



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1865 OF 2016

GEOFFREY ONGERI ONDIMU.....CLAIMANT

-VERSUS-

BEVERLY SHOOL OF KENYA LIMITED.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 24th July, 2020)

JUDGMENT

The claimant filed the memorandum of claim on 09.09.2016 through Mudeshi Muhanda and Company Advocates. The claimant prayed for judgment against the respondent for:

- a) Salary up to June 2016 Kshs. 18, 200.00.
- b) Salary in lieu of notice Kshs. 42, 000.00.
- c) Money remitted to Octagon Pension Scheme as at May 2016 Kshs. 48, 480.00.
- d) Money remitted to E-Kenya Co-operative Society as at May 2016 Kshs. 10,000.00.
- e) Service pay Kshs. 63, 000.00.
- f) Damages for unfair termination equivalent to 1 year's salary Kshs. 504, 000.00.
- g) Total claim Kshs. 685, 680.00.
- h) Certificate of service.
- i) Costs of the suit plus interest thereon.
- j) Any other relief as the Court may deem just.

The claimant has exhibited the letter dated 01.04.2013 by which he says the respondent employed him as a Senior School Teacher to teach Kiswahili, History and Government and Geography and to perform other duties from time to time. He was to be provided housing at the school and paid net salary of Kshs. 38,000.00 with 30 days leave and NHIF contribution. He served the probationary period of three months successfully and was confirmed in appointment by the respondent's letter dated 01.10.2014. Terms of service remained per original letter of appointment.

By the letter dated 10.06.2016 titled "EXPIRY OF CONTRACT" the respondent referred to the letter of employment dated 01.06.2014 whose clause 2 stated that the term will run from 01.06.2014 to 31.05.2016 and that the renewal shall be at the discretion of the respondent. The letter notified the claimant that his contract had lapsed and would not be renewed. He was to handover and report to the head office in Nairobi for calculation of his final dues. The claimant's case is that he never signed the letter dated 01.06.2014 as referred to in the respondent's letter of 10.06.2016 on expiry of contract. He further pleads that even though he may have signed a contract on 01.06.2014 it could not have been terminated in the manner it was done because by 13.06.2016, it was presumed that the parties had entered into a new contract. Further deductions were made to the pension scheme but no remittances were made. Further deductions were made from his salary to the Co-operative society whose existence the claimant did not know about.

The respondent filed the response to the claim on 14.10.2016 through Farrah Munoko & Company Advocates. The respondent prayed that

the memorandum of claim be dismissed with costs as it amounted to waste of judicial time. It was pleaded for the respondent as follows:

a) The respondent admitted employing the claimant as a Senior School Teacher by the letter dated 01.04.2013 and the last monthly pay was Kshs. 40,000.00 and not Kshs.42,000,00 as alleged for the claimant. The letter of appointment constituted the contract of service but the respondent was at liberty to issue further letters detailing terms of service. During service the claimant frequently obtained permission of absence to attend to personal matters.

b) On 01.06.2014 the respondent issued the claimant a substantive contract of service setting out the terms and conditions of service and the duration of service. The claimant signed the contract in acceptance. The respondent has exhibited the letter dated 01.06.2014 remuneration is Kshs. 40, 000.00 per month subject to statutory deductions The contract states that it was running from 01.06.2014 to 31.05.2016. the renewal was at the respondent's discretion. The claimant signed the contract on 01.06.2014. the respondent states that there was no legitimate expectation on the part of the claimant that the contract would be renewed. The contract of service lapsed when the agreed term ended.

c) The claimant was a member of the pension scheme for less than one year and is entitled to his contribution at Kshs. 24, 240.00 which the respondent undertook to pay after approval by the respondent's Board. The respondent admitted it was liable to pay salary up to 13.06.2016 as prayed for at Kshs. 18, 200.00.

The claimant testified to support his case. The respondent did not call avail its witness on the dated scheduled for the hearing and the respondent's case was closed to be decided on the basis of the material on record and final submissions. The claimant filed the final submissions but the respondent failed to do so. The Court has considered the material on record and makes findings as follows.

1) There is no dispute that the respondent employed the claimant as Senior School Teacher as pleaded by both parties. As per the exhibited pay slips and last contract signed, the monthly pay was Kshs.40, 000.00.

2) The Court finds that parties are bound by their own contracts and there is no reason to doubt that the claimant signed the letter of employment dated 01.06.2014. Under that letter the contract of service was running from 01.06.2014 to 31.05.2016. the Court returns that the contract of service lapsed by effluxion of time. The claimant had no legitimate expectation that the same would be renewed because the parties agreed that renewal would be in the respondent's sole discretion and the evidence is that the respondent never exercised that discretion to renew. The Court finds that the claimant's presumption that the contract had been renewed was lifted when the letter on expiry was served. The Court therefore returns that the alleged unfair termination has not been established at all. The Court further finds that the respondent was entitled to vary the terms of service in consultation with the claimant per section 10(5) of the Employment Act, 2007 and in the present case the claimant signed to accept the new contract. The Court finds that it was misconceived for the claimant to urge that the terms in the initial contract continued to apply after he had accepted the new and last contract he had signed.

3) The claimant has agreed to pay until 13.06.2016 being **Kshs. 18, 200.00** which is hereby awarded by the Court accordingly. It is clear that as at that date the claimant had not served for a month and the Court cannot infer a month to month contract within section 35 of the Employment Act, 2007. Thus the claim for a one-month salary in lieu of termination notice will fail.

4) There is no doubt that the claimant made contributions to the Cooperative Society. However, as urged for the respondent, the Society was an autonomous person in law and the claimant should be able to pursue his refund from the Society. It is not the claimant's case that the deduction and remission made to the Society was without his knowledge or that it was without his consent. He was a member of the Society and deductions and remissions from his salary were made to the Society by the respondent per the claimant's instructions. The prayer in that regard will fail.

5) As the claimant was a member of the NSSF, service pay as claimed will fail in view of the provisions of section 35 of the Act. In any event the claimant further admits that he was also a member of another pension scheme. If NSSF was not remitted the claimant is at liberty to pursue the same in accordance with the relevant statutory provisions.

6) The respondent admits that the claimant is entitled to his pension contribution Kshs.24, 240.00. The claimant's evidence that the respondent was to equally contribute Kshs,24, 240.00 over the period in issue has not been rebutted by the respondent. In the circumstances the Court returns that the claimant has established on a balance of probability that he is entitled to the **Kshs,48, 480.00** in pension contributions as claimed.

7) The Court returns that it is not in dispute that the claimant is entitled to the certificate of service.

8) As the claimant has substantially succeeded in his claims the respondent will pay partial costs of the suit fixed at **Kshs.40,000.00**. While making that award the Court has considered that the respondent admitted part of the claims but failed to perfect the admission by effecting the relevant payment.

In conclusion judgment is hereby entered for the claimant against the respondent for:

1) Payment of **Kshs. 106,680.00** by 01.12.2020 failing interest to be payable thereon at Court rates from the dated of this judgment till the date of full payment.

2) The respondent to deliver the claimant's certificate of service in 30 days from the date of this judgment.

3) In view of the prevailing Covid 19 situation there be stay of execution herein until 01.12.2020.

Signed, dated and delivered by the court at Nairobi this Friday, 24th July, 2020.

BYRAM ONGAYA

JUDGE