



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU

CAUSE NO.9 OF 2017

SILAS KIPKIRUI CHESIRE.....CLAIMANT

VERSUS

THE BOARD OF GOVERNORS KABIMOI HIGH SCHOOL.....RESPONDENT

JUDGEMENT

The claimant was employed by the respondent as a general worker from January, 2011 until October, 2015 when his employment terminated over what the claimant avers was unfair on the grounds that there was no warning, disciplinary hearing, no notice or any reasons given. The respondent also failed to pay terminal dues.

The claimant is therefore seeking to be paid following underpayments from January, 2011 to October, 2015 all being Ksh.370,381.00; pay for overtime work all at ksh.115,731.05; his wage for October, 2015 was not paid and claim ksh.15,529.35; severance pay at Ksh.540,464.78; damages for unfair termination of employment and costs.

The claimant testified that he started work with the respondent as a casual employee in the year 2010 in March and served under different school heads, principals. In the year 2011 he was issued with a letter for a casual employee and on 30th October, 2011 he got a letter for a Grounds man. On 9th May, 2012 he was appointed a ground man and a new wage of ksh.7,372.00 per month. The wage was reviewed when the employees would complain. In his department they were 4 of them and the wage was reviewed to Ksh.9,700.00 per month. Every year he got an increase of Ksh.200.00

The claimant also testified that on 23rd October, 2015 the respondent terminated his employment on the grounds that he had a family problem outside of the workplace. On 14th May, 2015 he was warned for assault outside the school which occurred while defending himself with regard to his wife and child and there was an altercation.

The claimant also testified that his work hours were 8am to 5pm. In the year 2013 he was promoted and would work from 8am to 4.30pm and then go to coach students in football and such coaching duties would run until 7pm on a daily basis. The accruing overtime was not compensated.

Before employment was terminated he was not called for a hearing. On 14th October, 2016 he was to go before the Board of Management and who dismissed him. He had talked to the principal and since his case related to an assault outside of the school he was advised to apologise and seek forgiveness which he did but the respondent proceeded to dismiss him.

In cross-examination the claimant testified that on 9th May, 2012 his wage was Ksh.7,372.00 per month and would be enhanced by Ksh.200.00 yearly and his last wage was ksh.12,358.00 inclusive of benefits per month. He later got additional duties of coaching students and the overtime work was not paid.

The claimant also testified that for a month he was not at work and the respondent was aware of his whereabouts. From 8th July to 6th August, 2015 he was not at work and had no permission of absence. He had been called by elders at home to address a matter. He also remained in place custody for a month and resumed duty in August, September and October, 2015 when he was called before the board and was dismissed. This was after he tendered an apology.

Defence

The respondent in reply has denied the claims made by the claimant and given the defence that before the claimant was dismissed from his employment he had been issued with warnings vide letter dated 14th October, 2015 and verbal warnings issued by the principal with regard to disrespecting the head of games and teachers and for inciting players. This was done in the presence of the Deputy principal Mr Kibet and games head of department Mr Cherop and three other teachers Mr Kiprop, Kipkech and Kiprop.

The defence is also that the claimant was dismissed from his employment for desertion of duty for over a month.

Upon appointment the claimant was issued with letter dated 9th May, 2012 and he accepted the terms and conditions of his employment to which he accepted vide letter dated 16th May, 2013. The claimant has since committed fraud by changing the details in his letters as issued by the respondent.

The letter to the claimant purported as appointment as soccer coach is suspect and does not add value to his claim. The alleged appointment is not done procedurally and is without approval by the respondent. The claims for work over time based on fraudulently obtained records should be dismissed.

The claimant was paid for October, 2015 and the claims made lack merit and should be dismissed.

Joash Odongo the principal testified for the respondent that the claimant's gross wage was Ksh.12,352.00 and the claimant as employed from 2012 to 2015 when he was dismissed following desertion of duty for no good cause. The procedure required the claimant to apply to be away from work which he failed to do. The school bursar who was the supervisor did not know the claimant's whereabouts. Through rumours there was information that the claimant had been arrested and by letter dated 14th October, 2015 the claimant was invited to attend before the board of management and he admitted to desertion of duty and therefore the dismissal was lawful and procedural.

Mr Odongo also testified that the claimant was paid for days worked in October, 2015 save for the days he remained absent from work without good cause. The letter purportedly appointing the claimant as soccer coach should have been issued procedurally and signed by the witness as the principal which was not the case and such cannot bind the respondent. The respondent was not aware the claimant was coaching students as no such appointment had been done. The respondent could not allow the claimant to undertake duties taking him away from his core duties. Official work hours run from 8am to 5pm.

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

The respondent as the employer filed various work records with regard to the claimant's employment by the school. Such records include the letter of appointment dated 9th May, 2012 defining the claimant as the Grounds man at a gross wage of Ksh.7,372.00 per month.

The record also includes minutes of the board of management sitting on 23rd October, 2015 and under Min.8/23/10/2015 on support staff discipline issues the case of the claimant was addressed and it was noted that he was found to have deserted duty for over a month from July to August, 2015.

The record also includes a payment voucher dated 30th October, 2015 where the claimant is paid Ksh.12,358.00 a salary pay for the month of October, 2015.

In his evidence-in-chief, the claimant admitted to being absent from duty over a family matter where he was summoned home by elders and was also in custody following an altercation with regards to him protecting his wife and child. He also admitted that when he was invited by the respondent to attend before the board of management he admitted to being absent and made an apology.

Absence from work without due cause and permission of the employer is specifically addressed under section 44(4)(a) of the Employment Act, 2007. Such conduct warrant summary dismissal subject to the provisions of section 41(2) of the Act where the employee is given notice and a hearing which was done to the claimant that on 14th October, 2015 he was invited before the respondent's board of management and where he opted to give an apology knowing well that he had been absent from duty without permission of the employer or without due notice to the employer.

On this basis, having been given a hearing the claimant cannot be found to justify his absence and rely on the case of **David Gichana Omuya versus Mombasa Maize Millers Limited [2014] eKLR** or **Anthony Mkala Chitavi versus Malindi Water & Sewerage Co. Limited [2013] eKLR** as the respondent properly applied the law and gave him a hearing. There was due process before the sanction of summary dismissal issued.

On the claims for underpayment, the claimant confirmed that the place of work was in Eldama Ravine where the respondent school is situated. Under the Wage Orders applicable for the subject are to a Grounds man for the period of 2012 to October, 2015;

In the year 2011/12 the wage due was Ksh.4,047.00 and the claimant for this period was paid Ksh.4,500.00 which is within the wage guidelines;

In the year 2012/2013 the wage due was Ksh.4,577.00 and the claimant was paid Ksh.4,110.00 which is less by Ksh.467.00 and the underpayment is Ksh.5,604.00 for this year;

For the period of 2013/2014 the wage due was Ksh.5,218.00 and the claimant was paid Ksh.9,500.00 which is way above the minimum wage;

For the period of 2014/2015 remained constant; and

From May to October, 2015 the due wage was Ksh.5,844.20 and the claimant last paid wage was Ksh.11,458.00 way above the legal minimum. For October, 2015 the claimant was paid Ksh.12,358.00 based on the record and evidence by the respondent. Such pay is generous.

Save for the due underpayment for the year 2013 and 2014 at Ksh.5,604.00 the claims made for underpayment are without merit.

On the claims for overtime work, the claimant sought to rely on a letter dated 17th March, 2014. Such letter and appointment as soccer coach was contested by the respondent in the manner of issue and the person who is alleged to have signed such letter.

The details with regard to the appointment of the claimant as soccer coach are not provided. At the time he had a running contract with the respondent for a grounds man for which he has since received the due consideration in wages as assessed and analysed above. To claim that he was then appointed;

... appoint you officially as the soccer coach ... with immediate effect. ...

is to negate the very essence of his on-going employment as grounds man for the respondent. the alleged appointment as soccer coach challenged and even where such appointment was done and required to take immediate effect, the obvious contradiction cannot receive sanction by the court with a payment of any alleged work overtime. One has to give way, the regular appointment or the next appointment. Having addressed the regular employment and appointment, the alleged second appoint and soccer coach is addressed.

On the findings that the October, 2015 wage was fully paid the other claim that the claimant has outlined is that of a severance pay. This claim did not stand out as one addressed under the provisions of section 40 of the Employment Act, 2007 to justify a claim for severance pay and this is found without basis and is hereby dismissed.

The claimant having been procedurally dismissed for desertion of duty, compensation or payment of damages is not due.

Accordingly, save for the payment of the sum of Ksh.5,604.00 in underpayment, the other claims are hereby dismissed. Each party shall pay own costs.

Delivered at Nakuru this 17th day of October, 2019.

M. MBARU

JUDGE

In the presence of:

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