



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 66 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

CLIFFORD SOSI NYABUTO.....CLAIMANT

-Versus-

BOARD OF GOVERNORS SINGHSABA NURSERY PRIMARY.....RESPONDENT

J U D G E M E N T

The Claimant herein filed this case seeking orders for payment of house allowance in the sum of Shs.403,920 from the Respondent. In his Memorandum of Claim filed on 1st April, 2014 he alleges that he worked for the Respondent as a teacher for 22 years before retiring on 7th February, 2014. He alleges that throughout the period he worked for the Respondent he was not paid house allowance. His last salary was Shs.10,200. He seeks payment of house allowance for the entire period of 22 years at the rate of 15% of basic salary being Shs.1,530 per month.

The Respondent filed a defence in which it denies owing the Claimant house allowance or the sum claimed. It avers that the Claimant's salary included house allowance at paragraph 8 of the defence while at paragraph 7 the Respondent states that the Claim has no basis as the claimant received a sum of Shs.1,500 as house allowance. The Respondent annexed Exhibit BT-1, a copy of casual salary voucher dated 28th February, 2014.

The Respondent also counter-claimed for sum of Shs.40,000/- being school fees of shs.19,000 collected by the Claimant on behalf of the Respondent but not remitted and a further shs.10,000 being a loan facility advanced to the Claimant by the Respondent on 9th October, 2013 and a further loan of Shs.30,000 advanced to the Claimant on 22nd December 2013.

At the hearing of the case the Claimant testified on his behalf while the Respondent did not call any witness. The parties thereafter filed and exchanged written submissions.

Determination

The issue for determination is whether the Claimant is entitled to payment of house allowance, and if so, whether the same is payable for the entire period he worked or for what period. The second issue is whether the Respondent is entitled to Shs.40,000 from the Claimant as prayed in the counter claim.

House Allowance

Section 31 of the Employment Act provides for house allowance as follows:-

31. Housing

(1) An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service—

(a) contains a provision which consolidates as part of the basic wage or

salary of the employee, an element intended to be used by the

employee as rent or which is otherwise intended to enable the

employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective

agreement which provides consolidation of wages as provided in

paragraph (a).

The Respondent has on the one hand, averred that the Claimant's house allowance was consolidated and paid together with the basic salary while on the other hand pleaded that the Claimant was paid Shs.1,500 per month as house allowance. The Respondent filed a casual salary voucher of Shs.1,500 paid as (house allowance) (sic) dated 28th February, 2014. It is therefore unclear whether the house allowance was paid separately from the claimant's basic salary of shs.10,200 or whether the said basic salary was inclusive of the Shs.1,500 house allowance. The Respondent did not call any evidence to prove or disprove the Claimant's position that his basic salary was Shs.10,200 and no house allowance was paid separately and neither was house allowance consolidated in his basic salary.

According to section 31(2) consolidation of basic salary should be provided for either in a contract of service or in a collective bargaining agreement. The Claimant was not issued with a letter of appointment his terms of contract were not subject of any collective bargaining agreement. The payslips issued to the claimant provided only for basic salary while the part providing for house allowance is blank in all the payslips attached to both the Memorandum of Claim and the Respondents Memorandum of Reply.

The Regulation of Wages and Conditions of Employment (General) Order provides for housing allowance as follows:-

An employee on a monthly contract who is not provided with free housing accommodation by his employer shall, in addition to the basic minimum wage prescribed in the First or Second Schedule, be paid housing allowance equal to fifteen per cent of his basic minimum wage.

The Claimant having been an untrained teacher would be categorised under an ungraded artisan in the schedule for basic minimum wages under the Regulation of Wages and Conditions of Employment (General) orders herein after referred to as the General Order.

The salary for an ungraded artisan under the General Order as at 7th February, 2014 when the Claimant retired was Shs.13,201.55. The consolidated wage for such period would be Shs.13,201.55 plus 15% house allowance being 15,181.80. This means that the Claimant's salary was not consolidated.

Under section 26(2) of the Employment Act, as read together with section 48(1) and (2) of the Labour Institutions Act, the court is under legal obligation to read into the contract the statutory minimum terms of employment. In this case the court must substitute the wage paid by the Respondent with the minimum

wage provided under the General Order. I therefore find and hold that the Claimant's minimum consolidated wage should have been shs.15,181.80 and that the Respondent underpaid him under section 53(1) of the Labour Institutions Act an employer is required to keep records necessary to show whether or not the employer was complying with a wages order for 3 years from date of last entry.

Although the Respondent pleaded at paragraph 10 of the Memorandum of Defence that it "shall at the appropriate time in the course of the hearing provide details of such payments in proof that there is no unpaid house allowance due to the Claimant from the Respondent," no such records were produced, section 10(6) and (7) require and employer to produce prescribed records failing which the burden of proving or disproving an allegation by an employee in relation to such prescribed particulars shift to the employer. Having failed to produce the records and having found that the Respondent was not paying house allowance to the Claimant, I find that the Claimant is entitled to the difference between the consolidated minimum wage and the salary actually paid. I can however only award him such payment for 36 months, that being the maximum period for which an employer can be compelled to produce such records under section 53 of the Labour Institutions Act and section 74 of the Employment Act. I therefore award the claimant Shs.4,981.80 x 36 months being Shs.179,344.80.

On the counter claim filed by the Respondent for Shs.40,000/-, no evidence has been adduced in support thereof. The result is that the counter claim is dismissed.

I therefore enter judgement for the claimant against the Respondent in the said sum of Kshs.179,344.80. The Respondent shall also pay the Claimant's costs for the suit.

Dated, Signed and Delivered this 15th day of September, 2016

MAUREEN ONYANGO

JUDGE