



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 285 OF 2017

BETWEEN

RICHARD OWINO ODERACLAIMANT

VERSUS

- 1. STAR OF THE SEA HIGH SCHOOL**
- 2. BOARD OF MANAGEMENT, STAR OF THE SEA HIGH SCHOOL.....RESPONDENTS**

Rika J

Court Assistant: Benjamin Kombe

Munee Katu & Associates, Advocates for the Claimant

State Law Office Mombasa for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 20th April 2017. He states he was employed by the Respondents as a Computer Teacher on 31st January 2007. His beginning salary was Kshs. 7,000 monthly. This was increased to Kshs. 20,200 by the time the Claimant left employment. His contract was terminated by the Respondents on 26th November 2016. He was not paid terminal benefits. He asks the Court to grant him the following orders against the Respondents:-

- a) 1 month salary in lieu of notice at Kshs. 30,304.
- b) Underpayment of salary for the period 1st April 2014 to 30th May 2016 at Kshs. 311,584.
- c) Underpayment of salary for the period 1st June 2016 to 29th November 2016 at Kshs. 59,904.
- d) 12 months' salary in compensation for unfair termination at Kshs. 363,648.

Total....Kshs. 735,136.

- e) Certificate of Service to issue.
- f) Costs and interest.

2. The Respondents filed their Statement of Response on 26th May 2017. The Claimant was employed by the Respondents as a Computer Teacher, on a 3 month contract, on 22nd February 2007. He was paid Kshs. 7,000 monthly. The School did not at the time of recruiting the Claimant, have a Computer Teacher. A Teacher was expected to be posted by the Teachers Service Commission [TSC]. The Respondents retained the Claimant after TSC posted a Computer Teacher. The Claimant was given additional responsibility of securing and maintaining

the computer room and the equipment therein. The School lost items from the computer room. It was discovered also that the Claimant registered a private candidate to do her practicals at Respondents' School without the permission of the Respondents. The Respondents issued the Claimant letter to show cause why, he should not be disciplined. He was asked at the end of August 2016, to assist Students at a neighbouring School, Mbaraki Girls Secondary School, in completing their computer projects. During Respondents' School KCSE examination, the Claimant was required to return to Respondents' School. He refused to return. The Respondents learnt later that the Claimant had sought employment with Mbaraki Girls, and was on this School's payroll. The Respondents took the decision to terminate Claimant's contract. He was informed about this in a letter dated 20th February 2017. The Respondents pray the Court to dismiss the Claim with costs.

3. The Claimant testified, and closed his case, on 12th February 2018. School Principal Janis Kiruriti testified for the Respondents on 6th June 2018, bringing the hearing to a close. Parties confirmed the filing of their Closing Submissions on 18th September 2018.

4. In his evidence before the Court, the Claimant adopted his Statement of Claim, Witness Statement and Documents on record. Cross-examined, he conceded he was employed by the School's Board of Management, not the TSC. He was aware a Teacher was posted to the School by TSC. There were conflicts between this Teacher and the Claimant. There was a discussion involving the TSC Teacher, the Claimant and Management over the conflicts. The meeting turned out to be a discussion about the Claimant's physical disability and level of education. He was told by Management " *wewe kila siku unataka disability yako ionekane.*" [Kiswahili/ Sheng' for: – *you always like to have your disability highlighted.*] There were allegations made, that items were stolen from the computer room. It is true he was asked to assist Mbaraki Girls. He was to extend his assistance during the exam period. He was told the TSC Teacher would perform his role in his absence. He did not negotiate any remuneration with Mbaraki. The arrangement was between the 2 Schools. Redirected, the Claimant testified there were no disciplinary proceedings against him. He was at Mbaraki for the period of the exam. On return, he found the letter of termination issued by the Respondents. He received a letter on missing items. There was a warning letter. These issued within a short period.

5. Principal Janis Kiruriti worked with the Claimant. The Claimant was employed in 2007 as an untrained computer Teacher. He was not employed by TSC, but by the Board of Management.

6. When the TSC posted a Teacher, there was tension between the new Teacher and the Claimant. The Principal asked the Board to retain the Claimant to do computer maintenance. The relationship between the 2 Teachers deteriorated. The Principal mediated in vain. There were threats by the Claimant to kill the new Teacher. This was reported to the Police.

7. Computers were disappearing from the computer room. The Claimant owned up that he had carried 1 computer home, and given another to his friend. 21 laptops were donated by an NGO to the School. 2 disappeared under Claimant's watch. The Claimant alleged 1 was stolen by Students. The Claimant disclosed that the other was attached by Auctioneers after the Claimant failed to pay his rent.

8. Mbaraki Girls Secondary School asked for supervisory assistance from Janis. The Principal asked the Claimant to go and assist. Assistance was for a specific project. The Principal called the Claimant when her School had its practical exams in November 2016. The Claimant told her he would not go back, because he had been hired by Mbaraki. Mbaraki later told the Principal that the Claimant received salary from Mbaraki. The Claimant went and cleared very fast with the Respondents in January 2017. He placed the Respondents in a problem with the District Education Office, by enlisting a private Student for exams at the Respondents' School. He was given a disciplinary hearing in the company of a Colleague, Oduor. The Board of Management felt the Claimant was not fit to continue working for the Respondents. His contract was terminated fairly.

9. Cross-examined, the Principal testified she sent the Claimant to Mbaraki. He was to finish with the project by 10th October 2016. He could be recalled if need be. The Respondents continued to pay him during his stay at Mbaraki. He was still an Employee of the Respondents.

10. His contract was terminated because he absconded, stole machines, and enlisted a private candidate for exams. No reasons are given in the letter of termination. The Claimant attended disciplinary hearing. He was invited through a phone message. Theft of computers was not reported to the Police. Both Schools paid him salary for the period he was at Mbaraki. He received termination letter from Mbaraki. He was paid salary in lieu of notice. The Schools have manpower shortages. TSC had advised the Schools to share resources. Termination was fair.

The Court Finds:-

11. The Claimant was employed by the Respondents as a Computer Teacher, on a 3 month contract, beginning 22nd February 2007. He was employed through the Board of Management. He was not employed through the TSC. His contract was renewed periodically afterwards, and his initial monthly salary of Kshs. 7,000, adjusted upwards. By the time the letter of termination issued, on 20th February 2017, his salary was Kshs. 20,200.

12. The Claimant has not stated which law, regulation, contract or wage instrument, enabled him to be paid the amounts he claims as underpayment of salary. His prayer for underpayment has no support in law and evidence. He negotiated and agreed on a salary with the Board of Management. What he was paid was based on his contract of employment. He has not directed the mind of the Court to anything outside his contract, entitling him to earn anything more than he earned in monthly salary. He has exhibited a document titled, 2015/2016 Minimum Teachers Gross Salary Kenya. He did not explain how this document applied to the contract between him and the Respondents. The source to the documents is given to be Salaries and Remuneration Commission and TSC Circulars. He was not an Employee of the TSC. He did not exhibit any SRC and TSC circulars under reference. He did not establish that any of the circulars applied to him. The prayer for underpayment of salary is declined.

13. The problems between the Respondents and the Claimant appear to have their genesis in the introduction by the TSC, of a new Computer

Teacher. The Claimant was no longer at ease. He felt he did not have the particular territory to himself. He was untrained. The new man was a trained Teacher, employed by the TSC. Bad blood developed. It is alleged the Claimant even threatened to murder the new Teacher, to protect what he perceived as his turf. Conflict resolution efforts led by the Principal and other Teachers came to a cropper.

14. The Court is convinced the chance to get away from it all, offered itself to the Claimant, with the request for assistance from the neighbouring Mbaraki Girls Secondary School. Mbaraki requested the Principal of Star of the Sea, for assistance with Students' computer project. There was shortage of resources, and TSC had advised Schools to share resources. The Claimant was however, not a resource at the disposal of TSC, and perhaps it was inadvisable for the Principal to use him as one of the resources TSC had asked the Schools to share.

15. Nonetheless a chance had offered itself to the Claimant to escape the rivalry the new TSC man brought at Star of the Sea. He went to Mbaraki. He explored ways of making the transition permanent. He was paid a salary by Mbaraki. He continued to receive a salary from Star of the Sea. A time came when his services at Star of the Sea were required. He was asked to return.

16. A letter dated 29th November 2016 from the Principal Star of the Sea to the Claimant, captures short text messages between the Principal and the Claimant, on the subject of Claimant's return. The conversation went as follows:

Principal: *Tomorrow we do computer. You are required to be present at the School.*

Claimant: *Was not involved in any preparation on the same and don't know the set-up in the Lab. Let Mr. Osome do it. Mbaraki has engaged me.*

Principal: *Who is your Employer Mr. Odera?*

Claimant: *Why was I sidelined in preparation yet I was available? The Teacher is supposed to be conversant with the set-up.*

Principal: *Regardless of who did the preparations, you are employed by this School, unless you have since left!*

Claimant: *You told me to assist Mbaraki, and if that was a trick to get rid of me of Star, then let it be. I am still an Employee of Star but some decisions are questionable and have a right to do so.*

Principal: *Oooh.*

17. This conversation confirms the observations made by the Court in the preceding paragraphs. The Claimant was not at ease working with the new Teacher. He was unhappy that he should be recalled and asked to work with the new Teacher, while he was not involved in the preparations leading to the exams.

18. But importantly, he confirms he had been engaged by Mbaraki. He categorically tells the Principal he was engaged by Mbaraki. He does not sound, in saying this, like he had any intention of going back to Star of the Sea. He tells the Principal that if the Principal intended to get rid of him by sending him to Mbaraki; let it be. The Claimant, had, in his mind crossed the Rubicon.

19. When eventually the Claimant was unsuccessful in his endeavour to make a complete change to Mbaraki, he made an attempt to go back to Star of Sea. The Respondents were now not interested in having the Claimant back.

20. The Respondents were aware they had a role in his moving to Mbaraki, but were less than candid to tell the Claimant to his face, that he was not welcome back at Star of the Sea after his exchange with the Principal captured above. The last word spoken by the Principal above – *Oooh* – was a coded message to the Claimant that he was not going to find an open door at Star of the Sea, if he ever decided to return, as he had declined to return when he was needed most. Because the Respondents were aware of their role in introducing the Claimant to Mbaraki, they did not wish to charge him with the specific offence of being away without lawful cause, or leave of the Respondents; they instead brought in a splendid display of other accusations against the Claimant, to justify termination. There were allegations about the Claimant having registered a private candidate to sit exams at Star of the Sea. There were allegations that the Claimant, after working for many years, stole computers. He also had Respondents' laptop attached and sold by Auctioneers for failing to pay rent. He had way back in May 2016, conceded about having lost a laptop which was in his custody, and agreed to repay the Respondent the value of the laptop. These were not current topics by the time of termination.

21. The letter of termination does not state any of the above allegations, to comprise the reason or reasons for termination. The letter complains about the quality of service the Claimant rendered to the School. This is the reason which can be read from the letter in justifying termination. What was the problem with the quality of Claimant's service while he served the Respondents' School? Would they pursue him at Mbaraki, if his service was substandard?

22. The meeting held on 24th January 2017, does not seem to the Court to have been a disciplinary hearing held in adherence to Section 41 of the Employment Act. The title to the minutes, indicates, the meeting was about "Mr. Richard Odera's Termination." The minutes disclose that the Board had as far back as 2nd August 2016, recommended termination of the Claimant's contract. The Claimant's comments at the meeting show he received a letter of termination on 29th November 2016. A decision had already been taken. That decision was the subject of the meeting. The Claimant was prejudged. The meeting of 24th January 2017 was not objective. No specific charges were presented to the Claimant before the meeting. The preliminaries section states that the Principal explained the meeting was to discuss the "issue of Mr. Odera who claimed he was wrongly terminated." A decision had already been made. If the meeting was meant to be an appellate exercise, the Court has not seen any record of the original hearing, leading to the decision subject of such an appeal.

23. Termination of the Claimant's contract was not based on valid reason or reasons. It was not carried out in accordance with fair procedure. It fell far short of the minimum statutory standards of fairness, laid down in Sections 41, 43 and 45 of the Employment Act 2007.

IT IS ORDERED:-

- a) *It is declared termination was unfair.*
- b) *The Respondent shall pay to the Claimant 1 month salary in lieu of notice at Kshs. 20, 200 and equivalent of 12 months' salary in compensation for unfair termination at Kshs. 242,400- total Kshs. 262,200.*
- 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 Mombasa this 22nd day November, 2018.

James Rika

Judge