



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 84 OF 2016

PATRICK IRERI.....CLAIMANT

-VERSUS-

JEPHEW NYAGA MURANG'A (AS TRUSTEE OF TOM WARTH

EDUCATIONAL ACADEMY).....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 24th March, 2017)

JUDGMENT

The claimant filed the statement of claim on 06.05.2016 through Bwonwonga & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) Kshs. 458, 685.00 being outstanding and withheld salaries.
- b) Kshs. 300,000.00 being withheld salaries.
- c) A declaration that the claimant is still in the respondent's employment and has all along been underpaid and demands payment for underpayment.
- d) Costs of the claim and interest thereon till payment in full.
- e) Any other alternative relief that the court may deem fit and just to grant in the circumstances.

The statement of defence was filed on 20.05.2016 through Mutwiri Arimi & Company Advocates. The respondent prayed that the suit be dismissed with costs.

The **1st issue** for determination is whether the parties were in a contract of service. The claimant's case is that he was employed by the respondent as a watchman for 7 years and 6 months at Kshs. 5,000.00 per month in salary. The claimant testified that the respondent employed him effective 15.11.2008. That the respondent promised to issue the letter of appointment but none was issued. The claimant testified that he was a night guard but he was assigned to collect fees from parents early in the morning and he produced original respondent's receipt books he retained for that purpose. The claimant also testified that he was given the trust document being his exhibit 1 on the claim bundle. The claimant further testified that he stayed at the respondent's school premises until 05.05.2016 when he was evicted and his residential house in the school pulled down. It was his evidence that he was paid irregularly and part of his salary had been withheld.

The respondent's case is that he never employed the claimant. The letter by the claimant's union dated 10.03.2016 clearly stated that the claimant was employed by one Miriam Mugure effective 15.11.2008. The union's letter dated 12.04.2016 was addressed to Miriam Mugure.

The respondent observed that the documentation on payment as filed for the claimant did not implicate the respondent and at no point did the respondent pay money to the claimant. The payments appeared to have been effected by Miriam Mugure for transactions the respondent testified he had not been privy to as he was a stranger in that regard. The respondent's case was that the claimant was his tenant and the claimant raised the present dispute upon the respondent demanding outstanding rent of Kshs. 180,000.00 as per the demand letter dated 29.01.2016.

The court has considered the evidence. It is incredible that the claimant worked for 7 years and 6 months without proper pay and without filing a grievance in that regard with his employer or the labour office; the last pay being in 2009. The union addressed Miriam Mugure as the employer and nowhere was the respondent addressed or alleged to be the claimant's employer except as claimed in the suit. The receipt books relied upon show that they were last used in June 2009. The claimant testified that the respondent's girls' secondary school closed down in February 2010 and the court returns that the evidence was incredible that despite the closure, the claimant remained in employment. Whereas the claimant testified that he served in the academy or baby day-care establishment and not the secondary school, the claimant offered no evidence to show that the academy or day-care existed and belonged to the respondent. The respondent's evidence was that he did not know why his wife Miriam Mugure paid some monies to the claimant but that the claimant was the respondent's tenant paying Kshs.2, 500.00 per month.

The court has taken into account all the evidence and returns that there is no evidence to establish a contract of service between the parties. The parties appear to have been in some relationship but it has not been shown that it was employment relationship. The court has considered all the circumstances of the case including the complicated and unclear relationship between the parties and returns that each party shall bear own costs of the suit.

In conclusion the claimant's suit is hereby dismissed with orders that each party shall bear own costs of the suit.

Signed, dated and delivered in court at Nyeri this **Friday, 24th March, 2017.**

BYRAM ONGAYA

JUDGE