



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 733 OF 2015

ALBERT ENOSI MUSASIA.....CLAIMANT

VS

MARY IMMACULATE COTTAGE HOSPITAL

AKA SISTERS OF MARY IMMACULATE.....RESPONDENT

JUDGMENT

Introduction

1. Before me is a claim by Albert Enosi Musasia, against his former employer, Mary Immaculate Cottage Hospital, also known as Sisters of Mary Immaculate. The claim is documented by a Memorandum of Claim dated 16th September 2015 and filed in court on 25th September 2015.
2. The Respondent filed a Memorandum of Response on 10th February 2015. By consent of the parties, the matter proceeded by way of written submissions.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent as a security guard on 1st August 2004. He worked until 15th June 2015 when his employment was terminated, on account of gross misconduct. At this time, he earned a monthly salary of Kshs. 9,500.
4. The Claimant avers that the termination of his employment was unlawful and unfair. He now claims the following:

- a) One month's salary in lieu of notice.....Kshs. 12,221
- b) Salary from 15th June – 15th July 2015.....12,221
- c) Gratuity (18 days x 11 years x Kshs. 365).....72,270
- d) Prorata leave (21 days x 7 months x Kshs. 365/12 months).....4,471
- e) Salary underpayment (May 2014 – July 2015).....120,779
- f) 12 months' salary in compensation.....146,652
- g) Costs plus interest

The Respondent's Case

5. In its Memorandum of Response dated 9th February 2016 and filed in court on 10th February 2016, the Respondent admits having employed the Claimant though as a gardener not a security guard.
6. The Respondent denies the Claimant's claim for unlawful termination and states that the decision to terminate him was lawful and fair. The Respondent further denies the claim for underpayment. In response to the claim for house allowance, the Respondent states that the Claimant was not only housed but was also paid a monthly house allowance of Kshs. 2,900.

7. According to the Respondent, the Claimant's claim was fully settled at the Labour Office but the Claimant refused to collect the settlement cheque.

Findings and Determination

8. There are two (2) issues for determination in this case:

- a) Whether the termination of the Claimant's employment was lawful and fair;
- b) Whether the Claimant is entitled to the remedies sought.

The Termination

9. The Claimant's employment was terminated by a hand written letter dated 15th June 2015 stating as follows:

"TERMINATION LETTER

ALBERT MUSASIA

We wish to thank you for the time you have worked with us.

We now regret to terminate you from work due to your Gross Misconduct which you couldn't acknowledge until we got you red handed. Having warned you verbally and inverbally (sic).

We have given you a one month notice from 15th June 2015 to 15th July.

May God bless you

Yours

Sr Pauline"

10. The parties in this case sought not to adduce *viva voce* evidence. On matters of fact therefore, the Court relied on the documents as filed. In doing so, the Court ignored the parties' attempt to testify in final submissions.

11. According to the letter dated 15th June 2015, the Claimant's employment was terminated on account of gross misconduct. The particulars of gross misconduct were however not disclosed nor was the Claimant given an opportunity to respond to any specific charges as required under Section 41 of the Employment Act, 2007. The result is that the Respondent failed to establish a valid reason for terminating the Claimant's employment in terms of Section 43 of the Act.

Remedies

12. Before making a determination on the remedies available to the Claimant, I need to dispense with the issues of his designation and effective date of employment. The Claimant states that he was employed on 1st August 2004 in the position of security guard.

13. However, according to a certificate of service dated 30th July 2015, filed in court by the Respondent, the Claimant was employed from 2006 until 15th July 2015, in the position of gardener. The Claimant did not adduce any evidence to counter the documentary evidence provided by the Respondent in this regard. The Court therefore adopts the employment record produced by the Respondent and holds that the Claimant worked as a gardener from 2006 until 15th July 2015, as evidenced by the certificate of service.

14. Back to the remedies available to the Claimant. I award him eight (8) months' salary in compensation. In making this award, I have taken into account the Claimant's length of service coupled with the Respondent's conduct in the termination process but mitigated by the Claimant's employment record.

15. I further award the Claimant one (1) month's salary in lieu of notice, salary for 15 days in July 2015 and prorata leave for 2015.

16. The claims for gratuity and salary underpayment are based on the Claimant's assertion that he was employed as a security guard. Having ruled against the Claimant on this score, these claims must fail.

17. In the end, I enter judgment in favour of the Claimant as follows:

- a) 8 months' salary in compensation.....Kshs. 72,000
- b) 1 month's salary in lieu of notice.....9,000

c) Salary for 15 days in July 2015 (9,000/30x15).....	4,500
d) Prorata leave for 2015 (9,000/30x1.75x7).....	<u>3,675</u>
Total.....	89,175

18. This amount will attract interest at court rates from the date of judgment until payment in full.

19. The Claimant will have the costs of the case.

20. Orders accordingly.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 26TH DAY OF JULY 2018

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JUDGE

Appearance:

Mr. Asewe for the Claimant

Mr. Gatonye for the Respondent