



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 598 OF 2015

MUSYOKA MUIACLAIMANT

v

BOARD OF GOVERNORS, MACHAKOS

GIRLS HIGH SCHOOL.....RESPONDENT

JUDGMENT

1. This Cause was heard on 21 March 2019, 26 June 2019 and on 13 November 2019. Musyoka Muia (Claimant) and the Principal/Secretary, Board of Governors, Machakos Girls High School (Respondent) testified.

2. The Claimant filed his submissions on 11 December 2019 while the Respondent filed its submissions on 16 January 2020.

3. The Court has considered the pleadings, evidence and submissions and adopted the Issue as set out in the Claimant's submissions (the Court also notes the parties failed to file *Agreed Issues* as directed, but filed separate Issues).

Employment relationship

4. The Claimant testified that he was employed on 17 December 2001 but was only issued with a formal contract on 21 December 2011 showing commencement of employment relationship as 1 January 2012.

5. The Claimant also testified that he used to sign a muster roll

6. The Respondent's witness took charge of the school 2 years after the Claimant had separated with the Respondent. She stated that she had been briefed by the previous Principal. She produced copies of Claimant's appointment letter dated 21 December 2011, *Provisional Member Statement of Account* from National Social Security Fund and NHIF Member Data summary to disprove the contention that the Claimant was employed in 2001.

7. The appointment letter shows the employment commenced on 1 January 2012. The Statement from the National Social Security Fund shows the Claimant was employed on 1 May 2007 by Lichi Security Systems Ltd while the NHIF Data Summary indicates that the Claimant was in the employment of the Respondent from 2013 to 2015.

8. The Court has secondary records from official sources which may shed light on the Claimant's employment history. The National Social Security Fund Statement indicates that the Claimant was employed by a security firm in 2007.

9. Despite the documentation, the Claimant asserted that he served the Respondent continuously from 2001.

10. The records from the National Social Security Fund suggest otherwise. It is not possible that the Claimant was serving two employers from 2007, Lichi Security Systems Ltd and the Respondent.

11. Based on the records, the Court finds that it is more probable that the relationship between the Claimant and the Respondent formally commenced on 1 January 2012.

Unfair termination of employment

12. The Claimant's case was that his employment was terminated on 9 October 2014 without notice or a hearing.
13. According to the Claimant, on that day the Principal summoned him and 2 other cooks and asked them to explain why they had left work early the previous day.
14. In the Claimant's narration, the other cooks were allowed to continue working and were deployed to other sections while he was instructed to go home because his services were no longer required.
15. The Respondent's witness on her part denied that the Claimant was dismissed. She stated that the Claimant was asked on 9 October 2014 to show-cause why he left work early without permission (copy produced together with a delivery book) with a request to respond immediately, but instead of responding, the Claimant left and did not report back to work.
16. According to the witness, the Claimant made a report to the Local Labour officer but failed to attend meetings at the Labour Officer (copy of the letter from Labour Office indicating Claimant snubbed the meetings was produced). The Claimant also caused a Union to write to the Respondent but there was no follow up.
17. The Claimant testified he was not issued with a show-cause. During cross-examination, he admitted receiving the show cause. He did not explain why he did not respond to the show-cause. There was equally no coherent explanation of why he did not follow up with the Labour Office after lodging a complaint with the office.
18. Under section 47(5) of the Employment Act, 2007, the Claimant had the burden of demonstrating that there was unfair termination of employment, at the first instance.
19. In the view of the Court, the Claimant did not discharge that burden. It is apparent he did not respond to a show-cause nor resume duty after getting the show-cause. He repudiated the contract.
20. Compensation and pay in lieu of notice are therefore not available remedies.

Underpayments

21. Underpayment of wages may occur where an employer pays below the contractually agreed wage, or where the wage paid is below the prescribed minimum wage.
22. The Claimant anchored his claim on prescribed minimum wages and more specifically the Regulation of Wages (General)(Amendment) Order, 2013, Legal Notice No. 197 of 2013.
23. The said Order became effective from 1 May 2013, and cannot support claims for underpayments for the 120 months as pleaded in paragraph 10(iii) of the Statement of Claim. The head of the claim was also in the nature of special damages and was not proved to the required standard).

Leave

24. Annual leave of at least 21 days with full pay is a statutory entitlement.
25. The Claimant sought Kshs 51,692/- purportedly being accrued leave over 8 years of employment.
26. Section 28(4) of the Employment Act, 2007 circumscribes the number of leave days which may be carried forward and most of the leave days claimed by the Claimant are caught by that provision.
27. It is also not lost to the Court that public schools in Kenya have holidays during the months of April, August and December. It is inconceivable that the Claimant, a cook, stayed behind in school during the holidays. However, this observation does not mean school authorities should not keep proper leave records.
28. For the above reasons, the Court declines to make any award on account of accrued leave.

Service gratuity

29. The Claimant sought Kshs 17,250/- as service gratuity. If by service gratuity, the Claimant meant *service pay* within the context of section 35(5) & (6) of the Employment Act, he is not eligible for the same as there is evidence before the Court that he was a registered contributor to and contributed towards the National Social Security Fund.

Certificate of Service

30. A certificate of service is a statutory entitlement and the Respondent should issue one to the Claimant within 21 days.

Conclusion and Orders

31. From the foregoing, and save for an order to the Respondent to issue a certificate of service to the Claimant within 21 days, the Court finds no merit in the Statement of Claim and orders it dismissed with no order on costs.

Delivered, dated and signed in Nairobi on this 7th day of February 2020.

Radido Stephen

Judge

Appearances

For Claimant Mr. Nyabena instructed by Nyabena Nyakundi & Co. Advocates

For Respondent Ms. Kamende instructed by Kamende D.C. & Co. Advocates

Court Assistant Lindsey/Judy Maina