

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 195 OF 2017

HILLARY MACHARIA MUTHANGA.....CLAIMANT

VERSUS

GITHUA YOUTH POLYTECHNIC.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for his termination which occurred on 19th January 2015. He averred that he had been employed by the Respondent with effect from 1st January 2013 and that the Respondent paid him less than the basic minimum statutory wage in total violation of the law. He averred that the Respondent failed to give him a written statement for each pay period, to explain the monthly payments and any deductions made. The Claimant averred that there were no employment particulars given to confirm the duration of the period of employment, length of notice to terminate the employment or other particulars as required by law. He averred that he reported the dispute to the Labour officer Murang'a County without delay on 5th February 2015 and the Labour officer wrote to the Respondent. The Respondent was advised to pay the Claimant his lawful dues within a period of 7 days but the Respondent wilfully resisted to pay the same up-to-date. The Claimant stated that the Respondent also failed to issue a certificate of service to enable the Claimant to secure suitable employment elsewhere and therefore the Claimant claims damages. The Claimant submitted the Respondent did not disclose that it failed to follow the right procedure in terminating the Claimant's employment and that the Respondent delayed by 16 months to present a response to the letter from by the Labour Officer Murang'a County causing the Claimant loss. He averred that he had lost his source of livelihood and suffered. The Claimant therefore sought unpaid wages Kshs. 464,072/-; gross monthly wage equivalent to one year Kshs. 268,747/-; pay equivalent to 3 months Kshs. 67,185/-; NSSF dues with 5% monthly penalty equivalent to 3 years Kshs. 15,870/-; other general expenses Kshs. 50,000/-; general damages and certificate of service making a total of Kshs. 965,867/-. The Claimant therefore sought damages as prayed for, general damages, costs of the suit, interest on the sums above at court rates from the date of filing till date of judgement and payment in full as well as any other relief the Honourable Court may deem fit.

2. The Respondent filed a reply to the memorandum of claim and in the said reply averred that the Claimant was employed an instructor by the Respondent which is partially run by a board of management and operates when funds are available. The Respondent averred that the Claimant was offered Kshs. 5,000/- a month and that the job was offered to a resident to avoid any housing costs and lunch which was provided at the school. It was averred that the Claimant worked normally and followed the laid down conditions of the institution upto March 2013 when he was entrusted with depositing trees belonging to the institution to Chinga Tea Factory and instead of remitting the amount to the school the Claimant misappropriated the funds and deserted duty. The board of management met and decided that the Claimant be paid his arrears after he pays the institution the amount that he had misappropriated being Kshs. 16,100/- and he be dismissed from duty instead of a criminal complaint being lodged against him. The Respondent averred that the Claimant is therefore not entitled to any amount claimed. The Claimant's dues were calculated from which was deducted Kshs. 48,100/- which was the total sum owed to the Claimant. The Respondent thus prayed for the claim to be dismissed with costs to the Respondent.

3. The Claimant testified on 15th March 2018 in the absence of the Respondent though the date was taken by consent. He stated that he sued the Respondent his former employer and had a few issues for determination. He testified that he was employed as a technical instructor in carpentry and joinery. He said he was paid Kshs. 65,155/- for his services. He requested the Respondent to pay his rightful statutory dues later reported a dispute to the Labour Office for underpayment. He testified that the minimum wage due to him was not paid as the minimum payment due was Kshs. 19,644/- between May 2012 to April 2013, and Kshs. 22,395/- a month between May and April 2013. He stated that if the sum paid is reflected against the amounts he was entitled to, the balance he was owed was Kshs. 464,372/- for the period he worked. He says he was verbally dismissed without cause and his efforts to settle the matter was fruitless and that the Respondent failed to mitigate the minimization of costs for the wrongful dismissal. He prays for compensation and states that he did not obtain a certificate of service. He sought payment of gratuity as NSSF dues were not paid and he also sought costs of the suit.

4. In the dispute before me, the Claimant asserts he was wrongfully dismissed. The Respondent asserts that the Claimant absconded duty as he was complicit in the theft of money for logs delivered to Chinga Tea Factory. It was averred that the Claimant deserted duty after the theft of the funds meant for the firewood delivered to Chinga Tea Factory. The Claimant never responded to the Respondent's claims on the theft and his desertion of duty. In his testimony before me, the Claimant did not rebut the issue of theft of logs. The sum he was entitled to was calculated and payment made after the misappropriated funds were deducted. The Claimant testified that he was entitled to payment of Kshs. 19,644/- between May 2012 and April 2013 and Kshs. 22,395/- between May and April 2013. The Claimant did not read the general wages order correctly. The sum due for other towns for an ungraded artisan was Kshs. 8,834/- The Regulation of Wages Amendment Order for 2013 was only applicable after May 1st 2013 and therefore could not apply to him since he left employment in March 2013. The only wages order that could apply is the one which set wages at Kshs. 8,834/-. In his bank statements he has payments from Githua Youth Polytechnic for Kshs. 49,000/-. He did not indicate which months of the year he taught at the polytechnic and therefore given that in the period covered by the payments is 6 months, the amount he received was Kshs. 8,166.66/- per month for the months in question. This was an underpayment of Kshs. 667.33 for each month making a total of Kshs. 4,003.98 unpaid. In the premises the only sum he is entitled to is Kshs. 4,003.98 for underpayment. On the issue of the dismissal, he did not prove the allegation that he was dismissed verbally. No person was named as the person who dismissed him verbally, he did not prove the dismissal by the Respondent as alleged in his pleadings. In my view, the version captured in the pleadings by the Respondent seems more plausible as even the payment for the firewood reflects on his bank statement. I

enter judgment for the Claimant against the Respondent for:

- i. Kshs. 4,003.98 for underpayment
- ii. Kshs. 10,000/- as costs for the suit
- iii. Costs of 1,500/- ordered by court in the course of the suit
- iv. A certificate of service in terms of Section 51 of the Employment Act.

It is so ordered.

Dated and delivered at Nyeri this 11th day of April 2018

Nzioki wa Makau

JUDGE