



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 127 OF 2014

MUTUNGI NJUGUNA.....CLAIMANT

VERSUS

PETER KARIUKI PRIMARY SCHOOL.....RESPONDENT

JUDGMENT

1. The Claimant has sued the Respondent for wrongful termination and averred that he was employed as a watchman by the Respondent around the year 1994 earning a salary of Kshs. 4,500/-. He averred he worked for the Respondent until 30th October 2013 when he was wrongfully terminated after serving the Respondent for 19 years. He avers that the Respondent did not pay him his house allowances, overtime and leave allowances in addition to underpayment. The Claimant avers that at the time of his termination of employment, the Respondent owed him a sum of Kshs. 2,567,162.80 being 1 month's salary in lieu of notice – Kshs. 10,116.50, accrued annual leave – Kshs. 155,224/-, overtime pay – Kshs. 1,845,185.70, severance pay – Kshs. 110,888.55, Public Holidays – Kshs. 73,925/-, underpayment of salary – Kshs.184,290.55, house allowance –Kshs. 66,118.55 and compensation for employment – Kshs. 121,393.80. He therefore prayed for judgment against the Respondent in the sum of Kshs. 2,567,162.80 plus costs and interests of the suit.

2. The Respondent filed a memorandum of response and averred that the Claimant's employment was never wrongful or at no material time terminated. The Respondent averred that the Claimant was suspended from his duties on 31st October 2013 following a theft incident that occurred between the 14th and 15th October 2013 and that the suspension was pending conclusions of investigations by the Police. The Respondent averred that the Claimant disengaged himself from employment unilaterally without any written notice and that as such he is expected to pay the Respondent 1 month's salary in lieu of notice. The Respondent averred that the Claimant was granted 7 days' leave per month during his tenure as its watchman and was paid all his dues according to his contract of employment.. The Respondent avers that the Claimant's claim against it lacks merit and is not supported by provisions of the law, is an abuse of the court process, misconceived, fatally defective and raises no reasonable cause of action and ought to be dismissed with costs.

3. The Claimant and the Respondent's witness testified at the hearing of the suit. The Claimant testified that he was dismissed after theft of property at the Respondent's school and that he was charged with the offence of failing to stop a felony but the case was withdrawn. He stated that he was never issued with any notice and was not paid in lieu of such notice. He testified that he used to Kshs. 4,500/- and he neither got an increment nor was he granted any annual leave and that he was not paid overtime but was given off for one week in lieu of the overtime. He stated that he never used to get paid for work on public holidays and was never paid house allowance. In cross-examination he confirmed that he was accused of theft and was dismissed on 30th October 2013. He testified that he had no reliever but he however, confirmed that there was someone who would take over when he was on off. In re-examination he stated that it is the Respondent who suspended him and never re-instated him to date.

4. The Respondent's witness was the head teacher Ezekiel Gathiga Murira of the Respondent. He testified that the Claimant was not dismissed. He stated that the Claimant declined to record a statement with the Police after the Respondent realized that there had been theft at the school. He stated that the Claimant disappeared and switched off his phone and was traced by the Police when he filed this suit. He testified that the Claimant never reported to work after the theft and he confirmed that the Claimant was suspended for purposes of investigations by Police. He stated that the Claimant was charged but the case withdrawn after documents went missing at the Police Station. He testified that the Claimant never worked for 19 years as the Respondent did not have such records. He testified that there was a watchman reliever and the Claimant would go for off days of 7 days every month. He testified that the Claimant was served with the suspension letter in person as he was called on phone to come and collect his salary which phone was later switched off. He confirmed that the Claimant earned Kshs. 4,500/- which was inclusive of house allowance and public holidays and stated that the Claimant was not paid any salary in lieu of notice upon suspension.

5. The Claimant's submissions were to the effect that he worked for 19 years a fact that was admitted by the Respondent in its memorandum of response and the Respondent's witness could not purport to deny that fact as a party is bound by its own pleadings. The Claimant submitted that he was suspended from work on 31st October 2013 to allow for investigations and he never received a letter of reinstatement since. He submitted that according to the evidence adduced in court the highest amount that the Claimant had ever been paid during the 19

years of service is Kshs. 4,500/-. He submitted that he was grossly underpaid contrary to the labour laws and by the time he was terminated in 2013 the minimum wage would have been Kshs. 10,116/-. The Claimant submitted that whereas the employer has a right to terminate an employee on grounds of poor performance, misconduct, gross misconduct, the employer cannot deprive the employee the accrued benefits as the employee had already worked for them before such dismissal or termination. He submitted that having worked for the Respondent for 19 years he ought to be paid as of right as it is a fair labour practice. He thus prayed for judgment as against the Respondent as prayed for in the memorandum of claim, costs and interest of the suit.

6. The Respondent submitted that the Claimant was suspended to pave way for investigations after the school theft was reported and it was therefore untenable for the Claimant to continue working as an employee of the Respondent until the conclusion of the criminal justice process. The Respondent submitted that it could not recall the Claimant back to work because the Claimant had already filed this claim for unlawful termination during the pendency of the criminal case and that the allegation by the Claimant that he was not reinstated after withdrawal of the criminal case could not stand. The Respondent submitted that the Claimant used to go off duty for 7 days every month and that there was a reliever as evidenced by payments to one Simon Kang'ethe and therefore his claim for annual leave should fail. The Respondent submitted that the Claimant used to be paid in line with the scale of the region where the school was located. The Respondent submitted that it only suspended the Claimant to pave way for the criminal justice process which ran concurrently with this claim and that it did not unlawfully terminate the Claimant's employment as alleged. It thus prayed that the suit be dismissed with costs.

7. From the foregoing and the evidence adduced, the following issues lend themselves for determination:

- a) Whether the Claimant was terminated from employment and if so, was the termination wrongful?
- b) Whether the Claimant is entitled to the remedies sought?

8. As to whether the Claimant was terminated from employment, the Claimant testified that he was issued with a suspension letter dated 31st October 2013 on suspicion that there was theft in the Respondent's premises and he was subsequently charged in Criminal Case No. 15 of 2015. The criminal case was eventually withdrawn by the complainant and the Claimant accordingly acquitted. It is common ground that the Claimant was never served with any dismissal letter or invited to any disciplinary hearing. The Claimant asserts that he was unfairly dismissed because he was not reinstated back to work even after the criminal case against him was withdrawn. The Respondent on the other hand contended that it never dismissed the Claimant but that rather, it suspended him to pave way for the criminal justice process. The Respondent however did not recall the Claimant back to work after withdrawal of the criminal case ostensibly since he had filed a case seeking relief for unlawful termination. The failure by the Respondent to reinstate the Claimant back to work was a tacit breach of contract. It is not in doubt that an employer has the statutory right to dismiss an employee summarily in terms of Section 44 of the Employment Act. However, the employer is required to accord the employee the procedural safeguards as set out in Section 41(2) of the Act. The Respondent herein was therefore required to ensure the Claimant was given notice and allowed a fair and reasonable chance to a hearing. Section 41 requires that before dismissing an employee for misconduct under Section 44 of the Act, the employer must first explain to the employee the reasons for the intended termination and afford the employee an opportunity to offer a defence. This opportunity has to be accorded the employee in the presence of his elected representative and the proceedings conducted in a language of the employee understands. The Claimant in the present case was not notified of the intention to dismiss him for gross misconduct and neither was he taken through any disciplinary hearing in terms of Section 41 thus rendering his termination was wrongful within the meaning of Section 45.

9. As to whether the Claimant is entitled to the remedies sought, having established that the Claimant was summarily dismissed without prior warning or notice and in the absence of due process, the dismissal was therefore was unlawful. The Claimant is therefore entitled to the declaration that his dismissal was wrongful and unfair and should be awarded 6 months' gross salary as compensation for wrongful termination – Kshs. 27,000/-. The Claimant will also recover one month's salary as notice – Kshs. 4,500/-. The claim for annual leave fails since the Claimant confirmed he used to go off duty for 7 days each month. This arrangement led to a cumulative 84 days off duty which is generous by any reckoning. According to the Regulation of Wages Order attached to the Claimant's list of documents and based on the Respondent's evidence that the highest amount the Claimant earned was Ksh. 4,500/- it is evident that the Claimant was not underpaid except for the months between May 2013 and October 2013 when he was entitled to a differential between the sum he earned and the minimum wage which was Kshs. 5,218/-. He was entitled to 628/- over and above his pay which translates to Kshs. 3,768/- as underpayment. There will be no order as to costs. In the final analysis I enter judgment for the Claimant against the Respondent for:-

- i. A declaration that the Claimant's dismissal was wrongful and unfair
- ii. 6 months' gross salary as compensation for wrongful termination – Kshs. 27,000/-.
- iii. One month's salary as notice – Kshs. 4,500/-.
- iv. Underpayment Kshs. 3,768/-.
- v. Each party to bear their own costs.

It is so ordered.

Dated and delivered at Nyeri this 24th day of September 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the Original

Deputy Registrar