



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.148 OF 2014

KEFA ASIAGO OBWOGOCLAIMANT

VERSUS

SEVENTH DAY ADVENTIST CHURCH.....1ST RESPONDENT

BENJAMIN RANDA2ND RESPONDENT

JACINTA RANDA3RD RESPONDENT

JUDGEMENT

The claimant is a male adult. The 1st respondent is the registered owner or director of Nakuru Central Adventist Academy. The 2nd and 3rd respondents are the owners/lessee of the school, Nakuru Central Adventist Academy.

The claimant was employed by the respondents in January, 2013 as a teacher and then as the headmaster at a wage of Ksh.14,000 per month. There was no written contract.

The claimant received Ksh.5,000 at month end contrary to what had been agreed upon. He protested and the respondent promised to pay the difference of ksh.9,000. This situation persisted until June, 2013 when the claimant made another request but was paid ksh.5,500 only.

The due salary was not paid the claimant continued to demand for the same until 5th April, 2014 when he was ordered out of the premises. His wage arrears were not paid.

The claim is for the payment of the following;

- a) Notice pay Ksh.14,000;
- b) Wage for March,2014 ksh.14,000;
- c) Wage arrears from January, 2013 to May, 2013 4 months at 36,000;
- d) June, 2013 to February, 2014 9 months ksh.112,500; and
- e) Compensation for unfair termination of employment.

The claimant testified that upon employment by the respondents as a teacher and then as headmaster it was verbally agreed that he would be paid ksh.14,000 per month which was not honoured. He repeatedly demanded to be paid his full wages to no avail. On 4th April, 2014 he met the directors at the office for his wage arrears who refused to pay and caused him to be removed from the premises and later was denied access to the school.

The claimant also testified that he did not steal from the respondent as alleged in defence. The report to the police was done after he made demand for his owing wages. The claimant was arrested at Bondeni police station but there were no clear charges. The respondents were trying to intimidate him.

The defence is that the suit was filed in bad in law as *she* is not the managing director of Nakuru Adventist Academy as claimed and is a stranger to the claims made.

The claimant replied thereto on the grounds that he was employed by Benjamin Randa the husband to Jacinta Randa who were managing the school, Nakuru Adventist Academy. Jacinta Randa caused the arrest of the claimant upon a report at Bondeni Police station.

Benjamin Owino Randa testified in support of the defence that the claimant applied for a teaching position with the respondent and stated he was a P1 teacher but had no documents to support such qualifications. He was required to bring the same so as to be issued with a contract but he failed to attend.

The agreed salary was Ksh.5,000 per month. This was endorsed on the letter but these were part of the documents stolen from the respondent's office over the weekend before the claimant left his employment. There was a break-in at the office and many documents stolen which was reported to the police on 9th April, 2014. The claimant as the headmaster went missing and could not be reached causing a report to the police as the gate and doors had not been broken into save for the claimant's office and documents stolen. The respondents made effort to reach the claimant without success. A report was then made to the police after 4 days.

The claimant as the head teacher was the first suspect. He had the key to the main door and gate. From his cabinet several documents were found missing;

Salary books;

Arrears files;

Bank slips and

The claimant's contract.

These are listed with the police as missing and or stolen documents.

Mr Randa also testified that several parents had paid to the school in cash, the claimant collected the cash from 5 pupils but there were no receipts issued. This was reported to the police as these were the documents listed as missing. The respondent lost Ksh.4,900 collected by the claimant and without a receipt. The claimant had signed for his wages at Ksh.5,000. He deserted his employment on account of funds collected from parents and not receipted and the claims made that he was entitled to ksh.14,000 wages and that there was unfair termination of employment is without justification.

That the respondent had registered a few pupils, there was a feeding programme and could not afford to increase the fees but increased the claimant's wage by ksh.500 as a token of appreciation and not a wage increase. The claimant had accepted to be paid ksh.5,000 wages all along. He then absconded duty after the theft at the respondent's offices.

At the close of the hearing both parties filed written submissions.

The respondent has not filed any work records. The reason(s) is that there was a break-in at their offices and documents stolen and which included the claimant's work records. These matters were reported to the police and the claimant arrested as he was the only one with the keys to the subject cabinet.

The claimant confirmed that indeed he was arrested over the alleged theft at the respondent's offices.

Effectively there is no written contract of employment.

The claimant asserted that he was employed as a teacher and headmaster on a verbal promise to be paid ksh.14,000 per month. The respondents on the other hand assert that the claimant was to be issued with his contract upon submitting his P1 certificate which he failed to do and it was noted in his contract that he would be paid ksh.5,000 which was increased later by ksh.500 as there was a low pupil registration and could not afford to increase the wages.

The claimant testified that he was sent away on 4th April, 2014 when he demanded for his wage arrears.

The respondents asserts that the claimant absconded duty after the office break-in.

In is common cause the claimant was arrested following a report by the respondents following a break-in at the offices. This related to theft of documents in what was the claimant's office.

Whether the claimant was sent away by the respondent or he absconded duty, the fact of his arrest by the police at Bondeni police station following theft of goods at his office forms a good basis that there existed good cause that was valid and genuine for his employment to terminate in accordance with section 43(2) of the Employment Act, 2007.

In **Kenya Power & Lighting Company Limited versus Aggrey Lukorito Wasike [2017] eKLR** it was held that;

Under Section 43 of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he "genuinely believed to exist," causing him to terminate the employee's services. In the present case ...

And in the case of **John Kisaka Masoni versus Nzoia Sugar Co. Limited [2016] eKLR** the court held that where there exists a genuine reason(s) of misconduct or gross misconduct against the employee, the employer is justified in effecting summary dismissal from employment.

Accordingly, on the basis of the claimant's arrest following theft at his office, being unable to extricate himself, the respondent had a genuine reason to terminate employment. The fact of the claimant causing a demand for the payment of his terminal dues vide letter dated 8th April, 2014 a period of 4 days after his alleged termination of employment, and after his arrested over alleged theft at the respondent's offices forms a good basis that employment terminated at the instance and misconduct of the claimant.

There is no compensation or notice pay due in accordance with section 45(5) (b) of the Employment Act,2007 which requires the court to look at the conduct of the employees leading to the termination of employment.

The above addressed, the claimant worked without a written contract. The applicable scale is that of a general labourer as privately employed teachers are not regulated as held in **Ignas Karingo Mghona & 4 others versus Star of Hope International Foundations [2016] eKLR**. in the private sector schools there are no wage guidelines and the grievant was paid in accordance with the contract of employment and which under clause 3 (salary) there was provision for a consolidated wage. See **Jairus Ochieng Ojwang versus Bridge International Academies, Cause No.496 of 2017 (Nakuru)**.

For the period of employment, the claimant was entitled to payment of his wages applicable under the wage orders.

In January, 2013 the basic wage was Ksh.7,915.90 plus a house allowance of ksh.1,187 all being Ksh.9,102.25.

The claimant was paid ksh.5,000 per month from January until May, 2013 which is an underpayment of ksh.4,102.25 all being Ksh.16,409.25.

From June, 2013 to February, 2014 the claimant was paid ksh.5,500 with an underpayment of 45,216 based on the applicable orders, Regulation of Wages (General) (Amendment) Order, 2013 applicable from 1st May, 2013.

The total wage arrears due is ksh.61,625.25 inclusive of the house allowance due with the minimum wage.

Accordingly, judgement is hereby entered for the claimant against the respondent for wage arrears of Ksh.61,625.25 subject to the provisions of sections 49(2) and 19 of the Employment Act, 2007 allowing statutory deductions and any other lawful owing dues from the claimant to the respondent, the employer. Each party shall bear own costs.

Delivered at Nakuru this 6th day of February, 2020.

M. MBARU

JUDGE

In the presence of: