



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 154 OF 2015
BETWEEN
YEZIEL MATHUFALI DADDAH CLAIMANT
VERSUS
CHAIRMAN [B.O.G] TARASAA YOUTH POLYTECHNIC RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mr. Nyange Sharia Advocate for the Claimant

Mrs. Nimwaka Muema State Counsel, for the Respondent

ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

[Rule 27 [1] [a] of the Industrial Court [Procedure] Rules 2010]

1. Yeziel Mathufali Daddah filed his Statement of Claim on 27th March 2015. He states he was employed by the Respondent as a Manager of Tarasaa Youth Polytechnic between 25th July 2011 and 3rd April 2013. His contract of employment was unfairly and unlawfully terminated by the Respondent on the latter date. He earned a monthly salary of Kshs. 32,240. He seeks the following orders against the Respondent:-

a) Declaration that termination was unfair, declaration that the Claimant was entitled to 30 days of annual leave every year, and declaration that he was entitled to house allowance, BOG sitting allowances, work night out pay, and expenses incurred while running the Polytechnic.

b) Payment of salary arrears of 48 months at Kshs. 1,547,520; house allowance of 48 months at Kshs 232, 128; annual leave pay for 2012 at Kshs 32,240; 16 pro rata annual leave days for 2013 at Kshs. 17,194; 1 month salary in lieu of notice at Kshs. 32,240; BOG sitting allowance at Kshs. 26,000; work nights out pay at Kshs. 86,631; expenses incurred running the Polytechnic at Kshs. 145,398; and 12 months' salary in compensation for unfair termination at Kshs. 386,880- total

Kshs. 2,419,540.

c) Certificate of Service to issue.

d) Costs.

e) Any other suitable reliefs.

2. The Respondent filed its Statement of Response on the 24th August 2015. It explains that the Polytechnic was initially a Church Project. It collapsed and was later revived by the Government under the economic stimulus plan. The Claimant was a volunteer at the beginning. He was to be considered into employment later. He was not entitled to any payments as a volunteer. There were complaints against him from Students, Co-Workers, Parents and B.O.G Members. An Instructor was posted by the Ministry of Youth to the Institution to assist the Polytechnic. The Claimant disappeared after the Instructor arrived. He was away from 15th January 2013 to February 2013. He was called for B.O.G meetings. He failed to attend some of the meetings. When he did attend, he was required to hand over, refused to do so and stormed out of the meeting. No sitting allowance was paid to B.O.G Members. His conduct warranted termination. The Respondent prays the Court to dismiss the Claim, with costs to the Respondent.

3. Parties recorded a consent order on the 21st October 2015, to have the Claim determined on the strength of their Pleadings, Documents and Submissions on record. They confirmed filing of Submissions at the last mention on the 16th June 2016, and the decision of the Court was reserved for 27th July 2016.

Claimant's Position

4. The Claimant submits he was employed by the Respondent on the 25th July 2011. Appointment was through the letter signed by the B.O.G Chairman, dated 25th July 2011 [Claimant's annexure 1]. Appointment was confirmed by the parent Ministry, as shown in the minutes of 8th March 2012.

5. His salary was Kshs. 32,240, in accordance with the Teachers Service Commission [TSC] Remuneration Table [page 12 of the Claimant's bundle].

6. His contract was terminated in August 2013 by the Respondent. It was ordered by the Minister through the minutes dated 21st July 2013, that no person should act as the Manager, until wrangling between two rival factions at the Respondent was resolved.

7. The Respondent concedes the Claimant had not been paid his dues at the time of termination. It was conceded he was going to be paid his dues, in accordance with the terms of his engagement. The Respondent made this concession in a letter dated 8th February 2013.

8. The Claimant cannot be said to have absconded duty at any time. The Respondent confirms there were skirmishes in Tana River County, resulting in closure of the Polytechnic.

9. There was no letter from the Respondent to the Claimant requiring the latter to show cause why he should not be disciplined. The Claimant was not heard on any of the allegations leveled against him. There were no details of complaining Students and Parents made known to him.

10. It is submitted by the Claimant that he was not paid the agreed monthly salary for 48 months worked. Failure to pay was admitted by the Respondent. The Claimant submits his plea for arrears of salary is merited. He merits notice pay as termination was at the instance of the Respondent and not preceded by notice. He was denied annual leave entitlement for the year 2012 and pro-rata annual leave for 2013. He was not given reasonable housing accommodation at or near the place of work, in accordance with Section 31 of the Employment Act. The B.O.G agreed in its meeting of 31st May 2012 that its Members would receive sitting allowance of Kshs. 1,000 per meeting. There was a reassurance by the Treasurer in

a meeting held on the 31st June 2010 that all sitting allowances would be paid once funds were available. Termination was unfair and did not meet the substantive and procedural standards, set under the Employment Act. The Claimant submits that his Claim is merited, and urges the Court to allow it, with costs to the Claimant.

Respondent's Position

11. The Respondent submits termination was fair and lawful. The Claimant, by his conduct, was in fundamental breach of his contract of employment. He had poor working relationship with B.O.G Members, Students, Parents and Ministry Officials.

12. He absconded on 15th January 2013, paralyzing training. Termination was justified under Section 44 [4] of the Employment Act. He has not given evidence to show the Respondent has refused to pay him his dues.

13. Termination was lawful and fair, even though no letter of termination issued. He is not entitled to arrears of salary of 48 months. The date of termination is not given. He terminated the contract himself by failing to report for duty when a new Instructor was engaged. He did not show the Respondent was capable of ‘financing all these expenses, even though passed in the B.O.G meetings.’ The financial status of the Respondent is wanting. The Respondent relies on Trainee enrollment and donors to finance its operations. The Claimant was an Employee of the Respondent, and not entitled to earn the rates of remuneration given under the TSC. He was indolent, and did not claim his arrears of salary in the many B.O.G meetings he attended. The Respondent submits the Claim is without foundation, and should be dismissed with costs to the Respondent.

The Court Finds:-

14. The Claimant was employed as Manager, Tarasaa Youth Polytechnic by the Respondent. Appointment and terms and conditions of service are contained in the letter of appointment dated 25th July 2011.

15. His salary was indicated to be as given in the relevant Job Group in the Ministry of Youth, and as obtained in the Teachers Service Commission. The TSC Remuneration Table at page 12 of the Claimant's Bundle of Documents indicates Manager, in Job Group N, was entitled to a monthly salary of Kshs. 32,240.

16. The submission by the Attorney General that the Claimant was an Employee of the B.O.G, not the TSC or the Government, and therefore not entitled to the above rate of monthly salary, is incorrect. The Parties adopted the Job Group, and terms and conditions of service obtaining in the TSC, and the Ministry, in fixing the Claimant's monthly salary. The amount of Kshs. 32,240 is the correct figure as urged by the Claimant.

17. It is undisputed that the Respondent did not pay the Claimant his salary for the period worked. The Respondent seems to have been harbouring the illusion that its Manager would be absorbed in the Public Service Commission, and paid his salary in arrears by the Public Service Commission. The Respondent kept beseeching the Public Service Commission to include the Claimant in its payroll. There are several letters where the Respondent recommends the Claimant for such absorption. It never came to pass.

18. That cannot be a reason for the Respondent, which took upon itself to employ the Claimant, and enter into the contract dated 25th July 2011, to fail to meet its obligations to the Claimant. The contract did not stipulate that the Claimant would have to wait to be paid by the Government. There was nothing in the contract to suggest the Claimant's salary would be paid by any other Institution other than the Respondent.

19. Employees do not have to show that an Employer has the financial wherewithal, in order to be paid

their salary. If the Employer cannot pay, he should not employ. The arrears of salary should however, be calculated for the period the Claimant was in actual service. The Respondent submits that the date of termination is unknown and this has effect on the arrears. Parties know the month the Claimant last worked. He states at paragraph 3 of the statement that he worked from 25th July 2011 to 3rd April 2013. This is about the same period, the Respondent concedes the Claimant worked. It is alleged the Claimant absconded between 15th January 2013, and 7th February 2013. He was asked to hand over subsequent to this period. He should not be claiming to still be in employment, and seeking arrears to-date. The rate of Kshs. 32,240 did not depend on the Claimant joining the Service Commissions as suggested by the Respondent; it was rather a term of his contract as agreed between him and the Respondent. He did not work as a volunteer. He is not described as a volunteer in the documents on record. Those who worked as volunteers are specifically designated as volunteers, in the documents on record. Lastly, the Court finds there is no merit in the submission by the Respondent on the Respondent's sources of income. These are considerations that ought to have been made before employing the Claimant.

20. There is sufficient evidence on record to conclude that the Claimant merits, and is therefore granted the arrears of salary for 20 months worked, at Kshs. 644,800.

21. Clause 2 of the contract provides that housing allowance would be paid to the Claimant, in accordance with the rate currently applicable to the concerned Ministry, or a rate above the applicable rate.

22. The Respondent again does not deny having not met this contractual obligation, believing perhaps, as in the case of the basic salary, that the obligation would be met at some point, by either of the concerned Service Commissions. The applicable rate in the Ministry, or the rate above that applicable rate, was not paid to the Claimant by the Respondent. There is no evidence that he was accommodated by the Respondent. The Court endorses the rate of 15% of the basic salary adopted by the Claimant, and recommended under the Wage Guidelines, as the housing allowance. **He is allowed the sum of Kshs. 96,720 as arrears of housing allowance.**

23. Section 28 [1] of the Employment Act allows Employees a minimum of 21 days of annual leave, after a continuous period of 12 months in service. There is nothing in the contract of employment to show the Claimant was entitled to a longer annual leave, than the minimum given under this law. He pleads 30 days. He has not shown what instrument allows him 30 days of annual leave. He is granted 21 days of annual leave for the year 2012, and 5.25 pro-rata annual leave days for the year 2013. He worked for 3 months in 2013. This works at Kshs. 32,562. **He is granted Kshs. 32,562 in annual leave pay for the two respective periods of accrual.**

24. There was ample evidence in the minutes of the B.O.G meetings that it was resolved Members be paid Kshs. 1,000 in sitting allowance. The Attorney- General does not dispute the resolution, or dispute that the Claimant sat in these meetings. The number of the meetings in which the Claimant was an active participant is not disputed. The only objection seems to be that although the resolution was made, the Claimant did not show that the Respondent was capable of paying. This submission is rejected on the same ground the submission justifying non-payment of the Claimant's salary arrears was rejected. **The Claimant is granted the sum of Kshs. 26,000 in accumulated sitting allowances.**

25. There is no good basis to allow the claims for Work Night Outs, and Expenses incurred while running the Polytechnic. The Claimant was employed as a Manager. His contract does not show the hours of work. There is nothing said of night or day duty. Receipts for expenses incurred are not conclusive that the Claimant indeed was engaged in activities related to the Respondent, when he incurred the alleged expenses. It was not clear how an Employee could, in any event, go about financing his Employer, while not being paid even his basic salary. These 2 claims are rejected.

26. The Respondent submits that the Claimant failed to work well with his Colleagues and Students. There were complaints lodged against him by the Students, Parents, Ministry Officials and fellow B.O.G Members. This ostensibly, was the reason why the Respondent terminated the Claimant's contract of employment. It was at the same time suggested that the Claimant fundamentally breached his terms of service by absconding between 15th January 2013 and 7th February 2013, paralyzing training at the

Respondent.

27. There was no evidence brought before the Court showing that indeed there were complaints lodged against the Claimant by the Polytechnic Community or the Ministry Officials. These allegations were not given any evidential support. When he was alleged to have absconded, the Claimant states there were skirmishes at Tana River County. He is not shown to have been subjected to any form of disciplinary proceedings for the alleged abandonment of duty. The Respondent did not convene any disciplinary meeting ultimately, where the Claimant was formally charged with any employment offence, and heard in the manner prescribed under Section 41 of the Employment Act 2007. There is merit in his assertion that termination was not fair in substance and procedure. It is declared termination was unfair. ***He is allowed 6 months' salary in compensation for unfair termination at Kshs. 193,440.***

28. Clause 4 of the contract, read with Section 35 and 36 of the Employment Act, allows the Claimant to have 1 month salary in lieu of notice of termination. ***He is granted Kshs. 32,240 as notice pay.***

29. In exercise of its discretion under the Employment and Labour Relations Court Act, the Court orders Parties shall meet their costs of the litigation.

30. ***Certificate of Service shall be availed the Claimant by the Respondent under Section 51 of the Employment Act 2007.***

IN SUM, IT IS ORDERED:-

a) Termination was unfair.

b) The Respondent shall pay to the Claimant: arrears of salary at Kshs. 644,800; arrears of house allowance at Kshs. 96,720; annual leave pay at Kshs. 45,570; sitting allowances at Kshs. 26,000; compensation for unfair termination at Kshs. 193,440; and notice pay at Kshs. 32,240- total Kshs. 1,025,762.

c) Certificate of Service to issue.

d) Parties to meet their costs of the litigation.

e) Other prayers declaratory in nature add no value to the Award, and there shall be no orders in their regard.

Dated and delivered at Mombasa this 27th day of July 2016.

James Rika

Judge