



**REPUBLIC OF KENYA**

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

**CAUSE NO. 18 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**ALBERT SAINA .....CLAIMANT**

**-Versus-**

**B.O.G. MOI GIRLS HIGH SCHOOL ELDORET .....RESPONDENT**

**JUDGEMENT**

The Claimant Albert Saina filed this suit by way of statement of claim alleging that he was unfairly declared redundant by the Respondent, the Board of Governors, Moi Girls High School Eldoret. He alleges that he was underpaid and he was not housed or paid house allowance. He prays for a declaration that the termination of his employment was unjust and inequitable, and in contravention of Articles 41(1), 28, 47, 48 and 50(1) of the Constitution. He further prays for payment of Shs.704,000 being underpayment of salary, pay in lieu of annual leave, house allowance and commuter allowance as particularised in his statement of claim and a further sum of Shs.278,628 being compensation for unfair termination. He also prays for costs and interest.

The Respondent filed a Response to the statement of claim in which it states that the Claimant was employed by the Respondent in January 2008, deployed as an electrician on 1st January 2010 and declared redundant by letter dated 1st February 2013 following a resolution passed by the Respondent's Board at a meeting held on 25th January, 2013 to declare the Claimant redundant and replace him with an artisan who can multi-task, and to outsource electrical work on a needs basis.

The Respondent averred that the Claimant was paid Shs.26,900 in lieu of 2 months notice and Shs.19,050 on account of severance pay at the rate of 15 days salary per completed year of service and that the redundancy was lawfully undertaken.

At the hearing the Claimant testified on his behalf while the Respondent called **BENJAMIN BARTIOL BUNDOTICH**, its Assistant Bursar who testified on its behalf. Parties thereafter filed and exchanged written submissions.

The Claimant's case is that he was declared redundant because he demanded payment according to the gazetted statutory minimum wages being Shs.18,000 while he was being paid Shs.8,000 in 2008 and Shs.12,000 at the time of termination. The Claimant also testified that the house he was supposed to occupy at the school was allocated to a teacher and he was forced to commute from home hence his claim for house allowance and commuter allowance.

The Claimant further testified that his position was not abolished and instead, he was sent on compulsory leave for 6 months and another electrician by the name Isaac Ombwayo who was retained during his

leave was recruited to replace the Claimant after he was declared redundant.

Mr. Bundotich for the Respondent testified that the Claimant accepted the terms of his employment contract issued to him on 6th May, 2010. He testified that the Claimant was declared redundant following a resolution of the Board because parents were overtaxed and the Ministry of Education had recommended a reduction of staff. He testified that the Redundancy was effected in accordance with the Respondent's Human Resources Manual 2010, a copy of which was annexed as Appendix 2 to the Respondents bundle of documents.

Mr. Bundotich further testified that the Claimant was allocated a house which he failed to move into, and he is therefore not entitled to claim house allowance.

## **Determination**

I have considered the pleadings, viva voce evidence and written submissions of the parties. It is not in dispute that the Claimant was employed by the Respondent in January, 2008, issued with an employment contract by letter dated 6th May, 2010 and declared redundant by letter dated 1st February, 2013. The issues arising for determination are the following:-

1. Whether the redundancy of the Claimant was unfair.
2. Whether the claimant is entitled to the prayers sought.

## **The Redundancy**

Redundancy is provided for under section 40 of the Employment Act as follows:-

### **40. Termination on account of redundancy**

*(1) An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions—*

*(a) where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for, and the extent of, the intended redundancy not less than a month prior to the date of the intended date of termination on account of redundancy;*

*(b) where an employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;*

*(c) the employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;*

*(d) where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;*

*(e) the employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;*

*(f) the employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and*

*(g) the employer has paid to an employee declared redundant severance pay at the rate of not less than fifteen days pay for each completed year of service.*

*(2) Subsection (1) shall not apply where an employee's services are terminated on account of insolvency as defined in Part VIII in which case that Part shall be applicable.*

*(3) The Minister may make rules requiring an employer employing a certain minimum number of employees or any group of employers to insure their employees against the risk of redundancy through an unemployment insurance scheme operated either under an established national insurance scheme established under written law or by any firm underwriting insurance business to be approved by the Minister.*

Redundancy is also provided for under the Human Resource Manual of the Respondent at 5.9.3.3 to 5.9.4.2 as follows:-

*5.9.3.3. Lay off/Redundancy:- This is involuntary termination of employment initiated by the school for non disciplinary reasons. (Relevant labour laws will be followed should this be necessary).*

*5.9.4 In either (a) or (b) notice is required by the school in the case of (a) and the employee in the case of (b)*

*5.9.4.1. Three months notice for an employee who has worked with the school for five or more years or one month's salary in lieu of notice.*

*5.9.4.2. One month's notice or salary in lieu of notice for an employee who has completed the probationary period and has worked for less than five years.*

The Respondent was bound to comply with both section 40 of the Act and Clause 5.9.3.3 to 5.9.4.2 of its Human Resources manual, which provides for notice.

The Respondent was therefore required to notify both the claimant and the Labour Office of the intention to declare him redundant at least one month prior thereto. This was not done. The Respondent also failed to give the Claimant 3 months notice as provided in the Human Resources Manual or pay in lieu thereof. The Claimant was only paid 2 months salary in lieu of notice.

For the foregoing reasons the redundancy was unlawful. There is however no evidence that the Claimant was singled out for redundancy because of agitating for payment of statutory minimum wage as alleged by him although there is evidence that he had complained about underpayments by his letters of 3rd November 2011, 11th July 2012 and 11th February 2013.

Section 26 of the Employment Act and section 48 of Labour Relations Act prohibit payment below statutory minimum rates of pay. Section 48 provides as follows:-

***Wages Order to constitute minimum terms of conditions of employment.***

***48. (1) Notwithstanding anything contained in this Act or any other written law—***

*(a) the minimum rates of remuneration or conditions of employment established in a wages order constitute a term of employment of any employee to whom the wages order apply and may not be varied by agreement;*

*(b) if the contract of an employee to whom a wages order applies provides for the payment of less remuneration than the statutory minimum remuneration, or does not provide for the conditions of employment prescribed in a wages regulation order or provides for less favourable conditions of employment, then the remuneration and conditions of employment established by the wages order shall be inserted in the contract in substitution for those terms.*

The statutory minimum rates of pay for Artisan Grade 1 for Eldoret (falling under all other municipalities) from 2010 when the Claimant obtained his Grade 1 Trade Test Certificate was as follows:-

From 1st May, 2010	Shs.14,319.00
From 1st May, 2011	Shs.16,109.00
From 1st May, 2012	Shs.18,219.30

These rates are exclusive of house allowance. The Claimant's severance pay should have been calculated based on Shs.18,219.30 which was the correct wage as at February, 2013 when the Claimant was declared redundant.

The Respondent therefore underpaid the Claimant.

### **Remedies**

The Claimant prayed for underpayments of wages, house allowance, annual leave and commuter allowance.

I have already stated above that the Claimant was underpaid. As he was not housed by the school he was also entitled to house allowance at 15% of basic. There is no provision for commuter allowance either in the Employment Act or in the Human Resource Manual and the Claim is rejected.

Having been unfairly declared redundant, the Claimant is entitled to damages for unfair termination. Taking into account the length of service and the circumstances under which the Claimant left employment together with all relevant factors, it is my opinion that 5 months salary is reasonable compensation and I award him the same.

### **Conclusion**

From the foregoing I find and declare that the redundancy of the Claimant was unfair.

For the want of notification to both claimant and the Labour Officer as provided under section 40(1) (a) as read with section 40(1) (b), I award the Claimant 1 months salary in lieu of notification (**See Thomas De La Rue (K) Ltd v David Opondo Omutelema [2013]eKLR**). This I award him in the sum of Shs.20,952.20 being basic salary of Shs.18,219.30 plus 15% house allowance in the sum of Shs.2732.90.

For severance pay the Claimant had worked for 5 years from January 2008 to February 2013. He is therefore entitled to severance pay in the sum of Shs.45,548.25 less payment made of Shs.19,050 leaving a balance of Shs.26,498.25 which I hereby award him.

The Claimant was entitled to termination notice of 3 months as provided in the Human Resource Manual as read together with section 26 and 40(1)(f) of the Act at gross pay of 20,952.20 x 3 being Shs.62,856.60 less payment made of Shs.26,900 leaving a balance of Shs.35,956.60 which I award to the Claimant.

The Claimant is entitled to underpayments of house allowance and wages, which I will only calculate from 2010, as follows:-

### **Wages underpayments**

2010 January to April 2011                      Shs.14,319 - 10,000

$$= 4,319 \times 16 = 69,104$$

2011 May to 2012 April (12 months at Shs.16,109 - Shs.10,300 per month)

Shs.5,809 x 12 =69,708 February

2012 May to 2013 (12 months at Shs.18,219 - 10,600 per month)

7,619.30 x 9 months =68,573.70/-

### **House Allowance**

January 1020 to April 2011 at Shs.2,147.85 x 16 =Shs.34,365.60.

May 2011 to April 2012 at Shs.2,416.35 x 12 = Shs.28,996.20.

May 2012 to February 2013 at Shs.2,732.90 per month - Shs.24,596.10

### **Annual Leave**

Both the Claimant and Mr. Bundotich testified that the Claimant was on 6 months leave just before he was declared redundant. I therefore find that the Claimant is not owed any leave.

In Summary, I award the Claimant the following:-

1. Pay in lieu of notification of redundancy Shs.20,952.20
2. Pay in lieu of notice Shs.35,956.60
3. Severance pay Shs.26,498.25

### **4. Underpayment of Wages**

January 2010 - April 2011 Shs.69,104.00

May 2011 - April 2012 Shs.69,708.00

May 2012 - February 2013 Shs.68,573.70

### **5. House Allowance**

January 2010 - April 2011 Shs.34,365.60

May 2011 - April 2012 Shs.28,996.20

May 2012 - February 2013 Shs.24,596.10

The Respondent will also pay Claimant's costs of this suit.

**Judgement Dated, signed and delivered this 23rd day of June, 2016**

**MAUREEN ONYANGO**

**JUDGE**