



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE 259 OF 2013**

***(Before Hon. Lady Justice Maureen Onyango)***

**ANTONY RAJULA NDUBI.....CLAIMANT**

**VERSUS**

**LIFESPING CHRISTIAN ACADEMY/KIBERA KIDS CENTRE...RESPONDENT**

**JUDGMENT**

The Claimant filed suit on 26<sup>th</sup> February 2013 seeking damages for unlawful termination arising out of an employment relationship which commenced on 10<sup>th</sup> February 2008 and terminated on 14<sup>th</sup> May 2012.

It is the claimant's case that he was employed on a contract of one year which contract was verbally renewed and he worked diligently to the satisfaction of the Respondent until May 2012 when he was unlawfully terminated without any reasons being given or procedure being followed. He prays for damages as particularised in the claim to include unpaid salary, house allowance and damages for unlawful termination.

The Respondent filed a Memorandum of reply and a counterclaim wherein they admit that the Claimant was employed by them effective March 2008 for a one year contract period expiring on 9<sup>th</sup> September 2008 at a consolidated salary of Kshs.6,000/=.

That he was then employed on a second contract effective September, 2008 to 31<sup>st</sup> December, 2009 after which he left the Respondent's service to pursue his own interests and returned and was engaged afresh effective 1<sup>st</sup> October, 2010 to 31<sup>st</sup> December, 2010, as a gardener earning a consolidated salary of Kshs.7,000 per month. Upon expiry of the 2<sup>nd</sup> Contract he was engaged afresh on 3-month contract commencing 1<sup>st</sup> January 2011 to 31<sup>st</sup> March 2011, and thereafter the contract was extended orally until 5<sup>th</sup> April 2012, when he was subjected to a disciplinary hearing for the theft of 'Sukuma' seedlings and as a result he was issued with a 1 month notice of termination which ran up to 15<sup>th</sup> May 2012.

The Respondent alleges that the Claimant failed to attend his duties during the notice period and the Respondent's directors deemed him to have absconded duties thus prematurely terminating his contract. They pray for the claim to be dismissed as the Claimant was not terminated as alleged. In the Counterclaim the Respondent claims for one month's salary of Kshs.8,000/= in lieu of notice.

**Evidence**

In evidence the claimant stated that he worked for the Respondent as pleaded in his Memorandum of Claim. That sometime in February, 2012, he together with his colleagues witnessed a girl being sexually abused by a fellow employee which they reported to their Supervisor and Director of the Respondent but they did not take any action. Instead they accused the claimant and his colleagues of stealing Sukuma Wiki. That they were taken to the police station but they were never charged in Court and thereafter the Claimant's employment was terminated without due process.

In cross examination he denied receiving a consolidated salary which included a housing allowance. He stated that some of his other colleagues were provided with housing at the Respondent's premises whereas he was not housed by the Respondent and neither was he given an allowance for housing.

The Respondent did not call any witnesses to controvert the Claimant's evidence.

**Submissions**

It was submitted on behalf of the Claimant that he was dismissed for no valid reason and without following any of the processes envisaged under section 41 and 45 of the Employment Act. For the said reason counsel for the Claimant submits that the Court should declare the termination unjustified and unlawful.

On the remedies sought it is submitted that section 35 as read together with section 37 of the employment Act requires that one month's notice is given prior to termination or one month's pay in lieu thereof.

It is submitted that the Claimant is entitled to 15 days salary for the month of May 2012 which were never paid in accordance with section 49(1)(b) of the Employment Act. Further that housing allowance is due as section 31 of the Employment Act requires an employer to provide reasonable housing or pay an employee a sufficient sum as rent in addition to wages. Counsel also urges the Court to award damages for unlawful termination equivalent to 12 months' salary.

## **Determination**

### **Issues for Determination**

#### ***Whether there was a valid reason for termination***

The Claimant in his evidence stated that he was victimised for reporting his supervisor for abusing a girl in the care of the Respondent. That he was thereafter accused of stealing Sukuma wiki subsequent to which he was terminated.

Section 43 of the employment act is to the effect that:

#### **43. Proof of reason for termination**

**1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.**

**2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.**

The Respondent did not present any evidence as proof of a hearing or to prove the reason for termination. Furthermore, no proof was presented to the Court by the Respondent of the procedure followed in terminating the Claimant's employment. The Claimant's termination was thus also procedurally flawed. There is a termination letter annexed to the Respondent's supplementary list of documents as App. 5 in which the reason for termination was purportedly given to the claimant and the Respondent insinuates some form of hearing. However the Respondent did not put up witness to attest to the veracity of its evidence. From the evidence on record, there is no proof of valid reason for termination or of fair procedure rendering the termination unfair.

#### **Whether the Claimant is entitled to the remedies sought**

##### ***Notice pay***

The Claimant filed a supplementary list of documents attaching notices of non-renewal of contract which required him to work during the notice period ending on 15<sup>th</sup> May 2012. The Claimant pleaded that he was in employment up to 14<sup>th</sup> May 2012. It is therefore evident that notice was issued as required under section 35 of the Act and thus no payment is due under this head.

##### ***Unpaid salary***

The Respondent did not present any evidence to prove that the Claimant was paid for days worked in May, 2012. Salary for the 14 days the Claimant worked in May 2012, is therefore due. I accordingly award him Ksh.3,733 being salary for 14 days worked in May 2012.

##### ***House Allowance***

The Respondent pleaded that the claimant was paid a consolidated salary. Section 31 of the Employment Act provides that:

**“An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.”**

Under the Regulation of Wages (General) (Amendment) Order 2011, the claimant was entitled to Kshs.7,586 plus 15% house allowance as consolidated wages. This would come to Kshs.8,723.90.

The contract of employment annexed to the Memorandum of response indicates that the amount paid to the Claimant was a consolidated salary. The Claimant was thus underpaid by Kshs.723.90 taking into account his consolidated salary of Kshs.8,723.90. I therefore award him only the short fall of Kshs.723.90 as the shortfall between the consolidated wage and the salary paid for one year. He did not adduce evidence of underpayment for previous years.

### **Damages for unlawful termination**

Having found that the Claimant was unlawfully terminated, he is entitled to damages in the form of compensation. Taking into account the circumstances under which his employment was terminated, his length of service and the fact that he left employment empty-handed after working for the respondent for 4 years, I award him 5 months' salary as compensation in the sum of Kshs.42,619.50.

### **Counterclaim**

The Respondent did not call evidence to prove the claimant did not work during the notice period. It was the claimant's evidence that he worked up to 14<sup>th</sup> May 2012. The counterclaim therefore fails and is dismissed with costs.

Judgment is hereby entered for the claimant against the respondent as follows--

1. Unpaid salary	Kshs.3,733.00
2. House Allowance	Kshs.8,636.80
3. Compensation	Kshs.43,619.50
<b>Total</b>	<b>Kshs.55,989.30</b>

The respondent shall pay costs for both claim and counterclaim and the decretal sum shall attract interest at court rates from date of judgment till payment in full

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7<sup>TH</sup> DAY OF DECEMBER 2018**

**MAUREEN ONYANGO**

**JUDGE**