



**Mboya v Board of Management Gendia High School (Cause 385 of 2018)
[2022] KEELRC 12741 (KLR) (5 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12741 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 385 OF 2018
S RADIDO, J
OCTOBER 5, 2022**

BETWEEN

GEORGE OLUOCH MBOYA CLAIMANT

AND

BOARD OF MANAGEMENT GENDIA HIGH SCHOOL RESPONDENT

JUDGMENT

1. George Oluoch Mboya (the Claimant) sued the Board of Management, Gendia High School (the Respondent), on 6 December 2018, alleging unfair termination of employment and breach of contract.
2. The Respondent filed a Response on 19 February 2019, prompting the Claimant to file a Reply to the Response on 29 April 2019.
3. The Cause was heard on 30 May 2022.
4. The Claimant and 4 witnesses called by the Respondent testified.
5. The Claimant filed his submissions on 22 June 2022, and the Respondent on 25 July 2022.
6. The Court has considered the pleadings, evidence, and submissions.

Unfair termination of employment

7. By dint of section 47(5) of the *Employment Act*, 2007, a Claimant is expected to demonstrate that an unfair termination of employment occurred before the former employer is called upon to justify the termination.



8. On its part, section 35(1)(c) of the *Employment Act*, 2007 contemplates written notice of termination of employment, whilst section 41 of *the Act* requires the employer to allow the employee an opportunity to make representations before termination of employment.
9. The Claimant, a security guard, was arrested on 30 May 2016 and charged in Court with criminal offences.
10. According to the Claimant, the Principal ordered him not to enter the school after arrest and that he was not taken through a disciplinary hearing.
11. The Claimant admitted during cross-examination that he never reported back to work after release by the Police/Court.
12. The Respondent's Principal at the material time denied that he verbally terminated the Claimant's employment as that was not part of his mandate. He testified that the mandate belonged to the Board.
13. The witness stated that the Claimant did not return to work after his arrest by the Police.
14. The Court has inconsistent uncorroborated oral evidence before it. The Claimant did not send out a demand letter alleging unfair termination of employment until 7 December 2017, over a year after the alleged verbal termination of employment. He admitted he never reported to the workplace after his release by the Court.
15. On the state of the record, the Court finds that the Claimant did not discharge the initial statutory burden of showing that an unfair termination of employment occurred.

Breach of contract

16. The Claimant alleged breach of contract/statute in that he worked overtime without the requisite compensation, and in this regard, he sought a total of Kshs 42,574/- (normal and double overtime).
17. The Claimant testified that he would work from 6.00 pm to 6.00 am (or vice versa) depending on the duty roster.
18. The Respondent did not controvert the Claimant's oral testimony. It is a notorious fact that the Court can take judicial notice that security guards work 12-hour shifts in this country, while the regular day shift consists of 8 hours.
19. The Court will therefore allow the head of the claim for overtime.

Gratuity

20. The Claimant did not provide an evidential or contractual basis for the prayer for gratuity or service pay. The records produced in Court also show that he was contributing to the National Social Security Fund and is thus not entitled to service pay by virtue of section 35(5) and (6) of the *Employment Act*, 2007.

Certificate of Service

21. A Certificate of Service is a statutory entitlement, and the Respondent should issue one to the Claimant within 30 days.

Conclusion and Orders

22. From the above, the Court finds and declares:



- i. That the Claimant failed to prove an unfair termination of employment occurred.
 - ii. The Respondent was in breach of contract, and the Claimant is awarded Kshs 42,574/-.
 - iii. The Respondent to issue a Certificate of Service within 30 days.
23. The Claimant has only partly succeeded.
24. Each party to bear own costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 5TH DAY OF OCTOBER 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant Ariho Ngundu Advocate

For Respondent Amos O. Oyuko & Co. Advocates

Court Assistant Chrispo Aura

