



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 579 OF 2014

BETWEEN

SAMMY WALTER BIRYA CLAIMANT

VERSUS

SHREE SWAMINARAYAN ACADEMYRESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Walter Sammy Birya, the Claimant in Person

Mr. Matheka Advocate, instructed by Wandai Matheka & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. The Claimant was employed by the Respondent School as a Teacher, between August 1996 and 31st July 2014. He earned a monthly salary of Kshs. 43,115 as of the date of termination. In his Amended Statement of Claim filed on the 27th July 2015, the Claimant states his contract was terminated by the Respondent without cause or notice. He seeks the following orders against the Respondent:-

- a. 12 months' salary in compensation for unfair termination at Kshs. 525,960.
- b. 1 month salary withheld as retention, at Kshs. 43,830.
- c. Terminal dues.
- d. Public holidays.
- e. Costs.

2. The Respondent filed its Statement of Response on the 13th January 2015. It concedes the Claimant was its Teacher. He was discretionarily dismissed in accordance with his terms of service, contained in his contract of employment dated 8th September 2000. The contract was terminable by either Party, by giving of 1 month notice, or 1 month salary in lieu of notice. The Respondent complied with the terms of the contract, and Section 36 of the Employment Act 2007. The Claimant was enrolled in a Provident Fund

and Pension Scheme, which offered him social security benefits. He was offered a cheque for terminal benefits which he refused to collect from the Respondent. The Respondent prays for dismissal of the Claim.

3. The Claimant testified, and closed his case, on the 9th February 2016. The Respondent testified on the same date, through its Deputy Head of the Junior School Mac Donald Chilumo Tunje, bringing the hearing to a close.

4. Birya told the Court he was employed on 1st September 1996. He was a Class Teacher. He was called by the Secretary on 28th July 2014, and issued notice of termination of employment, which was to take effect 3 days later, on the 1st August 2014. He was not given reasons for the termination decision. Cross-examined, he testified that he signed numerous contracts over the years. The one dated 1st September 1996 had a termination clause. The Respondent did not follow this. There were 3 school terms. The Teachers stayed at the School during the holidays. The Claimant prays the Court to grant his Claim.

5. Tunje joined the School on 14th April 1998. He found the Claimant already there. He is aware the Claimant's contract was terminated by the Respondent. All Teachers worked on contract. School vacations were in the months of April [2 weeks] July-September [6 weeks] and December [4 weeks]. Teachers received their salaries even on vacation months. Coaching of Pupils during vacation started only in the year 2015. The Claimant's contract had a termination clause, which the Respondent followed in making its decision. Tunje told the Court on cross-examination that he is the Deputy Principal. He was first employed as a Class Teacher. The Claimant was a good Teacher. He was commended and given a token. Teachers underwent training before promotion.

Parties' Closing Submissions

6. The Claimant submits it was the evidence of the Respondent, that the Claimant was a good Teacher. The Respondent had a legal obligation to give reasons to justify termination. No reasons were given to the Claimant. Termination was unfair and unlawful. The Claimant is entitled to compensation and terminal benefits as pleaded.

7. The Respondent's position is that the Claimant's first contract of 1996, terminated on 27th September 2005. He was re-employed on 27th September 2005. His employment date was not in 1996, but in 2005. He was paid all his dues under the first contract. He cannot claim terminal dues dating back to 1996. Termination followed clause 4 in the contract, and Section 36 of the Employment Act 2007. The Claimant was enrolled in a Provident Fund and Pension Scheme. He derived terminal benefits from these Social Security Plans. He did not work during school vacation. Termination was fair and lawful.

The Court Finds:-

8. The Claimant was employed by the Respondent School as a Teacher. He was employed with effect from 1st September 1996, earning a monthly salary of Kshs. 10,000.

9. On 1st September 2005, the Respondent rescinded the earlier contract, citing decrease in the number of students and escalation in operational costs, to demand the Claimant is offered revised terms. The new letter of appointment issued, and was effective 1st October 2005.

10. The Respondent issued the Claimant a letter of termination dated 16th July 2014. It was issued on 28th July 2014, and was effective 3 days later, on the 1st August 2014. It is not disputed that the Claimant earned a gross monthly salary of Kshs. 43,960.

11. No reason or reasons are stated by the Respondent in the letter, to justify its decision. The letter simply states ‘ *we regret to inform you, your services will not be required, with effect from 1st August 2014. You will be paid 1 month salary in lieu of notice once you have formally cleared with the*

school....”

12. The respondent submits its decision was grounded on Clause 4 of the contract of employment, and Section 36 of the Employment Act 2007.

13. Clause 3 of the contract of employment issued in 2005 states:

“This employment can be terminated by either Party giving the other 3 months’ notice in writing, or payment of 1 month’s salary in lieu of notice.....”

14. Section 36 of the Employment Act 2007 states:

“ Either of the Parties to a contract of service to which Section 35 [5] applies may terminate the contract without notice, upon payment to the other Party of remuneration which would have been earned by that other Party, or paid by him as the case may be, in respect of the period notice required to be given under the corresponding provision of that section.”

15. The termination Clause, read with Section 36 of the Act would on the face of it, suggest that the Respondent acted within the requirement of the law, as argued by the Respondent.

16. Termination clauses contained in contracts of employment, and Section 36 of the Employment Act, are not standalone termination clauses and provision. They are to be read together with the core termination provisions contained in Section 40, 41, 43, 45 and 47 of the Employment Act. Read alone, the result would be that termination is at the will of the Employer. As long as notice issues, or notice pay is made available, termination would be fair and lawful, and the rest of the provisions of the law mentioned above, would be meaningless. There would be no obligation on the part of the Employer to prove the reasons for termination under Section 43, 45 and 47 of the Act, and fulfill the demands of procedural fairness under Section 41 and 45 of the Act. Termination Clauses must therefore conform to these provisions. Section 36 must be read together with these other provisions, not singly, otherwise the whole termination law would be thrown back to the years before 2007, when Employers could terminate at will, for good reason, bad reason, or no reason.

17. There were no reasons given by the Respondent in terminating the Claimant’s contract. There were warning letters issued to the Claimant by the Respondent in the course of his career. Most of them were about the Claimant’s habit to inflict corporal punishment on his Pupils. Parents are said to have complained to the School Management about this. There were other infractions recorded against the Claimant.

18. None of the complaints however, featured in the process of termination. None were the reasons for termination. Their presence in the Respondent’s Bundle of documents was never related to the termination decision. There was no investigation for any complaint and hearing, before termination. The termination notice issued on 28th July 2014, and was effective 3 days later, on the 1st August 2014.

19. There is no doubt termination fell far short of the substantive and procedural standards required under the provisions of the law cited above. It is not possible to say if the Claimant left employment for good cause, bad cause, or no cause at all. The record indicates at one time, the Respondent was compelled to change the Claimant’s terms for economical reasons. There were other instances when disciplinary issues arose. None of these termination causes were captured in the letter of termination. Termination was unfair and the Claimant is entitled to compensation under Section 49 of the Employment Act, as read together with Section 12 of the Employment and Labour Relations Court Act. ***Termination was flawed for want of reasons and fairness, and considering the Respondent’s concession that the Claimant was a good Teacher who had received commendation, compensation at a maximum of 12 months’ salary computed at Kshs. 525, 960 is merited and granted.***

20. The Claimant was not clear about his prayer for 1 month salary withheld as retention. The item did not come out with any degree of clarity in his Pleadings, Evidence of Submissions. The Court is unable to

grant the item.

21. There was no detail of terminal dues given to the Court. Terminal dues would comprise any grant under the contract or the applicable law. It would include claims such as notice pay, annual leave pay, overtime pay, house rent allowance, service pay etc. It is ordinarily all monetary claims due on termination, other than claims for damages or compensation. A blanket claim for terminal dues is incapable of being redressed. If the Claimant intended to pursue service pay, which is sometimes improperly characterized as the totality of the term 'terminal dues,' the Respondent adequately showed the Claimant belonged to a Pension Scheme. He was paid Kshs. 83,069 in 2005 when his terms of employment were varied. He would be entitled to Pension for the period after 2005. He is not entitled to service pay under Section 35 [6] of the Employment Act 2007. The claim for terminal dues is rejected.

22. The claim for Public Holiday pay is similarly unmeritorious. The Claimant was a Teacher. He enjoyed paid holidays in April, August and December every year. He did not show to the Court which Public Holiday in his entire career, he spent teaching. There was evidence given by Tunje that holiday coaching at the School is a recent innovation, and did not involve the Claimant. The prayer for holiday pay is declined.

23. Parties shall meet their costs of the Claim.

IN SUM, IT IS ORDERED:-

- a. *Termination was unfair.*
- b. *The Respondent shall pay to the Claimant 12 months' salary in compensation for unfair termination at Kshs. 525,960.*
- c. *Other claims are declined.*

Dated and delivered at Mombasa this 8th day of July, 2016

James Rika

Judge