



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 20 of 2013**

**JULIUS KIPKORIR KIGARIR.....CLAIMANT**

**-VERSUS-**

**ELDORET POLYTECHNIC.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 26<sup>th</sup> April, 2013)

**JUDGMENT**

The claimant **Julius Kipkorir Kigarir** filed the memorandum of claim on 21.03.2012 through Chepkwony & Company Advocates. The respondent **Eldoret Polytechnic** filed the statement of defence on 18.04.2012 through Andambi & Company Advocates.

The claimant has prayed for judgment against the respondent for:

- a) **a declaration that the termination process as carried out by the respondent is unlawful and that during his employment with the respondent, the claimant was not remunerated as required by law;**
- b) **payment of Ksh.113,525 being three months pay in lieu of notice, 12 months compensation and service pay for eight years as the sums of money claimed under paragraph 9 of the memorandum of claim;**
- c) **costs and interests; and**
- d) **any other relief the honourable court may deem fit to grant.**

The respondent pleaded that the claimant had been paid the three months salary in lieu of notice, that the claimant proceeded on annual leave as required in law, that the claimant had not served the agreed 12 years to justify the claim for service pay, that the claimant was paid the agreed salaries and accordingly, the claim be dismissed with costs.

The case was heard on 16.04.2013 and on 24.04.2013. The claimant gave evidence to support his case and counsel for the respondent decided not to call any witness but to rely on the material on record.

The claimant testified that he was employed by the respondent on 30.04.2003 as a Library Assistant. It was his testimony that before 30.04.2003 and with effect from 01.08.2002 the respondent had engaged him as a temporary worker to serve at the respondent's library. The letter of temporary employment dated

17.02.2003 is at folio 16 on the memorandum of claim. The letter of appointment as a Library Assistant dated 30.04. 2003 is at folio 15 on the memorandum of claim. The letter stated that the claimant would serve four months on probation and upon successful completion of the probationary service he would be automatically confirmed. The appointment was subject to the terms and conditions of service of employees of the respondent's Board of Governors established under the Education Act, Chapter 211 of the Laws of Kenya.

The claimant successfully served the probationary period. He diligently performed his duties including arranging books and handling loaning of the books to library users. There was no complaint about his performance. He testified that without any notice and hearing, the respondent terminated his services by the letter dated 20.12.2010 being the appendix at *folio 14* on the memorandum of claim. At the time of termination, the claimant informed the court that he was undertaking a Diploma in Library Studies at the respondent's institution. The termination letter addressed to the claimant stated as follows

**“RE: TERMINATION**

**The Institution regrets to inform you of having terminated your services due to lack of the requisite qualifications to perform the duties of a Library Assistant effectively.**

**Consequently you are to be paid three months' salary being payment in lieu of notice. We wish you well in your future endeavours.**

**Thank you.  
Yours faithfully,  
Signed  
C.K Lagat  
PRINCIPAL”**

The claimant stated that he was under paid during his service with the respondent. However, in his evidence he did not lay a foundation for the alleged underpayment. He stated that he had gone on leave and had not been paid leave allowance of Ksh.400. He stated that the leave allowance was paid upon making a claim at the end of the annual leave period. He also testified that his last pay slip was for December, 2010 and he had been paid in July 2011 only a sum of Ksh.11,570 as his terminal dues.

The court has considered the pleadings, the evidence and the submissions on record and makes the following findings:

1. The claimant was employed as a Library Assistant and was automatically confirmed in appointment following successful probationary service. The parties agreed on the job description and designation and in view of the successful probationary service and in absence of adverse performance appraisals, the court finds that the claimant was qualified and performed as appointed. The court further finds that in absence of agreed or prescribed qualifications at the conclusion of the employment contract, it is a mere moot ground for the respondent to have terminated the claimant's employment upon an imaginary ground namely, “ **....lack of the requisite qualifications to perform the duties of a Library Assistant effectively.**” In the opinion of the court, the alleged ground for termination was poor performance. Accordingly, the respondent was required to comply with the provisions of section 41 of the Employment Act, 2007 which provides for a notification and a hearing in event of termination on account of poor performance. The respondent did not establish a genuine reason for terminating the claimant's employment especially in circumstances whereby the claimant was studying to improve his efficiency and effectiveness and no adverse performance reports had been made. Thus, the court finds that the termination was unfair.

2.It was submitted for the claimant that the respondent had failed to comply with provisions of section 40 of the Employment Act, 2007 on termination on account of redundancy. The court has considered that submission and finds that the case did not relate to abolition of office, down-sizing, or reorganization leading to the claimant's loss of employment. Thus, the submissions pointing at unlawfulness for alleged

breach of the section did not aid the claimant's case at all.

3. As already found by the court, the claimant's evidence did not establish a case for underpayment. The claimant did not provide any computation of the alleged underpayment in his submissions or in his evidence. The court finds that the claim for underpayment was unfounded.

4. The claimant has prayed for service pay for eight years of service. The respondent submitted that the claimant had not served for twelve years as required under the relevant collective agreement so as to be entitled to the service pay. The collective agreement and the basis of its application were not established and the court finds that the submission for the respondent was unfounded. For the claimant the claim for service pay was anchored on provisions of section 40 of the Employment Act, 2007 on termination on account of redundancy but which the court has found not to apply in this case. The court has perused the pay slips attached on the memorandum of claim and the verifying affidavit and finds that the claimant was a member of the National Social Security Fund. In the circumstances, he was not entitled to service pay in view of the provisions of section 35 (6) which preclude members of the Fund from urging claims for service pay. The court finds the claimant not entitled to service pay.

5. The respondent prayed for three months pay in lieu of notice. The respondent in the submissions alleged that the claimant's last pay slip was for December, 2008 and January and February 2009 as attached on the memorandum of claim. However, the court finds that the pay slips as referred to in the respondent's submissions do not help resolve the issue because the claimant's last month of service was December, 2010 and not December, 2008. The court finds that there is no evidence of payment of the undisputed three months pay in lieu of notice and the claimant is entitled to **Ksh.17,925** at the rate of the basic monthly salary of Ksh.5,975.

6. The claimant did not provide any evidence for the alleged overtime with respect to alleged work performed on rest days and public holidays. The evidence on record is that the claimant went on leave but was not paid leave travel allowance of Ksh.400. The reason he was not paid is that he had not claimed the same. The court finds that on a balance of probabilities, the respondent is entitled to the **Ksh.400** for annual leave allowance.

7. The court finds that the claimant is entitled to **Ksh.84,330** at the rate of the last gross monthly salary of Ksh.9,370 and for nine months being compensation for the unfair termination. While making this finding, the court has taken into account the claimant's acknowledgement that he had been paid only a sum of Ksh.11,570 as his terminal dues. Accordingly, it is the court's opinion that compensation for nine months and not twelve months will meet the balance of justice in this matter.

8. As the parties have separated, the court finds that the claimant is also entitled to a certificate of service by operation of section 51 of the Employment Act, 2007.

In conclusion judgment is entered for the claimant against the respondent for orders that the:

- a) **termination of the claimant by the respondent was unfair;**
- b) **respondent to pay the claimant a sum of Ksh.102,655 plus interest at court rates from the date of judgment till full payment;**
- c) **respondent to pay costs of the case; and**
- d) **respondent to deliver to the claimant a certificate of service within 30 days from the date of the judgment.**

Signed, dated and delivered in court at Nakuru this Friday, 26<sup>th</sup> April, 2013.

**BYRAM ONGAYA**

**JUDGE**