



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 326 OF 2016

BENSON PETER ACHIENG NYAWANDA.....CLAIMANT

VERSUS

MARY LUKWAGO

LYDIA GATERE

HELLEN OKEYO DORCAS OKEYO

(sued in their capacity as Board of Governors Josana Academy).....RESPONDENT

JUDGMENT

1. Benson Peter Achieng Nyawanda (Claimant) sued Mary Lukwago, Lydia Gatere, Hellen Okeyo and Dorcas Okeyo (the Respondents), alleging breach of contract (failure to terminal benefits).
2. The Respondents filed a Response on 9 March 2017, which prompted the Claimant to file a Reply to the Response on 23 May 2017.
3. On 1 November 2021, the Court fixed the Cause for hearing on 1 February 2022, and the Claimant was directed to serve a hearing notice.
4. According to an affidavit of service filed on 31 January 2022, the Claimant's advocate served a hearing notice upon the Respondents through email address mail.josanaacademy.ac.ke on 4 November 2021. Despite the service, the Respondents did not attend the hearing
5. The Cause was heard on 1 February 2022, when the Claimant testified.
6. The Claimant filed his submissions on 29 March 2022
7. The Court has considered the pleadings, evidence, and submissions.
8. The Respondents employed the Claimant as Head Teacher in 1993. On 1 October 2014, the Claimant gave notice of retirement, and upon receipt of the notice, the Respondents requested him to resign as a director of the company which was running the school.
9. The Claimant relinquished the directorship on 13 July 2015 and then handed over and requested payment of his terminal dues totalling Kshs 4,139,143/-.
10. The Respondents did not pay the dues, and the Claimant moved the Court on 10 November 2016.
11. The Respondents filed a general defence to the claims by the Claimant wherein it was contended that they were strangers to the claims or any relationship with the Claimant.
12. The Claimant's cause of action for terminal dues is contractual. The general law of employment does not provide for the payment of terminal dues, strictly speaking.
13. The Claimant did not place before the Court any contractual documents providing for the payment of terminal benefits (severance pay, service pay or pension).
14. In the submissions, the Claimant asserted that the Respondent's letter dated 22 November 2014 referenced *Handover Procedure* assured

him of the payment of terminal dues. A note attached to the letter indicated that the Respondent would commission the Accountant to process the Claimant's terminal dues after handing over.

15. The body of the letter itself provided:

Please find enclosed the response from the Founding Director Dorcas Oluoch-Okeyo, to your notice for retirement.

Also find attached the handover procedure.

Kindly let us meet in your office on Monday November 24, 2014 at 1030 am to effect the handover.

After the exercise we ask that you would serve the rest of your notice on leave to allow us prepare the office for the next occupant.

16. In the Court's view, the note attached to the handover letter does not constitute an enforceable contractual term or primary contract to warrant an award of terminal dues.

17. The Claimant also made a claim for accrued leave amounting to 239 days.

18. Section 28(4) of the Employment Act, 2007 circumscribes how many leave days can be carried forward. The Claimant did not place any evidence before the Court that the leave days were accrued or carried forward with the Respondents' approval or that he applied for leave and was denied.

19. The mere fact that the Respondents did not participate in the hearing does not mean that the claimant was excused from the burden of proving his case to the required evidential threshold.

20. The Court finds that the Claimant did not lay an evidential or contractual foundation for the remedies pleaded.

Conclusion and Orders

21. From the foregoing, the Court finds no merit in the Cause, and it is dismissed.

22. Costs in the cause.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 20TH DAY OF APRIL 2022.

RADIDO STEPHEN, MCIARB

JUDGE

APPEARANCES

FOR CLAIMANT OTIENO, YOGO, OJURO & CO. ADVOCATES

RESPONDENTS IN PERSON

COURT ASSISTANT CHRISPO AURA