



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

ELRC CAUSE NUMBER 43 OF 2018

PETER NGUNJIRI KARIUKI.....CLAIMANT

-VERSUS-

BOARD OF MANAGEMENT MAGOMANO SECONDARY SCHOOL.....RESPONDENT

(BEFORE HON. JUSTICE DAVID NDERITU)

JUDGMENT

I. INTRODUCTION

1. The Claimant initiated this cause by way of a Statement of claim dated 14th February, 2018 filed in court on the same date. As is the procedure, accompanying the statement of claim is a verifying affidavit, list of witnesses, a witness statement by the Claimant, a schedule of documents, and copies of the listed documents.

2. The Claimant is seeking the following:-

- a) **A declaration that the Claimant was a regular employee of the Respondent**
- b) **Kshs.9,030/= being one month salary in lieu of notice**
- c) **Kshs.1,126,574.90 being salary underpayment**
- d) **Kshs.1,834,818.00 being pay for overtime worked**
- e) **Kshs.95,575.85 being pay for annual leave earned but not taken from January 2002 to the time of dismissal**
- f) **Kshs.561,256.90 being pay for rest days worked**
- g) **Kshs.95,515.00 being pay for public holidays worked**
- h) **Kshs.209,407.98 being unpaid house allowance**
- i) **Kshs.108,360/= being compensation for wrongful dismissal at the rate of 12 months gross salary in terms of Section 49(1)(c) of the Employment Act.**
- j) **Certificate of service**
- k) **Costs of this suit and interest.**

3. The breakdown of the amounts stated above is provided for by the Claimant in the last part of the Memorandum of claim.

4. The summons to enter appearance issued by this court on 14th February, 2018 together with the other court process was served upon the Respondent who filed a Memorandum of defence on 23rd March, 2018. Accompanying the Memorandum of defence is a verifying affidavit and several attachments, ostensibly intended to be produced as exhibits by the Respondent during the hearing. However, there is no copy of Memorandum of appearance in the court file and there is no evidence that the Respondent entered appearance.

5. The Claimant filed a further list of documents on 4th October 2018 and a reply to memorandum of response on 15th February, 2019.

6. On 25th July, 2019 after confirming that the Respondent had been properly served with a hearing notice, the court (Lady Justice Mbaru) proceeded with the hearing with the Claimant testifying alone in support of his cause. The Respondent did not attend the hearing and did not tender any evidence.

7. After the close of the Claimant's case his counsel filed written submissions on 23rd August, 2019 in support of Claimant's cause.

II. CLAIMANT'S CASE

8. In summary, the Claimant's case, based on the pleadings filed, his oral testimony in court, the documentary evidence, and the written submissions by his counsel, is that he was engaged by the Respondent as a general labourer from July, 2004 at an agreed monthly salary of Kshs.2,000/=. He alleges that on 30th July, 2008 he was promoted to a cook at an agreed monthly salary of Kshs.4,000/= with effect from 1st August, 2008 and that salary was reviewed upwards to Kshs.9,020/= from 1st March 2016 till his termination on 9th January, 2018.

9. The Claimant alleges that he was unfairly and unlawfully terminated by the Respondent on 9th January, 2018 by way of a telephone call by the secretary to the Respondent. He alleges that he was not paid his terminal and other accrued dues and he therefore filed this cause in pursuance of those dues.

III. RESPONDENT'S CASE

10. As stated earlier on, the Respondent filed a Memorandum of response to the claim and copies of documents. However, the Respondent did not attend court for hearing and as such the said defence and the intended documentary evidence was not properly presented to court in the hearing. No evidence was called or adduced by the Respondent.

IV. ISSUES FOR DETERMINATION

11. Flowing from the pleadings, oral and documentary evidence from the Claimant, and the written submissions, the following issues manifest for determination:-

- (i) What were the terms of employment between the Claimant and Respondent?
- (ii) Was the termination of the Claimant by the Respondent unfair and unlawful?
- (iii) If (ii) above is in the affirmative is the Claimant entitled to the reliefs sought?
- (iv) Who meets the costs of this cause?

V. EMPLOYMENT

12. The Claimant alleges that he was engaged as a casual labourer from July 2004. However, there is no supporting document to buttress that position. The earliest correspondence available in evidence regarding the employment of the Claimant, by the Respondent is the letter of appointment on permanent terms dated 30th July, 2018 which was produced by the Claimant as exhibit.

13. The above letter does not indicate when the Claimant was first engaged, for how long he had been on probation as a cook before this confirmation, or whether he had been doing any other work for the Respondent.

14. **Section 42(2) of the Employment Act** (the Act) provides that a probationary period shall not be more than six (6) months but such probationary period may be extended for a further period of not more than six (6) months with the agreement of the employee. This means that prior to 30th July, 2008 the maximum aggregate period that the Claimant may have been in employment of the Respondent on probation is twelve (12) months. In absence of any documentation evidencing extension of the probationary period beyond six (6) months, with the agreement of the Claimant, this court finds and holds, in accordance with the above law, that the Claimant could only legally have been on probation as a cook for a period of six (6) months prior to 30th July, 2008. This is the only logical, reasonable, and lawful position that this court can arrive at based on the evidence presented by the Claimant and the above law.

15. It is a cardinal principle of law that, except where the law provides otherwise, he who alleges must prove. The Claimant alleges that he was at first engaged by the Respondent as a general labourer in July, 2004. However, there is no evidence adduced in support of that position. There is no evidence of such an appointment, evidence of payment of wages, work attendance register, or such other relevant evidence. If the Claimant was not in possession of such records or documentation at the hearing the law provides for avenues on how the Respondent may be summoned to avail the same in court by issuance of notice to produce and tender evidence. In case the Respondent failed and or refused to comply this court has powers to compel it to produce such evidence and also take the presumption that failure to

produce such evidence is because such evidence was against the Respondent – See **Order 16 of the Civil Procedure Rules** and **Section 69 of the Evidence Act**.

16. In the circumstances, this court finds and holds that the Claimant did not prove on a balance of probability that he was an employee of the Respondent beyond six (6) months prior to 30th July, 2008. The documentary evidence produced by the Claimant, including the letter of appointment on permanent terms dated 30th July, 2008, letter on salary adjustment dated 14th March, 2016, bank statements from Equity Bank, certificate of medical examination from the County Government of Nakuru issued on 15th March, 2017, and certificate of employment dated 8th June, 2009 were all issued or obtained by the Claimant after 30th July, 2008.

17. Working backwards six (6) months to 30th July, 2008 means that the Claimant was first engaged by the Respondent as a cook on probation from 1st February, 2008 and that he was confirmed on permanent terms six (6) months later vide the letter dated 30th July, 2008. And since the said letter was confirming the Claimant in that position this court takes the presumption that the Claimant was on the same monthly salary of Kshs.4,000/= even while on probation. Later on this monthly salary was adjusted to Kshs.9,030/= as per the letter dated 14th March, 2016 and that is the salary that the Claimant was earning per month as at the time of termination on 9th January, 2018.

18. On this issue of employment, therefore, this court finds and holds that the Claimant was engaged by the Respondent as a cook on probation from 1st February, 2008 at a monthly salary of Kshs.4,000/= and that the appointment was later confirmed on the same terms vide a letter dated 30th July, 2008 with effect from 1st August, 2008.

19. It is important at this juncture to comment on **Section 10(7)** of the **Act** that provides as follows:

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

20. The import of the above law in my understanding is that once it is established that there exists a written contract of service and the employer **fails** to produce that written contract or such other written particulars as set out in **Section 10 of the Act**, the burden of proving or disproving the existence of a specific term of the contract alleged shall be on the employer. This provision was made in full cognizance that records of employment are ordinarily in custody of the employer and there is a possibility of an employer **failing** to produce the same in court to deny an employee his dues.

21. This section applies where there is a written contract between the parties stipulating the terms, conditions, and particulars as set out in Section 10 of the Act. Where there exists no written contract of service, and an allegation is made by either party, such party is still legally bound to prove such an allegation based on the established rules and principles of adduction of evidence.

22. In this case the Respondent failed to comply with Section 9 of the Act by failing to reduce the employment relationship into writing as there is no allegation by the Claimant of existence of a written contract. However, this does not mean that the Claimant is to be automatically granted his prayers as sought in the statement of claim. The Claimant has a legal obligation of proving his cause on a balance of probability and to use all legal avenues to compel the Respondent to produce any oral or documentary evidence that the Claimant deems necessary to aid his cause especially in a cause like the present one where there is no written contract of service and the Respondent opted to abstain from the hearing.

VI. TERMINATION

23. The Claimant’s case is that he was terminated by way of a phone call from the Respondent’s secretary on 9th January, 2018. Having found as a matter of fact that the Claimant was an employee of the Respondent and that he is no longer in such employment and in absence of any evidence to the contrary, this court is inclined to uphold the evidence by the Claimant regarding how he was terminated.

24. The Claimant testified that he was not issued with a notice of termination, he has not given a hearing, and that he was not informed of the reason for termination.

25. In a letter dated 29th August, 2018 the secretary to the Respondent admitted that the manner in which the Claimant was terminated was unlawful. The letter was produced by the Claimant as an exhibit.

26. The importance of substantive and procedural fairness has been emphasized by this court in many a decisions. See **Mary Chemweno -vs- Kenya Pipeline Company Limited (2017) eKLR**, and **Loice Otieno -vs- Kenya Commercial Bank Limited (2013) eKLR**, and **Walter Ogal Anuro -vs- Teachers Service Commission (2012) eKLR**

27. **Section 43 of the Act** places a burden on the employer to prove the reason for termination. As stated in an earlier part of this judgment the Respondent did not adduce any evidence in this cause and as such no reason whatsoever has been advanced by the Respondent for the termination of the Claimant.

28. There is also no evidence that the Respondent accorded the Claimant procedural fairness or due process in accordance with the rules of natural justice, **Section 4** of the **Fair Administrative Actions Act**, **Section 45 of the Employment Act**, and **Article 47** of the **Constitution**.

29. This court finds and holds that the Respondent denied the Claimant substantive and procedural fairness and hence the termination was unfair and unlawful.

VII. RELIEFS

30. The Claimant is seeking for the reliefs set out at the onset of this judgment. To enable a comprehensive consideration of each of the prayers this court shall look into each prayer as hereunder.

31. This court has already found and held that the termination of the Claimant by the Respondent was unfair and unlawful for lack of substantive and procedural fairness and the same is hereby declared as such.

32. This court has also established the nature and terms of the relationship between the Claimant and the Respondent based on the evidence adduced by the Claimant and the applicable law. In that regard prayer (a) in the Memorandum of claim “**A declaration that the Claimant was a regular employee of the Respondent**” is moot and does not make sense. The Act does not define what a regular employee means, in any event.

33. Prayer (b) seeks one month’s salary in lieu of notice being Kshs.9,030/=. This court has already held that no notice was issued to the Claimant prior to dismissal and as such this prayer is readily granted.

34. In prayer (c) the Claimant prays for Kshs.1,126,574.90 being salary underpayment. The particulars and the breakdown of this claim is provided at the end of the Memorandum of claim. However, this court is unable to allow this claim on several grounds. This court has already found that based on the evidence on record as adduced by the Claimant the earliest that the Claimant may have started working for the Respondent is 1st February, 2008 as to be confirmed after six (6) months from 1st August, 2008. This court has arrived at this conclusion based on **Section 42 of the Act** and the letter of confirmation dated 30th July, 2008. In that letter of confirmation the monthly salary was set at Kshs.4,000/= based on mutual understanding between the parties. The issue of underpayment does not arise as the salary was mutually agreed by and between the parties and this court cannot vary the terms thereof except where the same offends the law.

35. As concluded and held elsewhere in this judgment there is no evidence that the Claimant worked for the Respondent as a casual general labourer from 2004 or any other time or at all. It is not enough for a party to make an allegation and expect the court to find in its favour without substantiating such an allegation and supporting the same with oral and or documentary evidence. This is more so where an allegation is expected to be supported with documentary evidence to establish payment of salary or underpayment thereof. This court holds that the Claimant failed to prove casual employment from 2004, or payment of wages for such employment, and or underpayment thereof.

36. Proof of a case on a balance of probability places a burden on the alleging party to prove and demonstrate to the trial court that more likely than not the alleged facts or set of facts existed. Although this burden is not the same as beyond reasonable doubts, as expected in criminal cases, nonetheless the party alleging a given set of matters, issues, or circumstances is expected to convince the trial court that more likely than not the alleged facts or circumstances existed as alleged. The Claimant failed to discharge this burden and hence prayer (b) on underpayment must fail. – See **Sections 107, 108, and 109** of the **Evidence Act** (Cap 80).

37. In any event and without prejudice to the contents of the foregoing paragraph, there is no evidence adduced by the Claimant on what the daily wage was for a general labourer within Nakuru County from 2004 to 30th July 2008. To make the matter worse, notwithstanding that the Claimant was on permanent terms from 1st August, 2008 the Claimant is claiming underpayment as a casual labourer for the period from 2004 to the date of termination on 9th January, 2018. This claim does not make sense and the same is illogical and unreasonable and must fail.

38. Prayer (d) is on overtime worked in the sum of Kshs.1,834,818.00. For the same reasons for which prayer (c) has failed above, this prayer (d) must fail. There is no evidence that the Claimant worked for the Respondent prior to the probationary period leading to the confirmation commencing on 1st August, 2008. There are no records that were produced in support of this claim and the Claimant did not challenge the Respondent to produce the same (as stated and elsewhere in this judgment) and as such this court finds that this claim has not been proved to the required standard.

39. Prayer (e) of Kshs.96,575.85 being pay for annual leave earned but not taken from January 2002 to the time of dismissal on 9th January 2018 must also fail for the same reasons on which prayers (c) and (d) failed above. The Claimant was at liberty to summon the Respondent to appear in court to produce the relevant records but no efforts or requests were made by the Claimant. In the circumstances this court finds and holds that this prayer was not proved to the required standard and the same fails.

40. Prayers (f) and (g) fail for the same reasons that prayers (c), (d) and (e) have failed as above. There is no need to reproduce the same reasons here.

41. In any event, the Respondent is manager of a public secondary school for and on behalf of the Government of Kenya and the parents of the students. In the letter dated 29th August, 2018 from the principal/secretary to the Respondent which was produced by the Claimant as exhibit, the **VISION** of the school is “**A Model Day Secondary School.**” If indeed the school is a day school, the Claimant could not have been working beyond the normal working hours. In any event, there is no explanation on how the normal school holidays have been accounted for in relation to annual leave and public holidays as well. It is a matter of judicial notice that public schools are closed at least three times a year and students go home on holidays. Students in day schools remain at home during weekends. On this account again the claim for payment for overtime, annual leave, and public holidays must fail.

42. Prayer (h) is on unpaid house allowance. In the letter of confirmation on permanent terms dated 30th July, 2008 the monthly salary is indicated as Kshs.4,000/= but the same was reviewed upwards to Kshs.9,030/= effective 1st March, 2016 vide a letter dated 14th March, 2016. The salary of the Claimant remained the same till termination on 9th January, 2018. **Section 31 of the Act** obligates an employer to provide reasonable housing accommodation to an employee or pay house allowance that will enable an employee to obtain reasonable accommodation. Such house allowance, unless expressly provided for as a component of a consolidated basic pay, shall be paid as a

separate item currently at 15% of the basic pay.

43. Having found that the Claimant started working for the Respondent on 1st February, 2008 the house allowance payable in arrears is calculated as:-

Kshs.9,030 X 15/100 X 120 (months between 1stFebruary 2008 to January, 2018.)

= **Kshs.162,540/=**.

44. Item (i) is on compensation for wrongful termination. This is a remedy provided for under **Section 49(1)(c) of the Act** and the Claimant is seeking the maximum compensation of twelve (12) months of his last gross salary.

45. The Claimant has not prayed for reinstatement or re- engagement, he has not been paid any terminal dues, and he did not contribute to his termination whatsoever. The Claimant worked for the Respondent for a considerably lengthy period of time of over ten (10) years. However, there is no evidence as to whether the Claimant was able to secure another job and if he did, how long it took him to secure such employment.

46. Going by the NHIF membership card produced as exhibit the Claimant was born in 1966 and therefore as at the time of termination in 2018 he was about 52 years of age. This implies that the Claimant would have worked for another eight (8) years before retirement at 60.

47. Considering all the relevant factors under **Section 49 of the Act**, this court is of the view that the Respondent was grossly unfair in the manner it terminated the claimant after he had served it for over ten (10) years. This court finds and holds that this is an appropriate cause for the award of maximum compensation of twelve (12) months gross salary for the unfair and unlawful termination and awards the same as hereunder.

Kshs.9,030/= X 12 = KShs.108,360/=.

This amount is subject to statutory deductions.

48. On prayer (j) the Claimant is entitled to be issued with a Certificate of service under **Section 51 of the Act** and the Respondent is ordered to issue and deliver the same to Claimant's counsel within 30 days of this judgment.

49. On costs, prayer (K), the Claimant is awarded costs and interest based on the award herein.

VIII. DISPOSAL

50. The Claimant is therefore awarded as follows:

(a) A declaration be and is hereby issued that the Claimant's termination by the Respondent was unfair and unlawful.

(b) (i) One month's salary in lieu of notice - **Kshs. 9,030/=**

(ii) Unpaid house allowance - **Kshs.162,540/=**

(iii) Compensation for unfair and unlawful termination - **Kshs.108,360/=**

TOTAL - Kshs.279,930/=

(c) The Respondent is ordered to issue a **certificate of service** to the Claimant **within 30 days** of this judgment.

(d) The Claimant is awarded costs of this cause and interest on the award.

DATED AND DELIVERED VIRTUALLY AT NAKURU

THIS 14TH DAY OF FEBRUARY, 2022.

.....

DAVID NDERITU

JUDGE

In the presence of:-

Ngigi for Claimant

No appearance for Respondent

Court Assistant - Lesinge