



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 564 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

BENEDICT MBITHI KINGOO.....CLAIMANT

VERSUS

THE DIRECTOR,

ST. MONICAH GIRLS HIGH SCHOOL.....1ST RESPONDENT

THE SECRETARY, BOARD OF GOVERNORS

ST. MONICAH GIRLS HIGH SCHOOL.....2ND RESPONDENT

THE TREASURER,

ST. MONICAH GIRLS HIGH SCHOOL.....3RD RESPONDENT

JUDGMENT

The Claimant filed his Memorandum of Claim on 7th April 2014 in which he avers that the Respondent has failed to process his terminal dues after his resignation and prays for orders against the Respondent as follows:

1. Terminal benefits for service rendered for the 12 years computed at the rate of half salary per year Kshs.8625 x 12 years = Kshs.103,500/=
2. Damages for wrongful withholding the Claimant’s terminal dues.
3. Costs and interest of tis suit.
4. Any other and or further relief that the Court deems fit and just to grant.

Despite service, the Respondent neither entered appearance nor filed a Reply to the Memorandum of Claim herein.

Claimant’s Case

The Claimant was employed as a teacher by the Respondent through a letter of appointment dated 13th September 2000. He testified that upon securing employment with the Teachers Service Commission, he terminated his employment with the Respondent vide his termination letter dated 3rd October 2012. He testified that despite his resignation he was not paid his terminal dues which resulted in him writing his letter dated 4th February 2013 seeking payment of Kshs.103,500. He testified that the Respondent did not respond to the letter. He sent subsequent letters dated 13th May 2013 and 3rd June 2013 before seeking legal redress. He testified that despite the Respondent failing to respond to his letters he had not waived his terminal benefits.

It is the Claimant’s submission that the withholding of terminal benefits by an employer after termination of their services amounts to unfair and labour practice .He relied on the decision in **Henry Kamau V Teachers Service Commission and Another [2016] eKLR** where the Court held:

“Thus the court holds that pensions benefits or service pay by whatever description is a pay to compensate the employee in view of the service rendered to the employer. It recognizes and compensates for service already given and being a right in the nature of property or a recognized employee’s right within the realm of employment law such as is recognized under section 5 of the Pensions Act and section 35(5) and section 40(1)(g) of the Employment Act, 2007. Thus, the court holds that it is unfair labour practice and unreasonable working condition (in contravention of Article 41(1) and 41(2) (b) of the Constitution of Kenya, 2010) for the employer to deny, withhold, or reduce in amount the employee’s crystallized or accrued pension or service pay of whatever description on account of misconduct, gross misconduct, poor performance or any other adverse ground attributable to the employee”.

Legal Opinion

The main issue for consideration is whether the Claimant is entitled to the Kshs.103,500 as service pay for the 12 years of service.

The Claimant was initially earning a sum of Kshs.5,653 as provided in his Letter of appointment dated 13th September 2000. In his witness statement, he avers that at the time of his termination he earned a salary of Kshs.17,250. It is based on this amount that he computed service pay of Kshs.103,500 being 15 days’ salary for each year of service. The Claimant never produced any payslip to prove that the amount of Kshs.17,250 was what he was entitled as his monthly salary. This amount would be what would be used to compute his service pay as it is undisputed that he started working in the year 2000 and that he terminated his employment in the year 2012.

In respect of service pay, the entitlement is provided for under Section 35(5) of the Employment Act and is dependent upon limitations under section 35(6) of the Act. Section 35(5) and (6) of the Employment Act provide:

(5) An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed.

(6) This section shall not apply where an employee is a member of—

(a) a registered pension or provident fund scheme under the Retirement Benefits Act;

(b) a gratuity or service pay scheme established under a collective agreement;

(c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section; and

(d) the National Social Security Fund.

Section 35(6) of the Act therefore requires the Court to determine whether the Claimant was a member of any of the scheme before awarding service pay. This would only have been established if the Claimant produced evidence that he was not a member of a scheme or NSSF. The Claimant never adduced any evidence on his scheme membership.

This Court is alive to the provisions of Section 10(7) to the effect that it is the employer’s burden to prove or disprove a term of employment. However, the Claimant must prove its case as was held in *Casmir Nyankuru Nyaberi v Mwakikar Agencies Limited [2016] eKLR* where the Court held:

“This Court is fully aware that it is the responsibility of an employer to document the employment relationship and in certain respects, the burden of proving or disproving a term of employment shifts to the employer. This does not however release the Claimant from the burden of proving their case. Even where an employment contract is oral in nature, the Claimant must still adduce some evidence whether documentary or viva voce to corroborate their word. More importantly, where an employee believes that the employer has in its possession some documents that would support the case of the employee, that employee is obligated to serve a production notice.”

Similarly, in *Stephen Wasike Wakhu and Another V Security Express Limited [2006] eKLR* the Court held:

“With due respect to counsel, I find that this suit was not properly prosecuted and counsel did not assist the court in a manner that would lead the court to determining the questions or issues for determination with a view to arriving at a properly considered judgment. A party seeking justice must place before the court all material evidence, and facts which considered in light of the law would enable the court to arrive at a decision as to whether the relief sought is available... That said, I find that the court does not have the necessary material evidence upon which to find that the Plaintiffs are entitled to the sums claimed herein.”

Consequently, in the absence of material evidence this Court finds that the Claimant has not proved his case that he is entitled to service pay. The Court therefore dismisses his claim.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF JUNE 2019

MAUREEN ONYANGO

JUDGE