



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 210 OF 2013

ZEDEKIA JUMA ADAYACLAIMANT

VERSUS

MSB EDUCATIONAL INSTITUTE.....RESPONDENT

J U D G M E N T

INTRODUCTION

1. The claimant filed this suit on 17/7/2013 claiming accrued employment benefits amounting to ksh.9,593,280. The said sum covers severance pay, salary arrears for 1996-2003, leave not utilized plus overtime of 3840 hours. It is the claimant's case that his salary between 1996 and 2003 was underpaid. He never went for leave; and he used to work extra hours.

2. The respondent has on the other hand denied liability to pay the claimant anything and avers that the suit is time barred. In addition, the respondent has accused the claimant for resigning from the employment without prior notice. She has therefore counter-claimed against the claimant the sum of ksh.59,000 being one month salary in lieu of notice.

BACKGROUND

3. On 22/10/2013 the respondent brought a motion seeking to strike out some portions of the claim for being time barred but the court declined to allow the motion and instead directed the parties to raise the issues during the trial of the main suit. The suit was then heard on 7/10/2014 and 18/12/2014 when the claimant testified as CW1 and the respondent called Jennifer Culaso as RW1. Thereafter counsels for both parties filed written submissions.

CLAIMANT'S CASE

4. CW1 is currently a lecturer at the Technical University Mombasa. Previously he was employed as a teacher by the respondent from 1996 to October 2012. He started under an oral contract but in 2003, the contract was reduced to writing via letter dated 28/2/2003. The letter's effective date was backdated to 8/1/1996. He stated that the claimant's commencement salary was ksh.24,000 per month. The letter also provided for 40 working hours per week and his annual leave was 1 ¾ day per month. CW1 was confirmed in the said position by letter dated 5/4/2013. He had a good relationship with the employer until the time he resigned. He explained that from 1997 he was earning ksh.14,000 per month but as at October 2012, he had a salary of ksh.59,000. He produced payslips and a letter to prove the said earnings.

5. CW1 contended that he used to work extra hours during extra curricular activities like sports and science congress which were mainly done over the weekend. He produced certificate to prove the foregoing allegations that he used to work on Saturday. He explained that he resigned because the salary was low. He explained that a new teacher was hired to take over from him and he in fact introduced the new teacher to the classes and handed over teaching materials.

6. CW1 prayed for a certificate of service, salary arrears for 1996-2003, gratuity, accrued leave plus overtime worked.

7. On cross examination by the defence counsel, CW1 stated that he was employed as a Biology and Chemistry teacher in 1996. He denied that he was helped by the respondent to get post graduate diploma studies. He explained that he was receiving ksh.10,000 as salary until 1997 when it was increased to ksh.14000. He admitted that the salary was thereafter reviewed progressively until 2003 when he was given a written contract stating the salary as ksh.24000. He denied receipt of the memo dated 30/9/2005. He however admitted that he breached the contract by resigned without notice. He stated that there was another Biology teacher and another new one had also been recruited.

8. CW1 admitted that he went for all his annual leave from 2003 except for the year he resigned. He prayed for severance pay for 16 years served between 1996 and 2012. He contended that he worked for long hours including Saturday in respect of remedial classes and extra curricular events. CW1 maintained that the contract letter provided for ksh.24000 as the starting salary.

DEFENCE CASE

9. RW1 is the respondent British National Curricular Consultant and the Head of the Secondary Section. She explained that the respondent is a community school owned by the Bhora community. She confirmed that CW1 was employed by the respondent as a teacher from 1996. She confirmed that CW1 was given a written contract on 28/2/2003 with a salary of ksh.24000. According to RW1, the salary was not backdated to 1996 and the matter was clarified by the Accountant's letter dated 10/6/2005 and 10/9/2005.

10. RW1 denied the claim for overtime and explained that school time starts at 7.45 am and ends at 4pm. She contended that no extra classes were assigned to a teacher unless he requested for make up classes for good reasons. She admitted that CW1 occasionally and voluntarily requested for extra classes.

11. RW1 also denied the claim for outstanding leave days and contended that CW1 like any other teacher used to take his annual leave during vacation, from November to January every year. She further denied the allegation that CW1 was denied certificate of service.

12. On cross examination by the claimant's counsel, RW1 stated that she had no records to prove that CW1 leave between 1996 and 2009. She however had leave records from 2009 to 2012. She admitted that CW1 went for leave sometime before the start of the vacation. As regards claim for overtime, RW1 admitted that CW1 used to do some work over the weekend including sports and science fares. She however explained that there was no extra pay for the extra classes. She admitted that apart from teaching CW1 had extra duties as Head of Science Department.

13. Concerning the written contract given to CW1 in 2003, RW1 contended that the letter backdated the appointment date only but not the salary. She admitted that when she joined the respondent in 2008, she found the appointment letter and the accountant's letter in the claimant's file. She could however not tell why it took the Account 2 years from 2003 to write the letters to correct the error in the appointment letter.

14. On re-examination RW1 clarified that CW1 was going for marking of National Exams and as such he used to go for his leave before the vacation started. She concluded by explaining that before 2009, there were no leave forms.

ANALYSIS AND DETERMINATION

15. After considering the pleadings, evidence and submissions, the court is satisfied that CW1 was employed by the respondent from January 1996 to 30th October 2012 when he resigned without notice. What is in dispute is whether the suit is time barred, whether the reliefs sought should issue, and whether the counter claim should be allowed.

Reliefs sought

16. The claimant prays for

- a) severance pay at ½ month salary for each completed year
of service472,000
 - b) salary arrears for 1996-2003600,000
 - c) accumulated leave days for 16 yearsX24000.....944,000
 - d) accumulated overtime of 3840 hours X1 ½ of
normal pay rate7,593,280
- 9,593,280

Time Limitation

17. Under Section 90 of the employment Act, a claim based on employment contract must be filed in court within 3 years after the cause of action arises. In this case the claimant claims for salary arrears and leave for the period between 1996 and 2003. The law applicable to such claims is the Limitation of Action Act, Section 4 which restricted the life of a cause of action based on employment contract to 6 years. From 2003 the 6 years period ended in 2009. The suit herein was filed in 2013. That was obviously out of time and such the said claims must fail. The only claim that passes the test of time bar is leave earned in 2012. The court awards a whole years leave because CW1 resigned just a few days before the school closed for December vacation. He will therefore get ksh.59000 for one month leave earned in 2012. The reason for awarding one month leave is that the RW1 told the court that CW1 used to go for his annual leave before the end of November until January every year. In addition the claimant will be issued with a certificate of service as prayed and admitted by the respondent.

The claim for severance pay is dismissed because the termination was by resignation and not redundancy. The prayer for overtime is also dismissed for being time barred for the period before 2010 and also for lack of evidence for the rest of the period. The court agrees with the defence that extra work was not forced onto the claimant but it was voluntary with no extra pay.

Counter Claim

18. CW1 admitted in evidence that he breached the employment contract by resigning without prior notice as prayed in the written contract. The court therefore allows the counter claim and awards the respondent one month salary in lieu of notice. The effect of the foregoing award is to cancel the one month salary awarded to the claimant for his leave earned in 2012.

DISPOSITION

19. For reasons stated above judgment is entered for:

- a) claimant against the respondent in the sum of ksh.59000 plus certificate of service.
- b) Respondent against the claimant in the sum of Ksh.59000

c) Each party to bear his or her own costs.

Dated, signed and delivered this 23rd March 2014.

O. N. Makau

Judge