amended Claim, filed on 8th August 2016, the Respondent explains that the Claimant was a Volunteer Teacher at the School, initially. The School was in its formative years. The Claimant was appointed as the Principal. He was to collect fees and pay himself and other Teachers. There were no structured salaries and job groups at the time. The Principal collected fees from available Students and paid himself and other Teachers. The appointment letter exhibited by the Claimant is a forgery. The Claimant took advantage of the Board members to manufacture the letter of appointment. His contract was terminated due to gross misconduct. The Claimant boycotted his assigned duties. He portrayed gross misconduct before the Board.

3. The Claimant gave evidence and closed his case, on 17th October 2017. It was agreed by the Parties that Respondent's evidence is given under Mombasa Cause No. 396 of 2015 [current Malindi Cause No. 30 of 2018]. The Witnesses for the Respondent were the same in 4 related, but unconsolidated matters. Respondent's evidence in all the 4 files is recorded under Cause 30 of 2018. Suleiman Bakari, Benjamin Kitsao and Charo Ngumbao testified for the Respondent between 17th October 2017 and 18th December 2017 when hearing closed.

Claimant's Position

4. The Claimant testified he was employed as the Head Teacher, on 15th August 2009. He was employed by the School Committee. The letter of appointment issued later on, in 2010. The letter was signed by Chairman Charo Ngumbao and Treasurer Suleiman Bakari. His salary as per the contract was Kshs. 25,000 monthly. The salary was not consistently paid. He was paid nothing the whole of 2009. The School opened in 2009. Student enrollment started in May 2010. By September 2013, the Claimant was owed Kshs. 420,000. Ngate had been called by District Education Officer and told to prepare list of all Debts owed by the School. He prepared the document, which was approved and signed the Board. The Claimant's salary from 2012 was Kshs. 30,000. He was not paid salary for October and November 2013. He claims Kshs. 60,000 being the salary for these 2 months, and previous arrears of Kshs. 420,000- total Kshs. 480,000.

5. He was called for a School Committee meeting on 18th November 2013. There was no formal invitation. He was supervising exams and did not attend the meeting. He was later called by PTA Chairman who informed him that Management had changed. There would be new contracts. The Claimant asked PTA Chairman to ensure Employees' outstanding dues were paid. The Claimant was studying and his Son as well, was studying. The Claimant needed to finance his Son's, and his own studies.

6. It is not true that the Claimant authored his own letter of appointment. Charo Ngumbao and Suleiman Bakari were not truthful when they stated they did not know how to read and write. The Respondent states arrears of Claimant's salary as of December 2012 stood at Kshs. 425,000. It is not true that the Claimant received Kshs. 77,000 after this. He received Kshs. 50,000 in form of school fees for his Children. He did not receive any other amounts.

7. Cross-examined, Ngate testified that the School opened on 15th August 2009. There were no Students and other Teacher at the time of opening. In 2010 there were 7 Students. It is possible for a School to have 7 Students. Ngate is a Pastor, not a trained Teacher. His salary was Kshs. 25,000 at the beginning. His job group was stated to be job group J. He did not know the requirement of this job group. He was not the originator of the letter of employment. He did not demand for payment of his arrears before termination.

8. He was pursuing studies at Mombasa Christian Leadership Institute. He was at the Institute on 28th November 2013. He was to attend a meeting called by the Respondent on this date. He did not as he was attending to his studies. He excused himself by word of mouth. He wrote to the Respondent on 25th November 2013 complaining he had not been invited formally. He was aware of the meeting but chose to stay away to avoid breach of the peace. There was tension in the School. His contract was terminated. He was never suspended.

9. He was not notified of the earlier meeting of 18th November 2013. He was supervising exams, and could not attend the meeting. He however received notice to show cause why, he should not face disciplinary action, and received notice inviting him to the meeting of 28th November 2013.

10. He did not have evidence of salary increment from the initial Kshs. 25,000 monthly, to Kshs. 30,000. There was evidence of salary arrears. He did not complain about non-payment of salary for October and November 2013. He never applied to go on annual leave. Schools closed 3 times annually. The Claimant remained in Office throughout.

11. Redirected, Ngate testified Respondent's letter of 25th January 2013 shows Claimant's salary was adjusted to Kshs. 30,000 monthly. He did not attend the meeting of 28th November 2013. He was attending College. Letter of termination refers to gross misconduct portrayed before the Board on 18th November 2013. The Claimant did not attend this Board meeting. He was not suspended. His contract was terminated.

Respondent's Position

12. As indicated above, Respondent's Witnesses gave evidence under Cause No. 30 of 2018 [Malindi] previously Cause No. 396 of 2015 [Mombasa].

13. Suleiman Bakari testified that the School was in its formative years, when its proposers, comprising the local community and leadership, wished the Claimant to be the pioneering Principal. The Claimant was a Pastor, not a trained Teacher. He was to pay himself and other Teachers from School fees and donations. The School was taken over by the Government with new salary structure and guidelines issued.

14. Ngate prepared the letters of appointment which he forwarded to Suleiman for signing. His contract was not terminated by the Respondent. He boycotted duties assigned to him. He was not paid his full salary. He was paid some amount. The School wanted the

Claimant to account for fees he collected while heading the School. He failed to attend Board meetings to this end. He did not apply for annual leave.

15. Cross-examined, Ngate told the Court there was a written agreement on setting up of the School. Ngate read the agreement to Suleiman. Suleiman was satisfied with everything. The building to accommodate the School had been set up years back by a former Mayor. Ngate was to look for Teachers and Students. He did not have a Secretary and did all office work unaided. There would be a salary to compensate him. Suleiman conceded the letter dated 15th August 2009, was Claimant's letter of appointment. There would be no valid agreement without a rate of pay. Suleiman signed the letter. He did not note the relevant date. He thought the letter was being addressed to Lengo Sacco.

16. Suleiman agreed the Claimant should be paid his dues, once such dues are ascertained. He agreed that he, and Ngate, were asked by the District Education Office to prepare a list of debts owed by the School to staff, as of September 2013. Ngate did the computation. Suleiman and the Chairman Ngumbao signed the document. It is true the Claimant and other Teachers were not paid salary regularly.

17. The Claimant was called for the 1st Board meeting on 18th November 2013. He informed the Respondent he was supervising exams. He asked for deferment of the meeting. Suleiman did not have a problem with the Claimant and accepted Claimant's explanation. If anyone states Claimant's absence on the date amounted to misconduct, that would not be a true statement.

18. He was called for the 2nd meeting of 28th November 2013, without agenda. Suleiman did not recall if the Claimant explained he was attending College in Mombasa on the material day. Termination was drastic. The Claimant should have had another opportunity to defend himself.

19. Benjamin Kitsao Katana and Charo Ngumbao corroborated the evidence given by Suleiman Bakari. It is not necessary to repeat what they said here. Their evidence has been analyzed under Cause No. 30 of 2018, the reference file.

The Court Finds:-

20. As found by the Court in **Cause No. 30 of 2018**, there were significant concessions made in this dispute, by Respondent's Witnesses. The letter of employment issued to Ngate is conceded to have issued to him in 2009. The terms and conditions of service in this letter can hardly be disputed. His starting salary at Kshs. 25,000 is in bold letters. There is evidence that this salary was not paid in full and consistently. It has been established that the rate was reviewed to Kshs. 30,000, in the year 2012.

21. Respondent's Witnesses, particularly Suleiman Bakari, were categorical that the Claimant was owed arrears of salary by the Respondent, at the time of termination. The Respondent raised several grounds in explaining why there was no payment of salary when payment became due. The School was in its formative years and unable to meet Employees' obligations; the Claimant had been asked to meet the wage bill from school fees and donations; the Respondent wished to sit down and agree with the Claimant on amount of fees he had collected and on sums due to him; there was no sufficient number of students to meet staff obligations; and there were no salary structures and guidelines until the Government came in, in the year 2013. The Respondent also pleaded that the letter of appointment was a forgery, casting doubt on the terms and conditions of service contained in the letter. This was categorically disproved by the evidence of Suleiman Bakari.

22. All these explanations are in order, in understanding delay and the short term inability to pay. There is however no acceptable reason for not paying the Claimant a debt which is acknowledged, years after the debt arose. The School was granted Certificate for Provisional Registration by the Ministry of Education, on 15th March 2013. It was authorized to have a maximum of 160 Students. It is understandable if there was a problem paying salary to the Claimant, at the beginning when there were no Students. It would be understandable if the problem persisted a year later, when the School had only 7 Students. By September 2013, the Board tabulated dues owed to the Teachers. No payment was made after tabulation. The Claimant came to Court in 2015. There is absolutely no evidence to suggest the Claimant was at any time a Volunteer. His contract did not state he would serve as a Volunteer at any time. If he was a Pastor and untrained Teacher, this was known to the Respondent when the Claimant was recruited as the pioneer School Principal. It was not in the contract that the Claimant would have to be a trained Teacher, to be employed by the School as its Principal. His training was not relevant to his being recruited, and to his right to continue earning the salary agreed to by the Parties. **The prayer for arrears of salary is allowed at Kshs. 480,000.**

23. The Claimant, unlike other Teachers who have filed other related Claims before this Court, did not attend the disciplinary meeting of 28th November 2013. He explained that he was attending College at Mombasa. His contract was terminated on 2 grounds: that he declined to appear before the Board on 28th November 2013; and that like the other affected Teachers, portrayed gross misconduct when they appeared before the Board on 18th November 2013.

24. The Respondent is required under Section 43 and 45 of the Employment Act to justify termination decision. The Claimant did not appear in the Board meeting of 18th November 2013. He could not therefore portray anything without being present. If the Respondent meant, that failure to attend the meeting of 18th November 2013, was in itself demonstration of gross misconduct, the Court is satisfied that failure to attend the meeting was justifiable, as the Claimant was supervising exams.

25. The Claimant's failure to attend the meeting of 28th November 2013, coming close to the failure to attend the previous meeting, was not sufficiently explained to the Court by the Claimant. He did not seek leave of the Respondent to be away in Mombasa, while the others were meeting at Mida. He states he sought leave by word of mouth, but did not say from which Officer in particular, leave was sought and granted. In his evidence on this, the Claimant was shifty. He did not persuade the Court why he opted to go to Mombasa, rather than attend an important School meeting at Mida, after failing to attend the first meeting. He was not forthcoming under cross-examination, on being asked if he was invited to the meeting of 28th November 2013. He stated it was possible he was invited. He did not recall where the venue was. He wrote to the Board Secretary stating he chose to stay away, to avoid breach of the peace. This appears to the Court at odds with the explanation that he was kept away by his pursuit of studies at Mombasa. He conceded when pressed, that he did not write to the Respondent, excusing his absence.

26. In the Court's view, there was valid reason shown by the Respondent, to justify termination. The 2nd reason given in the letter of termination dated 29th November 2013 was a valid termination reason, under the law. The Claimant deliberately and without lawful cause, disobeyed the instruction of the Employer, to attend the meeting of 28th November 2013. He was engaged in insubordination.

27. Procedurally the decision was flawed. After the Claimant failed to attend the meeting of 28th November 2013, termination should not have been immediate. The Respondent was required to charge the Claimant with the specific offence of insubordination, and take the Claimant through a disciplinary process as contemplated under Section 41 and 45 of the Employment Act. The Claimant should have been granted an opportunity to explain his absence. He was not heard, on the charge of insubordination, surrounding his detour to Mombasa. Termination on this account was unfair.

28. ***He is allowed a minimal compensation, the equivalent of 2 months' salary at Kshs. 60,000.***

29. As the Respondent had valid reason to summarily dismiss the Claimant under Section 44 [4] of the Employment Act for insubordination, notice pay is not available to the Claimant.

30. The School, like most Schools in Kenya, had 3 vacations annually, in April, August and December. The Claimant ought to have utilized his annual leave during the School break. He did not persuade the Court that he remained in Office throughout. The prayer for annual leave is declined.

31. The Respondent did not provide the Court with evidence of social security compliance. There were no records from the National Social Security Fund, showing the Claimant was registered under the Fund, and that the Respondent actively made contributions to the Fund, on account of the Claimant. The Respondent did not have any other Social Security Plan available at the workplace. The Claimant merits service pay under Section 35 [5] [6] of the Employment Act 2007. ***He is granted service pay at the rate of 15 days' salary for every year completed in service at Kshs. 69,231.***

32. ***Costs to the Claimant.***

33. ***Interest allowed at 14% per annum from the date of Judgment, till payment is made in full.***

IN SUM, IT IS ORDERED:

a) Termination was unfair on account of procedure.

b) The Respondent shall pay to the Claimant: arrears of salary at Kshs. 480,000; compensation for unfair termination the equivalent of 2 months' salary at Kshs. 60,000; and service pay at Kshs. 69,231- total Kshs. 609,231.

c) Costs to the Claimant.

d) Interest granted at 14% per annum from the date of Judgment, till payment is made in full.

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

James Rika

Judge