



## REPUBLIC OF KENYA

### Industrial Court of Kenya

#### Cause 13 of 2012

JOSEPH MWANGI.....CLAIMANT

-VERSUS-

THE BOARD OF GOVERNORS,  
MWIRUTI SECONDARY SCHOOL.....RESPONDENT

#### JUDGMENT

The claimant **Joseph Mwangi** filed the statement of claim on 13.04.2012 through Wambua Kigamwa & Company Advocates. The claimant prayed for judgment against the respondent for a declaration that his termination was unfair or unlawful; payment of a sum of Ksh.119,000 being one month notice pay of Ksh.7,000, twelve months salaries for compensation being Ksh.84,000, and service pay at one month salary for each of the four years served of Ksh.28,000; and costs and interest.

The respondent filed a response to the statement of claim on 13.11.2012 through Nyandieka & Associates Advocates. The respondent prayed that the claim be dismissed with costs because the claimant's case was malicious, ill-conceived and devoid of any basis and meant to embarrass the respondent.

The case came up for hearing on 13.02.2013 and on 25.04.2013. The claimant gave evidence to support his case. The respondent called two witnesses namely George Sigu Thadayo, the respondent's secretary and Principal (**RW1**), and Francis Mwiru Mbatia the respondent's Board member and a founder of the respondent school (**RW2**).

The claimant was employed by the respondent as a cook on 4.11.2008. He testified that on 16.1.2012 the respondent's Principal (RW1) asked him to proceed on suspension. He was not told when he would resume work or attend the disciplinary proceedings. He visited the school on 16.02.2012 and complained to the school bursar about his predicament and who advised him that he had been replaced. The claimant instructed his Advocates who delivered to the respondent the demand letter dated 17.02.2012. The respondent did not reply and the claimant filed this cause.

The respondent's Principal, **RW1** testified that the claimant was employed as a cook on 4.11.2008 and he left employment on 10.01.2012. He stated that teachers and students complained that the claimant was late in serving them lunch. He stated that on 4.01.2012 the school store was broken into so that eleven bags of maize and one bag of beans were stolen. The school made a report to Yamumbi Police Post. The police investigation diary recording the report is marked **R2**. The report shows that eight bags of maize and one bag of beans valued Ksh.30,000 were stolen from the school and upon search at the claimant's and the school watchman's house nothing was recovered. The investigations were to continue for the police to trace the unknown thugs.

RW1 testified that in view of the theft, he redeployed the claimant from the agreed duties as a cook to the

duties of a grounds man. He further told the court that in the meantime he told the claimant that he would suspend the claimant in view of the theft till after the investigations. On 9.01.2012 the claimant, RW1 stated that the claimant came to the respondent school and asked for the suspension letter but RW1 declined to issue the letter because it was in the authority of the Board and not his powers to suspend the claimant. RW1 further stated that the claimant was redeployed and worked on 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> as a grounds-man and thereafter he disappeared. RW1 then wrote to the claimant the letter dated 20.02.2012 marked **R2** stating that the claimant had been absent from duty from 16<sup>th</sup> January 2012 to 20.02.2012 without giving any reasons. The letter further stated that if the claimant did not report back to work and give reasons for his absence, then the claimant would be deemed no longer interested in work and therefore would be replaced.

RW1 also testified that the claimant's case was discussed by the respondent's Board as per the minutes of the meeting of 23.02.2012 marked **R3** at *Minute No. 2/1/2012* on confirmation of workers. The minutes show that in the case of the claimant the Board directed RW1 to respond to the demand notice. No evidence of the response was produced before the court by RW1.

RW2 confirmed that the Board met as per RW1's evidence. He stated that he had advised RW1 to report the case of the theft in school to the police station and the Board never dismissed the claimant because there was no evidence implicating the claimant in the theft. He confirmed that the Board never handled the claimant's disciplinary case as none was tabled.

The first issue for determination is whether the claimant was suspended and never recalled or whether he absconded upon redeployment. The court has to determine the version of the true circumstances of this case in view of the contradicting versions by the claimant and for the respondent. It is the claimant's case that the respondent's secretary asked him to go on suspension and he was not recalled at all. On the other hand, the respondent's evidence is that the claimant absconded following the redeployment.

To resolve the opposing versions, the starting point for assessing the versions presented by the parties during the hearing is to determine the extent to which the employer's version is more probable than not. If both versions by the employer on the one hand and the employee on the other are both probable, then, the court should decide which version is more probable by comparing the opposing versions.

In this case, the court has considered the respondent's version and finds that version is not probable. First, RW1 testified that he told the claimant that he would suspend the claimant in view of the theft till after the investigations. It is the court's opinion that RW1 by his evidence has admitted that he in fact verbally suspended the claimant. Further, on 9.01.2012, RW1 stated that the claimant came and asked for the suspension letter but RW1 declined to issue the letter because it was in the authority of the Board and not his powers to suspend the claimant. The natural flow of the events was for RW1 to seek the Board's decision for suspension of the claimant. That did not happen and the account by the claimant is more probable that RW1 verbally suspended him to be recalled later but which never came to pass.

Secondly, RW1 testified that the claimant worked on 10<sup>th</sup>, 11<sup>th</sup> and 12<sup>th</sup> as a grounds man and thereafter he disappeared. He then wrote to the claimant the letter dated 20.02.2012 marked R2 stating that the claimant had been absent from duty from 16<sup>th</sup> January 2012 to 20.02.2012 without giving any reasons. It is obvious that RW1 misled the court because the letter and his oral testimony contradicted as to the effective date of the claimant's absence from duty.

Thirdly, the minutes of the Board meeting held on 23.02.2012 show that the Board directed RW1 to respond to the demand letter but there was no evidence of compliance. The court's inference from that flow of events is that as secretary to the Board, RW1 was inclined not to implement clear directives of the school's final institutional authority and the claimant's account of how RW1 treated the case cannot be doubted.

Finally, RW1 was not clear about the alleged reason for the alleged redeployment of the claimant from a cook to a grounds man, citing lateness in performance as a cook and stumblingly citing the theft that had taken place in the school. In the court's opinion, such imprecision of the account of events on the part of a

top decision maker of the respondent is an irresistible impetus for the court to conclude that the account is not probable.

Accordingly, to answer the first issue for determination whether the claimant was suspended and never recalled or whether he absconded upon redeployment, the court finds that the respondent suspended the claimant and never recalled him back.

The next issue for determination is whether the claimant was unfairly terminated. The court considers that the employment relationship is of high trust and confidence under which the employer and employee must at all times uphold cooperation. Thus, it is the court's opinion that conduct by the employer that undermines such high trust, confidence and cooperation thereby occasioning breakdown in the employment relationship amounts to termination of the contract of employment. In such circumstances, it is the view of the court that a dismissal by way of constructive termination occurs if, the employee leaves employment by reason of the employer's breach of his, her or its obligation.

In the instant case the respondent had a duty to facilitate the claimant a fair grievance management procedure or a fair disciplinary procedure. The claimant's grievance about absence of a suspension letter was not addressed at all. Further, the respondent decided not to initiate the relevant disciplinary proceedings and also failed to recall the claimant from the verbal suspension. In the circumstances of this case, the court finds that the claimant was entitled to treat the employment as terminated taking into account the respondent's breach of its obligations to fairly handle grievances and in proper cases to undertake fair disciplinary proceedings by giving notice and hearing the claimant as envisaged under **section 41 of the Employment Act, 2007**. The court therefore finds that the claimant was unfairly and constructively terminated from employment.

The court finds that the claimant is entitled to all the remedies as prayed. Accordingly, judgment is entered for the claimant against the respondent for:

- a) **a declaration that the termination was unfair;**
- b) **the respondent to pay the claimant a sum of Ksh.119, 000 as prayed together with interest at court rates from the date of the judgment till full payment; and**
- c) **the respondent to pay costs of the case.**

**Signed, dated and delivered in court at Nakuru this Friday, 3<sup>rd</sup> May, 2013.**

**BYRAM ONGAYA**  
**JUDGE**