



**REPUBLIC OF KENYA**

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

**CAUSE NO. 1 OF 2015**

**PETER WAFULA WASIKE.....CLAIMANT**

**VERSUS**

**LOCKWOOD GIRLS' HIGH SCHOOL.....RESPONDENT**

**JUDGMENT**

1. Peter Wafula Wasike (Claimant) was employed by Lockwood Girls' High School (Respondent) on 20 August 2012 as Principal. The contract was to run up to 2015, and was renewable on expiry.

2. On 28 August 2014, a director of the Respondent wrote to the Claimant informing him of the termination of the contract with immediate effect.

3. The letter gave the reasons for termination of the contract in the following terms

You are unable to maintain the School population to a sustainable level..... You took over when the School had 280 students in the year 2012. Today we have less than 160 students and in January we shall hardly have 100 students in Forms 2, 3 & 4. You do not have any solution to this challenge.

In addition your administration has at best been very weak which has led to instability in the School. We have had at least 2 strike during your short stay.

4. The Claimant sought legal advice and on 24 September 2014, his legal advisers sent a demand letter to the Respondent alleging *unfair termination of employment* and demanding Kshs 79,551,166/60 as compensation and other dues.

5. The Respondent denied liability and on 9 January 2015, the Claimant instituted legal proceedings against the Respondent contending that the termination of his contract was unfair and seeking compensation and terminal dues, among other remedies.

6. The Respondent filed an Answer to Memorandum of Claim on 18 February 2015, which prompted the Claimant to file a Response to Answer to Memorandum of Claim on 16 June 2015.

7. The parties also filed documents to support their respective cases and the Cause was heard on 6 April 2016, 23 November 2016 and 29 March 2017.

8. The Claimant did not file submissions as directed, while the Respondent filed its submissions on 17 July 2017.

9. The Court has given due consideration to the pleadings, evidence and submissions and identified the *Issues* arising for determination as, *whether the termination of the Claimant's contract was unfair, whether the Claimant had outstanding off days/public holidays by time of separation, whether the Claimant worked overtime, whether the Claimant had outstanding leave by time of separation, whether Claimant was underpaid and appropriate remedies.*

## **Whether termination was unfair**

### **Procedural fairness**

10. It is not in dispute that the separation was on account of *performance* related reasons.

11. The statutory framework governing termination of employment contract(s) is found in sections 35, 40 (*redundancy*), 41 (*misconduct, poor performance and physical incapacity*), 43, 45 and 47 of the Employment Act, 2007.

12. The point to start the discourse is section 47(5) of the Employment Act, 2007 which provide that

*For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.*

13. The above statutory provision lays a very low threshold of proof on an employee, but in any case, a threshold which an employee must meet in the first instance when complaining of *unfair termination* or *wrongful dismissal* before an employer is called upon to discharge the onerous burden placed on the employer by sections 40, 41, 43 and 45 of the Employment Act, 2007.

14. It is not disputed that the Respondent did not give the written notice contemplated by section 35 of the Employment Act, 2007, and on that account the Court finds that the Claimant has met the burden placed on employees by section 47(5) of the Act.

15. In this respect, therefore the obligation shifted to the Respondent to show that the termination of the Claimant's contract was in compliance with the procedural fairness safeguards of section 41 of the Employment Act, 2007, and to further prove the reasons for the dismissal as required by section 43 of the Act, and to prove that the reasons for dismissal were valid and fair reasons pursuant to section 45 of the Act, and to justify the termination in terms of section 47(5) of the Act.

16. It is now widely accepted that the hearing contemplated by section 41 of the Employment Act, 2007 can be conducted through correspondence or verbally. The process does not require an employer to hold a mini-court.

17. But a prudent employer with many employees is well advised to reduce into writing what transpires during a disciplinary hearing (employers with over 50 employees must have a written disciplinary policy).

18. Where the hearing is conducted verbally, the employer should at least answer in Court the *What, Who, When* and *How* questions to demonstrate it complied with the statutory safeguards.

19. The *What* question relates to the particulars of charges brought to the attention of the employee. The *Who* part of the equation relates to who heard the representations made by the employee, in short, who was present. The *When* question will address where and the date when the hearing took place.

20. When an employer grants a hearing to an employee, it is a fact which should be easy to prove. The evidence in that respect should be precise and concise.

21. The Claimant's testimony that he was summoned to a strategy meeting in Nairobi on 28 August 2014

but was instead issued with the letter terminating the contract was not interrogated by the Respondent and the Court finds it's more probable that the meeting was a strategy meeting and not disciplinary hearing.

22. The Respondent's director in the present case did not place before Court a coherent story to show how and whether it complied with the procedural fairness dictates of the law. It merely attempted to justify compliance with the process by stating that pay in lieu of notice was paid

23. The Court would therefore conclude that the termination of the Claimant's contract was procedurally unfair.

### **Substantive fairness**

24. In the pleadings and during oral testimony, the Respondent went beyond the reasons given in the letter of termination to explain the separation.

25. However, because of the conclusion on the procedural fairness of the separation, it is not necessary for the Court to examine the reasons, their fairness and/or validity as compliance with the procedural fairness requirements are mandatory in a case such as was presented here.

### **Off days/public holidays/overtime**

26. The Claimant contended that he used to be in the school during Saturdays, Sundays and public holidays.

27. The Claimant was a manager in his own right. The nature of his duties as principal/teacher also necessitated that he spend more than average time in the school (above the normal office hours).

28. Off course by the nature of schools in this country, he could not have been overly busy with official duties during weekends and public holidays.

29. The Claimant did not disclose the contractually agreed working hours. He also did not draw the attention of the Court to any prescribed working hours applicable in the sector he was engaged in. Overtime therefore was not proved.

30. The Court cannot therefore concede to the contention that he was entitled to off duties and/or compensation for public holidays and overtime. He could as well have negotiated for an allowance to cover such extra responsibilities/hours, if at all.

### **Leave**

31. The Claimant's contract provided for 21 days annual leave to be taken during school holidays.

32. Although contending that he did not take the leave, the Claimant did not demonstrate that he made an attempt to secure annual leave from the Respondent's director(s) and that such request was denied.

### **Underpayments**

33. The Claimant sought underpayments/salary arrears of Kshs 587,926/-. He filed and produced a tabulation of payments made. The agreed monthly salary was Kshs 70,000/-.

34. The Respondent also filed and produced payment schedules (mpesa) of amounts sent to the Claimant.

35. Why the Respondent opted to make salary payments through mpesa to a Principal of a high school and at the same time through a bank account is baffling.

36. The law actually requires that an itemised pay statement (pay slip) be issued to each employee and

that salary be paid in cash or through a bank account.

37. The Respondent did not issue pay slips to the Claimant and if any were issued, such information was not filed with the Court.

38. Instead of filing a salaries payment schedule, the Respondent was content with throwing at the Court a bulky 115 page mpesa statement from a director and secretary. The statement must have been intended to obfuscate the question of arrears.

39. The Court would give the benefit of doubt to the Claimant and find that by time of separation, he was owed arrears of Kshs 587,926/-.

### **Appropriate remedies/Orders**

#### **Pay in lieu of Notice**

40. The Claimant was paid dues which included pay in lieu of notice. This remedy is therefore not available.

#### **Salary arrears**

41. For the reasons given above, the Court would find for the Claimant in the sum of Kshs 587,926/-.

#### **Off days/public holidays/Overtime**

42. These heads of claim were not proved.

#### **Service pay**

43. Under this head, the Claimant sought Kshs 70,000/-. The foundation for this was not disclosed. The contract produced in Court provided for gratuity.

44. Gratuity in terms of contract is not the same as the service pay contemplated by section 35(5) of the Employment Act, 2007.

#### **Compensation**

45. The Court has concluded that the termination of the Claimant's contract was procedurally unfair, and in consideration of the premature termination of contract with 16 more months to go, the Court would award the equivalent of 12 months gross wages as compensation.

#### **Payment for breach of contract**

46. The Claimant sought Kshs 1,120,000/- on account of breach of contract. The contract was for 3 years, but was prematurely ended.

47. In the view of the Court, and considering that maximum compensation has been awarded, it would not be fair to make an award under this head of claim.

### **Conclusion and Orders**

48. The Court finds and holds that the termination of the Claimant's employment was procedurally unfair and awards him and orders the Respondent to pay him

(i) Salary arrears

Kshs 587,926/-

(ii) Compensation	Kshs 840,000/-
<b>TOTAL</b>	<b>Kshs 1,427,926/-</b>

49. Claimant to have costs.

**Delivered, dated and signed in Nakuru on this 20<sup>th</sup> day of July 2017.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Ms. Ngeresa/Mr. Gichigo instructed by Wasilwa & Co. Advocates

For Respondent Mr. Kagucia instructed by Kagucia & Co. Advocates

Court Assistants Nixon/Daisy