



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET**  
**APPEAL NO. 1 OF 2017**

**(Originally Eldoret High Court Civil Appeal No. 93 of 2007)**

**BOARD OF GOVERNORS, ST. JOSEPH'S**

**GIRLS SECONDARY SCHOOL CHEPTERIT**

**APPELLANT**

**v**

**BENJAMIN KIPTUM TOGOM**

**RESPONDENT**

**(Being an appeal arising from the Judgment and Decree of Honourable Magistrate Mr. W. Njage delivered on the 20<sup>th</sup> March, 2007 in ELDORET CMCC NO. 672 OF 2003)**

**JUDGMENT**

1. Benjamin Kiptum Togom (Respondent) sued the Board of Governors, St. Joseph's Girls Secondary School, Chepterit (Appellant) on 23 April 2003 alleging breach of contract and unlawful dismissal (without lawful cause).
2. The Appellant filed a Response and after a hearing, the trial Court delivered a judgment on 20 March 2003 in which it found and held that the Respondent had proved his case and awarded him a total of Kshs 543,910/- (being unpaid salaries from January 1999 to December 2002 (with yearly increments) together with costs and interest.
3. The Appellant was dissatisfied and it sought and obtained stay of execution pending appeal.
4. On 20 June 2007, the Appellant moved the High Court to extend/enlarge the time for filing of an appeal.
5. The High Court, on 24 July 2007 allowed the Appellant's application and ordered that an appeal be filed within 14 days.
6. As a result, the Appellant filed a Memorandum of Appeal on 30 July 2007 listing some 6 grounds of appeal, viz
  1. THE Learned Magistrate erred in Law and fact in failing to consider the evidence tendered by the Appellant.
  2. THE Learned Magistrate erred in Law and fact failing to consider the submissions tendered by the Appellant.

3. THE Learned Magistrate erred in law and in fact in arriving at a decision that is contrary to law.
4. THE Learned Magistrate erred in Law and in fact by awarding the Respondents damages that are high and excessive in the circumstances.
5. THE Learned Magistrate erred in Law and fact in failing to find that the Respondent had been properly and justly dismissed by the Appellant for reasons of misconduct.
6. THE Magistrate erred in law and fact in finding that the Respondent is entitled to full pay for the period he was on suspension in total disregard of the evidence on record.
7. The Appeal was not prosecuted timeously and on 7 July 2015, Mativo J directed that the Appeal be fixed for hearing within 30 days or it would stand dismissed.
8. There is nothing on record to suggest that the Appellant made any attempts to have the Appeal fixed for hearing in terms of the order by the High Court.
9. On 29 October 2015, the Appellant moved Court seeking an order to set aside the orders by Mativo J of 7 July 2015.
10. On 16 November 2015 Kimondo J directed the Appellant to serve the motion for *inter partes* hearing on a date to be given by the Registry.
11. On 15 December 2015, the parties filed a consent in Court in the following terms
  - a. The orders of this honourable court dated 7/10/2015 be and are hereby set aside by consent and the appeal herein be reinstated and listed for hearing.
  - b. Costs shall be in the cause.
12. The Deputy Registrar declined an invitation to have the consent adopted because there was nothing on record to suggest that the High Court had granted any orders on 7 October 2015 (as opposed to 7 July 2015).
13. The action of the Deputy Registrar prompted the parties to file another consent on 28 January 2016 to the effect that
  - a. The orders of this honourable court dated 7/17/2015 (sic) be and are hereby set aside by consent and the appeal herein be reinstated and listed for hearing.
  - b. Costs shall be in the cause.
14. The Deputy Registrar formalised the consent on 12 February 2016 and on 10 May 2016, the Appellant applied to have the Appeal transferred from the High Court to this Court.
15. With the consent of the Respondent, the High Court acceded to the transfer request and on 28 July 2017, this Court gave directions as to the filing of submissions and scheduled judgment for today.
16. The Appellant filed its submissions on 15 August 2017 while the Respondent filed his submissions on 29 August 2017. The Court has given due consideration to the record and the submissions.

### **Role of Court on first appeal**

17. There are numerous authorities on the role of an appellate court on a first appeal and two citations would be sufficient.

18. In *Kamau v Mungai* (2006) 1 KLR 150, the Court described the role thus this being a first appeal, it was the duty of the Court.... To re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.

19. About 3 years later, the Court of Appeal in *Seascapes Limited v Development Finance Company of Kenya Limited* (2009) eKLR, held that As this is a first appeal, we are bound to look at the evidence that was adduced before the superior court afresh, analyse it, re-evaluate it and reach our own independent conclusion but always bearing in mind that the trial court had the advantage of seeing and hearing the witnesses and giving allowance for that.

20. This Court will bear those legal principles in mind.

### **The law**

21. The Appellant has in its submissions made extensive reference to case law predicated on the Employment Act, 2007, a statute which came into effect in 2008.

22. Similarly, the Appellant has sought umbrage in section 44 of the Employment Act, 2007.

23. The Employment Act, 2007 was not the statute in place at the material time to the cause of action and therefore the provisions therefrom are of no application to the instant appeal nor to the cause agitated before the trial Court.

24. The Respondent's cause of action therefore fell to be determined on the basis of the repealed Employment Act, the common law and contractual provisions.

### **Heads of claim asserted by the Respondent**

#### *Suspension without pay from January 1999*

25. The Respondent essentially asserted heads of claim relating to unlawful dismissal (without cause) and breach of contract in that he was not paid wages from 1 January 1999 to December 2002 when he was on suspension. He also claimed for yearly increments he would have received during that period.

26. It is not in dispute that the Respondent was sent on compulsory leave with full pay through a letter dated 23 February 1998 and that he was recalled through a letter dated 17 November 1998.

27. On 28 January 1999, the Appellant wrote to the Respondent informing him that he would remain on suspension without pay from January 1999.

28. On 20 September 2000, the Respondent complained to the Appellant that he had been on suspension for nearly 2 years without pay. There was no response and the Respondent wrote a reminder in January 2001 which was replied to on 5 March 2001.

29. The Appellant invited the Respondent through letters dated 4 December 2001, 13 June 2002 and 18 July 2002 to appear before it and on 10 August 2002, the Appellant informed the Respondent that he had been dismissed for failing to report back to work after 17 November 1998.

30. The Respondent, in his testimony stated that he resumed duty but was turned away by the then Headmistress Sr. Mary Irene Kirongo, and the Chair of the Board.

31. The Appellant's first witness on her part stated that though she was not with the Appellant in 1998, from the records, the Respondent did not resume duty after 17 November 1998.

32. Technically, the Respondent was an employee of the Appellant until he was formally dismissed.

33. There is material on record which suggest that the Respondent was on suspension from January 1999. The letter though referring to a Parents Teachers Association meeting resolution is on the letter head of the Appellant.

34. The Appellant did not disown the letter and was merely content with asserting that it was the responsibility of the Board and not PTA to run the school.

35. Despite that assertion, the letter can be a source of an inference that the Respondent was still an employee and that he was sent on suspension without pay from January 1999.

36. Under the common law, the obligation of the employer has always been to pay wages but not to offer work (see *Employment and Discrimination Law, Middlesex University Business School London 2008/9*).

37. Similarly, a suspension should have a contractual or statutory foundation or backing.

38. Without the statutory or contractual authority, unilateral suspension by the employer with or without pay would constitute breach of contract (see *McKenzie v Smith (1976) IRLR 345*, which holding I endorse as being sound in law and appropriate in our jurisdiction).

39. The Respondent did not place before the trial Court any material, either statutory or contractual authorising it to suspend the Respondent without pay.

40. In so far as the Respondent was not paid from January 1999 to 10 August 2002, he would have been entitled to the wages for the period.

#### *Yearly increments/salary revision*

41. The Court has analysed the record and has not been able to find any material at all, statutory or contractual entitling the Respondent to annual salary increments. No letter of appointment or contractual document with such a provision was produced.

42. The trial Court therefore fell in error of both law and fact in awarding this head of claim.

#### *3 months' pay in lieu of notice*

43. At the time the Respondent was dismissed, an employer was free to dismiss an employee without cause, on no reason or even for a bad reason provided that payment equivalent to the agreed notice period was paid.

44. The parties did not produce any evidence as to the agreed period and because the Respondent was paid by the month, the Court is of the view that the equivalent of 1 month's salary in lieu of notice would have been reasonable (Respondent was earning Kshs 10,670/- at the time).

### **Competence of Appeal**

45. As already alluded to, the Appellant was directed on 7 July 2015 to fix the Appeal for hearing within 30 days or the Appeal would stand dismissed in default.

46. The Appellant did not comply and therefore the Appeal stood dismissed as of around 7 August 2015.

47. Both parties thereafter took a route not envisaged under the Civil Procedure Rules to resuscitate the Appeal and that course of action was purportedly formalised by the Deputy Registrar.

48. Technically, there is no Appeal before the Court, but because the parties showed clear intent to reinstate the Appeal and in consideration of the need to do substantive justice and the time lapse, and that it is the Court which raised this issue, this Court will not declare the Appeal incompetent.

