



REPUBLIC OF KENYA



KENYA LAW
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Obonyo v Kenya Union of Post Primary Education Teachers Service (Cause 291 of 2014) [2024] KEELRC 13415 (KLR) (16 December 2024) (Judgment)

Neutral citation: [2024] KEELRC 13415 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 291 OF 2014
NZIOKI WA MAKAU, J
DECEMBER 16, 2024

BETWEEN

JOHN OTIENO OBONYO CLAIMANT

AND

**KENYA UNION OF POST PRIMARY EDUCATION TEACHERS
SERVICE RESPONDENT**

JUDGMENT

1. The matter has had a chequered past, having proceeded up to the Court of Appeal, which on the 22nd of March 2024 ordered a re-trial. The Claimant initiated this suit through an amended claim dated 29th March 2017, seeking unpaid salary amounting to Kshs 430,129/-. In response, the Respondent filed an amended reply on 14th June 2017, denying that it owed the Claimant any salary arrears. The matter then proceeded to hearing on 2nd October 2024 with one witness each testifying for the Claimant and the Respondent.

Claimant's Submissions

2. The Claimants identifies the following issues for determination.
 - a. Whether or not the Claimant was employed by the Respondent
 - b. Whether or not the Claimant's salary was reduced
 - c. Whether or not the Claimant has been paid all his salary arrears
 - d. How much is the Claimant entitled to in terms of salary arrears.
3. Regarding his employment status, the Claimant reiterates that he was employed as the Respondent's Executive Secretary at the Migori Branch. He highlights evidence such as payslips, an extract from the Registrar of Trade Unions, a circular dated 2nd October 2011 where the Respondent undertook to



employ all Executive Secretaries, and a letter dated 7th December 2011 from the TSC, which released him from the payroll and confirmed his employment with the Respondent.

4. In addition, the Claimant points to this Court's dismissal of a preliminary objection challenging his employment status on 19th November 2014. He also references Wasilwa J's orders of 13th November 2014, which directed the release of salary arrears, and Radido J's ruling of 11th December 2014, which instructed the Respondent to continue paying his full salary pending the hearing and determination of this case, as further proof of his employment.
5. The Claimant further asserts that it was the Respondent who controlled his remuneration, discipline, and overall conduct. To support this, he cites the case of *Wachira v Mbote & another* (cause 821 of 2018) [2022] KEELRC 12992 (KLR) (28 October 2022) (Judgment) which references the case of *Samuel Wambugu Ndirangu v 2NK Sacco Society Limited* [2019] eKLR that highlights the essential elements of an employment relationship as: selection and engagement of the employee, proof of payment of wages, power of dismissal and power to control the employee's conduct.
6. Regarding the reduction of his salary, the Claimant disputes the Respondent's claim that his salary was reduced to Kshs. 27,992/- in 2016. He asserts that there is no signed agreement or evidence linking his salary to branch contributions as suggested by the Respondent's constitution. The Claimant maintains that his salary was consistently Kshs. 96,398/-, as confirmed by the Respondent's witness and supported by salary records. He emphasizes that no suspension letter or disciplinary meeting minutes were provided to justify any reduction in his salary. Therefore, he argues that the unilateral reduction was unlawful, referencing the case of *Ibrahim Kamasi Amoni v Kenital Solar Limited* [2018] eKLR, which underscored the necessity of employee consent for any salary reductions, given their significant impact on an employee's livelihood.
7. In relation to salary arrears, the Claimant submits that the Respondent still owes him substantial amounts. He cites the months of September and October 2014, when he was paid Kshs. 48,587/- and Kshs. 34,300/- respectively, instead of the agreed Kshs. 96,398/-. He also highlights the Respondent's disregard of Radido J's ruling, which ordered it to continue paying his full salary until the hearing and determination of this matter. The Claimant further submits that had he received his full salary from September 2014 to February 2016, he would have earned Kshs. 1,542,368/-. However, his bank statement reflects payments of only Kshs. 1,114,577/-, leaving an outstanding balance of Kshs. 472,791/- in salary arrears. In conclusion, the Claimant asserts that the payments made by the Respondent are inaccurate, as they do not align with the bank records, which show payments to his accounts at Equity and Barclays banks.
8. The Respondent submits that the Claimant was employed by the TSC and was subsequently seconded to the Respondent's Migori branch following his election as executive secretary. The Respondent further asserts that the Claimant's salary was directly linked to the membership size of the branch, which had significantly decreased during the Claimant's tenure. In response to the Claimant's assertion that his salary was Kshs. 175,000/-, the Respondent refutes this, claiming that the paychecks showing this amount are fraudulent.
9. The Respondent further submits that the Claimant was suspended on half salary following allegations of misappropriation of funds as evinced by Migori Civil Case No. 72 of 2011. With regard to whether it owes the Claimant any salary arrears, the Respondent denies owing any amount, referencing Exhibit No. 4 from its further list of documents dated 28th June 2024, which shows payments to the Claimant totalling Kshs. 1,335,237/- made from September 2014 to January 2017. Additionally, the Respondent notes that the Claimant was paid Kshs. 469,000/- by Liberty Life Assurance. In further support of its case, the Respondent submits that the Claimant is the author of his own misfortune,



having engaged in actions that led to his suspension. As such, the Respondent contends that the Claimant is not entitled to full compensation. To bolster this point, the Respondent cites the Court of Appeal case of *Kenya Power & Lighting v Aggrey Lukorito Wasike* [2017] eKLR, which highlights the importance of courts delivering just decisions for both employees and employers. Finally, with regard to costs, the Respondent claims entitlement to the same, arguing that the Claimant's case lacks merit.

10. The Court has duly considered the pleadings, the facts, the law and submissions filed herein to come to this conclusion. The Claimant was employed by the Respondent as an official upon election by Union members and there is evidence of that. Secondment is employment and the fact the Claimant was an employee of TSC seconded to the Respondent upon election does not mean he was not an employee of the Respondent. He was an employee of the Respondent albeit on secondment. What seems to be the only contentious issue is the non-payment of salary arrears. There is no evidence adduced that the salary of the Claimant was pegged to the membership of the Union members. That would be ridiculous as it sounds and there was no evidence the Claimant agreed to the unilateral salary reductions made by the Respondent. As such, the only dispute the Court has to ascertain is in relation to arrears due to the miscalculation by the Respondent since the Claimant's tenure came to an end after elections resulting in his replacement as the Respondent's official at the Migori Branch of the Respondent. He was not dismissed and therefore the discussions around unfair termination do not lie.
11. The Respondent admits a sum of Kshs. 1,335,237/- was paid in addition to some pension dues which have nothing to do with the case before the Court. Netting off the sum paid to the Claimant from the sum owed, the Claimant is entitled to Kshs. 207,131/-. In my considered opinion this is the only sum the Claimant is entitled to since he had no other tenable claim. He was dismissed for the alleged misappropriation of funds and therefore the merits of the dismissal are obvious. Given the chequered history of the matter a modest sum of costs which I set at Kshs. 30,000/- is granted meaning the Claimant is only entitled to Kshs. 237,131/- as the full and final sum due. Should the Respondent decline to make payment within 30 days of the judgment the Claimant shall be entitled to interest at court rates on the sum of Kshs. 207,131/- from the date of filing suit till payment in full.
12. In the final analysis judgment is entered for the Claimant against the Respondent for:-
 - a. Kshs. 207,131/- as salary arrears.
 - b. Kshs. 30,000/- as costs.
 - c. In default of payment of the decretal sum within 30 days of the judgment, the decretal sum of Kshs. 207,131/- shall attract interest at the rate of 14% per annum from the date of filing suit till payment in full.

It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 16TH DAY OF DECEMBER 2024

NZIOKI WA MAKAU, MCIARB.

JUDGE

