



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 78 OF 2012

**KENYA UNION OF EMPLOYEES OF VOLUNTARY
AND CHARITABLE ORGANIZATIONCLAIMANT**

-VERSUS-

BOARD OF GOVERNORS – TALA HIGH SCHOOLRESPONDENT

MR. OTIENO FOR CLAIMANT.

MR. NYABUTO FOR RESPONDENT.

JUDGMENT

This court delivered an award by consent of the parties on 28th January, 2012.

In terms of the award, the Respondent was to reinstate the Grievant herein **Mr. Nicholas M. Muoka**, a gardener with immediate effect.

The court still holds the Respondent to this specific order and finds that the Claimant is entitled to payment of his full salary from the date of the consent award on 28th January, 2013.

According to the Report of the Ministry of Labour dated 6th May, 2013 (EPD Report) the Claimant's case is that the Grievant was employed by the Respondent on permanent terms of service on 3rd May, 2006 and was in continuous employment till the 22nd March, 2011, when his services were wrongfully and unfairly terminated by the Respondent.

Between May, 2006 to July, 2009 he earned a monthly salary of Kshs.3,150/=. Between August, 2008 and February, 2011, he was earning a monthly salary of Kshs.6,000/=. He had served the Respondent continuously for a period of 6 years.

The Grievant was not given a letter of appointment and was paid by way of a petty cash voucher instead of payslip.

The Respondent acknowledge him as their casual employee and the Respondent remitted his National Social Security Funds dues from the year 2008 up to February, 2012. No remittance were done from the period May, 2006 to December 2007.

The Grievant was simply laid off on 22nd March, 2011 without any reason given to him. He has never been reinstated to-date inspite of the court order.

He reported to work and was told to go back and await further communication which has not been forth coming to-date.

The Claimant seeks payment of;

- i. *House allowance at the rate of 15% of the basic salary for the period of six (6) years;*
- ii. *Annual and prorated leave for the entire period.*
- iii. *Remission of NSSF dues for the period May 2006 to December 2007 and from March 2011 to-date.*
- iv. *Salary for the 22 days not paid in March 2011.*
- v. *Salary for the period commencing from date of the Award to the time the Respondent reinstates the Grievant and beyond.*
- vi. *Costs of the suit.*

As late as 3rd May, 2013, the Grievant had reported at work again ready for reinstatement.

The Respondent states that the Grievant was reinstated by a letter dated 5th February, 2013 which he declined to collect.

On 3rd May 2013, the Grievant reported to school but he declined reinstatement under casual terms demanding that he be reinstated under permanent terms of service.

The Respondent insists that the Grievant was engaged on casual basis and he has all long been aware of this fact. That he had severally written to the Board of Governors, the Respondent herein, to confirm his terms of service which had not happened.

That he had asked the local chief to assist him twice so that he may be employed permanently by letters dated 14th April, 2008 and 25th February, 2011.

The Respondent states that the work done by the Grievant was not continuous but fluctuated from time to time. The Grievant therefore has never been issued with a letter of appointment.

The Respondent further states that the daily rates paid to the Grievant are consolidated and therefore house allowance is not payable. He is also not entitled to other allowances including medical services enjoyed by other employees.

The Respondent states that it is ready and willing to reinstate him as a casual and does not owe him any terminal dues.

The Report of EPD indicates that the daily rates paid to the Grievant were far above the legal minimum therefore no statutory underpayments are due and if, the Claimant's position is upheld, he would not be entitled to housing allowance.

Conclusion of fact and law.

The court has carefully analysed the competing positions by the parties and has arrived at the following conclusions of fact and law;

1. The Respondent was in contravention of **Section 7** and **9(i) (a)** and **(b)** failed to provide the Grievant herein with a written contract of service.

It is evident that the Grievant was a gardener from the year 2006 up to the time of termination on 22nd March, 2011, a period of six (6) years.

Section 9(i) provides a contract of service –

- a. **for a period or a number of working days which amounts in the aggregate to the equivalent of three months or more; or**
- b. **which provides for the performance of any specified work which could not reasonably be expected to be completed within a period or a number of working days amounting in the aggregate to the equivalent of three months; shall be in writing.”**

It is without a doubt that the terms of service of the Grievant and the nature of work he performed as a school gardener falls within the aforesaid definition of employment that must be put in writing by the employer in terms of **Subsection 9 (2)**.

If the contract was put in writing the dispute as to its specific terms would not have arisen at all.

Section 10 (7) provides;

“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 terms of employment stipulated in the contract shall be on the employer.”

Accordingly, the Claimant has made a *prima facie* case that he was employed continuously as a gardener by the Respondent for a period of 6 years. Once the Claimant has discharged its burden, as is the case herein, it is for the employer to disprove on a preponderance of evidence that this was not the case.

The Respondent has offered no evidence whatsoever to discharge its burden in this regard. The court finds that the Claimant has on a balance of probabilities established that he was a permanent employee and was paid a monthly salary of Kshs.6,000/= at the end of each month; that he was not granted leave throughout the period; worked during public holidays and was also not given weekly rest days.

The Claimant has also shown that no NSSF dues were paid for the period May, 2006 to December, 2007 and same is due and owing to NSSF.

The Claimant has also proved that he was not paid a salary for 22 days worked in March, 2011, the Respondent having failed to produce any documentation showing that such payment was made or that the Grievant went on leave at all.

It should be remembered that **Section 74 (1)** of the Employment Act, 2007 obliges the employer to keep records

(e) of an employee’s weekly rest days specific in Section 27.

- f. **of an employee’s annual leave entitlement days taken and days due specified in Section 28.”**

The Respondent has availed no such records to the court and has failed to discharge its onus to rebut the Claimant’s case that the Grievant was not given leave days and was not allowed weekly rest days and public holidays.

Furthermore, in terms of **Section 37(1)** of the Employment Act, a casual employee –

“works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

- b. **performs work which can not reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more.**

the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35 (1) (c) shall apply to that contract of service.”

Section 35(1) (c) qualifies an employee to service gratuity in recognition of that service to be continuous.

It is without a doubt that regardless of whether the gardener was initially recruited as a casual, his employment had by virtue of the provisions of the Employment Act been converted into a permanent employment and the court finds accordingly.

Therefore, for the purpose of complying with the consent Award entered into by the parties herein on 28th January, 2013 the court directs;

- a. The Respondent to reinstate the Grievant to employment on permanent basis, earning the monthly salary of Kshs.6,000/= he earned at the time of termination and pay all arrear salary to-date in the sum of Kshs.60,000/= up to the 30th October, 2013.
- b. The Respondent to continue to employ the Grievant on such terms and in conformity with the minimum wage prescribed by the General Wage Order.

Further the Respondent is directed to pay the following terminal benefits to the Grievant;

- c. Kshs.23,200 in lieu of 116 annual and prorata leave at the rate of Kshs.6,000/= salary per month.
- d. Kshs.69,578/50 for work done during 307 public and weekly rest days and;
- e. Remit Kshs.8,000/= at the rate of Kshs.400/= per month for 20 months to NSSF.

Total award of terminal benefits including NSSF dues Kshs.160,778/50.

- f. Respondent to pay costs of the suit.

Dated and delivered at Nairobi this 25th day of October, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE