



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO 1543 OF 2010

MALIKA ALI.....1ST CLAIMANT

FRANCIS KARAKACHA2ND CLAIMANT

CAROLINE OBIERO3RD CLAIMANT

VERSUS

THE BOARD OF GOVERNORS

LIGHT ACADEMY PRIMARY SCHOOL..... RESPONDENT

JUDGMENT

This case was originally filed as Cause No. 1543, 1544 and 1545 of 2010 by the Claimants MALIKA ALI, FRANCIS KARAKACHA AND CAROLINE OBIERO respectively against the Claimant. They were on 16th November 2011 consolidated under Cause no. 1443 of 2010.

In the Memorandum of claim which are similar the Claimants allege that they were employed as teachers by the Respondent as follows;

Name	Date of Employment
MALIKA ALI	1 st February 2008
FRANCIS KARAKACHA	24 th February 2008
CAROLINE OBIERO	May 2006

All the Claimants contracts were terminated on 30th July 2010 on account of unsatisfactory performance.

They claim the following;

1. Malika Ali

- a. Leave days Kshs.41,580
- b. Severance pay Kshs.59,367
- c. Pension to be proved Kshs.100,947

Total Kshs.100,947

2. Francis Karakacha

- a. Leave Kshs.204,456
- b. Severance Pay Kshs.292,000
- c. Pension (To be proved at hearing)

Total Kshs.496.456

3. Caroline Obiero

- a. Leave Kshs.62,412
- b. Severance pay Kshs.89,112
- c. Pension (to be proved at the hearing)

Total Kshs.151,524

The Respondent filed its Memorandum of Reply on 21st December 2010 in which it denies the Claims by claimants.

The parties filed a consent on 26th August 2011 by which the Claimants were each paid service pay and the claimants withdrew the Claims in respect of severance pay, terminal benefits and pension. The only issue left for determination by the court is the claim in respect of annual leave.

When the case came up for hearing on 11th December 2012 after several mentions, the parties agreed to proceed by way of written submission.

The parties further agreed to use the testimony of Mr. GENC MUSTAFA, the headmaster of Mombasa Light Academy, the Respondent when he testified in Cause No. 1546 of 2010 on 11th December 2012 in the case between ANGELINE NDILA MULI and the Respondent herein where parties were represented by the same advocate as this case, that is Mr. Mukele for the Claimant and Mr. Ahmed for Respondent.

Mr. Mukele for the Claimants submitted that he will rely on the particulars filed in court on 31st August 2012. In the particulars he tabulates the Claims for leave of each of the Claimants as follows;

- 1. Malika Ali 660x21x3=41,580
- 2. Francis Karakacha 1,217x21x8=204456
- 3. Caroline Obiero 743x21x4=62,412

He further submits that the Respondent has not submitted any records to prove that the Claimants took annual leave, that the Respondent's witness admitted not having any records, that section 74 of the Employment Act which requires an employer to keep records containing particulars of annual leave, entitlements, days taken and days due under section 26.

The Respondent submitted that Claimants have only made allegations but produced no evidence to support their assertions, the RW1 testified that the school has always maintained a school almanac with vacations in April, August and December each year, that school vacations are at least 3 weeks each with no school activities during the school vacations and that teachers do not report to school during vacations and were paid full salaries, that the school considered the vacations as leave for teachers and therefore did not have records as the same was automatic.

The Respondent further claims that the leave prayed for is time barred by Section 90 of the Employment Act, that the Claimants have based their claims on gross pay rather than basic pay.

In the allegation that the Respondent did not produce any documentary evidence the Respondent refers to Section 62 of the Evidence Act to the effect that all facts may be proved by oral evidence except the contents of documents.

The Respondent further refers to the section 20(1) of the Industrial Court Act which provides that the court shall act without undue regard to technicalities and shall not be bound by rules of evidence except in criminal matters.

Although the Claimants did not plead that the termination of their employment was unfair and/or wrongful, I find it important to mention that the Respondent did not comply with Sections 41,43 and 45 when terminating the employment of the Claimants. The reasons for termination given in the letters of termination for all 3 Claimants who also happen to have been terminated on the same day, the 30th July 2010 is unsatisfactory performance. The Claimants were never given an opportunity to defend themselves nor was there any evidence that the Claimants had been cautioned about poor performance before the termination of their employment. The Claimants did not however make any Claim in respect of unfair termination. I will therefore make no findings on the same.

Section 10(6) and (7) of the Employment Act provide as follows;

(6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.

(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

One of the prescribed particulars to be kept by employers are entitlement to annual leave and the particulars should be sufficient to enable the employees entitlement to be precisely calculated. This is provided for in Section 10(3)(a)(i). This is further re-enforced in section 74(1) (f) which provides that the employer shall keep records of particulars of annual leave entitlement, days taken and days due as specified in section 28.

RW1 admitted that he did not have any records of leave. It has been submitted for the Respondent that the Evidence Act permits all evidence not in documents to be proved orally and further that the Industrial Court Act provides that the court shall act without undue regard to technicality.

I do not agree with the Respondents submissions. The Evidence Act does not apply to proceedings in the Industrial Court as correctly observed in the Respondent's submissions. Secondly the Evidence Act does not provide that evidence that is specifically required to be in records to be kept a party to proceedings can be proved by oral evidence. Section 10(7) of the Employment Act is specific. The burden to prove that the Claimants went on leave during vacation is on the employer. No records have been produced either to prove the fact that the Claimants took leave during vacation nor the policy that this will be the case. RW1 in his evidence stated that teachers take 36 days leave and further that they apply and sign a form yearly. He further testified that the Respondent clears all leave days not used. If this is the case, then such records should have been produced. The Respondent had perfect opportunity to do so after the Claimants filed particulars of their Claim on the directions of the court with leave to the Respondents to file further particulars in response. They also had opportunity to do so in the written submissions. In any event RW1 testified that he joined the Respondent in August 2010 after the claimants had been terminated on 30th July 2010. The letters of termination are signed by a headmaster by the name OSMAN OZPAMUKCU while the name of RW1 is GENC MUSTAFA.

His evidence is therefore hearsay evidence or at best secondary evidence.

For the foregoing reasons I find that the Respondent has failed to discharge the burden of disproving the allegations by the Claimants that they did not take annual leave for the whole of the period they worked for the Respondent.

Malika Ali had worked for 3 years at the time of the termination of her employment. Mr. Karakacha for 8 years and Ms. Obiero for 4 years. The Respondent has submitted that they are time barred by Section 90 of the Employment Act.

Unfortunately the courts have on numerous occasions held that limitation must be specifically pleaded failing which a party cannot avail himself to the same. This is to give the Claimant an opportunity to respond to the Claim. It cannot be raised in final submissions.

The Claimants claim leave as follows.

Malika – 3 years.

Francis Karakacha – 8 years

Caroline Obiero – 4 years.

The claims are based on gross salary. The Respondent argues that the same should be based on basic pay and not gross pay. The law does not address the calculation of pay in lieu of annual leave.

I however think that since during leave an employee earns full salary and still occupies the same house as they do while on duty, the annual leave must be based on gross pay.

Malika Ali is therefore entitled to annual leave of 3 years calculated as follows.

Gross pay as per pays lip for June 2010 is kshs.19,789. 1 day's salary is therefore $19789/30=660 \times 21$ days leave $\times 3=41,580$.

I award her kshs.41,580 as claimed.

Francis Karakacha's last salary was shs.36,550/30x21x8=204680. I award him the sum of Kshs.204,680.

Caroline Obiero's last salary was Kshs.22,278/30x21x4=62,378.40.

I award her the sum of Kshs.62,378.40.

The parties had already entered consent Judgment that each party shall bear its costs.

Orders accordingly.

Read in open Court this 19th day of September 2013

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Momanyi h/b for Mukele _____ for Claimants

No appearance _____ for Respondent