



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 335 OF 2013

VINCENT OMOLLO OBUOM

CLAIMANT

v

CATHOLIC DIOCESE OF NAKURU

RESPONDENT

JUDGMENT

1. Vincent Omollo Obuom (Claimant) was employed by the Catholic Diocese of Nakuru (Respondent) sometime in 1992. Through a letter dated 2 May 1996, the Respondent authorised him to act as a Manager of St. Mary Press.
2. It is not clear from the documentation produced whether the terms and conditions of service were embodied in a written document but according to an employment contract made on 6 January 2009, the Claimant was appointed to the position of Project Co-Ordinator for a period of 5 years.
3. On 9 October 2013, the Claimant commenced legal proceedings against the Respondent and he stated the issues in dispute as

1. Unfair termination

2. Discontinuing of a contract without information contrary to the agreement of the employment between C.D.N and Vincent Omollo Obuon.

4. The Claimant contended in the Memorandum of Claim that he was underpaid from January 2009, was not paid wages from January to August 2012 and that attempts to resolve the question of wages and other issues were not successful and thus he considered his employment as terminated unfairly.
5. And for the breach of contract, the Claimant sought a total of Kshs 6,054,112/-.
6. The Respondent filed its Response on 8 November 2013. However, it filed an Amended Response on 27 November 2013 and this prompted the Claimant to file what he referred to as Reply to Amended Memorandum of Response.
7. Just before the hearing of the Cause, the Claimant was abandoned by his legal counsel and on 13 May 2015, he filed a Notice of Change to act in person. The Respondent filed a further list of Documents on 15 June 2015 and the Cause was heard on 16 June 2015.
8. Both parties filed written submissions after the close of testimonies.
9. The Court has considered the pleadings, the evidence adduced and documents produced and the written submissions and identified the issues for determination as, *whether the Claimant absconded from work or was dismissed (constructive dismissal), if dismissal, whether the dismissal was unfair, whether the Respondent underpaid the Claimant, whether Claimant is owed any contractual/statutory entitlements and appropriate remedies/orders*

Constructive dismissal or abscondment

10. The Memorandum of Claim was inelegantly drafted. But from paragraphs 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 24 and 26 it is apparent that the Claimant's cause of action is grounded on constructive dismissal.
11. The Respondent on the other hand contended that the Claimant had absconded from duty with effect from April 2012.
12. The question is therefore whether the Claimant dismissed himself by absconding from the work place or the Respondent made the work environment difficult.
13. The doctrine of *constructive dismissal* was discussed in detail in the case of *Western Excavating ECC Ltd v Sharp* (1978) 2 WLR 344. The Court discussed the rival tests and ended up endorsing the contract test.
14. The test, essentially as to what amounts to constructive dismissal as endorsed in the authority is that the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.
15. From this test, the duty the Court is called upon to do is to look at the conduct of the employer which might have led to the employee leaving. In the instant case, supposing the Claimant absconded, the Court is called upon to look at whether the so called abscondment was a result of the Respondent's conduct.
16. The Claimant's case is that the Respondent did not fulfil the terms of the contract made on 6 January 2009 as regards the payment of wages. According to the contract, the basic wage was agreed at Kshs 27,890/-, house allowance at Kshs 4,140/- and a medical allowance of Kshs 1,400/-.
17. The Claimant produced his pay slip for November 2009. The basic wage was Kshs 15,750/- while the house allowance was Kshs 3,200/-.
18. In testimony, he stated more or else the same.
19. The Claimant also contended that he was not paid wages from January to July 2012. He exhibited letters (exhibits 4, 5 and 6) he wrote to the Respondent asking for the wages.
20. The Respondent did not challenge or controvert the Claimant's evidence in respect of these 2 issues, namely failing to pay wages as agreed in the contract and payment of wages in 2012 (or at least upto April 2012 when the Claimant allegedly absconded).
21. Payment of wages as agreed and on due dates is one of the *essentialia* of an employment contract. Failing to pay agreed wages goes to the root of the contract of employment.
22. The Respondent was in breach when it did not pay wages according to the agreed terms. The Respondent was also in breach in withholding wages in 2012.
23. The Court consequently finds that the Respondent was in breach of an essential term of contract and therefore the Claimant was entitled to treat himself as having been discharged by the Respondent's conduct.
24. Although the Claimant did not leave immediately, he has demonstrated that he made efforts to have the breach(es) addressed/ rectified to no avail.
25. With the conclusion reached, it is not material to discuss the defence advanced by the Respondent.

Underpayments

26. The question of underpayments does not need any detailed discussion considering the finding above. The Claimant's case was that he was underpaid for 12 months.
27. The Respondent did not produce any employment records on wages paid to the Claimant during the material period.

28. Sections 9 and 10(3) and (7) of the Employment Act, 2007 therefore kick in and because of the operation of the statutory provisions the Court finds for the Claimant.

Leave

29. The Claimant sought the equivalent of 4 years leave (2009 to 2012). The Respondent sought to defend itself on the basis that the Claimant did not apply for leave and therefore it could not be liable.

30. The Claimant did not address or explain whether he sought for leave and was denied.

31. The Court finds that the Claimant did not lay an evidentiary foundation for this head of claim.

Wages in 2012

32. The Respondent's first witness admitted that the Claimant was not paid wages from February 2012.

33. The last substantive communication from the Respondent to the Claimant was the letter dated 30 July 2012.

34. Relying on this letter, the Court would agree with the Claimant that the effective date of separation was July 2012.

35. The Claimant would therefore be entitled to wages from February to July 2012.

Pay in lieu of notice

36. The contract at clause 10 provided for 3 months notice after the 3rd year of contract.

37. The Claimant is therefore entitled to the same.

Gratuity

38. Clause 5 (d) of the contract provided for gratuity at the rate of 25% of basic pay and the Claimant is entitled to the same on a *pro rata* basis for time served.

Compensation

39. The Claimant served the Respondent under different contracts which cumulatively come to about 17 years. The last was a fixed term contract of 5 years which was terminated prematurely with about one and a half years to go.

40. Although the Court did not go into the merits of the defence of the Respondent that the Claimant failed to answer audit queries or explain use of some donor project funds, the Court has considered the circumstances of the separation and the balance of the contract and is of the view that 2 months gross wages as compensation would be fair.

Damages

41. The Claimant sought what he pleaded as damages of Kshs 4,821,120/-. But he failed to lay any contractual or legal foundation for this head of relief as opposed to compensation.

Conclusion and Orders

42. The Court finds and holds that the Claimant has proved he was constructively dismissed and awards him and orders the Respondent to pay him

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|-------------------------------------|----------------|
| a. Underpayments | Kshs 156,960/- |
| b. Wages February-July 2012 | Kshs 163,200/- |
| c. 3 months wages in lieu of notice | Kshs 83,670/- |
| d. Gratuity | Kshs 167,340/- |
| e. Compensation | Kshs 64,060/- |

TOTAL

Kshs 635,230/-

43. Relief in respect of leave is declined.

44. Each party to bear own costs.

Delivered, dated and signed in Nakuru on this 20th day of November 2015.

Radido Stephen

Judge

Appearances

Claimant in person

For Respondent Mr. Orege instructed by Rodi, Orege & Co. Advocates

Court Assistant Nixon