



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 3 OF 2017

(BEFORE D. K. N. MARETE)

DR. BENJAMIN CHARLES AKENGA.....CLAIMANT

VERSUS

ST. CAMILLUS FOUNDATION.....1ST RESPONDENT

TABAKA MISSION HOSPITAL.....2ND RESPONDENT

FR. JULIUS MORARA.....3RD RESPONDENT

THE REGISTERED TRUSTEES OF THE CATHOLIC CHURCH DIOCESE OF

KISII.....4TH RESPONDENT

BISHOP JOSEPH MAIRURA OKWEMWA.....5TH RESPONDENT

JUDGEMENT

This matter is originated vide a Statement of Claim dated 11th January, 2017. It does not disclose an issue in dispute on its face.

The respondent in a Reply to Statement of Claim dated 8th February, 2017 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that on or about the month of July, 2014, he entered into employment contract with the respondent and indeed was employed by the 1st and 2nd Respondent as a doctor at Tabaka Mission Hospital. He earned 210,000.00 a month and this was paid into his bank account by the 2nd respondent.

It is the claimant's further case that the respondent in violation of the the Employment Act committed the following omissions;

- Assigning the claimant work without any breaks.
- Failing to furnish the claimant with a written contract of employment despite such representation.
- Arbitrary deductions on the claimants salary all amounting to Kshs.484,110.00.
- Failure to furnish an itemized pay statement.
- Not granting leave for two years service.

- Non payment of salary for July, 2016.

These are clear violations of sections 5, 9, 17 (1), 20, 27, 31 (1) (c), 41, 43, 45 and 46 of the Employment Act, 2007.

The claimant's further case is that his services were terminated in August, 2016 without notice or grounds for such termination. This therefore was unfair and unlawful.

The claimants other case is that he did report the matter to the labour officer – Kisii County but despite incessant attempts at reconciliation, this failed and therefore this action.

He claims as follows;

a. Compensation equal to his gross monthly salary for 12 months as under section 49(1)(c) as read with section 50 of the Employment Act as; Kshs.210,000/= x 12 = 2,520,000/=;

b. His unpaid leave for 3 years under sections 28(1) of the employment act Kshs.210,000/30 x 21 days x 3 years =Kshs.441,000/=;

c. One month's salary in lieu of notice being Kshs.210,000/=; and

d. Unlawful deductions to the claimant's salary amounting to Kshs.484,110/=

Grand Total Kshs.3,655,110/=

In the penultimate he prays thus;

a. A Declaration that the Respondents' dismissal of the claimant from his employment was wrongful and unfair.

b. A Declaration that the Respondents' applied discriminatory practices with respect to the claimant.

c. An order directing the Respondents to pay the Claimant his terminatl dues and benefits of Kshs. 3,655,110/= as set out in paragraph 28 above.

d. An order directing the Respondents to issue the Claimant with a certificate of service.

e. Cost of and incidental to this suit.

f. Interest at Court rates

g. Such other or further relief this Honorable court shall deem fit and proper to grant.

The respondents case is one of denial.

It is their other case that there is no breach of the law as the claimant was only assigned duties based on availability and need. She also denies the claim on salary deductions. This is as follows;

13. The respondents deny the averments under paragraph 12 of the statement of claim and particularly that section 5 of the Employment Act 2007 was breached in regard of the claimant who was only assigned duties based on availability and need.

The Respondents further deny an employer employee relationship resulting in a salary payment and aver that the claimant was paid a stipend on work done only.

19. In reply to the averments under paragraph 18 of the statement of claim, the respondents deny that the claimant worked for the 2nd respondents for two years uninterrupted and shall invite strict proof thereof from the claimant.

20. The statement of claim that the respondents did not pay the claimant his July 2015 salary is denied and the claimant is invited to strict proof thereof. Further to the foregoing the respondents shall aver that Kshs.230,000 vide Cheque No. 000185 drawn in favour of Kenya Commercial Bank with schedule date 31.7.2015 as evidenced by annexures marked “TMH – 1 (a) & (b)” was paid as July stipend to the claimant, receipt of which is reflected in the claimant’s bank statement.

21. The respondents deny the statement of fact contained under paragraph 20 of the statement of claim and further avers that it is the claimant who deserted duty without cause and/or reasonable justification and the respondents shall at the hearing of the claim herein make reference to annexure marked “BCA-4” in the claimant’s bundles of documents.

The respondents in finality also deny receipt of a demand letter as alluded by the claimant.

This matter came to court variously until 3rd May, 2017 when it was heard with the testimony of the claimant. The respondent was absent and did not participate in the hearing. This is despite service.

The issues for determination therefore are;

1. Was the termination of the employment of the claimant was wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the claimant was wrongful, unfair and unlawful. The claimant in his examination in chief testified in reiteration of its case.

The claimant’s evidence was that he used to work at Tabaka Mission Hospital from July, 2014. His salary was Kshs.210.000.00 per month and payable through his bank account.

The claimant’s further evidence is that he was not issued with a written contract of service as agreed. Further, his salary payments were irregular with numerous deductions. He worked literally at all times and was on cover through and through – even on Sundays.

The claimant’s other evidence is that on 11th July, 2016, he lost his sister. He applied for compassionate leave as usual but this was not awarded. His children also fell into fees arrears at university because of salary deductions which were not explained. Due to this and other issues at work, he sought the intervention of the labour officer who did several summon letters to the Hospital Director but he only attended a meeting on 5th October 2016. This did not offer any solutions prompting him to seek legal counsel and therefore this claim.

The claimant seeks to rely on the authority of Section 9 (1) (b) as read with section 9 (2) of the Employment Act which provides as follows;

1. A contract of service-

1. Which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the AND aggregate to the equivalent of three months, shall be in writing.

2. An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract

is consented to by the employee in accordance with subsection (3)

The claimant submits a case of breach of the provisions of section 9 by the respondent for failure to offer a written contract of service as agreed and also discrimination contrary to section 5 (3) (b) of the Employment Act,2007 as follows;

(3) No employer shall discriminate directly or indirectly, against or prospective employee or harass an employee or prospective employee-

a. ...

b. *In respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.*

The claimant further submits a case of arbitrary deductions from his salary in contravention of section 17 (1) of the Employment Act, 2007 as follows;

1. Subject to this Act, an employer shall pay the entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service directly, in the currency of Kenya –

a. In cash;

b. Into an account at a bank, or building society, designated by the employee;

c. By cheque, postal order or money order in favour of the employee;

d. In the absence of an employee, to a person other than the employee, if the person is duly authorized by the employee in writing to receive the wages on the employee's behalf.

These deductions are tabulated as follows;

This approximately 15 months, had the claimant been paid his full salary for this period it should have amounted to a total of Kshs.3,150,000/= (this being 15 months x Kshs.210,000/=). A simple calculation shows the deductions as follows;

<i>Amount due</i>	<i>Kshs. 3,150,000/-</i>
<i>Less Amount paid</i>	<i><u>Kshs.2,455,890/=</u></i>
<i>Result</i>	<i>Kshs.694,110/=</i>
<i>Less July salary</i>	<i><u>Kshs.210,000/=</u></i>
<i>Total Deductions</i>	<i><u>Kshs.484,110/=</u></i>

The claimant submits that this was undue and unwarranted and claims refund of the same.

The claimant further seeks to rely on the authority of **David Wanjau Muhoro v Ol Pejeta Ranching Limited (2014) eKLR**, at page 36 where in Rika, J. observe thus;

“The correct approach in the view of the Court, was established in the Unreported Industrial Court of Kenya Cause No. 43 (N) of 2009 between Crispol Ngugi Kimani and 24 Others v. Yako Supermarket Limited and Another. The Court stated that in remedying employment wrongs, claims for unpaid wages and salaries should not be treated as claims for special damages in Civil Claims. Focus of the Court should be on what is reasonable in each case, particularly as employment

records, which are necessary in specific proof, are legally in the custody of the Employer. It would also not be possible to shift the burden of persuasion effectively to the Employer in discrimination claims, if the Employee was called on to specifically plead and prove details of wage or salary discrimination. The procedure shown under the case of G.M.V. v Bank of Africa on the shift in the burden of persuasion would be unworkable. The Industrial Court retains wide latitude in addressing employment disputes legally and equitably. Nowhere in the substantive and procedural laws relating to enforcement of employment rights, are Employees required to specifically plead, particularize and prove wage or salary claims. In cases such as those brought to Court by the Law Income Groups, like Domestic Servants and Security Guards, the court would not be living up to its mandate if for instance, it realizes in the course of the proceedings that such an Employee was paid monthly rates below the known statutory minimum wage, and the Court does not on its own motion, grant an order for underpayments. The Court would be legally obliged to grant the Employee an order for underpayments without the Employee having pleaded, particularized or proved the wage disparity. The Industrial Court needs not be moved, to discharge its role as an enforcer of Labour Standards”

The claimant further sought to rely on section 45 (1) & (2) (a) (b) which provide as follows;

45 (1) No employer shall terminate the employment of an employee unfairly

(2) A termination of employment by an employer is unfair if the employer fails to prove-

a. That the reason for termination is valid;

b. That the reason for the termination is a fair reason –

i. related to the employees conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer; and

c....

Again, the claimant sought to rely on the authority of **V M K v C U E A (2013) Eklr**, at page 17 where Nduma, J. observed as follows;

“Having said that, and specifically that the Respondent has failed to discharge its onus in terms of Section 47 (5) in that, it has failed to justify the grounds for the termination of the employment of the Claimant, the court having found that the termination was a culmination of various discrimination against the Claimant which conduct was unlawful and in violation of human rights of the Claimant, the court finds that the termination did not meet the threshold provided under Section 45 (2) (a) of the employment Act in that, the termination was not for a valid reason and further, it was not done in accordance with a fair procedure contrary to Section 45 (2) (c).”Hajmfkdsmkmlklll; gfv jiojjjjjjijkjmkll

The claimant in all submits a case of unlawful termination of employment and seeks relief as prayed. The respondents on the other hand do not file any written submissions in answer to the claim. They did not appear at the hearing either thus leaving their matter at the mercy of their defence filed on 8th February, 2017.

This matter tilts in favour of the claimant. This is because the claimant’s evidence of employment is not controverted by the respondents. It is trite law that employment records are the preserve of the employer as espoused in sections 9 and 10 of the Employment Act, 2007. In the circumstances of this case, the employer was duty bound to avail the particulars of the employment contract or other such data subsisting between the parties with a view to shedding light on the issues raised by the claimant. This would have been instrumental in easing a determination of the issues raised by the claimant. They (respondents) did not.

The claimant enlisted the following documents in support of his claim;

1. *Cheque in favour of Benjamin Charles Akenya dated 06.02.2015.*
2. Payment schedule to the accountant Kenya Commercial Bank Kisii branch dated 29.06.2015 with cheque of Kshs.481,992 dated 29.06.2015
3. *Payment schedule to the accountant Kenya Commercial Bank Kisii branch dated 31.07.2015 with cheque of Kshs.573,491 dated 31.07.2015*
4. *Payment schedule to the accountant Kenya Commercial Bank Kisii branch dated 31.08.2015 with cheque of Kshs.452,619 dated 30.08.2015*
5. *Payment schedule to the accountant Kenya Commercial Bank Kisii branch dated 30.09.2015 with cheque of Kshs.565,859 dated 30.09.2015.*
6. *Payment schedule to the accountant Kenya Commercial Bank Kisii branch dated 30.11.2015 with cheque of Kshs.626,653 dated 12.11.2015.*
7. *Payment schedule to the accountant Kenya Commercial Bank Kisii branch dated 28.12.2015 with cheque of Kshs.589,320 dated 29.12.2015.*
8. Payment schedule to the accountant Kenya Commercial Bank Kisii branch dated 28.01.2016 with cheque of Kshs.590,507 dated 29.01.2016.
9. *Payment schedule to the accountant Kenya Commercial Bank Kisii branch dated 26.02.2016 with cheque of Kshs.662,728 dated 29.02.2016.*
10. *Payment schedule to the accountant Kenya Commercial Bank Kisii branch dated 31.03.2016 with cheque of Kshs.652,676 dated 30.03.2016.*
11. *Payment schedule to the accountant Kenya Commercial Bank Kisii branch dated 29.04.2016 with cheque of Kshs.717,899 dated 29.04.2016.*
12. Payment schedule to the accountant Kenya Commercial Bank Kisii branch dated 27.05.2016 with cheque of Kshs.752,663 dated 30.05.2016.
13. *Payment schedule to the accountant Kenya Commercial Bank Kisii branch dated 29.07.2016 with cheque of Kshs.140,000 dated 01.08.2016 & Kshs.733,021 dated 29.07.2016.*
14. Payment schedule to the accountant Kenya Commercial Bank Kisii branch dated 29.08.2016 with cheque of Kshs.933,507 dated 30.08.2016.

These are demonstrative of a case in his favour. The respondent has not rebutted this overwhelming case of the claimant and the defence collapses *in toto*. I therefore find a case of unlawful termination of employment and hold as such. This answers the 1st issue for determination.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is. Having succeeded in a case of unlawful termination of employment, he becomes entitled to the relief sought.

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

- i. A declaration be and is hereby issued that the dismissal of the claimant's employment by the respondent was wrongful, unfair and unlawful.
- ii. A declaration be and is hereby issued that the respondent applied discriminatory practices in

respect to the claimant's employment.

iii. One months salary in lieu of noticeKshs.210,000.00.

iv. Unpaid leave for 3 years Kshs.210,000.00 x 21/30 x 3 years =..... Kshs.441,000.00

v. Unlawful and undue deductions from the claimant's salary.....Kshs.484,000.00.

vi. 6 months salary for unfair termination of employment Kshs.210,000.00 x 6 months
=.....Kshs.1,260,000.00

Total of claim.....Kshs.2,395,000.00

vii. The respondent be and is hereby ordered to issue the claimant with a certificate of service.

viii. The cost of this claim shall be borne by the respondents.

Delivered, dated and signed this 15th day of November 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr.Obosso instructed by Obosso & Company Advocates for the claimant.

2. No appearance for the respondents.