



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT BUNGOMA**

**CAUSE NO. 104 OF 2017**

**EMMANUEL SIMIYU.....CLAIMANT**

**VERSUS**

**BOARD OF MANAGEMENT**

**SIPALA FYM PRIMARY SCHOOL.....RESPONDENT**

**J U D G M E N T**

The suit was filed on 15.11.2017 in which the Claimant seeks compensation for unlawful termination and payment of terminal benefits set out under paragraph 7 of the Memorandum of Claim.

The Respondent filed a replying Memorandum to the claim on 14<sup>th</sup> December 2017.

The Claimant testified as CW1 and told the court that he was employed by the Respondent as a security officer on 4<sup>th</sup> March 2014.

That on 5<sup>th</sup> February 2017 the Principal of the school called him to his office and asked him why he had joined a union without telling the principal. CW1 said that he had registered as a union member just like other workers had done. The principal dismissed the Claimant on the spot and he went home until the time of filing this suit. CW1 testified that he was not paid terminal benefits. That he had not taken any leave. That he was paid Kshs 3,000 per month and had not been paid arrear salary for March 2014 to February 2017. That he worked 12 hours a day from 6.00 a.m. to 10.00 p.m. or 6.00 p.m. to 6.00 a.m. and was not paid overtime.

That he worked during holidays and was not paid double salary for those days. CW1 adopted his written statement dated 10.11.2017 as his part of his evidence in chief.

The Claimant produced the annexures to the Memorandum of Claim as his exhibits including letter of appointment dated 4<sup>th</sup> March 2014, Letter of demand dated 10.2.2017 from the Union and another from Masika & Koross Advocates dated 21.9.2017. Under cross examination the Claimant stated that the Letter of Appointment was for a period of six months. That there were three watchmen and they worked on shifts. That he was not given a Letter of Termination but was verbally dismissed.

That he was not paid salary for the month of October 2017. CW1 denied that on 23.3.2017, he was asked to reapply for work.

RW1 Nathan Wafula, the head teacher of the respondent school and Secretary of Board of Management testified for the Respondents.

RW1 adopted a written statement dated 13.12.2017 as his evidence in Chief and produced exhibits '5 to 10' in the list of documents filed before court.

RW1 testified that he employed the Claimant on 4.3.2014 on a six (6) months contract. That the contract was not renewed but the Claimant continued to work. That the Claimant absconded from duty. That on 3.2.2017 RW1 wrote to the Claimant a letter to find out his where about. That the Claimant received the letter from the school. RW1 confirmed that the school had three (3) watchmen. That they worked from 7.00 p.m. to 6.00 a.m. or from 6.00 a.m. to 7.00 p.m. daily and on shifts. That the duty roster showed time of checking in and checking out. RW1 stated that Claimant was not entitled to overtime because he had many days off duty. That the school did not generate profit. That the Claimant worked 10 hours per day. That the Claimant's terms were guided by security wage order. That the Ministry of Labour did not invite the school for conciliation. RW1 prayed the suit be dismissed with costs.

**Determination**

The issues for determination are

(a) Whether the Claimant was dismissed from work or he absconded duty?

(b) Whether the Claimant is entitled to the reliefs sought.

**Issue (a)**

CW1 testified that he was summoned by RW1 on 5.2.2017 and asked why he had joined the union. Upon stating that he had joined the union just like other employees he was verbally summarily dismissed without payment of any terminal benefits.

RW1 stated that the Claimant was not dismissed but absconded work. That the Discipline and Ethics Committee interviewed the Claimant and four other casual employees to address concerns raised on better terms of service, lapse in extension of contracts of employment and rampant indiscipline cases amongst employees serving on casual basis. The Board resolved that all employees on Casual basis re-apply for renewal of contracts. That the Claimant undertook to re-apply for renewal of contract.

This took place on 23.1.2017. The Claimant did not reapply for renewal of contract but absconded duty and did not return. That on 3<sup>rd</sup> February 2017, RW1 wrote a letter to the Claimant inquiring his whereabouts and why he had deserted work. That RW1 personally delivered the letter to the Claimant when he came to school to inquire about payments. That the Claimant did not respond to the letter.

That the Respondent never dismissed the Claimant from work. That the Letters written for the Claimant by the union and his advocate did not address the issue of his desertion.

That the Claimant's wage included house allowance and was paid Kshs 3,000 per month. That his wages were paid promptly and there was no overtime the Claimant was entitled to. That Claimant had applied and taken his full leave entitlement and none was pending.

RW1 produced letter dated 27.2.2017 from Kenya Union of Employees of Polytechnics, Colleges and Allied institutions in which the union demanded that the Respondent address the issue of underpayment of staff in disregard of the Ministry of Education, science and Technology circular, 2005 (the primary Education) the subsequent Legal Notice of the Regulation of wages/General Amendment orders, and the Ministry of State of Public Service Re-alignment of the salary structure for Civil Servants 2012.

RW1 also produced the Letter from the Ministry of Labour dated 6.10.2017 on the reported dispute by the Claimant issue being dismissal of Claimant on grounds of having joined trade union.

It is apparent that the Claimant had recently joined the union and the union had on 27.2.2017 written to the RW1 demanding review of terms and conditions of service of staff since they were being under paid.

The testimony by the Claimant that he was questioned why he had joined the union by RW1 on 5.2.2017 is consistent with the fact that staff were complaining of poor work conditions and had been summoned by the Board and asked to re-apply for their jobs.

The Claimant had continued working upon expiry of the initial six (6) months contract and was thus not an employee on fixed term contract anymore and his employment was deemed continuous and protected by the Employment Act 2007 and the Security wage order.

Demand by the board that the Claimant re-apply for his job failing which his employment had lapsed is consistent with the testimony by the Claimant that he was verbally dismissed on 5.2.2017.

The Claimant has proved on a balance of probabilities that his employment was terminated verbally without notice, notice to show cause and/or any disciplinary process being followed by RW1 on 5.2.2017. This amounted to summary dismissal which was not for a valid reason and without following a fair procedure.

The dismissal violated section 36, 41,43 and 45 of the Employment Act, 2007 and the Claimant is entitled to compensation in terms of Section 49 (1) (c) and (4) of the Act.

In this regard, the Claimant was dismissed without notice and any payment of terminal benefits. The Claimant did not contribute to the dismissal. The Claimant had served for about three years. The Claimant was underpaid throughout the three years period and was not given any leave nor paid in lieu thereof. The Claimant worked 12 hours daily contrary to testimony by RW1 that he did 10 hours. These are all aggravating circumstances in this case. The Claimant ought to have been paid minimum wage of Kshs 9,814 per month instead of Kshs 3,000 and he is entitled to the arrear salary and compensation calculated on the minimum wage.

The court therefore awards the Claimant the equivalent of Six (6) months salary calculated at  $(9,814 \times 6) = 58,884$  in compensation for the unlawful and unfair dismissal.

**Issue (b)**

On the issue of terminal benefits, the Claimant has proved on a balance of probabilities that he is entitled to the following;

Notice pay:

One month salary in lieu of notice in the sum of Kshs 9,814 being the minimum wage the Claimant was entitled to at the time.

Payment in lieu of leave:

The Claimant had not taken leave for three years and was entitled to 21 days leave for every year served at the current wage being Kshs 9,814 x 3 Kshs 29,442.

Arrear salary for 3 years.

The Claimant was entitled to Kshs 9,814 per month but was paid Kshs 3,000 per month which was an underpayment. The court awards him Kshs 353,305 being arrear salary underpayments.

Overtime

The Claimant has proved that he worked for 12 hours daily instead of the 8 hours he ought to have worked. The Claimant is awarded Kshs 45,360 in respect of overtime worked.

Public holidays:

The number of public holiday worked have not been specified. This claim is not sufficiently proved and is dismissed.

Arrear house Allowance.

There is no sufficient evidence adduced on this item. Since the court has made an award on arrear salary, this claim is dismissed for want of proof.

The final judgment of the court is in favour of the Claimant against the respondent as follows:-

- (a) One month salary in lieu of notice Kshs 9,814
  - (b) Equivalent of six months salary in compensation Kshs 58,884
  - (c) Untaken leave for 3 years Kshs 29,442
  - (d) Arrear salary arising from underpayments for 3 years Ksh355,304.
  - (e) Overtime Kshs 45,360
- Total award Kshs 448,990
- (f) Interest at court rates from date of judgment till payment in full.
  - (g) Costs of the suit.

**DATED, SIGNED and DELIVERED at BUNGOMA this 26<sup>Th</sup> day of SEPTEMBER, 2019.**

**HON. M. N. NDUMA, JUDGE**

**EMPLOYMENT AND LABOUR RELATIONS COURT**

**BUNGOMA**

**Appearances:**

Mr. Were for Claimant

Tarus for Respondent

Joy: Court Assistant.