



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.113 OF 2015**

**PETER WAMBUGU KARIUKI ..... CLAIMANT**

**VERSUS**

**THE BOARD OF MANAGEMENT,**

**MERERONI PRIMARY SCHOOL .....1<sup>ST</sup> RESPONDENT**

**PRINCIPAL SECRETARY,**

**MINISTRY OF EDUCATION.....2<sup>ND</sup> RESPONDENT**

**JUDGEMENT**

The claimant is a male adult. The 1<sup>st</sup> respondent is a body established under section 55 of the Basic Education Act with respect to Mereroni Primary School a public primary school within Nakuru County. The 2<sup>nd</sup> respondent is the principal secretary ministry of education.

The claimant was employed by the 1<sup>st</sup> respondent in August, 2010 as a night guard until 28<sup>th</sup> January, 2015 when his employment was terminated. He was paid a wage of Ksh.2,500 per month from August, 2010 to February, 2014 and ksh.3,000 per month from March, 2014 to January, 2015. This was contrary to the wage orders and an underpayment.

The claimant was not allowed time to go on annual leave.

There were no contributions to the NSSF or any other pension scheme.

The claimant worked for 7 days with rest and including public holidays from 6pm to 6am without compensation for overtime hours.

The claim is that there was verbal termination of employment without notice, hearing or reasons being given or payment of terminal dues.

The claimant is seeking the following terminal dues;

- a) Notice pay ksh.10,116.15;
- b) Underpayments Ksh.334,342.75;
- c) Unpaid house allowance Ksh.71,376.41;
- d) Leave for 4 years Ksh.39,308.41;
- e) Gratuity/service pay ksh.29,274.00;
- f) Pay for rest days ksh.99,211.84;
- g) Work during public holidays ksh.19,539.00;
- h) Overtime pay ksh.72,838.83;

- i) Compensation Ksh.121,393.80;
- j) Costs and
- k) Certificate of service.

The claimant testified in support of his claims. That he had worked well with the 1<sup>st</sup> respondent until there was a new head teacher in the 1<sup>st</sup> respondent Mr Wambugu who dismissed him from his employment.

The claimant also testified that in the year 2013 the head teacher beat up his child causing injury and he made a report to the chief and for that period he was not paid his wages for 9 months all being Ksh.24,000. He demanded for his due and unpaid wages which led to the dismissal from employment.

#### Defence

The defence is that the claimant was employed by the 1<sup>st</sup> respondent in August, 2010. He took his annual leave each year; before employment was terminated the claimant was given an opportunity for hearing for the respondent to be able to address his work concerns and regarding his conduct which then led to termination of employment for lawful cause. The claims made were without justification. The claims made should be dismissed with costs.

The respondent filed a list of documents.

John Kimani testified that he is head teacher to the 1<sup>st</sup> respondent and previously Mr Julius Nderitu was the head teacher but died in July, 2018. The witness adopted the statement of the deceased head teacher Mr Nderitu. This statement is not on file.

Part of the work records filed by the respondent with regard to the claimant is a letter of reply to the demand notice issued by the claimant's advocate. The respondent notes that the claimant was an employee earning ksh.2,500 per month as a security guard. That the claimant had been directed to serve the respondent with his written terms and conditions of employment and that he failed to comply.

The requirement by the respondent to the claimant to supply his employment terms and conditions is contrary to the law. Section 10 and 74 of the Employment Act, 2007 places the duty upon the employer to keep work records and to submit them with the court once suit is filed. There cannot be a reversed role in this duty. The employer remains the custodian of work records.

On the confirmation by the respondent that the claimant was an employee, and that he was paid ksh.2,500 per month, there was underpayment of wages for a security guard which is contrary to the Wage orders and guidelines setting out the minimum wage due.

For the period the claimant was retained in the employment of the respondent, August, 2010 to December, 2014 the underpayments shall be assessed and awarded.

By letter dated 21<sup>st</sup> October, 2014 the claimant was accused of desertion of duty by the respondent. That he had not been attending work *for a couple of weeks*. This communication is copied to the labour officer, Nakuru and the TAC Turot, Dundori Division.

The claimant denied ever receiving this communication. That it was not served upon him at all. However, the principle that the employer is the custodian of work records stands in all respects. The claimant testified that at some point of his employment his child was beaten by the head teacher and got injured and was forced to report the matter to the chief. I take it he took time to attend to his child and go to the chief. Where the claimant alleges that he was at work every day, the subject letter was copied to the labour officer, he too was served. To desert duty amounts to gross misconduct under the provisions of section 44 of the Employment Act, 2007. The claimant was issued with notice in this regard and there is no evidence of his response thereof. The resulting summary dismissal is found justified.

There is no response by the claimant as to his whereabouts vide notice dated 21<sup>st</sup> October, 2014.

There is also letter dated 24<sup>th</sup> June, 2014 To Whom It May Concern.

The letter emanated from the head teacher on the basis that there was a management meeting which directed that the claimant should clock in and out of work at 6pm and 7am. That he should report any incidents to the SMC chairman and his wages to be paid per government allocation.

There is however no record of work attendance filed.

The claimant testified that he would work from 7pm to 6am and sometimes would have to wait until 7am to do the handing over. The period of work with certainty is therefore 6pm to 6am. On the applicable wage orders, the overtime hours worked daily shall be assessed and awarded.

On the claims made, notice pay and compensation are not due.

The claims for underpayment shall be assessed together with the due house allowances from August, 2010 to December, 2014.

There is no record that the claimant took his annual leave or rest days each week. Even where the claimant deserted duty and which necessitated issuance of the notice dated 21<sup>st</sup> October, 2014 his annual leave and rest days record is due under the provisions of section 28 and 27 of the Employment Act, 2007. These shall be assessed and awarded.

Work during public holidays and overtime should be compensated. There are no records of compensation.

Certificate of service should issue for the period of employment.

**Accordingly, judgement is hereby entered for the claimant against the respondent.**

**(1) The matter is referred to the County labour Officer, Nakuru for the assessment of the terminal dues for the period of August, 2010 to December, 2014;**

- a) Underpayments inclusive of house allowance due;**
- b) Pay for leave days;**
- c) Pay for rest days;**
- d) Pay for overtime for work at 12 hours for 7 days each week;**
- e) Pay for work during public holidays;**

**(2) The claimant shall be issued with a certificate of service; and**

**(3) Costs awarded to the claimant.**

**(4) Mention in 30 days for the County Labour Officer report.**

Delivered at Nakuru this 27<sup>th</sup> day of February, 2020.

**M. MBARU**

**JUDGE**

In the presence of: .....