



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 45 OF 2014

JOHN ANDOLA WEYAMA.....CLAIMANT

VERSUS

NEHEMIAH INTERNATIONAL.....RESPONDENT

JUDGMENT

1. John Andola Weyama (the Claimant) was offered employment as a Spiritual Director/Pastor on or around 12 August 2011 by Nehemiah International (the Respondent).
2. On 5 March 2014, the Claimant lodged legal proceedings against the Respondent alleging wrongful/unlawful termination of employment and breach of contract.
3. The Respondent filed a Response on 10 September 2014, and the Claimant's evidence was taken on 19 December 2018 in the absence of the Respondent as it was not present or represented.
4. In the course of the Claimant's testimony, the Claimant sought to file an Amended Statement of Claim, and the Court directed that a formal application be filed within 21 days.
5. The Claimant filed a Motion on 21 January 2019, and the Court allowed the application on condition that the requisite fees were paid.
6. The hearing resumed on 29 July 2019 with the Respondent represented. The Claimant closed his case on the said day.
7. The Respondent's case was rescheduled to 16 December 2019. On the aforesaid date, the Respondent sought an adjournment which the Court declined.
8. The Court directed the parties to file and exchange submissions within defined timelines, but the parties did not comply. The Court extended the timelines, but again the parties did not comply.
9. The Claimant eventually filed his submissions on 30 November 2020.
10. When the Cause came up for mention on 2 February 2021, the Respondent was not present. Nevertheless, the Court directed it to file and serve submissions before 2 March 2021 with a mention set for 8 March 2021 to confirm compliance and give a judgment date.
11. On 8 March 2021, the internet failed, and the Court directed the Deputy Registrar to notify the parties that the judgment would be delivered on 23 June 2021. The delivery was rescheduled to today because the Court had other official engagements.
12. The Respondent's submissions were not on record.
13. The Court has considered the pleadings, evidence and submissions on record.

Claimant's legal representation

14. The Claimant's pleadings were filed by the firm of Otieno C.O. Ayayo & Co. Advocates.
15. On 6 September 2020, the Claimant filed a Notice to Act in Person, but on 7 October 2020, the firm of ROW Advocates LLP filed a Notice of Appointment of Advocates to come on record.

16. However, on 8 March 2021, the firm of Kiarie & Odera Advocates purported to file an affidavit of service in Court in which it was asserted that the firm was on record for the Claimant. There is no Notice of Change of Advocate on record from the firm.

17. Despite the affidavit of service, the Claimant's submissions were filed by the firm of Rogo, Okelloh, Wangari & Co. Advocates. Again, there is no Notice of change of Advocate.

Unfair termination of employment

18. The Claimant asserted that the Respondent terminated his employment through a letter dated 13 March 2013, and the ground given was *restructuring process and internal audit*. The effective date of termination was stated as 14 April 2014.

19. The termination of the Claimant's employment was involuntary on his part. It was a redundancy.

20. By virtue of section 40(1)(b) of the Employment Act, 2007, apart from giving the Claimant written notice, the Respondent was expected to notify the local labour officer of the decision.

21. The Respondent did not lead any evidence or call any witness to disclose whether the labour officer was notified of the redundancy.

22. The Court, therefore, finds that the termination of the Claimant's employment was unfair.

Salary in lieu of notice

23. The Claimant was given 1-month notice of termination and is therefore not entitled to pay in lieu of notice.

Compensation

24. The Claimant served the Respondent for about 2-years, and in consideration of the length of service, the Court is of the view that the equivalent of 2-months gross salary as compensation would be appropriate (gross pay in January 2013 was Kshs 24,827/-).

Breach of contract/statute

Service pay

25. The Claimant was contributing to the National Social Security Fund and is not eligible for *service pay* by dint of section 35(5) & (6) of the Employment Act, 2007.

26. The Court also notes that the copies of payslips filed by the Claimant indicate he was getting a *service payment* on a monthly basis.

Unremitted NSSF and NHIF deductions

27. The National Social Security Fund Act and the National Hospital Insurance Fund Act have clear mechanisms for addressing unremitted deductions. The Claimant should exhaust the statutory procedures.

Sick leave

28. The Claimant sought Kshs 22,400/- on account of unclaimed sick-leave. No supporting documents were produced in the Court to prove the head of this claim, and relief is declined.

Overtime

29. On account of overtime, the Claimant prayed for Kshs 32,000/- but he did lay an evidential foundation to this head of the claim in the witness statement or during oral testimony. The employment agreement contemplated varied work hours, including over the weekends and holidays.

30. In the Court's view, the mere recital of the averments in the Statement of Claim was not sufficient.

Accrued leave

31. The Claimant sought Kshs 28,269/- on account of accrued leave. An employee is entitled to at least 21-days annual leave on full pay.

32. The Respondent did not produce the Claimant's leave records, and in light of section 10(3) of the Employment Act, 2007, the Court will allow this head of the claim.

April 2013 salary

33.. The Claimant's employment was terminated effective 14 April 2013, and he is entitled as of right to earned wages up to that date.

34. Since the Claimant worked for half a month, this head of the claim is allowed in the sum of Kshs 12,413/- being half a month's salary.

August 2012 salary

35. The Claimant's testimony that he was not paid August 2012 salary amounting to Kshs 16,000/- was not rebutted, and the relief is allowed.

Airtime and travelling allowance

36. The contract provided that the Claimant would be paid a monthly airtime allowance of Kshs 3000/- and travelling allowance of Kshs 2000/-.

37. The Respondent did not file any records to show the same was paid, and the Court will allow the head of the claim.

Conclusion and Orders

38. From the foregoing, the Court finds and declares that the termination of the Claimant's employment was unfair and that the Respondent was in breach of contract/statute.

39. The Claimant is awarded:

- | | |
|---------------------------------|---------------|
| i. Compensation | Kshs 49,654/- |
| ii. Accrued leave | Kshs 28,269/- |
| iii. April 2013 salary | Kshs 21,000/- |
| iv. August 2012 salary | Kshs 16,000/- |
| v. Airtime/travelling allowance | Kshs 45,000/- |

TOTAL **Kshs 159,923/-**

40. Claimant is denied costs for the mix-up on representation.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 30TH DAY OF JUNE 2021.

RADIDO STEPHEN, MCI Arb

JUDGE

Appearances

For Claimant	ROW Advocates LLP
For Respondent	Maxwell O. Ogonda & Associates Advocates
Court Assistant	Chrispo Aura