



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.188 OF 2017

JACOB RONOH LAGATT.....CLAIMANT

VERSUS

BOARD OF MANAGEMENT KAGAKI SCHOOL.....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent, an educational institution situated at Rongai as a driver.

The claim is that in the year 2006 the claimant was employed at a wage of ksh.3,000.00 per month and in the year 2007 the wage was increased to Ksh.3,500.00 per month. Such employment subsisted until December, 2016 when there were allegations made and which resulted in termination of employment. He was then earning ksh.14,610.00 per month plus house allowance at Ksh.2,500.00 communication allowance Ksh.500.00 and performance allowance at ksh.1,000.00 all being a gross of ksh.17,610.00 each month.

The claim is also that when the claimant reported on duty on 1st January, 2017 he worked until noon on 3rd January, 2017 when the head teacher Mr Nzuki called him with information that the school director had sent him away until the disciplinary committee called him the claimant was not informed of any allegation with regard to his conduct.

On 5th January, 2017 the claimant was informed of a meeting on 6th January, 2017 and he met Professor Miriam Kinyua at 7pm and was informed that he had not been discharging his duties honestly and for these reason(s) he was required to step aside. He was advised to await the disciplinary hearing which was to be held on 24th January, 2017 but there was no meeting. The meeting was held on 28th January, 2017 where the claimant attended and defended himself and then he was issued with notice dated 30th January, 2017.

The claim is that the hearing was held before the notice to show cause was issued. By letter dated 3rd February, 2017 the claimant wrote seeking to know the outcome of the disciplinary hearing but there was no reply. Such resulted in unfair termination of employment and the claimant is seeking for the payment of the following dues;

- a) Notice pay of one month at Ksh.17,090.50;
- b) Pay for December, 2016 at Ksh.9,000.00;
- c) Unpaid leave for 11 years Ksh.127,353.55;
- d) Underpayments for 11 years Ksh.702,207.35;
- e) Unpaid overtime for 11 years Ksh.327.70;
- f) Unpaid off days for 11 years;
- g) Pay for work during public holidays Ksh.57,851.60;
- h) Compensation for unfair termination of employment Ksh.253,849.20; and
- i) Costs of the suit.

The claimant testified that in the year 2006 he was employed by the respondent as a bus driver. He had a Nissan vehicle and which he used to serve the respondent by picking and dropping students to the school and back. He later started driving a bus.. while not driving he would be a security guard at the gate and would be at work from 8am to 4.30pm then start his driving duties. Such work would go on for 7 days a week without rest, leave or rest during public holidays. On Sundays he would be at work as the respondent runs a boarding facility.

The claimant also testified that his wage was ksh.3,000.00 per month since the year 2008 which was increased over time but there was an underpayment.

On 26th January, 2017 he was called to a disciplinary hearing over allegations he had not been made aware of and then later on 30th January, 2017 e was issued with a show cause notice for alleged insubordination and colluding with a spare parts shop to defraud the respondent which allegations were not true and there was no proof.

Defence

2The respondent has denied all the claims made and a defence that the claimant was offering driving services in the year 2006 and got employed in the year 2008. The payment of Ksh.3,000.00 and Ksh.3,500.00 was for the services rendered until employment commenced.

The claimant was issued with both verbal and written warnings in the course of his work duties. In July and August, 2012 he was suspended following gross misconduct. a disciplinary hearing was held on 8th August, 2014.

By April, 2016 the claimant was earning a gross wage of Ksh.19,110.00 per month and not Ksh.17,610.00 as alleged. The respondent paid the wage in accordance with Wage Guidelines and orders as it is located in Rongai outside of Nakuru municipality.

The claimant reported to work on 1st to 3rd January, 2017 and the respondent informed him his work was poor and by letter of equal date he was directed to step aside as there were serious accusations against him and a disciplinary hearing was conducted on 26th January, 2017 when he was suspended until he was able to show cause why disciplinary action should not be taken against him for gross misconduct vide letter dated 30th January, 2017. The claimant failed to respond to date.

The claims made lack merit as the claimant was not underpaid, work hours were 5.30am until 8am and then the claimant would resume duty at 4.30pm to 7pm. Work was for a total of 25 hours a week as opposed to 48-52 hours. The logging book for drivers was stolen and a report made to the police.

Notice pay is not due or the December, 2016 salary as claimed. The claimant would go on leave while schools were closed. The claimant was paid for overtime work whenever such arose or for working during public holidays.

In evidence, Professor Miriam Kinyua a director of the respondent and who testified that since the year 2005 the claimant was offering the respondent driver services as it was a new school and he had a Nissan vehicle and thus hired the vehicle. Drivers were only required from Monday to Friday at 5.30am to 8.30am and later from 5.30pm to 7pm. Weekends such services were not required as parents would drop the students on a needs basis. The claimant was then hired in the year 2008 when the respondent got a bus.

Professor Kinyua also testified that on public holidays, school holidays and weekends, when the claimant was called to drive he would be paid for the day in cash. On school holidays there was an alternation each person for a week and the rest no work was required.

In the course of his duties, the claimant was not diligent, he was issued with verbal and written warning and in the year 2012 a disciplinary hearing was conducted and he was then reinstated.

The respondent then changed from a partnership to a company and all employees were advised to reapply for employment. All employees were paid for 2 months until December, 2016. The claimant as the driver would only be required for some hours but he opted to remain at the gate and offered assistance. The drivers organised themselves to be at the gate.

The claimant had disciplinary issues, he as invited to a disciplinary hearing and from the proceedings he was issued with a show cause notice but he failed to reply. The allegations against him were gross misconduct but he failed to show cause, he did not return to work and the next thing he served court summons upon the respondent.

The claims made are without basis and should be dismissed.

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

The date of employment is contested as the claimant asserted that his employment with the respondent commenced in the year 2006 while the defence is that from the year 2005 the claimant was offering driver services until the purchase of a bus in the year 2008. There is no record of employment save for the payment statements and the undated letter filed by the claimant for *Appointment as the Head of Transport* with effect from 3rd January, 2012. This letter is relevant as it states that;

Kagaki School has re-appointed you Jacob Rono ... on this day of 03/01/2012 as the head of transport department, to be responsible and accountable of all the activities the monthly pay is ... Ksh.9,580.00.

The operative term here is the *re-appointment* of the claimant as Head of Transport with effect from 1st January, 2012. The claimant

produced this record. It

With the *re-appointment* the court takes it that new employment commenced as of such date. Whatever was subsisting before the re-appointment was dealt. Time taken into account, the application of section 90 of the Employment Act, 2007 going back to the alleged period of the year 2006 or 2008 is dealt by the re-appointment the claimant as head of Transport by the respondent.

The defence that the claimant's employment terminated as of November, 2016 and that there was payment of terminal dues with notice pay for two months is without any evidence. Professor Kinyua for the respondent testified that the respondent changed from a partnership to a company and that all employees were required to apply for their positions and terminal notice was issued. However, there is no evidence with regard to the stated changes in the respondent entity, there is no evidence that the claimant was required to reapply for his employment or that he was paid the notice pay for two months.

What is clear from the submitted records is that by letter dated 3rd January, 2017 was directed to step aside from duty until further instructions following reports of gross misconduct.

Following the notice to step aside, on 19th January, 2017 the claimant was admonished for alleged dishonesty and directed to attend disciplinary hearing on 24th January, 2017 to show cause why he should not be dismissed.

In this regard there was conflicting evidence where the claimant testified that he attended disciplinary hearing on 26th January, 2017 and Professor Kinyua testified that the claimant was before the disciplinary committee on the 27th December, 2016 and the pleadings speak to different dates. The attached records also relates to different dates as against what both parties submitted in their oral evidence.

The claimant admitted to being invited to the disciplinary hearing some time in January and was then issued with letter dated 30th January, 2017. From this letter, he was required to show cause why disciplinary action should not be taken against him for gross misconduct that that;

... show cause

In reference to the letter given to you dated 19/01/2017 on issues to do with dishonest, you appeared before the disciplinary committee.

You were requested to react on the following accusations: insubordination, colluding to hike spare parts' prices, diverting fuel meant for buses and being arrogant to fellow workers.

You did not appear remorseful neither did you convince the members that you were innocent of the accusations.

When asked of your readiness to resume duties, you told the members that you would give your reply later. This may indicate that you were not ready to work with the institution.

Members unanimously agreed that you be requested to show cause why you should not have your services terminated.

You need to give a written defence over the accusation above. ...

There is no specific response to the show cause notice of 30th January, 2017. Save that the claimant on 3rd February, 2017 wrote about *injustice and unfairness* and noted that on 16th December, 2016 he was given a contract of employment to sign for one year and which contract was to start on 2nd January, 2017 but he did not understand why he had to sign such contract.

As noted above, without any work records submitted by the respondent, the only key documents submitted by the claimant has to be relied upon. From the letter of *injustices and unfairness* dated 3rd February, 2017 it is clear that there was no new contract signed, the claimant was retained under the same employment terms and under such terms he was directed to step aside for his alleged gross misconduct to be addressed.

However the claimant does not reply to the show cause notice issued to him. he went on a tangent of his own and opted to address what he considered to be *injustice and unfairness*. At the end of his letter he noted that it was fundamentally difficult to resume duty until the allegations against him were addressed. He also requested for the proceedings of the disciplinary hearing so that he could defend himself.

A show cause notice issued to an employee to give response why his employment should not be terminated is not a termination of employment. The employee is simply given a chance to urge his defence. See **Paul Ooko Okoth versus Chemilil Sugar Co. Ltd [2016] eKLR** and the case of **Grace Gacheru Muriithi versus Kenya Literature Bureau (2012) eKLR**. a suspension or show cause notice is a prerogative of the employer to allow the employee to respond as directed and thus form a basis of the disciplinary hearing.

Without any response to the allegations set out in the show cause notice for insubordination, colluding to hire spare parts prices, diverting fuel meant for buses, being arrogant to fellow workers, the claimant cannot claim he was unfair treated or was denied his rights and fair labour practices. By opting to respondent on a different agenda and citing *injustices and unfairness* the claimant removed himself from the seat of justice and reverted to activism. He did not return to work. Without rendering any labour from 30th January, 2017 the claimant cannot claim for notice pay, compensation of any wages after such date.

On the claims made, employment addressed as at 1st January, 2012 from the work records and schedules attached, the claimant would be at work as early as 5.10am and close duty as late as 19 hours. This is admitted under paragraph 11 of the defence save that the respondents case is that the claimant would report from 5.30am to 8am and then return later at 5.30pm to 7pm. However the letter of appointment does not spell out the applicable terms and the requirement to work for between 25 hours unlike 48 to 52 hours.

Section 10 of the Employment Act, 2007 places the burden upon the employer to spell out the work terms to the employee in a language the employee best understands.

In this case, it was apparent that the claimant would operate as a driver in the morning and later evenings and to occupy his time during the day was allowed and or permitted to work as a day gateman alternating with others at the school gate. The letter of appointment thus not clear on the work hours, the claimant being at the disposal of the respondent from 5.30am to 7pm he worked over hours of 4 hours each day. Such time should be compensated.

Under paragraph 9(vi)(1) the claimant acknowledges that the respondent school would be closed for 3 months each year. His basis for overtime claim goes back to the year 2010 but as noted above, such time commences at 1st January, 2012.

The wage due to the claimant for the period of 1st January, 2012 to December, 2016 is not as stated. The court looking at the applicable wage orders for the area of Rongai in the outskirts of Nakuru general area is that in such period the minimum wage was as follows;

For the period of 2011/2012 the claimant as a driver had a minimum wage of Ksh.7,811.00 and was paid Ksh.8,000.00 and of which for the period of January, 2012 to May, 2012 he worked overtime for 4 months factoring the school holiday, for 5 days a week at 4 hours all being 104 hour over work. The due pay being $8000 \times 104 \times 1.5/125 = 9,984.00$;

For the period of 2012/2013 for 9 months, the maximum wage being Ksh.8,834.00 and the claimant was paid Ksh.9,130.60 and overtime pay is $8834 \times 288 \times 1.5/125 = 30,530.00$;

For the period 2014/2015 the wag did not change and on the above formula what is due is ksh.30,530.00 in underpayment;

For the period of 2015/16 the wage due is ksh.11,299.00 and at this point the claimant was earning Ksh.19,110.00 gross and for the 4 months until December, 2016 the due overtime pay is 23,849.00.

Total overtime pay is ksh.40,514.00.

On the claim for underpayment, the court assessment of the applicable wage orders for Rongai area, and the payment statements submitted by the claimant for the period of January, 2012 to December, 2016 there was no underpayment. The claimant enjoyed the benefit of a house allowance, commuter allowance, communication allowance and was registered with NSSF and NHIF as part of the benefits over and above the basic wage.

As noted above, the claimant has admitted the respondent school would close for 3 months as an educational institution. The defence that the claimant was paid in cash for any extra duties over weekend, holidays and public holidays was also not challenged in any material way. Such secured and noting academic institutions take such time off the school can lender for rest for students and teachers, the claim for work on weekends, public holidays, rest day and annual leave does not suffice. The claimant also admitted in his evidence that his work at the school gate was rotational for week each. In this regard, he was not required to be at such a gate for a full month save for this allocated week. With his overtime work hours addressed to claim beyond such pay would be an unjust enrichment.

With regard to the due pay for December, 2016 the claimant testified that he had been paid 10,000.00 to meet school fees for his children and there remained a balance of Ksh.9,000.00. as noted above, there is no evidence of these balances being paid. The defence that the claimant was paid a notice pay of two months is also without any record. This amount is thus due.

On the evidence, it is apparent the claimant did not render any service for the respondent after the 30th of January, 2017. As the respondent opted to address the alleged misconduct within such time and failed to take a conclusive stand on him, the wages due to the claimant for the period until he failed to respond to the show cause notice is payable. The pay for January, 2017 is assessed at ksh.19,110.00.

Accordingly, the claims made are found without merit save for pay for January, 2017 at ksh.19,110.00; overtime pay awarded at ksh.40,514.00 and balance of wage for December, 2016 at ksh.9,000.00; the claimant shall also be issued with a certificate of service for the period worked and ending 30th January, 2017.

The dues paid to the claimant 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