



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT ELDORET

CAUSE NO.90 OF 2017

ALLFAYO JAGONA IMBUYA.....CLAIMANT

VERSUS

THE BOARD OF MANAGEMENT IVUGWI

SECONDARY SCHOOL.....RESPONDENT

JUDGEMENT

1. The claimant was employed by the respondent Board of Management of Ivugwi secondary School established under the Basic Education Act. The claimant was employed as a Grounds Man in September, 2012 and started at a monthly wage of Kshs.3,759.00 and which was increased to Kshs.5, 520.00 per month. The claimant performed his duties diligently and was recognised and awarded commendations;

On 2nd June, 2012 the was recognised as the most dedicated employee;

On 14th June, 2014 the claimant was recognised as the most dedicated employee;

On 8th August, 2014 the claimant was recognised doe duty dedication; On 5th September, 2015 the claimant was recognised for duty dedication.

2. On 30th October, 2015 the respondent suspended the claimant without any justifiable cause. There was no hearing or a written reason for the action by the respondent and the duration of the suspension was not stated.

3. On 10th May, 2017 the claimant was unfairly terminated from his employment. There were no valid reasons leading to such decision and no due process in accordance with section 41 of the Employment Act.

4. While in employment, the clamant was not paid his legal wages under the Regulation of Wages (General) Orders. For the period of September, 2012 to July, 2013 the claimant was paid kshs.3, 759.00 instead of Kshs.4, 577.20 and the due house allowance and the due unpaid balance is Kshs.16, 552.58;

For the period of August, 2013 to December, 2013 the claimant was paid Kshs.3, 759.00 instead of Kshs.5, 218.00 plus house allowance and the due balance is Kshs.11, 208.50;

For the period of January, 2014 to July, 2015 the claimant was paid kshs.5,520 instead of Kshs.6,000.70 and house allowances and the due balance is kshs.8,171.90;

For the period of August, 2015 to October, 2015 the claimant was paid

Kshs.5, 500.00 instead of Kshs.5, 844.20 and house allowance due all being

Kshs.3, 602.49 in unpaid wages.

5. The claim is also that the worked overtime hours and was not paid the compensation due. work hours were over 4 hours daily and the total amount due in this regard is Kshs.321, 130.60 in overtime pay.

6. The claimant did not not take any rest days for the period of employment all being Kshs.78, 308.80.

7. Work on public holidays computed and unpaid all amounting to Kshs.14,882.80.
8. The due annual leave was not taken or paid for and the claim is for Kshs.17,985.31.
9. The claim is also that the claimant was unfairly placed on suspension and which violated his rights and the salary due for the period should be paid and all being Kshs.123, 215.32. that damages are due for unfair termination of employment with notice pay, 12 months gross wage and 3 years' service pay at Kshs.107, 533.30.
10. Claim for costs for future treatment at Kshs.500, 000.00 and general damages, special damages and assessment of damages for lost of earning capacity.
11. The claimant testified in support of his claims. The claimant was employed by the respondent as the Grounds Man in September, 2011 at a wage of Kshs.3, 759.00 and was promised an increase annually but this was not done. The claimant was responsible for the cows in milking and taking care of the grounds. On 30th October, 2015 the watchman brought a letter to him and which indicate that he should proceed on suspension. The reasons and duration were not stated.
12. On 5th May, 2016 the claimant went to the school principal seeking to know his fate and was advised to appeal against the suspension. No reason had been given for the same.
13. On 7th May, 2016 the claimant was invited to attend a meeting with the respondent board but was kept waiting the whole day and when he was called the board chair demanded to know if the claimant was aware who his employer was and he was sent away. He was not given a hearing or chance to urge his defence.
14. After a month, the claimant received letter dated 7th May, 2016 indicating that he had been dismissed from employment. There were no reasons given for the termination of employment. No terminal dues were paid.
15. The claim was also amended to include claims for work injury sustained while the claimant was at work with the respondent that such injury has caused him pain and suffering and has had a debilitating effect on his health and work performed. He was treated and issued with a medical report and treatment has been set at Kshs.500, 000.00 together with general damages. As a result of such injury the claimant is unable to seek gainful employment as before and being 34 years only he can no longer undertake employment for gain. Such should be redressed based on his minimum wage of Kshs.6, 720.00 per month for the rest of his work years.
16. The claimant also testified that while at work he got injured and went to hospital through the assistance of some teachers. His duties were a lot and had to struggle to ensure that he attended to all allocated work.
17. There was no rest day due to the nature of duties and taking care of all cows for feeding, milking and taking care of the grounds. During all public holidays the claimant remained at work and no annual leave was allowed or allocated. There was no pay for the rest days untaken, overtime worked or the work during leave.
18. In cross-examination, the claimant testified that he got the letter of suspension stating that he was negligent in his duties and had been insubordinate. He was called for a hearing and was asked questions by the respondent. the letter of termination gave similar reasons.

Defence

20. The respondent filed its response and amended the same and the case is that the claimant was never their employee and was not awarded for good performance as alleged. There was no unlawful suspension from any employment of the claimant with the respondent or breach of the law. Where the claimant was the respondent's employee a fact which is challenged he was accorded all his rights but he neglected his duties by being absent from work for no reason. The claimant had been warned severally and was summoned before the Board of Management to respond to allegations against him but his explanations were not satisfactory and had to be relieved of his duties.
21. The defence is also that the claimant did not work for more than 8 hours in one day and the allegations and claims made for overtime are not justified. The claimant was allowed to attend annual leave when it was due and was let off duty on public holidays and other days as necessary and the claims made in this regard are not with merit.
22. The claims made with regard to work injury are not available to the claimant herein and the entire claim should be dismissed with costs.

In evidence the respondent called **Michael Mundia Lukoya**, the Principal of the respondent school and who testified that h worked with the claimant who was employed by the respondent on 1st August, 2012 as a Grounds Man.

23. Mr Mundia also testified that the claimant performed his duties well until 2013 when he started being reluctant in his work by neglecting his duties, being careless and improperly performing them. he would sneak out of school using the school bicycle to engage in personal activities for several hours. This caused the respondent to summon him in a meeting held on 17h September, 2013 and where he was

reminded of his duties and cautioned over his misconduct. Despite the claimant being issued with a warning letter, he continued to engage and neglect his duties by being absent from work for several hours a day. A second warning letter was issued on 22nd April, 2015. The claimant failed to change and he was suspended on 30th October, 2015 for among other reasons, being absent from work, negligence of duty and failure to sign the work attendance register.

24. The respondent board was reconstituted in 2016 and the claimant was invited for a hearing where he urged his defence. He opted to attend alone. The disciplinary hearing was held on 7th May, 2016 and he pleaded guilty and for leniency. The board of the respondent arrived at a decision to relieve the claimant of his duties.

25. The certificates issued to the claimant were issued to him during the school prize giving day and to all employees. This was in order to motivate the claimant.

26. The claimant never worked over hours as alleged. He took his annual leave and was not on duty during public holidays. The termination of employment was lawful.

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

28. Section 43 of the Employment Act, 2007 requires an employer before effecting termination of employment to prove the reason(s) for the termination and where an employer fails to do so, such termination of employment is deemed unfair within the meaning of section 45 of the Act.

29. The burden to give reasons is on the rationale that section 45(2) of the Employment Act, 2007 requires an employer to demonstrate that;

(2) A termination of employment by an employer is unfair if the employer fails to prove— (a) that the reason for the termination is valid;

(b) That the reason for the termination is a fair reason—

(i) Related to the employee's conduct, capacity or compatibility; or

(ii) Based on the operational requirements of the employer; and

(c) That the employment was terminated in accordance with fair procedure.

30. Even in a serious case that warrants summary dismissal, the employer must comply with the provisions of section 41(2) of the Employment Act, 2007.

31. In this case, the claimant admitted that while undertaking his duties he was issued with a suspension letter dated 30th October, 2015. That he read and understood the matters therein though he contested them.

32. From this suspension letter, the reasons given for the same are that the claimant had;

i. Negligence of duty in that you fail to attend to all your duties due to non-observance of work hours

ii. Insubordination – you have ignored the school authorities instructions to sign in and out in the workers attendance register while entering for work and leaving respectively.

You are required to appear before the board when it is constituted and convened to clear yourself against accusation levelled against you.

33. In this regard, the claimant remained on suspension until notice inviting him to appear before the respondent management board on 7th May, 2016. The claimant confirmed he got the notice but no party herein has attached it. The contents of this notice and its compliance to the provisions of section 41 of the Employment Act, 2007 cannot be secured. In The minutes of the Board panel hearing the claimant, it can be discerned that the claimant attend alone, together with other employees facing disciplinary allegations against them.

34. As set out above, even where the claimant was faced with serious allegations of negligence of duty, insubordination and being absent from work, his rights secured in law and under section 41(1) of the Employment Act, 2007 had to be guaranteed. Such required that where there were disciplinary hearing,

he should have been invited to attend with another person, employee, and representative of his choice.

35. In the records filed by the respondent, failure to secure the rights set out in law is a violation of the procedural justice. The substance of the allegations made against the claimant addressed, due process demanded that attendance at such a disciplinary panel and which had the potential to have his employment terminated be with another person of his choice.

36. The respondent in submissions relied on the case of **KUDHEIHA versus Pwani University College, Cause No.105 of 2012 (Mombasa)** and the finding that where an employee is absent from work such is gross misconduct and that section

41 of the Employment Act, 2007 does not place the burden on the employer to tell the employee to bring a colleague of choice at the disciplinary hearing and that the employee should demand to have this right secured. However my reading of section 41(1) is that the employer who summons the employee to a disciplinary hearing must issue notice and ensure compliance to section 41 of the Act as follows;

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation

37. The wording of the law is that *an employer shall ... explain to the employee, in a language the employee understands ... and the employee shall be entitled to have another employee or a shop floor union representative ... present at the disciplinary hearing.*

38. The claimant in submissions has thus correctly applied these provisions as cited in the case of **Bernard Ngugi versus G4S Security Services Kenya Limited [2013] eKLR** and the finding that termination of employment should not be casually treated without adequate explanation of the circumstances and the reasons taken into account. The employees' rights in law and under section 41 of the Employment Act, 2007 should be secured.

39. Ultimately, the claimant was on 10th May, 2016 issued with a letter terminating his employment with the respondent. in the letter, the respondent made reference to the disciplinary hearing on 7th May, 2016 which has hereinabove been faulted for being procedurally unfair. The substance of the allegations have not been challenged in any material way and the warning issued to the claimant preceding the disciplinary hearing are matters the court is required to address as under section 45 (5) (b) on the conduct and capability of the employee up to the date of termination.

Remedies

40. On the claim for overtime pay, the basis is that the claimant was made to work for over hours, would arrive at school early to make tea for teachers and would be taking care of the cows in the school while maintaining the grounds. Part of the reasons the claimant was relieved of his employment was the matters set out in his letter of suspension, the warning letters and these related to his negligence to mark the attendance register. Such compromises the claimant's claim for overtime work as where he failed to adhere to work directions by the employer, such resulting in the issuance of various warning letters, such poor work record put into account, this claim has no justification.

41. The above put into account, section 10(7) of the Employment Act, 2007 requires the employer;

(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

42. Save for the respondent taking disciplinary action against the claimant for failure to register in the

work attendance records, the only other records submitted related to warning letters, minutes of the board, letter of suspension and annual leave sheet for November, 2014.

43. The work records with regard to the claimant taking rest day, public holidays and pay statements in terms of sections 27(2), 37(2) and section 10(3) (a) (i) read together with 10(7) and the provisions that the employer has the duty to secure all entitlements and benefits due to the employee in the employment contract as required under section 10(3) that;

(i) entitlement to annual leave, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee's entitlement, including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated);

44. without the work records by the respondent as the employer I take it the claims due for work on rest days and public holidays are due.

45. the claim for rest days is on the basis that from 1st September, 2012 to 31 st July 2013 the claimant worked for 44 days and based on his minimum wage was entitled to Kshs.20, 416.00; from 1st August, 2014 to July, 2015 the claimant was entitled to 96 days and for the period of 1st August, 2015 to 30th October, 2015 he was entitled to 12 days.

46. The period of 1st September, 2012 to 31st July, 2013 in computation is correct and the claim due is for Kshs.20, 416.00 The period of 1st August, 2013 to July, 2015 has 52 week and the rest days due all put constant are thus 52 in accordance with section 27 of the Employment Act, 2007 and the due pay is Kshs.27, 508.00. for the period of 1st August, 2015 to October, 2015 the computation is correct at Kshs.7, 108.00 all being due at Kshs.55, 032.00.

47. The claims for work during public holidays are well set out and chronologised. The defence to these claims is general and not materially challenged. Based on the applicable Wage Orders, these dues are owed to the claimant at kshs.14, 882.80.

48. The claims for underpayments and including housing allowance where such was not provided for within the respondent entity is due. going through the claims and the applicable Wage Orders and the claimant is entitled to kshs.39, 535.47.

49. On the claim for leave days due, on the records submitted by the respondent as the employer, the claimant had his annual leave starting 25th November, to 4th January, 2015. Such is a period of over 30 days. On this account, I find the respondent ensured compliance with section 28 of the Employment Act, 2007 as and when the claimant annual leave was due.

50. All claims for work injury and the impact thereof are to be made under the provisions of Work Injury Benefit Act, 2007 (WIBA) and jurisdiction is removed from this court to the lower court unless the claim is made to give emphasis on the unfair work conditions and termination. In this regard, the claimant had an assessment of his injuries conducted by the County Occupational Safety and Health Officer and which office is legally mandated to issue the claimant with the requisite documents for WIBA claims. such claims are to be secured in the lower court.

51. On the claims that there were constitution violations and that the claimant was subjected to slavery and servitude, these are serious claims against the respondent and the evidence in this regard that the respondent allocated the claimant a series of work duties in excess of his prescribed work, my reading of the contract of service issued to the claimant was that as the Grounds Man, he would be allocated duties among others and including such a function as grounds man. As the claimant has compromised his claims for overtime work hours where he failed to register in the work attendance and he was disciplined over the same, with such claim not confirmed, to assert that he was given excess duties and this amounted to slavery and servitude I find to have no justification.

52. The claimant was on suspension from 30th October, 2015 to 10th May, 2016 when he was issued with

letter of termination of his employment by the respondent. the claimant effectively remained in the employment of the respondent until his employment was terminated. The failure to take action on his disciplinary case in time or within a reasonable time over matters that the respondent board had not been constituted should not be visited upon the claimant.

53. A prolonged suspension does not serve justice. In the case of **Samson Omworo versus Maasai Mara University and others, Cause No.2367 of 2016** the court held that the employer has the prerogative to discipline its employees. However, a prolonged suspension of an employee that is not addressed within a reasonable time only results in anxiety and is bound to raise concern. In **Victor Sammy Mutiso versus TSC [2016] eKLR** the court held that a reasonable time period for an interdiction or suspension from duty should be within 3 months and if not possible, soon thereafter and a period of over a year is definitely long and not reasonable. In any event, an interdiction or a suspension like in this case should only be interim to allow for investigations and should not take long as held in **Peter Gaitho Ng'ang'a versus Board of Management Banita School and another [2015] eKLR**.

54. That set out, where the claimant's employment with the respondent did not cease until termination on 10th May, 2016, the due wages are payable. The claim for Kshs.123, 251.32 is due.

55. On the claims for damages and or compensation for unfair termination of employment, as set out above upon the finding that there was no procedural fairness in addressing the claimant's misconduct, the court is given power to look at section 45 of the Employment Act, 2007 in whole and put into account the claimant's work record in assessing the remedy due for unfair termination of employment. Putting the existing warnings and matters of negligence and insubordination into account, such warranted summary dismissal on short notice. The respondent however did not apply such summary action and opted to invite the claimant for hearing and the requisite notice was issued. Consequently, based on this findings, no compensation shall be awarded save for the due notice pay for one month being Kshs.6,720.83.

56. The claim for service pay for three (3) years is not due on the basis that the claimant confirmed he had his NHIF membership and his NSSF membership was active. In this regard, section 35 (6) (d) of the Employment Act, 2007 apply to the claimant.

Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;

(a) notice pay Kshs.6,720.83;

(b) unpaid wages during suspension period awarded at Kshs.123,251.32;

(c) rest day pay Kshs.55,882.00;

(d) public holidays pay Kshs.14,882.80;

(e) underpayment including house allowance pay Kshs.39,535.47;

(f) costs awarded at 50%;

(g) the claimant to be issued with a Certificate of Service in accordance with section 51 of the Employment Act, 2007

(h) the dues payable shall be paid less statutory deduction and in accordance with section 49(2) of the Employment Act, 2007.

Delivered in open court at Eldoret this 12th day of July, 2018.

M. MBARU

JUDGE

In the presence of:

Court Assistants: Nancy & Robert

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