



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 336 OF 2017**

**KEVIN OTIENO ONYANGO.....CLAIMANT**

**V**

**BOG LIFE CENTRE HIGH SCHOOL.....RESPONDENT**

**JUDGMENT**

1. Kevin Otieno Onyango (the Claimant) sued the Board of Governors of Life Centre High School on 25 July 2017, and he stated the Issue in Dispute as:

Unlawful summary dismissal, unfair termination and wrongful dismissal and withholding of the Claimant's dues under sections 43(1), 44(2), 45(1), (2) & (4)(a) & (b) and 25(1) & (2) of the Employment Act.

2. The Respondent filed a Response on 30 January 2018 denying that it unfairly terminated the Claimant's employment. In the alternative, it was contended that the Claimant was a volunteer.

3. The Cause was heard on 18 February 2020 and 8 February 2021. The Claimant, a Pastor and School Administrator with the Respondent, testified.

4. The Claimant filed his submissions on 16 April 2021 (should have been filed and served by 8 March 2021) in which it set the Issues for adjudication as:

- i. Whether the termination of the Claimant's employment was wrongful and unfair?
- ii. Whether the Claimant is entitled to special and general damages for unfair termination?

5. The Respondent filed its submissions on 18 May 2021 (should have been filed and served by 8 April 2021).

6. The Respondent identified the Issues for adjudication as:

- i. Whether or not the Claimant was engaged as an employee under a contract of service?
- ii. If the answer to (a) is in the affirmative, whether the Claimant deserted the employment or he was unfairly dismissed by the Respondent?
- iii. Whether the Claimant is entitled to the reliefs sought?

7. The Court has considered the pleadings, evidence and submissions and identified the Issues for determination as set out hereunder.

**Volunteer or employee?**

8. The Claimant testified that he was employed by the Respondent as the Principal upon the Respondent establishing a private school around January 2016.

9. To prove the employment relationship, the Claimant produced a copy of a contract dated 11 January 2016.

10. Under cross-examination, the Claimant admitted that he was a part-time student of Education at the Great Lakes University at the material time.
11. The Respondent, however, denied having a formal employment relationship with the Claimant.
12. Its witness testified that the Claimant had volunteered to teach at a school the church was establishing and that at the material time, the Claimant had been turned away from Odera Akango University for lack of school fees.
13. According to the witness, it was agreed that the Claimant would be paid a stipend of Kshs 20,000/- monthly.
14. The witness denied the authenticity of the contract produced by the Claimant on the basis that it was not signed.
15. Article 237 of the Constitution vests in the Teachers Service Commission the mandate of registering trained teachers.
16. Under section 23(2) of the Teachers Service Commission Act, no person is allowed to engage in teaching service unless registered by the Teachers Service Commission.
17. Without making any finding on the authenticity of the contract dated 11 January 2016 produced by the Claimant, the Court finds that the contract herein was void because the Claimant did not demonstrate that he had been registered by the Teachers Service Commission.
18. Having made the finding above, the Court can draw the inference and conclude that at most, the Claimant was a volunteer entitled to a monthly stipend of Kshs 20,000/-.

#### **Unfair termination of employment**

19. From the foregoing examination and findings on the nature of the relationship between the Claimant and the Respondent, a finding of unfair termination of the contract or repudiation of contract through desertion does not arise.

#### **Breach of contract**

20. The Claimant alleged breach of contract in respect to 11 months accrued leave, underpayments, accrued commuter allowance, accrued house allowance and overtime.
21. In terms of the contract, the Claimant did not provide an evidential basis for these entitlements either in the filed witness statement or during oral testimony.
22. Legally, the Claimant would not be entitled to these heads of the claim, which accrue to employees under a contract of service.

#### **Unpaid 3-months stipend**

24. The Claimant testified that by the time of separation, he was owed the equivalent of 3-months' stipend.
24. The Respondent's second witness conceded that the Respondent was willing to pay the arrears out of good heart.
25. The Court will allow this head of the claim.

#### **Conclusion and Orders**

26. The Court finds and declares:
  - i. The contract between the Claimant and Respondent for the Claimant to serve as a Principal or teacher was void.
  - ii. The Respondent was not in breach of contract in respect of accrued leave, underpayments, house allowance, commuter allowance and overtime.
  - iii. The Respondent owes the Claimant the equivalent of 3-months stipend.
27. The Claimant is awarded:
  - (i) 3-months stipend **Kshs 60,000/-**
28. The Claimant has only succeeded on one head of claim.
29. The parties filed their submissions long after agreed timelines. Each party to bear own costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 19<sup>TH</sup> DAY OF MAY 2021**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

**Appearances**

For Claimant Mr Mwamu instructed by Mwamu & Co. Advocates

For Respondent Mr Indimuli instructed by M.A. Ochanji-Opondo & Co. Advocates

Court Assistant Chrispo Aura