



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATINS COURT OF KENYA AT NAKURU**

**CAUSE NO.266 OF 2015**

**VITALIS BEN OTIENO.....CLAIMANT**

**VERSUS**

**CATHOLIC DIOCESE OF NAKURU..... RESPONDENT**

**JUDGEMENT**

The claimant, a male adult was employed by the respondent, a Christian organisation running a chain of businesses. the claimant was employed on 1<sup>st</sup> January, 1998 as a Binder in the Printing Press and was promoted to the position of Assistant Manager at the St. Mary's Printing Press.

The claim is that On 1<sup>st</sup> September, 1999 the claimant was appointed Manager of the printing press but no written communication was issued to him. a Certificate of Service was issued and dated 16<sup>th</sup> January, 2012 noting the claimant had been the manager of St. Mary's Printing Press from 1<sup>st</sup> September, 1999 to 4<sup>th</sup> December, 2012.

The claim is that while the claimant was in the employment of the respondent he was underpaid. There were no pay slips issued and such were only introduced later in the course of employment. As manager, the claimant was not paid the due salaries.

The claim is also that the claimant was made to work overtime reporting to work at 8am to 7pm for 6 days a week with rest on Sunday and public holidays.

On 19<sup>th</sup> November, 2012 the claimant was served with letter titled *compulsory leave for two weeks* and on the allegations that the office of St. Mary's Printing Press was not locked on the night of 16<sup>th</sup> November, 2012. The respondent also alleged that the claimant only realised the office had not been closed, on 17<sup>th</sup> November, 2012 at 11am meaning this was not deliberate and no theft occurred.

In a letter dated 4<sup>th</sup> December, 2012 the respondent alleged that the claimant gave his keys to a stranger which is not correct and this was not a valid ground for his dismissal as no disciplinary proceedings were conducted and this was done while he was on compulsory leave. There was no termination notice, a hearing or payment of terminal dues contrary to sections 35, 41, 44 and 45 of the Employment Act.

The claimant is seeking for;

- (a) Notice pay at 3 months Kshs.62,856.60;
- (b) Underpayments Kshs.844,870.20;
- (c) Overtime pay Kshs.618,093.75;
- (d) Compensation for unfair termination Kshs.251,426.40;
- (e) Costs of the suit

The claimant testified that upon employment by the respondent he was issued with a contract of employment dated 1st April, 1997 as a Binder. In 1999 he became the manager of the printing press and

letter dated 16th January, 2012 was issued to this effect. Upon promotion the claimant would report to work at 5am so as to pick school children at the end his day at 7pm. There was no overtime payment made.

Upon employment, the claimant was a casual employee with underpayments which the respondent has failed to pay. As manager, the claimant was paid Kshs.4, 500.00 basic pay and Kshs.900.00 in house allowance per month. While in the course of his duties, the claimant did not take off days or rest on public holidays and was not paid in compensation.

The claimant also testified that on 19th November, 2012 he was sent on compulsory leave on allegations that he left the printing press unlocked. These allegations were made by Fr. Ngaruiya the proprietor of the business but the claims were not true as the claimant had not left the premises unlocked. He was responsible for closing the printing press. After two weeks the claimant was recalled back and issued with letter dated 4th December, 2012, a summary dismissal written by Fr. Mbogo. This was done before the claimant could be given a hearing for his defence as where the printing press was left unlocked, nothing was stolen.

Upon cross-examination the claimant testified that he was issued with various contracts and the ones filed by the respondent have signatures similar to his. His position was that of a manager at the wage grade of Artisan Grade I and had overall duties to manage the printing press and source materials. The allegations that he left the place of work unlocked is not true as he had left his keys to attend a meeting and knew the same would be locked and nothing was stolen. Such duty was delegated and key left with Jane, the secretary.

The claimant also testified that in November, 2007 he was surcharged for alleged misuse of the respondent's motor vehicle and for 6 months he was made to pay through a salary deduction.

Before the letter of summary dismissal was issued there were a series of meetings held but such was not for the hearing of his case. The claims made are based on the law.

## **Defence**

The defence is that the on 1st January, 1998 the claimant was employed by the respondent and issued with a written contract of service as a Binder. On 1st January, 2011 the claimant was employed as Press Manager and issued with contract of service. the work hours were agreed at 8am to 5pm with a one hour lunch break and the printing press remained closed on Sunday and all public holidays.

The defence is also that the claimant was dismissed from his employment by the respondent on 4th December, 2012 for gross misconduct and prior he had been issued with letter dated 19th November, 2012 and sent on compulsory leave on the grounds of leaving the printing press not locked on the night of 16th November, 2012. The claimant had also left the printing press not locked on 22nd February, 2012 and without informing the procurator's office, he had carelessly handled the respondent's motor vehicle and sent on suspension and had been found to have misused the respondent's vehicles Registration No.KAJ 098C.

The claims made are without justification and should be dismissed with costs. Jimnah Kimani Mwangi the human resource manager testified that the claimant was an employee of the respondent and had written contracts of service and the last contract was issue don 1st January, 2011 for the position of press manager stating work hours to be 8am to 5pm with a lunch break. The contract had no provision for overtime work. The claimant remained the press manager and not on a scale of Artisan Grade I as alleged.

Mr Mwangi also testified that the claimant was paid a basics wage of Ksh.6, 870.00 with a house allowance of Ksh.1, 198.00 and medical allowance of ksh.1, 400.00 per month.

During the course of his employment the claimant had a series of misconduct which included misuse of

vehicles and on two occasions left doors open overnight exposing the respondent to possible break-in and theft. He was issued with show cause notice and his responses found unsatisfactory. He was surcharged for the misuse of vehicles and deducted from his monthly wage.

The claims made are without merit and should be dismissed.

Both parties filed written submissions.

The claimant submits that his date of employment is 1st January, 1998 and from 1st May, 2002 he was underpaid when the respondent failed to pay him in accordance with the wage scale for an Artisan grade I. he worked overtime due to the nature of his employment and for such extra hours he should be compensated, paid notice and compensation for unfair termination of employment.

The respondent submits that there were different contracts of service issued to the claimant and the last being dated 1st January, 2011 stating the position held, the work hours and remuneration to which the respondent complied. Following gross misconduct by leaving the office door not locked and putting into account previous cases of gross misconduct, the summary dismissal of the claimant was justified. The claims made are not justified.

From the pleading, the evidence and submissions, the issues which emerge for determination can be summarised as follows;

Whether the nature of employment was defined;

Whether the summary dismissal of the claimant by the respondent is unfair and or justified;

Whether the remedies sought are due; and Who should pay costs.

Fixed term contract in employment and labour relations is recognised as a lawful and legitimate mode of employment and in accordance with section 10(3)(c) of the Employment Act, 2007 (the Act);

*(c) where the employment is not intended to be for an indefinite period, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end;*

Also a written contract of service defining terms and conditions of employment is regulated under the provisions of section 10 of the Act and an employer is required to issue such written contract to employees. Where there is a dispute, the court is bound by the agreed terms and conditions unless there is evidence to the contrary in defining the set out terms and conditions. See **Fatuma Abdi versus Kenya School of Monetary Studies [2017] eKLR** and **Narry Philemons Onaya-Odeck versus Technical University of Kenya [Formerly, the Kenya Polytechnic University College] [2017] eKLR**.

In this case, the claimant attached his contract of service dated 1st January, 1998 where he was employed by the respondent as a Binder.

As part of the work records, the respondent filed contract of service with the claimant made on 1st January, 2011 for the position of press manager. The claimant testified that the signatures appended to this contract are similar to his though he was not issued with such contract. Such evidence was not truthful as the claimant confirmed he was the press manager and where the signature looked similar to his, he did not denounce it. This contract is signed by the claimant on 10th March, 2011.

The memorandum of claim is filed on 18th September, 2015. The claims made relates to underpayments from May, 2002 to December, 2012. Claims for overtime pay from September, 1999 to December, 2012.

The claimant was under separate and distinct contracts of service for a Binder and dated 1st January, 1998 and a different contract of service for a press manager from 1st January, 2011.

These two contracts are not a renewal but are separate and distinct.

For the period ending the contract as binder and starting as press manager on 1<sup>st</sup> January, 2011, the claimant ought to have made The claims for overtime and underpayments due as at January, 2015.

The issuance of contract starting as at 1st January, 2011 commenced a new work relationship. And by operation of section 90 of the Act, any dues owing for the period ending and started by the new contract, claims therefrom should have been addressed in 3 years since the date they accrued.

Even in the event where the claimant basis for underpayments and overtime claims is premised on being due as at 4th December, 2012 under the contract terms and conditions, work hours were stated and the alleged underpayment at the scale of Artisan I has no bearing in his case. He was a binder and then a press manager. The wage scale for an artisan, a position he was not trained or qualified in and this not being the position he was appointed to hold, has no bearing herein.

The claims for underpayment and overtime are lost.

Section 44(3) and (4) of the Act allow an employer to summarily dismiss an employee for breach of the employment contract and for gross misconduct. Section 44(4)(c) provides as follows;

*(c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;*

The claimant was dismissed over gross misconduct and on the grounds that on 16th November, 2012 he left the printing press where he was the manager open for the whole night. It was also established that this was not the first time the doors had been left open. The claimant was also found to have left the office keys to a stranger who was not a member of staff.

These matters had been brought to the attention of the claimant vide notice and letter of suspension on 19th November, 2012.

In defence, the claimant testified that as manager he was allowed to delegate his duties and on this day he was at a meeting and left the secretary Jane with the office key. The claimant also testified that as the press manager he was responsible for the office.

As noted above, where the claimant was put in charge of his work area(s) and neglected his duties by his wilful conduct and also was careless in the performance of such duties and exposed the respondent as the employer to possible loss and injury by leaving or causing the office door to be left open overnight, the same managerial responsibility stands. When put to account, there was no satisfactory response.

Summary dismissal is hereby found justified. See **Moses Ochieng versus Unilever Kenya Limited [2018] eKLR** and the case of **John Kebaso Mose versus Uchumi Supermarket [2017] eKLR**.

The additional evidence that the claimant was of poor work performance where he misused the employer's motor vehicles and was surcharged and the fact he was suspended for driving the vehicles only adds to show that the gross misconduct at the work place had built over time, this was addressed with a sanction but the claimant failed to take heed and change.

The claimant invited the resulting summary dismissal upon himself. He cannot claim compensation or notice pay in the circumstances. Under the contract of service, the work hours were agreed. To go overtime and without approval and sanction of the employer is not a practice made as a condition of the contract.

**Accordingly, the claims made are found without merit and are hereby dismissed. The claimant shall meet the costs due to the respondent.**

**Delivered at Nakuru this 21st day of March, 2019.**

**M. MBARU**

**JUDGE**

In the presence of: .....