

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAIROBI
ELRC CAUSE NO. 1331 OF 2015

WAMBUA **KIILU.....**
CLAIMANT

VERSUS

THE HEADTEACHER,
MILAANI MIXED SECONDARY SCHOOL.....1ST
RESPONDENT

THE CHAIRPERSON BOARD OF GOVERNORS,
MILAANI MIXED SECONDARY SCHOOL.....2ND
RESPONDENT

ATTORNEY GENERAL.....3RD RESPONDENT

JUDGMENT

The suit is premised on an amended memorandum of claim dated 24th February 2025 in which the Claimant seeks the following reliefs against the Respondents:

- (i) Notice pay Kshs. 5,000.00
- (ii) Service pay $(5000/30 \times 15 \times 4.67)$ Kshs. 4,675.00.
- (iii) Accrued payment in lieu of leave $(5000/30 \times 21 \times 2)$ Kshs. 16,345.00
- (iv) Overtime not paid during the tenure of employment Kshs. 208,408.00

- (v) Unpaid public holidays and Sundays for the tenure of employment being Kshs. 10,528 (167 x 1.5 9 x 4.071) public holidays; Kshs60,831 (167 x 1.5 x 52 x 4.67) Sundays.
- (vi) Unremitted NSSF dues for 56-month (400 x 56) Kshs. 22,400.00
- (vii) 12-month compensation for unlawful dismissal.
- (viii) Special damages of Kshs. 3,000.00
- (ix) Costs and interest.

The amended memorandum of claim and hearing notice dated 24th February 2025 were served on the Attorney General on 24th February 2025 and an affidavit of service sworn to on 20th March 2025 by Boniface M. Muinda process server was filed on 20th March 2025.

On 24th March 2025, M/s. Orege appeared in court for Respondents and informed court that she had filed notice of change of advocates and sought 14 days within which to file a defence to the amended memorandum of claim.

The court directed the Respondent to file statement of defence within 14 days and the Claimant to file a reply to the defence within 14 days of service and the hearing of the suit was set for 28th July 2025

Respondents' memorandum of defence

The Respondents had filed a memorandum of defence to the original memorandum of claim filed on 3/8/2015. The defence was filed on 25/1/2016.

In the said statement of defence, the Respondents had admitted that the 1st Respondent had employed the Claimant on or about January 2008 as a security guard but had denied that it unlawfully terminated the employment of the Claimant as alleged in the statement of claim.

The Respondents averred that the Claimant had deserted work in the year 2013.

The Respondent admitted that the Claimant had suffered injuries while at work and was admitted at Thika Level 5 hospital and the 1st Respondent had paid his hospital bill.

The Respondents stated that when the Claimant returned to work from hospital, the parties had agreed that the Claimant continues to undertake light duties which the Claimant continued to do until when he absconded or deserted work.

The Respondents averred that they had paid NSSF and NHIF statutory deductions in respect of the Claimant.

The Respondents denied claims of overtime, leave and in respect of public holidays and Sundays and put the Claimant to strict proof thereof.

On 28th July 2025, Mr. Mbui Advocate appeared for the Respondents and told the court that he was not conversant with the matter.

Mr. Nzioka Advocate for the Claimant stated that the matter was set for hearing and he was ready to proceed with 1 witness.

The court directed that the matter to proceed to hearing at 12:30 p.m. Mr. Mbui did not turn up for the hearing.

At 12:30 p.m. the matter proceeded with CW1 Wambua Kiilu testifying for the Claimant. CW1 testified that he was 66 years old and was the Claimant. That he was from Masinga in Machakos County. That he had worked as a watchman for the 1st Respondent from January 2008 and was paid a monthly salary of Kshs. 5,000.00 vide equity bank. CWI produced a bank statement to that effect marked '2'.

CW1 stated that he was attacked by robbers while at work and was injured on the face and hips and was left unconscious. That he was taken to level 5 hospital at Thika where he was admitted for a period of one month. That upon release he stayed at home recuperating for another one month and then went back to work.

CW1 said that he asked the 1st Respondent for compensation for the injuries suffered at work and the headteacher dismissed him from work summarily.

The Claimant adopted the facts set out in the amended statement of claim as his evidence in chief from paragraph 8 to 24 and the submissions made in support of the case at paragraph 25(a) to (f) in the memorandum of claim.

CW1 prayed to be awarded as set out in the prayers in the memorandum of claim.

The evidence by the Claimant was not controverted, the Respondent having failed to call any witness and did not cross-examine the Claimant despite having knowledge that the matter proceeded for hearing on 28th July 2025, when the Respondent was represented in the morning by Mr. Mbui who did not turn up at 12:30 p.m. when the hearing commenced.

The court is satisfied that the Claimant adduced sufficient evidence to prove the particulars of claim and the reliefs sought on a balance of probabilities in terms of section 27 and 28 of the Evidence Act Cap 80 Laws of Kenya.

The Claimant proved that he worked for the Respondent from January 2008 earning a paltry salary of Kshs. 5,000.00 per month which constituted an underpayment. That he was injured while at work and hospitalized for about a month and when he came back to work, he was summarily dismissed without notice, notice to show cause or hearing and for no valid reason.

The court finds that the summary dismissal of the Claimant violated sections 36, 41, 43 and 45 of the Employment Act, 2007 and the Respondent did not respond to the demand letter or make good the reliefs sought in the said letter and set out in the memorandum of claim.

Furthermore, the reliefs sought by the Claimant including notice pay, payment in lieu of leave; unpaid overtime and unpaid public holidays and unremitted NSSF dues deducted by the 1st Respondent remain

uncontroverted and the court finds that the Claimant has proved that he is entitled to the reliefs sought.

Accordingly, the court enters judgment in favour of the Claimant against the respondents jointly and severally as follows: -

- (i) Kshs. 335,247 as particularized in paragraph 167 of the amended memorandum of claim

Compensation

The Claimant had served the Respondent for a period of four years and six months. He was underpaid; Did not go on leave; His NSSF dues were not remitted. He served overtime without pay. Claimant is entitled to compensation in terms of section 49(1)(c) and (4) of the Act.

The Claimant had vide his Advocates sent a demand letter to the 1st and 2nd Respondent dated 5th January 2015. The Respondents did not deny that the Claimant suffered severe injuries while at work and the Respondents did not compensate him for the injuries suffered, instead the Claimant was sacked for demanding to be compensated for the injuries without payment of any compensation and or terminal benefits. These are aggravating factors in this matter. The Claimant was not paid gratuity/service pay which is a statutory requirement. The Claimant was 66 years old and incapable of getting another employment. The Claimant did not contribute to the summary dismissal.

The court lacks jurisdiction to award any general damages in respect of the injuries suffered by the Claimant. The Claim ought to have been referred to

the Director of Occupational Safety and Health (DOSH) in terms of the Authority by the Supreme Court in the case of **Law Society of Kenya vs Attorney General & Another 2019 e KLR** where it was held that;

“In agreeing with the Court of Appeal, we note that it is not in dispute that prior to the enactment of the Act litigation relating to work-injuries had gone on and a number of the suits had progressed up to decree stage; some of which were still being heard; while others were still at the preliminary stage. All such matters were being dealt with under the then existing and completely different regimes of law. We thus agree with the Appellate Court that claimants in those pending cases have legitimate expectation that upon the passage of the Act their cases would be concluded under the judicial process which they had invoked. However, were it not for such legitimate expectation, WIBA not being unconstitutional and an even more progressive statute, as we have shown above, we opine that it is best that all matters are finalized under section 52 aforesaid”.

However, the Claimant is entitled to compensation for the unlawful and unfair summary dismissal being equivalent of twelve (12) months’ salary in the sum of Kshs. (12 x 5,000) Kshs. 60,000.00.

In the final analysis the total reliefs awarded to the Claimant against the Respondents jointly and severally are:-

- (a) Kshs. 335,247.00 terminal benefits.
- (b) Kshs. 60,000.00 compensation

Total award Kshs. 395,247.00

(c) Costs of the suit

(d) Interest at court rates from date of judgment till payment in full.

Dated at Nairobi this **18th Day of December 2025.**

Mathews Nduma

JUDGE

Appearance:

Mr. Nzioka for Claimant

Mr. Kemboi – Court Assistant