



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.495 OF 2017

MOSES OCHIENG OWISO.....CLAIMANT

VERSUS

BRIDGE INTERNATIONAL ACADEMIES LTDRESPONDENT

JUDGEMENT

On 19th July, 2018 both parties attended court for hearing directions. The respondent was given time to file defence and work records and a hearing date allocated for 21st January, 2019.

On the due date, the respondent had filed the defence and work records but failed to attend. The claimant was heard on his case.

Claim

The claimant was employed by the respondent on 11th August, 2011 as a Teacher and then promoted as Academy manager on 16th December, 2013. The claimant was placed at the same position as a general clerk but was underpaid in his monthly salaries and upon promotion he was in a position similar to a care taker and was therefore underpaid.

The claimant was not paid a house allowances for the duration of his employment with the respondent.

The claimant made several requests to the respondent to have his salary reviewed, there was a minimal increase but below the wage guidelines. The claimant felt demoralised by the low pay and therefore opted to resign from his employment with the respondent on 1st February, 2017 and by giving 30 days' notice. At the end of such notice the claimant was only paid the due salary and not his terminal dues owing.

The claimant is seeking for the payment of underpayment amounting to Ksh.366, 681.50.

The claimant testified in support of his claim and on the grounds that he worked diligently for the respondent when he commenced his employment as a teacher at a wage of Ksh.5, 400.00. Upon promotion to the academy manger the claimant was paid a wage of ksh.7, 400.00 as basic pay and without the due house allowances. The roles undertaken were that of taking care of the respondent schools, supervising teachers, students and the overall caretaking of the institution. Such duties are similar to those of a caretaker and the applicable wage orders were not properly applied.

Defence

In response the respondent's case is that the claimant was employed as a teacher and then as the academy manager and issued with a written contract. A house allowances was not payable as a separate item. The claimant made several requests for the review of his salary which the respondent did.

The defence e is also that the claimant resigned for his employment on his own volition and issued notice in accordance with section 35 of the Employment Act, 2007. The claims made with regard to underpayment as without merit and should be dismissed.

Resignation from employment by an employee who feels frustrated by the actions of an employer is allowed as a justified and legitimate mode of terminating employment. However where such resignation is dictated upon an employee due to the conduct of employer, putting he employee under intolerable conditions of work, such can only be redressed by the court upon pleading and claim under constructive dismissal.

In the case of **Lear Shighadi Sinoya versus Avtech Systems Limited [2017] eKLR** the court held as follows;

... [in] constructive dismissal, this is a case where an employee is placed by the employer under intolerable conditions forcing her to resign from employment. The duty is upon the employee to demonstrate such intolerable circumstances and conditions for the court to make a finding that indeed, placed under such conditions, the employee was justified in tendering resignation. Such a claim must be pleaded and evidence advanced to this effect.

In this case, the claimant has not pleaded such matter as constructive dismissal, his evidence is premised on facts that when his salary review requests were declined he opted to resign and he issued notice. On this basis, employment terminated by the option of the claimant.

In the education sector, there are no wage regulations for wages and in this regard, the claimant cannot equate his employment to that of a clerk or caretaker as his contract was for a specific position and for which he was paid a consolidated salary.

Despite there being no evidence called by the respondent, on the pleadings, applicable law, the claims fail. No costs shall be awarded.

In this regard, the claim is found without merit and hereby dismissed. Each party shall bear own costs.

Delivered at Nakuru this 7th day of February, 2019.

M. MBARU JUDGE

In the presence of: