



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO.87 OF 2016

(Before Hon. Justice Mathews N. Nduma)

SAMWEL K. KANGOGO.....CLAIMANT

VERSUS

BHAYANI NURSERY & PRIMARY SCHOOL.....RESPONDENT

JUDGMENT

1. The suit is premised on an amended statement of claim filed on 25/9/2017 in which the Claimant prays for payment of terminal benefits for the years worked from 15th May 1986 to October 2015 in the sum of Kshs. 488,915, overtime not paid during that period in the sum of Kshs. 2,019,513 and costs of the suit.

2. The claimant testified under oath and adopted written statement dated 7th December 2015 as his evidence in chief. CW1 stated that he was employed by the respondent school as a watchman on 15th May 1986 at a monthly salary of Kshs.1,000. That the salary was improved gradually and was paid Kshs. 13,411 as at 15th October 2015 when the employer asked him to retire since he had passed retirement age.

3. The claimant produced a letter dated 15th October 2015 titled “your resignation” dated 15/10/2015. The letter was written by N. R. Bhayan manager of the respondent and it reads,

‘We accept your resignation due to your personal reasons. As your last working day was 15th October 2015 all your dues have been cleared until then. Meanwhile as appreciation we give you five months’ salary which will be banked in your bank account.’

4. In Court the Claimant denied that he had voluntarily resigned and stated that Mr. Bhayan told him that his work had come to an end because he was born in 1947. That he was told to retire but did not get letter of termination.

5. CW1 testified that he was paid Kshs. 45,000 as terminal benefits but had refused to take it since it was little. CW1 said that he had worked for many years from 6 pm in the evening to 6 am in the morning and was not paid overtime.

6. That he was not paid minimum wage. That he did not report the underpayments and non-payment of overtime to the Ministry of Labour until he came to court.

7. The claimant produced a pay slip dated 25/2/2015 which showed his monthly gross salary of Kshs. 13,411. The respondent paid NSSF, NHIF and PAYE on his behalf in terms of the pay slip. The claimant also produced certificate of service dated 15/10/2015.

8. The claimant prayed that he be paid gratuity, underpayment, overtime and costs.

9. Under cross examination, the claimant denied having resigned from work. CW1 also denied having received any terminal benefits. CW1 said that he was paid by cheque and money was deducted from his salary every month. Claimant also stated that he never went on leave.

10. RW1 Richard Ouma testified that he was the Principal of the respondent school. That he relied on a written statement filed on 24/6/2016 as his evidence in chief.

11. RW1 testified that the claimant spoke to Mr. Bhayan in the presence of RW1. The claimant then wrote a letter of retirement and brought it. RW1 produced the letter of resignation dated 15/10/2015 marked as ‘BS ’7’. In terms of the letter, the claimant requested to resign due to old age and health. The claimant requested to be paid his terminal benefits.

12. RW1 produced a pay slip dated 15/10/2015 showing that the claimant was paid Kshs. 79,500 vide cheque No. 002084 less Kshs. 18,944 PAYE. RW1 also produced a copy of a cheque in the sum of Kshs. 67,855 dated 15/1/2015 in favour of the claimant. RW1 also produced a bank statement showing that the cheque was deposited and cashed. RW1 testified that the amount in the cheque represented salary for days worked and notice pay.

13. RW1 stated that he was not aware that the claimant was in addition offered Kshs. 45,000 but had refused to take it.

14. RW1 stated that the respondent school was sold to new owners and Mr. Bhayan had since died. RW1 stated that the claimant requested him to write the letter for resignation for him in English which he proceeded to do.

15. RW1 stated that the claimant was given off days and someone would stand in for him when he was away since he was the only watchman for the school. RW1 stated that he was not aware if the claimant was paid service gratuity calculated at 18 days salary for each completed year of service. RW1 stated that the claimant had served 29 years. RW1 stated that the gratuity payable would be Kshs. 233,856.

16. RW1 stated that the claimant worked 12 hours daily and he was not aware if he was paid overtime.

DETERMINATION

17. The issue for determination is whether the claimant is entitled to payment of terminal benefits prayed for in the amended statement of claim.

18. The claimant testified that he was retired by the respondent on account of old age. The respondent testified that the claimant had requested the resignation to let him rest on account of age and ill health. RW1 wrote a letter of resignation for the claimant.

19. It is not in dispute that the claimant earned Ksh. 13,411 per month at the time of termination. It is also not in dispute that the claimant was paid a sum of Kshs. 79,000 less tax on 15/10/2015 upon termination of employment.

20. The claimant has not alleged in the statement of claim or in his testimony that the termination of his employment was unlawful. The claimant only sought payment of his terminal benefits.

21. The claimant did not adduce sufficient evidence to prove on a balance of probabilities that he was entitled and was not paid overtime.

22. The claimant has however satisfied the court that being a watchman who had served the respondent for a continuous period of 29 years that he was entitled to payment of terminal gratuity in terms of Regulation of wages (Protective Security services) order 1998 and in particular section 17(i) thereof which mandates an employer of a security servant including day and night watchmen to pay the employee at least 18 days salary in every completed year of service as service gratuity.

23. RW1 did not dispute the 29 years' service by the claimant to the respondent and there is no evidence before court that the respondent paid service gratuity to the claimant upon termination.

24. Accordingly the Court awards the claimant service gratuity in terms of prayer (a) of the amended statement of claim calculated at Kshs. 13,411 (Monthly salary) for 29 years of service in the sum of Kshs. 388,910.

25. RW1 testified that the sum of Kshs. 79,500 paid to the claimant was in respect of notice pay and arrear salary.

26. In the final analysis Judgment is entered in favour of the claimant as against the respondent in the sum of Kshs. 388,910 being service gratuity in respect of 29 years of service by the claimant to the respondent. The amount is payable with interest at Court rates from date of filing suit till payment in full.

27. Costs to follow the outcome.

Judgment Dated, Signed and delivered at Nairobi this 28th day of May, 2020

Mathews N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling 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.

Mathews N. Nduma

Judge

Appearances

Mr. Andiso for Claimant

Mr. Oduor for Respondent

Chrispo – Court Clerk