



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE NO 681 OF 2011

NELSON MOREKA MAUGA..... CLAIMANT

VS

THE BOARD OF GOVERNORS

KENYANYA MIXED SECONDARY SCHOOL.....RESPONDENT

Mr Osoro for Claimant

Mr Silo for the Respondent

JUDGEMENT

1. The Claimant was employed by the Board of Governors of Kenyanya Mixed Secondary School on 24th January 1996. He was assisting in Accounts department in 2001, and also served as a teacher.
2. On 1st August 2006, he was appointed as an Accounts Clerk at a salary of Kshs 5,000 per month. It was later increased to Kshs 6,000.
3. The Claimant worked continuously until 8th February 2011 when he was suspended from employment by a letter dated 6th January 2011. The letter did not give reasons for the suspension. On 7th February 2011, the Respondent advertised for appointment of an Accounts Clerk. The Claimant did not apply for the position since he was still under suspension.
4. The Claimant was not called to a disciplinary hearing by the Board. The Claimant states that he was constructively dismissed from employment. The Claimant believed he was suspended for claiming payment of salary arrears on 10th February 2011 in the sum of Kshs 150,900.
5. On 5th December 2006, the new headmaster had confirmed that the school owed the Claimant Kshs 139,400 in salary arrears. In 2007 there was accumulated arrears of Kshs 41,000 making a total arrears salary of Kshs 180,900.
6. The Claimant stated that he was paid Kshs 30,000 leaving a balance of Kshs 150,900 as per Annex 'I' to the statement of claim. The claimant now seeks payment of;
 - i. 1 month salary in lieu of notice in the sum of Kshs 6,000
 - ii. Salary for January and February 2011 in the sum of Kshs 12,000
 - iii. Salary under payment for the period January 1996 upto January 2011 in the sum of 98,200. The underpayment resulted from failure to make an agreed annual salary increase of Kshs 500 from 1997.
 - iv. House allowance at 15% of the salary from 1996 to 2011 at Kshs 3,000 per month.
 - v. Gratuity for the period 1996 to 2011. The Respondent did not remit NSSF due from 1996 to 2011 except for some months in 2009 and 2011. The Claimant worked for 15 years. The letter of appointment is silent on gratuity but claims 15 days salary for each completed year of service

- vi. The Claimant claims Kshs 340 per month as medical cover contribution which was not paid from 1996 to 2011.
 - vii. Unpaid leave allowance equivalent to 9 months' salary, which the Respondent failed to pay whenever the Claimant went on leave.
 - viii. Kshs 150,900 salary arrears
 - ix. 12 months' salary being compensation for unlawful dismissal. The Claimant was not recalled upon suspension.
 - x. Certificate of service
 - xi. Costs of the suit and interest.
7. Under cross examination by Mr Silo, the Claimant stated that he did not receive a letter of dismissal but was suspended indefinitely by a letter dated 6th January, 2011. Suspension was with effect from 30th January 2011. The claimant filed the suit on 4th May 2011, 4 months down the line.
 8. The Claimant stated that when he applied and was hired for the position of Accounts Clerk he stopped teaching. The claimant prepared particulars of monies owed to him by the school. The Respondent used to pay him in piece meal. The increment of Kshs. 500 per year was verbal. The Claimant insisted his position was advertised upon his suspension.
 9. The Claimant said he had a CPA I qualification and was not a teacher by profession. He was issued with a temporary SI teachers certificate at Migori (in service) course. TSC issued the certificate to him to enable him attend the in service training at Migori. He did not attend due to lack of fees. The Claimant insisted he was dismissed constructively. The Claimant also insisted that he was deducted NSSF and NHIF dues but the Respondent did not remit the same.

Respondent's Case

10. The Respondent relies on memorandum of reply filed on 28th June 2011 in which the Respondent denies it ever employed the Claimant as a teacher but admits, the Respondent employed the Claimant in the position of Accounts Clerk.
11. That the Claimant was justifiably suspended from work following serious allegations of financial mismanagement, financial irregularities and gross misconduct to allow an impartial investigation to take place. That the employment of the Claimant was not terminated and he was still an employee of the Respondent.
12. That the Claimant refused and or ignored to appear before the investigations team inspite of several invitations to explain, defend or otherwise exonerate himself of the serious allegations and findings against him.
13. That the Claimant was in breach of his contract and the Respondent reserved the right to take further action against the Claimant.
14. That the misconduct by the Claimant included;
 - a. failure to handover collected monies
 - b. failure to keep proper cashbooks, records of all cash transactions as required by the law
 - c. unlawfully and irregularly allocating himself an imprest for an alleged supplies and work done which was false and fictitious.
 - d. Failure to honour lawful summons or invitations to appear before the audit team to give information as to impropriation and misconduct.
 - e. Failing to hand over the requested documents within his custody relating to the cash transactions and minutes for scrutiny and auditing.
 - f. Committing acts of insubordination at the workplace.
 - o. The Respondent avers that the suspension was lawful, fair and necessary. The Respondent denies owing any monies to the Claimant as arrears or otherwise and the issue of payment of terminal benefits and certificate of service does not arise at this stage since the Claimant's employment with the Respondent has not been terminated. The Claimant has simply ignored to appear as invited or to report to duty.

16. Issues for Determination

- i. Was the Claimant terminated from employment or has he refused to honour invitations to attend investigations into his conduct.
- ii. Is the Claimant owed any payment as claimed or at all
- iii. What remedy if at all is due to the Claimant

Issue I

17. It is common cause that the Claimant was suspended from employment vide a letter dated 6th January 2011 by the Board of Governors due to gross financial misconduct. The letter stated that the Claimant would be required to appear before the Board on a date to be communicated to him. The Respondent produced a letter dated 6th February 2011 written to the Claimant by Mr Zachary M. Onzinyo, the Principal/Secretary of the board of Governors. The letter informed the Claimant to appear before the schoolboard at a meeting scheduled for 22nd February 2011 at 10.00 a.m. He was required to respond to the following;

- i. Misappropriation of school funds
- ii. Claimant's letter to the PAE (Kisumu)
- iii. Claimant's general conduct as school employee

18. It is the evidence of RW1 Zachary Maticha Onzinyo, the head teacher of the Respondent, that the Claimant received the notice to appear before the Board but he failed to do so. The Claimant instead instructed his advocate to write to the school.

19. RW1 also invited the Claimant to attend another Board meeting scheduled on 22nd March 2011, but the Claimant failed to appear again. The Respondent wrote a final reminder to the Claimant to attend the Board meeting by a letter dated 5th April 2011. The Claimant was to appear on 22nd April 2011 at 10.00 a.m. at the school. Again the Claimant failed to attend the meeting. The Claimant filed this suit on 4th May 2011 claiming constructive dismissal.

20. RW1 denies the School owes the Claimant any monies as claimed or at all. That when he joined the school the Claimant wrote to him alleging he was owed salary arrears of Kshs 180,900. That RW1 conducted his own investigations and came to the conclusion that the Claimant had been fully paid his salary and was owed no arrears.

21. RW1 produced vouchers showing payments to the Claimant by the School. That the Claimant took offence when RW1 told him that he was making false claims against the school. The Claimant wrote a complaint against the school to the Provincial Director of Education impersonating a parent. RW1 reported the matter to the Board. This led to suspension of the Claimant pending investigations by a Board meeting held on 30th January 2011.

22. RW1 said that the board had not advertised the position held by the Claimant but had a temporary employee doing accounts for the school. That the Board has not terminated the employment of the Claimant and awaits the determination of this suit before taking further steps. According to RW1, the Claimant absconded from duty and issue of his terminal benefits does not arise at this stage.

23. Upon evaluating the evidence adduced by the Claimant vis-à-vis that by the Respondent, the court is of the considered view that the Claimant was suspended from employment pending investigations by the Board of alleged misconduct by the Claimant. The Claimant failed on three occasions to attend the meetings of the Board and instead filed this suit.

24. It is the Court's view that the Respondent did not terminate the employment of the Claimant. This suit is premised on falsehoods by the Claimant that his employment was terminated by the Respondent.

25. The Claimant has chosen not to honour summons to account for his conduct at the school. This court cannot come to his aid in this respect.

26. The claim for constructive dismissal is accordingly dismissed.

27. The evidence by the Claimant that he is owed monies by the Respondent does not appear credible. The evidence by RW1 that the Claimant had been fully paid his dues is supported by the various vouchers RW1 produced in court to the contrary. This evidence reflects the true picture in court's view.

28. The Claimant must go back to school and face the Respondent on the outstanding issues of misconduct. It is upon conclusion of that process when the parties will make a decision on the way forward and deal with any outstanding issues including whether or not the Claimant is owed any monies by the Respondent.

29. This suit having been filed prematurely is dismissed with costs to the Respondent.

Dated and Delivered at Nairobi this 28th day of August, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE