



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 25 OF 2016

(Before Hon. Justice Mathews N. Nduma)

FRANCIS KIGALU.....CLAIMANT

VERSUS

THE HEADTEACHER MUSASA PRIMARY SCHOOL.....1ST RESPONDENT

MANAGEMENT COMMITTEE MUSASA PRIMARY SCHOOL....2ND RESPONDENT

JUDGMENT

1. The claimant sued management Board of Musasa Primary School and the head teacher praying for maximum compensation for unlawful dismissal. The claimant testified that he was employed by the respondent on 21st January 2010 as a security officer earning Kshs. 2,100 per month. The claimant worked until 8th July 2015. The salary was increased to Kshs. 3,000. That he worked for seven (7) days a week from 6 p.m to 6 a.m in the morning. That the respondent delayed to pay the claimant salary for May and June 2015 and on 8th July 2015, the claimant approached the headmaster at his office to request for payment. The claimant was asked to return on 9th July 2015. On 9th July 2015, the headmaster gave the claimant a letter of suspension dated 8th July 2015.

2. The claimant asked to be paid so that he could leave peacefully but the headmaster chased him from office. Claimant spoke to the Chairman of the Board who informed him that money for payment of salary was given out to the headmaster. The claimant reported to the ministry of labour. The dispute was discussed with the headmaster who promised to pay but did not. The claimant was not given letter of termination. The claimant filed suit and claims compensation and two months salary. The claimant denied under cross examination that he was paid salary for May and June.

3. Claimant said he was paid for March and April. Claimant denied that a school bell got lost on 29th March 2015. Claimant stated that this was an afterthought raised by the school in the year 2016 after he had filed suit. Claimant was arrested and charged. Claimant said that the issue was first raised by the headmaster at the labour office on 27th August 2015. Claimant denied that he was suspended due to the loss of the bell. Claimant said no bell got lost whilst he was still working. Allegation was made in a letter dated 10th July 2015. Claimant said this was a false hood. Claimant stated that he had a clean record and no warning at all.

4. RW1 Festo Anyara, testified that he was a retired head teacher. That a bell got lost when claimant worked for the respondent as a security guard. That the claimant did not report the matter. That RW1 called claimant to his office over the matter but the claimant did not turn up until after 3 days. RW1 stated that the claimant promised to bring back the bell since he knew where it was but he never brought it back. RW1 denied having terminated employment of the claimant. That respondent gave the claimant time to bring back the bell. That claimant stopped working on 8th July 2015 when he was suspended. That the claimant reported the dispute to labour office. That at the labour office the claimant was asked to return the bell. That the claimant has not returned the bell to date. RW1 reported the matter to the police. Claimant was arrested and charged at Hamisi Magistrate Court. The claimant was acquitted under Section 87 A of the Penal Code. The case was withdrawn. That the board had met and resolved to give claimant time to bring the bell since he was a neighbour of the school. RW1 prayed that the suit be dismissed.

Determination

5. RW1 suspended the claimant from work by a letter dated 8th July 2015. The letter was produced in court by the respondents. According to the letter, the suspension was indefinite and did not provide any date of return nor did it ask the claimant to explain any matter.

6. The letter states that the suspension followed discussion by the Board regarding the claimant's performance. The letter did not allege loss of a school bell as alleged by RW1 in court or at all. The claimant testified that the issue of loss of a school bell was first raised at the labour office by RW1 as an afterthought. That the allegation was false and the claimant had not been asked to explain the matter of a bell at all.

Claimant testified that he was suspended by RW1 for having gone to his office to demand payment of May and June salary that had not been paid to date.

7. Respondent produced payment vouchers dated 8th May 2015 for Kshs. 6,000, 16th April 2015 for Kshs. 3,000 and one dated 17th March 2015 for Kshs. 9,000. Claimant testified that the respondent delayed to pay his salary and this is evident from the arrear salary payments made in the three vouchers produced by the respondent. The respondent has failed to demonstrate to the court that it had paid the claimant salary for the months of May and June 2015. The salary would have been reflected in a voucher dated June and July 2015 since salary was paid in arrears. The court also notes that the respondent violated the minimum wage requirement for a security guard for the entire period the claimant worked. The claimant has however not claimed any underpayments. The claimant has also not claimed gratuity which all security guards are entitled to upon termination in terms of the regulatory wage order for security officers.

8. The court is satisfied that the respondent has failed to provide a valid reason for indefinite suspension of the claimant from work which the claimant correctly construed as termination of his employment and reported a dispute to the ministry of labour.

9. The respondent subsequently reported false charges to the police against the claimant which charges were later withdrawn for lack of any evidence and the claimant acquitted.

10. The court finds that the respondent violated *Sections 36, 41, 43 and 45 of the Employment Act* in that it dismissed the claimant for no valid reason and dismissal did not follow a fair procedure since claimant was not given any notice, notice to show cause nor was he subjected to a disciplinary hearing.

11. The court therefore finds that the dismissal of the claimant was unlawful and unfair and the claimant is entitled to compensation in terms of Sections 49(1) (c) and 4 of the Employment Act 2007.

12. The claimant was heavily underpaid since he received a salary of Kshs. 3,000 per month, was not given at least one off day per week and worked 12 hours a night for seven nights a week without payment of overtime. The claimant was not registered with NSSF and was not paid any terminal benefits upon dismissal. He was not compensated for the loss of his job and he suffered loss and damage. The claimant was victimized for asking to be paid arrear salary. This is another aggravating circumstance.

13. The court finds this an appropriate case to award the claimant maximum compensation being equivalent of 12 months salary for the unfair and unlawful dismissal in the sum of Kshs. (12x3, 000) 36,000. The claimant is also entitled to one month salary in lieu of notice in the sum of Kshs. 3,000. Had the claimant claimed payment in respect of gratuity, underpayments and overtime, the court would have awarded the same in the circumstances of the case.

14. In conclusion judgment is entered in favour of the claimant against the respondent in the sum of Kshs. 39,000 with interest at court rates from date of judgment till payment in full.

15. The respondent to pay costs of the suit.

Judgment Dated, Signed and delivered this 9th day of October, 2019

Mathews N. Nduma

Judge

Appearances

Claimant in person

Mr. Orengo for Respondent

Chrispo – Court Clerk