



REPUBLIC OF KENYA



KENYA LAW
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**Adero v Silversands Academy (Cause E005 of 2022)
[2023] KEELRC 1727 (KLR) (29 June 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1727 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
CAUSE E005 OF 2022**

M MBARÚ, J

JUNE 29, 2023

BETWEEN

JACK ADERO CLAIMANT

AND

THE SILVERSANDS ACADEMY RESPONDENT

JUDGMENT

1. The claimant filed his Memorandum of Claim on 2 September 2022 and served the respondent who entered appearance on 25 April 2023 but did not file a response and on 12 June 2023 filed a Notice of Change of Advocates but no response was filed or attend during the hearing of the claimant's case.
2. The claimant's case is that he is an adult male and was employed by the respondent, a learning institution in Malindi and carrying out its business activities in Malindi, Kilifi County.
3. The respondent employed the claimant in September 2011 where he worked as a teacher up to 13 April 2022 when he became the head teacher.
4. On 13 April 2022 the claimant reported to work but was issued with letter of interdiction and then was issued with letter terminating his employment with effect on the same date without being given any reasons or allowed to have a hearing with regard to any matter. This resulted unlawful and unfair termination of employment on the grounds that there were no reasons given to warrant such sanction or notice issued or terminal dues paid.
5. At the time, the claimant was earning Kshs. 27,000 and would be paid Kshs. 20,000 in cash total being Kshs. 47,000 per month.
6. The claim is that there was underpayment for the position held by the claimant as head teacher and his claims is for the following terminal dues;
 - a. Notice pay Kshs. 79,860 according to the lawful salary due;



- b. Wages for days worked including 13 April 2022 Kshs. 34,622;
 - c. Severance pay for 17 months since January 2021 to April 2022 at Kshs. 492,480;
 - d. 12 months' compensation for unfair termination of employment Kshs. 956,752; and
 - e. Costs.
8. The claimant testified in support of his case that he holds a B.A Degree in Languages and Literary Studies and a Post Graduate Diploma in Education in 2019 and was employed by the respondent as the English/Literature Teacher by the director, Sharifa Bux. In September 2011 his salary was Kshs. 17,500. In 2013 the salary was increased by Kshs. 1,000 to Kshs. 18,500. The claimant then became the head of language department and teaching languages alone from one to four.
9. In January 2015 the claimant was promoted to the position of Deputy Principal and his salary increased to Kshs. 20,000 and until the year 2016 when he was promoted to the position of Principal and salary increased to Ksh. 24,000.
10. The claimant testified that as his duties increased, in February 2020 his salary increased to Kshs. 27,000 and in January 2021 his salary was increased to Kshs. 47,000 until 13 April 2022 when he was rendered redundant. No terminal dues were paid. he reported the matter at the Malindi Labour Office who invited the parties to attend and the respondent was advised to pay terminal dues amounting to Kshs. 1,964,190 based on the number of years worked and the last wage paid.
11. The respondent has since refused to pay the terminal dues as required leading to the claimant going through distress and hardship, this has affected his livelihood since he is unable to secure new employment and efforts to settle the matter out of court and the respondent's advocate attending court and offering to have the matter settled amicably has not been honoured leading to the claimant incurring more costs. The claims made should be awarded.
12. As noted above, the respondent only entered appearance and no response was filed.
13. Without any response, the claim is not challenged in any material way. The claims made shall be assessed based on the pleadings, and the applicable law.
14. Under the law, Section 10(6) and (7) of the Employment Act, 2007 (the Act) the employer has the duty to file work records upon service of summons. Without the respondent filing any response to the claim, these work records are not supplied and the claimant's record is the only record and which the court shall take as the truth.
15. The claimant has given a chronology of events leading to his employment and termination thereof. he has attached payment statements indicating his wage was Kshs. 27,000. That he would be paid Kshs. 20,000 in cash. The Mpesa statements filed do not speak to the payment of Kshs. 20,000 in cash. The only payment of Kshs. 20,000 the claimant received from Shafira Bux was on 11 April 2022, it is single and does not establish a pattern that this was a regular payment over the months.
16. The written record shall be applied. The last wage paid was Kshs. 27,000.
17. The legal regime under the Act has changed the employment terrain in Kenya and an employer is no longer at liberty to terminate employment at will and is required to give reasons and ensure the due



process of the law. The Court of Appeal in addressing such matter in the case of *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR held that;

There can be no doubt that the Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination. The Act also provides for most of the procedures to be followed thus obviating reliance on the *Evidence Act* and the *Civil Procedure Act*/Rules. Finally, the remedies for breach set out under section 49 are also fairly onerous and generous to the employee. But all that accords with the main object of the Act as appears in the preamble:

“to declare and define the fundamental rights of employees, to provide basic conditions of employment of employees.”

18. The employer must give reasons leading to termination of employment and effectively give the employee a chance to be heard on any matter of misconduct or gross misconduct. Even in an issue of operational requirements leading to redundancy, the employer is required to give notice or payment *in lieu* thereof pursuant to Section 40 of the *Act*.
19. In this case, the claimant has addressed the twin issues of unfair termination of employment and that he was declared redundant. However, the letter terminating employment dated 13 April 2022 does not assign any reasons. There is nothing to suggest that the respondent closed its business leading to redundancy. The sheer negligence in assigning any reasons for termination of employment is in itself an unfair labour practice and looked at, lead to unfair termination of employment.
20. Such is not justified and does not meet the threshold of fair procedure and is contrary to section 45 of the *Act*.
21. The claimant served the respondent from the year 2011 based on his evidence. The unfair termination of his employment taken into account, he is entitled to payment of compensation based on his last wage of Kshs. 27,000 and a basis of 10 months thereof is hereby found appropriate and sufficient to address the unfairness and lack of due process and subjective fairness. This amount to Kshs. 270,000 in compensation.
22. The claimant is claiming underpayments. In the education sector and particularly private schools such as the respondent are not regulated. The claimant cannot equate himself with a teacher placed in his circumstances in a public school registered with the Teachers Service Commission and hence claim the wage payment thereof.
23. Without regulation of wages in the private schools sector, the claimant was entitled to a minimum wage and he was paid Kshs. 27,000 above such minimum wage as held in *Ignas Karingo Mghona & 4 other v Star of Hope International Foundation* [2016] eKLR. The Court stated that;

The Teachers in public service have their structures of wage adjustment. Teachers have the option of seeking employment in the private or public sectors. Once in the private sector, they are not guided by the structures in the public sector. They do not have a Trade Union which negotiates collectively. They are not covered under a specific wage order. They negotiate their own terms and conditions of employment with their Employers, and provided what they have agreed does not breach the minimum wage law set by the



Government across the industries, they cannot be heard to lament that what they are earning is too little. The two Claimants do not say they were paid below the general minimum wage; they allege they should have been earning a certain amount as Nursery School Teachers. They did not focus the attention of the Court on any specific wage instrument, affording them the higher rate they demand. It was submitted for the two Claimants that the Court should at the very least consider the two Teachers 'General Labourers' and find they were underpaid considering the rate availed to General Labourers under the Wage Order. The Court understood this to mean that the two Claimants were paid below the general wage floor, as General Labourers occupy the bottom of the pile. The Regulation of Wages [General] [Amendment] Order 2012, set the basic, minimum monthly wage for General Labourers on monthly contracts, in Mombasa, at Kshs. 8,579. Teachers are not 'General Labourers, but to answer their submission, they accepted and earned Kshs. 9,000 monthly, above the basic pay for General Labourers.

There is no underpayment.

24. With regard to the claim for severance pay, on the finding above that there was unfair termination of employment and not a redundancy, such payment is not due.
25. For the unfair termination of employment, this is addressed and compensation assigned.
26. Employment terminated without notice of hearing and pursuant to Section 35 of the Act, notice pay is due for a month's gross salary all at Kshs. 27,000.
27. For days worked up to 13 April 2022 the claimant is entitled to the same for his labour. The claim for payment of Kshs. 34,622 is based on the evidence that salary was Kshs. 47,000 but this was at Kshs. 27,000 per month and for 13 days, a sum of Kshs. 11,700.
28. The claimant has religiously followed up the payment of his terminal dues from the date his employment was terminated on 13 April 2022. He reported the matter to the labour office and the respondent has failed to pay as directed.
29. He was forced to file suit and has attended court as directed. He is entitled to costs which the court shall assess in terms of the discretion allowed under Section 12 of the Employment and Labour Relations Court Act, 2011. A reasonable sum of Kshs. 50,000 is hereby awarded as costs.
30. Accordingly, judgment is hereby entered for the claimant against the respondent in the following terms;
 - a. A declaration that employment terminated unfairly;
 - b. Compensation is hereby awarded at Kshs. 270,000;
 - c. Notice pay Kshs. 27,000;
 - d. Pay for days worked 11,700;
 - e. Costs awarded at Kshs. 50,000.
 - f. The respondent is hereby directed to pay the terminal dues outlined above within 30 days after which the same shall accrue interests at court rates from this date and until paid in full.

DELIVERED IN OPEN COURT AT MOMBASA THIS 29 DAY OF JUNE, 2023.

M. MBARŪ

JUDGE



In the presence of:

Court Assistant: Japhet

..... and

