



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.260 OF 2017

AMOS OTIENO KASIMBA CLAIMANT

VERSUS

BOARD OF MANAGEMENT

BAHATI DIVISION ACADEMY RESPONDENT

JUDGEMENT

The claim is that in April, 2009 the claimant was employed by the respondent as a graded artisan at Ksh.600 per day and worked at this rate until January, 2014 when payments were made on monthly basis. Work was from 8am to 5pm from Monday to Saturday.

The claim is that from January, 2014 the respondent started paying the claimant Ksh.15,000 per month. There were occasional pay slips issued.

The claim is that on 1st February, 2017 the director Mr Joseph Kiuna informed the claimant that business was low as the students in the school had reduced and his work had to stop. The claimant had saved some money at ksh.1,500 per month starting 8th January, 2011 to 24th December, 2011 and such savings continued in the year 2012 to December, 2015 all ksh.88,000;

Ksh.93,000 in the year 2012;

Ksh.104,000 in the year 2013;

Ksh.96,000 in the year 2015'

Total ksh.477,000.

The respondent gave the claimant some money in February, 2015 a cheque of ksh.10,000 which bounced and the claimant was charged ksh.1,000. Total claim being Ksh.478,000.

Employment was terminated due to reduced work and failure by students to pay school fees. The claimant used to be paid his dues and savings and be able to relocate from the school. On 22nd January, 2016 the claimant was paid Ksh.37,250.

From the total dues owing at ksh.478,000 the claimant would pay school fees and take loans from the respondent. The claimant had been advanced ksh.60,000 and ksh.20,000 all ksh.80,000 by the respondent.

In December, 2015 the claimant paid Ksh.236,875 in school fees plus loan ksh.80,000 all ksh.316,875 and which was subtracted from the total due at ksh.478,000 and a balance of ksh.161,125. From the paid dues of Ksh.37,000 the balance is ksh.123,875.

The claimant was paid ksh.19,500 by cheque on 23rd March, 2017 leaving a balance of ksh.104,375.

Upon termination of employment, the claimant was directed to vacate the allocated housing by the respondent. The claimant was allocated a house but would pay rent from his wages. There was deduction of electricity.

In the year 2016 the claimant applied for annual leave but he was only given two weeks off days instead. No other terminal dues were paid despite the redundancy provisions under section 40 of the Employment Act which resulted in unfair and unlawful termination of employment.

The claimant is seeking for payment in lieu of notice; 9 years leave pay; payment for service for 7 years; a refund of ksh.104,375 and compensation for unfair termination of employment;

- a) Notice pay at ksh.15,600;
- b) Annual leave ksh.109,450;
- c) Housing allowance refund ksh.87,600;
- d) Severance pay ksh.54,600;
- e) house allowances claims Ksh.217,620; and
- f) Costs.

The claimant testified that in the year 2009 he was employed by the respondent in construction work and paid weekly at the rate of ksh.600 per day. There was no written contract issued and operated as a general worker. In a month he would earn ksh.15,000. The claimant worked until 1st February, 2017 when the school director called him with information that there was reduced work and his services were no longer required. There was no prior notice or payment of terminal dues.

The claimant also testified that on 5th July, 2016 he applied for 63 days of his annual leave but was only allowed 2 weeks off.

He was accommodated in the school but rent deducted from his wages at ksh.1,200 per month and he paid for electricity.

The claimant also testified that he was living with his wife and children who attended the respondent's school and following termination of employment the whole family was affected.

The defence that the claimant was a casual employee is not correct as for 7.9 years the claimant remained at the service of the respondent. his wages were paid monthly from the year 2012 to 2017. He was not an independent contractor as alleged. The alleged payments made for school fees related to a refund of the savings he had with the respondent.

The claimant also testified that initially he worked for the respondent as a casual employee but in the year 2012 he became a full time employee paid monthly. As an employee he was allowed a loan of Ksh.60,000 and 20,000. There was no contract for employment of for the facilities given by the respondent.

The defence is that in the year 2009 they employed the claimant as an independent contractor when constructing its school at a weekly pay on Saturday and but without defined work hours as alleged since he would be paid for completed work. The claims that there was change in payments from the year 2015 is denied. The claimant was never issued with a letter of employment since he was not one.

The defence is also that in the year 2009 the respondent was constructing a school at Bahati Division secondary School when they employed casual workers including the claimant and which completed in the year 2012. The claimant pleaded to be retained and on goodwill he was appointed as an independent contractor and would be called when repair work was needed.

There was no saving account for the claimant held by the respondent. the claimant had been advanced a loan facility of Ksh.60,000 for expenses incurred by his children at the school. There was an agreement to balance off the loan and the sum of ksh.19,000 was paid to him by cheque.

As an independent contractor the claimant did not take annual leave and the claims made should be dismissed with costs.

No witness was called.

There were no records filed.

Both parties filed written submissions.

The defence is that the claimant was an independent contractor and not an employee of the respondent save that initially from the year 2009 to 2012 the claimant was a casual employee.

As noted above, the respondent did not call any evidence. the claimant's case is not controverted in any material way.

The claimant submitted part of his work records and which included payment statements. In a given statement for July, 2016 the claimant was paid by the respondent a basic wage of ksh.15,000 less statutory deductions of PAYE, NSSF and NHIF, rent and power. These payment statements are replicated in the same format with payment of a basic wage less statutory deduction and which include that of pay as you earn (PAYE).

The claimant also applied for 63 leave days and was only allowed two weeks. This evidence was not challenged.

On whether the claimant was an employee or an independent contractor, in the case of **Fredrick Byakika versus Mutiso Menezes International Unlimited [2016] eKLR** the court that;

On the question whether the Claimant was an employee, the Employment Act section 2 define who an employee is. Such definition sets clarity with regard to the payment of salary or wage. Any employee is thus paid a wage or salary. However, even where a salary or wage is paid, where parties have reduced the terms and conditions regulating the relationship into writing, such is to be given importance with reference as such form the basis and intentions of such parties. In this case, the letter of appointment issued to the claimant, he accepted it on 26th July 2014. Such letter spelt out the terms and conditions of engagement between the parties. The Claimant was appointed as a Resident Engineer for a project in Uganda; he was appointed as a Consultant and was required to be part of the Project Consultancy Team. Further, the work hours were to be in accordance with the project programme Schedule but would go beyond such scheduled time at no extra remuneration. Of paramount importance was the mode of payment – monthly gross remuneration was \$5,260.00 upon issuance of an invoice and subject to withholding tax at 5%. [underline addeded].

In **Kenya Hotel & Allied Workers union versus Alfajiri Villas [2014] eKLR**. The Court analysed the difference between an employee under the Employment Act and an independent consultant thus;

....a true independent contractor are that the contractor will be a registered taxpayer, will work his own hours, runs his own businesses, will be free to carry out work for more than one employer at the same time, will invoice the employer each month for his services and will be paid accordingly and will not be subject to usual 'employment' matters such as the deduction of PAYE, will not get annual leave, sick leave ...

In this case, the claimant was paid a wage as against a fee due to an independent contractor. There were statutory deductions unlike an independent contractor. He was issued with payment statement and allowed off time when he had applied for annual leave unlike the relationship with an independent contractor.

The court finds the claimant was the employee of the respondent.

On the claimant's evidence, his employment started on causal terms until the year 2012 when he became a full time employee. His evidence is supported by the respondent in the filed statement of response that initially there was construction work going on until the year 2012 when they laid off causal employees and took in the claimant. He was accommodated in the school and rent deducted from his wages.

Employment of the claimant is therefore from January, 2012 to 1st February, 2017.

Where there is reduced work and the employer is forced to lay off its employees this is allowed under the provisions of section 40 of the Employment Act, 2007 (the Act) which regulate redundancies. The claimant testified that he was called and informed of reduced work and which applied immediately on 1st February, 2017.

The claimant had no written contract. He testified that he was a general worker and therefore general Wage Orders apply. The payment of Ksh.15,000 per month from the year 2012 to 1st February, 2017 was over and above the basic minimum wage for a general worker.

Under section 40 of the Act, upon a redundancy, the employer is required to issue notice or pay in lieu of such notice. all due annual leave days not taken should be paid in cash and a severance pay at least for 15 days for every full year served.

On the claim for notice pay, such is due at one month gross wage of Ksh.15,000 as the claimant was under oral contract for a general employee.

The claim from annual leave allowance is due under the provisions of section 28 of the Act at 21 days each year. From January, 2012 to 1st February, 2017 the claimant served as a general worker for 5 years. at a wage of ksh.15,000 the due annual leave pay is Ksh.60,576.90.

On the claim for house allowance refund and house allowance claims, the claimant was accommodated by the respondent. his wage of ksh.15,000 per month was over and above the minimum wage. his payment of ksh.1,200 rent each month, even where reduced to make the wage payable at ksh.13,800 per month, such wage is over and above the allowed minimum. To allow these claims would amount to unjust enrichment.

Severance pay is due upon a redundancy. For the 5 full years of full time employment with the respondent, the claimant is entitled to 15 days' pay for every year served all at ksh.37,500 in severance pay.

The claimant has also outlined his claims of Ksh.104,375 from the respondent following his wage savings from the year 2012 to the year 2016, the repayments made and deductions of what he owed with regard to loan facilities and for school fees for his children and the balance outstanding. The court finds no defence in this regard. The averments in defence that the claimant was paying for services rendered to his children at the respondent school is without any evidence. accordingly the claim for ksh.104,375 is found justified and is due.

On the claim for payment of compensation for unfair termination of employment, the claimant admitted there was a redundancy. He was called and informed of this fact. The lapse in issuing notice is above redressed with notice pay. As there was a valid reason leading to termination of employment, compensation is not due.

Accordingly, judgement is hereby entered for the claimant in the following terms;

- a) Notice pay awarded at ksh.15,000;
- b) Leave pay ksh.60,576.90;
- c) Severance pay ksh.37,500;
- d) Owed savings of salary ksh.104,375; and
- e) Costs of the suit.

Dated and delivered electronically this 25th June, 2020.

M. MBARU

JUDGE