



THE REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT BUNGOMA

CAUSE NO. 83 OF 2017

[formerly Kisumu Civil Case No. 355 of 2014]

JOHN WANJALA MUCHELE -----CLAIMANT

VS

KENYA UNION OF POST PRIMARY TEACHERS -----RESPONDENT

M/S J.K. Khakula & Co. Advocates for Claimant

M/S A.W. Kituyi & Co Advocates for Respondent

JUDGMENT

1. The suit was brought vide a statement of claim on 19th December, 2014 seeking payment of arrear, salary, costs and interest.
2. The claimant's case is that he was employed by the respondent as an office clerk/Office Assistant, at the Bungoma Branch office on 3rd March, 2006 and was given a letter of appointment. The claimant was paid a monthly salary of kshs. 12,000/-. On 31st October, 2007, the claimant was confirmed as a permanent employee and was given a letter of confirmation.
3. In terms of the letter of confirmation, written pursuant to a meeting held on 31st October, 2007 the claimant was to be paid 6% of the total Bungoma, branch income. The claimant's duties remained as spelt out in the appointment letter.
4. The claimant managed the branch office, maintained office records, performed customer care services and communication as required.
5. In his sworn evidence before court, the claimant testified that the respondent continued to pay him a salary of Kshs. 12,000/= a month despite the letter of confirmation that required that he be paid 6% of the total income received by the respondent.
6. On 10th November, 2014, the advocate for the claimant wrote a demand letter to the respondent to honour the contract but this was not heeded hence the suit.
7. The claimant told the court that as at that time he filed the suit the total monthly income for the Bungoma office of the respondent was Kshs. 714,265/- and he was entitled to be paid Kshs. 42,855.66

cts being 6% of that income as at that time.

8. The income came from Union membership and agency fees paid by non members at the rate of 1.5% of the basic salary monthly.

9. The agreement to pay salaries based on percentages is documented in the minutes of a meeting by the respondent held on 31st October, 2007 and produced as exhibit 3 in the claimant's list of documents.

10. The letter of appointment and the one of confirmation were produced as exhibits "1" and "2" respectively.

11. The claimant testified that the monthly deficit due and owing to him was Kshs. 30,855.66/- per month, since he was paid Kshs. 12,000/- per month.

12. The claimant added that the total sum owed to him was Kshs. 3,363,195/-, in respect of 109 months.

13. That the respondent stopped the claimant's salary upon receipt of summons on 1st January, 2015 to date.

14. The claimant added that he continues to report to work, since he has not received any letter of termination but is not given any duties. He only reads newspapers at the office.

15. The claimant seeks payment of his entire salary to date. The claimant told the court that previously he worked alone, but, respondent has employed a lady, since he filed suit.

16. The claimant prays the suit be allowed with costs.

Defence

17. The respondent filed a Memorandum of defence on 24th January, 2017 in which, it admits having employed the claimant as an office assistant/clerk at a monthly salary of Kshs. 12,000/-.

18. The respondent however denies having increased the salary of the claimant to be calculated at 6% of the monthly branch office income of the respondent.

19. The respondent denies having refused and/or neglected to compute the monthly salary due and owing to the claimant.

20. The respondent further denies having approved the said payment at a meeting held on 31st October, 2007 or at all.

21. The respondent put the claimant to strict proof thereof.

Hearing of the suit.

22. The suit was set for hearing on 29th November, 2017 by Hon. Lady Justice M. Onyango in court in the absence of the parties and the court directed that Deputy Registrar Bungoma, to issue hearing notices to the parties.

23. The notices were issued and served on M/s. J.K. Khakula & Co. advocates for the claimant and on M/S A.W Kituyi & Co. advocates for the respondent.

24. On the date of the hearing, the respondent and it's advocates did not appear in court, and the matter proceeded for hearing exparte.

25. The court has considered the pleadings by the parties and the list of documents produced in support of the case, and *viva voce* evidence by the claimant and has arrived at the following conclusion of facts:-

(i). The claimant was employed as an office clerk/Office Assistant on 9th March, 2006 and was given a letter of appointment accordingly.

(ii). It is not in dispute that the claimant was paid a monthly salary of Kshs. 12,000/-.

(iii). That the respondent issued the claimant with a letter of confirmation of employment dated 31st October, 2007, in which it raised his monthly salary to 6% of the total Bungoma branch income. This followed a meeting of the Branch Executive Committee (BEC) held on 31st October, 2007. The minutes were produced by the claimant as exhibits "3" and are signed by the chairman, and the secretary.

(iv). The total monthly income of the respondent, Bungoma branch given by the claimant at Kshs. 714,261/- under oath was not controverted by the respondent and the court finds that to be the correct monthly income of the branch.

(v). The court finds that the claimant was entitled to a monthly salary calculated at 6% of the said total income from 1st November, 2007, until the time he stopped working upon filing of this suit at the rate of Kshs. 30,855.66/- per month, a period of 86 months.

(vi). The claimant admitted under oath that he stopped to do any work for the respondent upon filing the case, even though he was not given a letter of termination of employment. The respondent actually stopped giving the claimant any new work and had employed a lady to manage its Bungoma branch.

26. The court makes an inference that the claimant was constructively dismissed as soon as he served this suit on the respondent on 1st January, 2015.

The court therefore finds that the claimant is not entitled to any salary from 1st January, 2015.

27. The claimant has not claimed any damages for constructive dismissal from employment and the court cannot consider or award the same.

28. Accordingly, the court enters judgment in favour of the claimant in respect of arrear salary for 86 months calculated at Kshs. 30,855.66/-, per month from 1st November, 2007, the date the salary at 6% took effect to 30th December, 2014 when the claimant stopped working for the respondent in the sum of Kshs. 2,653,586.76/-

29. The respondent to meet the costs of the suit.

Dated at Bungoma this 1st day of December, 2017.

HON. MATHEWS NDERI NDUMA

EMPLOYMENT AND LABOUR RELATIONS COURT

BUNGOMA.