



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT AT NAIROBI**  
**CAUSE NUMBER 1873 OF 2011**

**BETWEEN**

**HUDSON MUDEHERI.....**  
**CLAIMANT**

**VERSUS**

**GARDEN ESTATE ACADEMY.....**  
**RESPONDENT**

*Rika J*

*CC. Mr. Kidemi*

*Ms. Gulenywa instructed by Gulenywa Jonathan & Company Advocates for the Claimant*

*Mr. Mwangi instructed by Swaleh, Mwangi & Company Advocates for the Respondent*

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**ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION**

**AWARD**

1. The Claimant filed his Statement of Claim on 8<sup>th</sup> November 2011, while the Respondent filed its Statement of Response on 14<sup>th</sup> December 2011. The Claimant, and the Manager of the Respondent School Philomena Mugure Rurigi, both testified and closed the respective cases, on 26<sup>th</sup> September 2013. The dispute was last mentioned 5<sup>th</sup> December 2013, when Parties confirmed the filing of their final arguments and were advised Award would be delivered on notice.

2. The Claimant's position is that the Respondent is a School registered under the Education Act Cap 211 the Laws of Kenya. On 10<sup>th</sup> February 2011, the Respondent employed the Claimant as a P1 Teacher, at a starting basic salary of Kshs. 8,500 per month. He was not paid house rent allowance. He sought from the Respondent, and was granted sick off of three days starting from 30<sup>th</sup> June 2011. He was treated at Lucky Summer Tumaini Clinic. The sick off ended on 3<sup>rd</sup> July 2011. When the Claimant resumed duty on 4<sup>th</sup> July 2011, his contract was unfairly and unlawfully terminated. Communication of the termination decision was by word of mouth. Termination offended Section 40 and 45 of the Employment Act 2007. He seeks orders against the School for:-

- a. Salary underpayments at Kshs. 19,210;

- b. Prorated annual leave of 9 working days in 2011 at Kshs. 5,896;
- c. Accrued housing allowance at Kshs. 9,256;
- d. Compensation for unfair termination the equivalent of 12 months' salary at Kshs. 170,319;
- e. 2 months' salary in lieu of notice at Kshs. 28,386;

Total..... Kshs. 233,067

The Claimant seeks in addition to these monetary claims a declaration that termination was unfair and in effect an illegal declaration of redundancy; certificate of service; costs; interest; and any other suitable remedy. The Claimant had asked for reinstatement in his Statement of Claim, but in his evidence withdrew that prayer, explaining that it would not be suitable to him to be reinstated, as he has settled down in the Western Region.

3. He was interviewed by the Respondent for the job in February 2011. He started working on 10<sup>th</sup> February 2011. He had fully informed Mrs. Rurigi the School Proprietor of his sickness before he took the sick off. When he returned, she summoned him, and surprisingly questioned where he had been. She told him he could not continue working this way. She asked him to clear from the school and go home. At the time of termination he was earning Kshs. 8,500 per month as his salary. He was ready to continue teaching. There were times when the Attendance Register was not available, and therefore it was reflected that he had not signed. He did not abscond from duty. After termination he paid Mrs. Rurigi a call on 8<sup>th</sup> July 2011 and asked for payment of his terminal dues. Rurigi asked him to leave and was not ready to listen to him. She told him he should go and report her actions to the Police.

4. Cross-examined, the Claimant told the Court he is a qualified Teacher, and served the Respondent for 6 months. He worked from 10<sup>th</sup> February 2011. He was not availed the terms of service on recruitment. He had taught previously at St. Hannah's, Mashimoni, and Aston Junior Primary Schools in Nairobi. He worked in 4 different Primary Schools. His last stop was St. Hannah's Preparatory School. He was earning Kshs. 15,000 at St. Hannah's. The Respondent offered him Kshs. 8,500. There was a misunderstanding between him and the Management of St. Hannah's. This ended in termination of his contract of employment by St. Hannah's Management. No reason was given to him for termination.

5. He accepted the lower figure from the Respondent because he needed the job. He had a family to feed. He was promised there would be increments in the future. His salary should have been Kshs. 12,342, which he was advised by his Advocate, is the scale applicable to a P1 Teacher. He never went for annual leave in the other schools. He did not know when he would have taken leave at the School. He seeks 2 months' salary in lieu of notice. He was given 2 months' salary in lieu of notice by St. Hannah's. He was not given the sick off in writing. Mrs. Rurigi never gave him anything in writing. There were dates he did not sign the Attendance Register such as between 17<sup>th</sup> Mach 2011 and 22<sup>nd</sup> March 2011. It is not true that he was absent. His colleagues signed on these dates. He never received the Respondent's letter dated 11<sup>th</sup> July 2011 cautioning him on absenteeism. The address on the letter was his address. He worked for 4 months. June 2011 was the last month worked. He did not simply abscond. Redirected, the Witness stated he called the Principal and told her he was unwell. He was told to clear from the school. He had worked in about 4 schools, but had not sued any of the schools; only the Respondent. He was paid his dues for March 2011. It would not have been the case if he was absent. He has not been able to secure a position in a Public School. He was trained at Kigari Teachers Training College.

6. The Respondents' position is that it employed the Claimant as a Teacher, at a negotiated, all-inclusive monthly salary of Kshs. 8,500. He was not granted permission to seek treatment on 30<sup>th</sup> June 2011; he reported for duty in the morning, soon left without authorization, and only returned on 4<sup>th</sup> June 2011. He did not give any explanation for his absence. Instead he disappeared once again within a short time of his reporting. He was paid his salary for June 2011. The School wrote to him on 11<sup>th</sup> July 2011 enquiring why he deserted work. There was no response. The next communication received by the Respondent from

the Claimant was the Court Summons.

7. Philomena Mugure Rurigi needed a Kiswahili Teacher. Her School interviewed the Claimant early February 2011. He said he would take a salary of Kshs. 7,000. The School had few Children. They paid Kshs. 7,500 in school fees per term. Mudeheri was taken through the School's history, and finally was offered Kshs. 8,500, more than he had bargained for. He did not say he earned Kshs. 15,000 per month elsewhere, and made no demands for house rent allowance. Rurigi had just taken over the school and was in the process of preparing employee contracts.

8. He did not apply for sick off. The register was always available. The Claimant was in the habit of reporting for duty late and absenting himself. He left school on Thursday 30<sup>th</sup> June 2011, and returned on Monday 4<sup>th</sup> July 2011. Rurigi asked the Claimant where he had been, and he said he was at the hospital, but gave no evidence of treatment. The Doctor's Chit attached to the Statement of Claim first came to the attention of Rurigi on receipt of the Statement of Claim.

9. The School Manager told Mudeheri to have some days off and think about whether he intended to go on teaching. He left but did not report back. He was not sacked. He went back to the school later, demanding to be paid his salary. He was advised he would be paid with the rest of the staff when the salaries were ready. He demanded to be given a letter of termination; he was advised the Respondent had not made a decision to terminate his contract. He left and did not report back. Rurigi wrote to him a letter dated 11<sup>th</sup> July 2011 asking him to resume duty. The Claimant did not answer this letter, but served the Respondent with the Court Summons.

10. In cross-examination, the Witness testified she is the School Manager, and her husband a Director. She could not say she owned the school. She did not give the Claimant a written contract of employment. There was a discussion preceding employment. The Claimant was in the habit of reporting to work late and absenting himself. There was no bad blood between him and Rurigi. The letter of 4<sup>th</sup> July 2011 was stamped by the Respondent as received. Rurigi explained the original copy was sent to the Claimant, while the file copy was stamped as received. The Respondent urges the Court to dismiss the Claim.

#### *The Court Finds and Awards:-*

11. The Claimant who is a qualified P1 Teacher, taught Children at Mashimoni Primary School in Kibera Nairobi, between 2000 and 2003; Victory Academy in Baba Dogo Nairobi between 2003 and 2004; Aston Junior Academy Kasarani Nairobi between 2004 and 2005; and St. Hannah's Preparatory School Karen Nairobi from 2007 to an unspecified date. His contract at St. Hannah's was terminated for reasons the Claimant states, were not revealed to him. He earned Kshs. 15,000 on termination.

12. He arrived at the Respondent school early February 2011. He applied for a teaching position in a letter dated 13<sup>th</sup> January 2011, and was employed from 15<sup>th</sup> February 2011. There was no letter of employment given to him. He asked for a salary of Kshs. 7,000 but was offered the higher amount of Kshs. 8,500 per month. He explained his willingness in his evidence, to take the far much lower salary at the Respondent comparative to what he earned at St. Hannah's, on the ground that he needed the job and had a family to look after. He was at any rate advised there would be increments in the future.

13. He however served for only 4 months and 15 days. He left employment in circumstances which are contested. The Claimant testified he was granted sick off by Mrs. Rurigi on 30<sup>th</sup> June 2011. He was treated at Tumaini Clinic and on returning to work on 4<sup>th</sup> July 2011, was told by Mr. Rurigi to clear from the School. The Respondent holds that the Claimant reported to work on 30<sup>th</sup> June 2011. He left without authorization. He returned on 4<sup>th</sup> July 2011. On being asked where he had been, he stated he was attending the Clinic for treatment. He did not offer the treatment records to the Respondent; the Respondent only saw these records after the dispute was filed in Court.

14. The Claimant's letter applying for the job at the Respondent School is stamped as received by the School. There are remarks made in handwriting, one confirming the Claimant's monthly salary at Kshs.

8,500. This amount is not contested. It is also indicated this amount would be paid for 6 months. The Claimant's evidence was that he accepted this figure because he was told there would be increments in the future. The comment that Kshs. 8,500 was to be paid for 6 months, seems to agree with the Claimant's evidence, that he was promised increments in due course.

15. There is a second comment on the letter applying for the job, which is- 'Probation for 6 months from February 15<sup>th</sup> 2011.' Although the Parties did not explain these comments to the Court, it is not improper in the absence of any written contract of employment, to conclude that the Claimant was to serve a probationary period of 6 months. He worked for 4 months and 15 days, which in the view of the Court was still within the probationary period.

16. His contract at the time he departed from work, was therefore subject to Section 42 [1] of the Employment Act 2007, in event the Respondent initiated termination. He would not be entitled to the procedural guarantees under Section 41 of the Employment Act 2007, and would only deserve not less than 7 days' notice of termination, or the equivalent of 7 days' salary in lieu of such notice.

17. There is ample evidence that the Respondent did not instigate termination. The attendance registers support the evidence by Rurigi that the Claimant was given to absenteeism and lateness. He did not provide any evidence that on 30<sup>th</sup> June 2011, he applied for sick off, or obtained sick off from the School. He just disappeared without authorization, and whether or not he was treated, is not the issue. He does not show that he presented the sick off chit to the school on his return on 4<sup>th</sup> July 2011.

18. He left employment on being confronted by the School Manager. He was asked to take a period of contemplation, but during that period, seems to have decided he would not serve out the remaining 1½ months of his probation. He decided to go back and confront the School, demanding payment of his salary, and for a termination letter probably to enable him institute a claim for unfair termination on much more sure footing. After he was told his salary would be paid, which was later done, and informed the School had not terminated his probationary contract, he filed this Claim.

19. In the view of this Court it was the Claimant who initiated termination. He is not entitled to notice pay and compensation as prayed. The Respondent cannot be compelled to pay to the Claimant 2 months' salary in lieu of notice, simply because his last School, St. Hannah's Preparatory, paid him 2 months' salary in lieu of notice. These two prayers are rejected. He did not make out a case for salary underpayments. He testified that he accepted the salary which was much lower than paid at his previous station, because there was potential for increment. He did not show that there is a Scale applicable to Teachers in Private Schools, and which was applicable to him during the 4 months and 15 days in employment. He states he was advised by his Lawyer he was entitled to Kshs. 12,342 per month, but gave the Court no Wage Instrument to support the assertion. He did not even put this figure to the Respondent at the time he negotiated his pay; he instead proposed a salary of Kshs. 7,000, but was offered the higher figure of Kshs. 8,500 to last the probationary period. His claim for salary underpayment is declined. He prays for annual leave of 9 days. He worked on probation as a Teacher, and would not have been working on School vacations. The Attendance Registers do not show that he taught on any day in April 2011. He most probably rendered no labour in the month of April 2011, during which he should have utilized his leave entitlement. He deserted duty and would not be entitled to go back to the Respondent and demand for prorated leave pay under Section 28 of the Employment Act 2007. The sum of Kshs. 8,500 offered to him was provisional to last the probation period. The Parties were still to concretize the employment relationship, but the Claimant did not make it possible to do so. The Claim for house rent allowance would only crystallize after probation, when the details of the employment would become fully known. In light of this the Court finds the claim for house rent allowance unfounded. The Claimant was placed on a trial period, but did everything to undermine the confidence of his Employer. He ought to accept that he walked out of the employment relationship, and move on.

***The entire Claim has no merit and is dismissed with no order on the costs.***

Dated and delivered at Nairobi this 14<sup>th</sup> day of March 2014

James Rika

Judge