



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

**CAUSE NO. 89/2013**

**(formerly Nairobi No. 978(B)/2012)**

**(Before Hon. Justice Hellen Wasilwa on 17<sup>th</sup> July, 2013)**

**SHABIRI WESONGA .....CLAIMANT**

**VERSUS**

**HILL SCHOOL ACADEMY .....RESPONDENTS**

**JUDGMENT**

The claimant herein Shabiri Wesonga filed his Memorandum of Claim on 8/6/2012 through the firm of Andia & Company Advocates. He later on presented this claim in person. The issues in dispute are wrongful and unfair termination, and failure to pay terminal benefits. The respondents were duly served with the Memorandum of Claim and they filed their response on 22.6.2012 through the firm of A. G Aburili & Company Advocates.

The claimant case is that he was an employee of the respondents having been employed as a teacher in the year 2005. However on 12.2.2012, the claimant states that his services were terminated by the respondents without any basis via a phone call made to the claimant by the respondent's director. The claimant states that no warning letter or notice to show cause why his services should not be terminated were served on him and his efforts to obtain an explanation were fruitless. He denies he committed any acts of gross misconduct nor absconded his duty. Therefore the claimant avers that his purported summary dismissal was therefore unlawful, wrongful and unjustified.

The claimant sought help from his advocates who wrote a letter to the respondents on 14.2.2012 to explain the circumstances under which the claimant had been dismissed and to admit liability for unlawful termination. The respondents responded on 21.2.2012 through their advocates alleging that the claimant used to teach at their school under no terms of employment attached to his engagement. They also claimed that he had assaulted a colleague Peter Mandila and also created disturbance.

He now decided to seek redress from court. He avers that he never assaulted a colleague. He seeks orders for payment of overtime, gratuity, unpaid leave allowance for 21 days, salary in lieu of notice and damages for unfair termination.

The respondents on the other hand called two witnesses. RW1 told court that she is the director of the respondent. She told court that she oversees the running of the School which has 120 teachers. She told court that the claimant was their teacher but he absconded and she does not know where he went. She says she does not know how the claimant left the School. She admitted that the claimant was their good teacher and was teaching Standard 8. She denies calling him on 12.2.2012 nor sacking him as this would

ordinarily be done by the Headmaster and the Principle if there was any problem.

She asked court to dismiss his case and avers that she owes him nothing. When the letter from respondents' lawyer to claimant's lawyer is put to her, she denies ever instructing her lawyer to say that claimant's terms of employment could not be classified. She also denies informing him that claimant had deserted School after assaulting a colleague.

RW2 – the respondents' Manager told court that he knows the claimant who was teaching at their school and to the best of his knowledge, claimant has not been sacked to-date as he has not received any report about him.

Upon hearing evidence from both parties, the issues for determination are:-

1. Whether the claimant was dismissed or he absconded duty.
2. Whether the claimant is entitled to any remedies from the respondents.

In answer to the first question, the claimant has informed court that he was an employee of the respondent having been hired as a teacher. This, the respondents do agree and RW2 told court that the claimant taught in the School from 2005. The respondents contention is that he absconded duty. However, the letter from the respondents' lawyer to the claimant's lawyer dated 21.2.2012 talks about claimant's criminal activities where it is alleged he assaulted a colleague. This allegation is however denied by RW1 who says they never gave their advocate any such instructions. The would be victim of the assault was never called as a witness and to-date no charges have been preferred against the claimant.

What remains is a desertion allegation which the respondents should have replied to in their letter of 21.2.2012. It is apparent that the claimant could not be a deserter if he was in communication 2 days after he left the School. The timetable and School duty Rosta shows he was in School even on 12.2.2012 and his advocate wrote a letter to respondents on 14.2.2012 after the respondents allegedly dismissed him and the print out from Safaricom also shows he made a call to the respondents on 13.2.2012 at 9.61.35 for a duration of 2.17 mins and there could not have been such an alleged desertion.

I believe the claimant's case backed by his evidence and exhibits to show he was in School and in touch with respondents from 12th to 14th February, 2012 and the issue of his deserting duty is a fabrication. I find that he was dismissed unprocedurally without being accorded an opportunity to be heard. He was also given no notice whatsoever. He also proved that he was working for the respondents and stayed on duty even on weekends as the 12.2.2012 was a Sunday and the Rosta shows he was at School. This has not been controverted by the respondents.

I find that indeed the claimant was unfairly and unjustifiably dismissed by the respondents. Failure to accord him a hearing contravenes the provisions of Section 42(1) of the Employment Act 2007 which states that:-

**“subject to Section 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 reason 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”.**

This provision is reinforced by Article 50(1) of the Constitution of Kenya which provides that:-

**“Every person has a right to have any dispute that can be resolved by the application of the law decided in as fair and public hearing before a court or if appropriate, another independent and impartial tribunal or body”.**

ILO recommendation 119 (4) also provides for a fair hearing which the claimant was denied. I find the claimant is entitled to the remedies he had sought and I find for him and enter judgment as follows:-

1. 1 month salary in lieu of notice - Ksh 30,700/=
2. 21 days leave - Ksh 21,490/=
3. Compensation equivalent to 12 months salary for unlawful termination.

30,700 X 12 - Ksh 368,400/=

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**TOTAL = KSH 420,590.00**

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**less statutory deductions.**

Claim for overtime is not proved as the times in question and period were not computed before court with proof. On gratuity, the claimant is not entitled to it as he was contributing to a NSSF Scheme and S. 35(6) of Employment Act provides that such an employee is not entitled to service pay.

I order that the respondents also issue the claimant with as certificate of service and pay costs of this case.

**HELLEN WASILWA**

**JUDGE**

**17/07/2013**

**Appearances:-**

Claimant present in person

Aburili for respondents present

CC. Sammy Wamache.