



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT MALINDI

CAUSE NO 47 OF 2018

GODHANA SAID OMAR.....CLAIMANT

VS

BOARD OF GOVERNORS WIYONI SECONDARY SCHOOL.....RESPONDENT

JUDGMENT

Introduction

1. This is an employment dispute between Godhana Said Omar and Board of Governors Wiyoni Secondary School.
2. The Claimant filed his Memorandum of Claim on 30th April 2018 to which the Respondent responded on 11th March 2019. The Claimant then filed a Reply to the Respondent's Response on 25th April 2019.
3. The matter came up for hearing on 14th October 2019, when the Claimant testified on his own behalf. The Principal of the School, Rita Kofa Balaghar testified for the Respondent.
4. The parties subsequently filed written submissions.

The Claimant's Case

5. The Claimant states that he was employed by the Respondent as a night security personnel on 1st March 2014. He earned a basic monthly salary of Kshs. 8,900.
6. On 28th August 2017, the Claimant was issued with a show cause letter on allegations of repeated absenteeism. He was required to respond within seven (7) days.
7. The Claimant states that prior to expiry of the 7 days within which he was to respond to the show cause letter, he was on 1st September 2017, summoned and notified that his services were no longer required. He was then summarily dismissed.
8. The Claimant claims that he was not given a chance to defend himself. He adds that the allegations that he repeatedly absented himself from work were false and driven by malice.
9. The Claimant further claims that he was not paid house allowance nor was he provided with accommodation in the alternative. He adds that he was underpaid and that he worked for 12 hours without overtime compensation.
10. The Claimant goes on to state that he was not allowed to proceed on his off days and that he worked on public holidays without compensation.
11. Finally, the Claimant avers that he did not go on leave and was not paid in lieu thereof.
12. The Claimant particularises his claim as follows:

a. Underpayment.....Kshs. 205,097.50

b. House allowance	75,563.07
c. Overtime.....	708,645.60
d. Holiday pay.....	40,088.60
e. Annual leave.....	40,656.98
f. Rest day pay	193,374.40
g. Notice pay.....	16,584.03
h. 12 months' salary in compensation.....	199,008.42
i. Certificate of service	
j. Costs plus interest	

The Respondent's Case

13. In its Response dated 8th March 2019 and filed in court on 11th March 2019, the Respondent states that the Claimant had failed to discharge his duties diligently, was uncooperative, rude and unbearable.

14. The Respondent adds that following several complaints by staff, teachers, pupils and parents, the Claimant had been given various verbal warnings.

15. The Respondent points out that the Claimant was duly issued with a notice to show cause dated 28th August 2017, to which he responded vide his letter dated 2nd September 2017. He was subsequently invited to appear before the Board on 19th September 2017, by letter dated 12th September 2017.

16. The Respondent avers that on 19th September 2017, the Claimant appeared before the Board and a hearing was conducted. The Claimant was asked to return for his verdict on 25th September 2017.

17. The Respondent states that following the decision of the Board, the Claimant was issued with a warning letter which he tore into pieces. The Claimant then left the Respondent's premises and had not returned.

18. In response to the claims related to underpayment, the Respondent states that the Claimant was offered the job of security guard, with all terms and conditions clearly set out. The Respondent maintains that by accepting the job, the Claimant was bound by all the terms thereof. The Respondent states that the Claimant was duly paid his house allowance as evidenced by his pay slip.

19. The Respondent denies that the Claimant worked overtime and states that the Claimant used to take his annual leave during school holidays.

Findings and Determination

20. There are two (2) issues for determination in this case:

- a. Whether the Claimant has proved a case of unlawful termination of employment;
- b. Whether the Claimant is entitled to the remedies sought.

Unlawful Termination?

21. In response to the Claimant's claim that his employment was unlawfully terminated, the Respondent states that the Claimant deserted duty after declining to receive a warning letter for unauthorised absenteeism.

22. From the record, the charge of absenteeism had been discussed and a disciplinary action in the form of a written warning taken. This is therefore not what is before the Court in this claim. The charge in this claim is desertion of duty.

23. By definition, desertion connotes an intention on the part of the employee not to return to work. In the final submissions filed on behalf of the Claimant on 28th October 2018, reference was made to the South African case of *Seabolo v Belgravia Hotel (1997) 6 BLLR 829 (CCMA)* where the following was stated:-

“.....desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning or, having left his or her post, subsequently formulates the intention not to return. On the

other hand.....an employer may deduce the intention of not returning from the facts of the case and should demonstrate the same. The facts may include lack of communication from the employee, duration of absence and attempts made to reach out or establish the whereabouts of the employee. Show cause notice to explain the absence may also be a factor to consider.”

24. An employer stating that an employee has deserted duty must therefore demonstrate that notice has been issued to the employee that he is deemed to have deserted. In its decision in *Gerald Maku Mwangi v Njuca Consolidated Co. Ltd [2018] eKLR* this Court held that an employee accused of desertion of duty ought to be issued with a notice to show cause why they should not be dismissed on this ground.

25. Discerning from the evidence on record, the Respondent did not take any action to follow up the Claimant after he left his place of work. The allegation that the Claimant deserted work was therefore not supported by any evidence.

26. In the result, the Claimant’s testimony that his employment was unlawfully terminated was uncontroverted. The Claimant is therefore entitled to compensation for unlawful termination of employment.

Remedies

27. I consequently award the Claimant six (6) months’ in compensation. In granting this award, I have taken into account the Claimant’s length of service plus the Respondent’s failure to observe the law in bringing the employment relationship to an end.

28. I further award the Claimant one (1) month’s salary in lieu of notice.

29. Regarding the claim for leave pay, the Respondent filed a letter dated 9th April 2015 by which the Claimant had applied for annual leave to run from 10th April to 30th April. The Claimant admitted having written this letter. He told the Court that he was claiming leave pay on account of 2014, 2016 and 2017.

30. If the Claimant requested and was allowed to go on leave in 2015, there was no justification for the claim that he had not taken his leave for the previous years. The claim for leave pay for 2014 is therefore without basis.

31. There were however no records to show that the Claimant had exhausted his leave for 2016 and 2017. I will therefore allow the claim for leave pay to this extent only.

32. From the Claimant’s pay slip filed by the Respondent, the Claimant was paid house allowance in the sum of Kshs. 1,800. The claim for house allowance is therefore without basis and is dismissed.

33. The claims for underpayment, overtime, holiday pay and rest day pay being in the nature of special damages ought to have been specifically proved. This did not happen and they therefore fail.

34. Finally, I enter judgment in favour of the Claimant as follows:

- a. 6 months’ salary in compensation.....Kshs. 67,710
- b. 1 month’s salary in lieu of notice.....11,285
- c. Leave pay for 2016 (11,285/30x21).....7,900
- d. Prorata leave for 2017 (11,285/30x1.75x8).....5,266
- Total.....92,161**

35. This amount will attract interest at court rates from the date of judgment until payment in full.

36. The Claimant is also entitled to a certificate of service plus costs of the case.

37. Orders accordingly.

DATED SIGNED AND DELIVERED AT MALINDI THIS 10TH DAY OF FEBRUARY 2020

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JUDGE

Appearance:

Mr. Odhiambo for the Claimant

Miss Njagi for the Respondent