



REPUBLIC OF KENYA  
IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT MOMBASA

CAUSE NO. 927 OF 2015

KATANA MWAGANDI .....CLAIMANT

VERSUS

THE BOARD OF GOVERNORS TAKAYE

PRIMARY SCHOOL.....RESPONDENTS

J U D G M E N T

**INTRODUCTION**

1. The claimant was employed by the respondent as a cleaner/grounds man on 7/4/2005 earning ksh.4000 per month. He worked until he voluntarily resigned in October 2013 after serving for 8 years and 7 months. After the said resignation, he was not paid his terminal dues and he now brings this suit claiming 2 months salary in lieu of notice, severance pay, unpaid leave and compensation for unfair and unlawful termination totaling to ksh.96000.
2. The respondent has denied liability to pay the alleged damages and averred that the termination of employment contract was done by the claimant through voluntary resignation. As regards the claim for accrued benefits, the respondent avers that the claimant was paid all his lawful salary. In conclusion, the respondent avers that the termination was not through redundancy and as such the claim for severance pay is without merits.
3. The issues for determination herein is whether the relief sought ought to be granted.

**CLAIMANTS CASE**

4. The claimant testified as CW1. He stated that he was employed by the respondent on 7/4/2005 as a cleaner/groundsman. He worked diligently and had no record of misconduct. In 2013, the work conditions became unbearable because of irregular bits of payment of salary, long hours of service and with no leave being given to him. As a result such conditions of work, he found it hard to sustain himself and his family and served the respondent with a termination notice in August 2013. By the said time, he had only been paid half salary for the month of April 2013. He therefore prayed for judgment in terms of the reliefs sought in the suit.
5. On cross examination by the defence counsel, CW1 admitted that he resigned from work voluntarily on 1/9/2013 by serving a letter. He further admitted that the resignation letter never cited the reason for leaving work as the alleged unbearable working conditions. He however insisted that he started working

as a cleaner but from 2010 he was forced to work as cleaner during the day and as guard during the night. He further contended that he worked continuously from the day he was employed till the day he resigned.

### **DEFENCE CASE**

6. M/s Constance Mzungu, the respondents former head teacher testified as RW1. She confirmed that when she joined the respondent in may 2012, she found the claimant working there as a watchman earning ksh.4000 but the same was increased to ksh.6000 as the time when he resigned. She however confirmed that initially the claimant had been employed as cleaner/grounds man.

### **DETERMINATION**

7. There is no dispute that the claimant was employed by the respondent from 2005 till 1/9/2013 when he voluntarily resigned. The only issue for determination is whether the reliefs sought herein ought to issue.

#### **Notice and compensation for unfair termination**

8. Unfairly terminated employee is entitled to salary in lieu of notice plus compensation of upto 12 months salary under Section 49(1) of the Act. In this case however, the claimant has admitted that he voluntarily resigned from employment. He is therefore not entitled to salary in lieu of notice and compensation under Section 49 of the Act.

#### **Severance pay**

9. Severance pay is provided for under Section 40 of the Act for the employee who is terminated on account of redundancy. In this case the claimant voluntarily resigned from employment as as such his claim for severance pay must fail.

#### **Unpaid annual leave**

10. The claimant's contention that he never went for leave during his service from 2005 till 2013 was not disproved by the employer using leave records. I will therefore award the claim for accrued leave for the 8 years and 7 months served at the rate of 21 days leave days per year and the 7<sup>th</sup> month on prorate basis. The total leave days accrued equals to  $21 \text{ days} \times 8 \text{ years} \times (1.75 \text{ days} \times 7 \text{ months}) = 180.25$ . I therefore calculate the accrued leave at  $\text{ksh.}6000 \times 180.25 / 26 = 41596.15$  but only award the pleaded ksh.,32000.

#### **Disposition**

11. For the reasons that the claimant was never paid for his accrued leave after resignation from employment, I enter judgment for him in the sum of ksh.32000 plus half costs of the suit.

**Dated, signed and delivered at Malindi this 22<sup>nd</sup> September 2017**

**O. N. Makau**

**Judge**