



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**CAUSE NO. 880 OF 2017**

**IBRAHIM KINGORI NJOKI.....CLAIMANT**

**v**

**ANTONY MUHORO.....1<sup>st</sup> RESPONDENT**

**TEACHER ELIZABETH..... 2<sup>nd</sup> RESPONDENT**

**JUDGMENT**

1. Ibrahim Kingori Njoki (Claimant) instituted legal proceedings against Antony Muhoro (1<sup>st</sup> Respondent) and Teacher Elizabeth (2<sup>nd</sup> Respondent) on 11 May 2017 alleging unlawful termination of employment and breach of contract.

2. In a joint Response filed on 13 June 2017, the Respondents contended that the suit was defective, the Claimant was not their employee or in the alternative, a casual employee, and that all of the Claimant's wages were settled.

3. The Claimant and his witness testified on 10 April 2018 while the 1<sup>st</sup> Respondent testified on 12 June 2018.

4. Claimant filed submissions on 20 June 2018 and the Respondents filed their submissions on 5 July 2018.

5. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as

*(i) Whether the suit was defective*

*(ii) Whether there was an employment relationship*

*(iii) whether there was unfair termination of employment/breach of contract and*

*(iv) Appropriate remedies.*

**Whether the suit is defective**

6. The Respondent's contended in the pleadings that the Cause was defective because of the description of the 2<sup>nd</sup> Respondent.

7. In the submissions, it was urged that because the 2<sup>nd</sup> Respondent was *non-existent*, the defect could not be cured.

8. The Claimant was a lay person acting for himself.

9. In the introductory part of his testimony, the 1<sup>st</sup> Respondent stated that the 2<sup>nd</sup> Respondent was his spouse and that together they run a school.

10. Although asserting defect in the way 2<sup>nd</sup> Respondent was cited in the pleadings, the Respondents have not demonstrated any injustice or prejudice occasioned by the half description of the 2<sup>nd</sup> Respondent. The 1<sup>st</sup> Respondent conceded that the 2<sup>nd</sup> Respondent was part of the school.

11. The Court therefore finds no reason to uphold the objection on defective pleadings.

### **Employment relationship**

12. The Claimant asserted that he was employed as a school driver on 6 February 2016, though a written contract was not issued.
13. He stated that he was on a monthly wage of Kshs 15,000/- and he produced copies of salary vouchers for September 2016, October 2016, February 2017 and March 2017.
14. The Respondent maintained that the Claimant was a casual employee who was called upon from time to time as work demanded (to relieve other drivers), and was paid accordingly.
15. The Claimant was not paid by the day nor did the Respondent indicate that the Kshs 15,000/- was accumulated from daily wages.
16. Further, the Claimant served the Respondents for over 1 year. It is apparent from the salary vouchers that he was on a monthly wage.
17. In the view of the Court, the relationship between the parties herein could not be that of casual employment or one of piece work.
18. The Court finds in the circumstances that the Claimant was on term contract, month to month albeit through an oral contract.

### **Unfair termination of employment**

19. The Claimant stated that sometime in March 2017 he secured permission from the 2<sup>nd</sup> Respondent to be away from work and that his wages for the period of absence were deducted. In the same month he fell sick and wages were deducted.
20. Consequently, the Claimant wrote to the Respondents on 23 March 2017 complaining about the deduction of wages, failure to make contributions towards NSSF and NHIF, failure to give him a tender to supply the school with grocery among other issues.
21. Upon receipt of the letter, the 2<sup>nd</sup> Respondent instructed him to meet the 1<sup>st</sup> Respondent.
22. The 1<sup>st</sup> Respondent admitted that he met with the Claimant over the school holidays (6 April 2017) and informed him that his services would not be required from the next term.
23. The reasons were not set out in the Response or disclosed in Court.
24. The Court has found there was term contract. The Respondents should therefore have given notice of termination of employment in terms of section 35(1)(c) of the Employment Act, 2007.
25. Since no notice was given, the Court finds that there was unfair termination of contract.

### **Wages for April, August, November and December 2016**

26. With the conclusion that the Claimant was on term contract, the Court is of the view and finds that he was entitled to wages during the school holidays of 2016.

### **Leave**

27. The Claimant did not lay any evidential foundation to this head of claim and it is declined.

### **Service pay**

28. The Claimant requested the Respondents to facilitate his membership with National Social Security Fund. They did not.
29. The Court is therefore minded to award service pay at rate of 15 days' pay for the 1 year the Claimant served as computed in the sum of Kshs 7,500/-.

### **Remedies**

#### **Compensation**

30. Compensation is discretionary. The Claimant served the Respondents for about one year.
31. In the view of the Court and considering the circumstances of this case, this is not an appropriate case to award compensation.

#### **Wages during holidays in 2016**

32. The Claimant was earning Kshs 15,000/- per month. The Court holds that he is entitled as of right to Kshs 60,000/- as wages for the

months.

**Service pay**

33. This is awarded at Kshs 7,500/-

**Conclusion and Orders**

34. The Court finds and holds

- (a) The Claimant was on term contract
- (b) The Claimant's employment was unfairly terminated.

35. The Court awards the Claimant

- (a) Wages during holidays Kshs 60,000/-
- (b) Service pay Kshs 7,500/-

TOTAL **Kshs 67,500/-**

36. No order as to costs.

**Delivered, dated and signed in Nairobi on this 20<sup>th</sup> day of July 2018.**

**RADIDO STEPHEN**

**JUDGE**

**Appearances**

Claimant in person

For Respondent Mr. Juma instructed by Mutua Waweru & Co. Advocates

Court Assistant Lindsey