



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 1051 OF 2015

ROBERT MONGARE OGORI.....1st CLAIMANT

JOSPHAT INYANJE SHITAKWA.....2nd CLAIMANT

JONATHAN MUTUNE.....3rd CLAIMANT

WYCLIFF NGESO.....4th CLAIMANT

RONALD WAKHUNGU.....5th CLAIMANT

v

BOARD OF MANAGEMENT

UPPER HILL SCHOOL.....1st RESPONDENT

PRINCIPAL, UPPER HILL SCHOOL.....2nd RESPONDENT

JUDGMENT

1. The 5 Claimants commenced legal proceedings against the Respondents on 18 June 2015 alleging unfair termination of employment and breach of contract/statute.
2. The Respondents filed a *Memorandum of Appearance* on 6 August 2015, but did not file a Response within the prescribed time.
3. On 17 July 2017, the Court directed that the Cause proceed as an undefended Cause.
4. The Cause was heard on 15 October 2018 and 11 December 2018.
5. The 1st to 4th Respondents testified and were cross examined by the Respondents.
6. Having failed to file a Response did not lead evidence/call witnesses.
7. The Claimants filed submissions on ... while the Respondents filed their submissions on
8. The Court has considered the pleadings, evidence and **submissions** and condensed the Issues for determination as, whether the Cause is competent, whether there was breach of contract/statute, whether the termination of the employment(s) of the Claimants were unfair and appropriate remedies/orders.

Competency of the Claim

9. The 3rd Claimant admitted in cross examination that he did not swear a verifying affidavit in support of the Memorandum of Claim. He also that he did not authorise the 1st Claimant in writing to commence suit.
10. The 4th Claimant made a similar admission.

11. In the instant case, the 1st Claimant averred that he had the authority of the other Claimants to swear the verifying affidavit and that he swore it on his and their behalf.

12. The Court of Appeal in *Luke Cheruiyot & 37 others v National Oil Corporation of Kenya* (2015) eKLR citing *Kenya Oil Company Limited v Javantilal Dharamshi Gosrani* addressed a scenario similar to the one obtaining here.

13. According to the Court

The power to strike out the plaint or (counterclaim) under the Rule is not mandatory but permissive. The phrase “the court may....” in Order 1(3) and in the new Order 1(6) gives the court discretion whether or not to strike out a plaint as the court held in

14. Ultimately, the Court of Appeal allowed the suit which had been dismissed to be reinstated.

15. The Respondent did not demonstrate any injustice or prejudice occasioned to it. The Court would therefore conclude that the interest of justice tilts towards sustaining, hearing and determining the Cause on the merits.

Breach of contract/statute

Underpayments

16. Underpayment of salaries can arise as a result of payment of wages below the contractually agreed rates or below the prescribed minimum wages, whichever is applicable.

17. In contending that they were underpaid, the Claimants asserted that they were paid wages below those prescribed by Circular No. MSPS2/6/4A Vol. X (2) dated 25 June 2012.

18. The Court has looked at the Circular. It was outlining the re-alignment of the salary structure for *civil servants*. It was effective 1 July 2012.

19. The Claimants were employees of the 1st Respondent and not employees of the *Public Service Commission of Kenya*.

20. In this regard, the Court finds that they were not *civil servants* for the purposes of the Circular even if they were public officers. The Circular did not apply to them.

21. The Court also notes that the Claimants sought underpayments for period prior to 1 July 2012 (before the effective date of the Circular) but did not disclose on what account they alleged the underpayments.

Commuter allowance

22. The 1st, 2nd, 3rd and 5th Claimants sought commuter allowance. Their contracts did not provide for commuter allowance(s). If there was another document incorporating other terms and conditions of service providing for commuter allowance, the same was not produced in Court.

23. If the claim was anchored on the Circular already alluded to, the Court has already made a finding that the same was not applicable as they were not *civil servants*.

24. This head of claim was not proved.

Overtime

25. Overtime may accrue for work beyond the contractually agreed working hours or over and above the prescribed minimum weekly working hours.

26. It is the 1st Claimant who sought overtime. He was a security guard.

27. The Claimant did not draw the attention of the Court to any *Regulation of Wages Order* or for that matter any statute prescribing the working hours in the sector the 1st Respondent operated in.

28. Despite that lapse, this Court has often taken judicial notice of the fact that security guards in this country work 12 hour shifts (day and night shift).

29. Computation of overtime pay would be based on the monthly salary.

30. The 1st Claimant used a salary of Kshs 20,135/- to claim overtime from January 2011 to July 2014, but he did not disclose from what period to what period he earned the salary. The salary could not have been static (the witness statement indicated the last salary was Kshs 14,124/-).

31. Although the Court was ready to find that the 1st Claimant worked overtime, the failure to disclose salary progression over the employment period makes it impossible to compute the hours of overtime and appropriate salary to compute the exact overtime.

32. The Court declines to order any relief under this head of claim.

Medical and house allowance arrears

33. The Claimants did not disclose the basis for seeking medical allowance, and the Court finds the head of claim was not proved.

34. On house allowance, the Court notes that the appointment letter for the 5th Claimant indicated that he would be paid house allowance attached to his job group.

35. The Court will on that basis assume that the wages paid to the Claimants included an allowance to cater for housing.

Leave

36. Annual leave is circumscribed by section 28(4) of the Employment Act, 2007.

37. The section contemplates that untaken/carried forward leave must be taken within 18 months.

38. The 1st Claimant sought leave extending to 4 years before separation, the 2nd Claimant claim went 10 years prior to termination of employment, the 3rd Claimant to 3 years, the 4th Claimant to 3 years and the 5th Claimant to 2 years.

39. In consideration of the aforesaid section and without evidence that the Claimants were allowed to carry forward their leave days, the Court would have been minded to find for the Claimants for *pro rata* leave for 18 months, save that it is in the public domain that schools in Kenya close in April, August and December each year and therefore it is more probable that the Claimants took their leave.

40. All in all, the Court declines to make an award under this head, but will consider the same while awarding compensation, if there will be a finding that there was unfair termination of employment.

Unfair termination of employment

Procedural fairness

41. Section 35(1) of the Employment Act, 2007 envisage written notice of termination of employment while section 41 of the Act contemplates a hearing.

42. The Claimants were suspended from duty on 30 July 2014 after an alleged incident of theft. The suspension(s) was to enable investigations/further action by the 1st Respondent.

43. The suspension letters outlined the allegations against each of the Claimants.

44. Although the Claimants denied that they were afforded an opportunity to be heard, the termination letters (all dated 2 February 2015) show that they appeared before the Board on 29 January 2015 for hearing(s).

45. The Court is therefore satisfied that the termination of the Claimants' employment(s) were procedurally fair.

Substantive fairness

46. Apart from procedural fairness, an employer is under a burden in terms of sections 43 and 45 of the Employment Act, 2007 to not only prove the reasons for termination of employment, but that the reasons were valid and fair.

47. Unfortunately, the Respondents did not avail themselves of the opportunity to discharge that burden. Having failed to file a Response and/or lead evidence that burden remains undischarged.

48. The Court however will not ignore the effort made by the Respondents in cross examination to demonstrate that there were valid and fair reasons to dismiss the Claimants.

49. The 1st and 5th Claimants were not cross examined, and the facts asserted by him remain unrebutted.

50. The 2nd Claimant was cross examined but not on the reasons leading to the termination of employment. The cross examination zeroed in on annual leave.

51. The Respondents did not interrogate the 3rd and 4th Claimants on the reasons leading to separation.

52. The Claimants were terminated for different roles in the alleged theft. The Respondents essentially failed to prove the role of each Claimant in the theft.

53. The Court in this regard, and in consideration of the fact that the Respondents failed to discharge the statutory burden placed on them find that the termination of the employments of the Claimants were not for valid and fair reasons.

Certificate of Service

54. A certificate of service is a statutory entitlement and the Respondent should issue to each of the Claimants' appropriate certificates of service(s) within 15 days.

Conclusion and Orders

55. The Court finds and holds that

(a) there was no breach of contract/statute.

(b) the termination of the employment of the Claimants though procedurally fair were substantively unfair.

56. For the unfair termination of employment the Claimants are awarded compensation as follows

57. 1st Claimant served for about 10 years and was on a gross monthly wage of Kshs 14,124/-. He is awarded compensation equivalent of 10 months of **Kshs 141,240/-**

58. 2nd Claimant served for about 15 years and was on a gross monthly wage of Kshs 14,329/-. He is awarded compensation equivalent to 12 months wages of **Kshs 171,948/-**.

59. 3rd Claimant served for about 10 years and was earning a monthly wage of Kshs 14,274/-. He is awarded compensation equivalent of 10 months wages of **Kshs 142,740/-**.

60. 4th Claimant served for about 1 year and is awarded compensation equivalent to 1 month gross wage of **Kshs 11,370/-**.

61. 5th Claimant served for about 12 years and was earning Kshs 14,124/-. He is awarded compensation equivalent to 12 months wages of **Kshs 171,288/-**.

62. The awards have considered length of service.

63. Considering that this was an employer/employee relationship, each party to bear own costs.

Delivered, dated and signed in Nairobi on this 22nd day of February 2019.

Radido Stephen

Judge

Appearances

For Claimants Mr. Ashiruma instructed by Ashiruma & Co. Advocates

For Respondents Mr. Wanjama instructed by Wanjama & Co. Advocates

Court Assistant Lindsey/Mercy