



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO. 13 OF 2012

1. JOHN OTIENO

2. PONTIUS KATAMMA .....CLAIMANT

VERSUS

ERICA KULUMBA T/A RISE & SHINE ACADEMY .....RESPONDENT

### **J U D G M E N T**

The claimants herein brought separate suits against the respondent on 2/8/2011 claiming terminal dues following their summary on 21/4/2011. The gravamen of their case is that the termination was both wrongful and unlawful. The respondent has denied liability and has contended that the summary dismissal was justified due to the claimants poor performance in terms of exam performance and students enrollment.

The cases were consolidated and John Otieno and Pontius Katama testified as CW1 and 2 respectively while Erica Kulumba represented the respondent as RW1. CW1 was employed by the respondent on 8/1/2007 and served as the Head teacher for secondary section until 21/4/2011 when he was summarily dismissed for poor performance. His salary was ksh.25,000 and according to him his performance was good. That his subjects were never performed poorly and he supervised other teachers and ensured that they covered the syllabus in time.

He contended that his summary dismissal was unfair because he was never accorded any hearing before the dismissal. In addition, he considered the dismissal wrongful for lack of 3 months notice or pay in lieu of such notice as required under the employment contract . He prayed for 3 months salary in lieu of notice, leave for the years worked, service at the rate of one month salary per year of service, costs and interest.

CW2 was employed as by the respondent in 2006. He was Head Teacher for the Primary Section and worked until 21/4/2011 when he was summarily dismissed on ground of poor performance. His salary was Ksh.32000 per month. He denied any poor performance and explained that poor performance in examination means a score of 0-25% according to him and the documents produced his school never scored less than 50% in the National Examination.

He termed the summary dismissal as unfair and in breach of the contract of employment which required termination after a 3 months notice of salary in lieu of notice. He maintained that he was never paid his salary for April 2011. He prayed for three months salary in lieu of notice, salary for April 2011, service and costs.

RW1 is the Director and Manager of the respondent. Confirmed the employment of the CW1&2 as the principal and Head teacher of the respondent secondary and primary section respectively. She blamed the CW1 for organizing teachers strike on 18/3/2009. That she dismissed the two claimants on 21/4/2011 for poor performance in examinations and enrollment of students. The CW1 found 181 High School Students and left only 91. The CW2 found 496 pupils in the primary and left 346. According to her the offence of poor performance did not require any notice but summary dismissal under the employment contract. That after the dismissal CW1 was paid his salary for April 2011 being a net of ksh.21,387 and CW2 was also paid his April 2011 which was negative 20832/ due to advances given to him by the respondent. After the close of the hearing the parties filed written submissions.

I have carefully perused the pleadings and considered the evidence adduced and the submissions filed. It is obvious from the employment nature of the dispute that the court has the jurisdiction to determine it by dint of Section 12 of the Industrial Court Act read with Article 162(2) of the Constitution for Kenya. The issues for determination which arise from the pleading, evidence and submissions are:

- 1. whether the summary dismissal was wrongful and unfair.**
- 2. Whether the claimant are entitled to the reliefs sought.**

In answering the first issues, the court has made reference to the respective letters of appointment produced and the law. The letter of contract provided for termination by a 3 months notice or salary in lieu except in the case of gross misconduct and incompetence. Section 44 of the Employment Act however provides for summary dismissal for poor performance of duty. The burden of proving such misconduct, incompetence and/or poor performance lies on the employer under Section 43 of the Said Act.

In this case the employment letter for the two claimants did not entitle the respondent to dismiss them summarily for poor performance of students in national exams and enrollment of students or pupils in her schools. I agree with the claimants on that issue. I also find that the respondent did not prove that the performance was poor and that the claimants were the cause of the poor examination performance and reduced enrollment.

Consequently the court finds and holds that the summary dismissal was uncalled for and amounted to breach of the contract and also unfair termination under Section 45 of the Employment Act. Even if the claimants were indeed liable for any poor performance, Section 41 of the Employment Act requires that they must be first accorded a hearing. That was not done as the letters of dismissal terminated the employment 'with immediate effect'.

As regards the issue of the reliefs sought and in view of the court's finding on the first issue above, the claimants are entitled to the benefits provided for Section 49 of the Employment Act. The court is however not bound to award what it has not been asked to give especially in this case where the claimants are represented by counsel.

They have prayed for salary for April 2011, 3 months notice, leave allowance for 4 years of service and service pay. The court will award each of the claimants 3 months salary in lieu of notice. The 2nd claimant has prayed for his salary for April 2011. The RW1 alleged that he had taken loan advances and produced the payroll for April 2011 showing that the claimant was entitled to negative Kshs 20,832. The payroll was not signed by the 2nd claimant and the author never testified. No primary evidence like vouchers, acknowledging receipt of the loan advance signed by the 2nd claimant were produced. The payroll which is a photocopy is therefore not enough prove of the alleged indebtedness. The 2nd claimant is therefore entitled to his salary for April 2011.

The prayer for service pay and leave allowance are dismissed. Section 35 of the Employment Act bars an employee from claiming service pay if during his service he was contributing to the NSSF. The payslips for the two claimants produced showed that they contributed to NSSF and consequently they lost the right to claim service pay.

In my view the law has been unfair to the employees of higher income on the foregoing issue

because on termination or retirement they end up getting very little benefits than the service pay they would have received if they did not join the NSSF. I dismiss also the prayer for leave allowance since no evidence was adduced to prove such a claim.

In summary therefore the court enters judgment for the claimants as follows:

**JOHN OTIENO**

- a. **3 months salary in lieu of notice.....75,000**
- b. **interest from the date of dismissal.**

**PONTIUS KATAMA**

- a. **3 months salary in lieu of notice .....96,000**
- b. **salary for April 2011.....32,050**

**128,000**

- c. **interest from date of dismissal.**

The claimant will also have costs of their respective claim as separate suits.

Orders accordingly.

**Signed, dated and delivered this 20th September 2013.**

**ONESMUS MAKAU**

**JUDGE**