



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.431 OF 2016

DAVID MUGUNA.....CLAIMANT

VERSUS

BOARD OF MANAGEMENT GIBEA JERUSALEM ACADEMY.....RESPONDENT

JUDGEMENT

The claimant is a male adult and the respondent is an entity running a private school, Moi's Bridge. The claimant was employed by the respondent as a teacher on 10th May, 2015 and issued with a contract to teach Swahili, Social studies and science in class 4 to 7 at the respondent's school.

The claimant worked until 26th May, 2016 when his employment was terminated.

On 20th May, 2016 the claimant was given permission to attend a funeral of a family member which was to be held on 25th May, 2016 but was held on 24th May, 2016 and the claimant returned to Moi's Bridge on 24th May, 2016.

On 25th May, 2016 the claimant was called by Mr Arunga the proprietor of the respondent and required to give details with regard to the funeral but informed him that burial had already taken place. The claimant was required to produce the burial permit as evidence that burial had occurred. The deputy principal Pauline Wamalwa also informed the claimant to stop working until he produced evidence of burial.

The next day the claimant was informed that he would not be allowed back to work without producing the burial permit. There was no hearing or notice given. The next day the claimant found that he had been replaced in his duties.

The claimant is seeking notice pay at Ksh.17,000.00; payment in lieu of taking leave at ksh.17,000.00; severance pay at ksh.8,500.00; pay due for May, 2016; unpaid house allowances Ksh.30,600.00; NHIF deductions not remitted; and compensation.

The claimant testified in support of his claims that on 20th May, 2016 he asked the respondent for permission to go and bury his step-brother and burial was scheduled for 25th May, 2016 but due to the state of the body the family opted to bury on 24th May, 2016 and then he returned to Moi's Bridge at his place of work with the respondent. He was directed to produce the burial permit and sent away. Such document is not given to everybody but the parents and the respondent could not accept the explanation. The claimant was not accepted back at work and was not paid his terminal dues.

Defence

The respondent's defence is that the claimant was an employee until 26th May, 2016 when he deserted his duties. In April, August and December each year the claimant would be on leave and the claims made for payment of annual leave have no merit.

The claimant informed the respondent that he had lost a relative and was given permission to attend and also given Ksh.2, 500.00 to attend. The school staff made contribution to attend burial on 25th May, 2016 as communicated by the claimant but he came back on 24th May, 2016 and stated that burial had already taken place and insisted on being given the money collected by staff. On 25th May, 2016 the claimant was called by management to produce the burial permit but he left and never reported back at work.

The claimant had poor work record with warnings and using bad language on new students. He had been issued with warning for absconding duty.

Upon the claimant deserting duty on 26th May, 2016 he filed suit in January, 2017 as an afterthought and which suit should be dismissed.

The respondent school is in Moi's Bridge and under Legal Notice No.117 of 1st May, 2015 the minimum wage is Ksh.13,152.50 plus house allowance Ksh.1,972.90 with gross wage at Ksh.15,125.40 and the claimant was paid Ksh.17,000.00 being above such minimum wage. The claims made should be dismissed.

Mr Gidieon Onyiego Otuoma testified in support of the defence.

At the close of the hearing the claimant filed written submissions.

The court has put into account the pleadings, the evidence and the written submissions and the issues which emerge for determination are;

Whether there is a case of unfair termination of employment; and

Whether the remedies sought are due.

Both parties are agreed that the claimant as an employee of the respondent and that on 20th May, 2016 he was given permission to attend burial of his relative, a step-brother. The burial was scheduled for the 25th of May, 2016 but the claimant testified that due to the state of the body, burial took place a day earlier on 24th May, 2016 and he returned to school for work.

The respondent asserts that the claimant was given permission to attend burial on 20th May, 2016 and was given Ksh.2, 500.00 to attend and as colleagues, the staff planned to attend burial on 25th May, 2016 and made contributions in this regard but the claimant returned earlier on 24th May, 2016 and demanded to be given the contributions made. The respondent's management demanded for burial permit but the claimant failed to do so and also failed to return to work.

Absence from work with the employer's permission is allowed. Given the reason of loss of a family member, compassionate leave is imperative. However, the employer is entitled to demand proof of the same on good cause.

The Employment Act, 2007 does not directly address the taking of compassionate leave save to address it in the context of taking maternity leave but the issue can be picked as appropriate under section 29(3) of the Act and addressed in this case;

(3) *Where—*

(a) *the maternity leave has been extended with the consent of the employer; or*

(b) *immediately on expiry of maternity leave before resuming her duties a female employee proceeds on sick leave or with the consent of the employer on annual leave; compassionate leave; or any other leave, the three months maternity leave under subsection (1) shall be deemed to expire on the last day of such extended leave.*

Taking of compassionate leave is a foreseeable good cause for an employee to be absent from work. Even in the case of taking maternity leave it is foreseeable and reasonable. However, even where an employee has taken maternity leave for good cause, such an employee is required under section 29(6) read together with section 30 of the Act to produce a medical certificate in this regard and as proof of the medical condition.

It is therefore reasonable that under similar terms and upon taking compassionate leave for good cause for the employer to demand the employee to produce proof of such requirement for compassionate leave and hence the need to be away from work. Where such proof is required and is not readily available to the employee, reasonable request for time to secure the same should be made and facilitated. In any event an employer who allows an employee to take leave and attend burial is one who is already supportive and facilitative of such an employee. The responsibility to produce proof of the need for compassionate leave should then be readily available.

The claimant testified that he could not secure the burial permit of his relative as such documents are kept by the parents. Where there was need to attend the burial of such relative and permission was granted, the claimant could as well secure the evidence with similar ease.

The failure to attend and prove the need to be absent from work thus lost, the respondent was at liberty to issue summary dismissal under the provisions of section 44 of the Employment Act, 2007. The claimant failed to produce the required proof and as such he cannot blame the respondent for frustrating his own employment. There is no justified grounds to claim unfair termination of employment.

On the claims made, the respondent has not produced any work records with regard to the employment of the claimant. After the 26th of May, 2016 there is no evidence of his due wages being paid. Had this been addressed, the respondent as the employer and in terms of section 10(6) and (7) of the Employment Act, 2007 read together the section 20 of the Act, such work records would have been sufficient proof of payments made. The May, 2016 wage is due for 26 days all at Ksh.14, 740.00.

On the claim for notice pay, the claimant having frustrated his own employment, such pay is not due.

On the claim for severance pay, this case did not stand out as one premised under the provisions of section 40 of the Employment Act, 2007 to justify payment of severance pay which is only due in a redundancy. Such claim is not justified.

The respondent is defined as an educational institution under which there is provisions of breaks in April, August, and December each year. To claim for annual leave over and above the due breaks would be an unjust enrichment.

The claimant testified that the work station was in Moi's Bridge. This is a location outside the city or municipalities gazetted for the wage regulations in the third column. The payment of Ksh.17, 000.00 in the location of the respondent in the years 2015 and 2016 was above the minimum wage and very generous to claim for house allowance in this regard would be unjust enrichment.

The claim for payment of Ksh.3, 600.00 not remitted to the NHIF is unlawful. Such dues are payable to the statutory body and not to an employee. The alternative claim should have been different where there was a deduction and no remittance but not to claim for monies due to a third party in law. such is declined.

Compensation is not due in this case based on the analysis above and there being no unfair termination of employment.

Accordingly, the claims made are hereby dismissed save for the payment of the wage due for May, 2016 all at Ksh.14,700.00 to be paid within 30 days from the date hereof and where not paid to attract interests at court rates until paid in full. such monies shall be subject to the provisions of section 49(2) of the Employment Act, 2007. Each party shall bear own costs.

Delivered at Nakuru this 26th day of September, 2019.

M. MBARU JUDGE

In the presence of: