



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO.234 OF 2012

RUTH WAMBUI GIKONYO.....CLAIMANT

VS

BIBLE BAPTIST CHRISTIAN ACADEMY.....RESPONDENT

Mr. Chigiti Advocate, for the Claimant

JUDGMENT

This claim is for;

- One month's salary in lieu of notice in the sum of Kshs.7,050/=;
- Unpaid salary for 6 days worked in the month of January 2011 in the sum of Kshs.1,440; and
- Severance pay for 26 years at the rate of 15 days for every completed year of service in the sum of Kshs.91,650/=.

Total claim - Kshs.100,110/=.

The claim is based on the allegations that the Claimant was employed by the Respondent as a teacher in January 1984 at a monthly salary of Kshs.3,000/= which was later reviewed to Kshs.7,050/=. That though she was given annual contracts of service by the Respondent, she served the Respondent continuously until 7th January 2011, when the Respondent failed and/or neglected to renew her contract of service.

That upon termination, she was not given notice nor paid in lieu thereof. That she was also not paid for the 6 days worked in the month of January 2011. She alleges that she had worked continuously for 26 years and since she was not registered with NSSF and that the Respondent had not provided her with any pension or provident scheme, she is entitled to severance pay at the rate of 15 days salary for every year worked.

She prays the court to award her the aforesaid amount and cost of the suit.

The Respondent was represented by its Chairman, Reverend Olaf Konnerup who testified under oath. He denies that the Claimant was employed by the Respondent in January 1984 and states that the Respondent Primary School was started by the Claimant and other members of the Ruiru Baptist Church in 1999. The Claimant became the 1st headteacher of the School. That the school was struggling financially and in 2002, he was approached by the Claimant and the Ruiru Baptist Church to take over the

school, which he did.

That, due to the poor financial performance by the school, the Respondent employed the Claimant on one year contracts and the 1st of such contracts was in January 2003. That she served continuously on renewable one year contracts until January 2011, when the Claimant voluntarily declined to continue working and refused to sign the contract for the year 2011 in spite of persuasion by the Respondent to do so through the school administrator Mr. Kizito Ambani.

It is his case that the Respondent does not owe the Claimant any payment in lieu of notice as she is the one who declined to continue working. The Respondent was at the material time ready and willing to renew her contract of service as it had done in the past.

The witness admitted that the Claimant was not paid salary for the six days worked in the month of January 2011 because she was hostile to Mr. Ambani and had declined to receive the terminal benefits. The witness also confirmed that the Respondent had not registered with NSSF until it did so in the year 2011 after the Claimant had left.

The witness however, submits that the Claimant is entitled to severance pay from the year 2007 when the new Employment Act came into operation.

The evidence of the Claimant regarding the circumstances leading to her termination is mutually destructive with the version told by Rev. Olaf Konnerup.

However, Rev. Olaf Konnerup did not have first hand information on what exactly took place because the school administrator, Mr. Kizito Ambani is the one who dealt with the issue. The court was not told why Mr. Kizito Ambani was not called to testify in this matter.

In the circumstances, the court treats the evidence of Rev. Konnerup as hearsay evidence. The same was not corroborated by any other witness and the court doubts its veracity.

The court finds that Mr. Ambani terminated the employment of the Claimant following a disagreement on salary payable to her and did not furnish her with termination letter. However, on 28th January 2011, Mr. Ambani provided the Claimant with a Certificate of Service where he recommended her employment by any prospective employer. In the letter, Mr. Kizito indicated that the Claimant had vast experience in teaching and was employed by the Bible Baptist Academy as a pre-school teacher on contract basis that was reviewed after every year. The letter was produced by the Claimant as exhibit '4'.

This letter is significant on the contentious issue as to when the Claimant was employed. The Claimant told the court that she was first employed in 1984 at a monthly salary of Kshs.3,000/= and the salary was later reviewed to Kshs.7,050/= Under cross-examination, she told the court that she was first employed as a house-help in the house of Rev. Konnerup in 1982. She worked as such for 2 years and in 1984, she was employed as a pre-school teacher at Kitambaa Bible Baptist School where she served for 3 years and was then transferred to Ruiru – Pre-school which later became Bible Baptist Academy, a primary school.

The court notes that the Certificate of Service by the Administrator, Mr. Ambani acknowledges her long service from the time she was employed as a pre-school teacher. It is common cause that the Claimant did not receive a letter of transfer from the pre-school to the primary school.

The court finds that the pre-school, which was owned by the Baptist Church, was elevated to a Primary School and the mere fact of such elevation did not terminate the continuous employment of the Claimant.

It is the court's view that the Claimant served the Respondent as a pre-school teacher and a primary school teacher from 1984 to 2011. It is also the court's view that the Respondent had a legal obligation to register the Claimant with NSSF from the date of her employment in 1984 but did not. This placed the

Claimant at a disadvantage in that she remained un pensionable for 26 years while giving good service to the Respondent.

The circumstances of the case indicate that the Claimant's service was terminated because the Respondent could not afford the salary increament she was requesting for. It was also her uncontroverted evidence that the Respondent did not pay her salary in full regularly. That she was often paid in instalments.

Accordingly, the court finds that the termination of the Claimant was due to operational reasons within the meaning of Section 40 of the Employment Act 2007. Therefore, the loss of employment was not through any of her fault, but was due to the inability of the Respondent to pay her full salary regularly.

The court, therefore finds that though she was not directly declared redundant, infact this was the case and was entitled to severance pay at the rate of not less than 15 days pay for each completed year of service. Had the Respondent registered her with NSSF and made monthly contributions on her behalf in respect thereof, the severance pay would have been realized as pension. She has suffered loss and damage by fact of non-registration and the Respondent is liable to pay her equivalent of 15 days salary for every completed year of service from 1984 to 2011. The court rejects the version by the Respondent that the pre-school was a different employer from the primary school and holds the Respondent liable for the entire period.

The Respondent is also liable to pay the Claimant an equivalent of one month's salary in lieu of notice having found that her employment was terminated due to inability of the Respondent to pay her full salary consistently.

In the final analysis, the court orders the Respondent to pay to the Claimant;

- (a) Kshs.7,050/= being 1 month's salary in lieu of notice;
- (b) Kshs.1,440/= being unpaid salary for 6 days worked in January 2011;
- (c) Kshs.91,650/= being severance pay for 26 years at the rate of 15 days salary for every completed year of service;
- (d) Costs of the suit;
- (e) Interest at court rates from the date of filing the suit to the date of payment in full.

It is so ordered.

DATED and DELIVERED at Nairobi this 5th day of July, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE – INDUSTRIAL COURT