



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT BUNGOMA

ELR CAUSE NO. 102 OF 2017

WYCLIFFE JUMA ILUKOL.....CLAIMANT

VERSUS

THE BOARD OF MANAGEMENT FATHER

OKODUI SECONDARY SCHOOL.....RESPONDENT

JUDGEMENT

1. The Claimant by way of statement of claim dated 9th November 2017 and amended 20th April 2018 seeks the following orders:-
 - (a) A declaration that his termination for employment was unfair and unlawful and he was not duly remunerated according to the law.
 - (b) 1 year's notice pay of Kshs.184,498.80/-
 - (c) Service pay of Kshs.215,246.60
 - (d) 12 months' salary as compensation – Kshs.184,498.80/-.
 - (e) Underpayments of wages Kshs.210,213.00
 - (f) Leave pay Kshs.37,692.75
 - (g) Overdue pay of Kshs.158,866.25
 - (h) Rest days pay Kshs.80,625.90
 - (i) Public Holidays pay Kshs.34,779.80
 - (j) Issuance of a certificate of service pursuant to section 51 of the Employment Act, 2007
 - (k) Costs and interests.
2. The Claim is verified by Affidavit sworn by the Claimant on the 9th November, 2017. The Claimant also filed together with the Claim, his statement, list of witnesses, claimants list of documents all dated 9th November 2017 together with the bundle of documents.
3. The Respondent was represented by the Hon. Attorney General who entered appearance and filed response being statement of response dated 3rd April 2018 together with list of witnesses, witness statement of John Ouma dated 23rd March 2018, Respondents list of documents dated 3rd March 2018 together with the bundle of documents.

HEARING

4. The Claimant's case was heard by Honourable Judge Nduma Nderi on the 24th September, 2018 where the Claimant gave evidence on his

behalf and was cross examined by counsel for the Respondent. On the 2nd November 2021 I took the defence case with both parties present.

5. The court gave directions after the close of defence case on filing of written submissions and both parties complied. The Claimant's submissions are dated 15th November 2021 by the Advocates for the Claimant Wambua Kigamwa to Company Advocates were filed on the 15th November 2021.

The Respondents submissions by Senior State Counsel, Deborah Were of the office of Hon. Attorney General are dated 4th November 2018 and filed on the 11th November,2021.

THE CLAIMANT'S CASE

6. The Claimant's witness adopted as his statement as his evidence in examination in chief at the hearing. The Claimant told the court that he worked for the Respondent as grounds man for 5 years then he became a watchman. That he was paid Kshs.8,145.00 per month by time of termination. That he served for 16 and 1/2 years. That his employment was terminated. That he was not paid service pay. That he was underpaid for the last 3 years being 2014 to 2017 as set out in the claim. That he worked from 6.00 o'clock to 7.00 pm in the evening or 6.00 pm in the evening to 7.00 am in the morning. The Claimant relied on the attendance register produced to prove he worked 7 days a week and was not paid overtime. That he worked during the holidays and was not paid twice the wages. That he got rest days last days only and went on leave for 4 days only. That he Claims wages pay for 2015 to 2017. He told the court he did not get a certificate of service. The Claimant told the court he was 62 years when he stopped working and was not given notice of retirement. That he got retirement letter on 8th May 2017 (page 12 of the claim) which is dated 4th May 2017. That he was working when he got the letter and was to stop working on the 1st June 2017. That he left work on 2nd July 2017 and was paid his salary of Kshs.8,145/- which was his gross salary. That his net salary was Ksh.2735. That he paid school fees for his children.

7. During cross examination it is recorded that the Claimant told the court he was a grounds man initially on his employment in 2002 vide letter dated 3rd March 2002. That he was employed to pay school fees. That he was promoted to watchman in 2007 and paid Kshs.8,145/-. And was later made in charge of security with no increment. That he was paid home allowance. That he was given a letter of retirement. That he was 62 years old. That he got rest days last years. That he went on leave last years 2014 to 2017, that overtime was not paid. That he was told he was due for retirement . That he worked for 2 months and was paid his NSSF dues.

8. On re-examination it is recorded that the Claimant told the court he paid school fees from his salary . Claimant closed case.

THE DEFENCE CASE

9. The defence called its witness John Ouma who testified on oath. DW told the court he was the Secretary to the Board of Management of the school. That he knew the Claimant as a former watchman of the school. DW adopted his statement dated 23rd March 2018 as his evidence in examination in chief . DW produced as evidence of the Respondent list of documents dated 3rd April 2018 and filed 18th April 2018 as evidence examination in chief. DW told the court that the Claimant retired.

10. During cross examination, DW told the court the Claimant was given notice before termination which was verbal through the Board of management. DW was referred to page 3 of minutes of court dated 1st October 2017 where 1 years Notice was to be given . DW said the 1 year notice was given verbally and that is why the Claimant returned after exceeding by 2 years mandatory retirement age of 60 years. DW told the court that he called the Claimant in office and explained and further called Board of Management and it was minuted and letter issued. DW told the court that the last pay of the Claimant was Kshs. 8,145/-. On house allowance DW said Claimant was operating from home and his housing allowance was Kshs.1500. That he was paid in kind as per letter of employment towards fees for his sons at the school. DW on question of whether the Union was notified of intended termination told the court that the issue was discussed by the Board as Claimant was an employee of the Board. On leave allowance, DW told the court normally staff are granted leave allowance on holidays. He said the record is normally at the school.

11. In re-examination DW told the court that the Claimant used to go on leave during holidays and that he was being paid house allowance. That DW gave Claimant verbal notice after termination was discussed by the Board . DW told the court that after he joined the school he noted the Claimant had exceeded by 2 years the mandatory retirement age and notified the Board which acted. The defence case closed.

DETERMINATION

ISSUES FOR DETERMINATION

12. The Claimant identified issues in dispute under the statement of claim to be :-

- Unfair and unlawful termination
- Non payment of service pay
- Non payment of notice pay
- Failure to issue certificate of service

- Underpayment of wages
- Failure to pay overtime, rest days and public holidays pay
- Failure to pay leave allowance or pay
- Failure to provide housing or pay house allowance.

13. The respondents in submissions identified in their written submissions the following as issues for determination:-

- (1) Whether the Claimant has established he was employed as grounds man and later as a watchman.
- (2) Whether his termination was unfair to unlawful.
- (3) Whether the Claimant is entitled to reliefs sought.

14. The court upon careful consideration of the case by the parties is of considered opinion that the following are the issues placed before it for determination:-

- (a) The nature or terms of employment of the Claimant.
- (b) Whether the termination was fair and lawful
- (c) Whether the Claimant s entitled to the relief sought.

The nature or terms of employment of the Claimant .

15. The Respondent produced letter of Claimant’s Employment dated 31st March 2003 of appointment as grounds man effective 1st January 2003. The letter states that the Claimant had applied for the job to serve in kind for school fees of his son. He was to be paid a basic salary of Kshs.1500 per month to be improved over time. Those were the terms of engagement. Evidence was led to effect that later the Claimant was engaged as watchman. The documents before the court being pay roll of 2011 September indicate Claimant as watchman earning Kshs.5900/- gross and as time of disengagement. In the payslip produced by Claimant of May 2017 he was earning Gross salary of Kshs.8145/- designation security which include NSSF and house allowance. Those were the terms. The employer did not provide evidence of when it actually engaged him as a watchman.

Whether the termination was fair and lawful.

16. There was no dispute that as at time of termination the Claimant had reached mandatory retirement age of 60 years and exceeded by 2 years. The Claimant states he was not given a fair hearing hence termination was unfair and unlawful.

The Claimant submits that evidence on record confirms that the engagement of the Claimant was terminated without the confirmed or agreed notice of one year as per minutes of the Respondent. The court referred to the minutes of 19th September 2017 under minute 04/09/17 where it is stated:- ‘ *The Notice of termination of employment on grounds of age should be given in one years time among others*’. The Claimant letter of termination of 1st dated 4th May 2017 is titled “Termination of Employment upon retirement age”. It is apparent that the minutes dated 19th September 2017 stating retirement notice should be issued for 1 year before retirement was not in relation to the case of the Claimant as he had already left employment. The Claimant submits for failure of 1 year notice he was entitled to 1 years equivalent pay under Section 35 of the employment Act and further relies on authority of *Joseph Akoto Ajwang -vs Kengen Company limited (2019) eKLR where Justice Hellen Wasilwa held:-*

“ *for whatever reason any employer may wish to terminate service of an employee, issuance of notice or notice pay was of necessity and cites Section 36 of the Employment Act 2007.*’

The court has already made a finding that the minutes relied on period of Notice were not in relation to the Claimant’s case.

The Claimant was entitled to one Month Statutory Notice or pay in view of Notice.

On question of fairness and lawfulness of the termination

17. The Respondent submits that the Claimant was not terminated but retired from service having attained mandatory retirement age. The Employment Act under section 45 (2) states that:-

“*a termination of employment by an employer is unfair if the employer fails to prove:-*

- (a) *The reason or termination is valid*

(b) *The reason for termination is a fair reason*

(i) *Related to the employees conduct, capacity and compatibility*

(ii) *Based on the operational requirements of the employer that*

(c) *That the employment was in accordance to a fair procedure”*

The Respondent submits that if the Claimant believes his termination was unfair then he ought to have pointed the reasons that led to his termination. That the Claimant admitted to have attained the mandatory retirement age and exceeded by two years. That communication was done to him verbally and through a letter dated 4th May, 2017. That though the letter is titled termination of employment the contents communicate that the Claimant is supposed to proceed on retirement. That the Claimant testified he received his July 2017 salary which is evidence he continued to serve for two months after notice was issued. That the Claimant testified that he worked upto 2nd July 2017 and was paid full salary. That there is no proof that the Claimant was subjected to unfair or unlawful termination. That he was given notice of retirement and proceeded on retirement after 2 months of service.

18. The Claimant did not provide evidence of entitlement of more than 1 months statutory notice pending retirement . The court found the resolution for 1 year Notice was not applicable to Claimant. The Court finds that Section 41 of the Employment Act does not apply to mandatory retirement based age. There was no need to be accompanied by Union Official or even fellow employee in the communication of the retirement. The letter of termination issued complied with Section 43 of the Employment Act as the reason for the termination was indicated as having attained mandatory age. The court in conclusion finds that the termination of the Employment of the Claimant was lawful and fair.

On whether the Claimant is entitled to reliefs sought.

19. On Notice pay – the court found that the Claimant had 2 months notice post notice of termination on retirement basis and was paid fully salary July 2017 having worked for only 2 days . The claim fails.

20. On the leave pay claim, the Claimant testifying on oath told the court he was on leave in the period sought of 2015, 2016, 2017. The Claim fails.

21. **On claim for service pay**, the Claimant produced evidence of payment of NSSF dues from 2011. It was the responsibility of the employer to prove payment of NSSF dues 2003 to 2010. The court finds that having been in service the Claimant is entitled to service pay for those 7 years when he was not under NSSF scheme. The Claimant submits he was underpaid under the Regulation of wages order. He claims he was entitled to be paid Kshs.13,269.50 for night watchman plus 1590 allowance of Kshs.2005.40 total Kshs. 15,374.90. The Respondent disputes the Claimant was a night watchman but agrees he was a watchman. The court states that is the responsibility of employer to produce employment records failing which the court will rely on evidence on record. In this case, the court finds that the Claimant worked day and night in alternate days as per attendance list produced by Claimant. The Claimant was engaged as security/watchman. The court finds that the Claimant is only entitled to service pay upto 2010 having been placed in NSSF scheme in 2011. The service pay is payable under section 35 (5) of the Employment Act. The court finds that payment of wages below the prescribed minimum wage is unlawful. Consequently, awarding service pay for 15 days for each of the 7 years worked at Kshs.10,116.15 plus house allowance of Kshs. per 1,517.40 months total **amount awarded Kshs. 40,717.43**. Service pay is not applicable post admission to the NSSF Scheme under Section 35 (6) d of the Employment Act 2007.

22. **On claim for underpayment of wages**. The Claim is limited to 3 years under section 90 of the Employment Act 2007. The Respondent submits that the same is not justified as there is no Employment letter for the Claimant as security guard and no record has been provided that the Claimant was a security guard in 2015 and therefore entitled to a watchman’s salary. That the records produced by the Claimant indicate he worked both as day and night watchman and not entirely as night watchman. The court has already held that the responsibility to produce employment record lay with the Employer under Section 74 of the Employment Act. The court on evaluating the record of attendance produced found the Claimant was a watchman. His 2017 salary was Kshs.8,145.00 per payslip he produced.

The Court finds he was paid below the minimum wages and awards under paid wages as follows:-

(i) The period 2014-2015, the Respondent paid a monthly salary of Kshs.7,125 (see payroll of February 2014) instead of Kshs. 10,116.15. plus 15% housing allowance thus Kshs. 1,517.40 amounting total of Kshs.11,633.55 hence underpayment of Kshs. 4,508.55 per month x 12 = Kshs. 54,102.60.

(ii) The period 2015-2016 the Respondent paid a monthly salary of Kshs.7,545/- instead of Kshs. 11,330.10 plus 15% house allowance thus Kshs.1,699.50 total Kshs.3,029.60. Hence underpaid wages of Kshs. 5,584.60. x12 months total – Kshs.65,815.20.

(iii) The period 2016-2017 The Respondent paid a monthly gross salary of Kshs. 8,145/- instead of Kshs. 11,330.00 plus 1590 house allowance thus Kshs.1,699.50 total Kshs. 13,029.60 hence due underpaid wage Kshs.13029.60 – Kshs.8,145.00/- total underpayment per months Kshs.4884.60 x12= Kshs.58,615.20. The total award of underpayment of wages is granted at Kshs.54,102.60/- . Kshs.65,815.20 + Kshs.58,615.20 total award of Kshs. 183,045.60/-.

The court awards the above amounts as underpaid wages.

23. **On the overtime claim** the Claimant states he worked for 12 hours hence was entitled to overtime pay of 4 hours overtime and tabulates the same. The Respondent did not produce evidence of payment of overtime. The Respondent submits that there is no proof the

plaintiff worked overtime between 2014- and only produced records for 2016 hence any claim before 2016 is not proved. That if the court is inclined to allow the prayer for overtime then 2016 -2017 is the only period where record of hours worked by Claimant. The court already held that the obligation to produce employment record lies with the employer. The Respondent having failed to produce the overtime payment record the court is inclined to grant claim as prayed as the terms of service of the Claimant as watchman are more likely than unlikely to be have been the same in 2014 and 2015. The total claim as prayed for Kshs. 158,866.25 is granted.

24. On the claim for rest days, it is evident from the record of attendance produced by Claimant that he was absent for at least 73 days between 2016 to 2017. Applying the same logic on overtime the court finds it is more likely than unlikely that the Claimant took rest days during his employment. The claim for rest days is dismissed in totality.

25. The Claimant was entitled to certificate of service under Section 51 of the Employment Act upon retirement . The Respondent to comply and issue the certificate of service as required under the law.

26. On the claim for Public holidays. The Public holidays in Kenya are :-

- New year 1st January
- Good Friday 15th April
- Easter Monday 18th April
- Labour day 1st May
- Eid -al-fitr (usually 2-3 may)
- Madaraka day 1st June
- Huduma day 10th October
- Mashujaa day 20th October
- Jamhuri day 12th December
- Christmas day 25th December
- Utamaduni day 26th December
-

I have perused the attendance record produced of 2016 -2017 and find the Claimant worked on an Public holidays. It is more likely than unlikely that was the practice in 2014 and 2015. I grant the claim for ½ the amount sought having already granted pay for overtime. Thus Kshs.34,779.80x1/2 award under this claim total award of Kshs. 17,389.90 under the claim head.

CONCLUSION AND DISPOSTION

27. In conclusion having found there was underpayment of wages and that the Claimant was entitled to service pay for 7 years when he was not under NSSF scheme and having found he was entitled to overtime and double pay for 11 Public holidays worked, I now enter judgement as follows:-

- a) A declaration that the termination on ground of having attained mandatory retirement age was fair and lawful.
- b) Payment of service pay for wages of 15 days for each of the 7 years worked without NSSF total amount awarded of Kshs.40,717.43/-
- c) Payment of total sum of Kshs. 183,045 .60/- as underpaid wages for 3 years.
- d) Payment of overtime for 3 years amounting to sum of Kshs.158,866.25/- is awarded.
- e) Public holidays pay of Kshs.17,389.90/- .
- f) All the amounts in b, c, d & e are subject to statutory deductions.
- g) The Respondent to issue the Claimant with certificate of service under section 51 of the Employment Act 2007.

h) The Claimant is awarded costs of this claim plus interest at court rates from date of judgement until payment in full.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT BUNGOMA THIS 26TH DAY OF JANUARY, 2022.

J. W. KELI

JUDGE

IN THE PRESENCE OF:-

COURT ASSISTANT : BRENDA WESONGA

FOR CLAIMANT:- ABSENT

FOR RESPONDENT : MS WERE ADVOCATE

COURT: STAY GRANTED FOR 30 DAYS.

J. W. KELI

JUDGE