



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA

CAUSE NO 666 OF 2016

REUBEN KENYANYA SIMEKA.....CLAIMANT

VS

KEVIN KEPHA NYONGESA T/A

KEVIN HILL SCHOOLS.....RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 14th September 2016 and filed in court on even date, the Claimant has sued the Respondent for unfair termination of employment and failure to pay terminal dues.
2. The Respondent filed a Statement of Reply and Counterclaim on 6th December 2016 to which the Claimant responded on 14th December 2016. The Respondent did not however attend the hearing in spite of due service. The Court therefore heard the Claimant *ex parte* on 9th July 2018.

The Claimant's Case

3. The Claimant states that he was employed by the Respondent on 5th January 2007 in the position of security guard. He worked until 10th March 2015 when his employment was terminated.
4. The Claimant avers that the termination of his employment was unlawful and unfair. His claim was tabulated as follows:

- a) One month's salary in lieu of notice.....Kshs. 9,780.95
- b) Annual leave pay for 8 years.....78,248.00
- c) Service pay for 8 years.....72,384.00
- d) Unpaid holidays for 8 years.....60,191.00
- e) Off days @ 4 days per month.....121,284.00
- f) Overtime for 8 years.....148,148.00
- g) Underpayment for 8 years.....266,976.00
- h) House allowance for 96 months.....140,846.00
- i) Gratuity for 8 years45,143.00
- j) NSSF deducted but not remitted.....38,400.00
- k) 12 months' salary in compensation.....117,372.00

l) Punitive damages

The Respondent's Case

5. In his Statement of Reply and Counterclaim dated 5th December 2016 and filed in court on 6th December 2016, the Respondent admits that the Claimant was engaged as a security guard between 2007 and 2015. He earned a monthly salary of Kshs. 7,000.
6. The Respondent further states that during his employment, the Claimant suffered from a persistent and chronic ailment. In light of this, coupled with the Claimant's age, it was agreed after extensive consultation between the parties that it would be to the Claimant's advantage if he was transferred to the Respondent's St. Kevin Matayos School in Busia County, which was closer to his home.
7. In 2015, the Claimant was formally transferred to St. Kevin Matayos School in Busia County. However, the Claimant did not report to his new station. The Respondent denies terminating the Claimant's employment and states that the Claimant himself voluntarily deserted and/or absconded his duties without notice.
8. The Respondent adds that despite reasonable efforts made to seek an explanation on the Claimant's conduct and/or whereabouts, the Claimant refused and neglected to give any reason and/or to return to work.
9. The Respondent avers that copies of letter of employment dated 1st August 2008, salary and petty cash vouchers, and transfer letter from St. Kevin Tudor to St. Kevin Magongo dated 20th January 2015 are all forged documents manufactured by the Claimant to advance his case. The Respondent states that a complaint on these forgeries had been lodged with the police.
10. In his response to the Respondent's Statement of Reply and Counterclaim, the Claimant denies the allegations of forgery of his employment records made against him by the Respondent. In this regard, he states that copies of employment letter dated 1st August 2008, salary and petty cash voucher and transfer letter from St. Kevin Tudor to St. Kevin Magongo, which he filed in court were all issued to him by the Respondent.
11. By way of counterclaim the Respondent claims from the Claimant the sum of Kshs. 7,000 being one month's salary in lieu of notice. The Respondent also asks for costs plus interest.
12. On 12th June 2017, the parties recorded a partial consent before my brother **Makau J** thus dispensing with the claims for leave pay, salary underpayment and service pay.

Findings and Determination

13. There are three (3) issues for determination in this case:
 - a) Whether the Claimant deserted duty or was unlawfully terminated;
 - b) Whether the Claimant is entitled to the remedies sought;
 - c) Whether the Respondent has made out a proper counterclaim against the Claimant.

Desertion of Duty or Unlawful Termination?

14. In denying the Claimant's claim for unlawful termination of employment, the Respondent states that the Claimant deserted duty after being transferred to the Respondent's St. Kevin Matayos School in Busia County.
15. Desertion of duty is a serious administrative offence which renders an employee liable to dismissal. It must however be proved. Jurisprudence emerging from this Court is to the effect that an employer asserting desertion must demonstrate two things; first that the employee has shown an intention not to resume duty and second, that efforts have been made to reach out to the employee with a view to putting them on notice that termination of their employment on account of desertion of duty is under consideration (see **Philemon Kiprotich Kirui v Lessos Veterinary Suppliers Ltd (CICADA Hotel) [2015] eKLR** and **Rashid Juma Ramadhan v Ready Consultancy Company Limited [2018] eKLR**).
16. In his Statement of Reply and Counterclaim dated 5th December 2016 and filed in court on 6th December 2016, the Respondent makes a general statement that efforts were made to reach out to the Claimant to no avail. He however did not produce any evidence to back this statement. The assertion that the Claimant deserted duty was therefore unsupported by evidence and the Court rejects it.

17. On his part, the Claimant produced a termination letter dated 10th March 2015, stating as follows:

“Dear Reuben,

RE: TERMINATION OF SERVICES

According to the above subject matter we have terminated your services W.E.F. 10th March 2015.

This is due to pressure for us to resize the staff, bear with us.

Payment of your services will be communicated to you later.

Thanking you in advance.

DIRECTOR

(Signed)

ST. KEVIN HILL SCHOOLS”

18. The Claimant further denies ever having been transferred from St. Kevin Hill School Magongo to St. Kevin Matayos School in Busia County. He maintains that he did not abscond duty and contends that on the contrary it is the Respondent who issued him with the termination letter dated 10th March 2015.

19. The Respondent chose not to testify and the Court found no reason to disbelieve the Claimant’s account of the circumstances leading to his exit from the Respondent’s employment. The Court therefore finds and holds that the Respondent terminated the Claimant’s employment without justifiable cause as required under Section 43 of the Employment Act and in violation of the procedural fairness requirements set out under Section 41 of the Act.

Remedies

20. Pursuant to the foregoing findings, I award the Claimant ten (10) months’ salary in compensation. In arriving at this award, I have taken into account the Claimant’s length of service as well as the Respondent’s conduct in the termination transaction. I further award the Claimant one (1) month’s salary in lieu of notice.

21. The Claimant also claims house allowance. Section 31(1)and(2) of the Employment Act provides as follows:

31. (1) An employer shall at all times, at his own expense, provide reasonable housing accommodation to each of his employees either at or near to the place of employment or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.

(2) This section shall not apply to an employee whose contract of service-

(a) contains a provision which consolidates as part of the basic wage or salary of the employee, an element intended to be used by the employee as rent or which is otherwise intended to enable the employee to provide himself with housing accommodation; or

(b) is the subject matter of or is otherwise covered by a collective agreement which provides consolidation of wages as provided in paragraph (a).

22. There was no evidence that the monthly salary paid to the Claimant was inclusive of house allowance. The Court however takes notice that part of the claim settled by the parties was underpayment. In my view, the claim for underpayment had a direct impact on the claim for house allowance. The only thing I will do therefore is to load 15% on the monthly salary of Kshs. 7,000 for purposes of the award on compensation and notice pay.

23. The claim for overtime compensation on account of public holidays, off days and extra hours was not proved and is dismissed.

24. The claims for gratuity and unremitted NSSF dues were abandoned in the course of the trial.

The Respondent’s Counterclaim

25. In light of the finding that the Respondent unlawfully terminated the Claimant’s employment, his counterclaim collapses and is dismissed.

Final Orders

26. Finally, I enter judgment in favour of the Claimant in the following terms:

a) 10 months’ salary in compensation.....Kshs. 80,500

b) 1 month’s salary in lieu of notice.....8,050

Total.....88,550

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

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

29. It is so ordered.

DATED SIGNED AND DELIVERED AT MOMBASA THIS 27TH DAY OF NOVEMBER 2018

LINNET NDOLO

JUDGE

Appearance:

Mr. Tolo for the Claimant

No appearance for the Respondent