

REPUBLIC OF KENYA

IN THE CHIEF MAGISTRATE’S COURT AT NAKURU

EMPLOYMENT & LABOUR RELATIONS CAUSE NO E255 OF

2023

GILBERT

OBARE

APONDI.....CLAIMANT

VS

MOI

HIGH

SCHOOL

KABARAK.....RESPONDENT

JUDGMENT

INTRODUCTION

1. On 12th September 2023, the Claimant filed a Memorandum of Claim, through which he sued the Respondent for unfair termination of employment. The Respondent filed a Response to Memorandum of Claim dated 05th October, 2023. The case was heard on 15th October 2024 and 05th

August 3025 with Ms. Achieng appearing for the Claimant and Mr. Opondo appearing for the Respondent. The Claimant testified on his own behalf and the Respondent's Finance and Human Resources Manager, Nickson Kiptiony, Procurement Officer, Jeruto Keitany, and Accountant, Isaac Kiprop testified for the Respondent.

2. The claimant and the witnesses all sought to rely on their witness statements which they asked the court to adopt as part of their evidence in chief. They also produced the list and bundle of documents filed together with their pleadings as exhibits before court. Both parties then filed written submissions.

THE CLAIMANT'S CASE

3. According to the Memorandum of Claim, the Claimant was, employed by the Respondent as a tailor in October 1979 and that he served continuously until his unlawful termination on 31/05/2023, a period of 43 years. It is the claimant's claim that his termination was abrupt and without notice, and that the Respondent unfairly cited 'reduced work' as the reason.

He further alleges that he was paid a lump sum of Kshs. 50,000/- as 'terminal dues', which amount he treats as acknowledgement of an employment relationship. That his salary was Kshs. 10,990/- per month, which he alleges was an underpayment against the applicable minimum wages. He also alleges that for over 4 decades, he never took leave or received leave allowance. He characterizes the termination of his engagement as a redundancy process conducted in violation of Section 40 of the Employment Act 2007.

4. The Claimant claimed the following:

1 months' notice pay	Kshs. 29,674.75
12 months' compensation	Kshs. 356,097.00
Severance pay for 43 years	Kshs. 638,007.10
Leave pay for 43 years	Kshs. 814,488.60
Underpayments	Kshs. 1,123,995.55
Total	Kshs. 2,962,263.00

THE RESPONDENT'S CASE

5. In its Memorandum of Response, the Respondent stated that the Claimant was an independent contractor, engaged on an intermittent basis to provide tailoring services. That the claimant's work was seasonal, tied to specific periods of high demand such as school admissions, and was governed by oral arrangements. That he was paid on piece-rate basis depending on the number of uniform pieces or alterations completed. That the Kshs. 50,000/- paid to the claimant in 2023 was expressly made as a one-off, voluntary ex gratia payment of goodwill, unrelated to any obligation under the Employment Act. That it was intended to appreciate his long-standing association with the school, not to acknowledge an employment relationship. That furthermore, the claimant accepted this payment without protest, and it cannot, in law, be construed as terminal dues or evidence of unfair dismissal. The Respondent therefore maintains that the Claimant's claim is wholly misconceived, and that the suit should be dismissed with costs.

FINDINGS AND DETERMINATION

6. The main issue for determination in this case is whether there was an employment relationship between the Claimant and the Respondent. Section 2 of the Employment Act, 2007 defines an employee as **'a person employed for wages or a salary and includes an apprentice and indentured learner'**.
7. The same section defines an employer as: **'any person, public body, firm, corporation or company who or which has entered into a contract of service to employ any individual'**. A contract of service is defined as:
- an agreement, whether oral or in writing, and whether expressed or implied, to employ or serve as an employee for a period of time, and includes a contract of apprenticeship and indentured learnership**
8. The question then is whether the Claimant was an employee of the Respondent as defined in the Act. The Claimant's case was that he was employed by the Respondent while the Respondent maintained that the Claimant was an independent contractor under a contract for services.

9. In support of his declared status as an employee, the Claimant produced a **leave application form** approved by the respondent's principal for the year 1982, as **CEXH. No. 3**, a **casual basis employment letter** from the Respondent dated 22/08/2019 as **CEXH. No. 4**, his **account statement** from Access bank at Kabarak, the respondent's premises, proving that he was being paid casual wages by the Respondent every month at various rates in the year 2022 from January to July (**CEXH. No. 5**), another **Statement from Boresha Sacco**, showing that he earned salaries from the Respondent, a private institution, as from August 2022, to August 2023, an **NSSF Statement** for the period 01/10/2019 to 30/04/2023 showing that the Respondent was making contributions on his behalf and as his employer, a **newsletter** from the Respondent dated 16/03/2019 recognizing him as the longest serving employee in the tailoring department (**CEXH. No. 8**), a **certificate of merit** dated 12/06/2009 issued by the respondent recognizing him for long dedicated service to the respondent from 1979 to 2009, as **CEXH. No. 9**, a **certificate of long**

service dated 16/03/2019, recognizing the claimant for long dedicated service to the respondent (1980 to 2019) as **CEXH. No. 10** and a **letter from the county labour office** to the respondent dated 21/08/2023 urging the respondent to settle their labour dispute with the claimant or attend the labour office for a settlement meeting, as **CEXH. No. 11**.

10. In determining the existence of an employment relationship, the Court is expected to go beyond mere terminologies employed by the parties either in their pleadings or in their testimony. The Court is called upon to inquire into the entire spectrum of facts and circumstances to establish whether an employer/employee relationship as defined in the Employment Act, 2007 actually exists.

11. The Claimant based his case on the above documents produced as exhibits in his case. The respondent on the other hand endeavoured to disprove the existence of an employment relationship by relying on the **admission forms** which were produced as **REXH no. 2**, which showed that the school provided uniforms by creating periodic demands for tailoring services, **Production schedules**

(**REXH. No. 3**), spanning several years which demonstrate that the claimant's work was irregular and tied to demand, and **payment records (REXH. No. 4)**, which shows varying and intermittent payments based on piece-work, inconsistent with a salaried position. In his submissions, the learned counsel for the respondent further submitted that the claimant admitted under cross-examination that he had no employment contract, no staff number, no staff identity card and no pay slips. That the plaintiff conceded that he was paid per piece, irregularly and that his bank records reflect this irregularity. That the August 2019 letter, which the Claimant signed, expressly acknowledged his status as a casual tailor with a basic rate of Kshs. 1,500. - per piece. That while there were isolated instances of NSSF remittances, these were made at the Claimant's own request and on a voluntary basis as personal contributions, not arising from any obligation of employment. That courts have consistently held that such statutory remittances, standing alone, cannot establish an employment relationship. That in this case, the contributions were purely facilitative and

unrelated to any contract of service, and therefore cannot be relied upon to prove employment. Lenard counsel referred the court to the cases of **EVERRET AVIATION LTD VS KENYA REVENUE AUTHORITY [2013] e KLR** and **MAURICE ODUOR OKETCH VS CHEQUERED FLAG LIMITED [2013] KEELRC 891 KLR**. That the claimant having been born in 1952, attained the statutory retirement age of 60 years in 2012 under section 80(1) of the Public Service Commission Act and the Government policy. That even if he was employed, his continued service would have been irregular and untenable. That the certificates of long service produced by the Claimant are unauthenticated and lacked school stamps.

12. As held by Kimondo J in the case of **EVERRET AVIATION LIMITED VS KENYA REVENUE AUTHORITY [2013] eKLR**, in determining whether a relationship between parties is a contract for services between two independent parties or a contract of service giving rise to an employer/employee relationship, the traditional tests of control of the work by the employer and its integration into

the employer's core business are no longer conclusive. In my view, the fundamental behaviour of the parties such as the form of documentation evidencing the relationship and the mode of payment is critical.

13. In the case before me the relationship between the Claimant and the Respondent was evidenced by the documents produced by the claimant. The authenticity of those documents was not impeached in any material way. Moreover, as submitted by the learned counsel for the Claimant, the Casual employment letter dated 22/08/2019, and produced as CEXH. No. 4, clearly proves that the claimant was casually employed by the Respondent for a period of 6 months at a rate of Kshs. 1,500/-.

14. A casual employee is defined as someone paid daily and engaged for no more than twenty-four hours at a time. Under Section 37(1) of the Employment Act, if a casual employee works continuously for the equivalent of at least one month, or performs work expected to take three months or more, their contract is automatically converted to a monthly-paid contract. Upon conversion, typically by the 3-

month mark of continuous service, the employee gains the same rights as other monthly-paid employees, including annual leave, sick leave, and a written contract. Employers are expected to issue a formal written contract for employment lasting three months or more. Continuing casual employment for six months without a formal contract and benefits is considered an unfair labor practice and a legal violation. Courts have recognized that employees in these circumstances may have a legitimate expectation of permanent employment. job cards, local purchase orders and job contracts. I thus find this casual employment letter for a period of 6 months sufficient to make me hold that the claimant has been able to establish that he was permanently employed by the respondent and as pleaded.

15. On the issue of the retirement age, I do find that the respondent was a private entity or institution and was thus not bound by the provisions of the Public Service Commission Act that relates to the retirement age of public servants. The respondent did not produce evidence of policy that its employees retire at age 60 or explain why the

Respondent was retired at that age above 60 if that was the Respondent's policy.

16. The Respondent's submission that retirement age in Kenya was 60 years and that the court should take judicial notice of the same is therefore not supported by the law or any evidence. The correct position is that for private entities, the law does not prescribe retirement age and an employer ought to set the same either in the contract of employment or in employee terms and conditions of service. This was stated in the case of **MICHAEL OTIENO OUMA VS CARSLAKE NOMINEES LTD T/A DIANI SEA RESORT [2013] eKLR** where the court stated that: -

Am however of the view that the present case involves a contract of employment in the private sector and not public sector as in the said Court of Appeal case. In the said case the employment contract was subject to a staff pension scheme which provided for mandatory retirement at the age of 55 years. In the present case, there was no provision for mandatory retirement at any age in the employment contract. It follows therefore that the respondent's MD was wrong to retire the

claimant summarily. There was no law and I believe there still none which provides for mandatory retirement of workers in the private sector. The matter of retirement therefore remains a mode of termination of employment which must be agreed upon by the employer and the employee. Consequently, if the same is not agreed between the parties, it is presumed that the employment is indefinite unless it is terminated by notice, breach, dismissal, impossibility or death. In the present case the court is satisfied that the employment contract was terminated through breach because the reason given of retirement on ground of age was not provided in the contract between the parties herein.

17. The same was further restated in the case of **FRANK N. KAMAU VS TUSKER MATTRESSES LTD [2018] eKLR**

where the court stated that: -

It therefore obvious that, in absence of any written evidence that the Claimant was to retire at 60 years, the natural inference to draw is that, he was to continue working indefinitely as long as he remained capacitated to do so. The Claimant maintained that he was strong enough

to continue working and that the physiotherapist did not recommend for his sick off but rather the reduction of his work load. Consequently, I find and hold that the retirement of the Claimant without his consent and/or for any just cause amounted to unfair and unlawful termination of his contract of service.

18. Having found that the claimant has proved that he was employed by the respondent and considering that there is no reason given why the claimant was terminated on any ground, including that of redundancy, or that the procedure for declaration of the claimant as redundant were not adhered to, it is my finding that the Respondent did not controvert the Claimant's evidence that his employment was terminated unfairly. The Claimant has thus proved his case on a balance of probabilities.

19. As for the reliefs I do find that the claimant is not entitled to service pay as he has provided evidence that he had NSSF contributions. I also do find that he is not entitled to annual leave pays because he did not provide evidence that he did apply for the annual leaves. Employees can only go on leave upon application. As for compensation, I shall consider the

longevity of service and award him 12 months' salary compensation.

20. For the above reasons, this court enters judgment for the claimant in the following terms: -

1 months' notice pay	Kshs. 29,674.75
12 months' compensation	Kshs. 356,097.00
Underpayments	Kshs. 1,123,995.55
Gross Total	Kshs. 1,509,767.30
Less	Kshs. 50,000.00 paid
<u>NET TOTAL</u>	<u>KSHS. 1,459,767.30</u>

21. The claimant also gets the costs and interest at court's rates.

DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN

COURT THIS 11th DAY OF November, 2025

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Claimant's Counsel: Achieng'

Respondent's Counsel: Opondo

Claimant: N/A

Opondo: Praying for 30 days stay of execution

Achieng': I do agree. I also pray for copy of the judgment.

Ct: There shall be 30 days stay of execution as agreed. The Claimant's counsel be supplied with a certified copy of the judgment upon payment of the necessary fee.