



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 331 OF 2015

BETWEEN

EDWARD W. OBUYA CLAIMANT

VERSUS

1. M.M. SHAH & M.V. SHAH ACADEMY

2. JAIN EDUCATION BOARD.....RESPONDENTS

Rika J

Court Assistant: Benjamin Kombe

Okanga & Company Advocates for the Claimant

Christine Kipsang & Company Advocates for the Respondent

JUDGMENT

1. The Claimant is a Teacher. He was employed by the Respondents, as the Headmaster of the 1st Respondent, from 20th August 2012 to 20th April 2015. His contract of employment was terminated by the Respondents on the latter date, after working for 2 years, 9 months. He earned Kshs. 105,000 on termination. He considers the decision to terminate his contract was unfair and unlawful, and prays for the following orders against the Respondents:-

I. Annual leave pay for 2013 and 2014 at Kshs. 210,000.

II. 12 months' salary in compensation for unfair termination at Kshs. 1,260,000.

Total..... Kshs. 1,470,000

III. Costs and interest.

IV. Any other suitable relief.

2. The Respondents filed their Statement of Response, on 2nd June 2015. They concede to have employed the Claimant, and terminated his contract. Termination was through notice. It was fair, the Respondent having been dissatisfied with the Claimant's work. The Claimant engaged in unethical behaviour. He failed to follow instructions given by the Respondents with regard to the school budget. He failed with regard to the overall school performance. There was a meeting between the Parties before the decision was made. The Respondents pray for dismissal of the Claim, with costs to the Respondents.

3. The Claimant gave evidence on the 23rd October 2015, and 12th February 2016 when he rested his case. 2 Witnesses gave evidence for the Respondents. Deputy Principal Lucas Mwakisha gave evidence on 22nd June 2016. Board Treasurer Gemini Shah did so on 20th July 2016 when hearing closed.

The Claim

4. Teacher Obuya adopts his Witness Statement filed on 20th May 2015. He was employed on the date shown above, on a monthly salary of Kshs. 105,000. He was informed by word of mouth by the Respondents, on the 17th April 2015, that the Respondents desired change in Management. He was not told the reason why change was needed. This information was given to him by Treasurer Kirti Shah in the presence of Chairman Dipan Shah. The Claimant was asked to resign. He declined. He was dismissed on the 20th April 2015. He was not heard. He did not have any warning for the entire period served.

5. It is not true, that the Claimant did not discharge his role as expected. The Respondents did not meet with him, and discuss performance. The school population rose during his tenure. The mean score rose from 294 marks to 354. This would not happen if the Headmaster was a limping sheep. He was not a dictator as alleged by the Respondents. He did not subscribe to Douglas McGregor teaching theory as alleged.

6. He never went on annual leave for the whole year. He was entitled to 30 days of annual leave. At no time was misconduct or performance an issue. He did not know a person named Onesmus Matano. Registration of Pupils for national examinations ended in May 2015. The Claimant had already left employment on this date. He did not know about Parents who sought to have their Children sit exams at other Centres.

7. The Claimant testified on cross-examination that he earned a monthly salary of Kshs. 105,000 by the time he left employment. The reasons given for termination did not have foundation. Kirti Shah and Dipan Shah went to the Claimant's Office. It was not a meeting. They told the Claimant they needed change in leadership. They said they were acting for the Board.

8. It was part of the Claimant's role to appraise staff. He carried out appraisals for the year 2013, but did not have the documents in Court. He did not supply the Board with these documents. There were routine meetings. Appraisal was never in issue at the meetings. He did not appraise in 2012. He was new at the School. He oversaw the running of the Nursery School. There were no complaints raised against the Claimant by the Head of Nursery School. The Claimant was involved in organizing the 1ST Respondent to participate in drama festival. He was to arrange transport, and oversee budgeting. There were issues raised about certain items in the budget. It was felt the items were not necessary. Filming was removed.

9. The Claimant testified he does not subscribe to any teaching theory. Theory X is advanced by Douglas McGregor. The theory postulates that where Teachers dislike their work, they have to be coerced, controlled, directed or threatened with punishment. The Claimant executed holistic teaching method. The mean score went down after the Claimant left the School. He met his targets. The school enrollment rose from 340 to 950 pupils. He taught science to Class 8. By the time he left, mean score was 70%.

10. The reasons for termination are stated in the letter of termination. The Claimant was not given time to refute these reasons. He was entitled to 30 days of annual leave. He applied for leave in October 2013, when the school was in session. There was no approval. It is not true that the Claimant failed to apply for annual leave in accordance with the school policy. He did not fail to discharge his role in accordance with

the terms of his contract. Termination was not lawful.

11. Redirected, the Claimant told the Court he did not perform below par. He did not have a warning, or other disciplinary measure in his employment file. He did not raise school enrolment at the expense of good examination performance. He was paid a monthly salary of Kshs. 105,000 and Kshs. 1,500 allowance for extra teaching. The allowance was paid during vacation tuition. Drama festival was held in Nakuru. The Claimant did not have the final say in drawing of the budget. 4 Drama Teachers were involved in the exercise. The Claimant did not derive any monetary gain from the budgetary process. He appraised Teachers for the year 2013. He could not do so with regard to 2012, as he joined in the year 2012.

The Response

12. Mwakisha testified he is the Deputy Principal of 1st Respondent. He sits on the 2nd Respondent Board. The Board instructs Management. The Management implements and reports back to the Board every month.

13. Children repeat classes only with their Parents' consent. They sit exams and move on to the next level the following year. The decision whether a Child repeats, can only be made by the Parents. This is the school policy.

14. Kenya National Examination Council [KNEC] regulates registration of candidates in January-March of each year. The process ends at the end of March. Forms are forwarded to KNEC. In May, KNEC forwards to the School the nominal roll of candidates with all the details. School Head is responsible for verification of the details. Errors can be corrected in red ink. A name cannot be removed. Names, if missing, can be added. Pupils are expected to sit exams in registered Centres. It is not legal to sit elsewhere.

15. Mwakisha observed the candidates while they were rehearsing for the exam in November. He noticed there were some Pupils who did not attend rehearsal. He was told these candidates had enrolled to sit exams elsewhere. There were general complaints about registration. Where a school registers Pupils to sit elsewhere, that school is blacklisted by the Ministry. Registering Pupils elsewhere tends to isolate bright Pupils from weak performers. Weak candidates are affected negatively by this isolation.

16. On cross-examination, Mwakisha told the Court he was employed on 15th September 2015. He did not find the Claimant in employment. Parents discuss their Children's performance with the Teachers, during open days. If a Child is weak, it is for the Parent to suggest repeating. Registration, to sit exams at other Centres, normally happens secretly. Redirected, the Witness told the Court the Board instructed Management on policy implementation.

17. Gemini Shah testified she is the Board Treasurer, while the Claimant was the School Principal. He carried out the instructions of the Board. Gemini was part of the Panel which interviewed the Claimant for employment. She was privy to the Claimant's letter of appointment.

18. The Claimant headed the School Management Team. He would go over his reports with the Board. He would give an overview of progress and actions for the future.

19. His reports were not always clear. The Board spent a lot of time fact-finding. There was a report from the Deputy of the Nursery School. It was reported that Nursery School Kids were not being taught in accordance with the curriculum. The Claimant did not investigate but reported to the Board. The Board carried its own investigations and found out the Claimant had misreported. There was an item on filming included in the Budget for County Music Festival. The Board enquired why this item was necessary. The Claimant merely withdrew the item. The School has no control over how money is used, once budget has been approved. If the issue had not been raised, money would have been released.

20. The Claimant did not carry out staff appraisal for the year 2012. He asked for time as he was new. He

did not carry out appraisal for 2013. Staff appraisal is important to the Respondents as it guides salary reviews.

21. The Respondents communicated their disaffection to the Claimant at every meeting. He did not change. His incompetence persisted. His contract was terminated.

22. He took annual leave during school vacation, in accordance with his contract. Staff had to apply for annual leave, and there was no carrying over of annual leave days.

23. The Claimant was responsible for registration of Pupils for the KCPE examination. All had to be registered at the 1st Respondent School. Standard 8C had 21 Pupils. Ordinarily, all would be registered at the School. 4 or so of them, were not registered. Ellie, Khalid and Victoria were not on list from KNEC. They were not on the provisional and final lists of KNEC results. They had paid school fees for term 1, 2, and 3. Their parents gave statements to the School, stating they were advised by the Claimant to register their Kids elsewhere. These statements are exhibit 7 of the Respondent's Bundle of Documents. The School was cautioned over the issue. The Claimant's termination letter is dated 20th April 2015. His contract had already been terminated by the time registration anomalies came to light. Termination was fair. The Claimant was engaged in irregular registration of candidates for KCPE. He failed to appraise staff. Salaries could not be reviewed, because of this failure.

24. Gemini told the Court on cross-examination that she did not have minutes capturing meetings held between the Claimant and the Board. The complaint raised by Head of the Nursery did not reach the Board in writing. It was alleged teaching was not in tandem with the curriculum. Gemini did not have the curriculum in Court.

25. She did not recall the amount assigned to filming in the budget. The item was removed by the Claimant, not by the Board. The issue about filming is captured in the letter of termination. The Board said the Claimant failed to justify the item.

26. It was in the meetings between the Parties that the Respondents called for performance appraisals. The minutes were not exhibited before the Court. There was no letter of warning given to the Claimant. Irregularity in registration of candidates was not a ground stated in the letter of termination in justification. It was a discovery which affirmed the Claimant's incompetence. Even if Victoria's registration was consensual, it was illegal. The School continued to receive fees from these candidates.

27. The Respondents did not give the Claimant a notice to show cause in writing. There was no disciplinary hearing. Termination notice took effect immediately. The Claimant had an orthodox view about teaching theories. There was valid reason justifying termination. If one did not apply for annual leave, it was forfeited. He did not apply for 2014/ 2015. The top candidate had 415 points, and the lowest 233 points. Performance improved under the Claimant's leadership. In closing her evidence on redirection, Gemini testified the letters from the candidates irregularly registered, were not revealed to the Board by the Claimant. The Respondents stumbled upon these letters when the Claimant had left. The Claimant only taught 1 subject. He would not take credit for the overall good performance.

Submissions

28. The Claimant submits there was no valid ground justifying termination. The grounds advanced in the letter of termination were non-issues. It was not clear what Winnie Head of Nursery had complained about; the Claimant had limited contract to be able to comprehensively appraise staff; and the budgetary items for the drama festival were mere proposals, subject to the approval of the Chairman.

29. The Claimant was denied a hearing contrary to Section 41 of the Employment Act 2007. This was conceded in the evidence of Gemini Shah. The Claimant submits termination was flawed on both substantive justification and procedural fairness. In making this conclusion, he urges the Court to apply its holding in ***Cause Number 341 of 2015 between Jeremiah Ochieng' Ponde & 3 others v. Borderless Tracking System Limited.***

30. The Claimant submits he merits the equivalent of 12 months' salary in compensation for unfair termination at Kshs. 1,260,000.

31. The contract allowed the Claimant annual leave of 30 days. He is entitled to annual leave for 2013 and 2014 at Kshs. 210,000.

32. The Respondents submit the Claimant's letter of employment enjoined him to comply with all rules and regulations and any other lawful instructions or directions given from time to time by the Board. He failed to investigate the matter between Head of Nursery and her Deputy. He failed to conduct staff appraisals. He included a high value item in the drama budget irregularly. He displayed ill motive by this inclusion. He oversaw registration of candidates for the year 2015. He instructed candidates to sit exams in other Centres. Teachers took their vacation during school vacation. The claim for annual leave pay is without merit. The Respondents urge the Court to find the Claimant, as in the case of **Daniel Sirengo Wakhungu v. Sawa Sawa Academy [2015] e-KLR**, went against established government and school policy, and is not entitled to claim compensation for unfair termination.

The Court Finds:-

33. The Claimant was appointed the Principal of the 1st Respondent School on the 20th August 2012. His contract was terminated by the Respondents on 20th April 2015. His gross taxable salary is shown in the pay slip for March 2015, at Kshs. 106,500. He explained Kshs. 1,500 was paid as tuition allowance. It is indicated as bonus in the pay slip. It is not included in the Claimant's gross salary for purpose of his Claim. Gross salary as at the time of termination, is quoted at Kshs. 105,000.

34. **Procedural Fairness:** It was conceded in the evidence of Gemini Shah, that the Claimant was not heard before termination. It is not therefore necessary to examine whether there was a notice issued to show cause why disciplinary action should not ensue; whether there were charges formulated against the Claimant; and whether he was heard in the mode prescribed under the law. There is concession these mandatory procedural steps were not taken. Section 41 of the Employment Act was not at all observed. To this extent, termination was unfair, the next question being whether termination was founded on valid reason or reasons, under Sections 43 and 45 of the Employment Act 2007.

35. **Substantive Justification:** This is contained in the letter of termination. It was alleged:-

a. The Head of Nursery, Madam Winnie had reported certain shortcomings of her Deputy. The Board instructed the Claimant to investigate, by meeting all the relevant Parties. The Claimant failed to investigate. A Meeting was called on 14th April 2015. The Claimant was not able to explain why he failed to investigate and find solution to the complaint. He was not impartial.

b. Appraisals for 2013 were not done. When the Claimant was asked by the Respondent to explain, he requested for more time up to October 2014. Appraisals were not done in time, and after much following, the Claimant did the appraisals in February 2014. Appraisals were important tools in organizing the Respondents' business

c. The monthly meetings had been reduced to petty fact – finding missions for the Board through the Claimant's failure to fact-find and present complete reports to the Board. A case in point was the Claimant's failure to find out how many games were played across the different classes.

d. The Claimant's attention to detail was abysmal. Given as evidence of this was the Claimant's actions revolving around the drama budget. According to the Respondents the Claimant was asked why it was necessary to have filming as a budgeted item. His response was immediate withdrawal of the item. Later on the School Management Team was able to explain why the item was important. Because of the Claimant's failure to explain, the School failed to participate in the particular category.

e. The Claimant subscribed to Douglas McGregor teaching theory, while the School recommended

holistic theory. The Claimant refused to go with the view of the School. He was resistant to change.

36. The unfortunate thing about these many accusations is that they were not tested through a proper disciplinary hearing.

37. The Respondents' evidence on the drama festival was that the Claimant included filming in the budget without justifying the item to the Board. The Claimant removed the item owing to the concerns of the Board. The Treasurer to the Board was not able to say in cross-examination if this was the first time the item was included. No impropriety was shown on the part of the Claimant in the inclusion of filming. Any reasonable tribunal, exercising its mind fairly, would have no reason to conclude that the School Principal's attention to detail was abysmal, merely because he withdrew a budgetary item against the background of protestations about the item, from his employing Board. The budget as testified by him, involved other Members of the staff. The Board was later persuaded by the Management Team about the importance of filming, and regretted the omission, appearing to blame the Claimant, in the letter of termination, for failing to convince them on the need for the item. The Claimant was blamed for causing the School to miss out on the particular category. The budget, as the Court understood it, was meant to contain proposals subject to the Chairman's approval. The Court does not think the Claimant's role in the drama and music festival budget, amounted to valid termination reason.

38. Irregular registration of candidates is not among the grounds listed in justifying termination. While the Court agrees that irregular registration is abhorrent and flies in the face of Government and School Policy, this was an accusation against the Claimant which came after the fact of termination. It did not inform the decision. It cannot be accepted by the Court as justification for termination. All the evidence relating to irregular registration is irrelevant, as this was never a ground cited in justifying termination.

39. The Head of Nursery Madam Winnie did not testify to explain to the Court what her dispute with her Deputy was; how that dispute touched on the Claimant; and how the Claimant's intervention or lack of it in the dispute, would justify the Claimant's loss of employment. The Respondents assert the Claimant failed in finding a solution to the two ladies' dispute. It was said the Claimant was not partial. No details of impartiality are apparent on the face of the record. If he was impartial, it would suggest he engaged the two ladies, and the charge of failing to investigate, would be inconsistent with that engagement. The exact details of the complaint relating to Nursery School curriculum, how the Claimant dealt with the complaint, are missing. These were generalized accusations, not capable of amounting to valid termination reasons.

40. Staff performance appraisals are crucial in gauging productivity, and reviewing salaries and wages. The Claimant arrived at the Respondent's employment place in August 2012. He could not appraise for the year 2012. For the year 2013, the termination letter indicates the Claimant sought more time, asking to be given up to October 2014. The termination letter states appraisal report was received in February 2014. The Respondents do not say that they declined the Claimant's request to deliver by October 2014. He delivered in February 2014 as per the letter of termination, months before October 2014. This is therefore not a valid ground in justifying termination, time for appraisal having been extended to October 2014, and appraisal report having been received in February 2014.

41. The accusation about Board / Management meetings being reduced to fact-finding sessions, due to the Claimant's lethargic approach, was not backed up by evidence. There are no minutes where the Board is shown to be fact-finding in the place of the Claimant. If there were enquiries made of the Claimant about certain issues, these would be in the nature of routine enquiries arising in such meetings. It was not shown that the Claimant deliberately failed in supplying information to the Board, as and when required. The accusation about his adherence to Douglas McGregor theory and rejection of the holistic theory was not backed up with evidential proofs. These again were omnibus accusations, lacking in detail and substantiation. The School mean grade went up during the Claimant's stewardship. Pupil enrollment went up. No Teacher gave evidence showing that the Claimant was dictatorial as alleged to be by the Respondents. The Respondents should have judged the Claimant from his deliverables, rather than his theories.

42. Termination did not meet the threshold of fairness under the Employment Act 2007. The multiplicity of accusations heaped on the head of the Claimant, were not ventilated through a disciplinary hearing. The accusations in the end remained without substantiation.

43. The Claimant agreed in his contract that he would have 30 days of annual leave. He further agreed these would only be utilized during the school vacations. He claims annual leave for the years 2013 and 2014. The School must have had vacations during the 2 years. It is improbable that the Claimant was engaged throughout, and failed to utilize his annual leave days. The Court has in the past held the position that Teachers' annual leave is normally programmed to be utilized during school vacations, to ensure schools are not hampered in meeting their academic objectives. The Claimant's contract suggests his annual leave utilization was not different from the norm in the profession. The prayer for annual leave pay is rejected.

44. Parties shall meet their costs of the Claim.

In sum, it is ordered:-

a. Termination was unfair.

b. The Respondents shall pay to the Claimant the equivalent of 9 months' gross salary in compensation for unfair termination, at Kshs. 945,000.

c. The whole amount shall be paid within 30 days of delivery of this Judgment.

d. Interest granted at 14% p.a. calculated from the end the 30 days above.

e. No order on the costs.

Dated and delivered at Mombasa this 9th day of December, 2016.

James Rika

Judge