



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO 199 OF 2018

COSMAS MUEMA KIMINA.....CLAIMANT

VERSUS

CROSSROADS ACADEMY.....RESPONDENT

JUDGMENT

Introduction

1. In his claim brought by a Memorandum of Claim filed in court on 5th April 2018, the Claimant seeks compensation for unlawful termination of employment plus terminal dues.
2. The Respondent’s response to the claim is contained in a Memorandum of Response dated 6th June 2018 and filed in court on 8th June 2018.
3. At the trial, the Claimant testified on his own behalf and the Respondent called its Head Teacher, James Nduva. The parties further filed written submissions.

The Claimant’s Case

4. The Claimant states that he was employed by the Respondent as a day security guard from 1st January 2014 until 28th August 2017, when his services were terminated. He earned a monthly salary of Kshs. 7,500.
5. The Claimant claims to have worked every day of the week without leave.
6. Regarding the circumstances leading to the termination of his employment, the Claimant states that on 23rd August 2017, he was injured on his left leg, while at work. He notified his supervisor, Eliud who granted him two days off to recuperate.
7. The Claimant avers that upon resuming duty, he was instructed to see the Director who terminated his employment on 28th August 2017.
8. The Claimant’s case is that he was not given any reasons for the termination and was not allowed an opportunity to be heard. Upon termination, the Claimant was only paid his salary for August 2017.
9. The Claimant sets out his claim as follows:

- a) 1 month’s salary in lieu of notice.....Kshs. 7,500.00
- b) Leave pay for 3 years.....19,500.00
- c) House allowance for 43 months.....48,375.00
- d) Public holidays.....21,346.20
- e) Underpayment.....205,740.60

- f) 12 months' salary in compensation.....131,448.00
- g) Certificate of service
- h) Costs plus interest

The Respondent's Case

- 10. In its Memorandum of Response dated 6th June 2018 and filed in court on 8th June 2018, the Respondent admits that the Claimant was in its employment as a security guard. The Respondent however denies that the Claimant's employment was terminated on 28th August 2017.
- 11. The Respondent further denies that the Claimant worked every day without leave.
- 12. The Respondent also denies that the Claimant sustained an injury while at work or that he reported the accident to his supervisor or that he was granted two days off to convalesce.
- 13. The Respondent denies that the Claimant's employment was terminated on 28th August 2017 and states that the Claimant's employment was terminated on 15th September 2017, on account of desertion of duty.
- 14. The Respondent avers that the Claimant sought permission from his immediate supervisor on 31st August 2017, to collect his salary from Mtwapa but failed to resume work.
- 15. The Respondent justifies its decision to terminate the Claimant's employment given that the Claimant had deserted work for a period of well over two weeks.

Findings and Determination

- 16. There are two (2) issues for determination in this case:
 - a) Whether the Claimant has made out a case of unlawful termination of employment;
 - b) Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

- 17. The Claimant states that his employment was terminated on 28th August 2017 upon his resumption of duty from a sick off granted by his supervisor.
- 18. While denying the Claimant's assertion in this regard, the Respondent states that the Claimant deserted duty on 31st August 2017, upon being granted permission to collect his salary from the bank at Mtwapa.
- 19. Desertion of duty is a serious administrative offence, which renders an employee liable to dismissal, but it must be proved. It is now well established that an employer alleging that an employee has deserted duty is required to demonstrate efforts made to reach out to the employee, with a view to putting them on notice that termination of their employment on this ground is being considered (see *Simon Mbithi Mbane v Inter Security Services Limited [2018] eKLR*).
- 20. The Respondent's Head Teacher, James Nduva made a general statement to the effect that efforts were made to reach out to the Claimant. Nduva did not however provide any evidence to support his statement. Moreover, the supervisor, who is alleged to have given permission to the Claimant on 31st August 2017, was not called as a witness and the Respondent's account of the events leading to the termination was consequently unverified.
- 21. Overall, the Respondent's defence that the Claimant deserted duty was not proved and is rejected. That said, the Court adopts the Claimant's account that his employment was terminated without justifiable cause and in violation of due procedure. He is therefore entitled to compensation

Remedies

- 22. Pursuant to the foregoing findings, I award the Claimant six (6) months' salary in compensation. In arriving at this award, I have taken into account the Claimant's length of service as well as the Respondent's unlawful and unfair conduct in executing the termination.
- 23. I further award the Claimant one (1) month's salary in lieu of notice.
- 24. The Respondent did not provide any leave records to show that the Claimant took his leave. The claim thereon therefore succeeds and is allowed.

25. In considering the claim for house allowance, I have looked at the Claimant's contracts of employment which provide for a global salary figure. It seems to me that the intention of the parties was to provide for a consolidated salary, inclusive of house allowance. The claim for house allowance is therefore disallowed.

26. The claims for public holidays and underpayment were not proved and are dismissed.

27. Finally, I enter judgment in favour of the Claimant as follows:

- a) 6 months' salary in compensation.....Kshs. 45,000
- b) 1 month's salary in lieu of notice.....7,500
- c) Leave pay for 3 years $(7,500/30*21*3)$15,750
- d) Prorata leave for 8 months $(7,500/30*1.75*8)$3,500
- Total.....71,750**

28. This amount will attract interest at court rates from the date of judgment until payment in full.

29. The Claimant is also entitled to a Certificate of Service plus costs of the case.

30. Orders accordingly.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY SEPTEMBER 2021

LINNET NDOLO

JUDGE

ORDER

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

LINNET NDOLO

JUDGE

Appearance:

MISS KITOO FOR THE CLAIMANT

MR. BARAKA FOR THE RESPONDENT