



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 247 OF 2014

SILAS MIGUNA AROMBE.....CLAIMANT

VERSUS

MINGO SECONDARY SCHOOL...RESPONDENT

JUDGMENT

1. The claimant filed suit on 17/9/2014 seeking reinstatement to employment and in the alternative damages for unlawful termination of employment and payment of terminal benefits for 16 years' service rendered by the claimant to the respondent.
2. Despite having filed a statement of defence on 26/11/2014 the respondent failed to call any witness to defend the case on 19/3/2020 and the Court made a ruling closing the defence case for the reason that this was a very old matter having been filed in the year 2014.
3. That the claimant testified on 9/7/2018 and was cross-examined by Counsel for the respondent and claimant's case was closed on that day and defence hearing set for 10/12/2018.
4. On 10/12/2018 the parties adjourned the matter by consent at the behest of Mr. Mwamu for respondent and defence hearing was slated for 28/5/2019 but hearing date was brought forward to 16/5/2019 when Mr. Mwamu again sought adjournment and same was granted and matter set for hearing 29/7/2019.
5. On 29/7/2019 the matter was again adjourned at the behest of Mr. Mwamu, who had indicated that the respondent was willing to settle the matter out of Court.
6. Another date for defence hearing was allocated for 9/13/2020. On 9/3/2020 the respondent again applied for adjournment on grounds that the respondent had not obtained its witness. Mr. Achura for the claimant vehemently opposed the application for adjournment. Having heard both parties, the Court declined the adjournment and deemed the defence case closed.
7. C.W.1 testified that he worked for the respondent and relied on a witness statement filed on 17/9/2017 as his evidence in chief. C.W.1 stated that he was employed first as a cleaner and was later promoted to a cook and then to head cook.
8. That he served the respondent from 1997 and had worked continuously until July, 2014 when he was suspended on allegations of theft. That he appeared before the Board and denied the allegations. That he was dismissed without payment of any benefits.
9. That he was not a thief but was merely victimized. That he had worked overtime all along without extra pay, in that he worked for '6' days a week from 8 am to 6p.m. Claimant stated that he did not know how much overtime and terminal benefits he was owed by the respondent but it was for the Court to help him. C.W.1 stated he was not reported to the police for any offence. That he supervised 5 cooks as the head cook. That the cateress was over all in the Kitchen and no theft was reported. Claimant stated that he no longer wished to be reinstated. That he earned Kshs.8,251 per month when he was dismissed.

Determination

10. The issues for determination are:-

- a. Whether the claimant's employment was terminated for a valid reason following fair procedure.

b. Whether the claimant is entitled to the reliefs sought.

11. In terms of Section 43(1) and (2) read with Section 47(5) the respondent has the onus of proving that it had a valid reason to terminate the employment of the claimant.

12. The respondent failed to call any witness to rebut the evidence by the claimant and his employment as head cook was terminated on false allegations of theft. The claimant testified that he had served the respondent from the year 1997 up to the year 2014 as a cleaner, cook, and head cook.

13. That he had a good record and was not a thief.

14. That no theft was reported by the respondent to the police and was not aware of any theft at the kitchen.

15. The claimant stated that he supervised 5 cooks and was supervised by a Caterer.

16. The claimant states that he was dismissed summarily without payment of any benefits and that the dismissal was unlawful.

17. The claimant stated that he no longer wished to be reinstated to his job and he be paid damages for the unlawful dismissal.

18. The Court is satisfied that the claimant has demonstrated on a balance of probability that the dismissal was wrongful and unfair.

19. The Court finds that the respondent violated Sections 43, 44 and 45 of the Employment Act in dismissing the claimant from employment without a valid reason.

20. The claimant is entitled to compensation in terms of Section 49(1) (c) and (4) of the Employment Act, 2007.

21. In this regard, the claimant had served the respondent faithfully for a period of sixteen (16) years. The claimant was paid a meagre salary of Kshs.8,251 at the time of dismissal. The claimant was a head cook at the time.

22. The claimant did not plead that he was underpaid and did not also make sufficient pleadings to demonstrate that he worked overtime without payment of statutory overtime. Though the Court sympathise with the circumstances of the claimant, its hands are tied in this respect.

23. The claimant was not given notice nor paid in lieu of notice. The claimant was not compensated for unlawful summary dismissal. The claimant in my view did not contribute to his dismissal but was merely victimized.

24. Considering the long service the claimant had given the respondent while being underpaid, the Court treats this as a proper case to award the claimant maximum compensation for the unlawful dismissal in the sum of Kshs.(8,251 x 12) 99,012. The Court also awards the claimant one month salary in lieu of notice in the sum of Kshs.8,251. Total award Kshs.107,263. The rest of the claims are dismissed for want of proof.

25. In the final analysis Judgment is entered in favour of the Claimant against the respondent as follows:

a. Kshs.107,263

b. Interest at Court rates from date of filing suit till payment in full.

c. Respondent to pay costs of the suit.

d. Respondent to provide Certificate of Service to the claimant to the Claimant within 30 days.

Dated and delivered at Nairobi this 28th day of January, 2021.

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue

technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

MATHEWS N. NDUMA

JUDGE

Appearances

Mose Mr. Achura for claimant

Mr. Mwamu for respondent

Chrispo: Court clerk