



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO 1314 OF 2015**

**DAN JACKSON IRUNGU KARIUKI.....CLAIMANT**

**VERSUS**

**CHAIRMAN BOARD OF GOVERNORS RIFT VALLEY ACADEMY..RESPONDENT**

**JUDGMENT**

**Introduction**

1. By a Memorandum of Claim dated 29<sup>th</sup> July 2015 and filed in Court on 30<sup>th</sup> July 2015, the Claimant has sued the Respondent for wrongful dismissal.
2. The Respondent filed a Statement of Response on 29<sup>th</sup> September 2015 and the matter proceeded to hearing with the Claimant testifying on his own behalf and Timothy Ray Hall for the Respondent. Both parties also filed written submissions.

**The Claimant's Case**

3. The Claimant states that he was employed by the Respondent in 1994 as a Tractor Assistant. He states that the Respondent did not issue him with a written contract of employment until 2011, when he was involved in an accident, while in the course of duty.
4. On 19<sup>th</sup> March 2015, the Claimant was summoned by the Respondent's Director of Services who informed him that he had been dismissed with immediate effect. The Claimant's plea for an explanation for the dismissal were ignored. By the time of dismissal, the Claimant earned a monthly salary of Kshs. 13,607.
5. The Claimant avers that his dismissal was without any justifiable cause and that he was not given an opportunity to be heard. He adds that he was underpaid and that he was not compensated for injuries sustained in the accident in 2011. He further claims that he did not take leave. He therefore claims the following:
  - a. 12 months' salary in compensation.....Kshs. 163,284
  - b. Damages for pain and suffering and loss of amenities
  - c. Service pay

- d. Punitive and aggravated damages
- e. Compensation for violation of constitutional rights
- f. Certificate of service
- g. Fine of Kshs. 100,000 against the Respondent for failure to comply with Section 51(3) of the Employment Act, 2007
- h. Costs plus interest

### **The Respondent's Case**

6. In its Statement of Response dated 28<sup>th</sup> September 2015 and filed in Court on 29<sup>th</sup> September 2015, the Respondent states that the Claimant's employment was lawfully terminated for valid and justifiable reasons.

7. The Respondent adds that the termination was effected in accordance with the Claimant's employment contract. Save for the certificate of service which the Respondent states has been ready for collection, the Claimant's entire claim is denied.

### **Findings and Determination**

8. There are two (2) issues for determination in this case:

- a. Whether the termination of the Claimant's employment was lawful and fair;
- b. Whether the Claimant is entitled to the remedies sought.

### **The Termination**

9. The Respondent produced a termination letter dated 16<sup>th</sup> March 2015 addressed to the Claimant as follows:

*"Dear Jackson,*

*On Friday, 13<sup>th</sup> March 2015, Jeff Hazard (Dean of Men) came to me and reported that you had tried to solicit funds from him for a water project. Mr. Hazard stated that you went to his house at 7.30 in the morning on 11<sup>th</sup> March 2015 and asked him to support a water project at your home. Upon questioning how it was that you came to his house to ask for funds, you told him that you were sent by Steve Couch (School Chaplain). Mr. Hazard asked Mr. Couch if he had indeed sent you to Mr. Hazard. He did not. In fact, Mr. Couch, on behalf of the Benevolence Committee, had previously denied your request for financial assistance. Therefore, you had no authorization whatsoever to collect for this water project.*

*The fact is you lied to an administrator of Rift Valley Academy for the purpose of obtaining financial assistance. Your actions are a violation of section 5.6 point 8 of the Rift Valley Academy Employee Handbook (Gross Misconduct) giving false information to mislead the organization, and point 5.6 point 1 (failure to act in accordance with policy). Your continued financial requests are also a violation of The Employment Act of Kenya 2007, section 44.4.e (knowingly fails or refuses to obey a lawful or proper command), to cease improper asking.*

*This is your 3<sup>rd</sup> (third) letter in less than 270 days, and as a result, your employment with Rift Valley Academy is being terminated.*

*You are required to acknowledge receipt of this letter of warning (sic) by signing and returning this delivery note. Refusal to acknowledge receipt constitutes an offence of misconduct.*

*Lamar Stoltzfus*

*Director of Services*

*Rift Valley Academy”*

10. This letter, whose receipt the Claimant denies, accuses him of irregularly soliciting funds from officers of the Respondent. While the letter sets out specific instances when the Claimant is alleged to have solicited for funds, there was no evidence that these accusations were put to him for his response prior to the termination of his employment.

11. What is more, the Claimant was not given a chance to face his accusers either at the shop floor or before the Court. The charges leveled against him were therefore not tested and the Court finds that the Respondent failed to establish a valid reason for terminating the Claimant's employment as required under Section 43 of the Employment Act, 2007.

12. On the same date the Claimant's employment was terminated, he was issued with a warning letter on the same accusations contained in the termination letter. The warning letter states inter alia:

*“Your actions have resulted in you being issued with a second letter of warning for the same violations. One more letter of warning within the next 270 days for any violations of the RVA handbook will result in your termination.”*

13. It would appear that the Respondent decided to issue a warning letter and a termination letter, for the same offence on the same day. This procedure, which was clearly improper, exposed the Claimant to double jeopardy. I say so because a warning and a termination are both disciplinary actions, albeit of varying degrees of severity.

13. In addition, the Respondent decided to convene a disciplinary hearing on the Claimant's account three (3) days after the termination on 19th March 2015. The procedure adopted by the Respondent in this case is unknown in law and the Court finds that the Respondent failed procedural fairness requirements set out Employment Act.

## **Remedies**

14. In light of the foregoing findings, I have reached the conclusion that the termination of the Claimant's employment was substantively and procedurally unfair and he is entitled to compensation.

15. Before making the final award, I need to dispense with the preliminary issue regarding the effective date of the Claimant's employment. The Claimant told the Court that he was first employed by the Respondent in 1994. The Respondent on the other hand states that while the Claimant had worked previously on casual basis, the effective date of his regular employment was 1<sup>st</sup> August 2011.

16. In support of its case, the Respondent produced several temporary casual labourer request forms showing the Claimant's engagement for periods of 20-22 days at a daily wage of Kshs. 240. The Respondent also produced the Claimant's employment contract showing the effective date of his employment as 1<sup>st</sup> August 2011. Looking at the records produced by the employer in this case, the Court did not find any evidence that prior to 1<sup>st</sup> August 2011, the Claimant worked for a continuous period beyond thirty (30) days. That being the case, the Court finds that the Claimant's engagement prior to this date was purely on casual basis and his regular employment commenced on 1<sup>st</sup> August 2011.

17. Having settled the issue of the effective date of the Claimant's employment, I now award him the six

(6) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service as well as the Respondent's conduct in the termination process. I also award him one (1) month's salary in lieu of notice.

18. Regarding the claim for service pay, I have this to say. The Claimant's employment contract and the Respondent's Employee Handbook provided for a pension scheme. There was evidence that the Claimant participated both in the pension scheme and the National Social Security Fund (NSSF). He is therefore not entitled to service pay.

19. The claims for damages for pain and suffering and violation of constitutional rights were not proved and are dismissed.

20. Finally, I enter judgment in favour of the Claimant in the following terms:

- a. 6 months' salary in compensation.....Kshs. 81,642
- b. 1 month's salary in lieu of notice.....13,607
- Total.....95,249**

21. This amount will attract interest at court rates from the date of judgment until payment in full.

22. The Claimant is also entitled to a certificate of service and costs of the case.

23. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 25<sup>TH</sup> DAY OF AUGUST 2017**

**LINNET NDOLO**

**JUDGE**

Appearance:

Mr. Kamotho for the Claimant

Mr. Mbugua for the Respondent