



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 86 OF 2016

JOHN NGATIA NDERITU.....CLAIMANT

VERSUS

OTHAYA BOYS HIGH SCHOOL..... RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 16th June, 2017)

JUDGMENT

The claimant filed the statement of claim on 09.05.2016 in person. The claimant prayed for judgment against the respondent for:

- a) A declaration that in the interest of justice and as per Article 35(1) (b) of the Constitution the respondent to produce sign-in and sign-out records which will greatly help in calculating the overtime hours that were not paid to the claimant for the 18 years he worked in Othaya Boys High School and which he was entitled to be compensated as per labour laws.
- b) Unpaid annual leaves of Kshs. 39, 295 as computed in paragraph 18 (a) of the statement of claim.
- c) Unpaid public holiday of Kshs.64, 301.00 as computed in paragraph 18(c).
- d) One year salary being compensation for unfair termination Kshs. 128, 604.00.
- e) Gratuity of Kshs. 192, 906.00.
- f) Costs of the suit.
- g) Any other relief that the court may deem fit and just to grant.

The response to the statement of claim was filed on 21.07.2016 through Wachira Nderitu & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs.

The claimant was employed by the respondent as a watchman on 01.02.1997. He served for 18.5 years until 07.04.2015 when he was arrested. The claimant was charged with the offence of stealing by servant contrary to section 281 of the Penal Code and it was alleged that the claimant together with 2 other accused person had stolen particularised food items, being the property of Othaya Boys Secondary School, their employer (Criminal Case No. 167 of 2015 in the Senior Resident Magistrate's Court at Othaya). By the judgment delivered on 14.07.2015, the claimant was convicted as charged and one year

probation sentence was imposed by the trial court.

The facts were not in dispute and parties agreed to file final submissions and the suit be determined on the basis of the material on record.

To answer the **1st issue** for determination, the court returns that in view of the conviction and sentence in the criminal case, the respondent has established that per sections 43 and 47(5) of the Employment Act, 2007, there was a valid reason leading to termination of the claimant's employment. The court finds that the claimant will not therefore be entitled to a declaration that the termination was unfair and is not entitled to 12 months' pay in compensation for unfair termination.

To answer **the 2nd issue** for determination, the court returns that the respondent has filed and served all records on the claimant's annual leave and taking into account those records, the prayer for unpaid annual leave will collapse.

To answer the **3rd issue** for determination the court returns that the claimant did not provide evidence for the claim for pay for public holidays and overtime as the same will collapse.

In any event, the court returns that the prayers for pay for overtime, leave, public holidays and unremitted union dues were of a continuing nature or injury and the time of limitation for the action is 12 months from the date of cessation under section 90 of the Employment Act, 2007. The claimant's last day at work or date of separation with the claimant was on or about 07.04.2015. The suit was filed on 09.05.2016 and the 12 months of limitation had lapsed on or about 08.04.2015. The court finds that the actions as based on the continuing injuries were time barred.

The court finds that the claimant failed to give justification for the claim for gratuity and the prayer will fail.

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

Signed, dated and delivered in court at Nyeri this **Friday, 16th June, 2017.**

BYRAM ONGAYA

JUDGE