



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 373 OF 2015

FREDRICK OCHIENG ODERO.....CLAIMANT

v

NAKURU TEACHERS TRAINING COLLEGE....RESPONDENT

JUDGMENT

1. This judgment is being delivered in Nairobi because of my transfer to Nairobi.
2. Fredrick Ochieng Odero (Claimant) sued Nakuru Teachers Training College (Respondent) on 25 November 2015 and he stated the Issues in Dispute as
 1. Unfair termination
 2. Underpayments.
3. In a Response filed on 3 May 2016, the Respondent denied that the Claimant was its employee but in the same breath contended that he was engaged by its Supervisor without its knowledge. The other heads of claim were also denied.
4. The Claimant filed a Reply to the Response on 17 May 2016 and *Agreed Issues* were filed on 18 July 2016.
5. The Cause was heard on 7 November 2018 when the Claimant and the Respondent's Principal testified.
6. The Claimant filed his submissions on 11 December 2017 while the Respondent filed its submissions on 10 January 2018.
7. The Court has considered the pleadings, evidence and submissions and will examine the same in terms of the *Agreed Issues* filed in Court.

Whether Claimant was an employee of the Respondent

8. In an endeavour to demonstrate that he was an employee of the Respondent, the Claimant produced an appointment letter purported to have been signed by the Respondent's Principal on 12 September 2007 and a *Certificate of Agreement* from the Labour Office in which the Respondent agreed to payment of *pay in lieu of notice, accrued leave and December 2014 wages*.
9. Apart from the documentation, the Claimant testified that he was employed on 6 January 2007 as a Painter after an interview by a Mr. Lukas and was getting paid in cash.
10. The Respondent's Principal admitted that he found the Claimant working with the Respondent when he joined in 2012 and that the Claimant was engaged on a need to basis (especially when school was closed) as a painter. He also stated that the Claimant was under a supervisor called Simon.
11. On the appointment letter, the witness stated that his signature was forged by the Claimant in cahoots with a secretary who has since passed on.
12. The law envisages both oral and written contracts. It also contemplates contracts to do specific work, fixed term contracts and contracts of indefinite duration.
13. When the contract requires formalisation, it is incumbent upon the employer to draw up the contract.

14. In the instant case, the Respondent has disowned the contract the Claimant produced but failed to produce any written agreement as contemplated by section 9 of the Employment Act, 2007.

15. However, it is admitted that there was some type of contractual relationship and that some form of payments were made to the Claimant.

16. Pertinent in the view of the Court is the testimony by the Respondent's witness that the Claimant was working under a named supervisor and whom the Claimant stated was in Court, and that some form of payments were being made.

17. That Supervisor was not called to explain what type of supervision he exercised over the Claimant or on what terms he recruited him. The failure to call him was also not explained.

18. For the purposes of the Employment Act, 2007, the supervisor qualified as an employer or agent of the employer/Respondent.

19. Equally no records of the payments made to the Claimant were produced.

20. If those records had been produced, may be the Court would have been in a position to determine that the Claimant was an *independent contractor* as the Respondent remotely seemed to suggest, without really going that far.

21. The Court can therefore conclude that the Claimant was an employee of the Respondent from 2007 to 2014 and that he was a painter.

Whether there was unfair termination of employment

22. The Claimant's testimony that when he resumed after December 2014 leave, a supervisor called Simon Maraga told him that his services were no longer required was not controverted/rebutted.

23. He also testified as to engagements with the Respondent's Director after the verbal termination of contract, which testimony was not controverted/rebutted.

24. It is also noteworthy that the said supervisor was present in Court but no explanation was tendered as to why he was not called testify on the assertions by the Claimant as to the circumstances of separation.

25. The director was also not called and the Principal's testimony on the circumstances of separation was second hand.

26. In terms of section 41 of the Employment Act, 2007, the Respondent was under an obligation to conduct a hearing if the separation was on account of *misconduct, performance or physical incapacity*. No such hearing was conducted.

27. Further, because no reasons were offered for the termination, the Court can only conclude that in terms of sections 43 and 45 of the Act, the Respondent has failed to discharge the burden of proving the reasons for termination and/or that the reasons were valid and fair.

Underpayments

28. The Claimant anchored the head of claim for underpayments on the assertion that he was an ungraded artisan (painter) and Legal Notices Nos. 38 of 2006, 70 of 2009, 64 of 2011, 71 of 2012 and 197 of 2013.

29. Ungraded artisan is defined as one who *carries out simple repairs and maintenance work with a reasonable proficiency in a particular trade or trades although not in possession of any Trade Test Certificate*.

30. It is therefore logical that the Claimant fits the bill of an ungraded artisan.

31. The Respondent did not interrogate the contentions in respect of underpayments and the Court will find that there were underpayments as asserted.

Overtime

32. The Claimant did not lay any contractual, evidential or legal basis for the claim on overtime (no evidence on contractually agreed working hours or prescribed minimum work hours).

Compensation

33. The Court has concluded that there was unfair termination of employment, and in consideration of the 8 years the Claimant served and the nature of work performed (painting is not a continuous/daily chore), the Court is of the view that the equivalent 4 months gross wages would be appropriate and fair (the prescribed wage at time of separation was Kshs 12,184/-).

Annual leave

34. This head of claim was not among those in the *Agreed Issues* filed but the Court notes that the Claimant disclosed that his dismissal

occurred after he resumed from leave and that in the agreement before the Labour Officer, he accepted to payment of the equivalent of 2 years leave totalling 42 days. Nothing turns on this head of claim/relief.

Pay in lieu of notice

35. The package the Claimant received include pay in lieu of notice and this head of relief is therefore not available.

Conclusion and Orders

36. The Court finds and holds that

- (i) The Claimant was an employee of the Respondent.
- (ii) The termination of the Claimant's contract was unfair.

37. The Court consequently awards the Claimant and orders the Respondent to pay him

- (i) Compensation Kshs 48,736/-
- (ii) Underpayments Kshs 222,815/15

- TOTAL **Kshs 271,551/-**

38. Claimant to have costs on half scale.

39. This file to be transmitted back to Nakuru after this judgment.

Delivered, dated and signed in Nairobi on this 23rd day of February 2018.

RADIDO STEPHEN

JUDGE

Appearances

For Claimant Mrs. Ndeda instructed by Ndeda & Associates

For Respondent Mr. Ochang' instructed by Ochang' Ajigo & Co. Advocates

Court Assistant Nixon