



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CASE NO. 216 OF 2015

(Before Hon. Justice Mathews N. Nduma)

PETER OKELLO OKELLO.....CLAIMANT

VERSUS

THE CHAIRMAN B.O.G ST. LUKE'S ODIADO

SECONDARY SCHOOL.....1ST RESPONDENT

THE SECRETARY BOARD OF GOVERNORS

ST. LUKE'S ODIADO SECONDARY SCHOOL.....2ND RESPONDENT

JUDGMENT

1. The suit was filed on 1st July 2015 by the claimant seeking compensation for unlawful dismissal and payment of terminal benefits set out under paragraph 26 of the Memorandum of Claim to wit:

- (i) Two months' salary in lieu of notice (8,163x2) 16,326.
- (ii) Salary underpayments 8,164-4,000=4,163x31months -Kshs. 129,053.
- (iii) Housing Allowance – 2,000x31 months -Kshs 62,300.
- (iv) Leave pay for 2¹/₂ years – Kshs. 20,407.
- (v) Service gratuity for 31 months.
- (vi) Costs and interest.

2. The facts of the case as set out in the Memorandum of Claim and sworn testimony by the claimant is that he was employed by the respondent as a security guard on 7th September 2009. Claimant produced letter of appointment. That the claimant was made to do other duties including cooking, Messenger, Shamba boy, Cattle keeper and other school chores. The claimant requested the respondent to review those duties but was accused of insubordination by a letter dated 23rd January 2012 and suspended by a letter dated 25th January 2012. The claimant complained to the Education Officer Samia who wrote a letter to the 2nd Respondent on 16th February 2012 but the letter was ignored. Claimant reported matter to County Labour office Busia who wrote two letters dated 24th May 2012 and 18th June, 2012 to the 2nd respondent.

3. On 13th July 2012, the 2nd respondent wrote to the claimant summarily dismissing him from employment as a school watchman.

4. From the documents submitted by the claimant marked exhibits '1' to '2' it would appear the claimant had two warning letters for failing to respond to allegations of insubordination contained in a letter dated 13th January 2012. The letter of suspension dated 25th January 2012 followed failure by the claimant to respond to two letters dated 13th January 2012 and 23rd January 2012.

5. The ministry wrote a letter dated 16th February 2012 to the principal requesting that a Board of Governors meeting be held to deliberate the matter and give the claimant opportunity to be heard.

6. A board meeting was held on 11th July 2012 in which was resolved to summarily dismiss the claimant.
7. There is no evidence that the claimant was given opportunity to be heard at all prior to the summary dismissal. The claimant filed a witness statement dated 7th April 2015, which he relied upon as his evidence in court.
8. The respondent filed a bare denial letter on 24th July 2015 and a reply to the defence was filed on 17th August 2015.
9. The respondent did not call any witness to defend the suit.
10. The testimony and documentary evidence presented by the claimant is un rebutted. The claimant has since died after his testimony before court and the next of kin need to substitute him as the claimant in the suit.
11. However the court is satisfied that the claimant proved that he was summarily dismissed without a hearing upon asking the respondent to review his duties. The claimant was paid Kshs 4,000 instead of the minimum wage of Kshs 8,163 at the time for a period of 31 months. The claimant also was not housed and was not paid house allowance during that period. The claimant was also owed in lieu of leave days not taken for 31 months.
12. In terms of the regulations of wages (Security services) 1998, the claimant was entitled to payment of gratuity calculated at 18 days salary in each completed year of service.
13. Accordingly, the court awards the claimant as against the respondents as follows:
 - (i) One month salary in lieu of notice Kshs. 8,163.
 - (ii) Underpayment for 31 months Kshs 129,053.
 - (iii) Unpaid house allowance for 31 months at Kshs 2,000 per month Kshs 62,000.
 - (iv) Payment in lieu of 2¹/₂ years leave Kshs 20,401 and
 - (v) Service gratuity calculated at 18 days salary for 2¹/₂ years Kshs. 12,244.50.

Compensation

14. The claimant also proved that he was summarily dismissed without a hearing for questioning his terms of service. Interventions by the Ministry of Education and labour to treat the claimant fairly were not heeded by the respondents.
15. The summary dismissal violated *Sections 41, 42 and 45 of the Employment Act 2007*. The claimant is entitled to compensation in terms of *Section 49(1) (c) and (4) of the Act*. He had served for 2¹/₂ years. He was underpaid and not paid house allowance during the period. The claimant was victimized for daring to ask his terms and conditions of service be improved. The claimant was not paid terminal benefits upon summary dismissal. The claimant suffered loss and damage and is awarded equivalent of five (5) months' salary in compensation for the unlawful and unfair dismissal in the sum of Kshs (8,163x5) Kshs. 40,815.
16. In the final Analysis, judgment is entered in favour of the Claimant against the respondent as follows:
 - (i) Compensation – Kshs 40,815
 - (ii) Other terminal benefits Kshs. 231,861.50.
 - (iii) Total award – Kshs 272,676.50.
 - (iv) Interest at court rates from date of judgment till payment in full for (i) above and from date of filing suit for (ii) above.
 - (v) Costs of the suit.

Judgment Dated, Signed and delivered this 19th day of February, 2019

Mathews N. Nduma

Judge

Appearances

M/S Kuke for Claimant.

Mr. Balongo for Respondent.

Chrispo – Court Clerk