



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT

NAKURU

CAUSE NO.66 OF 2017

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL

INSTITUTIONS, HOSPITALS AND ALLIED WORKERS.....CLAIMANT

VERSUS

TURI SULGUTA SECONDARY SCHOOL..... RSPONDENT

JUDGEMENT

Issue in dispute – unfair termination of the grievant, Joseph Eibach Ekai.

The claimant is a registered trade union representing the grievant in these proceedings while the respondent is a public educational institutional registered under the Basic Education Act. The parties have a recognition agreement and a collective agreement (CBA) with agreement terms and conditions of employment.

The grievant was employed by the respondent as a Watchman on 6th February, 2009 and issued with letter of appointment dated 22nd February, 2012. He became sick and was attended at Molo District Hospital on 22nd August, 2014 and was issued with letter dated 16th October, 2014 from the medical superintendent with a recommendation that he should work in a warm environment in order to alleviate his ailment.

The grievant presented his medical letters to the respondent and proposed to work during the day which was not allocated.

On 29th October, 2014 the grievant wrote to the respondent as follow up request to work during the day and the claimant made a follow up letter on 31st October, 2014. There was no reply.

On 20th January, 2015 the claimant requested for a meeting with the respondent on 2nd February, 2015 to discuss the matter, the grievant went back to hospital and was given 4 days sick off but in October, 2015 the respondent terminated the grievant from his employment due to his medical condition.

On 18th November, 2015 the claimant registered a dispute with the minister, a conciliator was appointed but the dispute was not resolved.

The claimant filed suit against the respondent seeking that the grievant be reinstated to his employment without loss of benefits and in the alternative there be payment of terminal dues as provided for under the CBA and comprising 3 months' notice pay, pay for 3 years annual leave, 3 years work during public holidays, compensation for uniforms for 6 years, arrears for underpayments, house allowances, compensation and costs.

The grievant testified that he started working for the respondent as Night Watchman from 6th February, 2007 and on 22nd February, 2012 he was issued with letter of appointment. He was paid a wage of Ksh.3, 500.00 per month without a house allowance and had to look or his own accommodation.

The grievant also testified that he had asthma due to work conditions at night and was admitted in hospital and got treated. The doctor recommended a change of environment to a warmer area to Baringo. He took the medical report to the respondent and proposed that he be allocated day time duties but was directed to resume his duties but later the grievant would get asthma attacks requiring his work colleagues to take him to hospital unconscious. On 24th October, 2015 the respondent verbally told him to stop working. It was not voluntary termination of employment and the respondent refused to allocate work as recommended by the doctor. On 24th October, 2015 the grievant was orally terminate in his employment.

The defence is that the particulars of employment are denied save that the grievant worked for the respondent until 22nd November, 2014 when he deserted duty without the knowledge of the respondent. Such was with the pretext that he was seeking medical attention which had not been approved by the respondent.

The defence is also that the request to work as a day watchman was not tenable at the time as the school was still small and there was no extra budget for such duty.

There was no verbal termination of employment and where there is a finding that termination of employment arose, the grievant deserted duty terminating his own employment with the respondent contrary to the law.

The claims made are not due.

Christopher Omosa the Board of Management Chairperson for the respondent testified that on 16th October, 2014 he was informed by the school principal that the grievant claimed to have asthma and wanted to be moved from night to daytime duty on medical grounds. Such matter and request was discussed by the board where it was noted that the grievant left his duty without leave and permission only to return on 26th January, 2015 with a letter from the claimant union. On 9th March, 2015 the board discussed the issue of desertion from duty and it was established the grievant had been absent from work since 22nd October, 2014. This was held to be gross misconduct and it was recommended the grievant be dismissed on account of desertion of duty.

The respondent school is small and supported by the school fees collected from students which cannot support the services of two guards during the night and day. There was no budget for payment of the claimant to work during the day.

At the close of the hearing both parties filed written submissions.

There is letter dated 22nd February, 2012 where the respondent has appointed the grievant as the night Watchman at a wage of ksh.3, 500.00 per month.

Section 8, 9 read together with 37 of the Employment Act, 2007 allow an employer who has employed an employee on casual terms to convert the same into full time employment with written terms and conditions. In this case, where the grievant was issued with a letter of appointment, such changed his casual employment to employment protected and with rights under the Employment Act, 2007. As the grievant was unionised, his employment was also regulated under the CBA applicable between the claimant and the respondent as correctly cited in the case of

KUDHEIHA versus Murang'a High School [2011] eKLR.

Section 30 of the Employment Act, 2007 give the right to take sick leave with full pay and section 34 allow an employee to seek medical attention for any ailment subject to notification to the employer and production of the medical certificate. Such rights must therefore be with the knowledge and approval of the employer. Where the employee is sick or unwell and is unable to reasonably communicate and inform the employer about such matter and the employee remains out of work, a third party is allowed to communicate with the employer subject to production of the medical certificate.

It is therefore imperative upon an employee to cause to be notified of the employer about any absence from duty due to sickness or illness. The approval of the employer is mandatory as held in **Dorothy Ndung'u versus Machakos University [2015] eKLR.**

In this case, the grievant's case is that he got unwell on 22nd August, 2014 and was admitted at Molo District Hospital. He was treated and discharged and by letter dated 16th October, 2013 it was recommended that he should avoid dust/cold and should always put on warm clothing. It was also recommended that *work be allocated in a warm environment with will favour his condition and help in alleviating his suffering.*

By letter dated 24th October, 2019 the grievant applied to the respondent to be allocated during the day. There is no response.

From such date, the respondent did not clarify as to what became of the employment relationship.

From the evidence of Mr Omosa, when the Board met on 9th March, 2015 the information shared was that the grievant had deserted duty from 22nd October, 2014 and it was decided due to such desertion his employment be terminated.

There was several communications by the claimant to the respondent with regard to duty allocation to the grievant. There are no responses.

The court finds the evidence by the grievant as correct, when he submitted his medical letter to the respondent, noting the recommendation, he was sent away to recuperate and to allow the respondent to take a decision as otherwise, section 44(4) of the Employment Act, 2007 allow an employer to dismiss an employee who absents himself from work without any reasonable cause. Where the grievant absconded duty over a position that was crucial and important as that of night watchman and he did so from 22nd October, 2014 to 9th March, 2015 reason demanded that he be issued with notice to show cause, called for a hearing and where his explanation and defence were found wanting, summary dismissal to issue as contemplated under section 44(4) read together with section 41(2) of the Act. This was not the case. The respondent opted to leave the grievant at large.

The resulting termination of employment was unfair. It was devoid of fair procedure and contrary to section 45 of the Employment Act,

2007.

On the remedies sought, noting the reasons leading to termination of employment, the fact of the clamant having asthma due to work in the respondent's environment, to reinstate him back to similar duties and work conditions would be the injustice. Where employment terminated since 9th March, 2015 it is now over three (3) years since and reinstatement would not be an appropriate remedy. This remedy was also not given much attention by the claimant in the evidence and submissions.

On the other remedies, the parties were regulated under a CBA. However the CBA submitted by the claimant is the one dated 1st March, 1986. To apply such CBA in assessing the claims payable would be retrogressive taking into account the various Wage orders which have issued since and noting employment of the grievant was converted into full time following the letter of appointment dated 22nd February, 2012.

In the absence of any other most updated wage regulations, the General Wage orders shall be applied.

In the letter of appointment, the grievant is only awarded a monthly wage of Ksh.3, 500.00 per month. Such wage is without a house allowance or an indication that such housing was provided for by the respondent. The grievant testified that he sourced his own accommodation and the due underpayment and house allowance is due.

The respondent has not provided any work records as required under section 10(6) and (7) of the Employment Act, 2007 to demonstrate how the wages were paid, the amounts and whether such provided for house allowances, the due annual leave allocated and or taken or paid in lieu thereof and whether the grievant was compensated during the public holidays.

In February, 2012 the minimum wage for a night watchman under the Regulation of Wages (General) (Amendment) Order, 2011 operational from 1st May, 2011 provided for Ksh.7,846.00 and house allowance at 15% being ksh.1,176.90.

For the period of February, 2012 to May, 2012 being three (3) full months, the grievant is owed ksh.4, 346.00 per month in underpayments all being ksh.13,038.00. The due house allowance for the period is ksh.3, 530.70 all being ksh.16, 568.70 in underpayments and house allowances due.

From May, 2012 to 30th April, 2013 the Minimum wage under the Wage Orders was Ksh.8, 873.80 per month and the due house allowance Ksh.1, 331.00 per month. There was an underpayment of ksh.5,373.80 per month and underpayment in house allowance of ksh.1,331,00 total underpayment being Ksh.80,457.60.

From 1st May, 2013 to 30th April, 2014 the minimum wage was ksh.10, 116.15 and house allowance ksh.1, 517.40. There was an underpayment of ksh.6, 616.15 + 1,517.40 all at Ksh.8, 133.55 and the total underpayment was ksh.97, 602.60.

The grievant was last at work on 22nd October, 2014 when he submitted his request to have a change of duty from night to day. From his evidence, he was advised to go home and await communication. There was no work performance from such date. For the period of May, 2014 to October, 2014 the full months at work are five (5) and the due wage underpaid is ksh.40, 667.75.

Total underpayments for the period of employment are hereby assessed at ksh.235.296.75.

On the claim for annual leave for 3 years, section 28 of the Employment Act, 2007 provides for 21 days of leave. As noted above the attached CBA relates to a period so far off and most of the provisions with regard to taking annual leave are far removed from the circumstances prevailing as at March, 2015. Under the applicable law, without any record of the grievant taking annual leaves payment in lieu thereof and based on the last due wage is ksh.21, 243.90.

The claim for payment for work during public holidays and payment for uniforms for 6 years is not explained or given the necessary particulars. There are no submissions as to how such claims arise. Such is declined.

On the findings that the grievant was unfairly terminated in his employment, the same is hereby awarded notice pay and compensation with one month's wage all at ksh.10, 116.15 and which shall be adequate payment in the circumstances.

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

- a) A declaration that employment was terminated without due process and therefore unfair;
- b) Compensation and notice pay awarded at ksh.10, 116.15;
- c) Underpayments and house allowances awarded at ksh.135, 296.75;
- d) Payment in lieu of annual leave ksh.21, 243.90;
- e) Each party shall bear own costs.

Delivered at Nakuru this 7th day of March, 2019.

M. MBARU JUDGE

In the presence of: