



**REPUBLIC OF KENYA**

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

**AT NAIROBI**

**CAUSE NO. 1473 OF 2010**

**JOHNSON SIMIYU LITEMA.....CLAIMANT**

**VERSUS**

**LOGOS CHRISTIAN SCHOOL.....RESPONDENT**

**JUDGMENT**

1. The Claimant filed his suit against the Respondent on 5<sup>th</sup> January 2010. He sought resolution of a dispute he framed as unlawful termination and breach of contract of employment. It was averred that the Claimant was employed by the Respondent as a school bus driver from 1<sup>st</sup> July 2007 on a contract that was renewable. At the time of termination of the Claimant's employment, the Claimant was serving a 2 year contract that had been renewed on 1<sup>st</sup> November 2009. He averred that on or about the 18<sup>th</sup> October 2010, he reported to duty at the school and was denied entry to the school guard on grounds that he was no longer an employee of the Respondent. He averred that he immediately attempted to get in touch with his immediate boss Mr. Steve Gicheru to obtain an answer but his calls went unanswered. He averred that he subsequently called the school business manager Mr. Charles Wambui who stated he had no knowledge of the dismissal of the Claimant. He averred that the Claimant called the Respondent's principal Mrs. Clara Igobwa and upon explaining his situation was asked to attend a meeting on 21<sup>st</sup> October 2010 to resolve the issues. It was further averred that the Claimant attended the meeting on 21<sup>st</sup> October 2010 which was also attended by the school principal, the school business manager and his immediate boss. The meeting begun with the Claimant's immediate boss accusing the Claimant of using the school bus without authority to go for a trip to Nakuru. The Claimant denied going to Nakuru at any point and sought that the accusation be put in writing to enable him respond. The meeting was called to an end with instructions that the Claimant responds to the verbal accusations in writing and that his termination stood. The Claimant averred that he wrote to the Respondent through his advocates on 25<sup>th</sup> October 2010 and that the Respondent responded through the school principal's letter of 29<sup>th</sup> October 2010. He averred that on the same date, he received the business manager's letter dated 13<sup>th</sup> October 2010. It was averred that the Claimant's response was on 2<sup>nd</sup> November 2010 through his advocate and that the Respondent never communicated to the Claimant since then. The Claimant averred that he earned Kshs. 20,598/- a month and sought judgment against the Respondent for breach of contract and a declaration that the Respondent acted in breach of the law of contract and the lawful procedure of termination was not followed. The Claimant thus prayed for damages for breach of contract Kshs. 267,774/-, 12 months' salary compensation Kshs. 247,176/-, an account of statutory deductions made, severance pay to be assessed by Court and any award deemed fit to grant. The Claimant also prayed for

costs of the suit and interest at court rates.

2. The Respondent filed a response on 14<sup>th</sup> February 2011 and a bundle of documents on 26<sup>th</sup> August 2011. The Respondent averred that the Claimant was employed on 1<sup>st</sup> July 2007 and denied that the contract was terminated as alleged and averred that at the time of filing suit, the Claimant was still employed by the Respondent. The Respondent averred that on 9<sup>th</sup> October 2010, the business manager had a meeting with the Claimant and the Claimant's immediate boss Steve Mbuthia and at the meeting the Claimant admitted to having engaged in the unauthorised use of the school bus registration no. KAY 631 F. The Respondent averred that the Claimant admitted to using the bus to ferry members of his church Redeemed Christian Sanctuary Centre to Nakuru without authorisation or consent of the Respondent. It was averred that the Claimant had taken such a trip before in August of 2009 without authorisation or consent by the Respondent. The Respondent further averred that on 15<sup>th</sup> September 2010, the Claimant had another meeting with the Respondent's business manager admitted to unauthorised use of the school bus and at the meeting admitted to having received money from the church group and failing to remit or account for the same. The Respondent averred that on 13<sup>th</sup> October 2010, the Claimant was sent on 2 months unpaid compulsory leave beginning November 2010 and was to pay the Respondent the equivalent pay for the hire of the bus to Nakuru. The Respondent averred that on 18<sup>th</sup> October 2010, the Claimant called the business manager and informed him that he had been denied entry to the school and that it was communicated to the Claimant that it was a miscommunication and that the Claimant should report to work the next day. The Respondent averred that the Claimant met the principal the next day and was advised that his employment had not been terminated and that compulsory leave was to commence on 1<sup>st</sup> November 2010. The Respondent averred that on 22<sup>nd</sup> October 2010 at a meeting between the principal, the Claimant and the business manager and the transport manager, the Claimant yet again admitted to unauthorised use of the school bus and asked for forgiveness for his actions and expressed an interest to continue working for the Respondent. The Respondent denied terminating the Claimant's contract and averred that there was no proof of termination. The Respondent thus sought the dismissal of the suit with costs.

3. The Claimant testified on 7<sup>th</sup> November 2011 before Kosgey J. and stated that he was a driver by profession and was working at Masinde Muliro University. He testified that from June 2007 he worked for the Respondent up to October 2007 when he was given a 2 year contract which was renewed for a further 2 years. He stated that he did not complete the contract in October 2010 as he had asked for leave to go for an off and was to resume on 18<sup>th</sup> October 2010. He testified that when he resumed on 18<sup>th</sup> October 2010, he reported in the morning but the guards barred him from entering the school as he had been sacked. He called the transport manager Mr. Stephen Gicheru but he did not answer and so he called the business manager Mr. Wambui who told him to go to the Kolobot campus. He was told to report to school on 19<sup>th</sup> October 2010 and again was barred by the guards and he called the principal Mrs. Clara Igbowa who told him to write a letter which he did. He was told to come for a meeting on 21<sup>st</sup> October 2010 to discuss the issue. He testified that he met her, Mr. Wambui and Mr. Steve Gicheru who alleged that the school bus had been hired on 2 occasions to take people to Nakuru in August 2009 and 2010 and that the people ferried were members of his church. He stated that he denied hiring out the school bus and was told to answer the verbal accusation in writing and that he sought legal advice and his lawyer wrote on 25<sup>th</sup> October 2010 and a reply made on 29<sup>th</sup> October 2010. He testified that the messenger called him and met him in town and gave him the business manager's letter saying the Claimant was on compulsory leave for 3 months. He stated that his salary for October 2010 was not paid as he had been struck off the payroll. He testified that he earned Kshs. 20,958/- and not Kshs. 18,560/-. He stated that there is a logbook in the bus on which are entered details of the journey and when one returns the bus in the evening the closing mileage is entered by the driver and the transport manager verifies. He stated that it was alleged a parent had seen the bus in Nakuru. He testified that there are 2 buses at the school with the same colour. He sought damages for unfair termination and damages for breach of contract. He stated that he was not given an opportunity to carry on his work.

4. He was cross-examined by Mr. Mwaura for the Respondent and testified that the Respondent is a Christian school governed by Christian values and uphold Christian values. He stated that he attends

church at Friends Church Kakamega and that he used to attend Redeemed Christian Church Kindaruma Road and that he had no position in the church. He testified that he was verbally told by guards not to enter the compound on 18<sup>th</sup> October 2010 when he reported to work. He stated that his contract was terminated by the principal Clara Igobwa in a meeting in which the transport officer Steve Gicheru and business manager Mr. Wambui told him that the decision that he was to write a letter to them explaining the allegations against him. He testified that they claimed he was still their employee though he had been refused entry to pick the tools of his work. He stated that he had never taken the bus without permission and that only Steve could authorise hire for the bus. He denied having had a meeting on 9<sup>th</sup> September 2010 where he admitted taking the bus to Nakuru and that he did not take the bus to Nakuru on 14<sup>th</sup> August 2010. He stated that he did not take it in 2009 without authorisation and that he has never been in Nakuru with any church group. He testified that he had not received any money from any church as payment for ferrying people to Nakuru. He stated that he was given a letter on 29<sup>th</sup> October 2010 stating that he was given compulsory leave. He testified that his lawyer wrote a demand letter on 2<sup>nd</sup> November 2010 and that he never proceeded on the compulsory leave. He stated that his employment was terminated and that the Respondent refused to reinstate him. He stated that he was not given time to reply to the allegations and that he wrote to asking for the allegations to be put in writing so that he could reply in writing.

5. In re-examination by Mr. Theuri, he testified that he was not given any document on the school values and that the letter of 25<sup>th</sup> October 2010 did not mention the compulsory leave. He stated that up to 29<sup>th</sup> October 2010 he was not aware of the letter of 13<sup>th</sup> October 2010 and that the stand of the Respondent was that he was not an employee until he explained the verbal allegations. He stated that termination was effected verbally and that he was denied opportunity to do his work.

6. The defence testimony was given on 25<sup>th</sup> June 2013, 29<sup>th</sup> July 2013 and 18<sup>th</sup> September 2013. The first defence witness was Clara Chao Igobwa who testified that she is the principal of the Respondent which had a kindergarten at Chaka Road and a primary school at Kolobot Drive off Arboretum Drive and that she oversaw both. She stated that her office is at Kolobot Drive and at times she sits at Chaka Road. She testified that she is a trained Montessori teacher and that the school is a Christian school and a ministry of Nairobi Chapel. She stated that it is based on Biblical values – integrity, honesty and hard work. She stated that the staff members are required to uphold the same values taught to the children as the staff were role models. She testified that the school has 2 buses and outsources transport as well. She stated that the buses were parked at the home of the board chairman along Jabavu Road and the keys would be picked and dropped there. She stated there were 2 drivers and the Claimant was one of them. She testified that for hire of the buses, the business manager Mr. Wambui and the transport manager Mr. Steve Gicheru had to be aware before the driver could take the bus. She stated that she was informed by Steve that the Claimant had taken the bus on two occasions without permission and hired it to a group of people and that she called the Claimant to her office and the Claimant admitted that he had taken the bus. She testified that the Claimant stated that there was a problem in transport office as the vehicles were poorly maintained and that he had repaired the vehicle to the tune of 9,000/- and availed receipts. She asked him to write a statement and he reluctantly agreed to do so but never brought the statement. She testified that she was called by the Claimant who stated that he had been denied entry to the school by guards who told him that he had been sacked. She stated that she told the Claimant that if he had been sacked she would have been the one to do it. She stated that the Claimant was sent on compulsory leave on 13<sup>th</sup> October 2010 and payment of costs for unauthorised usage of the school bus. She testified that she received a demand letter from the Claimant's lawyers and replied stating that she had not dismissed the Claimant. She stated that the compulsory leave was to enable the Claimant understand the gravity of what he had done. She stated that she was surprised to hear that the Claimant had withdrawn his son from the school since the compulsory leave was to only affect him and not the son.

7. She was cross-examined by Mr. Theuri and testified that she was the head of the Respondent and supervised Mr. Wambui. She stated that the school is based on Christian values and admitted that the staff handbook and staff policy were not presented to the Court by the Respondent. She stated that the Claimant had a very good record before the incident on the hiring of the school bus. She testified that she had not seen the minutes of the meeting of 15<sup>th</sup> September 2010. She stated that there was no notice to

show cause why disciplinary action should not be taken against him. She stated that the Claimant was met, told what happened and admitted it. She testified that she met the Claimant in mid-October and he confessed and that she asked him to write a statement on the issue. She admitted that she wrote the Claimant's lawyers a letter in which she denied that the Claimant had been sacked. She stated that the Claimant ought to have been paid for October but she would have to confirm if he was paid.

8. In re-exam by Mr. Theuri, she testified that the letter of 13<sup>th</sup> October 2010 had conditions and that they ordinarily did not take minutes for the meeting they had with the Claimant.

9. The next witness for the defence was Stephen Gacheru Mbuthia who testified that he was a consultant and was the transport manager for the school coordinating transport for the school. He stated that in December 2009 he was called by a friend of his who asked him if he was in Nakuru as the friend had seen the school bus in Nakuru. He stated that he called the driver who was assigned the bus and the Claimant told him he had the bus at Uthuru. He stated that he asked the Claimant to state the truth as his friend at Nakuru confirmed he was in a parking lot next to the bus and that the bus was not at the parking bay in Nairobi. He testified that the Claimant then admitted to being in Nakuru. He stated that again in August 2010, the bus was again not at the parking and on calling the Claimant admitted to having taken the bus to Nakuru on hire. He scheduled a meeting with the Claimant and the business manager Charles Wambui to clarify the incidents. He testified that the Claimant confirmed having taken the buses on both occasions and was asked to write a statement but did not write a statement. He testified that they had another meeting a few days later and the Claimant was given compulsory leave to enable him write the letter. He stated that he told the school guard that during the leave, the Claimant was not to have access to the bus. He testified that he got a relief driver to drive the bus and did not allow the Claimant to continue until clarification was given.

10. In cross-examination he testified that he managed the routes, the drivers and the schedules as well as hires. He confirmed that the schedule was not attached to the pleadings and evidence of allocation was not presented. He testified that there is a log which has the date, the purpose for the trip and the mileage covered. He stated that the first call he received was in December 2009 and that other than talking to the Claimant he did not take any other action and the second time it happened he spoke to Mr. Wambui. He stated that the letter spoke of August 2009 and August 2010 but that it was erroneous since the date was December 2009. He testified that he was not aware of any minutes taken by Mr. Wambui. He stated that there was no letter asking the Claimant to reply to the accusation. He confirmed that he stopped the Claimant from accessing the buses. He denied terminating the Claimant and stated that the Claimant was employed as a driver and if the Claimant could not access the bus he could not do the work.

11. In re-examination by Mr. Theuri, he testified that the drivers would feed the log but the log would just help in tracking mileage for purposes of maintenance.

12. The last defence witness was Charles Mbugua Wambui who testified on 18<sup>th</sup> September 2013 and stated that he was the business development manager of the Respondent. He testified that the Claimant drove the bus Zuma Ridi registration no. KAY 631 F and that the buses were parked along Jabavu Road at the compound of Mr. Karianjahe a board member till 2011 when the buses were parked at the school. He stated that the other driver arrived to collect a bus for an authorised trip and found the other bus missing and notified the transport manager who reported the incident to his office. He stated that he called the Claimant and the transport manager to a meeting on 9<sup>th</sup> September 2010 and that they all attended and when they met he laid the issue on the table and that the Claimant admitted to having taken the bus on two occasions without permission. He asked the Claimant to write an account of the incident but the Claimant did not do so. He stated that the management placed the Claimant on compulsory leave and calculated the cost of the hire and repairs for the vehicle and sought the sums from the Claimant. He stated that the Claimant was not terminated.

13. In cross-exam, he testified that he was in charge of administration and was in charge of the overall operations of the buses. He stated that he did not have minutes for the meetings that he had stated that he had. He stated the unpaid leave given to the Claimant was to be for 2 months. He denied that the intention of the unpaid leave was to frustrate the Claimant to leave. He stated that the Claimant was paid his

October salary.

14. The file went into a hiatus and was to be listed on 19<sup>th</sup> January 2016 for mention and the Respondent sought 2 weeks to file submissions. These were not filed. The Claimant filed his submissions on 23<sup>rd</sup> September 2015. In his submissions he submitted that he was denied an opportunity to discharge his duties to the Respondent and was deliberately frustrated and treated as dismissed. He relied on the case of **Kenneth Kimani Mburu & Another v Kibe Muigai Holdings Ltd [2014] eKLR** where the Court found constructive dismissal occurs when an employee is forced to leave his job against his will because of the employer's conduct.

15. In the case before me, the Claimant was accused of misuse of the school bus. This accusation was from all accounts made verbally and no letter was issued to him to seek an explanation. The Respondent's officials stated that the Claimant had not been dismissed. Constructive dismissal is defined by the **Black's Law Dictionary Ninth Edition** as a termination of employment brought about by making the employee's working conditions so intolerable that the employee feels compelled to leave. Did the request by the Respondent for a statement and the insistence that he proceeds on 2 months unpaid leave amount to constructive dismissal or did the refusal to let the Claimant access the premises amount to constructive dismissal? Taken singularly, the request for a statement or explanation is not by itself sufficient to infer constructive dismissal. On the part of the Claimant, he declined to avail the statement. Was the suspension for 2 months constructive dismissal? Had the Claimant proceeded on 2 months unpaid leave he could have been able to demonstrate conditions so unbearable as to compel him to leave. Was the refusal to let him into the premises constructive dismissal? The Claimant was denied access on two occasions. Was this on its own constructive dismissal? In my mind, the conditions at work were not so grave as to infer dismissal. In my view, the Claimant was being taken through a process that was not as seamless as it should have been but nonetheless, the Claimant was not dismissed by the Respondent. He was required to give an explanation. Indeed, the Respondent insisted that at time of filing suit the Claimant was still its employee. In view of the foregoing and granted that the Claimant sought compensation for termination, I would hold that no termination took place. The Claimant left of his own volition and the suit was thus a non-starter. I would dismiss it and given the poor disciplinary process by the Respondent will order that each party bears their own costs.

Orders accordingly.

**Dated and delivered at Nairobi this 28<sup>th</sup> day of June 2016**

**Nzioki wa Makau**

**JUDGE**