



**IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI**

**CAUSE NO. 2354 OF 2012**

**FRANK J MALINGA ..... CLAIMANT**

**VERSUS**

**THE TRUSTEES OF ARYA SAMAJ EDUCATION BOARD ..... RESPONDENT**

**JUDGEMENT**

1. The Claimant Frank Mulinga filed his claim on 21<sup>st</sup> November 2012 seeking his terminal dues from the Respondent the Trustees of Arya Samaj Education Board. Summonses were served upon the respondents on 7<sup>th</sup> January 2013 and an Affidavit of Service filed to this effect by Tom M Kayere. There was appearance for the respondents by Muma & Kanjama Advocates through their Notice of Appointment of Advocates filed on 4<sup>th</sup> February 2013. No defence was filed despite such service of summons and Respondent entering appearance. The Claimant took hearing dates and served upon the respondents advocates on 22<sup>nd</sup> April 2013 but hearing did not take off. Another date was taken and the Respondent served on 10<sup>th</sup> December 2013. On both occasions the respondents advocates accepted service but no defence was filed and on the set hearing date of 21<sup>st</sup> July 2014, the respondents and or their advocates were absent from court. On the basis of proper service the Claimant was heard in the absence of the Respondent and without a defence on record.

**Claimant's case**

2. By a letter dated 28<sup>th</sup> January 1997 the Claimant was employed by the Respondent as a science teacher and in February 2012, the Claimant opted to retire from employment on reasons of ill-health. On this retirement the Claimant was entitled to terminal dues which the Respondent had refused to pay. The contract provided that the Respondent would withhold and retain a sum equivalent to one month salary from the Claimant and would be refunded on termination of employment. The contract also provided that the Claimant could retire on medical grounds.

3. The Claimant became unwell and received a medical report that recommended that he was unable to perform his duties efficiently due to the condition he suffered which recommendation the Respondent accepted and the Claimant thus retired with effect from 1<sup>st</sup> March 2012. The terminal dues owing are;

- a. *Salary for February 2012 at kshs.46,000.00*
- b. *3 months' salary in lieu of notice at kshs.138,000.00*
- c. *One month salary withheld at Kshs.46,000.00*
- d. *Leave pay of one month salary for each year for 17 years at kshs.782,000.00*
- e. *Payment of 12 months' salary for each year worked in accordance with section 49(1) of the Employment Act at kshs.552,000.00*

*Total being 1,564,000.00*

4. The Claimant also gave evidence in support of his claim and testified that upon employment by the Respondent he performed his duties diligently and worked for six days a week from Monday to Saturday where on Saturdays he would work with the candidates to be able to catch up with their studies. From 2010 he started having health problems with cataract and surgery was performed on him at Sabatia Hospital. In 2011 he had nerve pains on the legs and standing became a problem and was admitted at St Mary's hospital. The doctor recommended early retirement on medical grounds in a report dated 10<sup>th</sup> February 2012.

5. Upon report back to work, the Claimant found that the Respondent had already employed Mrs Odhiambo for the classes he was teaching and the Respondent were not keen on him and was told to clear with the respondent. His terminal dues were all calculated at kshs.46, 000.00 but the salary for February 2012 was not paid. He was also not given notice before he was replaced as notice was to be for three months or pay in lieu of such notice. He had deposited one month salary that was to be refunded at termination. For the 17 years he served no leave or pay was granted and being a teacher, he worked on Saturdays. It was difficult to take leave as this was only for students and not for teachers and he continued work when he was supposed to be on leave. He was also not compensated for the unfair termination and was also entitled to gratuity and is seeking kshs.1, 564,000.00 as terminal dues together with costs.

6. In a case like this one where the Respondent as the employer is sued and does not offer any defence or appear at the hearing, a lot of questions are left unanswered. The option taken by the Respondent to make appearance but fail to defend the claim or appear at the hearing leaves the court with the claimant's statement and evidence.

7. The basis of the claim is that the Claimant became unwell and a doctor recommended that he retires on medical ground which was accepted by the Respondent and thus the Claimant retired. At paragraph 6 and 7 of the claim, it states;

*6. In a medical report dated 10<sup>th</sup> February 2012 from Mary mission Medical Centre, Dr. O.M. Mburu of the said hospital diagnosed that the Claimant had suffered from Lumbargo/Arthritis/Hypocalcaemia and recommended that due to illness and the claimant's age the Claimant would not be able to efficiently perform his duties and recommended that he retire on medical ground.*

*7. Following the said recommendation that the Claimant be retired on medical grounds, the Respondent accepted the recommendation and accordingly the Claimant retired from the respondent's employment with effect from 1<sup>st</sup> March 2012.*

8. In evidence the Claimant stated that after leaving hospital and getting his letter of recommendation for retirement on medical ground he went to the Respondent and found Mrs Odhiambo had been allocated his classes. He was told to clear which he did and got his dues of kshs.46, 000.00; which he stated was not adequate. I find no claim for unfair termination or evidence to support that the retirement on medical grounds was initiated by the Respondent or that this recommendation was used to unfairly terminate the employment of the claimant. His own evidence and statement does not support succinctly establish any unfair labour practice to warrant the court to infer, interpret or in any other manner form a basis of unfair termination.

8. The Claimant is seeking salary for February 2012 which was unpaid. Since retirement on medical grounds was effective from 1<sup>st</sup> march 2012, salary for February 2012 is due and will be awarded.

9. The Claimant is seeking notice pay. Notice pay arise where there is termination without notice and where parties to a written contract have agreed to such notice as due. Where notice whichever way is not given, pay in lieu of such notice is awarded. However in this case, despite there not being any defence or evidence from the respondent, the Claimant failed to outline how this claim became due. His evidence was on the nature that he reported back to school but found Mrs Odhiambo teaching his classes, the

respondents were not keen on him but he was paid his terminal dues, but contests the amount. He was given the clearance forms which he took to all departments and did the clearance and was paid his dues and left for his home. There is nothing to this end to suggest notice was not addressed by either party. I will not award.

10. There is a claim for one month salary withheld by the respondent. Clause 7 of the contract of employment is clear to this end. There was a deposit equivalent to one month's salary that was to be refunded upon termination of the contract. The sum of kshs.46, 000.00 will be awarded.

11. The claim for leave is on the basis that for the 17 years the Claimant was employed he never went on leave and the school term leave was for students and not for him. He taught for 6 days a week from Monday to Saturday. I take note that ordinarily school terms in Kenya run on a common schedule basically from January to March with a school break in April, second part from May to July with a break in August and the last part from September to November with a break in December. There obvious exceptions to schools undertaking different models of school terms but even these have a long summer or winter breaks. These breaks unless with consent of parties are for all to take a rest. Even where such rest or breaks are not taken, ordinarily in Kenya, December is a month with no schooling. This the Claimant should have clarified as to how his leave became due and arose with or without a defence to challenge his claim. This will thus not be awarded.

12. On the basis that there was no unfair termination as assessed above. There is no compensation due. This will not be granted.

13. The reasoning that compensation does arise in every case of termination is a misnomer. The circumstances of each case must be clearly outlined for the court to make a finding that indeed there was an unfair labour practice and thus unfair termination. It is therefore imperative to a litigant who has pleaded unfair termination to set out the procedure applied by the employer so as to cause the termination and further the reasons used by the employee for such termination. That procedure and the reason or reasons for termination must be outlined by the party relying on evidence that there was unfair termination. It does not arise automatically to the court that each case is up for compensation for unfair termination. Such a finding must have the basis of evidence and the applicable law. I found no evidence to support a claim of unfair labour practice as under section 43 and 45 of the Employment Act well applied does not

14. Cost will be awarded.

**Judgment is entered for the Claimant against the Respondent in the following terms;**

- a. **Salary dues for February 2012 at kshs.46, 000.00**
- b. **Salary withheld for one month at kshs.46, 000.00**
- c. **Costs of the suit.**

Delivered in open Court at Nairobi this 7<sup>th</sup> Day of October 2014

**M. Mbaru**

**JUDGE**

In the presence of;

Lilian Njenga: Court Assistant

.....  
.....

