



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT AT BUNGOMA

ELR CAUSE NO. 14 OF 2017

KENNEDY WAKOTOCLAIMANT

VERSUS

THE SECRETARY BOARD OF MANAGEMENT

CHEBUKWA SECONDARY SCHOOL.....RESPONDENT

AND

KENYA TERTIARY & SCHOOLS WORKERS

UNION – KETASWU.....INTERESTED PARTY

JUDGEMENT

1. The Claimant by Claim dated 19th July, 2017 and amended 30th August 2019 sought the following reliefs:-

- (a) A declaration that the indefinite suspension of the Claimant's services and/employment by the Respondent was unlawful unfair and/or illegal and amounts to constructive termination.
- (b) Issuance of a certificate of service.
- (c) Payment of the sum of money claimed under paragraph 7 above as damages from loss of employment amounting to kshs.4,155,164.00.
- (d) Costs and interest of the claim .

2. The Claimant also filed amended verifying affidavit sworn on the 30th August, 2019, amended list of witnesses dated 19th July, 2017 and amended 30th August 2019 and amended statement of claim dated 30th August 2019. The Claimant produced list of documents dated 19th July 2017.

3. The Respondent filed response to the statement of Claim dated 1st August 2017 and filed in court on the 4th September 2017. The Respondent filed in court on the 10th July 2019 witness statement of Paul Masika Wafula.

4. The parties appeared in court for first hearing on the 22nd September, 2021 when the Claimant presented their case and was cross examined by counsel for the Respondent. The Claimant was in person. The Claimant case was closed on that day.

5. On the 6th October 2021, the Respondent presented its case and their witness was cross examined by the Claimant.

The Claimant's case

6. The Claimant on oath adopted his statement dated 5th September 2019 as his evidence in examination in chief. He produced as his evidence the documents in the list dated 19th July 2017 and filed in court on the 21st July 2017 and prayed for grant of his claim as amended.

7. The Claimant was cross-examined by counsel for the Respondent Mr. Tarus, Senior State Counsel. The Claimant confirmed he had been employed as Accounts Clerk/bursar. He confirmed that he received letter of 12th May 2017 in which the Principal of the Respondent complained of his absence from duty. He confirmed receipt of letter dated 12th May 2017 complain of his absence in school when Bungoma County officers visited the school and they locked the office. The Claimant admitted he was invited for a meeting at the school on the 25th May 2016 with the Board of Management and he did not attend.

8. The Claimant confirmed he was invited to the Board of Management meeting for 1st August 2017. He said he did not attend but is aware his disciplinary conduct was discussed and the Board decided to dismiss him. He confirmed that his employer the BOM (Board of Management) had a legal right to dismiss him from work. The witness attention was drawn to paragraph 12 of the Claimant's witness statement dated 19th July 2017 and the Claimant admitted he did not produce evidence of membership to the union. He said the School Principal had said the school does not recognize any union.

9. On paragraph 7 of his amended claim the Claimant said he was not aware of time limit on claim for salary arrears. He further said he was an accountant by profession hence should be paid like other civil servants. He said court declined his request for order Principal to produce his certificates. That he had requested interested party to do so. No certificate was produced as prove of the profession .

10. On the claim for commuter allowance he said he had not produced the circular.

11. The Claimant further told the court that he had not stated his qualifications in the claim which he said are with employer. In re-examination he told the court he was employed as accounts Clerk/Bursar, that his documents were locked in the office and could not access, that is his dismissal was unlawful and the indictment. The Claimant said his amended claim is not contested and urged court to adopt. He relied on clause 5 of amended statement which gives particulars of the unlawfulness and illegality of the Respondent action.

12. Interested party Case

The interested party, Kenya Tertiary & Schools Workers Union "KETASWU" told the court that the Claimant was their member (Claimant's exhibit No. 17) and remitted dues. That the employer did not give pay slips. The interested party referred the court to the page 25 of the Claimant's documents being " Education (Board of Governors) Non-teaching staff) Regulations 1993 which provides that persons belong to a professional cadre and employed by the Board shall be employed on such terms and conditions of service similar to those recommended to equivalent posts in the Civil service and as per the applicable scheme of service". The interested party said he will file submissions on the same.

13. Respondent's case

The Respondent called as its witness Paul Masika (RW) who told the court on oath he was the Principal of the school of the Respondent the employer of the Claimant. RW adopted as his evidence in examination in chief his statement dated 19th June, 2019 . He produced Respondent's list of documents dated 1st August 2017 as Respondents exhibits 1-12. RW told the court that the Claimant appeared before the Board on the 1st August 2017 for discussion of allegation against him. That he was given opportunity to defend himself. That the Claimant told the Board that the case was already in court and he was under instructions from his advocate not to respond on any allegation against him. That the Claimant never said a word. That the Claimant was employed as Accounts Clerk and was dismissed from same position. That there was no document in the Claimant's file showing he belonged to a professional body.

14. RW told the court that during his employment the Claimant never raised issue of under payment. On housing allowance RW said housing allowance was paid and Claimant never complained that housing allowance was insufficient.

15. RW told the court that there was no letter for payment of Commuter Allowance to Claimant. RW was cross examined by Claimant. RW told the court that there was no communication to Claimant to be at school on 10th May 2017 and that the County Audit Office does not communicate when it will visit.

16. RW denied that Claimant responded to letter dated 10th May 2017 attaching treatment notes. RW told the court he had minutes to show the Auditors locked the Accounts office door on 10th May, 2017. RW said he did not have evidence that the Board allowed books to be audited outside the school on the 25th May 2017 and did not have evidence that the books left the school.

17. RW told the court after the door was locked it was not broken into. RW told the court when the door was locked by Auditors the Claimant was not informed as he was off air. RW on how the door having been locked the minutes of 25th May 2017 indicate to the BOM(Board of Management) the books had left for audit outside the school, he said the books are many.

18. RW confirmed that the Claimant did not access his office from the 11th to 22nd May. RW admitted the letter he wrote to Claimant of 22nd May 2017 ordering he leaves the school did not give reasons.

19. RW admitted the letter of 24th May 2017 inviting the Claimant to the school did not indicate he was to meet the BOM(Board of Management).

20. RW told the court that they did not have to give reasons to the Claimant in the letter of interdiction of 25th May 2017. RW told the court that BOM (Board of Management) manages the schools in answer as to whether investigations Committee was formed and further that the minutes of 25th May, 2017 the BOM (Board of Management) deliberated the school's accounts office and the minutes was the report. RW told the court the Claimant had no previous warnings. RW confirmed that the Claimant was to be paid ½ salary during the period

of interdiction and was not paid.

21. During cross examination by interested party RW told court there was no court case when Claimant appeared for hearing and on dismissal on 1st August 2017. RW told the court he was not aware of Union letter allegedly written to them after the interdiction of the Claimant and further said the letter was not stamped.

22. RW told the court they did not ignore the union. RW said he was not aware if the BOM (Board of Management) was equal to Civil Service and said they were governed by the Basic Education Act.

23. On Re-examination by counsel, RW confirmed it was the auditors who closed the office on the 10th May 2017 and not the school and when the office was locked the Claimant was not in the school.

24. RW confirmed that on 1st August 2017 when the Claimant appeared before the BOM (Board of Management) he did not talk and informed the Board the case was with the Lawyer . RW said they had not been served with any court order or pleadings.

25. RW told the court that all the time of the Claimant being invited for hearing the union knew that the Claimant had issues with the employer . The Board of Management is mandated to discipline employees and the process is exclusive to the Board of Management unless somebody who is not a member is invited.

26. RW told the court that the Board of Management did the disciplinary hearing contained in the minutes of 1st August 2017 and that it was not necessary to prepare a disciplinary report. RW said he relied on the Board of Management proceedings record.

27. RW told the court that the Claimant has not come to school for the ½ salary on interdiction. That the Claimant was the School's Accounts Clerk and not a member of any professional body.

DETERMINATION

28. The parties did not file agreed list of issues for determination. The court having carefully considered the pleadings and the submission is of the opinion that the following are the issues placed before it for determination:-

- (a) Whether the Claimant's termination of Service was lawful and fair.
- (b) Whether interdiction without ½ pay salary constituted unfair practices.
- (c) Whether the Claimant's Claim is time barred?
- (d) Whether the Claimant was entitled to the reliefs sought.

i. Whether the Claimant's termination of Service was lawful and fair.

29. On reasons for termination of employment Section 43 (2) of the Employment Act Provides:-“the reason or reasons for termination of a contract are the matters that the employer at the time of termination believes to have existed”. RW led evidence that the Claimant absconded duty on the 10th May 2017 when an audit of books exercise had been going on from 7th May 2017 and on 10th May 2017 the County Audit office found his office locked hence could not access the books for audit purpose (Claimant's exhibit No. 2) . The Claimant did not produce evidence in court to explain his absence from duty which act the law recognizes as a reason to terminate the employment. The Court finds that aspect of the process complied with for the process to be said to be fair being that the employer shall before terminating the employment of the employee summarily under Section 44 as was the case here, hear and consider any representation which the employee may give and the person if any chosen by the employee, explain to the employee in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or shop floor union representative of his choice during this explanation.

30. The Claimant was invited to the hearing by letter dated 25 July, 2017 (Respondent's exhibit No10). The Respondent produced the minutes of the proceedings before the Board of Management in court. The minutes of 1st August 2017 indicate that the charges were read to the officer, the Claimant herein, being inter *alia*:-

- a. Absenting himself from duty and therefore obstructing the County Audit Team from carrying out the assessment exercise.
- b. Maliciously removing a pad lock from the accounts office (page 18) of the Respondent's bundle documents.

The court from the questions of the interested party formed the opinion that the Union was aware or ought to have been aware of the proceedings from their member. The Claimant was explained the charges and chose not to respond. Evidence before the court provides substantial compliance of the provisions of section 41 of the Employment Act and hence the process of termination was lawful and fair. These were charges which did need investigations.

ii. On whether the interdiction without ½ pay of the Claimant by the Respondent constituted unfair practices.

31. The court recorded testimony of the RW to extend that the Claimant ought to have been paid ½ salary and that it was not paid. The

interdiction was for 2 months. The failure to pay ½ salary was unfair labour practice and violation of the Claimant's employment rights. The court finds in favour of the Claimant to be paid the ½ salary for the two months of interdiction. Calculation of the interdiction ½ salary as follows $20228 \times 2 \times \frac{1}{2} = 20,228/-$ **The claimant is awarded ½ salary for period of interdiction at Kshs. 20,228/-**

iii. On whether the Claimant's Claim is time barred.

The Respondent submits that Section 90 of the Employment Act, 2007 which regulates Limitation period in Employment matter provides as follows:- *'Notwithstanding the Provisions of Section 4 (1) of the Limitation Act Cap 22 No civil action or proceedings based or arising out of this Act or contract of service in general shall lie or be instituted unless it is commenced within three years next after the Act neglect or default complained or in the case of continuing injury or damages within twelve months next after the cessation thereof.'*

32. The Respondent submits that the Claimant's claim specifically for leave pay, salary under payment, commuter allowance and house allowance are statute time barred as per the provisions of Section 90 of one Employment Act 2007 and any claim that may succeed will only be limited to the last 3 years.

33. The interested party told the court he could file submissions under the Basic Education Act and on this issues I find nothing on this issue on its submissions.

34. The Claimant under paragraph 6 of this submissions relies on Section 48 of the Labour institutions Act No. 12 of 2007 inter alia that :-

'Notwithstanding anything contained in this Act or any written law-

(a) The minimum rules of remuneration or conducting of employment established under the wages order constitute a term of employment of any employer to whom the wages order apply and may not be varied by agreement. '

35. The Claimant does not submit on the provisions of Section 90 of the Employment Act and how it affects his claim for arrears. The court applying section 90 of the Employment Act then finds any claim before 3 years to the filing of claim to be time barred thus 1994 to 2014. The Claimant sought arrears on ground of not having been paid salary due to professional accountants. The Claimant was engaged as Accounts Clerk and not placed on formal job group. He did not produce evidence of membership to any relevant professional group. The Respondent distinguished the decision cited by the Claimant of this court sitting at *Nyeri ELR C NO. 168 of 2016 – Dadson Maina & 33 others vs Board of Management Nyeri primary school (2017) eKLR* . The Respondent submits unlike the instant case the Claimants therein were in various job groups. The decision is not binding on this court though persuasive.

36. The Respondent further submits that the Claimant claim to be paid under the DPM circulars of 2012 is not premised on any law, agreement with the Claimant, Employment contract or wages orders and relies on the case of *Kenya Union of Domestic Hotels, Educational Institutions, Hospitals and allied worker (Kudheihia) vs BOM Mji Mzuri Girls School (2019) Eklr* where the court rejected a similar claim on that basis.

37. The court nevertheless finds that the Claimant is entitled to minimum wage protection. The court examined the payment roll of July 2016 produced in the list of documents by Claimant dated 19th July 2017 (exhibit 007). The Claimant is number one on the payroll. His gross salary is indicated as Ksh. 20,228/- which the court finds is in compliance with minimum wage notice of the time. The claim for arrears based on under payment of salary is dismissed .

38. On the claim of arrears of commuter allowance the Claimant did not provide prove that this was a benefit under his terms of employment. The Respondent denied the Claimant was entitled to commuter allowance. The claim is not proved and is dismissed.

39. On the notice of pay, following summary dismissal under section 44 (2) of the Employment Act, the Respondent should have paid the Claimant notice pay of one month salary. The Claimant is granted 1 month notice pay of Kshs. 20,228/-.

40. On leave pay, the Respondent did not produce record on leave. The Claimant did not give reasons for not taking annual leave for the 23 years before. The limitation of time under Section 90 of the Employment Act bars the claim for more than 3 years prior to dismissal. The obligation to provide the record on leave of the Claimant lay with the employer who did not produce the record. This obligation is under Section 74(1) (f) of the Employment Act. Consequently the court awards the Claimant leave arrears of 63 days salary Kshs. 20,228 divide by 30 days x63 days total Kshs. 42,478.8/-.

41. The Claim for house allowance is disallowed as the same was paid as per terms of employment.

42. On the claim of gratuity for each year worked, the Claimant has not demonstrated the basis of the claim. Gratuity is not an automatic right due to the employee and it flows from the statute and terms of employment . The terms of service were not produced in court. The court looks into the statute. Section 35 (of the Employment Act) provides for service pay every year worked. However, the provision does not apply to the instant case as the employer was under the NSSF scheme and the payroll produced by Claimant (exhibit 7) indicates the NSSF employer contribution and the employee contribution. Statutory gratuity dues not then apply under section 35 (6) (d) of the said Act. The claim for gratuity is dismissed.

CONCLUSION DISPOSTION

The court found the dismissal of the Claimant from the employment of the Respondent lawful. The court also found the Claimant is entitled to terminal dues and awards as follows:-

1. $\frac{1}{2}$ salary payment for the period of interdiction of two months Kshs.20228 x 2 x $\frac{1}{2}$ = Kshs.20,228/-.

2. Payment of annual leave arrears for 3 years that is 63 days.

Award of kshs.42,478.81

3. Payment of notice pay of 1 month. The Claimant is awarded Kshs.20,228/-.

4. The amount in 1,2,&3 above subject to the statutory declarations.

5. The Claimant is awarded costs for the claim and interest on the award amounts at court rates for the date of judgement.

It is so ordered.

DATED, DELIVERED, SIGNED THIS 20TH DAY OF DEEMBER, 2021 AT BUNGOMA.

jkeli

J. W. KELI

JUDGE

READ IN OPEN COURT IN THE PRESENCE OF :-

COURT ASSISTANT : BRENDA WESONGA

CLAIMANT : KENNEDY WAKOTO KHAEMBA

RESPONDENT : ADWAR HB TARUS

INTERESTED PARTY: ABSENT – UNWELL