



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NYERI

CAUSE NO. 98 OF 2013

WILSON W. KUBUTA.....CLAIMANT

VERSUS

B.O.G KABARE GIRLS HIGH SCHOOL.....RESPONDENT

JUDGMENT

1. The claimant in this suit is a former employee of the respondent working as an accounts clerk. According to his memorandum of claim as well as evidence in court he resigned from employment but was not paid his terminal dues.
2. It is his contention that being a professional staff his salary ought to have been at par with professionals of similar cadre serving in Public Service as recommended by circulars issued from time to time by the Ministry of Education. The claimant therefore in addition to his terminal dues, made a claim for salary underpayment. That is to say, he is claiming from the respondent the difference between his actual pay and what he thinks is his right entitlement as per the Ministry of Education circulars.
3. The respondent for its part has refuted the claimant's claim arguing that he was not a professional accountant hence not governed by circulars issued by the Ministry.
4. According to the respondent, the claimant was merely a semi-professional staff and did not possess any professional qualifications. The respondent as it were, does not refuse to pay the claimant his terminal dues their only contention is that they should be calculated based on the claimant's exit salary and not salaries recommended by the Ministry for non-teaching professional staff. The respondent through its witness Mr. Njoka testified that the circulars are never implemented immediately as they await collection of funds from the parents. It was his evidence that by the time the salaries were harmonised the claimant had ceased to be an employee of the respondent and that circulars could not be backdated.
5. As observed earlier in this judgment, there is no dispute about payment of the claimant's terminal dues. The only bone of contention is the criteria to be used in its calculation.
6. Whereas the respondent contends that the claimant is not entitled to benefit from circulars issued by the Ministry, the claimant insists that being a professional he was entitled to benefit from these circulars. In the circumstances the burden seems to be on the claimant to show that he was a professional accountant to benefit from the circulars. From his evidence however, he stated that he had not attained CPA level and was not a member of any professional body. The court's understanding of a professional is somebody who is skilled in his field and has been duly examined by the body responsible for such professionals and permitted either through registration or subscription to practice that profession. Mere experience gained from continuous practice does

not confer on a person membership to a profession. The claimant's admission that he had not attained any professional level in accountancy by the time he resigned and further that he did not belong to any accountants professional body disqualifies him from benefiting from circulars issued from time to time by the Ministry of Education for the benefit of non-teaching professional staff. That being so his claim in this regard hereby fails and is rejected. The claimants terminal dues will therefore be calculated based on his exit salary which was Kshs.6,755.

7. Concerning the issue of leave, the court is reluctant to delve into this issue for the simple reason that it cannot take fourteen years and a termination of employment relationship for an employee to claim he or she never went on leave. Besides, the court is aware of the education system in the country where schools break for holidays three times in a year. It is incredible that the claimant could have been continuously working even during these holidays. If indeed he was, the burden was on him to produce evidence, which he did not. This claim is therefore rejected.
8. Concerning the issue of costs awarded to the respondent after the withdrawal of Kerugoya PMCC No. 74 of 2010, the court is of the view that this should be pursued separately and in that file where the same can be assessed as per the rules of that court. This court cannot make an order on the issue of costs in that case especially where the same has not been properly brought and proved as counter claim.
9. In conclusion the court hereby directs that the respondent do compute and pay the claimant all his terminal dues in accordance with his contract of employment and operational CBA if there was one at the time of his resignation. The calculation of his terminal benefits shall be based on his exit salary which was Kshs.6,755. The computation and payment be done within 60 days of this judgment in default execution to issue.
10. The court will make no order on costs.
11. It is so ordered.

Dated at Nyeri this 5th day of June, 2014.

ABUODHA N. J

JUDGE

Delivered in open Court in the absence of the Advocate for the Claimant and in the presence of Mr. Ochieng holding brief for Mr. Muriithi Advocate for the Respondent.

ABUODHA N. J

JUDGE