



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1102 OF 2014

(Originally Mwingi Principal Magistrate's Court Civil Case No. 177 of 2009)

EDWARD MATHEMBE MUSEMBA.....CLAIMANT

v

BOARD OF MANAGEMENT,

TSEIKURU SECONDARY SCHOOL.....RESPONDENT

JUDGMENT

1. This Cause was heard on 1 November 2018. The Claimant and the Respondent's Secretary and Accounts Clerk testified after which the Claimant filed submissions on 26 November 2018 (should have been filed by 16 November 2018). The Respondent filed its submissions on 13 December 2018.

2. The Court has considered the pleadings, evidence and submissions and identified the Issues in dispute as, *whether the Cause is res judicata, whether the termination of the Claimant's contract was unlawful, whether the Claimant worked overtime without compensation, whether the Claimant had accrued leave by time of separation, whether the Claimant was paid salary for November 2003, whether the Claimant was underpaid and appropriate remedies/orders.*

Res judicata

3. Section 7 of the Civil Procedure Act sets out the statutory foundation to the doctrine of *res judicata* in this jurisdiction and one of the elements is that an issue has been heard and determined with finality for the level of the Court concerned.

4. The Claimant filed Mwingi Senior Resident Magistrate's Court Civil Case No. 67 of 2005 on the same facts as herein, challenging his dismissal.

5. A copy of decree produced in Court by the Respondent show that the said suit was struck out.

6. Striking out of a suit legally is made before a hearing on the merits and therefore, *res judicata*, in the view of the Court does not arise in the circumstances.

Unlawful termination of employment

7. The Claimant's employment was terminated on 18 November 2003.

8. In terms of the legal framework in place then, an employer could terminate the employment of an employee *without cause, for a good reason or a bad reason* provided that damages equivalent to the contractually agreed notice period was paid (see Civil Appeal No. 29 of 1985, *Cyrus Nyaga Kabute v Kirinyaga County Council*).

9. The need to observe the rules of natural justice or to hear the employee before the termination was not necessary unless the contract provided otherwise (see Nakuru Civil Appeal No. 27 of 1992, *Rift Valley Textiles Ltd v Edward Onyango Oganda*).

10. In the instant case, the Claimant contended that he was entitled to be heard before the termination and that he was not afforded an opportunity to be heard, but also filed *notices/show cause* issued to him on 27 September 2001 on absenteeism and for failing to avail documents to the District Schools Auditor, and his responses thereto.

11. Again, on 22 August 2002 and 3 September 2002, the Claimant was called upon to explain in writing *absenteeism* and *insubordination* culminating in a suspension on 31 March 2003, and eventual dismissal on 18 November 2003.

12. In his submissions, the Claimant urged that the dismissal was unlawful because the Respondent did not make a report of his dismissal within 7 days to the District Labour Officer as required by the law then in place.

13. In the view of the Court the mere failure to notify the District Labour Officer of a vacancy or dismissal under the then prevailing legal framework could not vindicate the dismissal or lawfulness of the dismissal.

14. The Court is unable to find any unlawfulness in the dismissal of the Claimant.

Overtime

15. The Claimant did not prove the contractually agreed working hours or the prescribed minimum working hours in/for schools beyond which he would be entitled to payment of overtime.

16. Without contractual or evidential foundation, this head of claim was not proved to the required standard.

Accrued leave

17. The Claimant asserted that by the time of separation he had 63 accrued leave days for which he sought Kshs 18,778/-.

18. The Respondent did not produce any leave records and the Court will allow the head of claim.

Salary for November 2003

19. The Claimant's testimony that he was not paid salary up to date of dismissal was not rebutted by production of pay records, and the Court will allow the same in the sum of Kshs 6,660/-.

Underpayments

20. Underpayment of wages may arise where wages are paid below the contractually agreed rates or where the wage is below the prescribed minimum wage.

21. The Claimant anchored this head of claim on the contention that he fell under the category of *cashier* as contemplated by the *Regulation of Wages (General) Order*. He alleged underpayment of Kshs 27,383/-.

22. The Claimant was interviewed for the position of Accounts Clerk and on 6 July 1996, the Respondent resolved to employ him as an Accounts Clerk.

23. The position or occupation known as *Accounts Clerk* is not one of those listed in the *Regulation of Wages (General) Order* and it is therefore ingenious of the Claimant to equate his position to that of a *Cashier*.

24. But more importantly, the Claimant did not prove that any other *Regulation of Wages Orders* applied to him and to the Respondent, in terms of sections 43 and 44 of the Labour Institutions Act.

Appropriate remedies/orders

25. The Employment Act, 2007 was not in place at the material/relevant times in this case, and therefore the remedies therein are not applicable.

26. With the conclusion that the dismissal of the Claimant was not unlawful, the Court dismisses the reliefs accruing therefrom but still awards the Claimant

(a) Accrued leave Kshs 18,778/-

(b) Salary November 2003 Kshs 6,660/-

TOTAL Kshs 25,438/-

27. Each party to bear own costs.

Delivered, dated and signed in Nairobi on this 25th day of January 2019.

Radido Stephen

Judge

Appearances

For Claimant Mr. Muigai instructed by Musyoka & Muigai Advocates

For Respondent Mr. Ngethe instructed by Kinyua Mwaniki & Wainaina Co. Advocates

Court Assistant Lindsey