



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2257 OF 2012

(Before D. K. N. Marete)

CHRISTINE ATIENO OPIYO.....CLAIMANT

VERSUS

MICHELLE ANYANGO &

NICHOLAS NYASORO T/A SMALL WHALES ACADEMYRESPONDENT

JUDGEMENT

This matter was originated by The Claimant's Memorandum of Claim dated 29th October, 2012. The issue in dispute is therein cited as;

Breach of Employment Contract dated 3/1/2014 and non-payment of the Claimant's dues upon termination.

This matter is not defended, or at all. This is despite service.

The claimant's case is that by an appointment letter dated 3rd January, 2004, she was employed by the respondent as Head Teacher at an initial basic salary of Kshs.25,000.00. She served loyally and diligently and was on 4th January, 2005 promoted to the position of manager at an enhanced salary of Kshs.30,000.00.

The claimant's other case is that upon the death of one of the directors, Jane Owili Nyasoro, the respondent succeeded the deceased as joint and or several proprietors, managers, trustees and or Administrators of the school.

The claimant's other case is that the duo started withholding part of her monthly salary to the extent that by the time of her resignation, they were withholding up to Kshs.43,300.00., Kshs.20,000.00 of which was paid upon service of a demand letter dated 2nd October, 2012 by herself. The balance still owes.

The claimant's further avers and posits that on or around 3rd February, 2012, the respondent unilaterally withdrew the transport service that was picking her to and from her Umoja residence thereby subjecting her to transport expenses of Kshs.200.00 per day. At the time of her resignation, this had cumulated to Kshs.42,000.00

The claimant's other case is that she was denied annual leave for the entire period of pay all amounting to

Kshs.540,000.00. She also prays for house allowance pegged at 50% of her house rent of Kshs.11,000.00 for nine years amounting to Kshs.396,000.00 and service pay at Kshs.270,000.00. In all she claims;

SUMMARY OF CLAIM

| | |
|-----------------------|-------------------------|
| a) Service | Kshs.270,00/- |
| b) Salary Arrears | Kshs.20,300/- |
| c) Leave pay | Kshs.540,000/- |
| d) Commuter/Transport | Kshs.42,000/- |
| e) Housing/Rent @50% | Kshs.396,000 |
| TOTAL | Kshs.1,268,300/- |

She prays as follows;

1. *The sum of Kshs.1,268,300/- as particularized in paragraph 8 of the Claim herein.*
2. *Compensation for breach of contract and consequent loss of career in the sum of Kshs.360,000/-*
3. *Costs of this suit.*
4. *Interest on 1 & 2 above.*
5. *Any other relief the court may deem fair and just to grant.*

The matter came to court variously until 17th October, 2018 when it was heard. With the CW1 – Emmah Anyango Onyango the claimant's sister and personal representative and the claimant's daughter as CW2 testified in reiteration and support of the claim.

The issues for determination therefore are;

1. Whether the claimant is entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the claimant is entitled to the relief sought. The claimant's counsel opened by a prayer that the claimant's witness statement dated 24th October, 2012 and her list of documents be adopted as evidence in support of the claim.

CW1 – Emmah Anyango Onyango testified that the claimant died in April, 2010 she was married but separated. She had two issues, Winny Achieng Opiyo and Welly Achieng Opiyo. At the time of her death Winny was at university while well was at Embu Girls High School.

CW1 further testified that the claimant worked at the Small Whales Academy until her resignation in 2012. She further testified that there was an out of court settlement on this claim but this was not met. The respondent's went quiet on the demise of the claimant. The claimant's children Winny is in her final year while Welly is yet to join college but for lack of college fees.

On cross-examination, CW1 testified that the claimant was her sister and worked for Small Whales Academy from 2004 to 2012 before she settled on self employment. She further testified that the claimant did her resignation letter on 31st May, 2012 and this was addressed to the director of Small

Whales Academy. She was, however, not clear on the receipt or authenticity of the letter.

The reminder of the resignation is dated 15th August, 2012 and has the features of the original. It has no acknowledgement, no stamp, no receipt, and no date of receipt. She also testified at paragraph 5 of the respondent's letter to the claimant dated 3rd January, 2004 is on notice before resigning or leaving. On paragraph 8 is on the consequences of desertion – no pay.

On re-examination, CW1 testified that the letter dated 31st May, 2012 was received by the school and has a stamp like the one of 4th January, 2008. It is signed by G. A. E. Nyasono, the 2nd respondent. The claimant did not have a school stamp.

CW1 further testified that negotiations for an out of court settlement took place on 31st August, 2012 and that ultimately, a demand letter was issued.

CW2 – Winny Achieng Opiyo testified that she was a daughter to the deceased who worked for Small Whales Academy as school administrator. She had filed a claim before she died and this was on compensation of services rendered. This had not been met. It is now the claim and her sister required the same to go to college.

The claimant in her written submissions submits that judgement ought to be entered against the respondent on the basis of their admission on the face of its document and correspondence. This is because all this time, the respondent has not filed any response to the claim or a witness statement. She did not call any witnesses or adduce evidence at the time of hearing. This should be deemed an admission on the part of the respondent and judgement entered in favour of the claimant. This is also in reliance to Order 13, Rule 2 of the Civil Procedure Act which provides as follows;

Any party may at any stage of a suit, where the admission of the facts has been made, either on the pleadings or otherwise apply to the court for such Judgment or order as upon such admissions he may be entitled to, without waiting for determination of any other question between the parties; and the Court may upon such application make such order, or give such Judgment as the court may think just.

The claimant seeks to rely on the authority of **Eunice Wambugu Gachogu vs. Hon. Charles Nyamai T/A My Hotels Palms, Industrial Cause No.1214 of 2012** (unreported) at page 2 where the admissibility and applicability of the Civil Procedure Rules in this court was acknowledged and upheld as follows;

At the onset, the Court wishes to settle the dispute as to whether the Civil Procedure Act and the Civil Procedure Rules apply to this court. Whereas it is desirable that recourse be, where possible, to the industrial court (Procedure) Rules 2010, this court is of the firm view that the Civil Procedure Rules 2010 can be relied on. Only the non-applicability of the strict rules of evidence under the Evidence Act are expressly mentioned in the Industrial Court (Procedure) Rules 2010. The Rules and the Industrial Court Act 2011 do not expressly bar the application of the Civil Procedure Rules and neither would I bar the use of the rules where there is lacuna in the Rules of this Court. The Applicant was well founded in reliance on the Civil Procedure Rules 2010.

The claimant in further support of her case seeks to rely on the authority of **John Nyonje Eliuaba v Lubao Jaggery Actory Ltd, [2016]eKLR** where the Court observed as follows;

The Claimant having been an employee of the Respondent, it was under obligation to prove that the Claimant took leave, was not underpaid did not work overtime or on public holidays and is not entitled to service pay. Such obligation is statutory under section 10 and 74 of the Employment Act. Section 10(7) expressly provides that failure of the Respondent to produce such records shifts the burden of proof from the Claimant to the Respondent.

This matter is not defended, or at all. The respondent did not file any defence. This all, is despite service.

The respondents however files written submissions dated 29th October, 2018 in which they contradict and discounts the validity of the claimant's letters of resignation. It is their case that the claim is not sustainable and further, the claimant should be treated as a deserter from duty without notice and therefore dismissed.

The salient issue at hand is the admissibility of written submissions in the absence of a defence. Would written submissions serve the purposes of a defence in the circumstances of this case or any other contested litigation? My answer is no. The rules of this game dictates that litigious proceedings are articulately and meticulously pursued through agreed process and procedure. This enables parties to foresee the expectations and respond to this accordingly. In the circumstances of this case, the claimant was entitled to service of a defence so that she would have been in a position to answer the same. This would have enabled her a fair chance at doing her case. This was not to be due to the respondent's shoddy management of the defence.

The respondent adopts ambush as a methodology of conducting her defence and case. This is not allowed. It is not acceptable or sustainable in law and practice.

The claimant should not be held responsible for the misgivings of the respondents. This should swallow their own cup of tea. I therefore discount the respondent's submissions and hold that these would not fall in place of a defence. In any event, this comprises of mere denial and is escapist. This brings out a cause as is submitted by the claimant. The suit is not defended. I therefore find that the claimant is entitled to the relief sought.

I am therefore inclined to allow the claim and order relief as follows;

- i. Arrears of unpaid salaryKshs.20,300.00
- ii. Commuter/transport costs.....Kshs.42,000.00
- iii. Service pay $15/30 \times 30,000 \times 9 =$Kshs.135,000.00
- iv. Housing/rent @50% of actual rent(of Kshs.11,000.00).....Ksh.396,000.00
- v. Leave pay.....Kshs.540,000.00
- Total of claim.....Kshs.1,133,300.00**

vi. The costs of the claim shall be borne by the respondent.

Dated and signed this 29th day of November 2018.

D.K. Njagi Marete

JUDGE

Delivered and signed this 3rd day of December 2018.

Maureen Onyango

PRINCIPAL JUDGE

Appearances

1. Ms Nyanchiru holding brief for Arum instructed by Otieno Arum & Company Advocates for the claimant.

2. Mr. Awino instructed Owiti, Otieno & Ragot Company Advocates for the respondent.