



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA ATELDOROT

CAUSE NO.94 OF 2017

ISAACK ANDOVE MUSISI.....CLAIMANT

VERSUS

BOARD OF MANAGEMENT (BOM) [Formerly BOARD OF GOVERNORS (BOG)

FLAX MIXED DAY/BOARDING PRIMARY SCHOOL.....1ST RESPONDENT

FLAX MIXED DAY/BOARDING PRIMARY SCHOOL.....2ND RESPONDENT

JUDGEMENT

1. On 9th June, 2017 the claimant filed his Memorandum of Claim. The respondent was served on 19th June, 2017 and returns filed to confirm service vide Affidavit of Service by Eliud Makhakha Khaemba dated 5th July, 2018. There was no appearance or defence filed. By application of Rule 15(3) of the Court Employment and Labour Relations Court (Procedure) Rules, 2016 the claimant was heard on his evidence.

2. The claim is that the claimant was employed by the respondent, an education institution and a public boarding primary school and managed by the 1st respondent.

The claimant was employed on 10th January, 2003 as a Cook earning Kshs.2, 880.00 and which was increased to Kshs.5, 885.00 per month.

3. The claim is also that on 25th February, 2015 the claimant was forced to resign from his employment due to sickness. Such resignation followed undue influence by the respondent and in total violation of the law. The unlawful conduct of the respondent arose from the fact that they failed to pay the claimant his terminal dues while he was sick; the claimant was not given sick leave; and the respondent forced the claimant into resignation due to sickness.

4. The claim is that the conduct of the respondent was demeaning and punitive and contravened his constitutional rights and safeguards on workers right to earn a living.

5. The claims are for the following;

- (a) Service benefits for 12 years Kshs.35,280.00;
- (b) Gratuity for 12 years Kshs.262,482.00;
- (c) Arrears for NSSF deductions for 2 years Kshs.800.00;
- (d) Arrears NHIF for 12 years Kshs.37,440.00;
- (e) Compensation for unfair termination Kshs.70,560.00
- (f) Loss of future earnings for 21 years kshs.1,481,760.00

6. The claimant also avers that at the time of his termination were aged 39 and is not likely to secure employment in the absence of a Certificate of Service. The claimant had hoped to work for 21 years and retirement at 60 years.

7. The claimant also testified in support of his claims. That his rights under section 15, 35, 41, 44, 45, 47, 49, 51 and 87 of the Employment

Act, 2007 were violated. In 2015 he voluntarily resigned after getting sick for long. He got a medical certificate. Upon getting well he was told to report to work and make application but the respondent refused to accept it. During employment the claimant was residing within the respondent school but his wages were in underpayment and when he resigned he was not paid the terminal dues owing.

8. The claimant also testified that on 24th February, 2015 the respondent's secretary advised him to resign from his employment so as to seek medical attention and to reapply for the employment after recovering from the sickness. Upon recovery the claimant reapplied for redeployment as he had been advised but this application was not given consideration. The respondent also refused to pay terminal dues owing for 12 years.

9. The claimant also filed his written submissions.

10. The claimant submits that under section 35(5) of the Employment Act, 2007 he is owed gratuity, service and severance pay as held in the case of **Elijah Kipkoros Tonui versus Ngara Opticians t/a Bright Eyes Limited [2014] eKLR**.

That where the employer failed to register the employee with the NSSF or a social security benefits and only pays a minimum pay he should be paid service pay.

11. The claimant also submitted that under section 19 of the Employment Act, 2007 the respondent was required to make statutory deductions that is NSSF and NHIF and make remittances and where these are not remitted he is entitled to rights under section 35 of the Act. In the case of **Hesbon Ngaruiya Waigi versus Equatorial Commercial bank Limited [2013] eKLR**. in this case the claimant is entitled to compensation under section 49(c) of the Act.

12. As there was no defence or attendance by the respondent, the case closed with the claimant's evidence.

13. Despite no defence the claims shall be assessed based on the applicable law and the evidence of the claimant.

14. In this case, the claimant by letter dated 25th February, 2015 he submitted his notice resigning from his employment with the respondent. his reasons were that;

RE: RESIGNATION REQUEST

Due to my health problem and proved by the Doctor as per the letter copy attached to this letter. I hereby submit my request with full confidence of your consideration.

15. The claimant attached a Medical Examination Certificate dated 9th February, 2015.

16. The claimant testified that he was under undue influence and duress to resign from his employment and was not voluntary. That despite his resignation, he was never paid his terminal dues.

17. A notice of resignation is basically a notice of termination of employment, given by the Employee to the Employer. It is a unilateral act. Under the Employment Act 2007, a notice of termination of employment does not have to be accepted by the recipient Party, to become effective.

18. Such termination of employment can only be disputed or arise as an unfair termination of employment where the employee claims constructive dismissal from employment and on the basis that the employer made the work environment so hostile that the employee could not continue working under such deplorable conditions. Such can be taken as rescission of the resignation notice based on the constructive dismissal.

19. In **Edwin Beiti Kipchumba versus National Bank of Kenya Limited [2018] eKLR** the court held that;

Withdrawal of the notice of resignation should be communicated to the Employer, as soon as possible. Where an Employee makes the decision on the heat of the moment, and the situation is still retrievable, it has been held that it would be unreasonable for an Employee not to be allowed to recall his decision to resign.

20. The rationale is that where an employee is under undue influence and duress to resign from his employment, upon the realisation of the undue influence and duress, such must be addressed instantly and a revocation done. The realisation that the resignation was not voluntary is therefore crucial based on the action(s) taken by the employee upon tendering the letter of resignation as without revoking the same, the employer has no basis of recalling or re-inviting the employee back into its workforce.

21. Without a claim for constructive dismissal, to find a case of undue influence and duress in a resignation notice taken at the instance of the employee without any other material evidence cannot sustain the claim as held in the case of **William Kariuki versus Kenya Civil Aviation [2008] eKLR** that;

Acceptance of resignation by the Employer does not bar the Employee from revoking his decision, where it can be shown the decision was made on the spur of the moment, and special circumstances exist. The Court should go beyond the mere acceptance at face value, that because resignation has been accepted, the contractual relationship has been severed. ... the effect that acceptance of resignation brings to an end the contract of employment, did not deal with on the spur of the moment resignation, made within the context of special circumstances. If the Employee has resigned, with clear intention to do so, he is bound by his decision, more so

where the Employer has accepted resignation. The Employee can only be accepted back in employment, if his Employer consents to the Employee's decision to withdraw resignation. Clear and unequivocal resignation, which has been accepted by the Employer deprives the Employee of locus poenitentiae [right to withdraw an offer of resignation after it has been accepted].

22. Effectively therefore, in this case, where the claimant resigned from his employment, he has not revoked the same, the employer has no basis taking him back or paying for his salaries until retirement or for the period he would have served until aged 60 years. There cannot be a case of unfair termination of employment where compensation is due under the provisions of section 49 of the Employment Act, 2007.

23. On the remedies claimed, the claimant was registered with the NSSF and has submitted his records as part of his evidence. Without any other evidence to suggest that he was under any other agreement, collective agreement or private treaty for any additional benefit or gratuity payment under his employment contract, under section 35 of the Employment Act, he cannot claim outside the same. Such dues for service pay and or gratuity payment are not due.

24. In any event, even where the respondent may have made a deduction of NHIF or NSSF and failed to remit with regard to the claimant, such dues are statutory and not owed to the claimant, rather, such should be remitted with the relevant bodies.

Accordingly, the claims made must fail. The claim is dismissed. As there was no attendance by the respondents, no orders to costs.

Delivered in open court at Eldoret this 26th day of September, 2018.

M. MBARU

JUDGE

In the presence of:

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