



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT ELDORET

CAUSE NO.322 OF 2017

CLEMENT MURUNGA CHARLES.....CLAIMANT

VERSUS

CHEBWARI ADVENTIST COMPLEX (COLLEGE).....RESPONDENT

JUDGEMENT

On 17th February, 2017 the claimant filed the Memorandum of Claim. On 2nd November, 2017 the respondent was served with summons herein and returns filed by the Process Server, Eliud Makhakha Khaemba vide Affidavit of Service filed on 28th June, 2018. There is no appearance, defence or attendance by the respondent.

Satisfied that the respondent was duly served, in accordance with Rule 15(3) of the Employment and Labour Relation Court (Procedure) Rules, 2016 the court heard the claimant.

The claimant, a male adult was employed by the respondent, a private learning institution and situated in Webuye. Employment commenced on 1st May, 2010 in the position of a Teacher on a contract running to 21st September, 2018 at a monthly salary of Kshs.10, 000.00 and which was increased to Kshs.16, 172.00.

On 18th April, 2016 the claimant was summarily dismissed from his employment by the respondent without notice, a valid reason or being given a chance to a hearing. Such was unlawful and in violation of the claimants rights. While in employment, the claimant was not given his rest days and continued to work during school holidays. There was no annual leave or payment in lieu thereof. Upon dismissal, the claimant was not paid his dues service benefits or issued with a Certificate of Service. The respondent failed to remit statutory dues to NSSF and NHIF and in breach of the law.

The claim is also that the respondent underpaid the claimant by failing to pay the due salary for a qualified teacher. As a registered teacher, the claimant had taught at Ingotse High School, Shikoti Girls Secondary School, among others.

The claimant is seeking the following;

- a) Annual leave for 7 years Kshs.113,204.00;
- b) Breach of contract and salary for 30 months Kshs.485,160.00;
- c) Service benefits Kshs.56,602.00;
- d) Gratuity Kshs.421,119.00;
- e) Notice pay Kshs.16,172.00;
- f) Compensation Kshs.194,064.00;
- g) Unpaid public holidays Kshs.401,139.00;
- h) Unpaid off days Kshs.36,467.00;
- i) Overtime due Kshs.616,896.00;

j) NSSF dues Kshs.10,400.00;

k) NHIF dues Kshs.23,140.00

The claimant is also seeking his Certificate of Service and costs for the suit.

The claimant testified in support of his case. The claimant is a teacher with a Certificate Diploma in Arts and Design and Computer Studies and has taught in various schools and institutions. Upon employment by the respondent, he worked diligently and was paid his salaries via bank account, Equity Bank Webuye Branch.

On 17th March, 2016 the respondent terminated the claimant's employment without any justifiable cause or reason. No terminal dues were paid. The respondent contributed to the NSSF but failed to make any remittances to the NHIF as required by law.

The claimant also testified that his termination of employment by the respondent was unfair as there was no notice or a hearing for his to urge his case. Such was wrongful and contrary to the law.

The claimant filed written submissions.

Despite no defence to the claims made, the claims made shall be assessed based on the applicable law, the evidence by the claimant and his written submissions.

By letter dated 17th March, 2016 the respondent issued notice to the claimant and states as follows;

TERMINATION OF SERVICE

I hereby most humbly inform you that your services at Chebwari Complex are terminated as from 18th April, 2016. Please kindly handover all school property ... you will be paid one month's salary in lieu of notice as per contract agreement. ...

Section 47(5) of the Employment Act, 2007 provides that;

47. Complaint of summary dismissal and unfair termination ...

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

The burden placed on an employee is to prove the termination of employment is unfair or that there is a wrongful dismissal from employment while the burden of justifying the grounds for which termination of employment is effected is on the employer as correctly held by the case cited by the claimant in **Mary Mutanu Mwendwa versus Ayuda Ninos De Africa-Kenya (Anidan K) [2013] eKLR.**

Section 43 of the Employment Act, 2007 on the other hand requires an employer before effecting termination of employment to prove the reason(s) for the termination and where an employer fails to do so, such termination of employment is deemed unfair within the meaning of section 45 of the Act.

The burden to give reasons is on the rationale that section 45(2) of the Employment Act, 2007 requires an employer to demonstrate that;

(2) A termination of employment by an employer is unfair if the employer fails to prove— (a) that the reason for the termination is valid;

(b) That the reason for the termination is a fair reason—

(i) Related to the employee's conduct, capacity or compatibility; or

(ii) Based on the operational requirements of the employer; and

(c) That the employment was terminated in accordance with fair procedure.

Even in a serious case that warrants summary dismissal, the employer must comply with the provisions of section 41(2) of the Employment Act, 2007.

In this case, by letter dated 17th March, 2016 the respondent does not give any reason(s) leading to the termination of the claimant's employment save to state that he would be paid for notice in accordance with his contract agreement. However, even where the notice period is to be paid for, the law requires the

employer to give reason(s) for termination of employment and which reasons assessed on the import must be found to be genuine, avid and fair. Such is to ensure that an employee enjoying his contract of service/employment is not treated unfairly and without justifiable cause loses the employment.

In this regard, where no reason is given by the respondent as to why employment of the claimant had to terminate and without any such reason as to the claimant's conduct, capacity, operational requirements and there having been no fair procedure, such termination of employment was unfair pursuant to the provisions of section 45 of the Employment Act, 2007.

The claimant is entitled to compensation in accordance with section 49 of the Employment act, 2007. An award of 12 months' pay is found justified and appropriate in this case and is awarded Kshs.194, 064.00.

On the claim for notice pay, such was provided for in the letter of termination. The unfair termination of employment is addressed above. There is compensation for the same.

Annual leave is claimed on the basis that the claimant was made to work without allocation of annual leave. However, the claimant in his evidence and written statement has not set out how; being a school teacher and taking cognisance of the applicable system of education prevailing that he did not take such annual leave. Such claim is not justified.

On the breach of contract and the claims made, the claimant testified that he worked for the respondent until 17th March, 2016 when he was dismissed. His letter terminating employment was essentially a letter of termination as notice was given and taking effect on 18th April, 2016. The employment letter though referred to is not attached to suggest that the claimant had a contract subsisting and ending in June, 2018. Even where such contract existed, the claimant offered his labours until 17th March, 2016 and for the unfair termination of employment such is redressed as set out above.

Gratuity and service pay are claimed for the period in service. as correctly held in the case of **Mary Mutanu Mwendwa**, cited above, and also set out in the case of **Elijah Kipkoros Tonui versus Ngara Opticians t/a Bright Eyes Limited [2014] eKLR** service and gratuity payments must be set out in a collective agreement, employment agreement or a private treaty between the parties as otherwise, where the employer remits statutory dues to the relevant bodies as required under section 35 of the Employment Act, 2007 such claims are without justification. Payments to NSSF are in their nature meant to secure the employee as a social protection scheme. Employers and trade unions or by agreement upon employment, employers may agree to enhance the cover for social security by making provision for the payment of service/gratuity. This is not the case for the claimant. His NSSF dues were paid and he testified to this fact. The dues owing to NHIF are equally not meant to go to the claimant rather these are statutory dues to be remitted to the appropriate body.

On the claim for work during public holidays, the details as to which days apply are not set out and though not challenged by the respondent, the 11 days of work and which were meant to be public holidays for the 7 years was for the claimant to articulate. Equally the off days claimed are not addressed in evidence.

Work hours and overtime claimed is also left bare. The claimant did not set out when he would report to work or leave work to justify that he was entitled to 45 hours per week but was made to work for 12 hours per day for 6 days. The computation of these claims particularly the overtime work, contradicts the claimants claims for rest days. Keenly looked at, where the claimant was at work for 6 days a week, the 7th days automatically became his rest day.

Accordingly, judgement is hereby entered for the claimant for compensation at Kshs.194,064.00 And costs of the suit.

Delivered in open court at Eldoret this 24th day of September, 2018.

M. MBARU

JUDGE

In the presence of:

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