



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1356 OF 2015

PETER SHIKHOLI.....CLAIMANT

VERSUS

KEY INTERNATIONAL SCHOOL LIMITED.....RESPONDENT

JUDGMENT

1. The suit was filed on 5th August 2015 by the claimant praying for maximum compensation for unlawful termination of employment and payment of terminal benefits including one month salary in lieu of notice and payment in lieu of 63 leave days not taken. The claimant also sought provision of certificate of service; interest and costs.

2. The claimant (CW1) testified that he was employed by the respondent in July 2011 as a security officer at a monthly salary of Kshs. 9,500. That he worked continuously and diligently until August 2014 when the claimant's mother died and the claimant requested for compassionate leave to go and rest her mother. The claimant was given three days by Mr. Soondo Key on 25th August 2014 because night travel had been banned by government at the time to Kakamega County. The claimant traveled back on 28th August 2014 but they found a road traffic accident at Salga and they were delayed there until the following day the 29th August 2014 which was a Friday. The claimant arrived at Nairobi at 3.30 p.m and he was supposed to report back to work the same day. The claimant reported and was told to go back home and report on 1st September 2014.

3. The claimant reported at 9.00 am on 1st September 2014 and he was verbally told by the director himself that his employment had been terminated. The claimant testified that he was not given opportunity to be heard and was not given notice to show cause. The claimant prays for the reliefs set out in the claim stating that he was still owed 63 days annual leave. That the termination was unlawful and unfair and that he be compensated accordingly. The claimant was without a job at the time of the hearing of the case. The claimant was also not given reason for the termination.

4. The claimant produced his pay slip for April 2014 which shows a gross salary of Kshs. 9,500. The claimant was registered with NSSF and NHIF and the dues were remitted. The claimant produced a certificate of service dated 2nd September 2014. The Advocates for the claimant served a letter of demand on the respondent dated 22nd September 2014. The claimant prays to be awarded as prayed.

Defence

5. RW1 Stephen Akako testified that he was the bursar of the respondent's school. That the claimant was employed by the respondent on 27th April 2012 as a security guard. That he guarded the school during the day. That the claimant served the school until 25th August 2014. That the claimant failed to report to work on 25th August 2014 without any approval or notice to the respondent. The claimant failed to go to work for three consecutive days on 26th, 27th and 28th August 2014 without any authority of the respondent. RW1 stated that the respondent did not grant the claimant any compassionate leave as alleged or at all and that the testimony by the claimant was false.

6. That the claimant did not fill any leave forms in that regard and no such record exists. That the supervisors were not aware of the whereabouts of the claimant during that period. That the employment of the claimant was terminated lawfully for absconding duty for three consecutive days. That the claimant was employed by the respondent for a period of two (2) years and four (4) months and not for 3 years as he alleges, having commenced employment on 27th August 2012 up to the date of termination on 29th August 2014. That the claimant is entitled to 48 days leave and not 63 days leave. That the claimant had taken 41 days leave and had a balance of seven (7) days leave only.

7. That the claimant owed the respondent Kshs. 7,000 given to him as advance by the respondent which amount the respondent has used to apply to offset the claimant's outstanding seven (7) days leave.

8. That the claimant is owed no further terminal benefits and the suit be dismissed with costs.

9. RW1 produced the letter of job application by the claimant dated 23rd April 2012. The respondent prays the suit be dismissed with costs.

Determination

10. The issues for determination are:

(a) Whether the respondent had a valid reason to terminate the employment of the claimant and if the respondent followed a fair procedure.

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

11. In answer to both questions above the court has considered the testimony by CW1 vis a vis that by RW1 and notes that on the question whether the claimant was granted compassionate leave on 25th August 2014 for three (3) days to go and bury his mother, the versions by CW1 and that by RW1 are mutually destructive. CW1 states that his supervisor Soondo Key granted him verbal authority on 25th May 2014 to proceed on compassionate leave to Kakamega to go and bury his mother. That the claimant travelled on 26th May 2014, and returned on 28th May 2014 but was delayed by a road accident at Salga and arrived at work at 3.30 p.m on 29th May 2014. The respondent did not call Mr. Soondo Key nor did it contradict directly the testimony by the claimant that Mr. Soondo Key had granted the claimant compassionate leave verbally. RW1 made a general denial that the claimant was supposed to fill a leave form to proceed on compassionate leave and since he had not filled any leave, he had absconded duty and was lawfully terminated from employment. Nothing would have been easier than the respondent to call Mr. Soondo Key to refute the testimony by the claimant that indeed he went to bury his late mother between the 25th August 2014 and 28th August 2014 and had been granted authority to do so by his supervisor Mr. Soondo Key. RW1 did not deny that Mr. Soondo Key was the supervisor of the claimant and the court was not told why he could not come to court to testify in this matter. Furthermore, the testimony by the claimant that he was not given a show cause letter or any hearing at all before the termination was not refuted by RW1. The claimant was simply sent away verbally and was not given letter of termination with reasons for the decision. The claimant was not given notice nor was he paid in lieu of notice. The claimant was given a certificate of service later dated 2nd September 2014.

12. The court finds that the respondent violated *Sections 36, 41, 43 and 45 of the Employment Act, 2007* for terminating the employment of the claimant for no valid reason and without following a fair procedure.

13. The claimant had proved on a balance of probabilities that termination of his employment was wrongful and unfair in terms of *Section 47(5) of the Employment Act, 2007 read with Sections 107 and 108 of the Evidence Act, cap 80 laws of Kenya.*

14. The claimant is entitled to compensation in terms of *section 49(1) (c) and (4) of the Employment Act.* In this regard the claimant had served the respondent for a period of 2 years and 4 months. The respondent acted callously by terminating the employment of the claimant immediately upon the death of his mother. This was inhumane conduct on the part of the respondent. The claimant lost his job without notice and without a hearing. The claimant did not in the court's finding contribute to the termination. The claimant was not paid any terminal benefits nor was he compensated for the sudden job loss. The claimant suffered loss and damage. The claimant lost prospects of career growth and development and was still unemployed at the time of the hearing of the case. The court considers the timing of the termination to constitute aggravating circumstance and award the claimant the equivalent of ten (10) months salary in compensation for the unlawful and unfair termination of employment of the claimant in the sum of Kshs. 90,500. The claimant is also awarded Kshs. 9,500 in lieu of notice.

15. The claimant's payment in lieu of 7 leave days not taken was offset against the Kshs. 7,000 advance given to him by the respondent and was not outstanding as per the testimony of RW1.

16. In the final analysis judgment is entered in favour of the claimant against the respondent as follows:

(a) Kshs. 90,500 in compensation for the unlawful termination of employment.

(c) Kshs. 9,500 in lieu of one month notice.

Total Kshs 100,000.

(c) Interest at court rates from date of judgment till payment in full.

(d) Costs of the suit.

Dated, Signed and delivered in Nairobi this 16th day of April, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court of operations due the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this judgment has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

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Judge

Appearances

M/S Ligwop for the Claimant

M/S Wansane for Respondent.

Mamo – Court clerk.