



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CASE NO. 384 OF 2017

(Before Hon. Justice Mathews N. Nduma)

JAFRED OMUKUNGA MUSA.....CLAIMANT

VERSUS

THE MANAGER, KAKAMEGA HILL JUNIOUR SCHOOL.....RESPONDENT

JUDGMENT

1. The suit was filed on 12th September 2017 praying for orders that:

- (a) Termination of the employment of the claimant on account of redundancy was unlawful and unfair and the claimant be compensated accordingly.
- (b) Payment of terminal benefits to wit; severance pay; in lieu of leave days not taken; in lieu of one month notice; payment of house allowance and commuter allowance.
- (c) Provision of certificate of service.
- (d) Costs and interest.

2. The claimant (CW1) testified that he was employed by the respondent as a school driver in February 2007 but was not issued a letter of appointment.

3. In September 2015, the respondent asked the claimant to take a break until further notice but continued to receive a salary up to the month of January 2016.

4. The claimant testified further that when he went to enquire about his fate from the respondent in February 2016, he was issued a letter back-dated to September 2015, in which the claimant's employment was terminated on account of redundancy.

5. The claimant did not produce the alleged letter. The claimant however produced a letter written by his advocates K.N. Wesutsa and Company Advocates to the respondent on 26th July 2017 in which the advocate stated that the claimant was stopped from working in September 2015 but had not received any communication in writing from the respondent about his fate. The advocate demanded the claimant be issued with written reasons for termination; payment of terminal benefits and he be issued with certificate of service.

6. The respondent's advocates J.J. Mukavale responded to the said letter on 8th May 2017 and requested to be afforded 30 days to get information to respond to the same. No further correspondence was availed in court by the parties.

7. The claimant produced a certificate of service dated 22nd October 2015, in which the respondent acknowledges that the claimant was their employee from February 2008 up to September 2015. That the claimant had served diligently as a driver and that he was honest and disciplined employee.

8. The claimant produced a pay slip for January 2015 which indicated that he earned a gross salary of Kshs. 13,305.

9. The claimant insisted under cross examination that he was simply asked to stay at home until further notice in September 2015 and was

subsequently declared redundant and given a back dated certificate of service.

10. RW1 Eija Koech testified that he was the manager Kakamega Hill School. He testified that he knew the claimant well since he worked with him. That the claimant started working for the school as a bus driver in the year 2007. That in the year 2015, the school started to experience fuel losses in two buses, one driven by the claimant and another by one Jackson Namayi which could not be accounted for.

11. That the two employees were given warning letters not to carry any jericans in their buses and stop siphoning diesel.

12. That the fuel loss did not stop and a letter of suspension was written to the drivers suspending them for three months to enable investigations to be carried out. The suspension started on 30th September 2015 up to 30th December 2015.

13. On 22nd October 2015, before the expiry of suspension period, the claimant came to the school and asked for a letter of recommendation to get another job and a letter was written for him dated 22nd October 2015. The claimant was then served with a letter to show cause dated 17th December 2015. The claimant responded to the show cause letter and was invited to a disciplinary hearing. That the claimant never attended the disciplinary hearing.

14. That the claimant received full salary during the period of suspension up to December 2015. In January 2015, the respondent received reliable information that the claimant was working as a driver at Jabster Academy and the respondent stopped payments to his account.

15. RW1 denied that the claimant was summarily dismissed from work but that the claimant absconded work and failed to come for a disciplinary hearing. That the suit lacks merit and it be dismissed with costs.

Determination

16. The issues for determination are:

(a) Whether the claimant was declared redundant as alleged or he failed to appear for a disciplinary hearing and moved on to another employment.

(b) Whether the claimant is entitled to the reliefs sought.

17. The claimant has the onus of proving that he was declared redundant by the respondent and not paid terminal benefits in terms of *Sections 107 and 108 of the Evidence Act, Cap 80 laws of Kenya* on a balance of probabilities.

18. The claimant did not produce any letter of termination of employment but instead produced a letter of recommendation given to him by the respondent dated 22nd October 2015. The testimony by RW1 is that at the time, the claimant was serving three months suspension pending investigations into theft of fuel from the bus the claimant was driving. That the claimant was on full pay until December 2015.

19. That the claimant was served a notice to show cause and was invited to a disciplinary hearing to which he did not attend but moved on to a new employment as a driver at another school.

20. The claimant has in the court's considered view failed to show on a balance of probabilities that he was declared redundant and/or his employment was terminated by the respondent. The allegations by the claimant in this respect lack merit and the court finds that the claimant failed to face a disciplinary hearing and moved on to new employment. Accordingly, the claimant is not entitled to any compensation for the alleged unlawful and unfair termination of employment. The claimant is also not entitled to payment in lieu of one month notice.

21. The claimant did not place any correspondence before court showing that he was owed any leave days and had not been paid in lieu of leave days not taken. Similarly, the claimant failed to prove that he was owed any house and commuter allowance by the respondent by the time he left his employment willingly.

22. The claimant is not owed any severance pay because he was not declared redundant. The claimant received a certificate of service from the respondent dated 22nd October 2015 which enabled him to get new employment.

23. Accordingly, the suit by the claimant lacks merit in its entirety. RW1 succeeded in rebutting the testimony by the claimant in all material respects. RW1 was a credible witness and the court believed his testimony regarding the manner in which the claimant left employment.

24. The claimant's case is dismissed in its entirety. The court deems this an appropriate case for each party to meet their own costs of the suit.

Judgment Dated, Signed and delivered this 20th day of February, 2020

Mathews N. Nduma

Judge

Appearances

Mr. Wesutsa for Claimant.

Mr. Indimuli for Respondent.

Chrispo – Court Clerk