



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1556 OF 2014

GEORGE NDIRITU MUEITHI.....CLAIMANT

VERSUS

PREMIER ACADEMY CHARITABLE TRUST

(BEING SUED THROUGH TRUSTEES

MUKESH MANUBHAI,

VIJAY PARSOORAM PATEL &

PRAFULCHANDRA CHANDUBHAI PATEL).....RESPONDENT

JUDGMENT

1. The Claimant filed suit against the Respondent on 5th September 2014 seeking resolution of the dispute between him and his erstwhile employer. He averred that he was employed by the Respondent in September 2012 as a teacher and was on a contract that was to run between September 2012 and July 2015. He earned a gross salary of 135,200/- plus group pension scheme of 6,760/-. He averred that on 22nd April 2014 he was called by the Human Resource Manager and handed a letter terminating his services. No reasons were ascribed and he averred that the termination was not procedurally fair. He thus sought 12 months salary compensation, balance of the contract up to July 2015, monthly pension contributions for the balance of the contract, costs, interest and any other relief the Court may deem just and fit to grant.

2. The Respondent filed a Defence on 24th September 2014. In the defence the Respondent averred that the Claimant was employed under a written contract of service and the contract provided for the giving of three calendar months notice or payment in lieu thereof. It averred that the Claimant was given a proper notice dated 22nd April 2014 and was paid a sum of Kshs. 306,291/- in lieu of notice. The Respondent averred that the Claimant accepted the termination by a letter dated 23rd April 2014. The Respondent denied that the termination was unlawful. The Respondent averred that the pension contribution will be paid once the completed claim forms are submitted by the Claimant. The Respondent thus sought the dismissal of the suit with costs.

3. The Claimant filed a Reply to Defence on 1st October 2014. In the reply, the Claimant admitted being paid the three months' salary in lieu of notice but averred that the dismissal was unlawful. He averred that in spite of submitting his claim forms his pension has not been paid. He denied acceptance of the

termination letter and sought the defence to be struck out. The Claimant and Respondent both filed documents and statements they wished to rely on.

4. The Claimant testified on 11th March 2015. He was led in his examination-in-chief by his counsel Miss Kinyanjui. The Claimant stated that he has a degree in Business Administration and is a teacher with a P1 certificate. He testified that he was employed in February 2007 by the Respondent after an interview process. He was to teach English, Maths and Science in year 4. He was also a class teacher and the contract was to run for 2 years. In 2008 the contract was renewed for another 2 years and was to expire in 2010. He was given a promotion to year 6 and he was given additional duties to oversee the teaching and learning of science in the whole school. The contract was renewed for 2 years and in the course of the contract there was a vacancy in the office of Deputy Head for which he applied and was successful. He was appointed Deputy Head of primary school from 2010 to 2012. He was given a 3-year renewal of contract in 2012. He testified that he had a very successful career and got promotions all the time as he was one of the most dependable teachers. He oversaw renovations and had no disciplinary issues, complaint or warning. He testified that he reported to work as usual on 22nd April 2014. The year 6 students were sitting the Cambridge exams and he was in charge of the exams to ensure the exams went on smoothly. He was shocked to receive the termination letter and wrote to the HR officer and copied the Board of Governors, head of section & principal and sought to know why he was terminated. He did not get any response. He testified that he did not know what he had done to deserve such an abrupt and sudden termination. He stated that at the time he had a gross of Kshs. 135,200/- which included his basic, coordination allowance and senior manager allowance. He testified that he saw an advertisement of his position which was filled. He testified that his passion is teaching and the part time work he had got in a construction company did not earn him as much. He thus sought the compensation for unlawful termination and the prayers in his claim.

5. In cross-examination by Mr. Goswami for the Respondent, the Claimant testified that he was still employed at the construction company and the earnings vary each month. He stated that if he works the whole month he earns 60,000/-. He testified that he was happy with the terms and conditions of the contract and had a good working relationship with the Respondent. He confirmed receipt of 3 months' pay. He testified that the head of the primary section Carman Antau was upset by his firing and he could not ask her why he was fired as the letter did not emanate from her. He testified that he did not know if she defended him and that he saw the advertisement for his position late last year. He stated that he was not aware of structural changes at the school and was not aware that the position of deputy head was being scrapped. He stated that the pension was paid through his lawyers. He testified that in July, August, September and October he was without pay as he got the part time job in November 2014. He confirmed that he was still in touch with Carman Antau and helped her whenever he can as when you leave you don't have to be an enemy.

6. In re-examination he confirmed no reasons were given to him for the termination.

7. The Respondent called Joyce Gathoni Kariuki who testified that she was the Human Resource Manager of the Respondent. She relied on her witness statement. In her statement she stated that in the Claimant's contract of service there was a clause for the termination by either party giving three calendar months written notice or payment of three months salary in lieu of notice. She stated that the Claimant was given a written notice to terminate and was paid a salary for three months in lieu of notice amounting to Kshs. 306,291/-. She stated that the Claimant was not owed any monies.

8. In cross-examination by Miss Kinyanjui, the witness testified that she found the Claimant already serving the Respondent. She confirmed there were no disciplinary issues in respect of the Claimant. She confirmed that the Claimant was not given any reasons for the termination. She testified that she did not respond to his letter seeking explanation. She stated that there were structural changes in the academy and the Board of Governors decided to scrap his position and that the decision was made around February. She testified that she spoke to him after he wrote his letter and that presently there is someone in that position.

9. In re-exam by Mr. Goswami she testified that the new person was engaged in January this year. She

stated that they later realised that they needed somebody in that position as the restructuring was not to the benefit of the institution.

10. The Claimant filed submissions on 25th March 2015 and the Respondent filed submissions on 16th April 2015. The Claimant recapped the pleadings filed and the testimony of witnesses and submitted that no reasons were given for his termination. He submitted that the Respondent's witness testified that the termination was due to a restructuring whereby the position of deputy head held by the Claimant was abolished. The Claimant submitted that under Section 45 (1) and (2) of the Employment Act, the termination was unlawful. The process of termination was this not in accord with justice and equity. He submitted that the Respondent was in utter breach of Sections 43 and 45 of the Employment Act. The Claimant submitted that redundancy is to be notified to the employee personally in writing and this was not done in his case. He thus sought the 12 months compensation, payment of the balance of his contract, the payment of pension for the balance of his term as well as costs and interest. He relied on the cases of **Bernard Dodo Mbaja v Air Traffic Limited [2014] eKLR** and **Samson Kimani Gachara v Auto Springs Manufacturers Ltd [2015] eKLR**.

11. The Respondent submitted that the Claimant entered into a contract of service with the Respondent and in the contract of service there was provision for termination with notice. The Respondent submitted that the provisions of Section 43 and 45 of the Employment Act are in breach of Article 27(1) of the Constitution of Kenya and therefore unenforceable. The Respondent relied on the cases of **Ombanya v Gailey & Roberts Limited [1974] EA 522**, **Ogoye v Kenya National Trading Corporation [1995-98] 2 EA 264** and **Githinji v Mumias Sugar Co. Limited [1995-98] 1 EA 81** for the proposition that the amount of damages payable is the period of notice under the contract. The Respondent further relied on the case of **Kyobe v East Africa Airways [1972] EA 403** for the holding that in the absence of a provision for termination in the contract a six month's notice was reasonable. Reliance was also placed on the case of **Mukiite v Barclays Bank of Kenya [1999] LLR 1138** for the position that it is optional to give notice. The Respondent submitted that the rules of natural justice have no application to a simple contract of employment unless the parties themselves have specifically provided so in the contract and the question of hearing before giving notice does not arise as held in the case of **Rift Valley Textiles Limited v Uganda [1009-94] EA 526**. The Respondent submitted that the Claimant had been paid all that was due to him under his contract of employment and the suit should be dismissed with costs.

12. The issues for determination as can be distilled from the rival positions taken are as follows:-

1. Was the Claimant unlawfully terminated and was the Respondent obliged to give a reason for termination?
2. As a corollary to the above is the Employment Act Sections 43 and 45 unconstitutional and in contravention of Article 27(1)?
3. If the answer to 1) above is in the affirmative what orders can issue?
4. Who is to bear the costs of the suit?

13. The Claimant's case is that he was dismissed without cause and the Respondent's position is that the Claimant was dismissed procedurally. I will deal with issue no. 2 first.

14. Are Sections 43 and 45 of the Employment Act unconstitutional? In the case of **United States International University (USIU) v Attorney General [2012] eKLR** Majanja J. held as follows:-

Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in section 12 of the Industrial Court Act, 2011 or to interpret the Constitution would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour

law. Litigants and ingenious lawyers would contrive causes of action designed to remove them from the scope of the Industrial Court. Such a situation would lead to diminishing the status of the Industrial Court and recurrence of the situation obtaining before the establishment of the current Industrial Court.

Article 19 provides that the Bill of Rights is an integral part of the framework of Kenya's democratic state and is the framework for social, economic and cultural policies. The necessity of having the Industrial Court deal with matters of fundamental rights and freedoms as part of the jurisdiction to resolve labour disputes is to infuse into employment and labour relations the values and essence of the Bill of Rights. The fact that the content of labour rights protected under Article 41 is reiterated in the Employment Act, 2007 and Labour Relations Act, 2007 does not create a separate wall of jurisdiction for the High Court and the Industrial Court.... The intention to provide for a specialist court is further underpinned by the provisions of Article 165(6) which specifically prohibits the High Court from exercising supervisory jurisdiction over superior courts. To accept a position where the Industrial Court lacks jurisdiction to deal with constitutional matters arising within matters its competence would undermine the status of the court. Reference of a constitutional matter to the High Court for determination or permitting the filing of constitutional matters incidental to labour relations matters would lead to the High Court supervising a superior court.

And later in the judgment:

In any matter falling within the provisions of section 12 of the Industrial Court Act, then the Industrial Court has jurisdiction to enforce not only Article 41 rights but also all fundamental rights ancillary and incidental to the employment and labour relations including interpretation of the Constitution within a matter before it.

15. Plainly put I have jurisdiction to determine the constitutionality or otherwise of sections of the Employment Act as postulated by the Respondent. Article 27(1) of the Constitution provides as follows:-

27. (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

16. The Respondent asserts that the requirement for it to prove the reasons for termination and show that the termination was not unfair is unconstitutional. In contracts of service there are different obligations cast on the parties. The employer and employee have different obligations to each other. Each can seek refuge in the Constitution. Article 27 provides each of them equal protection of the law. If the Claimant was required to give notice or pay and did not the employer would be entitled to the protection of the law in seeking recovery of dues to it. The fact that Section 43 and 45 place a burden on the employer does not make the provisions of the Employment Act unconstitutional. If that argument was let to fly it would mean that there would be a challenge to each and every section of the law in this land that does not provide a corresponding position for the opposite side. It is not unconstitutional to require the owner of capital to ascribe a reason for actions taken when undertaking an action such as termination. I hold that Sections 43 and 45 Sections of the Employment Act are NOT unconstitutional. The essence of the giving of reason is so that the employee knows with certainty why he is being dismissed.

17. Was the Claimant's termination lawful? The Respondent was entitled to terminate the Claimant in line with the terms of the contract. The Respondent was however required to comply with the law and ascribe a reason for the termination. The Respondent failed to do so and as a shield throws up Article 27(1) of the Constitution. The termination was unlawful and without regard to the dictates of the law. The cases cited by the Respondent are grossly outdated. They all preceded the Employment Act 2007 and are no longer good law as far as the issues of compensation go. The Employment Act and the Industrial Court Act have expanded the range of reliefs an employee or employer can seek and obtain in Court.

18. The final issue before we deal with costs is what relief is available? The Claimant was paid his notice and the only issue remaining is what measure of damages he is entitled to for the abrupt and unlawful termination. The Claimant seeks 12 months compensation as well as payment of the balance of his contract. I have held in the past that payment for services not rendered is not automatic and good grounds

must exist for this. In the case of **D. K. Njagi Marete v Teacher Service Commission [2013] eKLR** where Rika J. considered the proportionality of remedies in employment cases, the learned judge held that it would be unconscionable to grant anticipatory salaries and allowances for a period of 11 years left to the expected mandatory retirement age of 60 years, and held that it would not be a fair and reasonable remedy.

19. In this claim I think an award of salary for 14 months would not be a fair and reasonable remedy. The Claimant is however entitled to compensation for the unlawful dismissal. Section 49 of the Employment Act makes provision on the factors to consider. It provides as follows:-

49. (1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following -

(a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;

(b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract.; or

(c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.

(2) Any payments made by the employer under this section shall be subject to statutory deductions.

(3) Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to -

(a) reinstate the employee and treat the employee in all respects as if the employees employment had not been terminated; or ?

(b) re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage . ?

(4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following-

a. the wishes of the employee; ?

b. b) the circumstances in which the termination took place, including the extent, if any, to which the employee ?caused or contributed to the termination; and

c. the practicability of recommending reinstatement or re engagement.

d. the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;

e. the employee's length of service with the employer;

f. the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;

g. the opportunities available to the employee for securing comparable or suitable employment with another employer;

h. the value of any severance payable by law;

i. the right to press claims or any unpaid wages, expenses or other claims owing to the employee;

j. any expenses reasonable incurred by the employee as a consequence of the termination;

k. any conduct of the employee which to any extent caused or contributed to the termination; ?

l. any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and ?any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee. ?

20. The Claimant was dismissed in a callous manner and the Respondent later filled the position a few months later after the dismissal of the Claimant. The Claimant has had difficulty securing a new job and was not offered the position once it was available or even redeployed as a teacher. This is a fit case for maximum compensation of 12 months salary. The Claimant is entitled to a Certificate of Service in terms of Section 51 of the Employment Act.

21. In the final analysis I enter judgment for the Claimant against the Respondent for

1. Kshs 1,622,400/- as compensation.
2. Interest on the above at Court rates from date of filing till payment in full.
3. Certificate of Service.
4. Costs of the suit.

Orders accordingly.

Dated and delivered at Nairobi this **26th** day of **May** 2015

Nzioki wa Makau

JUDGE