



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**

**CAUSE NO. 33/2013**

(formerly KSM HCC No. 43 of 2003)

(Before Hon. Justice Hellen Wasilwa on 25<sup>th</sup> July, 2013)

BEN JULIUS ACHILA ..... CLAIMANT

**-VERSUS-**

KIMA INTERNATIONAL SCHOOL OF THEOLOGY .....  
RESPONDENTS

**JUDGMENT**

The claimant herein Ben Julius Achila filed his Memorandum of Claim in person on 15/3/2013. The issues in dispute is unfair termination and failure to pay his terminal dues. The claimant also gave oral evidence in court and he told court that he was employed by the respondents on 5.6.2006 as Director of Security Services. His salary was Ksh 6000 per month. He held this position upto 27th January 2013 now earning Kshs 8600 when he was now terminated.

He gave evidence and told court that he is a professional teacher and a retired senior chief. That as Security Director he worked diligently and had a good working relationship with his colleagues. That on 28/1/2013, he was on duty as usual when he was ambushed with a letter of termination. He was not given any notice nor hearing. He showed court his termination letter which is marked as Appendix 2. He says that he was quite embarrassed as 3 strangers – 3 guards and the Deputy Principle of the respondent came and served him with the letter. They alleged he was negligent on his duty and had undermined the authority of the administration which he hadn't done.

He wrote them a letter Appendix 3 wanting to know the reasons as to why he had been terminated. He even declined to take benefits they had calculated before the explanation was given but the respondents deposited Ksh 31,605/= in his account as per Annexure 6.

He now sought court's help. He told court that he had never gone on leave all the 6 years he worked as he had no assistant. He avers that he was not paid any house allowance and his employment agreement never indicated that what he was being paid included house allowance.

In cross examination he told court he was working on a contract renewable yearly and the last contract was with effect from 1.9.2012, with basic pay of Ksh 8600/= inclusive of house allowance. He admits that on 15.1.2013 there was a robbery at School but he is not aware that property worth Ksh 400,000/= was stolen. He called police but he does not know what decision was made after the raid. He says he was not paid notice fee and his January pay is not notice amount.

He called one witness who was also an employee of respondent as a guard. He states that there was some theft in respondents premises on 15.1.2013. CW2 was on duty and after this incident, he was suspended from duty and thereafter terminated.

The respondents on the other hand filed their Memorandum of Reply on 17.4.2013 through the firm of Akwala & Company Advocates. They also called one witness. They aver that they terminated claimant's services due to negligence of duty and also undermining the respondents authority. They say he had been told to work with new guards and he refused to comply with that directive. So they decided to change the entire security system. They gave him 36 days pay in lieu of notice and also paid him severance allowances as per January 2013 payment, unpaid leave. These amounts were Kshs 8,600/= 1 month salary in lieu of notice, 15 days for each year worked = 6 years amounting to Ksh 27,800/= and leave was Kshs 2,867/= for period between September 2012 and January 2013. On overtime, they say he never worked on overtime. They aver that according to his contract his pay was Kshs 8,600/= inclusive of house allowance. On leave, they aver that he was entitled to it but he never applied for the same. They asked court to dismiss this case.

Upon hearing the evidence of both parties, and upon considering the submissions of the parties, the issues for determination are:-

1. Whether claimant was unlawfully terminated.
2. Whether claimant is entitled to any terminal dues.

On 1st issue, claimant was employed on 1st September 2012 as per his contract Exh 1. His salary was Ksh 8,600/= inclusive of house allowance. Hours of work were Monday to Friday 8 am to 5 pm with one hour lunch break between 1 pm and 2 pm. He was required to take his leave of 21 days during the year. From this contract, he could be dismissed for gross misconduct for negligence of duty and insubordination amongst other issues. This contract could be terminated by either party after giving 30 days notice or 30 days pay in lieu of notice.

The respondents aver that the claimant was negligent in his duty and also was insubordinate. However one cardinal principle of natural justice was flouted by the respondents when they failed to give the claimant an opportunity to be heard.

Under S. 4(ii) of the Employment Act:-

**“Subject to S. 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 reasons 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”.**

S. 42(2) states:-

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

In the case of the claimant he was not accorded this chance. Even if the respondents felt he had breached his contract, this right could not be abrogated by the respondents. Failure to accord claimant a chance to be heard and make his representation and proceeding to terminate his services amounts to unfair termination as explained under S. 45 of the Employment Act.

What remedies then is the claimant entitled to? He had prayed for certain remedies which I found he has already been paid including 1 month salary in lieu of notice, leave pay and severance pay. However, the respondents having terminated him without giving him a fair hearing, I award him 12 months salary as

compensation accordingly amounting to Ksh 85,260/=.

According to the contract of employment, the claimant was paid Ksh 8,600/= all inclusive. This is basically the minimum wage for employees in this Industry. However the minimum wage cannot suffice in this case because if house allowance is removed from the Kshs 8,600/= the claimant will be earning less than the minimum wage. Though he signed and agreed to be paid Kshs 8,600/= inclusive of house allowance this translates in an illegality. I therefore find that in addition to Ksh 8,600/= claimant was paid, he was also entitled to some house allowance which I find for him at 15% of his salary for the period worked and this translates to;

$$15/100 \times 8600 \times 72 \text{ months} = \text{Kshs } 92,880/=$$

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**TOTAL = KSH 178,140/=**

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The claimant should also be issued with a certificate of service - costs to the claimants. It is so ordered.

**HELLEN WASILWA**

**JUDGE**

**25/07/2013**

**Appearances:-**

Claimant present in person

Odongo for respondents present

CC. Sammy Wamache.