



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT MOMBASA
CAUSE NUMBER 199 OF 2014

BETWEEN

DANIEL SIRENGO WAKHUNGU..... CLAIMANT

VERSUS

SAWA SAWA ACADEMY..... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Angima, Advocate, instructed by Omagwa Angima & Company Advocates for the Claimant

Ms. Bakari, Advocate, instructed by Aboubakar, Mwanakitina & Company Advocates for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFL TERMINATION

AWARD

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

1. Sawa Sawa Academy is a Primary School based at Watamu in Malindi, North Coast of Kenya. The School initially employed Daniel Sirengo Wakhungu as a Teacher on 12th May 2012. He was re-employed through a written contract dated 2nd February 2013, to serve for 2 years, earning an all-inclusive monthly salary of Kshs. 13,000. The contract was renewable.

2. His contract, however, was terminated prematurely by the Respondent. The letter of termination is dated 20th February 2014. The Respondent alleged the Claimant was absent from work for 10 days, without the leave of the Respondent. The Claimant feels termination was unfair and unlawful, and filed this Claim on 8th April 2014. He seeks, in his own language, the following Award against the Respondent:-

- I. A declaration that the Claimant employment was a contract of employment having worked for a continuous period of more than three months ;
- II. A declaration that the termination of the Claimant's employment was unlawful;

- III. A declaration that the Claimant was entitled to 1 month leave after 12 months;
- IV. Investigation and calculation of underpayment of wages of the Claimant by the Respondent and the payment of the same;
- V. An order directing the Respondent to pay terminal benefits of Kshs. 5,000, off days at Kshs. 10,800, 1 month salary in lieu of notice at Kshs. 13,000, public holidays worked at Kshs. 3,600, compensation for wrongful dismissal at Kshs. 156,000;
- VI. Certificate of service ;
- VII. Any other relief this honourable Court may deem fit and just to grant to meet the ends of justice; and
- VIII. Costs of the Suit.

3. The Respondent filed its Reply to the Claim on 7th May 2014. It states the Claimant was employed by the Respondent as a Teacher on 12th May 2012. His contract was terminated by the Respondent on 20th February 2014. Termination was based on lawful ground, the Claimant having deserted employment. He is not entitled to terminal benefits claimed, as he was employed under contract. And even if he is entitled, he was paid all his dues. The Claim has no merit.

4. Mr. Wakhungu gave evidence on 10th November 2014. He called one other Witness Adelaide Simiyu, who is his Wife, and a Teacher at St. John's Primary School Watamu. Head Teacher Sawa Sawa Academy, testified on the same day, bringing the hearing to a close. The Claimant confirmed the filing of his Closing Submissions to the Court on 24th November 2014, and the Award was reserved for 27th February 2015. The record appears not to include the Closing Submission from the Respondent.

5. The Claimant testified he received the letter dated 20th February 2014 from the Head Teacher, alleging the Claimant had deserted employment. Wakhungu had received a call from his Mother in Bungoma Western Kenya on 2nd February 2014, telling him his Brother was ill, and admitted at Kenyatta National Hospital. The Claimant sent an SMS message to the Head Teacher, and called the Deputy Head Teacher Mr. Mutiso on 3rd February 2014, informing them he was leaving for home to attend to his Brother. He took 10 days attending to his Brother.

6. He reported back on 13th February 2014. He was unwell and requested the Head Teacher for more days off-duty. He was granted up to 17th February 2014. When he turned up for duty on 17th February 2014, he was asked to write a letter to the School's Director, explaining his absence. The Claimant wrote explaining his absence, in a letter dated 17th February 2014.

7. He continued working up to 20th February 2014. The School was breaking for Mid-Term. He was issued the letter of termination. He was paid Kshs. 4,000, which was for pupil coaching done in February 2013. He was not paid his February 2014 salary. He was employed on 12th May 2012, but issued written contract only on 2nd February 2013. The Claimant availed to the Court Statements of Calls made from his Mobile Phone line Number [particulars withheld], indicating he had called the Head Teacher's Mobile Phone Number [particulars withheld] during his 10 day absence. He was paid his salary through the Bank, and received his last salary in January 2014.

8. Wakhungu told the Court on cross-examination that his Mother called him, and he in turn called his Deputy Head Teacher. He informed the Deputy that he was leaving to attend to his Brother. The Deputy advised the Claimant the Deputy would call the Head Teacher with the information. The Deputy told the Claimant the Deputy had called the Head Teacher. The Claimant went back to the School on 13th February 2014, and was granted permission to rest until 17th February 2014. It is not true that he was sent away on 13th February 2014, to bring evidence supporting the reasons given for his absence. The Claimant had written another letter dated 13th September 2014, apologizing to the Respondent for not reporting to duty on time, after he had travelled home again. He was not given a warning before termination. Redirected, the Claimant testified he had been retained in employment because of his good performance. One could call the Head Teacher, or see him in person, to have leave of absence. The Claimant called the

Head Teacher, and sent SMS message to the Deputy. He prays the Claim be allowed.

9. Mrs. Wakhungu testified her husband was called by his Mother on 2nd February 2014. He was told his Brother was ill. He departed for the upcountry on 3rd February 2014. He informed his Wife he had called his Head Teacher, and informed him he was leaving for the upcountry. The Claimant called his Wife after traveling; informing her he had transferred his Brother from Nairobi to Eldoret Referral Hospital. He returned to Watamu on 12th February 2014, reporting to work the following day 13th February 2014. He told his Wife he had been allowed days off up to 17th February 2014. On 20th February 2014, he informed her he had been dismissed. Cross-examined, Mrs. Wakhungu testified the Claimant's letter dated 17th February 2014, says the Claimant's Brother was discharged from hospital on 12th February 2014. The Claimant returned to Watamu on 12th February 2014. He did not lie when he stated he was looking for money to pay to the Hospital to secure his Brother's discharge. Redirected, she explained that the letter of 17th February 2014 was authored by her Husband, and she did not know its contents.

10. Mr. Zablon Maina Munyu is the Head Teacher of Sawa Sawa Academy. He came to know the Claimant when the Claimant joined the School. The Claimant worked for about 2 years. He taught Upper Primary. Munyu explained that whenever a Teacher wishes to take off- duty days, he/she must do so in writing. This is captured in the Claimant's letter of 7th September 2012, in which he sought leave of absence in writing.

11. After signing his contract of employment dated 2nd February 2014, he just left without informing anyone in the Management. He received his salary and left. He communicated with the School after he was already gone. He returned and wrote a letter of apology. His Safaricom Call Statements only show the outgoing calls; he did not bring data on incoming calls. The Head Teacher was first to call the Claimant enquiring about his absence, before the Claimant sent his SMS.

12. The Head Teacher consulted other Teachers, and shared out the subjects taught to the Pupils by the Claimant, amongst the other Teachers. This interfered with the School's Programmes. The Claimant did not report to the School on 13th February 2014. He reported on 17th February 2014. He said he would avail to the School travel documents justifying his absence, but provided nothing. He was summarily dismissed on 20th February 2014. Reason justifying the employment decision was desertion of duty. He was paid for the remedial classes a sum of Kshs. 4,000. He left the School, and is not owed any money.

13. All Teachers are on contract, Munyu told the Court on cross-examination. The Claimant had written on 7th September 2014, requesting for days off. The circumstances then, were different. He did not call the Head Teacher before he left on 3rd February 2014. He sent the Head Teacher SMS after the Head Teacher called him. He said there was an emergency at his home. The Attendance Register was not availed to the Court. It is true the Claimant did not report to the School on 13th February 2014. He only reported on 17th February 2014. He was given time to prove the reasons for his absence. On 17th February 2014, he reported but did not teach; the Respondent had already employed a replacement Teacher. The Claimant was paid his salary for February 2014. Termination was in March 2014. The Head Teacher corrected himself, clarifying that the salary paid was for January 2014, and the Claimant left in February 2014, not March 2014. There was no warning before termination. All that the Claimant was paid was Kshs. 4,000 for remedial classes. Munyu did not doubt that the Claimant had traveled upcountry; all the School required was for the Claimant to supply documents in support of such travel.

14. The Claimant submits he informed the School he would be absent, as captured in the Safaricom Call Statements. He returned to the School on 13th February 2014, was fatigued and was allowed off duty days by the Head Teacher, up to 17th February 2014. He was not given a chance to be heard before termination. Termination was contrary to Section 43 and 45 of the Employment Act 2007. He is entitled to compensation for unfair termination the equivalent of his 12 months' gross salary. His evidence was corroborated by that of his Wife. He submits the Claim is merited.

The Court Finds and Awards:-

15. The Claimant was employed by the Respondent School on 12th May 2012 at a monthly salary of Kshs. 10,500. He was issued a written contract effective from 2nd February 2013, with an all-inclusive salary of Kshs. 13,000 per month. It is not contested the employment relationship was ended by the Respondent in a letter of termination dated 20th February 2014. The reason given by the Respondent in justifying termination was that the Claimant had been absent from duty without the leave of the Respondent.

16. Was the reason given by the Employer a valid and fair reason under Section 43 and 45 of the Employment Act 2007; was termination fairly carried out; and is the Claimant entitled to the terminal benefits and compensation as prayed? These are the issues in dispute.

17. The Claimant explained that he was called by his Mother on an emergency on 2nd February 2014. He was informed his Brother was ailing. He stated he called the Deputy Head Teacher, and sent SMS to the Head Teacher, informing them of the emergency. He produced Safaricom Call Statements to support his evidence that he communicated his absence to the Head Teacher and the Deputy Head Teacher.

18. The Court is not satisfied that the Claimant sought and was accorded leave of absence by his Employer, before traveling to Nairobi and presumably to Eldoret to attend to his sick Brother. The School Regulations, as explained by the Head Teacher, required the Teacher seeking off duty days, to do so in writing. The Claimant had followed this Regulation earlier on, as shown in his written request of 7th September 2012.

19. The evidence on record shows he made no such request on 2nd February 2014. In his apology letter of 17th February 2014, he writes that he was sorry for not writing to the Office before leaving. It is difficult to understand the Claimant when he testifies he was not under the obligation to communicate to the School and seek leave in writing.

20. Even his Mobile Phone communication to the Head Teacher was after he was well away from the School. He was presenting the School with a fait accompli, not seeking leave. He was communicating his absence after he had already left. An Employee caught up in domestic emergencies should seek the leave of his Employer to attend to such emergencies. This enables the Employer make arrangement for the performance of the Employee's duty, in the absence of the Employee, by Relievers. Productivity is sustained. In the case of the Claimant, he was in an important teaching position at the Upper Primary, and needed help the School arrange for his absence, ensuring Pupils were not left unattended to.

21. The Claimant seems to have fallen into a pattern of absenting himself from his teaching duties. He had on 13th September 2012, written to the School explaining his absence. He on that occasion alleged to have been delayed by bad weather and by group activities involving fellow villagers in Bungoma. He apologized and promised the Respondent not to repeat the mistake. The evidence given to the Court by the Claimant's Wife simply supported the Claimant's case that he had traveled to the upcountry to attend to his Brother; it did not shed any light on authorization by the School, of the Claimant's journey.

22. There can be no justification for any Teacher to show the kind of cavalier attitude to duty, as shown repeatedly by the Claimant. Even when he returned from his unauthorized trip, the Claimant was off duty again from 13th February 2014 to 17th February 2014. There was no evidence that he was authorized to take this additional off duty days, by the School Administration. He went on inconveniencing the Children. Mid-term was around the corner- on 20th February 2014. When was the Claimant going to make up for the lost time?

23. In the finding of the Court, the Respondent was justified in terminating the Claimant's contract of employment. There was valid and fair reason, under Section 43 and 45 of the Employment Act 2007. His contract expressly incorporated Section 44 [4] of the Employment Act 2007, making it an offence justifying summary dismissal, for the Claimant to be absent from duty without the leave of the

Respondent or without lawful cause, and for the Claimant to willfully neglect to perform his work. The Claimant fundamentally breached the law and the contract governing his terms and conditions of employment.

24. The only flaw in the termination process, quite clearly, is the lack of procedural justice. Section 41 and 45 of the Employment Act 2007, require an Employee to be accorded a fair opportunity to defend himself, however obvious or egregious the employment offence. Once the Claimant showed up at the School on 17th February 2014 as alleged by the Head Teacher, the School should have given to the Claimant specific charges in a written form, called on him to appear before a Disciplinary Panel in the company of his Trade Union Representative or Workmate, as contemplated by the Section 41 of the Employment Act 2007.

25. The Head Teacher just slammed the Claimant with the letter of termination on 20th February 2014. The Claimant was allegedly asked to provide travel documents, showing he had traveled upcountry. This was not an opportunity to be heard, and in any case, as testified by the Head Teacher, there was no doubt whether the Claimant had traveled. The core issue should have entailed the Claimant showing his travel and absence were authorized by the School, not whether he traveled. The Court does not think the presence of 2 versions of the termination letter, is material to the dispute. The date of termination and the responsibility for the decision are not in question.

26. The procedural lapse, while weighed against the substantive breach by the Claimant, can be redressed by grant of minimal compensation. ***The Court allows the Claimant 1 month salary at Kshs. 13,000 in compensation for unfair termination***

27. The declaratory orders sought have no basis in law and fact, and save for a declaration that termination was unfair for breach of fair procedure, are rejected. Why should the Court declare the Claimant was employed on contract, was entitled to annual leave, while these are shown and are self-evident on the face of the written contract dated 2nd February 2012? Was it ever contested that the Claimant was working on contract?

28. What is the prayer for terminal benefits at Kshs 5,000 for? How is the claim for Kshs. 10,800 in off days, for a Teacher who was absent without leave for almost an entire teaching month, justifiable? And on what Wage Instrument is the claim for underpayments based? The Court has not found anything on record to justify these claims, as well as the claim for public holidays and salary arrears. These claims are not based on the Claimant's contract or the law. The Claimant was paid his salary for January 2014, and left employment at the beginning of February 2014. He rendered no labour to the Respondent in the month of February 2014, to warrant salary for that month. The Certificate of Service is granted to the Employee under Section 51 of the Employment Act 2007, and this should be no different with regard to the Claimant.

In Sum, IT IS ORDERED:-

- a. ***Termination was based on valid and fair reason, but flawed on procedure;***
- b. ***The Respondent shall pay to the Claimant 1 month salary at Kshs.13,000, in compensation for unfair termination;***
- c. ***The Respondent to release to the Claimant his Certificate of Service forthwith; and***
- d. ***Other prayers are rejected.***

Dated and delivered at Mombasa this 27th day of February 2015

James Rika

Judge