



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MALINDI
CAUSE NUMBER 33 OF 2018

[FORMERLY CAUSE NO. 398 OF 2015, E&LRC MOMBASA]

BETWEEN

NELSON MENZA MWABEGU.....CLAIMANT

VERSUS

THE BOARD OF GOVERNORS [BOARD OF MANAGEMENT]

MIDA SECONDARY SCHOOLRESPONDENT

RIKA J

Court Assistant: Benjamin Kombe

Kenga & Company Advocates for the Claimant

The Attorney- General, for the Respondent

JUDGMENT

1. The Claimant filed his initial Statement of Claim on 15th June 2015. The Claim was subsequently amended. Further Amended Statement of Claim was filed on 12th July 2016. The Claimant states he was employed by the Respondent on 22nd November 2010, as a Teacher, earning a monthly salary of Kshs. 13,733. As of September 2013, he was owed salary arrears totaling Kshs. 70,000. He was not paid salary for October, November and December 2013; and salary for January and February 2014, all added up at Kshs. 138,665. His contract was terminated by the Respondent through a letter dated 28th February 2014. Termination was based on the allegation that the Claimant portrayed gross misconduct before the Board, in a meeting held on 18th November 2013. He prays the Court to find termination was unfair, and order the Respondent to pay him the following:-

- a. Salary arrears 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 the rate of 15 days' salary for every complete year of service at Kshs. 31,692.
- e. Compensation the equivalent of 12 months' gross salary at Kshs. 146,769

Total...Kshs. 375,254

- f. Interest.

g. Costs.

2. The Respondent filed its Further Amended Statement of Response on 8th August 2016. Its position is that the Claimant was a Volunteer, untrained Teacher at the outset. The School was new. There was no agreement on the salary. The School was developing and Teachers were to be paid through whatever fees and donations were available to the School. The Claimant was paid his salary at all times. There were no arrears. The letter of appointment exhibited by the Claimant is a forgery. Termination was grounded on Claimant's act of gross misconduct he engaged in before the Board. He boycotted duties assigned by the Respondent. The Respondent prays the Court to dismiss the Claim with costs.

3. The Claimant gave evidence, and closed his case, on 17th October 2017. Parties agreed evidence for the Respondent would be recorded under Malindi Cause No. 30 of 2018 [then Mombasa Cause No. 396 of 2015]. There are 4 related matters, brought by 4 Claimants with a common cause against a common Employer. There are certain points of divergence in the respective Claims. The Claims were not consolidated, but proceeded at the same time, with Claimants' evidence recorded in their respective files, and Respondent's evidence recorded in one file.

4. The Claimant's evidence is similar in all details to that of his Colleague Henry Ramadhan Kafedha, under Malindi Cause No. 30 of 2018. The terms and conditions of employment, the employment history, and the circumstances of termination are the same. The prayers in the 2 Claims are the same. The Respondent's evidence, pleadings and documents are the same.

5. In Malindi Cause No. 30 of 2018, the Court made, among others, the following findings:-

a. The Claimant was employed by the Respondent as a Teacher.

b. The letter of appointment was valid and duly signed by the Board Chairman and Treasurer.

c. It was conceded in the evidence of the Respondent that the Claimant was an Employee of the Respondent, and was owed arrears of salary.

d. The Claimant did not attend the meeting of 18th November 2013, called by the Board, because he was supervising exams.

e. As he did not attend that meeting, it could not be that he portrayed gross misconduct before the Board, on the given date.

f. His absence in itself did not amount to an act of gross misconduct, as he was involved in supervision of exams.

g. It was preposterous for the Respondent to advance the view that exams could be supervised by fellow students.

h. Termination was unfair and the Claimant entitled to notice pay and compensation for unfair termination.

i. The Claimant was owed arrears of salary amounting to Kshs. 138,665.

j. He was not subscribed to the N.S.S.F or any other Social Security Plan, and was therefore entitled to service pay, under Section 35[5] of the Employment Act.

k. He did not merit annual leave pay as he should have utilized his annual leave entitlement during school vacation to avoid disrupting learning.

l. He merited costs and interest.

6. Against this background the Court adopts the above findings in considering and disposing of Malindi Cause No. 33 of 2018. Same Judgment, as made in that Cause, is recorded in the Cause herein.

IN SUM, IT IS ORDERED:-

a. Termination was unfair.

b. The Respondent shall pay to the Claimant: arrears of salary at Kshs. 138,665; 1 month salary in lieu of notice at Kshs. 13,733; service pay at Kshs. 31,692; and the 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 allowed 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