



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA**

**AT NYERI**

**CAUSE NO. 191 OF 2018**

**JAMES WAIRI MWANGI.....CLAIMANT**

**VERSUS**

**BOARD OF MANAGEMENT KIRIAINI GIRLS**

**SECONDARY SCHOOL.....RESPONDENT**

**JUDGMENT**

1. The Claimant sued the Respondent for the alleged wrongful death of the deceased employee and failure to pay his terminal benefits. The Claimant averred that he was employed by the Respondent as a cook. He averred that his services were unprocedurally and unlawfully terminated on 30<sup>th</sup> September 2016 terminated and his dues remained unpaid to date. He averred that he was not given notice or a reason for the dismissal; dismissal without a fair hearing or due process; failure to abide by the rules of natural justice and being unfair in the circumstances. The Claimant sought a declaration that the termination was unfair, illegal and unlawful. He sought one month's pay in lieu of notice – Kshs. 12,335/-, 12 month's salary as compensation for unlawful termination – Kshs. 148,020/-, leave pay due – Kshs. 156,559/-, salary arrears – Kshs. 369,377/-, commuter allowance – Kshs. 259,200/-, travelling and leave allowance – Kshs. 44,000/-, overtime of 21 hours each week for 396 weeks– Kshs. 512,889/-, rest days – Kshs. 325,643/-, public holidays – Kshs. 199,004/- all making a grand total of Kshs. 2,027,027/-. He also sought a certificate of service, costs of the suit plus interest on the sums claimed.

2. The Respondent averred in its defence that the Claimant was not dismissed unlawfully but voluntarily resigned on medical grounds. The Respondent averred that cooks at the institution work on a schedule and have rest days within the week. It was averred that when one works for 2 nights on night shift he/she goes for a day off and when one works for 10 days daytime they go for a day off. The Respondent averred that the workers work according to the school calendar and therefore they did not come to work during mid-term breaks and school holidays. The Respondent averred that mid-term breaks were usually for 7 days thrice a year while the school holidays were 4 weeks twice a year and 8 weeks in December. The Respondent averred that the claim for rest days and overtime cannot stand in light of the foregoing. The Respondent averred that reliance on the Ministry of State for Public Service circulars was erroneous as these only applied to civil servants. The Respondent urged the dismissal of the claim with costs as the Claimant had resigned voluntarily and the claim totally misplaced.

3. The Claimant testified that he was employed in 2005 and worked as a cook until 2016 when he was told to go home as there was an investigation being undertaken on stolen sugar and maize. He stated that he was asked to collect a letter in September and did not recollect exactly when he collected the letter. He said that he found a cheque for Kshs. 54,000/-. He testified that he would report at 5.00am and work till evening and was not paid overtime. He stated that he was given one day off and never went on leave. He stated that he was not given any reason for the dismissal and that he never went on leave. He stated that he never resigned but was dismissed. In cross-examination he stated that he commenced work in 2015 and that the schedule of work was inaccurate. He testified that they would work even in school holidays by splitting firewood and arranging the firewood. He stated that he did not get a dismissal letter. He denied resigning from employment and was shown a letter in the Respondent's bundle to which he answered that it was not his letter. He stated that he was called and told to pick a letter and he was not paid. In re-examination he testified that there was no letter accompanying the cheque.

4. The Respondent called Teresia Muthoni Kiarie who testified that she was a teacher at the school and was acting Principal at the material time. She said that she has worked at the school for 28 years and knows the Claimant. She testified that there was a schedule drawn by the cateress and the cooks work per the schedule. She stated that the cooks always have breaks at mid-term and during the school holidays in April, August and December. She testified that the cooks would work from 6.00am till 8.00pm and that the Claimant was paid after resignation. She was cross-examined and she testified that the Claimant resigned in September 2016 vide a letter. She stated that he had requested to resign in July and presented the letter in September. She stated that he tendered his resignation and that thereafter the Respondent gave him terminal dues. She testified that the school had 10 cooks and they alternated. She said the school did not offer tuition which was also prohibited by Government regulations. That marked the end of oral testimony and parties were to file written submissions.

5. The Claimant submitted that he was dismissed for alleged theft of the Respondent's property, to wit, a sack of maize, sugar and tea leaves among others. The Claimant submitted that this piece of evidence was not challenged by the Respondent. The Claimant submitted that he was not given a chance before the disciplinary committee to ascertain whether the allegations were true. The Claimant submitted that in an attempt to deceive the Court the Respondent had presented a purported letter of resignation dated 30<sup>th</sup> September 2016. The Claimant disputed the authenticity of the letter and submitted that the signature on the said letter does not resemble the signature in the verifying affidavit. The Claimant submitted that the witness for the Respondent indicated that the Claimant resigned in July and gave a letter in September which cast doubt as to whether the Claimant really resigned or not. The Claimant urged the court to find so. The Claimant submitted that the Respondent was unable to explain whether the letter was acknowledged. The Claimant submitted that the Respondent after dismissing the Claimant issued him a cheque of Kshs. 54,780/- which sums the Respondent was unable to explain the purpose of. The Claimant submitted that he was entitled to the claims made in his claim. The Claimant submitted that per the circulars from the Ministry of State for Public Service, the Respondent had failed to increase the Claimant's basic salary between August 2005, July 2006 to July 2007, between 2008 and 2007 as well as payment of commuter and other allowances. The Claimant cited the case of **Kudheiha v B.O.G Ngaru**

**Girls Secondary School [2014] eKLR** where the court held that though the claimant was not an employee of the Public Service Commission her terms and conditions of service ought to have been similar to those recommended for equivalent posts in the civil service as per the applicable scheme of service with effect from the date in the circular. The Claimant submitted that he was entitled to judgment against the Respondent as prayed in the statement of claim.

6. The Respondent submitted that the Claimant was employed as a cook and voluntarily resigned from employment, paid a cheque only to surprise the Respondent with this claim. The Respondent submitted that the Claimant alleged unlawful termination by the Respondent. The Respondent submitted that there was no evidence of dismissal nor was there any proof on how the dismissal occurred. The Respondent submitted that on the contrary it had produced a letter of resignation from the Claimant dated 30<sup>th</sup> September 2016 where the Claimant cited medical grounds for the resignation. The Respondent submitted that the Claimant had pleaded that he was not paid his terminal dues but the Respondent asserted that it had produced a cheque showing the payment of the terminal dues after resignation and the Claimant admitted receipt of the sum. The Respondent submitted that the claim for unlawful dismissal fails.

7. The Claimant's claim was misplaced and full of lies. The Claimant averred that he was not paid terminal dues but in his testimony confirmed receipt of a cheque from the Respondent after 30<sup>th</sup> September 2016 the alleged date of dismissal. He said he did not know what the sum was for. In the defence filed, the Respondent produced a letter of resignation dated 30<sup>th</sup> September 2016. He disavows the letter asserting he did not resign as the signature is different from that in the verifying affidavit in the claim. The signature on the letter is however similar to the signature in the Claimant's letter of acceptance of employment and his national identity card. He attempted to mislead the court and as such his claim is unmerited only fit for dismissal with costs. Civil service circulars do not apply to private employment no matter how similar the jobs are. The decision cited by the Claimant being **Kudheiba v B.O.G Ngaru Girls Secondary School [2014] eKLR** is not the correct exposition of the law relating to terms and conditions of service. The inevitable outcome is that this suit is dismissed with costs to the Respondent.

8. This decision was rendered online in keeping with the express consent by parties to the waiver of Order 21 Rule 1 and 3 of the Civil Procedure Rules and in line with the Chief Justice's Practice Directions to Mitigate COVID-19 dated 16<sup>th</sup> March 2020 and the Kenya Gazette Notice 2357 of 20<sup>th</sup> March 2020 issued in Vol. CXXII No. 50. In line with the Practice Directions of the Chief Justice and the statement made in the NCAJ address to the Nation of Kenya by the Hon. Chief Justice when the Judiciary and the other stakeholders in the administration of justice agreed to scale down operations to mitigate the effects of COVID-19, execution of the judgment is automatically stayed for 14 days.

It is so ordered.

**Dated and delivered at Nyeri this 24<sup>th</sup> day of April 2020**

**Nzioki wa Makau**

**JUDGE**