



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1296 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 30th September 2019)

BENSON OKONJI ATIRA.....CLAIMANT

VERSUS

KIBERA CHURCH OF GOD PRIMARY SCHOOL.....RESPONDENT

JUDGMENT

1. The Claimant, Benson Okoji Atira filed this Claim vide a Statement of Claim dated 06/08/2014 against the Respondent, Kibera Church of God Primary School.

2. He avers that he was employed by the Respondent as a Head Teacher and that his terms and conditions of service were regulated by the Respondent's Constitution and the TSC Circular dated 10/06/2009 which took effect on or about 01/07/2009. That on or about 12/08/2012, the Respondent suspended him from employment on the grounds of his failure to convey information to the Teachers, refusal to conduct examinations and establishing a website for the school.

3. He avers that he was not given a fair opportunity to be heard pursuant to **provision 3(g) of the Respondent's Constitution** which provides for a general meeting where members whose expulsion has been proposed are to be considered as a matter of right. That the termination of his employment was unlawful and breached the Respondent's Constitution which particulars he gives as follows:-

a) Failure to demonstrate the basis of terminating the Claimant's employment as required by provision 3(e) of the Respondent's Constitution.

b) Failure to grant the Claimant a fair opportunity to be heard.

c) Failure to respond to the Claimant's letter dated 14/08/2012 for grounds of termination of his employment.

4. That by reason of the matters aforesaid and the conduct of the Respondent, he has suffered loss and damage which he particularises and claims against the Respondent as below:-

a) Salary balance for the following months for underpayment of wages and allowances on TSC Rates as follows:-

i) 9th March – December 2009 Kshs. 104,950/=

ii) 1st January – December 2010 Kshs. 125,940/=

iii) 1st January – December 2011 Kshs. 131,220/=

iv) 1st January – August 2012 Kshs. 74,025/=

Kshs. 436,135/=

b) Salary balances for August 2012 to

October 2012 (Kshs.17,875 x 3months) Kshs. 65,625/=

TOTAL

Kshs. 501,760/=

5. The Claimant prays for judgment against the Respondent for:-

a) Special damages in the sum of Kshs. 501,760/=

b) Costs of this suit.

c) Interest on (a) and (b) at court rate.

d) Any other further relief in the interest of justice.

6. In his Witness Statement dated 06/08/2014, the Claimant states that he recollects he was employed by the Respondent in the year 2009 before he was verbally suspended for unspecified allegation. That the Respondent and/or its agent did not serve him with any notice prior to the termination and thus violated the rules of natural justice.

7. CW1, the Claimant testified in court that he wished to adopt his filed Witness Statement and Documents as his evidence in court and in support of his case. He stated that his salary was Kshs. 14,000/= per month and that he also wished to rely on the *Supplementary List of Documents* filed on 07/03/2019 as his evidence. That these documents show he used to work for the Respondent as the Head Teacher.

Claimant's Submissions

8. The Claimant submits that the Respondent did not enter appearance nor file defence to this suit and so the facts stated in the Statement of Claim and witness statement adopted as the Claimant's evidence in chief remain unchallenged. He also confirms that he was employed on 01/07/2009 and that there was no written contract or letter of appointment.

9. He submits that **Article 41 of the Constitution of Kenya** provides for the right to fair labour practices; fair remuneration; and reasonable working conditions and that **Article 43** guarantees economic rights. That the payment of salary is fundamental to fairness as far as an employee is concerned and that when expected remuneration is not forthcoming for months on end like in this case, the employee's security is also affected. That **Section 18 of the Employment Act** buttresses the requirement to pay salaries when the same falls due and **Section 18(4)** envisages that on termination, an employee is entitled to all money, allowances and benefits accrued up to the time of dismissal.

10. It is submitted by the Claimant that he was discriminated upon in salary payment because the non-payment did not affect all employees and that almost all have been edged out of the school. That he is therefore entitled to 12 months' salary as damages for unlawful termination amounting to (Kshs. 17,875 x 12=) Kshs. 214,500/= and the unpaid salaries and underpayment as claimed in the Statement of Claim. That he claims damages pursuant to **Section 44 and 45 of the Employment Act** on summary dismissal and cites the case of **Beatrice Achieng Osir -v- Board of Trustees Teleposta Pension Scheme Industrial Cause No. 665/2011**. The Claimant invites the Court to find that in the circumstances of this case, he has proven his claim and is entitled to his claim as prayed.

11. I have examined the evidence of the Claimant and submissions filed herein. The Claimant's case remains uncontroverted. There is no evidence to the contrary as to reasons that led to the Claimant's termination or any evidence that the Claimant was accorded due process.

12. I therefore find the Claimant has established his case that he was unfairly and unlawfully terminated. I therefore award the Claimant compensation for the unlawful termination being an equivalent of 12 months' salary = 14,000 x 12 = 168,000/=

13. The Claimant sought to be paid salary as per TSC Circular No.26/09 of 10.6.2009. However, this circular as per paragraph 2 states:-
...."Applicability --- the new conditions of service apply to all teachers in the service on or after 1st July 2009...". The circular did not apply to teachers not in the service of TSC and so did not apply to the Claimant.

14. The Respondent will also pay costs of this suit plus interest at Court rates with effect from the date of this judgement.

Dated and delivered in open Court this 30th day of September, 2019.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties