



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT BUNGOMA**

**ELR CAUSE NO. 83 OF 2017**

*(Formerly KSM ELR NO. 3551 OF 2014)*

**JOHN WANJALA MUCHELE.....CLAIMANT**

**VERSUS**

**KENYA UNION OF POST PRIMARY TEACHERS.....RESPONDENT**

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

1. The Claimant filed a statement of claim dated 18<sup>th</sup> December 2014 seeking the following orders:-

- (a) Computation of his salary since employment.
- (b) Payment of the outstanding balance of the salary since employment with his dues and benefits.
- (c) Costs and interest
- (d) Any other order deemed fit to be granted by the Honourable court.

2. The Claimant in addition filed a verifying affidavit to the claim sworn on 18<sup>th</sup> December 2014, and his statement filed on 19<sup>th</sup> December 2014 and a list of documents dated 18<sup>th</sup> December 2014 with the bundle of documents. The Claimant further filed his supplementary statement dated 17<sup>th</sup> January 2019, witness statement of Wabolinga Wasike dated 16<sup>th</sup> January 2019, witness statement of Dr. Peter Khakina dated 16<sup>th</sup> January 2019 and supplementary list of documents dated 21<sup>st</sup> January 2019.

3. The Respondent entered appearance and filed Memorandum of defence dated 3<sup>rd</sup> January 2017. The Respondent further filed list of witnesses dated 25<sup>th</sup> September 2018 with witness statements of Augustine Kundu Luketelo and Japheth Wafula Machio all of same date.

4. The Claimant's case was first heard by Justice Nduma Nderi on the 29<sup>th</sup> November 2017 and ex parte judgement entered which was later set aside. On 29<sup>th</sup> January 2020 Justice Nduma Nderi heard the Claimant's case inter partes on the 29<sup>th</sup> January 2020 with 2 witnesses.

5. The court heard the Respondent 's case on the 27<sup>th</sup> March 2021 with 2 witnesses testifying.

6. The parties filed written submissions. The Claimant's written submissions are dated 30<sup>th</sup> November, 2021 filed by J.S. Khakula & Co. Advocates . The Respondents written submissions are dated 1<sup>st</sup> October, 2021 filed by J. O. Makali & Company Advocates.

**DETERMINATION.**

7. The Claimant seeks retained salaries amounting to the sum of Kshs. 2,653,586/- for 86 months upto December 2014 and unpaid salaries from January 2015 to date Kshs.2, 307,579/- total claim of kshs. 4,961,165/- as per his supplementary statement dated 17<sup>th</sup> January 2019.

8. The court noted the claim is dated 18<sup>th</sup> December 2014. There was no termination letter and the court takes the position that the filing of the instant case amounts to termination of employment by claimant by constructive dismissal. The Claimant did not plead for damages and thus the court leaves the issue out.

9. From the evidence on record, it was established as follows: -

a. That vide minutes of 31<sup>st</sup> October 2017 (exhibit 3 by Claimant) the Claimant was to be paid wages equivalent to 6% collection dues of the Respondent. This position was followed by letter of confirmation dated 31<sup>st</sup> October 2017 and signed by CW2 who was the Executive Secretary. RW2 Japheth Wafula the then Chairman confirmed on cross examination that the Kshs. 8000/- paid to Claimant were determined by KUPPET on basis of dues.

b. The Claimant testified that between 2007 to 12<sup>th</sup> January 2015 the branch was receiving Kshs.714,660.95/- per month from National office. He told the court he had been doing computation. The court did not find evidence of such amount as collected dues in the documents produced at the hearing. On cross examination he was referred to his exhibit 3 (minutes of 2007) and asked to read where he read 'monies were meagre after payment of salaries. They discussed figures received of kshs.80,000 per month'. The Claimant admitted he had not filed his computation in court.

c. CW2 was the Secretary to KUPPET and issued the Claimant with the confirmation letter stating his dues were to be based on 6% collection dues. He told the court that the Claimant was to be paid 6% of all monies received at the branch, That then the Board received 136-138,000/- per month and at that time the pay was about Kshs. 8,000/-. This was a witness of the Claimant and one who issued the confirmation letter.

d. The court takes the Respondent's monthly collections at Kshs. 138,000/- per month considering the minutes of 2007 reflected Kshs. 80,000/- CW2 having left in 2011. 6% of Kshs. 138,000/- comes to Kshs.8,280/-. As at time of leaving the Claimant admitted he was being paid Kshs.12,000 per month. The Claimant told the court the arrears sought was based on 6% wages difference with salary paid. Obviously, the salary he was receiving of Kshs. 12,000/- per month applying the collections of Kshs. 138,000/- as stated by CW2, was beyond the 6%.

e. In his statement the Claimant said he was sent on compulsory leave on 12<sup>th</sup> January 2015 and admitted he had no dues based on the kshs. 12,000/- salary. The Court infers that the Claimant by act of filing this Claim dated 18<sup>th</sup> December 2014 on the 19<sup>th</sup> December 2014, he was constructively dismissed as soon as he served this suit on the Respondent on the 1<sup>st</sup> January 2015 and was thus not entitled to salary effective 1<sup>st</sup> January 2015.

10. The Claimant has not claimed any damages for termination of employment. Parties are bound by their pleadings hence the court cannot award the remedies under Section 49 of the Employment Act. The court has found that the salary or wages paid to the Claimant of Kshs.12,000/- were beyond the 6% of collection dues of the Respondent as per the evidence of CW2 of Respondent's collection of Kshs. 138,000/- per month.

11. Consequently, the Claim is without merit and is dismissed. The court considered the circumstances of the case and the proceedings and finds that this is a case where each party should bear own costs in the case.

It is so ordered.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 23<sup>RD</sup> DAY OF FEBRUARY 2022.**

**J. W KELI,**

**JUDGE.**

**In The Presence Of :**

**Court Assistant : Brenda Wesonga**

**FOR CLAIMANT: J. S Khakula Advocate**

**FOR RESPONDENT:- Makali Advocate**