



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU

ELRC CAUSE NO. 31 OF 2015

PIUS MUNGUTI CHARO.....CLAIMANT

VERSUS

BOARD OF MANAGEMENT

MIRITHU SECONDARY SCHOOL.....RESPONDENT

JUDGMENT

1. The Claimant through Messers Rubua Ngure and Company Advocates filed this claim vide a Memorandum of Claim dated 3rd February, 2015, alleging wrongful dismissal and unlawful termination from employment and non-payment of terminal dues against the Respondent and seeks for orders that This Honourable Court ;-

1. Find that the termination of the claimant was unlawful, wrongful and illegal.

2. Award him damages for unlawful termination.

3. That the claimant is entitled for payment of;

i. compensation for unlawful termination equivalent to 12 months wages

ii. Compensation for public holidays worked but not paid

iii. Compensation for overtime worked.

4. Costs of this suit.

2. The summary of the claimant's case was that he was employed by the respondent on 20th March, 2006 as a watchman earning a salary of Kshs 5, 685/-. Till his termination on 31st October, 2014.

3. It is stated that prior to the termination, on the night of 31st August, 2014/ 1st September, 2014 thugs invaded the Respondent's premises and made away with computers and in the process the claimant who was on duty was injured.

4. That sometimes on 24th October, 2014, the Respondent through its secretary issued Notice to show cause letters to all security guard why disciplinary action should not be taken against them owing to the increased security complaints in the premises.

5. That pursuant to a request by the letter dated 25th October, 2014, the claimant and other security guard requested for a meeting to address the Notice to Show Cause letter. That a meeting was set up for 31st October, 2014 at 9.00am by the Respondent's letter of 29th October, 2014.

6. That on 31st October, 2014 before the meeting began the Claimant was interrogated by CID officers from Tigoni Police station regarding the incident and later on he was terminated from employment on allegation that he did not respond to the Show cause letter when he had responded by his letter of 25th October, 2014 culminating to the summons of the meeting by the Respondents letter dated 29th October, 2014. he thus contends that the termination was unprocedural and unlawful

7. He states that as a night watchman he worked from 6pm to 6am everyday thus clocking 4 hours overtime each day which was never paid for during his tenure at the Respondent employ.

8. The claimant stated that he was underpaid contrary to regulation of wages order. Further that he worked during public holidays and was never compensated for the same.

9. The Hon. Attorney General entered Appearance on behalf of the Respondent on 2nd April, 2015 and filed a preliminary objection on the basis that another claim being civil suit no. 28 of 2015 at Principal's Magistrates Court at Limuru had been filed by the same party based on the same cause. In addition, the Attorney General filed a response to the claim on 14th April, 2015 and denied all the allegation in the memorandum of claim and stated that the claimant neglected his duty at the Respondents premises leading to the theft of 14 computers and assorted textbooks.

10. The Respondent stated that prior to the theft, in December, 2013 the premises were fixed with CCTV and all guards were issued with portable panic buttons to enable them alert security apparatus in case of any emergency, however the claimant together with his colleagues neglected the use of the said buttons culminating to the theft.

11. That it is the continued insecurity in the area and the lackadaisical approach in which the claimant approached the issue that confirmed indeed that the claimant was negligent in his duty which resulted to his termination on 31st October, 2014 by the Respondents board resolution on grounds of redundancy.

12. The Respondent stated that the claimant never worked overtime as alleged neither did he work over public holiday. Also that he was duly compensated for the work done.

Hearing.

13. This cause proceeded for hearing on 16th March, 2021 where the Claimant **Pius Charo, CW-1** adopted his witness statement and document filed and testified that the Respondent fired him on allegation that their vacancy was redundant when the procedure of redundancy was not adhered to.

14. On cross examination by Mr. Ondieki Advocate, he testified that he was employed by the Respondent for 9 years and throughout the 9 years, the respondent did not complain about his service, he stated that he never complained for not being paid overtime but had talked to the principal about him working over holidays. He stated that he was aware that security in the area was wanting and learnt that books had been stolen from the school but did not report the same as they did not witness the alleged theft. he contends that he wrote a statement with the police on the stolen computers and was later terminated from employment but was not given reasons for the dismissal neither was he afforded an opportunity to be heard in a disciplinary hearing.

15. The Respondent's case proceeded for hearing on the 11th May, 2021 where the Respondent called one Witness, **Julian W. Mukundi-RW-1**, the principal mirithu High school, who adopted her witness statement blaming the claimant for the negligent manner in which he carried out his duties.

16. On cross examination by **Mwumi Advocate**, the Respondent's witness testified that the claimant was fired because he was a local watchman and they needed to employ professional guards that was recommended after several incidents of theft.

17. She testified that the claimant was indeed working for 12 hours and was compensated for the same as evidence in the pay slips annexed and that the said watchmen worked for only 5 days and not 7 days as alleged.

Claimants Submissions

18. The claimant's Advocate submitted that the claimant was unfairly terminated from employment within the meaning of section 45 of the Employment Act in that he was not subjected to procedural disciplinary process as envisaged under section 41 of the Employment Act after being allegedly dismissed for negligence of duty.

19. He argued that the reason for the termination was alleged negligence by the claimant in performing his duties, he however contends that the Respondent failed to adhere to the provisions of Section 40 of the Employment Act on procedure that an employer ought to follow in case of redundancy.

20. The Claimant submitted further that he worked from 6pm to 6am a fact which was not controverted by the Respondent as such prayed that the claimant be paid for the overtime worked at the rate of 1.5 times the normal rate as was held in **Evans Katiezo Aligulah –v-v Eldomatt wholesale and Supermarket ltd [2016] eKLR**.

21. He therefore submitted that the claimant has proved his case on a balance of probability and urged the court to allow the claim as prayed.

Respondent's Submissions.

22. The Respondent on the other hand submitted that the claimant was terminated from its employment after a series of thefts were reported at the respondent school causing the Respondent to come up with a resolution to hire professionally trained guards instead of the night watchmen to avert the said losses they were already experiencing.

23. He argued that the claimant was afforded fair hearing and subjected to disciplinary process which found the claimant negligent in his duties and resulting to his dismissal which dismissal according to the Respondent was lawfully arrived at and the claimant was paid salary in lieu of Notice as dictated by law.

24. The Respondent submitted that it is not in dispute that the claimant worked from 6pm to 6 am, he however contended that according to the pay slips annexed to the claimant's cause, indicates that he was paid overtime, therefore, the claim of overtime ought to be dismissed.

25. On the holidays worked the Respondent submitted that the public holidays allegedly worked by the claimant are 31 and not 108 as alleged, therefore, he argued that if the said public holidays are found to be deserving then the holidays are only 31 throughout the tenure of the claimant's employment.

26. He concluded that the claimant claim is not warranted as he was terminated in accordance with the law and urged this Court to dismiss the claim with costs to the Respondent.

27. I have examined all evidence and submissions of the parties herein. From the evidence of the claimant he was terminated after theft at the respondent's premises by thugs.

28. He avers that he was not accorded a fair hearing. The respondents deny dismissing the claimant unfairly.

29. The claimant exhibited his termination letter dated 31/10/14 which indicate that he was terminated by the respondent because the DCI investigation confirmed he was a suspect of the robberies that had taken place at the school.

30. Despite being a suspect as alleged, the claimant was never charged on any offence and neither was he subjected to any internal disciplinary hearing.

31. In my view there were no valid reasons to terminate the claimant and neither was he subjected to any fair disciplinary hearing.

32. Section 45 (2) of the Employment Act 2007 states as follows;

45. (1).....

(2) *A termination of employment is unfair if the employer fails to prove-*

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

33. In the circumstances, I find the claimant's termination unfair and unjustified.

34. In terms of remedies, I find the claimant is entitled to compensation for the unfair termination which I award at 12 months due to the unfairness meted against him.

= 12 x 5,685 = 68,220/=

Less statutory deductions

35. The rest of the claim is not proved. The claimant will also be paid costs and interest at court rates with effect from the date of this Judgment.

DATED AND DELIVERED VIRTUALLY THIS 27TH DAY OF JULY, 2021.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ondieki for respondent – present

Munyiri holding brief for Ngunjiri for claimant – present

Court Assistants – Fred and Wanyoike