



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 115 OF 2016

(Before D. K. N. Marete)

RICHARD BARASA WEPUKHULU.....CLAIMANT

VERSUS

THE BOARD OF MANAGEMENT,

CHENJENI PRIMARY SCHOOL.....RESPONDENT

JUDGEMENT

This matter was originated by way of a Statement of Claim dated 13th July, 2016. The issue in dispute is therein cited as;

Wrongful dismissal/unfair termination.

The claimant's case is that he was orally employed by the respondent on 2nd January, 2001 as a Security Guard at a salary of Kshs. 1000.00 per month way below the minimum salary of Kshs. 1754.00 per month excluding housing allowances. In March, 2007, this was increased to Kshs. 2,000.00. He puts it thus;

5. That, at all material times, the respondent was obligated to issue a written salary statement to the claimant at or before the time at which any payment was made, within the meaning of mandatory provisions of Section 20 of the Employment Act, No.11 of 2007, Laws of Kenya, which it did not.

6. That, the claimant herein was duly entitled to his rest day in every period of seven (7) days, within the meaning of mandatory provisions of Section 27 (2) of the Employment Act, NO.11 of 2007, Laws of Kenya and that the claimant was never granted such rest days by the respondent at all.

7. That, according to Section 49 (1) (c) of the Employment Act, 2007, Laws of Kenya, the Claimant herein is eligible for compensation to a maximum of twelve (12) months gross pay for wrongful dismissal from his employment services.

8. That, the maximum compensation is premised on the basis of the claimant's faithful service and also hard work as a "Security Officer Guard."

It is the claimant's further case that he worked faithfully until the 18th March, 2015 when he was wrongfully terminated from employment on account of some unspecified reasons and in contravention of Section 41 and 42 of the Employment Act, 2007. He thereafter reported a dispute to the county labour office, Bungoma but there was a resolution and therefore this claim.

The claimant's other case is that he had served for fourteen years and three months without disciplinary issues and that his dismissal is violation of the mandatory provisions of ILO Convention NO. 158 concerning termination of employment at the initiative of the employer. He has therefore suffered grave harm, damage and loss and has suffered loss and damages.

He prays as follows;

- 1. That, the termination of the employment of the claimant herein was unprocedural, unfair, unlawful, illegal and hence, NULL and VOID.*
- 2. That, the respondent pays the claimant herein the sum of “Kshs 1,322,721.60=” as tabulated at paragraph 10 hereinabove.*
- 3. That, the respondent pays the claimant herein compensation for the lost income at the rate of Kshs.6,720.85/= per month respectively, from the 18th March, 2015, the effective date of the wrongful dismissal or unfair termination of his employment service, to the date of judgement of this suit.*
- 4. That, the respondent pays interest on the total amount at court rates.*
- 5. That, the respondent pays a twenty percent (20%) interest on the award every month, until settlement is cleared.*
- 6. That, the respondent issue the claimant herein with a “certificate of service” within the mandatory provision of Section 51 of the Employment Act, No.11 of 2007, Laws of Kenya.*
- 7. That, the costs of this suit be provided for by the respondent.*
- 8. For any other further and better relief deemed to fit to grant be granted.*

The respondent denies the claim and avers that the claimant was working on contract and being paid promptly basing on the agreement between him and the respondent whereby the issue of house allowance and annual leave were never discussed at all. She was not party to this agreement and puts the claimant to strict proof of the same.

It is the respondent's further case that the claimant absconded from duty after being sought by police from Chwele Police Station to record a statement over loss of KPLC cables that were being kept in school (respondent's premises) and therefore this was not a case of unfair termination.

The respondent further states that the discussion of suspending the claimant was reached by the board of management when the claimant absconded duty and there was no way the school could operate without security. This, she submits is a matter for determination by way of judicial review and the respondent would raise a preliminary objection at the earliest opportunity, notice of which is given.

The respondent again describes the claimant as uncanny person who involved in adulterous practice and criminal activities and had been warned and directed to desist from such unwarranted behavior. Again, this matter was managed by the County Labour Officer, Bungoma who found a case for the respondent and dismissed the claimant's.

The respondent in conclusion avers that this matter is within the jurisdiction of the Employment and Labour Relations Court, Kisumu and that she would raise a preliminary objection to this extent. Again,

the claim is bad in law, incompetent, fatally defective.

The issues for determination therefore are;

1. Whether there was a termination of the employment of the claimant by the respondent.
2. Whether the termination of employment for the claimant by the respondent was wrongful, unfair and unlawful.
3. Whether the claimant is entitled to the relief sought.
4. Who bears the costs of the claim.

The 1st issue for determination is whether there was a termination of the employment of the claimant by the respondent. It is noted that this matter was not heard *inter partes*, or at all. It is also notable that the respondent did not actively participate in the trial. When the matter came for hearing on 24th January, 2017, there was no appearance for the respondent and the claimant submitted that the matter be determined in terms of the claim as filed.

It is also notable that all this time the only evidence of service on record is a Notice of Summons by the Deputy Registrar dated 14th July, 2016 and an affidavit of service sworn on 25th July, 2016. The next one is a hearing notice dated 8th December, 2016 by the Deputy Registrar. There is no evidence of service for this.

Counsel for the respondent M/s G. M. Maengwe and Company Advocates filed a Memorandum of Appearance and the reply to the Memorandum of Claim dated 26th July, and 2nd August, 2016 respectively. However, on 22nd August instant, the advocates filed a Notice of Cessation of Acting.

It would appear that the claimant's overture and submission on determination of the matter is an attempt to steal the show. This is because there is no evidence of service to the respondent on his part.

Looking at the matter from a different perspective, the claimant submits letters dated 12th October, 2015 to the respondent inviting her to a meeting *inter partes* before the County Labour Officer, Bungoma. There is also another letter to the respondent by the County Labour Officer above notifying her of a labour complaint by the claimant.

The claimant had ample opportunity to demonstrate and establish his case but chose to rely only on his pleadings. This, coupled with the defence as presented does not in the least establish a case of termination of employment by the respondent. There are numerous disconnected links in the employment engagement which are not clearly spelt out by the claimant. He does not establish a case of termination or even employment by the respondent. The respondent pleads a case of no termination and this is the more probable of the two scenarios. No wonder, the conduct of the trial by the claimant. I therefore find that there was no termination of employment of the claimant by the respondent.

The other issues for determination therefore lapse with the finding on issue No. (i) above.

I am therefore inclined to dismiss this claim with costs to the respondent. And this answers all the issues for determination.

Delivered, dated and signed this 21st day of February, 2017.

D.K.Njagi Marete

JUDGE

Appearances

1. Claimant in person.

2. No appearance for the respondent.