



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 666 OF 2010

JOHN MBUTHI CLAIMANT

VERSUS

RUSINGA INVESTMENT RESPONDENT

Mr. Wanam Sale for Claimant

Mr. Chacha Odera for Respondent

JUDGMENT

1. The Claimant herein sought payment of terminal benefits and compensation for unfair dismissal.
2. The claim for payment of terminal benefits was compromised by the parties upon payment of Kshs.2.5million.
3. Written submissions were filed on the issue of whether or not the termination was substantively and procedurally unfair.
4. In terms of the contract of service, either party could terminate the agreement by giving the other six months' notice or payment in lieu thereof. However the employer reserved the right to terminate the employment of the employee due to gross misconduct or summarily dismiss him.

Such termination was to be guided by the provisions of the *Employment Act No. 11 of 2007*.

5. The Claimant in paragraph 11 of the Memorandum of claim avers that he wrote a letter dated 2nd October 2009 to the chairman of the Respondent in compliance with the contract dated the 1st September 2009 tendering his resignation by giving to the Respondents six (6) months' notice of his intention to terminate the contract. The separation was to take effect on the 1st April 2010. The letter of resignation is attached to the Memorandum of Claim on page 25.

The claimant delivered the letter personally to **Dr. Jacob Mwangi** the Chairman of the Respondents Board of Directors who accepted the same.

6. It is the Claimant's case that on 5th October 2009 the Chairman instructed the Claimant to immediately vacate the office of the Headmaster of the school and the accommodation provided to him by the school by Friday 9th October 2009.

The Claimant complied with the demand of the Respondent's Chairman and promptly handed over the office to an employee appointed by the Respondent's Chairman.

7. On 8th October 2009, the Claimant handed over and vacated the official residence of the Headmaster of the school as directed.

On 12th October 2009, the Claimant demanded payment of his terminal dues in terms of the contract calculated at Kshs.4,054,300/=.

8. According to the Claimant, the Respondent failed to honour the payment in spite of his written demand on 22nd January 2010. However by a letter dated 5th March 2010, the respondent wrote to the British American Insurance Company authorizing the transfer of the Claimant's total pension fund from Rusinga School staff Retirement Benefit Scheme. In the letter, the reason for the separation was said to be resignation.

9. The Claimant demands full payment of the notice pay in the sum of Kshs.4,054,300 and in the alternative claims special damages in the sum of Kshs.18,146,350/= being special damages for unlawful termination of the contract of service.

10. No particulars of unlawful termination are found in the Memorandum of claim. The effect of the Claimant's pleadings is that the respondent promptly accepted his resignation and asked him to leave the school but defaulted to pay terminal dues in terms of the contract of employment dated 27th April 2009.

11. The only issue in dispute is the computation of the terminal benefits, the Claimant's tabulation indicating a total sum of Kshs.4,054,300 as claimed whereas the Respondent has tabulated the sum due from the final pay-slip of the Claimant and arrived at a total of Kshs.2,511,000/=.

Determination

12. In terms of the pay-slip for the claimant for the month ended 31st August 2009 which was the last pay-slip for the Claimant, he earned;

- i. Basic salary Kshs.140,000/=
- ii. Responsibility allowance Kshs.126,500
- iii. Utility Kshs.60,000/=
- iv. Entertainment Kshs.50,000/=
- v. Gross earnings Kshs.376,500/=

He also earned a tax relief of Kshs.20,000/= for pension and Kshs.42,000/= housing benefit giving a Gross Taxable pay of Kshs.398,500/=.

The Claimant further adds taxable benefits in the computation as follows:

Housing Kshs.90,000/=

Car Kshs.45,000/=

Pension Kshs.6,000/=

Life assurance Kshs.1,000/-

Free education Kshs.32,250/=

Medical Kshs.300/=

Night guard Kshs.19,500

Club membership Kshs.1,500/=

hence arriving at a Taxable total of Kshs.583,050 and a Total Net of Kshs.556,000/=.

According to this tabulation the total payable for six (6) months is Kshs.3,498,300/=.

13. The Respondent submits that, the claim can only be premised upon his pay-slip since it is upon the figures contained in the pay-slip that income tax was paid. It is submitted that to claim payment or benefit not captured in the pay-slip, would be to premise a claim upon an illegality since under the income tax Act, all income and benefits are subject to taxation.

14. The Respondent relies upon the case of **Heptulla Versus Noor Mohamed [1984] KLR 580**, where the Court of Appeal at holding number 5 said that no Court ought to enforce an illegal contract where the illegality has been brought to the attention of the Court and if the person invoking the aid of the Court is himself implicated in the illegality.

15. That the Claimant in the present case is asking the Court in calculating his terminal dues to apply the figure not declared in his pay-slip for tax purposes.

That the effect of failure to declare the entire remuneration in the pay-slip to evade tax under the Income Tax Act, which is illegal and which the Claimant is party to bars the Claimant from invoking the aid of the Court.

16. Whereas this submission may hold water, it is not lost on the Court that the principal culprit in the tax evasion here is the Respondent, the employer who bears the primary duty to declare earnings of an employee and remit tax on his behalf. This has never been the role of an employee.

However, where the employee has over time benefitted from the said illegality but now wants to be assisted by the Court, the Court will not take the matter kindly.

17. Instead, the Court would in the first place determine the correct formula of computing the terminal benefits claimed and if this involves earnings in respect of which no declaration of income was made and therefore no tax was remitted in respect thereof, the Court will apply the correct formula and direct the respondent to tabulate the tax payable in respect thereof backdated to the period when the tax became due and payable and remit the same to the tax authority accordingly.

Contract of Service

18. The salary package comprising of the salary and benefits offered to the position of headmaster is attached to the contract itself as attachment A. These benefits are therefore part and parcel of the contract between the parties.

19. In terms of the annexure the Gross salary payable in cash to the Claimant was Kshs.464,500/= whereas the non cash benefits per month amounted to Kshs.206,550.

The total monthly package per attachment A11 Kshs.617,550/=.

20. **Clause 9**, provides for “**six months’ notice of intention to terminate contract or six months’ salary equivalent in lieu of notice.**”

21. In the case where the employee serves the six (6) months’ notice, it is obvious that he would be entitled to the full salary and fringe benefits in the same way as when he is doing normal service.

It is clear from the letter of resignation that the Claimant’s intention was to serve the six months’ notice

but not to seek payment in lieu thereof. However, the Respondent opted instead to have the Claimant leave the school immediately and went ahead not to pay the terminal benefits until this matter was filed in Court.

In the contract of employment, all the fringe benefits were given a monthly value which was totaled to Kshs.206,550/=.

22. In terms of *Section 2* of the *Employment Act, 2007*, “**remuneration is defined as “the total value of all payments in money or in kind made or owing to an employee arising from the employment of that employee.”**

23. The remuneration of the Claimant herein includes his salary and fringe benefits as contained in the contract of employment.

However, the Court has taken into consideration the Court of Appeal decision in **Kenya Ports Authority versus Edward Otieno MSA Civil Appeal No. 120 of 1997** where it was held “**other than the basic salary all other emoluments are only enjoyed by those in actual employment and are never included in payment in lieu of notice** and the Decision in **George Kangethe Kinani Versus Associated Steel Limited HCC No. 775 of 1987** where **Bosire J.** (as he then was) said that:

“some of such emoluments are not paid for services rendered but as a means of enabling an employee to perform his services.”

24. Also by **Justice Waki in Wanjohi Versus Mitchell Colts Kenya Limited [2002] KLR 462** where he held that the payments in lieu of notice made to the plaintiff should be based on basic salary only and not the total sum of basic salary plus benefits as they are set out separately and are not part of the salary.

25. It is therefore the Court’s considered view that the Claimant’s notice pay should be calculated in terms of the Gross earnings per month in the sum of Kshs.376,500 as per the pay-slip of 31st August 2009 and not to include the fringe benefits in the sum of Kshs.206,550/= per month.

It is the Court’s believe that the net amount already paid to the Claimant in the sum of Kshs.2,511,000/= was calculated using the Gross earnings of Kshs.376,500/=. If that be not the case, the sum should be revised only if it is in favour of the Claimant and not otherwise and the final quantum be filed in Court within 30 days from the date of this judgment.

26. The Respondent is to pay the costs of this suit in view of the fact that it did not pay the terminal benefits until this matter was brought to Court. The amount if any is to be paid with interest at Court rates from date the resignation became effective until payment in full.

Dated and Delivered at Nairobi this 11th day of July, 2014.

MATHEWS N. NDUMA

PRINCIPAL JUDGE