



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 777 OF 2014**

**(Before Hon. Justice Hellen S. Wasilwa on 24<sup>th</sup> June, 2015)**

**MICHAEL EDMUNT AROCHI .....1<sup>ST</sup> CLAIMANT**

**MARGARET WAMBUI NDUNGU.....2<sup>ND</sup> CLAIMANT**

**VERSUS**

**MEMUSI ACADEMY .....RESPONDENT**

**JUDGMENT OF THE COURT**

1. The Claimants herein filed their respective Memorandum of Claim on 13/5/2014. The issue in dispute in their claim is their unlawful and unfair termination and refusal to pay terminal benefits.

**1<sup>st</sup> Claimant's case**

2. The 1<sup>st</sup> Claimant's case is that on 5/1/2010, he was employed by the Respondent as a teacher following an oral contract on agreed terms. The terms were that the 1<sup>st</sup> Claimant was to teach pupils and improve the school performance in KCPE and the agreed salary was 13,000/= which could be renewed to Teacher Service Commission standards after the Claimant's performance.

3. The Claimant avers that he performed his part of the bargains but on 25<sup>th</sup> March 2014 his contract was terminated by a letter dated 2/3/2014. He avers that the termination letter was handed over to him by the Respondent's advocates and another person not known to him and this was in total disregard to the law.

At the time, the 1<sup>st</sup> Claimant had served the Respondent for 4 years and 2 months and he avers that he had served with dedication and raised the Respondents standard in KCPE and managed to register over 400 marks in 2013 where the top student got 421 marks out of a total aggregate of 500. He was then earning 15,000/= without any house allowance.

4. The Claimant further avers that on 23<sup>rd</sup> January 20124 he wrote to the Respondent, (Annex MEA 2) listing issues agreed upon and not met and their deteriorating relationship. The Claimant submits that his termination was as a result of the above letter whereby he talked of their deteriorating relationship out of his frequent demand for better terms including payment of house allowance, transport allowance and freedom to administer as a head teacher.

5. The 1<sup>st</sup> Claimant further avers that his termination letter was couched in terms to suit the desires of the Respondent who did not want to increase his salary or pay his housing and transport allowance as had

been agreed upon during employment. This he states is because he fails to understand how the 7 misconducts could happen between February 7<sup>th</sup> 2014 and March 4<sup>th</sup> 2014 within a period of 4 years they had been together.

6. The 1<sup>st</sup> Claimant therefore contends that his termination was unlawful and unfair and therefore seeks payment of the following: underpayment, service pay, annual leave, notice, house allowance, transport and compensation all totaling to 1,221,812.5 plus costs of this suit.

### **2<sup>nd</sup> Claimant's case**

7. The 2<sup>nd</sup> Claimant on his part avers that she too was employed by the Respondent in 2003 to work in the kitchen and therefore she cooked and did all kitchen duties. This was a verbal contract which ended in 2007 when she proceeded for unpaid maternity leave but was not allowed to resume after child birth.

8. She was recalled back on duty in 2011 after 4 years to take up the previous duties in the kitchen and was paid 4,000/= per month without house allowance, or any other allowance paid.

The 2<sup>nd</sup> contract was terminated on 7<sup>th</sup> January 2014 without notice nor payment of her terminal dues. It is the 2<sup>nd</sup> Claimant's case that she served the Respondent with dedication and on 7/1/2014 the Respondent recalled all 3 staff who had worked in the kitchen and terminated her leaving the other 2.

She reported the incident to the Kenya Union of Private School Teachers who wrote to the Respondent seeking for a meeting but the Respondent's director refused, neglected and adamantly rejected to discuss with the Union.

9. Her claim is for payment of 1 months notice, 2 years leave, 7 months leave, 8 months unpaid wages (April, August and December), service pay for 2 years, underpayments etc. all totaling Kshs.275,880.45/=, issuance of a certificate of service plus costs of this suit.

### **Respondent's case**

10. The Respondents filed their Statement of Response to the Claimants' case on 5/6/2014 through the firm of Kembi Gitura & Company Advocates. It is the Respondents case that the 1<sup>st</sup> Claimant was terminated by them on 21/3/2014 but denies that the same was done unfairly.

It is their position that the 1<sup>st</sup> Claimants conduct and breaches warranted lawful summary dismissal of his services on 21/3/2014 which misconduct included absconding duty on 7/2/2004 and 10/2/2014, habitual use of abusive language, insubordination, corrupt behavior through use of the Respondents school bus for personal commercial gain, dishonesty and poor performance of duty.

11. They agree that at the time of termination, the 1<sup>st</sup> Claimant was earning a consolidated pay of 15,000/= per month. They deny the 1<sup>st</sup> Claimant's case and ask court to dismiss it save for payment of 29,800/= being salary for March 2014, notice pay and NSSF dues.

12. Concerning the 2<sup>nd</sup> Claimant, the Respondents aver that she was employed as a cook by the Respondent via an oral contract at a consolidated pay of 4,000/= per month. They deny other allegations made by the 2<sup>nd</sup> Claimant. They aver that the 2<sup>nd</sup> Claimant deserted her duty station. However, RW1 in her oral evidence contradicted the statement of defence by stating that the Claimant was basically a cleaner and she lacked a medical certificate and that is why she was send away.

13. Having considered all evidence from both parties plus their submissions, the issues for determination are as follows:

#### **1. *Whether there were valid reasons to warrant dismissal of the Claimants.***

2. ***Whether due process was observed before the Claimants dismissal***
3. ***Whether the Claimants are entitled to prayers sought.***

14. On the 1<sup>st</sup> issue, the reasons given by the Respondents for dismissing the 1<sup>st</sup> Claimant are that he absconded duty from 7/2/2014 to 10/2/2014, habitually used abusive language, insubordination, corrupt behavior, dishonestly and poor performance of duty. Despite this claim of the misdeeds above, the Respondents have not adduced any evidence to show the Claimants committed the misdeeds complained of.

15. The 1<sup>st</sup> Claimant has stated that his woes started when he agitated for better pay as per his Appendix MEA 2 dated 23/1/2014. The Respondents didn't deny receiving this letter of complaint. The issue of insubordination is alluded to by RW2 who said she overheard a shouting match between the 1<sup>st</sup> Claimant and the Respondent's director at one point.

16. She also stated that there was money she was given by a parent Kshs.1,500/= to give to the 1<sup>st</sup> Claimant for which the parent complained that he child was never given books as anticipated. This however remained RW2's word against the 1<sup>st</sup> Claimant who denied ever receiving such an amount of money from the RW2.

17. Another complaint was poor performance of the 1<sup>st</sup> Claimant. The 1<sup>st</sup> Claimant however countered this allegation by producing the schools examination results to show that the schools performance improved at the time he was Head teacher from a mean of 306 in 2009 to 339 in 2013.

18. Under Section 43 of Employment Act:

***“(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.***

***(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”***

The reasons for termination must be real not a speculative reason at the time of the termination.

19. In this case the reasons relied on to terminate the 1<sup>st</sup> Claimant are not tangible but speculative and especially in light of the letter written by the 1<sup>st</sup> Claimant agitating for a better salary.

20. In the case of the 2<sup>nd</sup> Claimant there was actually no reason to terminate her given except the allegation that she deserted duty on one hand and the other of lacking a medical certificate which reasons are contradictory in terms of Respondents evidence.

That being the position, this court finds that there were no valid reasons to terminate the Claimants herein.

21. On the 2<sup>nd</sup> issue, the process of due process in any termination of employment matter is laid down in Section 41 of Employment Act 2007 which states as follows:

***“(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.***

**(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”**

22. It is apparent from the evidence on record that the Claimants were not accorded any hearing and therefore their termination was unfair and wrongful.

23. On remedies sought there is no proof of underpayment claimed given that the 1<sup>st</sup> Claimant was being paid 15,000/= per month and he has not shown to court against which regulation he seeks to be paid higher than that. For the 2<sup>nd</sup> Claimant it is apparent she was underpaid against the basic minimum wages in Kenya.

24. Concerning other prayers, I find for Claimants as follows:

**1<sup>st</sup> Claimant**

1. **1 month salary in lieu of notice = 15,000/=**
2. **Service pay = 15,000 x 15/30 x 4 = 30,000/=**
3. **House allowance = 15% of 15,000 x 48 months**

**= 108,000/=**

4. **6 months salary compensation for unlawful termination**

**= 15,000 x 6 = 90,000/=**

**TOTAL = 243,000/=**

5. **Certificate of service**

Respondents to pay costs of this suit.

**2<sup>nd</sup> Claimant**

1. **1 month salary in lieu of notice = 9,500/=**
2. **Underpayment in terms of the minimum wage of**

**9,500 -4,000 = 5,500 x 12 months = 66,000/=**

3. **Service pay = 9,500 x 15/30 x 24 months = 114,000/=**
4. **House allowance = 15% of 9,500 x 24 months**

**= 34,200/=**

5. **6 months compensation for unlawful termination**

**= 9,500 x 6 = 57,000/=**

**TOTAL = 280,000/=**

6. **Plus Certificate of Service**

Respondents to pay costs of this suit.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Claimants in person - Present

Wamboi holding brief for Njoki for Respondent- Present