



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT BUNGOMA

CAUSE NO. 20 OF 2018

NERBERT JUMA CHINYINGI.....CLAIMANT

VERSUS

BOARD OF MANAGEMENT NAMBALAYI D.E.B PRIMARY SCHOOL.....RESPONDENT

JUDGMENT

1. The suit was filed on 26th February 2018 seeking the following reliefs:

a. A declaration that the termination of the services of the claimant was unlawful and unfair.

b. Payment of terminal benefits including:

i. 21 days salary in lieu of leave Kshs. 14,538.

ii. Arrear salary for the period January 2011 to November 2016 Kshs. 285,840.

iii. Overtime for 288 weeks Kshs. 90,720.

iv. Public holidays worked Kshs. 26,400.

v. Service gratuity Kshs. 18,000 and

vi. House allowance arrears for the period January 2011 to November 2016 Kshs. 32,400.

vii. Certificate of service.

viii. Interest and costs.

2. The claimant testified that he was employed by the respondent as a watchman in January 2011 working during the day and night.

3. The claimant worked continuously until 4th November 2016. The claimant worked from 6 am in the morning to 6 pm in the evening and was not paid overtime. The claimant was paid a gross salary of Kshs. 3,000 per month. The claimant stated that he was underpaid and was not paid house allowance. The claimant testified further that he was never granted annual leave and worked 7 days a week without an off-day. The claimant added that he worked during holidays.

4. Regarding termination of employment the claimant testified that he had collected NHIF registration forms from NHIF office and was asked to take them to the principal for signature. That the principal declined to sign the forms. NHIF wrote to the principal regarding the matter. The claimant was dismissed from employment for that reason.

5. Under cross examination the claimant stated that he had complained to the principal regarding the poor terms of service but the same were not improved. The claimant stated that he had a clean record at work. The claimant testified that the union calculated the terminal benefits set out in the claim on his behalf and prays to be awarded accordingly.

6. RW1 Violet Wanjala, the head teacher of the respondent testified that she dismissed the claimant from work for absconding duty and that

he was rude to administration. That he threw cattle dip spray on the head teacher. That the claimant was invited to a meeting and was given opportunity to apologize but he declined. That the claimant had several warning letters. That on 22nd November 2016, the claimant was invited to attend a Board meeting which he attended and was dismissed by the board on 26th November 2016.

7. RW1 stated that the claimant worked from 6 am in the morning to 7 p.m in the evening. He worked for 13 hours. That the school could not pay overtime. That he was paid Kshs. 3,000 per month. RW1 stated that they paid the claimant what they could afford. RW1 admitted that the claimant did not go on leave. RW1 added that the government does not pay house allowance. RW1 testified further that the respondent did not pay NSSF for the claimant. RW1 denied that the claimant was dismissed for bringing NHIF forms to the principal for signature. RW1 said she did not receive the NHIF notice for the claimant as alleged.

8. The issues for determination are:

- a. Whether the dismissal of the claimant was for a valid reason and if respondent followed a fair procedure.
- b. Whether the claimant is entitled to the reliefs sought.

9. It is not in dispute that the claimant worked for the respondent as a watchman between January 2011 to 22nd November 2016. It is also not in dispute that the claimant was paid a gross salary of Kshs. 3,000 per month. According to RW1, the claimant worked from 6 am in the morning to 7 pm in the evening a duration of 13 hours. RW1 testified further that the school could not afford to pay the claimant overtime. RW1 conceded also that the claimant was not paid house allowance and that he was not granted annual leave.

10. The testimony by the claimant that he worked 7 days a week without an off day including during public holidays was not refuted by RW1. The calculation of terminal benefits presented by the claimant and set out in the memorandum of claim was equally not challenged by the respondent. However, the claims made by the claimant that go beyond the limitation period of 3 years are time barred and the court lacks jurisdiction to grant the same.

11. Accordingly, the court finds that the claimant has proved on a balance of probabilities that he is owed by the respondent all the terminal benefits set out in paragraph 7(a) (d) (e) (f) and (h) but limited to a period of three years. The court therefore awards the claimant as follows:

- i. Untaken leave days for 3 years Kshs. calculated at a minimum salary of (3,000x3, 970(underpayment) x15% unpaid house allowances Kshs. 8,015x3) Kshs. 24,045.
- ii. Salary arrears for underpayment of Kshs. 3,970 per month including 15% unpaid salary allowance Kshs. 1,202 per month Kshs. 186,192.
- iii. Overtime at 5 hours a day for 7 days for 3 years Kshs. 171,360.
- iv. 22 public holidays worked in three years Kshs. 6,408.
- v. Service gratuity calculated at 18 days salary for each completed year of service for 5 years Kshs. 24,120.

Compensation and notice pay

12. The claimant was dismissed from employment without notice or payment in lieu of notice. The claimant states that he was dismissed for having obtained NHIF forms from NHIF office without authority of the principal. The claimant testified that upon presenting the form to RW1 for signature, he was summarily dismissed.

13. RW1 on the other hand testified that the claimant had thrown cattle dip spray on the principal and when he was given opportunity to apologize, the claimant declined. The claimant had also absconded work without authority. The claimant was then summoned by the Board of Management for a disciplinary hearing. That the claimant was given opportunity to explain himself which he did, but the board decided to summarily dismiss him for misconduct. RW1 added that the claimant had several previous warnings for misconduct. RW1 produced warning letters dated 16th March 2015; 10th September 2015 and last warning dated 15th August 2016.

14. RW1 further produced letter of suspension dated 4th November 2016 on the basis of the two charges made against the claimant. Finally, RW1 produced the minutes of the meeting of the Board of Management held on 22nd November 2016 in which misconduct by the claimant was discussed and a resolution made to terminate the services of the claimant for hurling cornicle dip chemical meant to kill ticks at RW1 in her office.

15. RW1 finally produced the letter of termination in which the services of the claimant were terminated forthwith.

15. The court is satisfied that the respondent had a valid reason to terminate the employment of the claimant and that proper procedure was followed by the Board in arriving at the decision to terminate the employment of the claimant.

17. The court however notes that the claimant was not summarily dismissed but his employment was terminated by the board. The claimant is therefore entitled to payment of one month salary in lieu of termination notice in the sum of Kshs. 8,015.

18. In the final analysis judgment is entered in favour of the claimant against the respondent as follows:

- a. Kshs. 8,015 being one month salary in lieu of notice.
- b. Kshs. 24,045 being payment in lieu of untaken leave days.
- c. Kshs. 186,192 being underpayments of salary and non-payment of house allowance for 3 years.
- d. Kshs. 171,310 being unpaid overtime for 3 years.
- e. Kshs 6,408 in respect of public holidays worked and not paid double rate for three years.
- f. Kshs. 24,120 being unpaid gratuity for 5 completed years of service.

Total award Kshs. 398,090

- g. The respondent to provide the claimant with certificate of service within 30 days.
- h. Interest at court rates from date of filing suit till payment in full.
- i. Costs of the suit.

Judgment Dated, Signed and delivered this 29TH day of January , 2020

Mathews N. Nduma

Judge

BUNGOMA

Appearances

Mr. Were for Claimant

Mr. Tarus for Respondent

Chrispo – Court clerk.