



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 163 OF 2015

JOACHIM MWENDA.....CLAIMANT

VERSUS

DAVID WAITITU.....RESPONDENT

Mr. Kurauka for claimant

M/S Njoroge for respondent

JUDGMENT

1. The claimant was employed by the respondent in September 2009 at Kshs.8,000/= a month. He worked continuously until 11th September 2014 when he was summarily dismissed for extending off days given to him to take his child to school by four (4) more days.
2. Claimant worked as a gardener and caretaker of the compound in Runda Estate.
3. The claimant states that he was unlawfully dismissed and was not paid terminal benefits upon dismissal. He seeks payment of;
 - (i) Service pay for 5 years.
 - (ii) Notice pay
 - (iii) Payment in lieu of 36 public holidays.
 - (iv) 2 days overtime, over 60 weeks at Kshs.200/= per day Kshs.31,900/=.
4. Claimant stated that he worked two (2) Sundays in a month and rested for two Sundays.
5. He seeks compensation for wrongful dismissal and grant of certificate of service.

Response

6. The suit filed by a memorandum of claim dated 10th February 2015 is opposed by memorandum of response dated 9th March 2015. The respondent also called RW1, David Waititu to testify in opposition to the suit.

7. Respondent states that he runs a primary school and kindergarten in Donholm. He admits having employed the claimant for five years as a gardener and caretaker of the dogs. He earned Kshs.8,000/= a month. He worked from 7 a.m. to 5 a.m. and usually kept time.

8. He went on leave when school closed. He took 25 or more days leave annually. RW1 stated that he compensated the claimant for the extra hours worked by paying him Kshs.10,000/= regularly beginning of every year for school fees.

9. RW1 adds that the claimant absconded duty and he was not dismissed from employment. RW1 found a replacement.

10. RW1 stated that claimant was given one week off to organise Harambee to raise school fees for the daughter. The daughter worked as a casual at the school. That claimant extended the off days by 1 week without authority and did not pick the phone when called.

11. He sent an “sms” stating he was not yet through with school matters and did not say when he would return. RW1 employed a reliever. RW1 had contributed to the Harambee and helped in the organisation of it. When claimant came back, RW1 told him he had found his replacement.

12. RW1 paid claimant 3 month’s salary in the sum of Kshs.24,000/=. RW1 wrote off the advance of Kshs.11,000/= he had given the claimant and so he paid him equivalent of 5 months’ salary in good faith.

13. RW1 confirmed that claimant worked alternative Sundays but did not work on public holidays. He also never did overtime. RW1 prays the suit be dismissed with costs.

Determination

14. The issues for determination are

- (i) Whether the claimant absconded work or was wrongfully dismissed from employment.
- (ii) Whether the claimant is entitled to the reliefs sought.

Issue I

15. The employment and the terms and conditions of employment of the claimant are largely not in dispute. It is also not in dispute that the claimant was given off days to raise funds to take his daughter to school. It is also not in dispute that the claimant extended the off period without express permission of the respondent by about a week.

16. The respondent found a replacement for the claimant in spite of the fact that the claimant wrote an “sms” message to the respondent explaining to him that he had yet to conclude taking the daughter to school and needed four (4) more days to finalise the matter.

17. When the claimant reported back to work after four (4) days, he found that he had been replaced and was told his position was no longer available.

18. Section 44 (4) provides that an employee may be summarily dismissed if;-

“(a.) without leave or other lawful cause an employee absents himself from the place appointed for the performance of his work:”

19. For the employer in this case to establish a lawful cause, it is imperative that he/she provides the employee opportunity to explain in terms of Section 41 of the Act, the reason for extending the off day. The employee had by telephone informed the employer the reason for the delay to return to work and upon his return, the employer ought to have provided the claimant with an opportunity to explain what

necessitated his delayed return to work. RW1 explained that he had employed a “reliever” awaiting the return of the claimant.

20. In the circumstances of this case, the respondent having participated in raising the school fees for the claimant and went ahead to grant the claimant off days to take the child to school did not act reasonably by deciding to replace the claimant only upon his 4 days’ absence and having received a telephone explanation as to the cause of the delayed return.

21. Having employed a reliever, the business was not unduly prejudiced by the short delay by the claimant considering the nature of his work which was cleaning and caretaker service.

22. The reason for the termination was not valid considering also the testimony by RW1 that the claimant was a good and reliable employee. RW1 also testified that the claimant only went on leave when school closed and he served alternate Sundays. All these matters render the decision by the respondent unreasonable in the circumstances of the case.

23. Furthermore, the respondent did not follow a fair procedure in dismissing the claimant from employment.

24. Accordingly, the dismissal of the claimant violated Section 45 of the Employment Act and the claimant is entitled to compensation in terms of Section 49 of the Employment Act.

25. The claimant served the respondent for a period of five years. The claimant partly contributed to the dismissal by extending his off days. He had a good record at work but suffered loss and damage upon losing his job, when his child had just joined school.

26. The claimant was paid various terminal benefits upon dismissal and the court awards him five (5) months’ salary as compensation for the wrongful dismissal from employment in the sum of Kshs.40,000/=.

Terminal Benefits

Notice Pay

27. The claimant was not given notice of dismissal nor was he paid in lieu of notice. The court awards him Kshs.8,000/= in lieu of notice.

Overtime

28. The respondent admitted that the claimant worked from 7 a.m. to 5 p.m. daily for six days and worked for seven days in alternate weeks. The claimant stated that he was not paid overtime and the respondent was unable to produce any records to demonstrate payment of overtime.

29. This claim was proved on a balance of probability and court awards the claimant overtime for 2 days for 60 weeks at Kshs.266/= in the sum of Kshs.31,920/=

Service Pay

30. The claimant worked for 5 years and was not registered with NSSF nor did the respondent make any contribution to NSSF. The claimant is entitled to gratuity calculated at 15 days salary for each completed year of service in the sum of Kshs.20,000/= (4,000 x 5). The court so awards.

31. In the final analysis the total award to the claimant is Kshs.99,920/= with interest at court rates from date of judgment till payment in full.

32. The respondent to pay costs of the suit.

Dated and Delivered at Nairobi this 19th day of May 2017

MATHEWS NDERI NDUMA

PRINCIPAL JUDGE