



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CASE NO. 92 OF 2017

(Before Hon. Justice Mathews N. Nduma)

EVANS SIMIYU NATEMBEYA MAYEKU.....CLAIMANT

VERSUS

ST. JOSEPH ROMANS CATHOLIC PRIMARY SCHOOL.....RESPONDENT

JUDGMENT

1. The suit was filed on 9th March 2017. The Claimant was employed by the Respondent on 1st January 1996 in the sickbay as Nurse Aid, Dom care-taker and ground man at a salary of Kshs.2,000 per month initially which was raised to Kshs.7,200.
2. The Claimant worked until January 2015. He used to work on yearly contracts.
3. Claimant testified that on 10th January 2015, he sought permission to go on sick leave. The employer threw Kshs.800 to the Claimant for the 8 days worked in the month of January 2015. On 25th January 2015, the Claimant wrote a letter of resignation on medical grounds. The Claimant prays for terminal benefits including notice pay; payment in lieu of leave days not taken between 1996 and 2015 and house allowance for the entire period. The Claimant also prays for underpayments between 1996 to 2015. Claimant testified that he should have been paid Kshs.10,107.10. The Claimant prays for double pay during public holidays for the period 1996 to 2009.
4. Claimant stated that he did not get off days per week since he worked Monday to Sunday from 5 a.m in the morning till late since he was housed at the school.
5. Furthermore the Claimant prays for payment of severance allowance for 18 years served since he had no pension but was on NSSF. The Claimant seeks compensation because he did not resign voluntarily. He testified that he was denied sick leave.
6. The Claimant testified that he was a qualified nurse but did menial work currently. That he got a letter of service.
7. That he relied on the particulars in the statement of claim.

Response

8. The Respondent filed a Memorandum of Response on 7th July 2017 in which the claim is denied in that at the time the Claimant left employment he was not owed any terminal benefits as at 31st December 2014, since terminal benefits were computed at the end of every year and paid since 1996.
9. That the Claimant resigned after being paid all his salary and terminal benefits and no arrears were pending.
10. The Respondent however did not attend the hearing of the suit and therefore did not adduce evidence to rebut the testimony by the Claimant.
11. It is trite however that in terms of *Section 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya*, the Plaintiff must prove his/her case on a balance of probabilities irrespective of whether the Defendant has adduced any evidence or not.
12. In the present case the Claimant testified that he served under one year contracts from 1996 until the year 2015 when he resigned from employment.

13. Accordingly, the Claims set out by the Claimant for the period 1996 up to the year 2015 are untenable since he had served to completion each successive annual contract from the beginning to the end for a period of 18 years.

14. The Claimant resigned from employment without giving the Respondent notice and is therefore not entitled to any payment in lieu of notice. The Claimant has not shown that his employment was unlawfully terminated by the Respondent and therefore the claim for compensation lacks merit.

15. The claims made for payment for annual leave; house allowance; underpayments; public holidays; of duty are time barred by *dint of Section 90 of the Employment Act, 2007* and are therefore untenable. In any event there is no proof that the Claimant at any one time demanded payment of the amounts claimed upon completion of the annual contracts and was not paid.

16. The claim for severance pay for 18 years is also without merit since the Claimant was not retrenched and NSSF was paid on his behalf during the employment period with the Respondent. In any event the Claimant did not join issue with the averments by the Respondent in the statement of response that the Claimant was paid terminal benefits upon completion of each annual contract and was not owed any terminal benefits.

17. Accordingly, the reliefs sought by the Claimant have not been proved on a balance of probabilities and are dismissed for lack of merit.

18. The Claimant served the Respondent for a lengthy period of time though on short term contracts. This is not a good labour practice since it is prejudicial to the welfare of an employee who is unable to plan his life on a continuous long-term basis.

19. Accordingly, the court awards no costs against the Claimant in this matter.

Ruling Dated, Signed and delivered this 10th day of December, 2019

Mathews N. Nduma

Judge

Appearances

Claimant in person

Situma and Company for the Respondent

Chrispo – Court Clerk