



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CASE NO. 289 OF 2016

(Before Hon. Justice Mathews N. Nduma)

JOB MUKHEBI MUTORO.....CLAIMANT

VERSUS

KITALE VOCATIONAL TRAINING CENTER.....RESPONDENT

JUDGMENT

1. The suit was filed on 29th September 2016, in which the claimant seeks reinstatement to work or compensation for unfair termination of employment and payment of terminal benefits including payment of basic minimum wages schedule for a period of three years 63 days; in lieu of leave not taken for three years, one month salary in lieu of notice, costs and interest.
2. The claimant testified as CW1 that he was employed as Instructor, Electric Technology on 15th October 2012 at a salary of Kshs. 5,000 per month. That he also carried out maintenance works for the institution which work was not included in the letter of appointment. That he worked diligently and skillfully until the 15th July 2016, when he received a letter from Justus Manyonge terminating his services on allegations of gross misconduct contained in the same letter. That the allegations were false and he had not been given opportunity to answer the charges levelled against him.
3. CW1 stated that he had applied for the job of instructor advertised on 21st April 2011 and was interviewed and appointed and so allegations that he was not qualified were not true.
4. CW1 explained that he was paid Kshs. 30,000. That Kshs. 15,000 was for maintenance work. That in May 2013 he was asked to sign for Kshs. 5,000 salary per month because auditors were coming. That on 30th October 2012, he was given two letters one reflected Kshs. 30,000 salary and the other did not.
5. Under cross examination, CW1 the claimant admitted that his employment was on one year contract renewable. CW1 denied that he had been subjected to disciplinary action. Claimant insisted that he was paid Kshs. 5,000 but was supposed to be paid Kshs. 30,000. That the respondent lied to him. That the letter reflecting Kshs. 30,000 was retained by the respondent. That he was tricked. CW1 insisted that he started working for the respondent in 2011 but the letter of appointment shows that he started work in October 2012. CW1 admitted that statement of claim shows that he earned Kshs. 5,000 a month. CW1 blamed the error on his advocate. CW1 said that the union had visited the school severally about his underpayment but the situation was not corrected. That he was not given notice of termination nor any notice to show cause and that no disciplinary hearing was held. CW1 added that he received no terminal benefits upon termination. CW1 said he now does his own Electrical works and no longer wanted to be reinstated. That he was only paid Kshs. 15,000 once. He received Kshs. 5,000 per month for the rest of the period. He claims the salary difference.
6. That he never went on leave for 3 years. That he got no notice of termination and claims one month salary in lieu of termination. CW1 said he applied for leave verbally but was never given. CW1 denied that his contract expired on 30th October 2016 adding that he got the letter of termination on 15th July 2016. He was not working on 30th October 2016 thereafter. That he was an Artisan with Craft Certificate from Mombasa Polytechnic and was entitled to minimum wage as per wage order.
7. RW1 Justus Manyonge testified that he was the manager of the respondent. RW1 said the claimant was employed by the respondent on 30th October 2012. That CW1 was an instructor on a one year contract renewable. That his gross monthly salary was Kshs. 5,528. That respondent paid NSSF for him. That CW1's salary was based on the financial status of the respondent. That after devolution was implemented the institution lost financial support from Government. That CW1 was dismissed for misconduct by a letter dated 15th July 2016. That CW1 had no qualification to be an instructor. That the allegations he faced are in the letter of termination. That on 28th October 2016, Respondent wrote to the Claimant informing him that his contract had expired. That CW1 was paid all terminal dues including one

month extra salary and salary arrears of Kshs. 20,000. That the Claimant held government grade test II and institution required a person with a Diploma for the instructor position. That he was paid current salary as per his qualification. RW1 admitted that the claimant was not paid minimum wage contained in the Government Gazette. He was paid what was agreed with him. RW1 admitted that CW1 did not go on leave and had not applied for the same. That he was paid in lieu of notice. RW1 said respondent had no formal procedure to be followed in terminating employees.

8. RW1 admitted that CW1 was not subjected to a disciplinary process. RW1 said CW1 was given certificate of service. RW1 said that the claimant received no salary increment but was paid some allowance on a separate programme. RW1 denied that the respondent had agreed to pay the claimant a monthly salary of Kshs. 30,000 and prays that the suit be dismissed with cost.

Determination

9. The issues for determination are:

- (a) Whether the employment of the claimant was terminated for a valid reason and in terms of a fair procedure.
- (b) Whether the claimant is entitled to the reliefs sought.

Issue (a)

10. The claimant was employed as an instructor by the respondent on 30th October 2012. The claimant held an Artisan Certificate Grade II from Mombasa Polytechnic and the General Minimum wage was applicable to him. That in addition to teaching he did maintenance work at the college.

11. The claimant's employment was terminated by a letter dated 15th July 2016 on allegations of gross misconduct contained in the letter. RW1 admitted that the claimant was not given prior notice of intention to terminate his employment; that CW1 was not given a letter to show cause nor was he subjected to any disciplinary hearing. It is clear therefore that the claimant got no opportunity at all to explain the charges levelled against him in violation of *Section 41 of the Employment Act*. The respondent did not establish therefore that the allegations levelled against the claimant were valid reasons to terminate his employment in terms of *Section 43, 45 and 46 of the Employment Act, 2007*. The termination of employment of the claimant has been proved to be unlawful and unfair on a balance of probabilities by the claimant. Accordingly the court finds this to be the case and that the claimant is entitled to compensation in terms of *Section 49(1) (c) and (4) of the Act*.

12. The claimant had worked for three (3) years. He was underpaid throughout the period. He was not granted leave for the three years worked. The claimant had no record of misconduct in the period. The claimant was promised a higher salary that was not implemented until he left. He was deceived to take up the appointment to his loss and detriment. The respondent has not proved that the claimant contributed to the dismissal. The claimant no longer wished to be reinstated. He was doing his own business.

13. The court has considered comparable case of *Alphonse Mwachanga Mwachanga vs Operation 680 Ltd (2013) eKLR* and factors above and awards the claimant the equivalent of five (5) months salary in compensation for the unlawful and unfair termination of employment. The claimant is also entitled to payment in lieu of leave days not taken for three years.

14. The claimant is also entitled to the gross salary gazetted for an Electrical Artisan Grade II for the period 30th October 2012 to 5th July 2016. The respondent is directed to calculate the difference between the gross salary paid to the claimant of Kshs. 5,000 for the entire period and the minimum wage payable to him and pay the difference.

15. The court finds that the claimant was paid one month salary in lieu of notice upon termination and arrear salary in the sum of Kshs. 20,000. The minimum wage is also applicable to the notice and leave pay the claimant is entitled to.

16. Accordingly, judgment is entered in favour of the claimant as against the respondent as follows:

- (a) Equivalent of five (5) months salary in compensation for the unlawful termination.
- (b) Three months salary in lieu of leave days not taken for three years
- (c) The difference between the minimum wage for an Electrical Artisan Grade II and Kshs. 5,000 gross salary paid to the claimant from 30th October 2012 to 5th July 2016.
- (d) The respondent to calculate the amounts payable in (a), (b) and (c) above and file with the court within 30 days failing which, the claimant to file computation within 45 days from to date.
- (e) The award above is payable with interest at court rates from date of filing suit till payment in full, except the item on compensation in respect of which interest is from date of judgment till payment in full.
- (f) Costs of the suit.

Judgment Dated, Signed and delivered this 9th day of July, 2019

Mathews N. Nduma

Judge

Appearances

Claimant in person

Mr. Okile for Respondent

Chrispo – Court Clerk