

REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT MOMBASA

CAUSE NO 18 OF 2013

ERIC OCHIENG AMOLLO.....CLAIMANT

VERSUS

VISIONS INSTITUTE OF PROFESSIONALS LIMITEDRESPONDENT

J U D G M E N T

On 6/9/2012, the claimant filed this suit against the respondent seeking to recover his employment terminal dues of Ksh.415100/, start of semester bonus and damages for unfair and wrongful termination of employment. He also seeks to be given a certificate of service and his teaching materials and books.

The respondent entered appearance but did not file any response to the claim to deny the allegations raised. The suit was heard on 28/5/2013 and 31/5/2013. The claimant testified as CW1 while the respondent was represented by Andrew Talam who testified as RW1.

CW1 told the court that he was employed by the respondent as a lecturer in January 2008. That his basic salary was ksh.34413 per month plus other non-fixed payments for other duties like exams which increased the monthly pay

to an average of ksh.55000/-. The contract was annual the renewal of which depended on the students evaluation. He produced letters of appointment for the years 2009, 2010, 2011 and 2012 as Exhibit 1 and the evaluation form for the same period as exhibit 2.

In addition to the monthly salary, he maintained that he was entitled to an automatic bonus of 25% of the gross at the start of every semester. On 4/7/2012, the claimant learned from his colleagues that he had been instructed to take over his classes during the new semester which was due to start on 5/7/2012. That as was the practice, he never received any call or SMS indicating the start of the new semester. That he called the respondent's registrar who was in charge of the time table to enquire on the new developments and he confirmed that he was excluded from the time table. That because he had not received any dismissal letter he went to work on 5/7/2012 and sat in the staffroom but the respondent's security removed him and prevented him from taking anything.

That he went to see the respondent's Mombasa Branch Manager on the matter and she told him that he was removed on orders from above possibly due to poor evaluation by the students.

That he went and picked his evaluation report (exhibit 2) from the

receptionist, and he found that he had been evaluated highly and returned to see the manager on the good evaluation but she only laughed it off saying this is Kenya. She then referred him to the HR manger to collect his one month salary in lieu of notice but when he contacted the HR Manager he was never paid anything.

He therefore prays for:

- a) salary for the 6 months of the unexpired contract period.**
- b) One month salary in lieu of notice**
- c) bonus for the July 2012 semester at the rate of 25% of his gross pay**
- d) damages for breach of contract**
- e) costs and interest.**

On cross-examination by the respondent's counsel he maintained that his actual monthly salary was ksh.55000/ excluding bonuses. He went further to say that the termination of his employment was implied. He also confirmed getting another job on 15/7/2012 through a friend and denied absconding duty to go for the new job. On further cross-examination by the court, he confirmed that his new job was on part time basis with a monthly salary of Ksh.20000/-.

RW1 is the Assistant Registrar and Accountant for the respondent. He confirmed that the claimant was employed as a lecturer by the respondent and

denied that the claimant's services were terminated. That on 20/7/2012 he learned that the claimant had gotten another job. He confirmed that the new semester started on the first week of July 2012. RW1 then told the court that the claimant's salary was ksh.34000/- per month plus other earnings depending on extra duties undertaken like exam setting and marking. He further confirmed that bonuses were payable to a continuing lecturer if he taught in preceding semester.

On cross-examination by the claimant's counsel, the RW1 confirmed that the claimant served for 7 years. He further confirmed that the claimant did call him over the phone at the start of July 2012 informing on when classes were to begin. That he denied telling the claimant that he has been removed from the time table by orders from above, but only told him that he was still preparing the time table.

He went further to deny any knowledge whether the claimant's lacker was cleared and whether he was removed from the respondent's compound by security guards. According to him the claimant was evaluated above average at 4/5 using scale of 0-5. The RW1 then alleged that poor enrollment of student was the reason for not including the claimant on the time table. He however changed his story to say that the claimant's classes were allocated to another lecturer after 20/7/2012, after establishing that he had another job. He however

confirmed that he did not look for him after he absented himself from work.

On further cross-examination by the court, he confirmed that the claimant was not a contributor to the NSSF. He also confirmed that had the claimant continued teaching in the July 2012 semester he would have earned a bonus of 25% of his total earnings from the previous semester running from January to June 2012 based on the basic salary of Ksh.34000/- for 6 months. After the close of the hearing the parties filed written submissions.

I have carefully perused the pleadings and the evidence and considered the written submissions. I am satisfied that the court's jurisdiction to determine the dispute is not in dispute just as as the fact that the claimant and the respondent were at all material times related as employer-employee.

The issues for determination are:

- (1)whether the contract of services was terminated by the claimant or the respondent**
- (2)whether the termination of the contract of services was wrongful or unfair.**
- (3)Whether the relief sought by the claimant ought to issue.**

The answer to the first issue lies in the evidence before the court. The claimant maintains that the termination was not in writing but could be implied

from the following conduct and circumstances of the respondent. Firstly, whereas from his experience during his service, the respondent would always call or SMS him to notify him of the start of a new semester, the same was not done on 5/7/2012 when a new semester was started.

Secondly, he learned from his colleagues that the latter had been allocated the classes which the claimant was supposed to teach in the new semester. Thirdly, when he went to the staffroom, he was removed by the security guards and denied permission to remove his private materials and books which had already been cleared from his locker. Lastly, when he went to show the branch manager his evaluation report he was told to go for his one month salary in lieu of notice. Without belaboring the point, the foregoing which was not challenged, manifests an implied termination. The implied termination is what is otherwise called constructive termination of employment which is attributable to an employer who makes it impossible for the employee to perform his duties despite his desire to work.

In view of the foregoing, I have rejected the explanation by the RW1 that the respondent never terminated the claimant's services. I have also rejected the allegation that it is the claimant who deserted employment to work elsewhere which the RW1 only learned about on 20/7/2012. From the record, there is clear pleading and evidence to show that as early as 9/7/2012 the

claimant had written a demand letter to the respondent even before he got his new job on 20/7/2012. Consequently in view of the observation above I find and hold that the claimant's employment was terminated by the respondent.

As regards the second issues of whether the termination was wrongful or unfair, I have considered the contract letter which provided for various ways of terminating the claimants services namely, through lapse of the contract period, summary dismissal for misconduct, poor performance, material breach of the contract, conviction of a criminal offence, operation of the law, incapacity and through a month's notice or salary in lieu.

The respondent did not make any effort to cite or justify the reason or the procedure used to terminate the claimants services as required under section 41, 43, 45 and 47 of the Employment Act. Instead RW1 merely blamed the claimant for terminating his own services by deserting the respondents work to serve another employer. In my view the evidence by RW1 fell short of discharging the burden of proof imposed on the respondent under section 47 of the Employment Act, that is to justify the reason for termination of the claimant's employment.

On the part of the claimant, I satisfied that he has discharged his burden of proving that the contract of employment was wrongfully terminated by the

respondent for no reason at all and without notice as required by the employment contract and the Law. As I held in **ICC 33 OF 2012 MARY MKAMBE SHETI vs LIGHT ACADEMY**, the doctrine of employment at will has no place in the present times. As much as an employer retains the discretion to employ, the current international labour standards now presents a paradigm shift towards protecting the employees' right to work. It means therefore that the employees right to livelihoods must be protected by legislations and judicial pronouncement.

Consequently and in view of my earlier evaluation of burdens of proof in respect each of the parties herein, the court finds and holds that the termination of claimant's employment by the respondent on or about 4/7/2012 was wrongful, unjustified and in breach of the contract dated 3/1/2012.

As regards the third issue of the relief sought, I am aware that the contract in issue was a term contract lasting for one year. That the reminder of the contract term was six months. The claimant has prayed for one month salary in lieu of notice plus lost income for the unexpired contract period of six months. He also seeks to be paid bonus for the semester beginning July 2012 at 25% of his income for the preceding semester plus certificate of service and his teaching materials and books

I will not take much effort in dismissing the prayer for teaching material and books because the claimant neither provided particulars thereof nor adduced any evidence in support of that claim.

I will however easily award the prayer for bonus for the semester starting July 2012 at the rate of 25% of the claimant's income for the preceding semester June 2012. The question in my mind is how much did the claimant earn in the material semester? The claimant testified that his average salary was Ksh.55000/- per month. The RW1 maintained that claimant's salary was Ksh.34000/- and the other earnings were not fixed. In the words of the RW1, the claimant was entitled to 25% of the total earnings for the semester based on a salary of Ksh.34000 per month. I will apply the figure of Ksh.34413 which was the fixed minimum pay according to the claimant and which is about what RW1 cited.

As regards the prayer for lost income, I award the same as prayed subject to variation. It was money due to the claimant had he been allowed to serve his full contract term. In my view this is a good case to order specific performance without reinstatement of the claimant. The respondent is therefore ordered to perform her part of the contract by paying to the claimant all the fixed income he would have earned had he been allowed to serve the unexpired period of his fixed term contract. The claimant did his part by attending work but the

respondent removed him from the time table and evicted him from the staff room.

The said payment however will be reduced by the sum earned by the claimant in his new employment under the doctrine of mitigation of loss. Consequently the claimant will get the difference of the salary between his fixed monthly earning of Ksh.34413 and the Ksh.20000 monthly salary he earned in his new employment during the six months of the unexpired period of the breached contract.

It follows from the foregoing, therefore, that the claimant does not qualify to get the 12 months salary for unfair termination because all his salary for the remainder of the term is compensated. Otherwise, in my view, it would be unjust and irrational to order further relief for procedural unfairness after awarding the employee his whole salary for the unexpired period of his fixed term contract.

The upshot hereof is that I enter judgment for the claimant and against the respondent for payment of the following:

| | |
|--|-------------------------|
| (a)one month salary in lieu of notice | 34,413 |
| (b)lost earning (34413-20000)x6 | 86,478 |
| (c)bonus (34413x6x25%) | <u>51,619.50</u> |

172,510.50

The respondent will also pay costs and interest.

Orders accordingly

Signed dated and delivered this 12th July 2013

ONESMUS MAKAU

JUDGE