



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 19 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**FRED J. OWUOR alias FRED O. J. OWUOR..... CLAIMANT**

**-Versus-**

**TEC INSTITUTE OF MANAGEMENT LIMITED ..... RESPONDENT**

**JUDGMENT**

By his Statement of claim dated 7th February 2014 the Claimant states that by letter of appointment dated 28th September, 2008 he was employed by the Respondent as lecturer at its campus in Eldoret at a monthly salary of Kshs.23,000 subject to statutory deductions. His terms of service provided for 30 days annual leave. The claimant states that he executed his duties diligently rising to the position of Deputy Principle with effect from January 2011.

On 19th September 2013 his contract of employment was terminated. Before the termination of his contract the Respondent withheld his salary thus subjecting him to inhuman treatment. The Claimant further states that he was subjected to long working hours of 12 hours per day but was not remunerated for extra hours worked.

The claimant avers that due to the inhuman treatment he was subjected to by the Respondent his marriage irretrievably broke down and his health deteriorated. He started suffering from ulcers requiring a lot of treatment and medication which the Respondent was unwilling to provide.

The claimant further states that while working with the Respondent he took a bank loan which was serviced through deductions from his salary. As a result of the stoppage of his salary the bank loan was not serviced and the claimant incurred bank charges and interest for which he holds the Respondent liable.

The claimant prays for the following orders against the Respondent

- |    |                          |                  |
|----|--------------------------|------------------|
| 1) | (a) Salary arrears       | Kshs. 122,598.00 |
|    | (b) Leave allowance      | Kshs. 306,000.00 |
|    | (c) House allowance      | Kshs. 732,000.00 |
|    | (d) Travelling allowance | Kshs. 90,000.00  |
|    | (e) Severance Pay        | Kshs. 173,000.00 |

(f) Termination benefit	Kshs. 30,000.00
(g) Extra working hours	Kshs. 5,755,480.00
<b>Total</b>	<b>Kshs. 7,209,078.00</b>

- 2) A declaration that the termination is unjust and inequitable and contravenes Articles 41(1), 28, 47,48 and 50(1) of the Constitution 2010 and be reduced to normal termination with full interests;
- 3) Interest at commercial rates
- 4) Costs of suit.

The Respondent filed a Reply to the Statement of Claim dated 18th February 2014 in which it admits employing the claimant at a consolidated salary of Kshs. 23,000.00 subject to statutory deductions. The Respondent denies the rest of the allegations in the claim and prays that the same be dismissed and/or struck out with costs.

The Claimant's evidence was taken on 12th February 2015 and the case was adjourned to 16th July 2015 for hearing of defence evidence. However both parties did not attend court on 16th July 2015 and the case was stood over generally. The Respondent's evidence was finally taken on 15th December 2016 after several adjournments by the parties. Thereafter parties filed written submissions.

### **Claimant's Case**

The claimant testified that he was appointed by the Respondent initially as a lecturer at its college in Eldoret. After one month he was promoted to Head of Department for Moi University programs which the Respondent was handling in collaboration with the University. The Claimant was again promoted to Personal Assistant to the Principle after 2 months. At the time the institution did not have a Principal and the claimant undertook all the functions of principal.

The Claimant testified that after about 8 months in June 2010 he was promoted to the position of Deputy Principal and in January 2011 he was promoted to the position of Principal. As principal he was in charge of academic programs generally and part of administration. He testified that as principal he was the second in command after the Branch Manager.

The Claimant testified that his first salary was Kshs. 23,000.00 consolidated. At the time he was principal his salary was Kshs. 50,000.00 gross and a net of

Kshs. 40,000.00. However at the time he left employment he was being paid

Kshs. 30,000.00. The Claimant testified that he was dismissed from employment by letter dated 19th September 2013. The grounds for dismissal were absenteeism, incompetence, lack of teamwork, being uncooperative, insubordination, cancellation and rescheduling of lectures, taking phone calls during lectures and failure to deliver course content.

The claimant testified that his problems started some time in 2011 when the Respondent lost the collaboration contract with Moi University. He testified that he was unable to secure another collaboration contract. He went to Maseno, Masinde Muliro, Chepkoilel and KEMU to seek collaboration and managed to get one with Chepkoilel in January 2012. However Moi University which was running Chepkoilel cancelled the contract as they did not want to deal with the Respondent's Managing Director. The Claimant testified that he signed the agreement without the Managing Director.

In April 2012 he was demoted from the position of principal and assigned duties as Head of Department, Social Services and Lecturer. His salary was reduced from Kshs. 50,000.00 to Kshs. 35,000.00. After some time he started missing his salary. His salary would delay while other staff were paid in time

without him being given any reason. Whenever he asked the Branch Manager he was referred to the Managing Director in Nairobi. Whenever this happened he did some correspondence and also spoke with the Managing Director.

The Claimant testified that things got worse and the salary delay degenerated to non-payment for up to 5 months. The Claimant stated that during this period of difficulties he still did his job. He was always the first to report to work and the last to leave as reflected in the staff register.

The claimant testified that all these had a toll on his health and social life and spilled over to his work. He developed ulcers and his wife left him but he still went to work. He testified that he would sometimes break down but was still expected to deliver. He would receive warning letters for every small matter. He testified that there was a time his salary which was in arrears was deducted. The manager deliberately stopped servicing his loan and he was at one time arrested by the Bank and locked up for 8 hours before the Manager paid the loan arrears of Kshs. 20,000.00 to secure his release after laughing at him.

The claimant testified that he received the dismissal letter on 26th September 2013. By then there were outstanding salary arrears of four-and-a-half months. The last salary he was paid was for May 2013.

Under cross examination the Claimant admitted that his letter of appointment provided for a consolidated salary and statutory deduction. He stated he did not have documents confirming official travel that was not refunded. He stated that he signed leave application forms but did not take any leave, and that he has attendance register to prove that he was at work during the dates stated in the leave form. The claimant also stated that he was not issued with a laptop by the Respondent but took a loan to purchase the laptop.

In the written submissions filed on behalf of the Claimant, it is submitted that the claimant was dismissed without a hearing and the summary dismissal was unlawful. The Claimant relied on the case of **Moses Kaunda Moro v CMC Motors Nairobi Cause 192 of 2013** in which the court held that the termination of the Claimant's employment was unfair and awarded 12 months' salary compensation.

### **Respondent's Case**

The Respondent called one witness **George Ambani** the Assistant Branch Manager of the Respondent who relied on his undated witness statement filed in court on 15th December 2016. In the statement he states that he knows the claimant as a workmate. He states that the claimant was employed as a lecturer at a salary of 23,000.00, then promoted to Deputy principal at a salary of Kshs. 30,148.00, then to principal at a salary of Kshs. 40,549 and then demoted to a lecturer at a salary of Kshs. 29,850.00. He states that the Claimant's salary was consolidated. He states that the claimant took his annual leave and was paid cash for the leave pending at the time of his dismissal. He states that the claimant did not work overtime and is not entitled to payment of any overtime. He further states that the claimant is not entitled to any travelling allowance.

Mr. Ambani further states that the termination of the claimant was lawful and that his contract provided for termination without giving reason. He states the claimant utilised 101 leave days and was on 7 days compulsory leave. That he was paid the balance of 33 days upon termination of employment. He states the Claimant owed the Respondent the sum of Kshs. 45,000.00 on account of laptop and further that the Respondent made payments for the Claimant's loan in the sum of Kshs. 70,000.00. That the Respondent advanced the claimant cash in the sum of Kshs. 5000.00 and a further Kshs. 51,000 internal loan all of which was recovered.

Mr. Ambani states that upon leaving service the claimant's terminal dues of Kshs. 141,000.00 was paid less the money owed leaving a balance of Kshs. 54,247.00 which was paid to the claimant.

Under cross examination Mr. Ambani stated that the letter demoting the claimant and reducing his salary was not produced in court. Mr. Ambani stated that the Respondent produced payment records for Claimant's salary for 2011 only and not the entire period he worked. Mr. Ambani stated that the Respondent did not produce evidence to prove that the Claimant owed the Respondent Kshs' 50,000.00

that was recovered from him.

In the written submissions filed on behalf of the Respondent it denies that the claimant is entitled to any of the payments sought in the statement of claim.

## **Determination**

I have carefully considered the pleadings filed by the parties, the evidence adduced in court and the written submission filed on behalf of the parties. The issues arising for determination are whether the claimant's summary dismissal was fair and whether he is entitled to the prayers sought in the Statement of Claim.

## **Summary Dismissal**

Section 44 of the Employment Act provides for circumstances when an employer may lawfully dismiss an employee summarily for gross misconduct. Section 41 however provides that before dismissal or termination of employment under section 44(4)(3) or (4) the employee must be given an opportunity to be heard in the manner set out therein. The section provides as follows-

### ***41. Notification and hearing before termination on grounds of misconduct***

*(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.*

*(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.*

In this case there was no hearing. All that the Respondent did was issue several letters of warning then after 4 such warnings the claimant was summarily dismissed.

Section 43 further states that there must be valid reason for dismissal. The letter of dismissal lists 6 grounds of dismissal none of which the Claimant was asked to respond to. The letter does not refer to any hearing. Having not been given an opportunity to respond to the allegations against him, there was no valid reason for dismissal.

I find that the summary dismissal of the Claimant was unfair for want of fair procedure and valid reason.

## **Remedies**

Having found that the summary dismissal of the Claimant unfair, he is entitled to the remedies set out in section 49 of the Employment Act. He is entitled to notice, days worked and not paid for and annual leave earned and not taken. In order to determine the amount payable I must first make a finding on the rate of salary that the Claimant is entitled to.

It is not in dispute that the Claimant was promoted to the position of principal at a salary of Kshs. 50,000.00 before being demoted to lecturer at a salary of Kshs. 30,000.00 per month by letter dated 30th March 2012. The letter is titled Re-Deployment and states-

**"RE-DEPLOYMENT**

*This is to inform you that, following the Management's recent staff reshuffle, your position of principal*

*has been affected. You will now be a full time lecturer and HOD-Social Studies Department.*

*Your salary will be adjusted to Kshs. 30,000.00 per month.*

*Take note that the changes become effective from April 1, 2012."*

A reduction of salary is a fundamental change in the terms of employment that cannot be effected without discussion with, and express consent of an employee. An employer cannot arbitrarily reduce the salary of an employee as this would constitute unfair labour practice that is prohibited under Article 41 of the Constitution and further amounts to a fundamental breach of an employee's terms of employment. So is a demotion.

I therefore find that the correct salary for the Claimant is Kshs. 50,000.00 and will use the same for purposes of calculation of his terminal benefits.

### **1. Notice**

According to the Claimant's terms of employment he is entitled to one months' salary in lieu of notice which I award him at Kshs. 50,000.00 .

### **2. Leave Allowance**

The Claimant prayed for leave allowance of Kshs. 306,000.00. He testified that he had not taken leave from the time he started working for the Respondent. He stated under re- examination that he was brought the leave forms to sign a month before his dismissal in the pretext that he was signing so that he could be paid in lieu of outstanding leave. Mr. Ambani for the Respondent testified that the Claimant went on leave and was paid for the outstanding leave with his terminal dues.

An analysis of the leave forms filed by the Respondent is outlined below-

1/12/2009 to 15/12/2009 gives a leave balance of 45 days

1/12/2010 to 15/12/2010 reflects a leave balance of 30 days

1/12/2011 to 15/12/2011 gives leave balance of 65 days

1/12/2012 to 15/12 2012 gives leave balance of 15 days

According to section 74(1)(f) as read with section 10(3)(a)(i) of the Employment Act an employer is required to keep records of an employee's leave entitlement, setting out days taken and days due as specified in section 28, the particulars given being sufficient to enable the employee's entitlement to be precisely calculated at the time of termination of employment.

In the leave forms produced by the Respondent, it is not possible to ascertain the leave due to the claimant. According to the forms the claimant took 15 days leave each year from 1st to 15th December. In the first place, 1st to 15th December is not 15 days annual leave as leave days are supposed to constitute only working days. It is common knowledge that 12th December is a public holidays and would not be counted as part of leave days. Secondly, weekends do not count as annual leave days. The claimant's letter of appointment states he is entitled to **30 working days** paid leave annually. In every period of 15 days there would be one or two weekends which would not count as part of leave days.

From the foregoing I am inclined to believe the claimant that he did not take leave and was tricked into signing the forms a month before he was summarily dismissed on the pretext that the forms would be used to work out and pay him leave due to him. Under section 10(7) of the Employment Act it is the burden of the employer to prove or disprove allegations of an employee where he fails to produce prescribed records of employment. Mr. Ambani's averment that the claimant was given 7 days unpaid

leave does not affect the entitlement of the claimant as only paid leave can be deducted from leave entitlement.

Having worked from 1st September 2008 to 19th September 2013, the claimant is entitled to 150 days leave. Based on a salary of Kshs.50,000.00 per month he is entitled to  $(50,000/30 \times 150)$  Kshs. 250,000.00 which I award him on account of leave.

### **3. House Allowance**

The claimant prayed for a house allowance of kshs.732,000.00. His employment contract states that he will be paid a consolidated salary. During cross examination the claimant admitted that he was paid a consolidated salary. For this reason the claimant is not entitled to house allowance and the prayer is dismissed.

### **4. Travelling Allowance**

The claimant prayed for travelling allowance of Kshs. 90,000.00. No evidence was adduced to prove either that he was entitled to the same or that he incurred expenses in official travel that he was entitled to be reimbursed and was not reimbursed. I find no evidence to support the claim and dismiss it.

### **5. Severance Pay**

Severance pay is provided for in the Employment Act as entitlement for an employee who has been declared redundant. Having not been declared redundant the Claimant is not entitled to the same . The claim is therefore dismissed.

### **6. Extra Working Hours**

The claimant prayed for kshs. 5,207,078.00 as extra working hours. As pointed out by the respondent, the claimant's employment contract provided that he may be required to work extra hours. The exact wording in his contract are "As the institution is small and still growing, you will be called upon to occasionally sacrifice for some two hours work between 5.00 to 7.00 pm to cater for the evening classes' tuition." In his position he is not expected to earn overtime or extra hours as he put it except with express authorization which he has not produced.

I find that the claimant has not proved that he is entitled to payment for extra hours and dismiss the claim.

### **7. Termination Benefit**

Under section 49 of the Employment Act, termination or rather terminal benefits include notice, salary for days worked and compensation . Having found that he was unfairly terminated, I award the Claimant 12 months salary as compensation in the sum of Kshs.600,000.

### **8. Arrears of Salary**

The Claimant testified that he was last paid salary in May 2013 and is owed arrears of Kshs. 122,598.00. The Respondent on the other hand stated that the claimant was owed salary arrears of Kshs. 94,402 and 18 days pay for September 2013. The Respondent further stated that the claimant owed it Kshs. 45,000.00 for a laptop and a further Kshs. 50,100.00 which was recovered from what the claimant was owed.

The claimant denied owing money on account of laptop while the other moneys referred to by the Respondent were recovered from the claimant's salary as reflected in the documents filed by the Respondent and the statement of Mr. Ambani. No evidence was adduced by the Respondent to controvert the Claimant's averment that he took a loan to buy the laptop, and no evidence was adduced to prove that the laptop belonged to the respondent and was issued to the Claimant by the Respondent. In any event, if any money was owed to the Respondent it should have been claimed in a counterclaim.

I find that the Claimant is entitled to salary arrears as follows-

Salary for June, July, August 2013

(@ Kshs. 50,000.00 per month) Kshs.150,000.00

Salary for 19 days worked in September. 2013

(50,000/30x19) Kshs. 31,667.00

**Total Kshs.181,667.00**

### **Conclusion**

In conclusion I enter Judgment for the Claimant against the Respondent in the total sum of Kshs.1,081,667. The Respondent will also pay the claimant's costs and the decretal sum shall attract interest at court rates from date of judgment.

**Dated, Signed and Delivered this 4th day of May, 2017**

**MAUREEN ONYANGO**

**JUDGE**