



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 212 OF 2017

(Before Hon. Justice Mathews N. Nduma)

JOHN JUMA OBUNGU.....CLAIMANT

VERSUS

KENYA NATIONAL UNION OF TEACHERS (KNUT).....1ST RESPONDENT

KNUT NYANDO BRANCH.....2ND RESPONDENT

J U D G M E N T

1. The Claimant voluntarily retired from the employment of the Respondent in February, 2016. He had served the Respondent as the Executive Secretary at the Respondents Nyando Branch for 15 years comprising three five year fixed contract terms.

2. These facts are not in dispute. The dispute concerns the payment of staff terminal benefit as stipulated in the Staff Terminal Benefit Scheme as amended on 19th September, 2007.

3. The claimant also demands payment of arrear salaries not paid to him because his salary was not increased in terms of Circular, Civ/122/7/2012 which reviewed/increased the salaries and allowances for all full time branch employees. It is the claimant's case that the circular altered his contract of service and he is entitled to payment of arrear salary and the terminal benefits be calculated on the basis of the reviewed salary as per the 2012 circular.

4. The Claimant therefore seeks payment as follows:-

(a) Kshs.593,990.40 being underpayments of salary and allowances for the years 2013 and 2014 and

(b) Kshs.3,244,221 terminal benefits.

Total claim Kshs.3,838,211 Less Kshs.951,456 paid terminal benefits. Balance claim Kshs.2,886,755.40.

Response

5. The Respondent in its memorandum of response admits the particulars of employment of the Claimant and that his terms of employment were governed by staff terminal benefits scheme.

6. That upon retirement, the terminal benefits would be calculated according to this formula:-

Lump sum payment + Total Monthly Emoluments x total Months of Service.

7. That for staff of branches and BEC Members, the Total months of service shall be limited to five years or sixty months in terms of paragraph 5.3 (1) of the Staff Terminal Benefit Scheme.

8. That the alleged amendment of the Terminal Benefit Scheme of 2007 being applied by the Claimant in his claim has not taken effect and it has not been used by the Respondent to calculate the terminal benefits of any other former employer of the Respondent.

9. That the claim is therefore misconceived. The Respondent states that on 30th November 2016, the Respondent's National Treasurer wrote a letter to the Executive Secretary KNUT Nyando Branch notifying him of the amount of unpaid salaries, salary in lieu of leave, terminal

benefits and salary underpayments in 2013 and 2014 owed to the Claimant.

10. That on 15th December, 2016, an advance terminal benefits of Kshs.150,000 was transferred to the Claimant's account. Respondent states that it then paid the Claimant tabulated final benefits set out in the letter dated 24th March, 2017 in the sum of Kshs.951,456 over and above the advanced Kshs.150,000.

11. That the Claimant was paid Kshs.1,845,473 which included unpaid salaries, salary in lieu of leave and terminal benefits. That the Claimant had been loaned Kshs.501,018.10 which was less the various deductions made on behalf of the Claimant as tabulated in the letter dated 24th March, 2017.

12. That furthermore, in the computation of total monthly emoluments, hardship allowances do not form part of it as per the Respondent's Staff Terminal Benefit Scheme, 2003.

13. Respondent maintains that the Claimant was fully paid all monies due and owing to him as arrear salary in respect of 2013 2014 underpayment, and terminal benefits and the suit be dismissed with costs.

Determination

14. The issue for determination is whether the Claimant has proved the claimed underpayment of salary and terminal benefits on a balance of probabilities.

15. The Claimant wrote to the Respondent letters dated 10th November, 2012; 5th December, 2012 and 17th December, 2012 requesting a salary increment for all branch employees on ground, that they were earning less compared to their colleagues in the teaching profession.

16. The Claimant wrote a further letter dated 12th February, 2003 to the Respondent requesting his salary and allowances be increased.

17. On 28th November, 2014 the Respondent's Secretary General wrote a letter to the Chairman KNUT Nyando Branch directing him to instruct the branch treasurer to adjust the Claimant's monthly salary to Kshs.71,470 with effect from January, 2017 and this was done. The Claimant was paid arrear salary upon this increment.

18. The Claimant opted not to testify in this matter and relies on the pleadings and documents attached to the statement of claim and in particular Cir/122/7/7/2012, which he has pleaded changed his terms of service.

19. In terms of sections 107 and 108 the Evidence Act, Cap 80 Laws of Kenya, the Claimant has the onus of proving his case on a balance of probabilities. The Respondent bears the burden of rebutting evidence adduced by the Claimant.

20. The Claimant stated that he was underpaid by Kshs.25,168.60 per month from January, 2013 since his salary ought to have been adjusted from 58,584 to Kshs.71,270 and the allowances were also to be adjusted as reflected on paragraph 12 of the statement of claim. The Claimant further states that in the year 2014, his basic salary was Kshs.60,580 instead of Kshs.72,710 and was over all under paid by Kshs.24,330.60 per month. He submits therefore that in 2013 he was underpaid by Kshs.302,023.20 and in 2014 by Kshs.291,967. To the contrary the Respondent submits that salary adjustment for the Claimant were with effect from January, 2015 and not January, 2013 and that all arrear salary was paid and taken into account in calculations of the terminal benefits.

21. The Respondent produced the letter dated 28th November, 2014, which authorized increment of Claimant's salary to Kshs.71,470 with effect from January 2015 which was category 18 of the new KNUT packages for KNUT Branch employees.

22. Accordingly, in the absence of a letter reviewing and increasing the salary and allowance of the Claimant with effect from January 2013, the court cannot arbitrarily purport to increase the salary and allowance of the Claimant as pleaded by the Claimant.

23. The Claimant has in the court's view failed to prove his claim for underpayment in 2013 and 2014 on a balance of probabilities. The effect of this finding is that the claim for adjustment of the terminal dues paid to the Claimant equally fails. The Claimant has not proved that a wrong formula and emoluments was applied in calculating his terminal benefits. To the Country, the Respondent has through documentary evidence sufficiently rebutted the evidence presented by the Claimant.

24. In the final analysis, the court finds that the suit lacks merit and is dismissed. The Claimant had faithfully and diligently served the Respondent for a period of 15 years. The Claimant left the teaching career and opted to be a union administrator voluntarily. He could not have his cake and eat it at the same time. His lamentation is largely that those he left in the teaching field appeared to have fared financially better than he had. Having said that, each party to bear their own costs of the suit in recognition of the faithful and diligent service the Claimant provided to the Respondent for a period of 15 years.

Dated, Delivered and Signed in Kisumu this 20th day of December, 2018

Mathews N. Nduma

Judge

Appearances

Mr. O. M. Otieno for Claimant

M/s Imbaya for the Respondent

Chrispo – Court Clerk