



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA**

**CAUSE NO. 26 OF 2018**

**MILTON WANYONYI OMAKA.....CLAIMANT**

**VERSUS**

**BOARD OF MANAGEMENT NAMBALAYI**

**D.E.B PRIMARY SCHOOL.....RESPONDENT**

**JUDGMENT**

1. The claimant vide a statement of claim filed on 9<sup>th</sup> May 2018 prays for payment of retirement benefits to wit:

- (i) Service gratuity for the years served between January 2007 to June 2015 when he retired in the sum of Kshs. 70,000. At the time of retirement the claimant earned Kshs. 3,000 per month.
- (ii) The claimant further seeks payment of rest days not taken for the entire period of service in the sum of Kshs. 224,000.
- (iii) Claimant further seeks payment of overtime not paid for the 480 weeks served between January 2007 to June 2007 calculated at 21 hours per week paid at one and a half times of the monthly salary in the sum of Kshs. 352,800.

**Further claims include:**

- (iv) Public holidays worked and not paid Kshs. 102,606.
- (v) House allowance arrears Kshs. 126,000.
- (vi) Leave allowance arrears Kshs. 56,538 and
- (vii) Salary arrears for the entire period worked in the sum of Kshs. 519,600.
- (viii) Costs and interest.

2. The claimant testified under oath and adopted a witness statement dated 13<sup>th</sup> March 2018. The claim is based on a minimum wage of Kshs. 7,000 per month which the claimant pleaded ought to have been paid. The claimant stated that he was employed by the respondent as a watchman on 18<sup>th</sup> January 2007. He served at the gate of the respondent school. That he worked until June 2015 when the head teacher advised him that he was past 60 years retirement age and ought to stop working.

3. That the claimant was not paid any terminal benefits upon retirement. The claimant wrote a demand letter on 3<sup>rd</sup> August 2017 via Were Lukoko and Company Advocates but was not heeded.

4. Claimant stated that he never went on leave between January 2007 and June 2015. That he worked from Monday to Sunday and was not given any rest day. That he reported to work from 6.00 am to 6.00 pm in the night shift and was not paid overtime which was in excess of 3 hours daily.

5. That the claimant worked during public holidays from the date of employment in 2007 until retirement in 2015 since he was the only guard. The claimant was not paid extra salary upon working during holidays.

6. The claimant earned Kshs. 3,000 per month. The claimant produced letter of employment dated 18<sup>th</sup> January 2007 and the letter of demand.

7. The respondent called RW1 Violet Wanjala who testified that the claimant was employed as a watchman on purely casual basis. That the claimant was therefore not entitled to payment of retirement benefits which was payable only to permanent and pensionable employees. That the claimant was employed by the respondent when he was 57 years when the retirement age of 55 years was applicable.

8. That the claimant was paid salary that included house allowance and was paid his full salary.

9. That the claimant left employment on account of advanced age. That the suit be dismissed with costs.

10. Under cross examination RW1 admitted that the claimant served the respondent as a watchman from the year 2007 up to 20<sup>th</sup> January 2017. That he served the respondent for a period of 10 years. That the claimant was paid Kshs. 3,000 and was not entitled to overtime. That he reported at 7.00 am and left at 6.00 pm in the evening daily. That he worked for 13 hours. RW1 admitted that the claimant was not paid in lieu of 21 days leave. RW1 also stated that the claimant worked 5 days a week and the relief watchman worked other two days a week. RW1 testified that the claimant rested during public holidays. RW1 prays the suit be dismissed with costs.

### **Determination**

11. The issue for determination is whether the claimant is entitled to the reliefs sought.

12. The claimant adduced uncontroverted evidence that he served the respondent for a period of 10 years continuously. That he was paid Kshs. 3,000 per month. That he worked 3 hours overtime every day and was not paid overtime. That he was not given 21 days leave for each completed year of service. That he was not paid gratuity upon retirement after serving 10 years.

13. The claim that he worked 7 days a week without any off days was not effectively disputed by RW1 by producing records to the contrary. The claimant was not placed on NSSF or any pension. RW1 testified that the claimant was a casual and was not entitled to any payment upon retirement.

14. The claimant has proved on a balance of probabilities all the claims set out in the statement of claim limited to a period of three years from the date the suit was filed on 16<sup>th</sup> March 2018. General wage order no. 71 of 2012 provided minimum wage for watchmen in the sum of Kshs. 8,873 however the claimant is bound by his pleadings of Kshs. 7,000.

15. Accordingly, judgment is entered in favour of the claimant as against the respondent as follows:

(a) Service gratuity calculated at a minimum salary of Kshs. 7,000 for 18 days for each year served in the sum of Kshs. 41,940.

(b) Rest days not taken for three years (233x48x3) Kshs. 33,552.

(c) Overtime of three hours per day for three years at Kshs. 233 per hour Kshs. 234,864.

(d) 8 public holidays worked per year for three years Kshs. 7,728.

(e) Untaken leave days not paid for 3 years Kshs. 20,286.

(f) Salary arrears calculated at Kshs. 4,000 per month for three years in the sum of Kshs. 144,000.

16. Unpaid house allowance in the sum of Kshs. 63,000(7,000x<sup>1</sup>/<sub>2</sub>x3). Pleaded by the claimant.

**Total award is Kshs. 545,370**

17. The award is payable with interest at court rates from date of filing suit till payment in full.

18. The respondent to pay costs of the suit.

**Judgment Dated, Signed and delivered this 29<sup>th</sup> day of January , 2020**

**Mathews N. Nduma**

**Judge**

**E&LRC BUNGOMA**

**Appearances**

Were Lukoko for Mr. Tarus for Respondent.

Chrispo – Court clerk.