



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 48 OF 2015

LEONARD KAHUTHU KIBUE

CLAIMANT

V

ST. HANNAH'S PREPARATORY SCHOOL 1ST RESPONDENT

PHILIP K. NDEHI

2ND RESPONDENT

JUDGMENT

1. Leonard Kahuthu Kibue (Claimant) instituted legal proceedings against St. Hannah's Preparatory School (1st Respondent) and Philip K. Ndehi (2nd Respondent) on 19 January 2015 and he stated the Issue in Dispute as

Unlawful termination and refusal by the Respondent to pay terminal benefits.

2. The Claimant sought a total of Kshs 504,000/- on account of the unlawful termination of employment/breach of contract.

3. In a Response filed in Court on 11 February 2015, the Respondents contended that the Claimant was engaged on work rate basis with no contemplation of permanent employment, and that the Claimant voluntarily left employment in November 2013, and thus his contract was not unlawfully terminated.

4. It was further denied that the Claimant was entitled to any of the reliefs sought.

5. The Cause was heard on 9 April 2018 when the Claimant and the 1st Respondent's Principal testified.

6. The Claimant filed his written submissions on 16 April 2018 while the Respondents submissions on were not on file by this morning (Respondents informed the Court before delivery of judgment that the submissions were filed on 7 May 2018).

7. The Court has considered the pleadings, evidence and Claimant's submissions and identified the questions for determination as

Nature of contract between the parties

Whether he Claimant deserted or was unfairly dismissed

Whether Claimant was entitled to December 2014 salary and

Appropriate remedies.

Nature of employment relationship

8. The Employment Act, 2007 contemplates and recognises oral as well as written contracts of employment.

9. The contract can be of a definite duration (fixed term) or indefinite duration (open ended).

10. If the contract provides for the performance of work for a period exceeding 3 months in the aggregate or for specified work which could not be completed within 3 months, then in terms of section 9(1) of the Employment Act, 2007, it must be reduced into writing by the employer. Such contract should include the start date, job description and duration.

11. The Respondent's witness' testimony was that the Claimant was engaged as a *Reliever* teacher without expressly stating the duration.
12. In the Response, however, it was pleaded that the initial engagement was for a probationary period of 6 months.
13. Assuming that the testimony by the Respondent's witness was true, and in consideration of the pleaded facts, then in terms of section 9 of the Employment Act, 2007, the contract should have been reduced into writing.
14. The Respondent did not reduce the contract into writing.
15. On his part, the Claimant testified that there was an oral agreement but denied that he was a *Reliever* teacher or that he was on probation.
16. On account that the Claimant served for more than 3 months he was entitled to a written contract despite and in spite of his *reliever* status, and because there was no written contract and by dint of section 10(7) of the Employment Act, 2007, the Court finds that the contract was of an indefinite duration.

Desertion or unfair termination of contract

Desertion

17. Because it was the Respondents asserting that the Claimant deserted, it was incumbent upon them to demonstrate that indeed there was desertion.
18. According to the Respondents' witness, the 1st Respondent closed around 20 November 2013, and the Claimant was assigned to be on duty around mid-December 2013 but he never showed.
19. The witness disclosed that it was probable the Claimant had gone to mark the national examinations.
20. Again assuming that the Claimant did not report for duty as assigned, that was a *misconduct* (absence without permission or lawful authority) which in terms of sections 41 and 44 of the Employment Act, 2007 warranted disciplinary action.
21. The witness did not disclose any action the employer took as a consequence of the Claimant's *misconduct*, if at all.
22. In the view of the Court, the Claimant did not abscond from work.

Unfair termination

23. For the Claimant, his testimony was that when he realised his December 2013 salary had not been paid, he went to inquire from the Principal, and he directed him to the Human Resource Officer.
24. Because of the holidays, the Principal advised him to wait until January 2014 to see the Officer.
25. When he eventually met the Human Resources Officer, she informed him that he had been relieved of his duties and when he asked for written reasons, he was told that since he was not a *permanent* employee, there was no letter to be issued.
26. The Respondents' witness admitted having had a meeting with the Claimant where the issue of salary was discussed and that he referred the Claimant to the Human Resources Officer.
27. In the mind of the Court, the narration of events by the Claimant as to the separation appear more probable and the Court believes it, and finds that the Claimant's contract was verbally brought to an end.
28. The Claimant was paid by the month and pursuant to section 35(1)(c) of the Employment Act, 2007, he should have been given written notice of termination of employment.
29. Since no such notice was given, or a hearing conducted in terms of section 41 of the Act, the Court finds that there was unfair termination of employment.

December 2013 salary

30. For purposes of the law, the Claimant was informed that his services were no longer required in January 2014, and therefore he would be entitled to December 2013 salary.
31. The contention by the Respondents that as a *Reliever* teacher he was not entitled to remuneration during school holidays is misplaced as there was even evidence that he was paid salaries for April and August 2013 which were school holidays.

Appropriate remedies

Pay in lieu of notice

32. The Court having concluded that there was no notice of termination finds that the Claimant is entitled to the equivalent of 1 month pay in lieu of notice (monthly salary was Kshs 36,000/-).

December 2013

33. The Claimant is entitled to the December 2013 salary as of right since he had not been informed that his services were no longer required until January 2014.

Compensation

34. The Claimant served the Respondents for about 1 year and in consideration of the length of service, the Court is of the view that the equivalent of 2 months wages as compensation, would be appropriate and fair.

Conclusion and Orders

35. The Court finds and holds that the Claimant did not desert duty or voluntarily leave but had his contract unfairly terminated and awards him and orders the 1st Respondent to pay him

(i) Pay in lieu of notice Kshs 36,000/-

(ii) December 2013 salary Kshs 36,000/- (iii) Compensation Kshs 72,000/-

TOTAL **Kshs 144,000/-**

36. Claimant to have costs of Kshs 30,000/-.

Delivered, dated and signed in open Court in Nairobi on this 11th day of May 2018.

Radido Stephen

Judge

Appearances

Claimant in person

For Respondents Mr. Munene instructed by Munene & Co. Advocates

Court Assistant Lindsey