



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAKURU**

**CAUSE NO.112 OF 2017**

**JAMES OCHAR OYOO..... CLAIMANT**

**VERSUS**

**SUNRIPE ALPHA ACADEMY .....RESPONDENT**

**JUDGEMENT**

The claimant was employed by the respondent on 31<sup>st</sup> October, 2013 as a night watchman at a wage of Ksh.5, 500.00 per month. Work hours were 6pm to 6am making 12 hours per day.

The claim is that on 14<sup>th</sup> February, 2017 the claimant was called by the headmaster of the respondent, Mr Njoroge and directed to be at work at 1pm and when he was informed that his employment had been terminated on the grounds that there was no more work for him. there was no prior notice save that the respondent school owners had decided to terminate employment.

There was no notice issued over a redundancy as required under section 40 of the Employment Act. such resulted in unfair termination of employment the claimant was not paid his terminal dues owing at the time employment terminated at the instance of the respondent.

Work for 14 days for February, 2017 was not paid. The claimant had not taken off days, 3 years annual leave, overtime hours worked were all not paid for at the end of employment.

The claimant was underpaid for the entire duration of employment where he was paid ksh.5,500.00 per month and is claiming the due balances based on the Wage orders.

Claims made are for the payment of;

- a. 13 days worked in February, 2017 Ksh.7,781.47;
- b. Compensation at 12 months ksh.156,355.20;
- c. Notice pay Ksh.13,029.60;
- d. Underpayments Ksh.286,526.28;
- e. Off days' pay Ksh.244,214.24;
- f. Public holidays Ksh.56,414.73;
- g. Annual leave Ksh.31,571.72;
- h. Overtime Ksh.376,099.44;
- i. Service pay/severance pay Ksh.22,551.23;
- j. Certificate of service; and

k. Costs.

The claimant testified in support of his claims. upon employment as a night guard he worked diligently until 14<sup>th</sup> February, 2017 when he was called and his employment terminated on the grounds that his services were no longer required. He worked without taking leave, off days or rest for 12 hours each day. There was no compensation.

The claimant also testified that the defence that he was allocated two (2) off days per week is not correct, the only time he was not at work was 2 days when he attended his mother's burial. He called Mr Njoroge the headmaster to allow him time off, he was forced to borrow money for travel and for the time he was away he had to look for a reliever and paid him Ksh.165.00 per day. He attended the burial from 6<sup>th</sup> January to 12<sup>th</sup> January, 2017.

The defence is comprised of mere denials on the basis that the respondent did not employ the claimant and the claims made are without basis. Without prejudice, the defence is that the claimant deserted duty for 7 days and efforts to find him were futile until summons were served. There was no redundancy declared or termination of employment. On several instances the claimant had been issued with warnings and finally deserted duty.

No work records were filed.

Caroline Wanjiku Ng'ang'a the administrator testified that the respondent started operations in July, 2014 and the claimant was the watchman from July, 2014. The respondent entity changed and the claimant was absorbed as an employee. Previously the respondent was under Sunrise learning Centre where she was the librarian and upon change in the year 2013 she became the administrator.

In January, 2017 the claimant started absconding duty, once or twice a week. He was issued with verbal warnings until the first week of February, 2017 when he was away. The claimant was paid on 3<sup>rd</sup> February, 2017 which was a Fridays and on Monday he did not turn up for work. Efforts to trace him were fruitless. He was then replaced with a new employee. This was not a case of redundancy.

Ms Ng'ang'a also testified that the claimant was paid all his wages in cash. No records were kept. He had Sunday as his day off and during public holidays the respondent does not allow work and a reliever would be taken instead. Annual leave was allocated.

The claimant was paid a wage of Ksh.10,000.00 and his work hours were 7pm to 5am.

At the close of the hearing, the court noting the conflicting information by the respondent, failure to submit and or file work records directed for attendance by the County Labour Officer to access the respondent premises and ascertain the registration status for the last 8 years, assess compliance with sections 10, 12, and 13 of the Employment Act, 2007 and file a report with the court.

The County Labour Officer complied and accessed the respondent premises, undertook an interrogation and records and filed a report on 14<sup>th</sup> December, 2018. from the report following emerged;

The respondent changed its name from Sunrise Learning Centre to Sunrise Alpha Academy with effect from January, 2014 under the directorship of Ms Mary Ann Wangare Mbugua;

The administrator an witness, Ms Caroline Ng'ang'a has been working with the respondent since the year 2011;

Since change of name in January, 2014 the respondent is not registered with the Ministry of Education or Registrar of Companies and has a trade licence permit No.8100/2018 from the County Government of Nakuru;

There is no compliance with section 10, 12, 13 of the Employment Act, 2007;

The alleged payment to the claimant at ksh.10,000.00 is without records;

Statutory deductions and compliance only started after the claimant left the employment of the respondent.

Both parties filed written submissions after the County Labour Officer filed his report.

Upon the confirmation by the Labour Officer that the respondent has not complied with section 10 of the Employment Act, 2007 effectively there are no work records filed with the court or kept by the respondent. the court is left with the word of the claimant. Such is to be believed on the face of the statutory failure by the respondent to keep work records.

Section 74 of the Employment Act, 2007 requires every employer to keep work records and to allow reasonable access to an officer of the court or the Minister.

74. Records to be kept by employer

1. An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars—

- a. of a policy statement under section 6(2) where applicable;
- b. specified in section 10(3);
- c. specified in section 13;
- d. specified in sections 21 and 22;
- e. of an employee's weekly rest days specified in section 27;
- f. of an employee's annual leave entitlement, days taken and days due specified in section 28;
- g. of maternity leave specified in section 29;
- h. of sick leave specified in section 30;
- i. where the employer provides housing, particulars of the accommodation provided and, where the wage rates are deconsolidated particulars of the house allowance paid to the employee;
- j. of food rations where applicable;
- k. specified in section 61;
- l. of a record of warning letters or other evidence of misconduct of an employee; and
- m. any other particulars required to be kept under any written law or as may be prescribed by the Minister.

2. An employer shall permit an authorised officer who may require an employer to produce for inspection the record for any period relating to the preceding thirty-six months to examine the record.

The trade licence permit issued to the respondent by the County Government of Nakuru and the attendance by parties on the basis that the respondent was the employer of the claimant, pursuant to section 10(6) and (7) of the Employment Act, 2007 the respondent is liable.

Where the respondent had a change of name with effect from January, 2014 the necessary changes to his employment should have been changed pursuant to section 13 of the Act. on the confirmation by the County Labour Officer that the respondent came into being with effect from January, 2014 and the claimant was retained as watchman, such date shall apply with regard to the assessment of his dues.

The evidence by the respondent that the claimant deserted duty, absconded work and was issued with warnings and when he failed to attend he was replaced is without any evidence. Even where the claimant may have deserted as alleged, the respondent as the employer had the duty to reach him so as to establish his whereabouts. The duty bestowed upon the claimant being that of night watchman was crucial and important to the business and mere allegations of absconding is not sufficient. Even in the worst case scenario of gross misconduct which warrant summary dismissal under the provisions of section 44 of the Employment Act, 2007 the employer is under a statutory duty to adhere to the provisions of section 41(2) of the Act. there is no effort by the respondent to demonstrate any form of compliance in this case.

The evidence by the claimant that he worked until 14<sup>th</sup> February, 2017 when he was called and advised that his services were no longer required without notice, hearing or being taken through the due process resulted in unfair termination of employment. Such is contrary to section 41, 43 and 45 of the Act and compensation is due pursuant to section 49 of the Act.

There is no record of the claimant being paid a wage of Ksh.10,000.00. his evidence was that he was paid ksh.5,500.00 in cash. on the applicable Wage Orders for January 2014 the claimant was entitled to Ksh.11,633.57 and such dues assessed for the period of employment, total underpayments amount to ksh.245,260.00.

For the period worked and unpaid wage is confirmed at 14 days worked in February, 2017 Ksh.6,080.20.

For failure to adhere to due process, notice pay is due under section 35 of the Act at Ksh.13,029.60 being the last wage due under the wage orders for the position held.

Every employee is entitled to an off day/rest day for every 7 days of work pursuant to section 27 of the Act. without any records that the claimant took the due rest day and that during public holidays he was allowed time off or was compensated, such payments are due. rest days' pay Ksh.244,214.24 and work during public holidays Ksh.56,414.73 is confirmed.

Annual leave is due under the provisions of section 28 of the Act at 21 days. without any work records to confirm the claimant took his annual leave and on his evidence that when his mother died he was forced to secure a reliever and pay for it, annual leave pay for the period is due at ksh.18,240.60.

On the claim for overtime on the basis that the claimant was at work for 12 hours per day, the wage orders allow for work at 12 hours for

security services and with the compensation for work over rest days, and public holidays, such is addressed.

Service pay and severance pay is distinguishable in law. compensation shall cater for the unfair termination of employment and without any record of the respondent complying with the statutory deductions or remittance, a service pay is dues for the two (2) full years of service all assessed at ksh.13,029.00.

Compensation is assessed at one (1) month pay all at Ksh.13,029.00.

Before conclusion, the court wishes to thank the **County Labour Officer Nakuru Mr G. O. Abuto** for his assistance to the court in this matter. Most appreciated.

Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;

- a. Compensation for unfair termination of employment Ksh.13,029.00;**
- b. Notice pay Ksh.13,029.62;**
- c. Service pay Ksh.13,029.00;**
- d. Pay for 14 days in February, 2017 Ksh.6,080.20;**
- e. Underpayments Ksh. 245,260.00;**
- f. Off days' pay ksh.244,214;**
- g. Public holidays ksh.56,414.73;**
- h. Annual leave Ksh.18,240.00;**
- i. Certificate of service shall issue in accordance with section 51 of the Employment Act, 2007;**
- j. The payments due above shall be subject to the provisions of section 49(2) of the Employment Act, 2007;**
- k. Costs to the claimant.**

**Delivered at Nakuru this 14<sup>th</sup> day of February, 2019.**

**M. MBARU**

**JUDGE**

In the presence of: .....