



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

**AT KISUMU**

**CAUSE NO. 190 OF 2016**

*(Before Hon. Justice Mathews N. Nduma)*

**SAMSON ABUGA NYABATE.....CLAIMANT**

**=VERSUS=**

**MAGENA HIGH SCHOOL ..... 1<sup>ST</sup> RESPONDENT**

**BOARD OF MANAGEMENT**

**MAGENA HIGH SCHOOL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The suit was filed on 5<sup>th</sup> July, 2016 by way of a Memorandum of Claim dated 5<sup>th</sup> July, 2016. The Claimant seeks general damages for unlawful and unfair termination of employment and payment of terminal benefits set out under paragraph 17 as follows:-

- a) Unpaid statutory dues to NSSF since 3<sup>rd</sup> February, 2008 up to 13<sup>th</sup> May, 2015.
- b) Pro-rata salary for a period of 8 years.
- c) Retirement and terminal benefits for eight (8) years.
- d) Salary in lieu of notice.
- e) Benevolent contributions made by the claimant.
- f) Days worked and overtime dues.
- g) Costs and interests of this Claim.

**Facts of the Claim**

2. The Claimant was appointed as a school driver by the Respondent on 3<sup>rd</sup> February, 2008 and earned a monthly salary of Kshs.6,000. The Claimant worked diligently and continuously until the 13<sup>th</sup> May, 2015 when the Claimant tendered his resignation by a letter dated 1<sup>st</sup> July, 2015 on the grounds that the

Respondent had failed and or neglected to pay his monthly salary from January 2015 to 13<sup>th</sup> May 2015 the date of resignation.

3. That during the entire period of employment, the Respondent deducted statutory dues of NSSF but failed to remit the same to the authority.

4. That the resignation was occasioned by blatant breach of the contract of employment whose particulars were set out as follows –

(i) Failure to pay salary from January to May 2015.

(ii) Instituting unreasonable disciplinary proceedings against the Claimant.

(iii) Creating a hostile and embarrassing work environment for the Claimant.

(iv) Failure to remit NSSF dues for the Claimant.

5. The Claimant states that he was constructively dismissed from his employment as a result thereof and is entitled to general damages.

6. The Claimant was not paid any terminal dues as set out in the Memorandum of Claim and seeks payment of the same.

7. The Claimant sent a notice of demand and intention to sue but same was ignored by the Respondent.

8. The Claimant prays to be awarded accordingly.

### **Response to the Claim**

9. The Respondent filed a response to the claim on 29<sup>th</sup> July, 2016 in which it admits that the Claimant was employed by the Respondent from July 2008 to February 2015. The Respondent denies that the Claimant was employed in February 2008 as alleged.

10. That the Claimant voluntarily resigned from employment and did not work for the respondent between March and July, 2015.

11. Respondent avers that the Claimant was paid monthly salary up to February 2015 and NHIF dues were remitted up to February 2015.

12. The Respondent avers that it did not deduct NSSF contributions from the Claimant because he had retired from KTDA in the public interest and was employed courtesy of nepotism by the then principal.

13. Respondent states that the Claimant deserted work and his claim should be dismissed with costs.

14. The Respondent further avers that the Claimant owes the school 27,000 Kshs. Being school fees balances for his two children but did not counter claim the amount.

15. The Claimant joined issues with the Respondent in the Claimant's reply to the response filed on 16<sup>th</sup> September, 2016 in which he reiterated the particulars of claim, denied the allegations of nepotism by the Principal and prayed the suit be allowed with costs. The Claim for school fee is also denied asserting that full figures were duly paid and the children had since left the school.

### **Hearing of the Suit**

16. The matter was heard exparte because the Respondent failed to appear for the hearing despite that the

date had been taken by consent.

17. The Claimant testified under oath in support of his case. He stated that he was employed by the Respondent on 2<sup>nd</sup> February, 2008 in terms of a letter dated 3/2/2008 by Mr. Samuel Ogero Otieno, Secretary of the Board of Governors produced as annex '1' to the statement of claim. The Claimant also produced work tickets for the school bus registration number KAT 962 in support of the work he did. The Claimant further relied on a circular by the office of the Prime Minister, Ministry of State for Public Service dated 1<sup>st</sup> July 2008, in which new salary scales for civil servants were set out.

18. The Claimant further produced the letter of resignation dated 13<sup>th</sup> May 2015, with effect from 1<sup>st</sup> July, 2015 for personal reasons. The Claimant thanked the school management for according him the opportunity to work for the school.

19. The Claimant adopted the witness statement dated 5<sup>th</sup> July, 2016 which he filed together with the statement of claim as his evidence in chief.

20. The Claimant testified in court that he tendered resignation upon being told by the teacher that there was no money to pay his salary from March 2015. That he had not been paid salary from January 2015.

21. That he was deducted NSSF but it was not remitted. That he had retired from KTDA when he joined the respondent. That the school deducted NSSF from December 2014. The Claimant added that he was not given leave and pays for the same.

22. The Claimant filed written submissions on 3<sup>rd</sup> November, 2017.

### **Determination**

23. The issues for determination are as follows:-

(i) Whether the Claimant resigned voluntarily from the employment of the Respondent or he was constructively dismissed by the Respondent.

(ii) Whether the Claimant is entitled to the reliefs sought.

### **Issue I**

24. The Claimant averred in his Memorandum of Claim and in his sworn testimony before court that he was constructively dismissed from employment by the respondent in that he wrote a letter of resignation dated 13<sup>th</sup> May 2015 to resign with effect from 1<sup>st</sup> July 2015 because of non payment of salary from 1<sup>st</sup> January 2015. That he had received last salary for December 2014.

*“Constructive Dismissal is where an employer has committed a serious breach of contract, entitling the employee to resign in response to the employer’s conduct. The employee is entitled to treat him or herself as having been “dismissed” and the employer’s conduct is often referred to as a repudiatory breach”*

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25. The constructive dismissal occurs when and not before the employee resigns as a result of the conduct by the employer which creates a hostile work environment.

26. The employee may resign over a single serious incident or over a pattern of incidents. Generally, a party seeking relief must have resigned soon after one of the constructive acts.

***See <https://en.m.wikipedia.org>.***

27. It must be remembered that the onus of proving the constructive acts on a balance of probabilities is with the claimant. This is the case whether or not the matter was heard *ex parte* and in the absence of the Respondent. **See Eastern Produce (K) Ltd v John Lumumba Mukosero, Eldoret Civil Appeal No.25 of 1998**, where it was held

*“The fact that one party has filed a suit or made a claim, by itself is not proof that there is a prima facie case which defendant must rebut. It is for the Plaintiff to prove liability and this onus of proof does not shift whatsoever.”*

28. The averments by the Claimant in the statement of claim and his oral testimony under oath is not supported by documentary evidence produced by the claimant himself, to wit, the letter of resignation dated 13<sup>th</sup> May, 2015 written by the Claimant at the material time when he decided to separate from the respondent. The letter does not in any manner indicate that his resignation was a result of any hostile or untoward act against the Claimant by the Respondent. The letter only stated *“I hereby tender my Notice of Resignation with effect from 1<sup>st</sup> July 2015 for personal reasons”*

29. This is the primary evidence in respect of the cause of the resignation by the Claimant. The document renders the subsequent testimony by the claimant, incredible and incapable of belief. What the employee does immediately after the constructive act of dismissal is the cornerstone of the right by the Claimant to repudiate the contract of service upon breach by the employer.

30. The claimant has failed to discharge the onus placed on him in this respect and the court finds that the claim for unlawful constructive dismissal has failed and with that the claim for general damages also fails.

## **Issue II**

### **Notice Pay**

31. Having found that the Claimant resigned for personal reasons and was not constructively dismissed, the Claimant is not entitled to any salary in lieu of notice. Indeed in terms of the letter of resignation, dated 12<sup>th</sup> May 2015, the Claimant was to stop working with effect from 1<sup>st</sup> July 2015. The claimant therefore served a notice of 1½ months on the Respondent and cannot be heard to claim payment in lieu of notice. This claim is dismissed therefore.

### **Unpaid Statutory NSSF from 3<sup>rd</sup> February, 2008 to 13<sup>th</sup> May, 2015**

32. The Claimant has proved on a balance of probability that the Respondent did not deduct or contribute NSSF dues from 2008 until 2014. From the year 2014 the Respondent deducted and did not remit NSSF dues on his behalf. In terms of section 35(5) and (6) of the Employment Act, 2007, the Claimant is entitled to payment of gratuity calculated at 15 days salary for every year of completed service. The Claimant served the Respondent from 2<sup>nd</sup> February, 2008 to 1<sup>st</sup> July 2015, a period of seven (7) years. The Claimant earned Kshs.6,000 a month at the time he left employment and the court awards him Kshs.3,000 for seven (7) years in the sum of Kshs.21,000.

### **Payment in Lieu of Leave**

33. The Claimant did not take leave and was not paid in lieu of leave for the entire period he worked for the Respondent. The Claimant is entitled to a month's salary in lieu of leave for every year served in terms of section 27 of the Employment Act 2007 which provides an employee who has served for twelve consecutive months at least 21 working days leave. Accordingly, the court awards the Claimant Kshs.42,000 in lieu of leave days not taken for seven (7) years.

### **Arrear Salary**

34. The Claimant is also entitled to payment of arrear salary for January 2015 to 13<sup>th</sup> May 2015 in the

sum of Kshs.27,000.

35. The rest of the claims have no merit and are dismissed.

36. In the final analysis, judgment is entered in favour of the Claimant against the Respondent in the sum of Kshs.90,000. The amount is payable with interest at court rates from date of filing suit till payment in full. Respondent to pay costs of the suit.

**Judgement Dated, Signed and delivered this 14<sup>th</sup> Day of December, 2017**

**MATHEWS N. NDUMA**

**JUDGE**

**Appearances:-**

Moerwa Omwoyo for Claimant

Koina Onyancha for Respondents

CC. Chrispo Aura