



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAKURU**

**CAUSE NO.417 OF 2017**

**DENNIS OTIENO ONYANGO..... CLAIMANT**

**VERSUS**

**MISSION IN ACTION SCHOOL AND CHILDREN'S HOME.....RESPONDENT**

**JUDGEMENT**

The claim is on the facts that in August, 2016 the claimant was employed by the respondent school as a van driver at a wage of Ksh.10,800.00 per month and without the payment of a house allowance. The claimant worked until 24<sup>th</sup> August, 2017 when his employment was terminated without warning or a hearing.

The claim is that work hours were from 6am to 7pm a period of 13 hours each day from Monday to Friday and with rest on weekends. The claimant would be at work during public holidays without compensation.

In August, 2017 the manager, Andrew Oino called the claimant and instructed him that he wanted to employ him afresh and that he was required to make an application. The claimant was already in employment and had signed some contract and thus could not sign a new contract before the end of his existing contract. At the same period the claimant was asked to assist the gate man who had been given other duties and the claimant agreed to attend from 8am and around 5pm some visitors came and requested the claimant to be allowed to see the manager and he took them to the accountant and to the manager's office and he then returned the keys to the gateman with information on the guest with the manager. He then left for home

On 24<sup>th</sup> August, 2017 the claimant reported to work at 8am and worked until 11am when the manger called him seeking to know who had ponded the gate for the visitors the previous day and the claimant explained his circumstances and the fact that he had been assisting the gateman at the time and he followed procedures and informed the accountant about the guests before leaving them at the manager's office.

The claimant was sent away which he reported to the head teacher.

On 28<sup>th</sup> August, 2017 the claimant called the head teacher asking if there was need to report to work and was informed there was a new driver in the school and advised him to look for new employment.

On 29<sup>th</sup> August, 2017 the claimant went to see the manager with regard to his dues but was advised to stay at home. On 7<sup>th</sup> September, 2017 the claimant was called to attend and have his employment matters resolved and present was Linda, social worker and henry Kibet, Syrus Kivuitu and the manager Mr Andrew Oino and where the claimant was advised to look for another job and that he would be paid for his time worked with the respondent.

The claim is that there was unfair termination of employment and the claimant is seeking payment of the following terminal dues;

- a) Notice pay;
- b) August, 2017 salary ksh.13,306.30;
- c) Annual leave pay Ksh.12,797.90;
- d) Overtime pay Ksh.94,098.70;
- e) Underpayment Ksh.32,499.20

- f) 4 months contract term not worked;
- g) Compensation for unfair termination of employment;
- h) Certificate of service; and
- i) Costs.

The claimant testified in support of his claims.

The defence is that the claimant was employed as a driver from 22<sup>nd</sup> August, 2016 and was paid ksh.9,931.00 and a house allowance of Ksh.1,409.00 per month and the wage of Ksh.10,800 was inclusive of his house allowance.

The defence is also that during the course of his employment the claimant committed various misdemeanours for which he was issued with warning letter by the respondent. The claimant still has an active case with Kaptembwo Police Station OB No.16/11/9/2017.

The claimant's work hours were 8 for 5 days a week and thus worked for only 40 hours and not 65 as alleged.

The claimant was suspended from duty to allow for investigations on his conduct. He then voluntarily resigned from his employment and demand payment of his dues on the grounds that he was not willing to work for the respondent after the complaint with the police.

The claimant attended at the respondent's office on 18<sup>th</sup> September, 2017 with his resignation letter and demanded to be paid his due. The board met and gave him a recommendation letter and paid him Ksh.22,085.00 vide cheque of equal date. Such payment included;

Contract gratitude ksh.4,590;

Terminal leave ksh.7,415;

Notice pay ksh.9,180; and

Unpaid holiday Ksh.900.

The defence is also that the claimant had been requested to assist in manning the gat but he allowed dubious characters into the respondent's office at 5pm without having signed them on the visitor's book. He then led these strangers to the manager's office and abandoned them there and left the premises without letting the manager know about the strangers. The next day he was summoned to show cause why he had allowed strangers into the premises and this resulted in his suspension to allow for investigations as this amounted to gross misconduct. Before the matter could be addressed to finality the claimant resigned from his employment. He was paid his terminal dues.

Cyrus Kivuitu a board member of the respondent testified that the respondent is a children's home and school which employed the claimant as a driver from August, 2016 and issued him with a contract. He was placed on probation for 3 months and in September, 2017 he resigned from his employment to seek new employment elsewhere and the respondent was kind to give him a recommendation letter.

Mr Kivuitu also testified that from July, 2017 the claimant had issues which were settled internally and in August, 2017 the respondent got a new manager who advised all employees to e-apply for their jobs and this created issues.

The claimant also had his own cases of misconduct, in August, 2017 he was directed to stand in at the gate and when he allowed strangers into the respondent's premises without recording them in the visitor's book and left them at the manager's office. He was suspended to allow for investigations as this was a serious lapse noting the children's home is sensitive and to allow strangers inside has potential to cause serious security challenge.

By letter date 18<sup>th</sup> July, 2017 the claimant resigned from his employment following a report to the police about his conduct. Having children at the school is a matter taken seriously and any security lapse had to be reported. The claimant also stole the gate book and this led to the police report.

Upon his resignation the claimant was paid all his terminal dues. Employment ended on good terms and settlement. The witness has continued to engage the claimant and got him a cab to run and ensure he has a means of livelihood.

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

The claimant's case is that 24<sup>th</sup> August, 2017 his employment with the respondent as a driver was terminated after he was sent home and was not allowed to attend work thereafter. This followed an incident where he was directed to man the gate and is said to have allowed strangers into the premises. The defence on the other hand is that the claimant of gross misconduct and when directed to man the gate he allowed strangers into the compound and left them at the managers officer and left without informing him and this caused a serious security lapse as the respondent in in charge of children who should not be exposed to such persons. That the claimant had committed several misdemeanours and a report had been made to the police and as a result the claimant had tendered his resignation and he was

then suspended to allow for investigations but before conclusion he resigned from his employment.

From the records, the alleged resignation of the claimant is vide letter filed by the respondent dated 18<sup>th</sup> July, 2017. The resignation was to take effect *from the end of second term*, meaning July/August, 2017.

There seems to have been inaction on the part of the respondent as the claimant remained at work after his resignation following events on 24<sup>th</sup> August, 2017 when he was directed to man the gates and where he is alleged to have allowed strangers into the compound. The claimant also remained with the respondent as the alleged complaint to the place regarding his conduct was made on 11<sup>th</sup> September, 2017 where he was accused to stealing the visitor's record book.

Employment did not end with the alleged resignation of the claimant.

Following the alleged misconduct of allowing strangers into the compound, it is not clear what action the respondent took against the claimant. The stated suspension to allow for investigations is not supported by any material evidence. The recall of the claimant for hearing or settlement with the respondent is equally left bare and without any material support. Ultimately employment terminated without any written record for the court to assess what was the reason(s) leading to the same and thus contrary to the provisions of section 43 of the Employment Act, 2007.

Where employment terminates without any genuine reason being given to the employee and where there is no evidence that the employee was given a fair chance to state his defence such is unfair as this is contrary to the provisions of section 45 of the Employment Act, 2007.

On the remedies sought, the claimant is seeking that he was underpaid. That the wage of ksh.10,800.00 as without his house allowance. A driver working for the respondent entity placed at Njoro area of Nakuru County in the year 2016/2017 under the Regulation of Wages (General) (Amendment) Order, 2015, and shall be deemed to have come into operation on the 1st May, 2015 was earning Kshs. 11,279.85 and 15% house allowance ksh.1,695 all at Ksh.12,970.85 and on the paid wage of Ksh.10,840.00 there was an underpayment and the tabulation of the claimant is correct at ksh.32,499.20 in total underpayments.

On the claim for overtime pay the claimant has produced the record book. This record ordinarily should be submitted by the employer. It is not clear under what circumstances the claimant was able to secure and submit this record. I take it this was part of the matters forming part and misdemeanour and report to the police as stated by the respondent in defence.

Indeed it is criminal for the claimant as an employee to source evidence through application of criminal means. It is not necessary for him to do so on the face of section 10(7) of the Employment Act, 2007 provisions. All what is required of the employee under the provisions of section 47(5) of the Act is to prove there was unfair and unlawful termination of employment.

On the records thus submitted to prove that there was work overtime, a scan by the court reveals the following;

At page 21 of the claimants record, the dates not clear but he reported to work as the last person at 6am and left at 6.50pm but the person ahead of him reported at 3.07pm and the next at 3pm;

On 1<sup>st</sup> September, 2016 the claimant reported at an hour which is an obvious manipulation between 7am and 6am as the person ahead of him reported at 7.28am and the next person to him at 7.30am. The overzealous effort to manipulate the record is apparent to the court;

This same conduct is repeated on the next day of attendance. There is a manipulation of the record.

On page 23 a date in October, 2016 the claimant reported at work at 7.25am and left at 6.18pm;

On 30<sup>th</sup> September, 2016 the dates are manipulated;

Page 31 overleaf the record is manipulated between 7am and 6am; and

This trend is reflective overall.

The reasons for the claimant submitting this record is lost in obvious manipulation. Where the same was to support his case, the same is reflective of his general conduct as a person who is dishonest and not to be believed and thus forming a good basis for the report made to the police about him stealing this record.

To rely on this record and evidence that the claimant worked overtime as alleged would be to reward gross misconduct.

Even where the claimant as truthful in his evidence, which is apparent he was not, his evidence was that he worked for 13 hours each day from Monday to Friday and took his rest on Saturday and Sunday. His employment as driver under the regulations if required to be for 8 hours for 6 days each week with one rest day all being 64 hours and where he worked for 13 hours instead for 5 days all being 65 as set out in his claim, the only consideration should have been the one (1) era hour. From the records the reporting hours were staggered and not static at 6am to 7pm and using the formula the claimant has applied to tabulate his overtime work hours this standard tabulation of time is obviously erroneous.

Adding the fact of records manipulation, the claims for overtime pay is lost.

On the finding that respondent failed in addressing the provisions of section 43 and 41 of the Act, notice pay is due. Compensation is due. however for the conduct of the claimant, the court is required under section 45(5) of the Employment act, 2007 to considered the contribution of the employee in addressing the compensation due and this being discretionary, and the claimant having an active criminal case running over the theft of the books records submitted with the court, to make an award would be to sanction criminal conduct. No compensation shall be allocated.

This addressed the claimant for pay for 4 months remainder term of contract is dealt.

Notice pay is however due at ksh.13,309.80 is due under the provisions of section 35 of the Act.

A certificate of service shall issue in accordance with section 51 of the Employment Act, 2007. The recommendation letter issued is discretionary and what is due is a certificate of service.

**Accordingly, the judgement is hereby entered for the claimant against the respondent for the payment of underpayments of ksh.32,499.20; notice pay ksh.13,309.80 and from which amount the claimant shall be paid less Ksh.22,085.00 already received. A certificate of service shall issue in accordance with section 51 of the Employment Act, 2007. Each party shall bear own costs.**

**Delivered at Nakuru this 11<sup>th</sup> day of December, 2019.**

**M. MBARU**

**JUDGE**

In the presence of: .....