



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 295 OF 2014**

**STANLEY OMWOYO ONCHWERI.....CLAIMANT**

**v**

**THE BOARD OF MANAGEMENT**

**NAKURU YMCA SECONDARY SCHOOL.....RESPONDENT**

**JUDGMENT**

1. Stanley Omwoyo Onchwari (Claimant) was appointed by the Board of Management Nakuru YMCA Secondary School (the Respondent) as a Physics/Maths Teacher through a letter dated 10 January 2012.
2. On 9 July 2014, the Claimant filed a Memorandum of Claim against the Respondent alleging illegal, malicious termination of employment and seeking terminal dues, damages for unlawful/unfair termination, salary and allowances and costs.
3. The Respondent filed a Response on 24 July 2014 and the Cause was heard on 4 March 2015. The Claimant filed his submissions on 19 March 2015, while the Respondent filed its submissions on 31 March 2015.
4. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the Claimant was an employee of the Respondent, whether the termination of the Claimant's employment was unfair and appropriate remedies.*

**Whether the Claimant was an employee of the Respondent**

5. The Claimant produced an appointment letter dated 10 January 2012, signed by one Seth O. Onchari and another undated appointment letter purportedly signed by one Julius Otieno.
6. The Respondent also produced a copy of the appointment letter dated 10 January 2012.
7. Because the Respondent did not deny the appointment letter dated 10 January 2012, the Court finds that the Claimant was an employee of the Respondent in terms of the said appointment letter.

**Whether termination of employment was unfair**

8. The Claimant's pleaded case was that his employment was terminated on 6 January 2014 through short message service (sms) by the Respondent's Principal/Secretary. He also pleaded that the termination did not comply with the law and employment contract.
9. In testimony, the Claimant stated that he reported to work as usual on 6 January 2014 and received a text message from the Principal, Julius Otieno that the Respondent had decided not to renew his contract.
10. He stated that on receipt of the sms, he asked the Principal for a letter of termination of employment, but the Principal told him the Respondent's practice was not to issue such letters,

- after which he sought legal advice. The Respondent did not respond to the demand letters.
11. In cross examination, the Claimant stated that according to the contract, he should have been given one month notice or pay in lieu of notice. He was not given notice. He denied walking out.
  12. The Respondent on its part contended that the Claimant deserted duty by failing to resume work in January after the Christmas holidays.
  13. The Respondent called its Head teacher to testify on its behalf. He admitted that he sent a text message to the Claimant informing him that the Respondent would not renew his contract.
  14. The witness further stated that the Claimant reported on 6 January 2014, and he asked him for his original certificates but he never brought them and the next thing he heard was that the Claimant had sued the Respondent.
  15. The Court finds the narration by the Respondent's witness incredible and lacking in candour. The witness clearly stated that he sent a text message to the Claimant informing him that his contract would not be renewed.
  16. If this is true, and the Court finds it is, then the defence advanced that the Claimant deserted duty cannot be true. The Court finds that the Respondent had made a decision to terminate the employment of the Claimant and this decision was communicated to the Claimant by the Headteacher through sms.
  17. For the benefit of litigants, the Court wishes to observe that an employer who advances desertion as a ground must be alert to the legal prerequisites to prove desertion. And desertion is not the same as absence without permission or leave, which occurs when the employee has an intention to return to work.
  18. Desertion can only take place where an employee leaves employment with the intention of not returning or formulating such intention not to return after leaving. Such intention may be demonstrated by showing absence of communication from the employee, duration of absence, impact of the absence and nature of employee's duties.
  19. The employer must also demonstrate that it made attempts to reach out to the employee to establish his whereabouts, making reasonable inquiries as to the absence (post, email, phone calls, colleagues, neighbours or family members), issuance of ultimatums to the employee to resume duty and the like. Each case will depend on its peculiar circumstances. And a hearing may be necessary. But that is enough observation for now.
  20. The Court has perused the appointment letter dated 10 January 2012. It did not provide for a fixed term contract which would be renewed on expiry. It was in the nature of what is loosely referred to as *permanent* employment.
  21. The Respondent could not purport not to renew the contract which was not a fixed term contract. To bring it to an end, it was duty bound to give one month written notice or pay in lieu of notice. No notice was given and no pay in lieu was offered.
  22. The action of the Respondent was to say the least in breach of contract.
  23. But it was not only in breach of contract, it was not in compliance with the Employment Act, 2007.
  24. The termination of employment was not because of anything done or not done by the Claimant, the certificate story notwithstanding. Pursuant to sections 41 and 45(2)(c) of the Employment Act, 2007, the Respondent ought to have used a fair procedure. The communication through a text message could not have been a fair procedure.
  25. The Respondent has further failed to prove the reasons for the termination (section 43 of the Employment Act). It is not even clear whether the failure to produce certificates was the real reason for the termination of the Claimant's employment.
  26. Further, the Respondent did not even attempt to prove that the reasons for termination of the Claimant's employment were valid and fair reasons.
  27. The Court finds that the termination of the Claimant's employment was both procedurally and substantively unfair.

## **Appropriate remedies**

### ***Terminal dues***

28. The Claimant did not specify the terminal dues he was seeking and whether they were founded on

- contract or statute. There are different types of terminal dues such as service pay and gratuity.
29. Because of the lack of clarity, this head of claim is declined.
30. But the Claimant is deserving of pay in lieu of notice. It is a relief arising directly out of the employment contract and statute. The Claimant's basic wage at separation was Kshs 9,500/- and he is entitled to an equivalent.

### ***Damages for unfair termination***

31. One of the primary remedies for unfair termination of employment/wrongful dismissal is an award of not more than 12 months gross wages. It is a discretionary remedy.
32. The Claimant served the Respondent for about 2 years. He had a legitimate expectation to continue serving the Respondent. The Court has declined to award terminal dues.
33. Considering these factors, the Court would award him the equivalent of 5 months gross wages. The Claimant testified his gross wage at separation was Kshs 10,300/-. The Respondent who ought to have known the wage it was paying the Claimant did not controvert this testimony.
34. The Court would therefore assess the damages as Kshs 51,500/-.

### ***Salary and allowances***

35. The Claimant further sought what was pleaded as salary and allowances due in the contract of employment. No clarification of what these salary and allowances were or quantification was given. The relief is also declined.

### **Conclusion and Orders**

36. The Court finds and holds that the Respondent unfairly terminated the employment of the Claimant and awards him and orders the Respondent to pay him
- a. 1 month pay in lieu of Notice Kshs 9,500/-
  - b. 5 months gross wages compensation Kshs 51,500/-

**TOTAL Kshs 61,000/-**

37. Claimant to have costs assessed as Kshs 25,000/-.

**Delivered, dated and signed in Nakuru on this 8<sup>th</sup> day of May 2015.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Geke instructed by A.N. Geke & Co. Advocates

For Respondent Mr. Kamau instructed by Aminga, Opiyo, Masese & Co. Advocates

Court Assistant Nixon