



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 24 OF 2013

WILLIAM ONYANGO.....CLAIMANT

VERSUS

AINSWORTH STREET PRIMARY

SCHOOL.....1st RESPONDENT

ABDI BIRE.....2nd RESPONDENT

JUDGMENT

1. William Onyango (Claimant) and acting in person sued Ainsworth Street Primary School and Abdi Bire (then Headmaster) (Respondents) on 9 January 2013 alleging breach of contract and wrongful termination of employment.
2. On 2 March 2017, the firm of *Gakoi Maina & Co. Advocates* came on record for the Claimant.
3. However, because the Claimant did not take steps to prosecute the Cause, it was dismissed by the Court on 2 October 2017.
4. The Claimant made an application to reinstate the Cause and the Court reinstated it on 14 June 2019. On 1 October 2019, the Claimant filed an *Amended Memorandum of Claim*.
5. When the Cause came up for hearing on 10 December 2019, the Respondent made an oral application seeking leave to file a *Response*. The Court allowed the application and directed the Respondents to file and serve a Response, witness statements and documents on or before 20 December 2019 ahead of hearing on 20 February 2020.
6. The *Response* was not filed.
7. When the Cause next came up for hearing on 20 February 2020, the Respondents indicated that they would not call any witness.
8. The Claimant testified and was cross-examined. His submissions were not on record by 20 March 2020 as directed and (by this morning). The Respondents submissions were filed electronically on 13 May 2020.
9. The Court has considered the pleadings, evidence and submissions on record.

Nature of employment

10. The Respondents contended in their submissions that the Claimant was a casual labourer from 1996 and that the contract was never converted into term contract by dint of operation of law (section 37(1) of the Employment Act, 2007) until separation in 2011.
11. The Claimant served the Respondents for more than 3 months (see section 37(1)(b) of the Act) and was not paid at the end of the day. It, therefore, cannot be as suggested by the Respondents that the contract was not converted into term-contract.
12. The Court finds that the Claimant was on term contract by the operation of the law.

Unfair termination of employment

13. The Claimant's case was that he was employed as a Caretaker on 6 January 1996 by the then Head of the school Mrs Olelo and that he was not issued with a contract of employment until 6 January 2005 (copy produced). The contract was subject to yearly renewal.

14. On the circumstances leading to the separation, the Claimant testified that upon the coming on board in 2011 of a new Headmaster (Mr. Dire), his salary started delaying and that when the school was closed for August 2011 holidays, he was directed not to report back when the school re-opened because there was no money to pay his remuneration.

15. The Claimant stated that his attempts to be paid his terminal dues were not successful and therefore he made a complaint to a Union but attempts to settle did not succeed.

16. The Respondents did not lead any evidence to controvert/rebut the Claimant's testimony and the Court finds that the termination of the Claimant's employment was involuntary on his part.

17. The separation, the Court finds was on account of operational reasons, and therefore amounted to a redundancy.

18. By virtue of section 40(1)(b) of the Employment Act, 2007, the Respondents should have given the Claimant written notice 30 days in advance.

19. The Claimant was not given a notice as envisaged by the section or under section 35(1)(c) of the Employment Act, 2007 and the Court in the event finds that the termination of the Claimant's employment on account of redundancy was therefore unfair.

Severance pay

20. The Claimant was entitled to *severance pay*, and he quantified the amount as Kshs 82,113/-, a computation the Respondents did not challenge.

21. However, in the submissions, the Respondents computed severance pay as Kshs 53,475/-.

22. The Claimant served the Respondents for about 15 years and in terms of section 40(1)(f) of the Employment Act, 2007 would be entitled to Kshs 61,701/- as severance pay based on the Kshs 7,130/- being the last salary.

Pay in lieu of notice

23. Pursuant to section 40(1)(f), an employee whose position is declared redundant is entitled to a 1-month salary in lieu of notice and the Court will allow the same in the sum of Kshs 7,130/- instead of the 4-months which was sought by the Claimant. The Respondents admitted the same in the submissions.

Compensation

24. The factors the Court should consider in making an award of compensation are set out in section 49(4) of the Employment Act, 2007.

25. The factors include the value of severance payable by law and any other payments.

26. Since the Court has awarded *severance pay*, it will not award compensation because of the nature of the School being a public school with limited public funds.

Salary for August 2011

27. The Respondents did not produce any records to show whether the Claimant was paid his wages for August 2011.

28. The Court allows the head of the claim in the sum of Kshs 7,130/-.

Overtime

29. On account of overtime, the Claimant made a plea for Kshs 407,340/-.

30. Apart from stating that he worked from 6.45 am to 6.00 pm, the Claimant did not disclose the formula used to arrive at the sum claimed or the period or number of hours worked as overtime. Relief is declined.

Underpayments

31. Underpayment of wages can result from payment of wages below the prescribed minimum wages or contractually agreed rates.

32. The Claimant did not produce any evidence on prescribed minimum wages applicable to primary schools, and the Court finds this head of the claim was not proved to the required standard.

Conclusion and Orders

33. The Court finds and declares that the termination of the Claimant's employment for operational requirements was unfair and awards him

(i) Severance pay Kshs 61,701/-

(ii) August 2011 wages Kshs 7,130/-

(iii) Pay in lieu of notice Kshs 7,130/-

TOTAL Kshs 75,961/-

34. The other reliefs are declined/dismissed.

35. The Claimant is denied costs for failing to file/serve submissions.

Delivered through video/email, dated and signed in Nairobi on this 15th day of May 2020.

Radido Stephen

Judge

Appearances

For Claimant Ms. Ochogo instructed by Gakoi Maina & Co. Advocates

For Respondents Ms. Wangeci, State Counsel, Office of the Attorney General

Court Assistant Judy Maina