



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**  
**CAUSE NO. 240 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**DOMINIC MATANGWE MANYASA.....CLAIMANT**

*VERSUS*

**THE CHAIRMAN, SECRETARY BOARD OF MANAGEMENT OF OUR LADY OF  
MERCY GIRLS SECONDARY SCHOOL – BUSIA.....RESPONDENT**

**JUDGMENT**

The Claimant was employed by the respondent, the Board of Management of Our Lady of Mercy Girls Secondary School, Busia, as an accounts clerk effective 1<sup>st</sup> May 2010. His employment was to be on probationary terms for the initial six months.

The claimant was suspended from duty by letter dated 20<sup>th</sup> January 2015 following a complaint by a parent that the claimant had defiled his daughter who was in Form One. The letter of suspension states that the decision to suspend the claimant was reached by the Executive Board of Management meeting held on 20<sup>th</sup> January 2018 at which the claimant was called and interrogated. The letter of suspension informed the claimant that he would be on half salary during suspension until his case is heard and determined by the full Board of Management on a date to be communicated to him.

The claimant’s employment was terminated by letter dated 8<sup>th</sup> April 2015. The letter stated that the claimant declined to attend the Board of Management meeting held on that day and had also failed to attend earlier meetings. His failure to attend the meeting was deemed insubordination, hence the termination.

After termination the claimant was paid Kshs.221,566 as terminal benefits which the claimant received and signed for on 2<sup>nd</sup> June 2015.

In his statement of claim dated 6<sup>th</sup> July and filed on 7<sup>th</sup> July 2015, the claimant avers that the termination of his employment was unlawful and wrongful and violated the provisions of the employment laws. He further avers that he was underpaid during employment. He prays for the following remedies –

- a. ... Salary underpayments-..... Kshs.246,844/=
- b. .. House allowance underpayment..... Kshs.24,000/=
- c. .. Medical allowances underpayment..... Kshs.42,000/=
- d. ... Commuter allowance underpayment..... Kshs.224,000/=
- e ... Leave allowance unpaid..... Kshs.136,165/=
- f.... Public Holidays unpaid..... Kshs.42,720/=
- g.... Payment in lieu of notice..... Kshs.54,466/=

**Total    Kshs.770,195/=**

h. Compensation for unlawful termination of employment or in the alternative reinstatement of the employment.

i. Any other relief the court may deem it fit.

j. The costs of this suit.

The respondent filed a statement of response denying the averments in the statement of claim. The respondent states that the claimant was employed on terms and conditions of the Board of Management and that the reference to Scale G in his letter of appointment did not mean he was in Job Group G of the employees of the civil service. The respondent further states that the claimant was not an employee of the Ministry of Education but an employee of the Board of Management.

At the hearing, the claimant testified on his behalf while FLORENCE OKWARE, the Principal and Secretary to the Board of Management of the school testified on behalf of the respondent. Parties thereafter filed and exchanged written submissions.

### **Determination**

The issues arising for determination are whether the termination of the claimant's employment was unlawful and unfair and whether he is entitled to the prayers.

### **Unfair Termination**

It was the testimony of the claimant that he was sent on suspension because he had written several letters to the respondent demanding adjustment of his salary and payment of arrears of underpayments while the reason for termination was insubordination.

The respondent's case is that the suspension was because of the complaint by a parent who reported that the claimant had bought his daughter a phone after making her pregnant and assisting her to procure an abortion, while the termination was on grounds of insubordination after the claimant failed to attend board meetings at which his case was to be discussed, allegations that the claimant denied.

The claimant's letter of suspension expressly states that the claimant was called and interrogated by the Executive Board of Management meeting held on 20<sup>th</sup> January 2015 before he was suspended. The minutes of the meeting are attached as exhibit CK4(a) of the statement of response. The relevant minutes (Min. 4/1/2015 and Min.5/1/2015) are reproduced below –

#### **“Min. 4/1/2015 - The Principal's Report.**

The Principal reported a case that had been brought to her attention by a form one parent, who came over the holiday with the daughter. The Principal gave a hearing to the parent and daughter - Rebecca Akinyi, and she alleged having been sexually harassed by the Bursar.

The magnitude of the offence made the Principal seek the boards hearing for proper settlement of the matter.

The Executive Board therefore called in Dominic to listen to his side of story.

Dominic denied the allegations as the girls own fabricated story. However, after hearing the allegations he in company of James - a young man on attachment in the accounts office went to the girls' residence near 48 estate, he made the girl - Rebecca with her friend Rose Auma write confessions that could not be understood by the governors.

#### **Min. 5/1/2015 - Boards Reaction/Recommendations.**

The documents presented by Dominic having been written by the girls were not addressed to the board.

The apology was not from the chief complainant - Rebecca's father.

After their deliberations the governors resolved that Dominic be given two options – Resignation or Suspension pending appearance before the full board to defend himself.

He opted for suspension.

The governors resolved to set a date in March after KCSE results are out, so that it would be discussed among other issues.

The Principal was mandated to communicate to Rebecca and the Father, to come along with other witnesses and evidence.

Dominic was also to appear on that day with any witnesses.”

The respondent further produced a letter dated 9<sup>th</sup> February 2015 inviting the claimant to a full board meeting to held on 6<sup>th</sup> March 2015. The letter of invitation states that among the issues to be discussed is a disciplinary case that involves the claimant. The respondent's witness RW1 testified that the claimant was invited by SMS but responded that he was sick and further that SMS was the official mode of communication.

I find that the respondent had a valid reason to discipline the claimant. Indeed the claimant was given a hearing by the Executive Committee before he was suspended. He was to appear before the full board at a later date for final determination which opportunity he was given twice but squandered by failing to attend.

The claimant's suspension and subsequent termination were therefore not unlawful. Under the circumstances of the case, the respondent was justified to terminate the claimant's employment following his failure to attend the board meeting for his disciplinary hearing on two separate occasions.

## **Remedies**

The claimant prayed for salary underpayments in the sum of Kshs.246,844, house allowance underpayment of Kshs.24,000, medical allowance underpayment of Kshs.42,000 and commuter allowance underpayments of Kshs.224,000. The claimant's justification for the underpayments was the circular on New Salary Scales for Civil Servants at appendix 3(a) and (b) of the statement of claim and a payslip of a Clerical Officer I attached to District Labour Office, Busia whom the claimant stated was in the same Job Group G as himself. The claimant further produced a copy of Legal Notice No. 262 The Education (Board of Governors) (Non-Teaching Staff) Regulations, 1993.

The regulations are produced below –

### ***EDUCATION (BOARD OF GOVERNORS) (NON-TEACHING STAFF) REGULATIONS, 1993***

*[L.N. 262/1993.]*

#### **1. Citation**

These Regulations may be cited as the Education (Board of Governors) (Non-Teaching Staff) Regulations, 1993.

#### **2. Interpretation**

In these Regulations, unless the context otherwise requires—

“**Board of Governors**” means a board of Governors established under the Education (Board of Governors) Order;

“**non-teaching staff**” means all employees of the Board of Governors who are not engaged in teaching or research.

#### **3. Appointment of non-teaching staff**

Each Board shall have the powers to manage the school, college or any other institutions for which it is established and for that purpose to engage, promote, demote or terminate the services of any of its employees.

#### **4. Terms and conditions of employment for non-teaching staff**

Persons belonging to a professional cadre and employed by the Board shall be employed on such terms and conditions of service similar to those recommended for equivalent posts in the Civil Service and as per the applicable scheme of service.

#### **5. Employment of semi-professional by the Board**

The Board may appoint suitable semi-professional and subordinate staff, on such terms and conditions as shall be determined by the Board.

#### **6. Board to deal with claims and grievances**

Where a claim or grievance arises from an employee of the Board, the Board shall deal with the claim or grievance exhaustively in accordance with the Employment Act (Cap. 226).

#### **7.. Seconded staff**

1. All members of staff seconded to the Board, shall be under the control of the Board.

2. Notwithstanding the provisions of paragraph (1) the Board may, by a resolution passed by two-thirds of the Governors present and voting, at a special meeting, convened for the purpose, request the Minister to terminate the secondment of any person seconded for service to the Board.

#### **8. Dismissal and termination of employment**

1. The Board of Governors shall reserve the right to dismiss any of its employees instantly and without notice or pay in lieu of notice for reasons of gross misconduct as provided in the Employment Act (Cap. 226).

2. The Board shall not decide on a proposal to—

- a. dismiss from employment any person employed by the Board;
- b. terminate a contract between the Board and its employees;
- c. request the Minister to terminate the services of a person seconded to the Board, on grounds of misconduct or grave professional default, until the person concerned has been given an opportunity to appear in person before the Board and has presented his defence.

3. Subject to the provisions of paragraph (1) where a member of non-teaching staff is entrusted as an agent of the Minister to perform certain functions and such officer fails or neglects to perform the duties so assigned and sufficient grounds exist to discipline, terminate or dismiss the officer from the service, the Minister shall direct the cause of action to be taken against that officer and the Minister's decision shall be final.

## 9. Determination of issues

Any issue arising as to the construction of these Regulations or on any act done or about to be undertaken under them shall be determined conclusively by the Minister.”

It is clear from the Regulations that the claimant was not a civil or public servant but an employee of the board employed on terms and conditions of service determined by the board, subject only the Employment Act.

The circular upon which the claimant based the claim for underpayments is therefore not applicable to him. Consequently I find no proof of underpayment of salary, house allowance, medical allowance and commuter allowance. The prayers are accordingly dismissed.

The claimant further prayed for leave allowance. During his testimony it was clear that what he was seeking was pay in lieu of leave. RW1 testified that the claimant was required to work even during school holidays although not on a daily basis. She further stated that she had no records of the claimant taking leave as the claimant never applied for any.

Under the Employment Act, the claimant is entitled to 21 days leave per year or 1.75 days per month worked. The claimant was in the employment of the respondent from 1<sup>st</sup> May 2010 to 8<sup>th</sup> April 2015, a period of 5 years.

Section 10(3)(a)(i) of the Employment Act requires employers to keep records of any terms and conditions of employment including –

**(a) any terms and conditions relating to any of the following—**

**(i) entitlement to annual leave, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated);**

Section 10(6) and (7) further provide as follows –

**(6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.**

**(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.**

Further, Section 74(1)(f) requires employers to keep records including “*an employee's annual leave entitlement, days taken and days due as specified in Section 28.*”

The respondent having failed to produce such records or to prove that the claimant took leave, I award the claimant leave at 21 days for each year worked being 105 days translating to Kshs.50,747.30 based on his last basic salary of Kshs.12,566 per month.

The claimant prayed for unpaid public holidays but did not specifically state that he worked on any particular public holiday or how many public holidays he was seeking payment for.

I find that the prayers has not been proved and dismiss it.

The claimant further prayed for payment in lieu of notice. He confirmed in his testimony that he was paid Kshs.221,566 which he collected on 2<sup>nd</sup> June 2015. This money was inclusive of pay in lieu of notice as confirmed by RW1.

The claimant further prayed for compensation for unlawful termination or in the alternative reinstatement. He is not entitled to either, having found that the termination of his employment was not unlawful or unfair.

**Conclusion**

Having found that the only money due to the claimant is Kshs.50,747.30 and having further found that he was paid Kshs.221,566 as terminal dues; I find that no further payment is due to the claimant.

The claim is therefore dismissed. Each party shall bear its costs.

**DATED AND SIGNED AT NAIROBI ON THIS 12<sup>TH</sup> DAY OF OCTOBER 2018**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 25<sup>TH</sup> DAY OF OCTOBER 2018**

**MATHEWS NDERI NDUMA**

**JUDGE**