



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT

AT MOMBASA

CAUSE NO. 254 OF 2014

DAVID KIPKOSGEI MUTTAICLAIMANT

VERSUS

GREEN PALMS ACADEMY RESPONDENT

J U D G M E N T

INTRODUCTION

1. The claimant has brought this suit claiming ksh. 240000 being his accrued employment benefits plus compensation for unfair termination of his employment by the respondent in January 2014. The basis of the suit is that the respondent unfairly dismissed claimant through fundamental breach of the employment contract.
2. The respondent filed his response after 3 months delay. She denied any employment relationship between the claimant and herself. She further denied the alleged breach of contract and violation of the labour laws. She also denied that the claimant was entitled to relief as claimed and put him to strict proof.
3. After several adjournments at the instance of the defence, the suit was heard on 8/10/2014 and 27/10/2014 when the claimant testified as CW1 and the respondent called Mr. Omondi Opar as RW1.

CLAIMANT'S CASE

4. CW1 is a retired teacher who was called back to work by the respondent in January 2012 as a teacher. The contract was verbal except the timetable. His salary was ksh.15000 per month. He worked continuously upto November 2013 when he went home after the school closed for the holiday. He was however not paid his salary for November and December 2013. When he returned to work in January 2014, for the new term, he found that the Deputy Principal had removed school books and personal files from CW1's desk at the staffroom. CW1 construed such action by the Deputy Principal as termination of his employment by clever tricks". When he demanded for his salary arrears, he was told to check from his bank account but nothing was paid by 11/1/2014 prompting CW1 to write a discharge letter.
5. Thereafter CW1 reported the matter to the Labour office who wrote several letters to the respondent when the respondent finally attended a meeting with CW1 and the labour officer, the respondent allegedly promised to pay the claimants dues by 5/5/2014. CW1 however never received any pay prompting him to file this suit praying for one month salary in lieu of notice,

- salary for November and December 2013, service pay for 2 years served at the rate of 15 days salary per year of service, plus 12 months salary for unfair termination.
6. On cross examination, by the defence counsel, CW1 maintained that he was employed under a verbal contract to teach biology, chemistry and Agriculture for a monthly salary of ksh.15000. He further maintained that he personally served the respondent with several demand letters from labour office and Kituo cha Sheria. He confirmed that no termination letter was ever served on him by the respondent. He explained that RW1 just told him to leave the school compound. According to CW1 the correspondence between him and the respondent's officials was always verbal. He contended that the bank statement he produced (exh.1) showed that he used to be paid by the respondent. He maintained that the removal of books and documents from his staffroom desk and telling him to go out, made him believe that he was dismissed.

DEFENCE CASE

7. RW1 is a teacher and the owner of the respondent school. He contended that CW1 was a volunteer teacher and not an employee at the respondent school. He explained that there was no written contract because RW1 never gives written contract to volunteers but only to employed teachers. RW1 denied receipt of any demand letter from the claimant or his representative.
8. On cross examination, RW1 admitted that CW1 taught in the respondent school upto November 2013. He however denied ever talking to the CW1 about his pay. He contends that CW1 was only receiving an allowance during his volunteer service because he was already a retiree.

ANALYSIS AND DETERMINATION

9. After considering the pleadings and the evidence adduced by the two parties, the court finds no dispute in the fact that CW1 was a teacher at the respondent school between January 2012 and January 2014. There is also no dispute that CW1 used to earn ksh.15000 per month which payment was paid through the bank. There is also no dispute that CW1 was never paid his salary for November and December 2013. There is also no dispute that in January 2014, CW1's desk at the staffroom was cleared of all books and personal files and CW1 told to leave the respondents compound. There is also no dispute that on 11/1/2014 CW1 wrote a discharge letter to the respondent citing breach of contract by the respondent through failure to pay CW1 salary for November and December 2013.
10. what is in dispute is whether there existed any employment relationship between CW1 and the respondent and if yes, whether the contract was unfairly terminated by the respondent. Lastly the court must determine whether the reliefs sought ought to issue.

EMPLOYMENT RELATIONSHIP

11. CW1 contends that he was employed as a teacher for a monthly salary of ksh.15000. RW1 on the other hand contends that CW1 was only a volunteer teacher earning an allowance. He however did not state how much allowance was payable to CW1 and he did not produce any written contract to dispose the verbal employment contract as alleged by the CW1. Under Section 3 of the Employment Act all employees in Kenya shall be employed under a contract of service and the terms and conditions of employment set out in the said Act shall constitute minimum terms and conditions of employment of an employee and any agreement that is inconsistent with the terms set out in the Act shall be null and void.
12. A contract of service has been defined under Section 2 of the Act as an agreement, whether oral or in writing, and whether expressed or implied, to employ or to serve as an employee for a period of time and includes a contract of apprenticeship and indentured learnership. In addition Section 2 of the Act defines an employee as a person employed for wages or a salary and includes an apprentice and indentured learner. The foregoing provisions of the law does not contemplate any employment relationship called volunteer labour. The court therefore dismisses the respondent's evidence that CW1 was not her employee but a volunteer teacher. That piece of evidence is not supported by the pleadings and the law. It also fall short of discharging the employer obligation under Section 9(2) and 10(6) & (7) of the Act which require in mandatory terms that the employer

shall be responsible for drawing employment contract and not only to keep it but also to produce it in any legal proceedings to disprove any alleged term of employment. In the present case, RW1 did not plead any volunteer relationship between CW1 and the respondent. He also did not prepare or produce any written contract to disprove the employment relationship as alleged by the claimant. Consequently, the court finds on a balance of probability that CW1 was employed as a teacher by the respondent. The said finding is reinforced by the uncontested testimony of the CW1 that he was instructed by the respondent to open a salary account at Ecobank which evidence was corroborated by claimants bank statements (exh.1) which showed that on 11/11/2013, Cw1 received a credit of ksh.15000 with description "Ref:016ww11133150001 salaries for Green Palms. The answer to the first issue for determination is therefore that there existed an employment relationship under a contract of service between the parties herein.

UNFAIR TERMINATION

- 13.unfair termination occurs where the employment was terminated without a valid and fair reason and without following a fair procedure. In this case no reason was cited for the termination. The requirement for fair procedure as required under Section 41 and 45 of the Employment Act therefore does not arise. This court has pronounced itself severally that an employer has the same right as an employee to terminate employment contract under Section 36 of the Employment Act without citing any reason therefor. The basis for the foregoing is premised on the fundamental principle of freedom of contract. The only legal obligation is that when the terminating party fails to serve the notice provided for under the contract of service or Section 35(5), of the Act he or she must pay salary or wages in lieu of the notice.
- 14.In the present case the respondent terminated the contract without serving one month notice. The termination took the form of a constructive dismissal. As correctly opined by the CW1, the respondent's failure to pay CW1's salary for November and December without any good cause was a fundamental breach of the contract. The employer failed to perform his obligation under the contract by withholding CW1's salary for 2 months until now. In addition the removal of books and other documents from CW1's staffroom desk and telling him to leave the school compound was enough evidence from which a reasonable employee would construe that his employment had been terminated. It is not correct therefore to blame the CW1 for the termination on the basis of discharge letter dated 11/1/2014. What the said letter did was only to confirm that CW1's desire to continue working had been made impossible by respondent's breach of the contract of employment. The court therefore is of the finding that the dismissal of the claimant was not unfair but wrongful. Dismissal is wrongful when the terminating party breaches Section 36 of the Employment Act or the contract of employment by failing to serve notice of termination or serving a shorter notice than the one stipulated. In this case CW1 was dismissed through construction and without any notice as required under Section 35(5) *supra*.

RELIEFS

- 15.In view of the foregoing the claimant is awarded ksh.15000 being one month salary in lieu of notice, ksh.30000 being salary for November and December 2013 and ksh. 15000 being service pay for the 2 years served at the rate of 15 days pay per year of service. The prayer for 12 months salary for unfair termination is however dismissed for the reason that the dismissal of the claimant was not unfair but wrongful.

DISPOSITION

- 16.For all the findings and reasons cited above, judgment is entered for the claimant as against the respondent for the sum of ksh.60000 plus costs and interest.

Orders accordingly.

Dated, signed and delivered this 5th December 2014.

O. N. Makau

Judge