



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

SUIT NO. 14 OF 2018

(Formerly Nyeri ELRC Cause No. 425 of 2017)

JOSEPH MBAE MWAMBBA.....CLAIMANT

VERSUS

THE DIOCESE OF MERU ST. ALOYSIUS DAY

& BOARDING PRIMARY SCHOOL.....1ST RESPONDENT

BISHOP SALESIUS MUGAMBI.....2ND RESPONDENT

FATHER ANDREW BUNDI.....3RD RESPONDENT

JUDGMENT

1. The Claimant sued the 3 Respondents (initially 4 in number but the 4th Respondent passed away and the suit against him was withdrawn by the Claimant) seeking redress for the alleged unfair and unlawful termination of his employment. He averred that he was employed by the Diocese of Meru as an untrained teacher from 1993 before he was trained as a teacher at Igoji Teachers College. He averred that he was re-employed in 2001 and served as a headteacher until his dismissal by the Respondents. He stated that he earned Kshs. 14,000/- a month and that because he was not housed by the Respondents nor paid house allowance he was entitled to recover the same from the Respondents for the entire duration of his service. He sought severance pay for 16 years of service – Kshs. 112,000/-, wages erroneously deducted – Kshs. 156,000/-, compensation for the dismissal – Kshs. 168,000/-, house allowance for 162 months (13.5 years), costs of the suit plus interest.

2. The Respondent filed a defence in which it averred that the Claimant failed to perform well and was suspended on 6th February 2017 but he left and rushed to the Labour Office. He sought calculation of his dues which was done and he received a sum of Kshs. 246,550/- after deductions from the original sum of Kshs. 472,400/-. The Respondents averred that he is not entitled to any other sum as the sum was calculated and approved by the Labour Officer. The Respondents assert that the Claimant was not dismissed but that he voluntarily left the Respondents service and the suit should therefore be dismissed with costs.

3. The Claimant testified as did the Respondents witnesses Dedan Maota Kaaria and Fr. Andrew Bundi the 3rd Respondent. The Claimant was categorical that the Respondent unfairly dismissed him and failed to pay him his terminal dues which included his unpaid house allowance, severance pay and compensation. The Respondents witnesses on their part held that the Claimant was not dismissed from service and that he was indeed paid his dues and therefore was not entitled to any remedy.

4. The parties were to file submissions and this was done by the Claimant on 18th December 2018 and the file forwarded to me in late January 2019 to pen the judgment. The Respondent filed submissions on 19th December 2018. The Claimant framed 4 issues for determination – (i) whether the Claimant was an employee of the Respondents, (ii) whether the Respondent unfairly and unlawfully terminated the services of the Claimant, (iii) whether the Respondents paid the Claimant his terminal dues and (iv) whether the Respondents provided the Claimant with an itemized payslip. The Respondent had 3 issues for determination which were, (i) whether the Claimant's services were terminated by the Respondents, (ii) whether the Claimant is entitled to the reliefs sought and (iii) who is to bear the costs of the suit. The Claimant submitted that he was an employee of the Respondent and went to great lengths towards this. It was entirely unnecessary as the fact of his being an employee was neither controverted in pleadings or in evidence by the Respondents. It was therefore irrelevant as it was not a fact in issue. The Claimant submitted on the termination by stating that the letter of warning, suspension and compulsory leave dated 6th March 2017 directed him to return to work on 7th March 2018. He averred that upon return he was told to calculate his accrued benefits and that was when he realized that he was dismissed. The definition of the words **warning**, **suspension** and **compulsory** in **Black's Law Dictionary 8th Edition** was reproduced for the proposition that there was no basis to sanction the Claimant as he had no written contract of service. The Claimant submitted that he was entitled to notice which was longer than the period he was given in his termination.

Sections 44 and 40(1) of the Employment Act were cited in aid of his argument that his dismissal did not accord with the law. The Claimant submitted that it was after several visits to the Labour Office that an amicable decision was made on 17th July 2017. The Claimant submitted that in light of Section 45 of the Employment Act the dismissal was unfair and that he was entitled to compensation under Section 49(1)(c). Reliance was placed on the case of **Kenfreight (E.A.) Limited v Benson K. Nguti [2016] eKLR** where the court held that the burden on the employee is limited only to asserting that unfair termination has occurred leaving burden to show the termination was fair to the employer. The Claimant submitted that he was not issued with an itemized payslip contrary to Section 20 of the Employment Act and that the Respondent should be sanctioned under Section 25 of the Act.

5. The Respondent submitted that there is a clear distinction between suspension and termination. It was argued that the Claimant was only barred for one month and that it was clear from the letter of 6th February 2017 that there was no intention to bring an end to the Claimant's employment. The case of **Mary Chemweno Kiptui v Kenya Pipeline Co. Ltd [2014] eKLR** was cited for the judicial definition ascribed to suspension. The Respondent submitted that having lost his case for unlawful termination the Claimant was not entitled to any recompense. The Respondent cited the case of **Francis Nyongesa Kwegu v Eldoret Water and Sanitation Company Ltd [2017] eKLR** for that proposition. It submitted that the suit ought to be dismissed with costs as the Claimant was paid all his dues and he signed a clearance certificate.

6. I have considered the pleadings, the evidence adduced and the submissions of parties in coming to the decision. However, the Claimant's case must fail as it turns on a legal aspect I will advert to shortly. The Claimant when he came to court seeking the dues he believes are due to him, was mightily handicapped by his own actions. In the case of **Coastal Bottlers v Kimathi Muthika [2018] eKLR**, the Court of Appeal held as follows:-

*21. In our minds, it is clear that the parties had agreed that payment of the amount stated in the settlement agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the respondent's termination. It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the part of the respondent or incapacity on the respondent's part at the time he executed the same. It did not matter that the amount thereunder would be deemed as inadequate. As it stood, the agreement was a binding contract between the parties. In **Trinity Prime Investment Limited vs. Lion of Kenya Insurance Company Limited [2015] eKLR** this Court, while discussing the import of a discharge voucher which is more or less similar as the agreement in question observed:*

"The execution of the discharge voucher, we agree with the learned judge, constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other. The appellant was thus fully discharged."

*22. All the ELRC was required to do was to give effect to the intention of the parties as discerned from the settlement agreement. Our position is fortified by the sentiments of Sir Charles Newbold P. in **Damodar Jhabhai & Co Ltd and another vs. Eustace Sisal Estates Ltd [1967] EA 153** that:-*

"The function of courts is to enforce and give effect to the intention of the parties as expressed in their agreement. In the English Court of Appeal case above - **Globe Motors Inc & Others vs TRW Lucas Electric Steering Ltd & Others (supra)** – Lord Justice Beatson stated as follows:-

'Absent statutory or common law restrictions, the general principle of the English law of contract is [that parties to a contract are free to determine for themselves what obligations they will accept]. The parties have the freedom to agree whatever terms they choose to undertake, and can do so in a document, by word of mouth, or by conduct.'

23. Giving effect to the parties' intention meant that the ELRC could not entertain the suit filed by the respondent. This is because the respondent had waived his rights to make any further claim in relation to his relationship with the appellant.

7. The Claimant therefore in signing the discharge on 14th August 2017 intended to be bound by that contract and absolve the 3 Respondents of any claims he could legally conceivably have. The bargain he took may have been less than what he could have been or was entitled to but that is neither here nor there. He cannot recover a cent in this claim as he waived the right to pursue any remedies through the waiver he freely signed. His suit is therefore only fit for dismissal as I cannot discern any intent by the Claimant not to be bound by his discharge. If he had reservations he could have signed 'without prejudice' or 'received in part payment'. The suit is dismissed with costs to the Respondents.

It is so ordered.

Dated and delivered at Meru this 4th day of February 2019

Nzioki wa Makau

JUDGE