



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 115 OF 2016**

**ROBERT GACHURU KIMANI.....CLAIMANT**

**VERSUS**

**MOUNT KENYA ACADEMY FOUNDATION.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 17<sup>th</sup> November, 2017)

**JUDGMENT**

The statement of claim was filed on 26.05.2016 through Ng'ang'a Munene & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) 12 months' salaries in compensation for unlawful termination Kshs. 78, 000.00 x 12 making Kshs. 936, 000.00.
- b) Underpayment for 8 months at Kshs.2, 000.00 per month making Kshs. 16,000.00.
- c) 3 months pay in lieu of notice Kshs. 234, 000.00.
- d) Housing allowance for three months Kshs. 7, 000.00 per month making Kshs.21, 000.00.
- e) Total claim Kshs. 1, 207, 000.00.
- f) Costs and interest.
- g) Any other or further relief the court may deem fit to grant.

There is no dispute that the respondent employed the claimant as a teacher per the letter of appointment dated 05.08.2015 at a basic salary of Kshs. 78, 000.00 per month, Kshs. 7,000.00 per month being housing allowance, and after confirmation either party would terminate the employment by giving three months notice or three months' basic salary.

The claimant was to serve 6 months probationary period during which either party could terminate by giving one month notice or one month pay in lieu of notice. The probationary service was therefore ending on or about 05.02.2015.

The claimant testified that he received the letter dated 06.04.2016 terminating his employment. The letter addressed to the claimant stated as follows:

**“Re: Termination**

**We wish to inform you that the Foundation hereby terminates your employment contract with immediate effect as per the terms on your appointment letter.**

**You will be paid one month’s salary in lieu of notice and any other outstanding dues. Kindly arrange to clear with the school so that your payments are released.**

**We thank you for your service at Mount Kenya Academy Senior School and wish you success in all your future endeavours.**

**Yours sincerely,**

**Signed**

**Mrs. Charity W. Mwangi**

**Director”**

The claimant testified that the termination was unfair and painful because it was not in accordance with the terms of the contract of service and because he had joined the respondent’s employment after leaving his long service of 9 years with his previous employer at Coast Academy in Mombasa. It was his case that it was very frustrating that the respondent had decided to terminate the claimant’s employment suddenly and without adverse reasons such as poor performance or misconduct. The claimant testified that prior to receiving the termination letter, the school’s principal had summoned him and informed him that the respondent was unable to sustain the claimant in continued employment.

After termination the claimant testified that the respondent paid Kshs. 195, 400.00 at the claimant’s bank account. That was after clearing with the school.

The response to the memorandum of claim was filed on 22.07.2016 through G.K. Kibira & Company Advocates. The respondent prayed that the suit be dismissed with costs.

The respondent’s case was that the claimant had been employed as a teacher on probation for 6 months. It was the respondent’s case that the claimant was to teach at secondary and A-levels. The respondent had anticipated enrolling for A-levels in September and January but as the claimant’s probationary service came to an end, no enrolment had been made for A-levels and there had been a drop in the secondary enrolment. The claimant’s position became redundant and the claimant was thereby redundant.

The **1<sup>st</sup> issue** for determination is whether the termination was unfair. The respondent alleged in the termination letter that the claimant was being terminated in accordance with the contract of employment. The provision in the contract under which he was being terminated was not cited. The response and testimony for the respondent are that the claimant was rendered redundant, allegedly due to failures in enrolment for A-levels and due to dropped enrolment at secondary level – and the respondent provided no documentary and statistical evidence to demonstrate that position. In any event such were not incorporated as contractual terms and conditions as preconditions to the claimant’s continued employment. The court returns that the respondent having failed to show the provision of the contract of employment under which the claimant was terminated from employment, the reason for termination was not valid as per section 43 of the Employment Act, 2007. In any event, the procedure for termination on account of redundancy was not complied with as envisaged under section 40 of the Act. The court returns that the termination was unfair.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to remedies as prayed for. The court makes findings as follows:

- a) The claimant prayed for 12 months’ salaries in compensation for unlawful termination Kshs. 78,

000.00 x 12 making Kshs. 936, 000.00. The court has found that the termination was unfair. The court considers that the termination came after 8 months of service, the claimant did not contribute to the same, and that the claimant had lost his earlier job of 9 years to take up employment by the respondent. Taking all the factors into consideration, the claimant is awarded **Kshs. 510,000.00** being 6 months' gross pay as at the time of termination at Kshs. 85, 000.00 per month and as per section 49(1) (c) of the Act.

b) The prayer for underpayment for 8 months at Kshs.2, 000.00 per month making **Kshs. 16,000.00** was admitted on the part of the respondent's witness. The respondent provided no evidence to show the payment of the claimed underpayment. The court returns that the claimant is entitled as prayed for and is awarded accordingly.

c) The claimant prayed for 3 months pay in lieu of notice **Kshs. 234, 000.00**. It is clear that the termination notice was 3 months or pay for 3 months in lieu of the termination notice provided the probationary period had lapsed. It was urged for the respondent that there being no confirmation letter, the claimant had not been confirmed in appointment after the successful probationary service. The court returns that there being no extension of the probationary service as was envisaged in section 42 (2), the claimant was automatically confirmed in employment upon lapsing of the probationary service. He is entitled as prayed for and is awarded accordingly.

d) The claimant prayed for housing allowance for three months Kshs. 7, 000.00 per month making Kshs.21, 000.00. There was no evidence or submission to justify the prayer. The same will therefore fail.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) The respondent to pay the claimant **Kshs.760, 000.00** by 15.01.2018 failing interest to be payable thereon at court rates from today till full payment.
- b) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 17<sup>th</sup> November, 2017**.

**BYRAM ONGAYA**

**JUDGE**