



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO 2250 OF 2012**

**NAHASHON CHERUIYOT**

**NGENO.....CLAIMANT**

**VS**

**STRENGTHENING OF MATHEMATICS & SCIENCE EDUCATION PROJECT.....1<sup>ST</sup>  
RESPONDENT**

**CENTRE FOR MATHEMATICS, SCIENCE & TECHNOLOGY EDUCATION IN AFRICA...2<sup>ND</sup>  
RESPONDENT**

**AWARD**

**Introduction**

1. By a Memorandum of Claim dated 18<sup>th</sup> December 2012 and filed in Court on 13<sup>th</sup> March 2013, the Claimant sued the 1<sup>st</sup> and 2<sup>nd</sup> Respondents for unlawful and unfair termination of employment. The Respondents filed separate Memoranda of Defence on 23<sup>rd</sup> April 2013 through the firm of Memba Muriuki & Co. Advocates and a joint Memorandum of Reply on 7<sup>th</sup> August 2013 through the Attorney General. The Claimant's case was heard on 7<sup>th</sup> October 2014 but the Respondents did not call any witnesses in spite of adequate opportunity to do so.

**The Claimant's Case**

2. The Claimant was employed by the 2<sup>nd</sup> Respondent as a driver on a three year contract running from 15<sup>th</sup> April 2010 to 31<sup>st</sup> December 2013. The contract was renewable subject to exemplary performance and availability of funds.

3. The Claimant worked under the supervision of the 1<sup>st</sup> Respondent. On 3<sup>rd</sup> February 2012, the 2<sup>nd</sup> Respondent issued the Claimant with a show cause letter citing allegations of several acts of misconduct. The Claimant responded to the show cause letter on 10<sup>th</sup> February 2012 denying all the allegations leveled against him. He appeared before the 2<sup>nd</sup> Respondent's Board on 25<sup>th</sup> April 2012 and on 2<sup>nd</sup> May 2012 he was dismissed by a letter emanating from the 1<sup>st</sup> Respondent's Advocate.

4. The Claimant pleads that the termination of his employment was unjustifiable and unfair and therefore claims the following:

- a. A declaration that the termination of his employment was unlawful
- b. Compensation for breach of contract.....Kshs. 232,392
- c. Gratuity.....Kshs. 134,092
- d. Underpayment.....Kshs. 14,376
- e. Costs and interest

### **The Respondents' Case**

5. In its Memorandum of Defence, the 1<sup>st</sup> Respondent states that the Claimant was an employee of the 2<sup>nd</sup> Respondent employed to work under the supervision of the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent adds that besides supervising the Claimant, it paid his salary directly to the 2<sup>nd</sup> Respondent for onward transmission to the Claimant.
6. As the party with supervisory powers over the Claimant, the 1<sup>st</sup> Respondent wrote a report to the 2<sup>nd</sup> Respondent on the Claimant's performance. The 1<sup>st</sup> Respondent goes on to state that it did not participate in any disciplinary proceedings against the Claimant. It however issued the notice of termination of employment dated 2<sup>nd</sup> May 2012 through its Advocate. The 1<sup>st</sup> Respondent avers that the sum of Kshs. 72,248 paid to the Claimant was paid in error. It is the 1<sup>st</sup> Respondent's case that it is wrongly joined in this case as there was no employment relationship between itself and the Claimant.
7. On its part, the 2<sup>nd</sup> Respondent states that it received a report from the 1<sup>st</sup> Respondent on the Claimant's performance on the basis of which the 2<sup>nd</sup> Respondent wrote to the Claimant asking him to respond to the allegations made against him. The 2<sup>nd</sup> Respondent subsequently constituted a disciplinary panel to hear the Claimant. According to the 2<sup>nd</sup> Respondent, the Claimant stopped reporting for work at the end of April 2012, before the 2<sup>nd</sup> Respondent's Board had made a decision on his case. The 2<sup>nd</sup> Respondent further states that it did not issue any termination notice to the Claimant nor did it take any steps towards effecting a termination of the Claimant's employment.
8. The 2<sup>nd</sup> Respondent submits that there was no contract of employment as between the 1<sup>st</sup> Respondent and the Claimant as the role of the 1<sup>st</sup> Respondent was only to supervise and pay the Claimant's salary. The termination notice dated 2<sup>nd</sup> May 2012 from the 1<sup>st</sup> Respondent was therefore ineffective and could not terminate the Claimant's contract of employment with the 2<sup>nd</sup> Respondent. It is the 2<sup>nd</sup> Respondent's case that it was in fact the Claimant who terminated the employment contract by failing to report for duty from April 2012.
9. In the joint Memorandum of Reply filed on 7<sup>th</sup> August 2013, the Respondents state that the Claimant's dismissal was a consequence of professional misconduct and insubordination to wit;
- a. The Claimant's misuse of project motor vehicle and re-assigning of his official tasks to other persons without following the official channel;
  - b. Inappropriate recording of work ticket for the month of December 2011;
  - c. The Claimant's failure to adhere to instructions issued by his senior; and
  - d. Making fraudulent entries on records with regard to fuel supplies for Motor Vehicle Registration No. KAL 339L.
10. The Respondents further plead that the Claimant's dismissal followed investigations which revealed gross misconduct on the part of the Claimant. According to the Respondents, the process leading to the Claimant's dismissal was lawful and fair

### **Findings and Determination**

11. The following issues call for determination by the Court:

- a. Whether there was an employment relationship between the Claimant and both the 1st and 2nd Respondents;
- b. Whether the termination of the Claimant's employment was justifiable, procedural and fair;
- c. Whether the Claimant is entitled to the reliefs sought.

### **Employment Relationship**

12. From the record, the Claimant's employment was formalised by an appointment letter dated 15<sup>th</sup> April 2011 issued by CEMASTEА, the 2<sup>nd</sup> Respondent herein. The letter states in part:

*“RE: APPOINTMENT TO THE POST OF DRIVER*

*Following your application for the above post and subsequent interview, I am pleased to inform you of the Board's decision that you be appointed to the post of **Driver, Job Group F, with effect from 1st April 2010** on JICA terms and conditions of Employment.*

*This appointment is on a **THREE-YEAR** contract pegged to the SMASE Project Period that ends on 31st December 2013, and may only be renewable subject to exemplary performance of duty and availability of funding coupled with suitability report from your supervisor.*

***NB: Your monthly salary will be paid by SMASE Project, while the Board of Governors, CEMASTEА shall pay your Gratuity on the expiry of your contract.***

*Yours faithfully*

*Cecilia C. Ngetich*

*Director, CEMASTEА/Secretary BOG CEMASTEА”*

13. From this letter, it emerges that the Claimant was recruited by the 2<sup>nd</sup> Respondent and then seconded to work for the 1<sup>st</sup> Respondent. In determining the parameters of an employment relationship within the context of a secondment, the Court is required to examine the intention of the parties as evidenced by their conduct and relevant documentation.

14. It is my view that, in assigning responsibilities to the parties in a secondment arrangement, the traditional tests of control and supervision are not adequate. In the Indian case of **Centrica India Offshore PVT Ltd Vs CIT (W.P.(C) No. 6807/2012 (Del)** the Delhi High Court held that an employee who is seconded to work for a secondment employer for a specified period of time remains an employee of the primary employer.

15. In the instant case, the Claimant was seconded by the 2<sup>nd</sup> Respondent to work for the 1<sup>st</sup> Respondent for a specified period of three years. According to the letter of appointment, the 1<sup>st</sup> Respondent would pay the Claimant's salary while the 2<sup>nd</sup> Respondent would pay his gratuity. Looking at the circumstances surrounding the Claimant's employment in totality, the Court has arrived at the conclusion that the 2<sup>nd</sup> Respondent was the Claimant's primary employer and that there was no intention that this responsibility be transferred to the 1<sup>st</sup> Respondent.

### **The Termination**

16. Having settled the question as to who the Claimant's primary employer was, I will now consider the termination of the Claimant's employment. On 2<sup>nd</sup> May 2012, the firm of Memba Muriuki & Co. Advocates, acting for the 1<sup>st</sup> Respondent wrote to the Claimant as follows:

*“TERMINATION OF EMPLOYMENT*

*OUR CLIENT: STRENGTHENING OF MATHEMATICS AND SCIENCE EDUCATION PROJECT (SMASE)*

*We regret to inform you that your employment with our client is hereby terminated with effect from the 2nd May 2012.*

*Your dues will be calculated accordingly and given to you immediately. As of the date of termination, it is essential that you return any of our client's property in your possession, that is, keys to the car and any material and/or document issued to you.*

*You will be issued with a certificate of service by our client. Our client thanks you for your time and wishes you the best of luck in the future.*

*Yours faithfully,*

*MEMBA MURIUKI & CO.”*

17. In light of my finding that the 2<sup>nd</sup> Respondent remained the Claimant's primary employer, it is as clear as day that the 1<sup>st</sup> Respondent had no mandate to terminate the Claimant's employment. If for some reason the 1<sup>st</sup> Respondent was dissatisfied with the Claimant's performance or conduct, the right thing to do would have been to ask the 2<sup>nd</sup> Respondent as the primary employer to recall the Claimant. A secondment employer has no authority in law to terminate the employment of a seconded employee except in cases where the primary employment contract has been expressly terminated.

18. In light of the foregoing, the Court finds that the termination of the Claimant's employment as communicated by the 1<sup>st</sup> Respondent's Advocate by letter dated 2<sup>nd</sup> May 2012 was unprocedural and unlawful. The Court also finds that by seconding the Claimant to the 1<sup>st</sup> Respondent, the 2<sup>nd</sup> Respondent created a principal/agency relationship between itself as the principal and the 1<sup>st</sup> Respondent as the agent. The 2<sup>nd</sup> Respondent was therefore vicariously liable for the 1<sup>st</sup> Respondent's wrongful act of terminating the Claimant's employment.

19. I therefore make an award in favour of the Claimant and against the 2<sup>nd</sup> Respondent in the sum of Kshs. 115,980 being the equivalent of six months' salary in compensation for unlawful termination of employment. In making this award I have taken into account the Claimant's length of service as well as the 2<sup>nd</sup> Respondent's conduct in the termination of the Claimant's employment.

20. I further direct the 2<sup>nd</sup> Respondent to calculate and pay to the Claimant gratuity for the period served, within the next 30 days from the date of this award. Any amounts already paid to the Claimant will be discounted from this award. The claim for underpayment was not proved and is dismissed.

21. I award the costs of this case to the Claimant.

Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 16<sup>TH</sup> DAY OF FEBRUARY 2015**

**LINNET NDOLO**

**JUDGE**

**DELIVERED IN OPEN COURT AT NAIROBI THIS 18<sup>TH</sup> DAY OF FEBRUARY 2015**

**HELLEN WASILWA**

**JUDGE**

**Appearance:**

Mr. Nyabena for the Claimant

Mrs Memba Muriuki for the 1st Respondent

Ms. Kassim for the 2<sup>nd</sup> Respondent