



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR
RELATIONS COURT AT MOMBASA
CAUSE NUMBER 850 OF 2016

BETWEEN

DANIEL M. KASEKYA..... CLAIMANT

VERSUS

BOARD OF GOVERNORS,

ST AUGUSTINE PREPARATORY SCHOOL..... RESPONDENT

Rika J

Court Assistant: Benjamin Kombe

Mutisya & Associates, Advocates for the Claimant

Wameyo Onyango & Associates, Advocates, for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 2nd November 2016. He avers, he was employed by the Respondent as School Bus Driver, on 1st May 2008. His contract was terminated by the Respondent on 3rd September 2014. He avers, termination was unfair and unlawful. He was not issued notice of, or reasons for, termination. His salary was Kshs. 10,827. He prays the Court to grant Judgment against the Respondent for:-

- a. 2 months' salary in lieu of notice at Kshs. 21,654.
- b. Pro-rata leave for 2014 of 15 days at Kshs. 5,413.
- c. Underpayment of salary by Kshs. 7,763 for 75 months at Kshs. 582,225.
- d. Overtime of 5 hours a day at Kshs. 98,955.
- e. Unpaid salary increments at Kshs. 76,000.
- f. 12 months' salary in compensation for unfair termination at Kshs. 129,924.

Total...Kshs. 914,171.

- g. Declaration that termination was unfair.
- h. Certificate of Service to issue.
- i. Costs.

j. Interest.

2. The Respondent filed its Statement of Response on 25th July 2017. It is the position of the Respondent that the Claimant abused Respondent's trust and confidence. He fraudulently used the school bus for his personal gain. When confronted by the Respondent, he disappeared, and did not return to the School. The Respondent prays the Court to dismiss the Claim with costs.

3. Hearing took place before Hon. Justice Linnet Ndolo, E&LC Court Mombasa. The Claimant gave evidence and rested his case, on 5th November 2018. School Principal Sarah Kessi, gave evidence for the Respondent on 24th July 2019, closing the hearing. The Trial Judge recused herself, with the concurrence of the Parties, on the ground that she worked with an Organization associated with one of the Parties, in her previous career as an Advocate. It was agreed that the record is submitted to the undersigned Judge for Judgment.

4. The Claimant adopted his Pleadings, Documents and Witness Statement, in his oral evidence. He did not desert as alleged by the Respondent. He was locked out. He was not issued any suspension letter. He was issued a warning letter in August 2014, alleging he had misused the school bus. It was not true that he did so. He had been assigned duty to pick School Children from Kitale. He confirmed that his last salary was Kshs. 10,827 monthly.

5. The Claimant gave evidence in the absence of the Respondent and its Advocates, and was not cross-examined.

6. Kessi confirmed that the Claimant was employed by the Respondent as a School Bus Driver. She was the School Principal. He would carry excess Students at a fee, contrary to the instructions of the Principal. There were complaints from Parents and Board Members. The Claimant was issued a letter to show cause, why disciplinary action should not be taken against him. He read the letter and threw it on the table. Suspension was indefinite. He was required to be within the School during suspension. He turned his phone off and was unreachable. The Principal sought the advice of the Labour Office. She was told to post suspension letter through the post. She did so. She did not see the Claimant again at the School. He was granted off-duty days and annual leave days. He signed annual leave register.

7. Cross-examined, the Principal told the Court the Claimant had been warned from 2012. The School thought he would mend, but he did not. He threw the letter to show cause on the table. He was last at work, on 16th June 2014. The Respondent continued to pay his salary while waiting for him to show up, for 3 months. It is not true that he returned and was locked out. Suspension was brought to an end in 2015 when the School employed another Driver. He was on half salary from September 2014. The Principal was unable to say when the School stopped paying salary altogether. Redirected, she told the Court that the Claimant received the letter to show cause in person. He did not respond.

The Court Finds:-

8. The Claimant was employed by the Respondent as a School Bus Driver, from 1st May 2008 to 3rd September 2014.

9. His last salary was Kshs. 10,827 monthly.

10. He was suspended indefinitely, through a letter from the Respondent dated 3rd September 2014, ostensibly to allow the Respondent thoroughly investigate alleged misuse by the Claimant, of the School Bus.

11. There is nothing on record to show that investigation followed, and what was established. The complaints against the Claimant, made by Parents, are contained in a letter date 17th January 2011, long before the event of 2014.

12. The show cause letter of 16th June 2014 refers to an accident at Taru, when the Claimant is alleged to have driven the bus carelessly, causing it to overturn, and killing a passenger in the process. It was alleged the Claimant ran away, leaving the overturned bus unattended.

13. These were serious allegation, which ought however, to have been supported by evidence. There was nothing such as an extract from a Police Occurrence Book showing that indeed the Claimant was involved in, or caused, such a serious accident. No police abstract giving details of the accident has been exhibited. No charges in a competent Court, were preferred against the Claimant for causing death by dangerous driving. The Respondent was content to stand by bare allegation.

14. The allegation were never reduced to a specific employment offence, presented to the Claimant and tested through a disciplinary hearing at the workplace. Instead, the Respondent posted a letter of indefinite suspension to the Claimant. Suspension was never lifted. No letter of termination ever issued.

15. Termination was unfair for want of fair procedure and valid reason.

16. The Claimant has not established that he was underpaid salary. He claims Kshs. 7,763 for 75 months. This apparently, is a period of approximately 6 years of employment. He did not supply the Court with Wage Orders showing that he was entitled to a salary of Kshs. 18,590 for the whole period worked. He filed a Legal Notice on Wage Amendment Order, dated 20th May 2015. He in his own evidence states he left employment on 3rd September 2014. The Legal Notice of 20th May 2015 did not apply to the Claimant. It would certainly not apply to the period the Claimant worked from 2008. The prayer for underpayment of salary is rejected.

17. There is absolutely nothing to support the prayers for overtime pay and salary increments. These prayers are rejected.

18. There are records to show the Claimant took annual leave. He has not established the prayer for pro-rata leave of 15 days.

19. ***He is granted the prayer for notice at Kshs. 10,827.***

20. He had worked for approximately 6 years. He had warnings in his file. He is recorded to have conceded to allegations of driving improperly some time in 2012, and asked for forgiveness. He was not a model Employee. It had also been alleged in the past, on 17th January 2011 to be precise, that the Claimant had been seen always dropping a lady “with a short skirt, at Tudor stage.” He was alleged to carry School Boys from Khamisi High School, an Institution unrelated to the Respondent. There were serial accusations against the Claimant, about the manner he discharged his role. Perhaps even the last accusations against him, if properly investigated, established, and the Claimant given a disciplinary hearing, would have resulted in justifiable disciplinary sanction against the Claimant. Given these apparent disciplinary lapses, it is not likely he would have gone on working with the Respondent for many more years. There were too many pointers in Claimant’s employment record that sooner or later, his relationship with the Respondent would come to a premature end. He certainly appears to have set the stage, through his disciplinary record, for the unceremonious exit from the Respondent School.

21. ***He is allowed equivalent of 3 months’ salary in compensation for unfair termination at Kshs. 32,481.***

22. ***Certificate of Service to issue.***

23. ***No order on the costs and interest.***

IN SUM, IT IS ORDERED:-

a. Termination was unfair.

b. The Respondent shall pay to the Claimant, notice at Kshs. 10,827 and compensation at Kshs. 32,481- total Kshs. 43,308.

c. Certificate of Service to issue.

d. No order on the costs and interest.

Dated and delivered at Mombasa this 21st day of February 2020.

James Rika

Judge