



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO 701 OF 2014**  
**BROOKHOUSE SCHOOLS LIMITED.....CLAIMANT**  
**VS**  
**DORCAS NJERI GICHUHI.....RESPONDENT**

**AWARD**

**Introduction**

1. The Claimant in this case is a limited liability company operating an international school in Nairobi in the name and style of Brookhouse International School. The Respondent is a teacher by profession and was employed by the Respondent from 1st September 2012. This claim arises out of the Respondent's decision to resign from the Claimant's employment. The claim is contained in a Statement of Claim dated 30th April 2014 and filed in Court on even date.

2. The Respondent filed a Response and Counterclaim on 16th October 2014 and the matter proceeded on 9th November 2015. The Claimant called its Deputy Director, Clara Mwangi and the Respondent testified on her own behalf. Both parties also filed written submissions.

**The Claimant's Case**

3. The Respondent was employed by the Claimant as a Teaching Assistant on a two year contract effective 1st September 2012. On 6th October 2013, the Respondent expressed her intention to resign from the Claimant's employment by issuing a 12 days' notice and offering to off set 18 days from her 21 days' leave entitlement.

4. The Claimant states that as at the date of the Respondent's resignation she had not accrued 21 days leave as the academic year running from September 2013 to August 2013 had not commenced. During the academic year running from September 2012 to August 2013, the Respondent had taken 70 leave days.

5. The Claimant agreed to waive the 2 terms' notice of intent clause in the employment contract and asked the Respondent to either serve 2 months' notice or pay 2 months' salary in lieu thereof. The Respondent however failed, refused and/or neglected to exercise any of these options.

6. The Claimant avers that the Respondent's resignation was contrary to her employment contract and claims the following:

- a. A declaration that the Respondent's resignation from employment was wrongful and in breach of her employment contract;
- b. Kshs.130,000.00 being 2 months' salary in lieu of notice;

- c. Costs plus interest.

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

7. In her Response and Counterclaim filed on 16th October 2014, the Respondent admits having been employed by the Claimant from 1st September 2011. She maintains that she lawfully resigned from the Respondent's employment by giving the requisite notice as per contract.

8. The Respondent further pleads that in the course of her employment with the Respondent, she had accumulated leave. She claims the following by way of counterclaim:

- a. Salary for days 18 days worked in October 2013.....Kshs.18,000.00
- b. Accumulated leave pay.....199,500.00

### **Findings and Determination**

9. There are three issues for determination in this case:
- a. Whether the Respondent gave adequate resignation notice;
  - b. Whether by the time of resignation the Respondent had pending leave days;
  - c. Whether the parties are entitled to the remedies sought.

### **Resignation Notice**

10. This dispute was triggered by a resignation letter written by the Respondent on 6th October 2013 stating as follows:

*“Dear Sir,*

*I am writing to hand in my resignation from Brookhouse International School, my last working day will be Friday, October 18th 2013.*

*This was not an easy decision for me to make. The past three years have been very rewarding. I've enjoyed working at Brookhouse and working with a very successful team dedicated to providing top level education. I leave Brookhouse with a lot of experience and I am forever indebted to you and the Board of Directors for giving me an opportunity to be part of the team. Thank you for the opportunities that you have provided me during my tenure with the school.*

*I wish you and the school the very best and hope we can keep in touch in future.*

*Sincerely,*

*Dorcas Njeri Kagonia.”*

11. This letter was followed by another one dated 22nd October 2013 by which the Respondent stated her notice period as one month and offered to forfeit any money owed to her by the Claimant on account of leave pay and days worked to cover the 18 days' notice period shortfall.

12. Section 35(1) of the Employment Act, 2007 provides for a mandatory one month's termination notice for contracts of employment where salary is paid monthly. Section 35(2) of the Act exempts application of subsection (1) where the terms of the contract provide for a greater notice period.

13. Clause 12(c) & (d) of the Respondent's employment contract provides as follows:

**“ (c) Notice of Termination**

- i. *The School may at any time give you not less than three (3) calendar months notice in writing of termination of this appointment expiring on the last day of any calendar month or by offering you salary in lieu of notice and in either event you will be entitled to benefits applicable upon completion*

**(d) Notice of Intent**

*(i) You are required to give the School notice in writing of your intent to terminate this appointment not less than two (2) full academic terms prior to your departure. The School may, at its discretion, require the employee to repay all or a proportionate part of any expenses incurred by the School if the contract is terminated by the employee, including work permit, travel expenses and bond”*

14. From the evidence on record, the Claimant chose not to enforce Clause 12(d)(i) and instead required the Respondent to serve 2 months' notice or pay the equivalent of 2 months' salary in lieu, in addition to the 12 days' notice served and 18 days' pay forfeited. On her part, the Respondent maintained that her notice period requirement was one month as provided under the Employment Act.

15. Section 35 of the Employment Act is clear. The statutory termination notice period for an employment contract in which an employee is paid on a monthly basis is one month, the only exception being where the contract carries a written provision for an enlarged notice period.

16. The Respondent's employment contract imposed a 3 months' notice period requirement on the employer but none on the employee. That being the case, the only obligation placed on the Respondent was the one month notice requirement under Section 35(1) of the Employment Act. I need to add that the reasonableness of the notice of intent under Clause 12(d) of the employment contract, which the Claimant chose not to enforce, is doubtful.

17. In light of the foregoing, the Court finds that the 12 days' notice period served by the Respondent together with forfeiture of 18 days' salary satisfied the notice period requirement under the employment contract. The Claimant's claim against the Respondent is thus without basis and is dismissed. By this finding, the Respondent's counterclaim for pay for 18 days worked in October 2013 also fails and is dismissed.

**Leave Pay**

18. The only remaining issue in this case is the Respondent's counterclaim for leave pay. She claims leave pay in the sum of Kshs. 199,500 and the Claimant's response is that by the time of leaving employment, the Respondent had no pending leave days.

19. Clause 6 of the employment contracts provides that:

**“6. Leave**

*You are entitled to 21 days working days local leave for each completed year of this contract to be taken during the school holidays by arrangement with the School Director. This will be in accordance with the calendar of allowed holidays published by the School each year, indicating start and end of term dates. Expected arrival dates and final departure dates before the start and after the end of terms for staff are also published at the start of each school year, dates for which will be determined at the discretion of the School Director.”*

20. It is the Claimant's case that the Respondent, like all teachers, took leave during the school holidays and mid-term holidays. It was not in dispute that the Claimant broke for school holidays as follows:

- a. 3 weeks in December
- b. 1-2 weeks in April
- c. 7 weeks in July/August

21. Additionally, there was mid-term holiday for one week each for the 1st and 2nd term and 2 days for the third term. The Respondent told the Court that the school holiday and mid-term holiday days aggregated to 70 days per year and that she would take her leave during these days, unless asked by the Claimant to attend to a specific task at school.

22. Even adopting the Respondent's testimony that a teacher would be asked to be in school during the holidays for a total of 3 weeks per year, that would leave approximately 50 days available for annual leave. The Court therefore finds that the Respondent exhausted her leave entitlement and the counterclaim for leave pay therefore fails and is dismissed.

23. In reaching this decision, the Court takes judicial notice that schools, as a category of employers, operate a set calendar where leave schedules for employees are set in advance. Lack of leave records cannot therefore be used as evidence that an employee is entitled to leave pay.

24. The ultimate result is that both the Claimant's claim and the Respondent's counterclaim fail and are dismissed with each party bearing their own costs.

25. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 12TH DAY OF FEBRUARY 2016**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Miss Omoto for the Claimant

Mr. Ndolo for the Respondent