



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 991 OF 2010

CYRUS MUINDE MAUNDU.....CLAIMANT

v

ALBERT MARANGU t/a

GLORIOUS PREPARATORY SCHOOL.....RESPONDENT

JUDGMENT

1. Cyrus Muinde Maundu (Claimant) commenced legal proceedings against Albert Marangu t/a Glorious Preparatory School (Respondent) and he stated the Issue in Dispute as Unfair and unlawful dismissal of the Claimant.
2. The Claimant filed an Amended Memorandum of Claim on 20 June 2011, the Respondent filed a Memorandum of Reply on 9 March 2016 and the Cause was heard on 29 January 2018 and 7 February 2018.
3. The Claimant filed written submissions on 28 February 2018 while the Respondent filed its submissions on 19 March 2018.
4. The Court has considered the pleadings, evidence and submissions and identified the Issues for determination as, *when the employment commenced, whether there was unfair dismissal and appropriate remedies.*

Commencement of employment relationship

5. The Claimant contended that he was employed by the Respondent in February 2007 as a cook while the Respondent maintained that in 2007, the Claimant was a volunteer earning a stipend and was given formal employment only in 2008.
6. In terms of sections 9 and 10 of the Employment Act, 2007 (commenced June 2008), it is the statutory responsibility of an employer to draw up a written contract with the prescribed particulars including date of commencement of employment.
7. Because the Respondent did not issue a written contract to the Claimant during the 2 or so years he served and in consideration of section 10(7) of the Employment Act, 2007, the Court finds that the employment relationship commenced in February 2007.
8. The Court in making the finding notes that the Respondent in an introduction letter to Equity Bank Ltd indicated that the employment commenced in 2007.

Unfair dismissal or desertion

9. The Claimant prosecuted his case as one of unfair dismissal while the Respondent contended that it was a case of desertion (absconding duty).
10. Supposing that the Claimant absconded, in terms of section 41(1) & (2) as read with section 44(4)(a) of the Employment Act, 2007 that was a *misconduct* for which a hearing was required.
11. And if a hearing was not possible, the Respondent should have demonstrated that it made attempts to have the Claimant *show cause* for not reporting to work. That was not done.
12. In terms of case law, the Respondent was also under an obligation, as the innocent party, to accept the Claimant's repudiation of contract,

for by failing to report at the designated place of work, he was repudiating the contract (see *Philomena Aromba Mbalasi v Uni-Truck World Ltd* (2015) eKLR, *London Transport Executive v Clarke* (1981) IRLR 166) and *Geys v Societe Generale, London Branch* (2012) UKSC 63.

13. In light of case law as well on statutory law, and on the assumption that the Respondent was the innocent party and employer, the Court can conclude that there was unfair termination of employment.

Remedies (including entitlements accruing from employment relationship)

Leave

14. It is a matter of public notoriety that in this country, schools close in April, August and December of each year.

15. During the closures, not much work goes on more so cooking when pupils/students are not in school.

16. Considering the nature of the Claimant's occupation and the school calendar in Kenya, the Court finds this head of relief is unavailable to the Claimant.

Overtime

17. On account of overtime, the Claimant sought Kshs 84,747/-.

18. His evidence was merely that he used to report at 5.30am and leave at about 6.30pm thus working for 11 hours instead of 8 hours per day.

19. The Claimant did not however prove during testimony the contractually agreed and/or prescribed minimum working hours beyond which he would have been entitled to overtime.

20. Equally he did not disclose the formula he used to arrive at the pleaded sum of Kshs 84,747/-.

Underpayments

21. The Claimant pleaded that he was underpaid by Kshs 2,876/- in 2007.

22. In this respect, the Claimant did draw the attention of the Court to the *Labour Institutions Act and Regulation of Wages and Conditions of Employment* in his submissions without specifying the Order applicable to the sector the Respondent was operating in.

23. In terms of evidentiary foundation, that was not enough.

Pay in lieu of notice

24. With the conclusion that there was unfair termination of employment, the Court holds that the Claimant is entitled to the equivalent of 1 month pay in lieu of notice.

Severance pay

25. The Claimant did not separate with the Respondent on account of redundancy and therefore severance pay is not available to him.

Compensation

26. The Claimant served for about 2 years and in consideration of the length of service, the Court will award the equivalent of 3 months gross wages as compensation.

Conclusion and Orders

27. The Court finds and holds that there was unfair termination of employment and awards the Claimant and orders the Respondent to pay him

(i) Pay in lieu of Notice	Kshs 8,500/-
(ii) Compensation	Kshs 25,500/-
TOTAL	Kshs 34,000/-

28. Claimant to have costs.

Delivered, dated and signed in Nairobi on this 6th day of April 2018.

Radido Stephen

Judge

Appearances

For Claimant Mr. Kabiru instructed by Kabiru & Co. Advocates

For Respondent Ms. Manegene instructed by Manegene & Co. Advocates

Court Assistant Lindsey