



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO.16 OF 2015

JULIUS D.M BAINÉ..... CLAIMANT

VERSUS

THE REGISTERED TRUSTEES DE LA SALLE CHRISTIAN

**BROTHERS T/A ST.MARY'S BOYS SECONDARY
SCHOOL.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 13th November, 2015)

JUDGMENT

The claimant filed the statement of claim on 10.02.2015 through C.M King'ori & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the purported retirement of the claimant as held by the respondent does not amount to termination of the employment contract.
- b. An injunction restraining the respondents, their servants and agents from evicting the claimant from the respondent's staff house.
- c. In the alternative a declaration that the respondent's actions as averred amount to unfair termination of the employment contract.
- d. Consequent to (c) above, payment of terminal benefits to the claimant at Kshs.538,050.00 as pleaded.

The respondent filed the response to the claim on 04.03.2015 through Wahome Gikonyo & Company Advocates. The respondent prayed that the claim be dismissed with costs.

The claimant retired from the public service after a long and successful service as a teacher and after attaining the mandatory retirement age applicable to teachers in the public service. He was subsequently offered and he accepted employment by the respondent as a teacher in the respondent's secondary school since January 2011.

It is not in dispute that the claimant served on a yearly written contract and one such contract was lapsing on 31.12.2014. On 7.01.2015 the claimant reported on duty under his understanding that his expired contract would be renewed. On that 07.01.2015 he was summoned by the respondent's principal and given two letters dated 07.01.2015; one of the letters informed the claimant that he had retired effective 07.01.2015 and the 2nd letter was a service and recommendation letter. By the letter dated 09.01.2015 the respondent asked the claimant to vacate the staff housing accommodation effective 05.02.2015.

The claimant's case was that the termination of his employment was unfair because he was relieved of his services due to alleged incompetence and misdeeds whereas he was competent, diligent and blameless in his service delivery.

The claimant denied that he had received the respondent's letter dated 15.09.2014 and denied the allegations in that letter that he was aware that in his 4 years' service with the respondent he had faced daunting classroom management, and enormous academic hurdles. He denied allegations in the letter that parents had raised similar concerns including the awarding of students marks they did not deserve and about quality of examinations. The claimant also denied receiving the letter dated 20.11.2014 conveying that the contract would not be renewed for 2015 academic year due to reasons as discussed and that his position had been advertised. The court finds that the respondent failed to show that the two letters had been delivered to the claimant.

The claimant testified that there was no complaint about his service delivery and the letter of 12.02.2015 by the respondent's dean of academics attached on the response bundle was defamatory in alleging that on several occasions the claimant delegated marking of examinations to non-teaching staff; that there were deviations in the marking in favour of students as the order of the day necessitating re-marking; that a parent had complained about shoddy marking of examinations; and that based on the allegations the claimant was found unfit to continue in the respondent's service.

To show that he was a dedicated and competent teacher throughout his service with the respondent the claimant testified as follows:

- a. He was the boarding master and woke up at 5.30 am and worked up to 7.00 pm.
- b. He was the debating master and was awarded the champion teacher in debating at the Kenya Institute of Administration.
- c. As an experienced teacher he was consulted by the others in the respondent's establishment.
- d. He sat in the Nyeri District Examination Committee.
- e. During the K.C.S.E he served as an examination supervisor at the District Education Office.
- f. He was the counseling teacher and he helped many students to succeed.
- g. He was secretary to staff meetings.
- h. He accompanied students on many school trips as assigned by the respondent and all were successful trips as there were no complaints.
- i. He obeyed all instructions especially as given by the respondent's principal.
- j. The letter of recommendation stated that his performance was above average.

The claimant's testimony was that he was on duty on 07.01.2015 and up to the time he met the principal and was given the letter on retirement, the respondent had not notified him about the retirement. Further, retirement as was communicated was not within the agreed terms of service because he served on renewable annual contracts.

The respondent's case was that the claimant voluntarily cleared from the school on 7.01.2015 as per the clearance form filed with the response. The respondent's witness (RW) Brother Peter Kombe being the respondent's principal testified that he gave the claimant the letter dated 15.09.2014 notifying the claimant that his contract would not be renewed for 2015 academic year due to the stated unsatisfactory performance. RW testified that he discussed the issues stated in the letter with the claimant. The claimant requested for renewal of his contract by the letter dated 18.11.2014 because he knew his contract would end on 31.12.2014. RW replied by his letter of 20.11.2014 stating that the contract would not be renewed. It was RW's position that the claimant received the letters from RW at RW's office. RW testified that the claimant had received sufficient notice that his contract would not be renewed and for the stated reasons of unsatisfactory performance. The terminal dues were paid on 07.01.2015. RW testified that the claimant owed the school Kshs.22,756.00 but which the respondent agreed not to claim and the claimant was paid Kshs.34,756.00 so that he left the employment clean and without liabilities.

The **1st issue** for determination is whether the claimant served beyond 31.12.2014 when his contract of service lapsed. The termination letter is clear. The claimant served the respondent as an English and

Literature teacher and retired with effect from 07.01.2015. The court finds that the claimant served after lapsing of his one year contract on 31.12.2014. The court therefore infers that the claimant's contract of service was renewed beyond 31.12.2014 and the termination was therefore not on account of lapsing of the contractual tenure of one year. Thus the current case is distinguishable from **James Magondu Githinji and Another –Versus. Peter Kombe and Another [2015]eKLR** where the claimants' employment clearly lapsed due to effluxion of the one year contractual term.

The 2nd issue is whether the termination of the claimant's employment was unfair. The respondent's evidence is clear that the claimant had to separate and his services had to be terminated in view of the allegations of unsatisfactory performance that were leveled against the claimant. Section 41 of the Employment Act, 2007 is clear that in event of removal on account of poor performance, the respondent was required to subject the claimant to a disciplinary process entailing a notice and a hearing. There was no evidence that the claimant was accorded such process. Instead, the evidence shows that the respondent invented a process of making allegations, failing to require the claimant to reply or be heard and then retiring the claimant. The court finds that the procedure as invoked was in contravention of section 41 of the Act and the reason for the termination was not genuine as envisaged in section 43 of the Act as retirement as invoked was also outside the agreement between the parties.

The court returns that the termination was unfair for want of due process under section 41 and want of a genuine reason as envisaged in section 43 of the Employment Act, 2007 and as per the contract between the parties. The court has considered the 4 years' service that the claimant has demonstrated was clean and that he rendered good professional and dedicated service. The claimant has demonstrated that he was keen to continue in employment. The claimant did not contribute to his termination and the recommendation letter by the respondent dated 07.01.2015 clearly praised the claimant as a competent teacher and knowledgeable in his subjects; very humble gentleman who related well with other teachers, students and administration; and was a diligent, hardworking, self-driven, and dynamic teacher in all his undertakings. The court considers that in light of the claimant's otherwise good and diligent service, it was an aggravating factor that the respondent made unjustified claims of unsatisfactory or poor performance against the claimant. In such circumstances, the court finds that under section 49(1)(c) of the Act, the claimant is entitled to 12 months' gross salaries at Kshs.31,650.00 per month making **Kshs.379,800.00**. The claimant is further entitled to **Kshs.31,650.00** being one month pay in lieu of the termination notice under section 35(1)(c) of the Act. Since the claimant was a member of the NSSF, he is not entitled to service pay in view of section 35(6) of the Act.

While making the finding of unfair termination, the court has considered the respondent's case that it was a catholic institution based on the doctrine of compassion hence the need and desires to give the claimant a soft landing instead of invoking full disciplinary process. In that regard, the court upholds its opinion on soft landing in **Malachi Ochieng Pire – Versus- Rift Valley Agencies, Industrial Cause No. 22 of 2013 at Nakuru [2013]eKLR** where in the judgment it was stated thus,

“The court has considered the submission and evidence of a soft landing to conceal the alleged poor performance and finds that it is not open for the employer to waive its authority to initiate disciplinary action in appropriate cases and in event of such waiver, nothing stops the employee from enforcing the entitlement to fair reason and fair procedure in removal or termination. The court holds that where the employer is desirous of waiving the disciplinary process or due process in event of poor performance, misconduct or ill health for whatever grounds, it is necessary to enter into an agreement such as a valid discharge from any future liability to the employee in view of the otherwise friendly or softer or lenient termination. Whereas, such soft landing is open to employer's discretion, it is the court's considered view that in an open and civilized society, employers hold integrity obligation to convey truthfully about the service record of their employees and swiftly swinging the allegations of poor performance or misconduct never raised at or before the termination largely serves to demonstrate that the employer has failed on the integrity test thereby tilting the benefit of doubt in favour of the employee in determining the genuine cause of the termination.”

As the employment relationship has ended and the court has awarded the claimant damages and not

reinstatement, the court considers that it should be fair for the claimant to vacate the respondent's housing accommodation by 15.12.2015.

In declining to grant reinstatement, the court has considered the strained relationships between the parties and the remedies as found due, in the opinion of the court, will meet ends of justice in the circumstances of the present case.

In conclusion, judgment is entered for the claimant against the respondent for:

1. The declaration that the respondent's termination of the claimant's employment by way of retirement on and effective 07.01.2015 was unfair.
2. The respondent to pay the claimant **Kshs.411,450.00** by 15.12.2015 in default interest at court rates to be payable thereon from the date of this judgment till full payment.
3. The claimant to vacate the respondent's housing accommodation by 15.12.2015.
4. The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 13th November, 2015.**

BYRAM ONGAYA

JUDGE