



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2146 OF 2011

SAMUEL ATSIAYA CLAIMANT

VERSUS

LITTLE SCHOLARS ACADEMY LIMITED..... RESPONDENT

Mr. Kiyonzo for claimant

Mr. Haseke for respondent

JUDGMENT

1. The claimant seeks payment in lieu of three months notice and compensation for thirteen (13) months salary for premature termination of a fixed term contract in the sum of Kshs.335,856.
2. It is not in dispute that the claimant commenced working for respondent as a teacher on 1st September 2008 and the contract was in accordance with Clause 6 thereof to end on 31st August 2010. The two year contract was renewable.
3. The contract expired but was not renewed, however, the claimant continued to work on same terms until he received a letter of termination dated 19th July 2011.
4. The respondent avers that upon expiry of the contract of employment dated 14th June 2008, the claimant's employment automatically terminated and the claimant left service. However, sometime in the year 2011, the claimant approached the respondent whereupon the parties informally agreed that the claimant would on a temporary and needs basis render services to the respondent as and when called upon to do so on a month-to-month basis pending formalization of the claimant's employment at another school.
5. The respondent adds that at the time of the alleged termination, the claimant had already secured employment at another school pending reporting.
6. The respondent therefore denies in toto the claims made by the claimant and prays the suit be dismissed with costs.

Oral testimony

7. The claimant testified under oath in support of the particulars of claim set out in the memorandum of claim filed on 19th December 2011.

8. The claimant reiterated that he served the respondent under a two year contract as a teacher. He taught Kindergarten to standard three. On 19th July 2011, he was retrenched and was told that the respondent was undergoing restructuring. He was called at 6.30 in the morning by the Acting headmistress Mrs Mandara and asked to see Mr. Thomas Mongare. He was given a letter of termination without notice. He had served the school well and had no previous warning.

9. In terms of the contract, termination was by giving either party three (3) months' notice. The claimant seeks to be paid unserved period of contract on the basis that he was to serve a further two years contract commencing on the 1st September 2010 up to 30th August 2012. The claimant was paid salary for July 2011 and got none for August 2011.

10. The claimant now teaches another school where he was employed in 2014. He remained jobless between the year 2011 to 2014. The claimant insisted that he was told to continue working and received same terms awaiting a new contract document. Clause 12 of the contract provided for three months notice.

11. RW1 Violet Mandara testified for the respondent. She was the immediate supervisor of the claimant. RW1 told the court that the claimant served on a two year contract which was not renewed. Upon expiry of the contract, RW1 told the court that the claimant served for a further one (1) year under a mutual arrangement on a month to month basis and on same terms. RW1 added that the claimant was interested to get a job elsewhere.

12. RW1 denies that the respondent owes any payment to the claimant.

13. The letter of termination indicates that the claimant was retrenched from service. His services were no longer required by the respondent.

14. Determination

i. Whether the termination of employment of the claimant was wrongful and in breach of the contract of employment.

ii. Whether the claimant is entitled to the reliefs sought.

Issue 1

15. Two documents produced by the claimant are not in dispute. That is the contract of employment between the claimant and the respondent dated 26th May 2008 pursuant to which the claimant was employed as a teacher for a period of two years. The claimant served the full term without any problem.

16. The second document is a letter of retrenchment given to the claimant by the respondent on 19th July 2011.

17. The evidence before court points to the fact that the claimant continued to work without any written extension of contract, when the initial two year contract expired on 31st August 2010.

18. In the words of the respondent, the claimant continued to work for a further one year, on mutual oral agreement on same terms as contained in the initial contract.

19. This being the case, the claimant became an employee on a month to month basis, and therefore a permanent and protected employee in terms of section 35(1) of the Employment Act, 2007.

20. The contract was therefore terminable by giving each other one month notice or payment in lieu thereof.

21. The further implication of the conversion from a fixed term contract to a protected employee under the Employment Act, is that the employment could now only be terminated:-

i. In terms of Section 45, for a valid reason and in terms of a fair procedure.

ii. The employer had in terms of Section 43 as read with Section 47 to prove the reason(s) for the termination and justify the same before the Employment and Labour Relations Court if challenged to do so.

22. The claimant came to court to challenge the termination and the employer is bound to prove on a balance of probability that, it had a reason to terminate the employment of the claimant and justify the termination by demonstrating that the reason was valid and that it followed a fair procedure to terminate the employment.

23. The respondent provided the reason for the termination to have been declaration of redundancy following a restructuring of the respondent school. No evidence was tendered whatsoever to show that the respondent followed the provisions of Section 40 of the Employment Act, which governs declaration of redundancy.

24. Furthermore, the respondent did not provide any notice of intended redundancy to the claimant nor was the claimant paid in lieu of notice. The claimant was not given the selection criteria used to declare him redundant.

25. The claimant was not paid any severance pay upon being declared redundant.

26. The claimant has therefore proved on a balance of probability that his employment was terminated for no valid reason and that the termination was not conducted in terms of a fair procedure.

27. The claimant has discharged the onus placed on him by section 47 (5) of the Employment Act, 2007 and is entitled to compensation in terms of Section 49 (1) (c) of the Act, which provides for a maximum of twelve (12) months salary.

28. This being the case, the claimant is entitled to, and is awarded:-

i. Kshs.25,000 being one (1) month's salary in lieu of notice.

ii. Compensation equivalent to ten (10) months salary. This compensation is justified by the fact that, the claimant remained jobless between the year 2011 to the year 2014, upon unlawful termination of his employment. He was not paid any terminal benefits, including severance pay and notice pay upon termination of employment.

29. The claimant was under legitimate expectation that his written contract would be renewed and that he would be entitled to at least one (1) month notice of intention to terminate his employment to enable him to prepare for the loss of income.

30. The claimant suffered loss and damage as a result of the unlawful conduct of the respondent. The claimant had good record at work and therefore did not contribute to the wrongful conduct by the respondent.

31. In the final analysis, the court makes the following orders;

The respondent to pay the claimant:-

i. Kshs.25,000 in lieu of one (1) month notice.

ii. Kshs.250,000 being compensation for unlawful and unfair termination of employment.

Total Kshs.275,000.

iii. Interest on the award at court rates from date of filing suit till payment in full.

iv Costs to follow the outcome.

Dated and delivered at Nairobi this 28th day of October 2016

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE