



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 327 OF 2015**

*(Before Hon. Justice Mathews N. Nduma)*

**AYUB OWINO.....CLAIMANT**

**VERSUS**

**THE CHAIRMAN OF THE BOARD OF**

**MANAGEMENT LAMBWE SECONDARY SCHOOL.....RESPONDENT**

**J U D G M E N T**

1. The Claimant vide a statement of claim filed on 17<sup>th</sup> September, 2015 seeks maximum compensation for unlawful termination of employment and terminal benefits set out under paragraph 7 of the Memorandum of Claim to include-

- (i) Service Gratuity
- (ii) Arrear Salaries for the month of December 2014 to April 2015.
- (iii) One month salary in lieu of notice.
- (iv) Under payments during 19 years served.
- (v) Lost income to retirement date.
- (vi) Costs and Interest.

2. The Respondent filed a Memorandum of Response on 27<sup>th</sup> October, 2015 in which the employment of the Claimant is admitted albeit on different terms as those set out in the claim. The terminal benefits Claimant are denied in toto and the Respondents denies that the termination of employment of the Claimant was unlawful. The Claimant is put to strict proof in all material particulars of the claim.

**Facts of the Claim**

3. The Claimant testified under oath and relied on list of documents attached to the Memorandum of claim and marked exhibits '1' to '6'.
4. The Claimant was employed on 1<sup>st</sup> February, 1996 as an accounts clerk by the Board of Governors of the school at a gross salary of Kshs.3,204 and house allowance of Kshs.844 per annum.
5. At the time of his dismissal on 12<sup>th</sup> March, 2015 the Claimant earned Kshs.23,513 per month inclusive of house allowance and medical allowance.
6. The Claimant had a diligent and clean record until the Respondent on 12<sup>th</sup> November, 2014 suspended the Claimant from work on allegations of poor work performance and absenteeism. The Claimant had no warning letter prior, verbal or written. The Claimant alleges no valid reasons were given for the termination in public interest. The Claimant alleges that no fair procedure, was followed prior to the termination.
7. The Claimant was not given chance to defend himself. The Claimant was not issued a certificate of service and was not paid terminal

benefits claimed herein.

8. Claimant was employed in Job Group G in 1996 and got not a single promotion for 19 years and claims under payments set out under exhibit 6 for the entire period of employment. Service gratuity is calculated at the rate of 15 days salary for each completed year of service for 19 years at a monthly salary of 29,974. The Claimant prays to be awarded accordingly.

### **Response**

9. The Respondent denies the claim and counter claims Kshs.178,464 being amount of money the Claimant overpaid himself without authority of the Board for 39 months at the rate of Kshs.4,576 per month. The Respondent testified that the Claimant's lawful salary was Kshs.14,000 but he paid himself 19,000 for 39 months.

10. On the reliefs sought by the Claimant, the Respondent through RW 1 David Opopo Oando, a member of Board of Management since 2012 told the court that the Claimant was entitled and was paid a salary of Kshs.14,747, a month as Accounts Assistant from 1<sup>st</sup> January, 2012. That the Claimant was constantly absent from work and was warned about it. The Claimant did not submit finance records to the Auditors and the Ministry of Education timeously. He was also unable to supervise his staff.

11. He was given a show cause letter on 25<sup>th</sup> August, 2000 by the Principal.

12. On 12<sup>th</sup> November, 2014 the Claimant and another were suspended on allegations of negligence of duty. He was put on ½ pay during the suspension. Disciplinary hearing was held in which he defended himself in March 2015. The Board was not satisfied with his explanation and terminated the Claimants employment on 4<sup>th</sup> March, 2015.

13. The Claimant was paying himself a salary of Kshs.19,000 without authority instead of Kshs.14,747 which was approved by the Board in 2012.

14. Under cross examination RW 1 conceded that the Principal of the school was in charge of management and approved the payroll including the 19,000 salary received monthly by the claimant. RW 1 conceded that the salary was authorised by the Principal. RW 1 was unable to refute that the actual salary of the Claimant at the time of termination was Kshs.23,513.

15. RW 1 stated that the employment of the Claimant was terminated for negligence and misappropriation of funds. No charges or notice to show cause was produced in court when RW 1 was placed under cross examination. Respondent prays that the suit be dismissed with costs.

### **Determination**

16. The issues for determination are:-

(i) Whether the termination was for a valid reason and done following a fair procedure?

(ii) What remedies the Claimant is entitled to?

### **Issue I**

17. Other than the letter of suspension produced by the Respondent dated 12<sup>th</sup> November, 2014 which stated that the Claimant was suspended from duty on allegation of negligence of duty, the Respondent was unable to produce before court any charges and notice to show cause served on the Claimant. RW 1 was hard pressed under cross examination to produce any notice to show cause and conceded there was none before court.

18. However, minutes of Executive Board meeting held on 12<sup>th</sup> March, 2015 in which the Claimant was called to attend were produced. No charges were read to him from a reading of the minutes. He was only informed that he had been summoned by the Board as a suspect. The Claimant was asked various questions without the Respondent disclosing what specific charge the Claimant faced. He was questioned about his salary increase from 14,000 to 19,000. The Board did not make specific finding about it. RW 1 however told the court that the payment was done monthly with the approval of the Principal. There was no specific finding or discussion of the alleged negligence by the Claimant and from the records, there was no particulars of the specific conduct the claimant had committed.

19. The court finds, that the Respondent has failed to discharge the onus placed on it under sections 43 as read with section 45 and 47(5) of the Employment Act, 2007, to show that there was a valid reason to terminate the employment of the Claimant. Conversely, the Claimant has proved his case on a balance of probabilities that the termination was wrongful and the claimant was not given a fair hearing in terms of section 41 of the Act. The court finds accordingly.

### **Issue II**

20. With regard to the remedies sought by the Claimant, the Claimant has not proved that he was –

(a) Underpaid as claimed for 19 years of service. The Claim for Kshs.451,668 is dismissed for want of proof.

(b) The Claimant was paid half salary during the period of suspension between December 2014 and April 2015. The Claimant is

awarded Kshs.48,305 as prayed.

**(c) Notice Pay**

The Claimant is entitled to one month salary in lieu of notice in the sum of Kshs.23,513.

(d) The Claim for service gratuity for 19 years calculated at ½ salary for each completed year of service is granted in the sum of Kshs.223,375.50.

(e) Claim for anticipated income to age of retirement is dismissed for lack of merit.

**Compensation**

21. The Claimant lost his job unlawfully and unfairly. He had diligently served the Respondent for 19 years. He was not paid any terminal benefits upon termination. The Claimant got no certificate of service to help him get alternative job. The Claimant suffered loss and damage and is awarded the maximum 12 months' salary in compensation for wrongful and unfair termination of employment in terms of section 49(1)(c) as read with 49(4) in the sum of Kshs.141,078.

22. In the final analysis, Judgment is entered in favour of the Claimant as against the Respondent as follows –

(a) Kshs.223,375.50 service gratuity.

(b) Kshs.141,078 compensation.

(c) Kshs.23,513, notice pay.

(d) Kshs.48,305 arrear salary.

**Total award Kshs.436,217.50**

(e) The award is payable with interest at court rates from date of filing suit till payment in full in respect of items (a), (c), (d) above and from date of judgment with respect to (b) above.

(f) Costs of the suit.

**Judgment Dated, Signed and delivered this 25<sup>th</sup> day of October, 2018**

**Mathews N. Nduma**

**Judge**

**Appearances**

G. S. Okoth for the Applicant

M/s. Rogo for Respondent

Chrispo – Court Clerk