



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

**CAUSE NO. 4 OF 2013**

JOSEPH G. G. KIBUNJA.....CLAIMANT

*Versus*

THE B.O.G THE MARY IMMACULATE

TEACHERS TRAINING COLLEGE.....RESPONDENT

**JUDGMENT**

By a memorandum of claim filed on 29th February, 2013, the claimant seeks an order of this court directed to the respondent to pay him the sum of Kshs.410,500 as his terminal dues following his resignation from the respondent's employ for reasons he cites as frustrations and non-payment of his salary and gratuity.

According to him, he was by a letter dated 4th September, 2010 employed by the respondent as a Principal of the school at a salary of Kshs.35,000 and a termly gratuity of Kshs.26,000. (The letter of appointment was attached to the memo of claim).

The respondent for its part and via a memorandum of response filed on 2nd April, 2013 while admitting the claimant was its employee, avers that his terms of service was changed and his salary revised downwards to Kshs.15,500 per month without any gratuity.

The respondent averred that the claimant worked from 1st October,2011 up to 15th January, 2013 when he resigned, under the new terms and by his conduct he was deemed to have accepted the revised terms of employment.

According to the respondent, the claimant's performance was below par leading to low student enrolment in the respondent's college and that despite various requests in writing from the respondent, the claimant failed to improve his performance and the student enrolment thus making it difficult to run the college and raise money for his salary.

The respondent however admits it owes the claimant the sum of Kshs.80,750.

At the trial the claimant testified that he worked for respondent up to 15th January. It was his evidence that upon giving his notice of intention to leave the respondent started refusing to pay his salary, so he decided to leave.

He denied ever agreeing to have his salary revised downwards. He further denied ever seeing the letters dated 15th October, 2011 and 25th September, 2011 purporting to revise his salary. According to him, it was not his responsibility to ensure enrolment improved at the school maintaining his work was

administrative.

Regarding house allowance, he admitted his letter of appointment never mentioned it but as a principal he ought to have been staying at the college which he was not hence entitled to claim house allowance. He maintained that he discussed the house allowance issue verbally with the college authorities. He denied his salary was consolidated.

Concerning low enrolment it was his evidence in cross-examination that this was due to the failure by the administration to deliver admission letters to prospective students.

The respondent called the evidence of Mr. Samuel Mugambi Ileri who stated that he was the college administrator. He confirmed the claimant was an employee of the respondent. According to him the college was experiencing fall in enrolment during the claimant's tenure. He stated that the principal had a duty to put an extra effort to ensure enrolment improved. His (the Principal's) responsibility was to market the college and that low enrolment affected his pay.

Mr. Ileri stated that he was the one who relayed the letter revising the claimant's salary to him but the claimant never responded to it though he continued to work without complaining.

According to Mr. Ileri, the claimant is owed salary for 5 months (August – December, 2012) at the rate of Kshs.15,500 per month totalling to Kshs.70,700. He is also entitled to 15 days worked in January, 2013 and salary arrears for the month of June, 2012. Out of these sums the claimant has been paid 20,000.

In cross-examination he stated that the claimant used to receive his salary via petty cash voucher, however these were not produced in court as evidence.

It is not disputed that the claimant was an employee of the respondent and further it is not disputed that he resigned from his employment.

The respondent further does not deny that it owes the claimant some money. The only dispute in this regard is the quantum and the reason for which that amount is owed.

The claimant was employed in writing by a letter dated 4th September, 2010 which put his salary at Kshs.35,000 per month plus a termly gratuity of Kshs.26,000 which works out to Kshs.8,700 per month on the assumption that a school term consists of three months.

The respondent claims that the claimant's salary was revised downwards to Kshs.15,500 and his gratuity removed and that claimant continued to work under these revised terms without any complaint. A letter dated 25th September, 2011 attached to the memorandum of response is averred to have communicated this fact to the claimant but the claimant denies receiving such communication. In the circumstances a situation of evidentiary burden has been created and the onus is on the respondent to show beyond peradventure that this communication was not only received by the claimant but acted on to his detriment without any complaint whatsoever from him. It therefore behoved the respondent to go beyond the letter to lead and or produce evidence to show that indeed the claimant's salary was revised downwards and that he continued to work under the circumstances without any complaint at all. In this regard, the court agrees with the claimant's counsel when he sought the production of a payment voucher or a payslip as corroboration to the letter. This was not done hence there is nothing to show that the claimant's salary was revised downwards.

Contracts of employments are contracts like any other hence the principles governing variation of contracts apply. Unequivocal consent of the parties is one of the essential requirements for variation of contract. The court cannot fathom that the claimant could without any complaint at all accept such a significant wage cut. Besides, now that the claimant disputed the allegation, it was incumbent upon the respondent to prove this allegation which regrettably it has failed to do. In the circumstances the court upholds the claimants position that his salary as stated in his letter of appointment was never revised downwards.

Regarding house allowance, section 31 of the Employment Act requires an employer at own expense to provide reasonable housing accommodation for each of his employees or pay such sufficient sum as rent, in addition to the wages or salary of the employee as will enable the employee to obtain reasonable accommodation. Employers who contract with their employees to pay a consolidated wage which includes an element intended to be used by the employee as rent are exempted from this requirement.

The claimant contended at the trial that as principal, he ought to have been staying at the college premises which was not the case with him. The respondent did not seriously refute his assertion that he was never housed by the college. All the respondent did was to allege that the claimant was offered a house which he refused to take and further that the issue of house allowance was never in his contract. Housing for employees is a legal requirement hence its provision or an allowance to cater for it cannot be contracted out. The claimant's letter of appointment does not state whether his salary was consolidated to include an amount that could afford him housing. In the circumstances the court can only conclude that no provision was made for house allowance.

There is no clear legislation on what amounts to reasonable house allowance however the practice by this court and its predecessor where there is no clear agreement on house allowance has been to award 15% of the monthly salary as house allowance. The court therefore so awards the claimant.

In conclusion the court wards the claimant as follows:-

	<b><u>Kshs.</u></b>
1. 5 months salary (August - December 2012)	
@ 35,000 per month	175,000
2. Salary for 15 days worked in January, 2012	17,500
3. Salary arrears for June, 2012	19,000
4. Gratuity for 2nd and 3rd term 2012	52,000
5. House allowance (September 2010 - December, 2012)	
@ 15% salary per month	<u>147,000</u>
	410,500
6. Less 20,000 already paid	<u>20,000</u>
	<b>390,500</b>
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This sum is less statutory deductions and any other money the claimant might owe the respondent.

It is so ordered.

***Dated at Nyeri this 17th day of September, 2013.***

**Abuodha J. N.**

**Judge**

***Delivered in open Court in the presence of Mr. Kioni for the Claimant and in the presence of Mr. Githinji for the Respondent.***

**Abuodha J. N.**

**Judge**