



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 149 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

NICODEMUS OCHIENG OGUTU CLAIMANT

VERSUS

VILLAGE OF HOPE – KENYA RESPONDENT

JUDGMENT

Vide memorandum of claim dated and filed on 13th May 2015 the claimant avers that his employment was unlawfully terminated by the respondent in contravention of his employment rights. He seeks the following remedies-

a) Three month's salary in lieu of notice

Kshs. 33,885/= less Kshs.7,000/- already paid Kshs.26, 885

b) April, 2015 minimum salary for a trained FI teacher

Kshs.11,295 Less Kshs.6,500 already paid Kshs.4,795

c) House allowance for 8 months worked =

Kshs.3,765 x 8 months Kshs.30,120

d) 12 month's salary for wrongful and unlawful termination of services

Kshs.11,295 x 12 months Kshs.135,540

e) Salary Underpayment from May 2013 to January 2015

as per relevant wage regulations.

Kshs.11,295 x 8 months less (Kshs.7,000 x 8 months) Kshs.34,360

f) Reimbursement for money the claimant used in

treatment of his son Kshs.2,500

Total terminal dues Kshs.236,600

g) The Respondent to update the claimant's NHIF and NSSF records and pay all the accrued penalties if any.

h) A Certificate of Service.

- i) Costs of the suit.
- j) Interest on total terminal dues (Kshs.236.600).
- k) Any other further relief that the court may deem just and fit to grant

The respondent filed a defence and reply to the memorandum of claim denying all the averments in the memorandum of claim.

At the hearing, the claimant testified that he was employed by the respondent, a charitable organisation operating a school, on 15th September 2014. He worked until 1st May 2015 when his contract of employment was terminated vide letter dated 24th April 2015.

The claimant testified that before the termination letter of 24th April 2015 which was signed by National Director of the respondent, he had received an earlier letter dated 20th April 2015 from the Administrator complaining about a text message he had sent to the Administrator asking about deductions from his salary for NSSF and NHIF which had not been remitted to the statutory bodies. The claimant testified that he found out that there was no remittance in January 2015 when his son was hospitalised. He was unable to use his NHIF card because the respondent had not remitted the deductions from his salary. He attached copies of the hospital bill and receipts.

He testified that before he was employed by the respondent he was remitting his NHIF contributions as an individual. He also attached a statement from NSSF, which reflected that the deductions from his salary was not remitted.

The claimant further testified that he was paid a salary of Kshs.7,000, that he is a qualified P1 Teacher, TSC No. 713055.

He testified that the minimum salary for a P1 Teacher was Kshs.11,295 per month. He attached a copy of the first schedule (salary scales) under Cap 212 Teachers Service Commission Act (Revised 2009) as evidence of the minimum salaries for teachers. The claimant testified that he was not paid house allowance.

The claimant testified that he was not given notice of termination or invited to a disciplinary meeting. He was further not given notice. He testified that the termination of his employment was unfair as fair procedure was not followed and the reasons for termination were not fair.

He prayed for compensation, underpayments of salary, pay in lieu of notice, house allowance, reimbursement of hospital expenses for his son, service pay and certificate of service.

Under cross-examination, the claimant testified that the respondent is a charitable organisation and is funded by donors. It take care of orphans and operates both a primary and secondary school. It does not entirely rely on donors as it also has fee paying students. He testified that after his contract was terminated he was paid Kshs.6,500 in lieu of notice.

JOHN OKELO ODHAIMBO, RW1 testified for the respondent. He testified that he is the Director of the respondent in charge of overall operations including the orphanage and the school. He testified that when the claimant was employed he was informed that the respondent reserved the right to terminate his employment depending on donations, that overseas donations dropped and at the time the respondent could only afford to pay him Kshs.7,000.

He testified that the claimant was given notice that he would be laid off due to low funding. The notice was given through a general staff meeting.

He testified that the claimant's NSSF and NHIF were not remitted and the respondent offered to refund the deductions to the claimant.

Determination

I have considered the pleadings, evidence adduced in court and submissions filed on behalf of the parties. The issues for determination are whether the claimant was unfairly terminated and if he is entitled to the remedies sought.

Unfair Termination

The letters dated 20th and 24th April 2015 capture the circumstances under which the claimant was employed.

The letters are reproduced below –

“VILLAGE OF HOPE – KENYA

P. O. Box 215 – 40123

Mega City

Kisumu Kenya

Mr. Nicodemus Ogutu

P. O. Box 536 – 40101

AHERO

20th April 2015

Dear Sir

RE: NSSF AND NHIF CONTRIBUTION

I am referring to the phone message you sent to me. It is true I have been deducting your salary for NSSF and NHIF since September 2014 but I had not remitted the same to the said bodies because I had not yet received your registration numbers until that date. You have been asking for a refund in two meetings: one when we were with the teachers who teach remedial classes and the other when we had a general staff meeting in ECD Final Class.

As an organization, we would like to work in a harmonious environment without antagonism. You can therefore come for your money and we end the contract between you and the organization on 30th of April 2015.

Yours Faithfully

SIGNED

Jane Okello (Mrs.)

ADMINISTRATOR

cc. The National Director”

“VILLAGE OF HOPE – KENYA

P. O. Box 215 – 40123

Mega City

Kisumu Kenya

Mr. Nicodemus Ogutu

P. O. Box 4860

KISUMU KENYA

24th April 2015

Dear Sir

RE: NSSF AND NHIF CONTRIBUTION

I received a copy of your letter on 24th April 2015 at 2.07 pm. I read it and understood its content with concern.

Referring to the copy of a letter addressed to you by the Administrator, and the one you wrote and copied to me, and also concerning the sms that you sent to the Administer on her phone concerning the same, your contribution to the said accounts will be paid not later than 4th May 2015. This is because now you have said in your letter that you are not interested in refund as earlier alleged.

I chaired the two meetings that the Administrator mentioned to you in her letter, and according to what has gone on over the April holidays concerning the same with the Government Agencies, something which has not happened to us, as an Organization we cannot withstand it. We would like to work in a harmonious environment without any antagonism whatsoever. If there is any problem then systems and protocol must be followed. You also complained to the Head Teacher about annual increment and you are only 8 months old.

I therefore, direct that your contract with us will end on 1st May 2015. Upon receiving letter, you will have to proceed with it to office of the Administrator for further information. Meanwhile, you will stay away from Village of Hope Kenya facilities and

functions.

Yours Faithfully

SIGNED

REV. JOHN OKELLO

NATIONAL DIRECTOR – VOHK

cc. The Administrator

Village of Hope Kenya

The Chairman Board of Governors

Village of Hope Kenya

The Head Teacher

Village Hope Academy”

It is clear from the letters that the claimant’s employment was terminated because he complained about the non-remittance of his NSSF and NHIF deducted from his salary.

The respondent has admitted not remitting the same. The averment of RW1 that the termination was due to lack of funds is not borne by the letters to the claimant. No minutes were produced of the alleged staff meeting in which the claimant and other staff were notified of intention to terminate some employees due to low funding.

Even if low funding was the reason for termination, (which I have already stated is not reflected in the letters of termination) it would still be unprocedural as it did not comply with Section 40 of the Employment Act.

Section 46(h) of the Employment Act provides that an employee’s initiation or proposed initiation of a complaint or other legal proceedings against his employer does not constitute a fair reason for dismissal or for institution of a disciplinary penalty against the employee except where the complaint is shown to be irresponsible and without foundation.

The claimant’s letters of termination dated 20th and 24th April 2015 clearly show that the reasons for the termination of his employment was the complaint of non-remittance of NSSF and NHIF. It is also clear from the letters that the claimant was not taken through any disciplinary process.

The termination was therefore unfair both procedurally and substantively in terms of Section 45(2) of the Employment Act and I declare accordingly.

Remedies

The claimant prayed for several remedies, which I will consider individually.

(1) Underpayments

The respondent did not deny underpaying the claimant. All it stated was that it did not have sufficient funds. Sections 3(6) and 26 of the Employment Act and 48(1) of the Labour Institutions Act prohibit the payment of imposition of terms of employment less favourable than the statutory minimum and require the courts to substitute such less favourable terms with the statutory minimum terms.

I therefore find that the claimant was underpaid both basic salary and house allowance. As is provided in the statutory minimum pay for teachers under TSC Act, the claimant was entitled to basic salary of Kshs.11,295 and a separate house allowance. I therefore award the claimant salary underpayments as follows –

Salary underpayment for 8 months at Kshs.4,295 per month Kshs.34,360

House allowance for 8 months Kshs.30,120

(2) Notice

The claimant was paid in lieu of notice after institution of this suit in the sum of Kshs.7,000. He is therefore entitled to the difference of Kshs.4,295.

(3) Reimbursement of hospital bills for claimant's son

The respondent admitted not remitting NHIF deductions from claimant's salary. This directly denied the claimant the benefit of the card. I find that he is entitled to a refund of the hospital bills, which I award him at Kshs.2,500.

(4) NSSF and NHIF

The claimant prayed that the respondent update his statements with the NSSF and NHIF deductions that were not remitted. RW1 however stated that the respondent is holding the money and is ready to refund the same.

I order that the monies be refunded to the claimant with interest at court rates from the date of deductions till payment in full. The claimant can use the same to update his account with NSSF personally. It is not necessary to update NHIF so he can pay the same from current date.

(5) Compensation

Taking into account all the circumstances of this case and specifically that the claimant lost his job because of raising a complaint about statutory deductions made from his salary and not remitted, further taking into account the mode in which the claimant discovered the non-remittance, and the fact that the procedure by which his employment was terminated was unfair, I award him 4 months' gross salary as compensation in the sum of Kshs.15,060 x 4 = Kshs.60,240.

(6) The respondent shall issue a certificate of service to the claimant

(7) The respondent shall pay claimant's costs.

(8) Interest shall accrue at court rates from date of judgment except for item (4) above which shall accrue from date of deduction from salary.

DATED AND SIGNED AT NAIROBI ON THIS 8TH DAY OF OCTOBER 2018

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 25TH DAY OF OCTOBER 2018

MATHEWS NDERI NDUMA

JUDGE