



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1296 OF 2013

KENYA NATIONAL PRIVATE SECURITY WORKERS UNION...CLAIMANT

VERSUS

DAMACREST ACADEMY.....RESPONDENT

JUDGMENT

1. The Claimant filed his suit on 14th August 2013 seeking the determination of the issue framed as the unfair termination of Peter Baraza, underpayment of wages, unpaid house allowance, standard overtime, unpaid public holiday, rest/off days and gratuity. The Claimant averred that Peter Baraza is a member of the Claimant and that he had been employed by the Respondent as a security guard. It was averred that the Respondent was an institution of learning owned by one Eliud Wagima. The Grievant, it was averred, was employed on 1st June 2007 by the Respondent and worked till 7th October 2012 when he was unfairly terminated. He was earning a gross pay of Kshs. 5,500/- with no leave, off days, public holidays and house allowance. The Claimant avers that the Grievant was dismissed without any notice and any reason whatsoever being given to him. The Claimant avers that the Grievant informed it of the dismissal and the Claimant wrote to the Respondent and did not receive a reply after which the dispute was referred to the Ministry of Labour on 23rd November 2012. The conciliator appointed for the purpose was Mr. S. M. Mwaniki and upon failure of the Respondent attending or responding to the conciliator's letters the Conciliator issued a certificate on 30th May 2013 referring the dispute to this court. The Claimant submitted that the Respondent violated all the labour laws when it unfairly terminated the Grievant and that the Grievant had worked for the Respondent for six years. The Claimant prayed for a judgment against the Respondent for days worked, payment in lieu of notice, annual leave for 6 years, underpayment of wages, house allowance, overtime for extra hours worked, off/rest days (52 per year), public holidays, gratuity/severance pay, any other legal claim, certificate of service and costs of the suit.

2. The Respondent filed a statement of defence on 14th October 2013 and in the statement averred that Eliud Wagima was unknown to it. It was averred that the Respondent was a registered company Damacrest School Limited and that the Grievant was previously employed by one Damaris Gathoni Wamakima the deceased wife of the late Wamakima Kinyanjui to man the main gate leading to the compound where the Respondent school begun operating as a tenant among other tenants. The Respondent averred that at the material time the Grievant was paid by all the tenants who resided in the compound and money collected from them handed over to the administrators of the estate of Wamakima Kinyanjui who in turn paid the Grievant. The Respondent denied any knowledge of the details of termination of the Grievant and denied owing him any dues.

3. The Claimant's counsel caused the case to proceed on 11th May 2015 by deceiving the court on the service of process and invitation to fix dates. Upon discovery of the matter at the point of submissions, the court vacated the prior proceedings and a new date was taken at the registry and hearing proceeded on 19th October 2017 after various attempts at hearing collapsing. The Grievant testified that he was employed in 2007 as a guard earning Kshs. 3,000/- a month. He said that he never went on leave, off day or public holiday and that he had no house allowance. He stated that on 7th October 2012 he found another guard and was told he had been dismissed. He testified that this was without notice and he was not asked to show cause. He notified the union and the employer did not respond and that the issue was then reported to the Ministry of Labour at Nyayo House. He stated that Mr. Mwaniki called them but they never got back to him.

4. In cross-examination by Mr. Jakech for the Respondent, he testified that he was a member of the Claimant union from 2002. He stated that he was given a card and that he did not have a card at the time and that they knew he was a union member at the time. He said that he was employed by Eliud Wagima and that he did not know Damacrest Academy Limited and that the school is Damacrest School and the company Damacrest School Limited. He denied knowing Damaris Muthoni and stated that he was a gate guard and was dealing with the school. He guarded at the gate to ensure the children did not leave and that he did not have to deal with the residents in the houses within the compound. He stated that he was paid by Eliud Ndungu Wamagima the owner of the school. He denied being negligent in the performance of his duties. He sought payment of his dues including service and stated that his lawyer and the judge would determine the amount. He denied being a caretaker and stated that he did not know that the people who lived in the compound were a family. He testified that there was no other business he undertook at the premises and specifically denied having a show shop. He stated that he was brought to the premises by a person who had been employed by Eliud and that he witnessed the construction of the school and that he was employed to guard against the

school kids leaving. He did not know the mother of the owner of the school.

5. In re-examination by his counsel Mr. Onyancha, he stated that he knew who had employed him and it was Eliud the owner of the school and he was to ensure the kids do not leave. He testified that he had never been informed of poor performance.

6. The Respondent called Eliud Ndungu Wamagima who testified that he was an engineer with KenGen. He stated that he was a director in Damacrest School Limited registered on 17th January 2011. He said that he knew Baraza as the Grievant used to operate the main gate of family land where he resides. He testified that they are 8 family members in total who reside on the land and that the main gate leads to the residences and the school Damacrest Academy. He stated that the Grievant was employed by his late mother before her demise and that the administrator of the estate is the one who handled issues with regard to the security. He testified that his late brother was the one who was in charge and that presently it is elder brother who is in charge as the estate is undergoing succession. He stated that the school has a tenancy and that there is a lease agreement. He testified that each family member contributes and that whatever rate the tenants pay is inclusive and each member knew what they were to pay to the person in charge. He said that he did not know how the Grievant was paid and he only knew how much he paid. He testified that the person who collects aggregates and pays the Grievant and that neither he nor Damacrest paid the Grievant. He said did not know the terms under which the Grievant was paid and stated that he had seen the letters from the Ministry of Labour annexed to the Claim and denied receiving any of the letters. He testified that he was not the employer of the Grievant.

7. In cross-exam by Mr. Onyancha, he testified that he knew the Grievant who used to operate the gate and that he never paid the Grievant. He stated that his mother paid the Grievant and that he contributed a certain amount, Kshs. 1,000/- and he did not know how much the Grievant got. He stated that he just used to give his share to his mother and later to his brother and did not know the total. He admitted that his tenants complained verbally and that he did not recall receiving letters from Ministry of Labour and all he got were the court summons when the Claimant sued. He denied receiving the letters from the ministry. He did not know how long it was after he stopped seeing the Grievant that someone else was employed. He testified that he did not employ the Grievant Peter Barasa. He stated that he had submitted the payroll for Damacrest and the name of the Grievant is not there.

8. In re-exam he stated that the Grievant was a gateman and had a shoe repair business. He stated he did not know how the Grievant was paid and that his tenants complained to him as he was the interface to the person responsible for the Grievant. He testified that first it was his mother then his brother who were responsible and not him. He stated the school is Damacrest School Limited. He denied the letter shown to him as it did not have his signature.

9. The parties filed submissions. The Claimant filed submissions on 8th November 2017 while the Respondent filed submissions on 17th November 2017. The Claimant submitted that the Grievant was employed on 1st June 2007 as a security guard earning Kshs. 5,500 a month by the Respondent and that he served with loyalty, diligence and full dedication until 7th October 2012 when he was unfairly, unprocedurally and unlawfully terminated without reasons. It was submitted that he found a new guard at his assignment and he was instructed to go home. It was the Claimant's case that the Grievant's termination was illegal and in contravention of Sections 41, 44 and 45 of the Employment Act 2007. The Claimant submitted that the following 2 issues were for determination:-

A. Whether the termination of employment of the Grievant was wrongful; unfair and unlawful;

B. Whether the Grievant is entitled to the relief sought

The Claimant submitted that the Respondent terminated the Grievant's employment without following the laid down procedures in the Employment Act. It was stated that the Grievant was not issued with notices and letters to show cause prior to his termination and that the Respondent terminated the Grievant's employment without proving that the reason for the termination was valid. The Claimant asserts that the Respondent failed to regulate working hours and that the Grievant worked overtime with no pay contrary to Section 27(1) of the Employment Act. The Claimant submitted that the Respondent failed to pay the Grievant his 12 months wages for loss of employment as provided for under Section 15(c) of the Labour Institutions Act and Section 49(c) of the Employment Act. The Claimant submitted that the Respondent failed to pay the Grievant his lawful leave dues contrary to Section 28(1) of the Employment Act and that the Respondent did not act in accordance with justice and equity in terminating his employment contrary to Section 45 of the Employment Act. The Claimant submitted that the Respondent did not accord the Grievant the opportunity to be heard before terminating his employment contrary to the Employment Act and the rules of natural justice. The Claimant thus sought the payment of the various sums enumerated for the years 2011 and 2012 being Kshs. 45,600/- for underpayment of wages, house allowance Kshs. 15,228/-, Kshs 50,900/- for overtime, 11,321/- for unpaid public holidays, Kshs. 28,887/- for rest days. In year 2012 the sums were Kshs. 24,432/- for underpayment of wages, Kshs. 8,622/- for house allowance, Kshs. 33,310.56 for overtime, Kshs. 6,126/-, rest days Kshs. 27,227/-, Kshs. 2,577/- for days worked in October 2012, Kshs. 9,572/- being one month notice, Kshs. 34,459/- being gratuity/service, Kshs. 114,864/- as compensation and certificate of service plus costs of the suit.

10. The Respondent submitted that the issues for determination where as follows:-

i. Whether the Claim is properly before the Court

ii. Whether the Grievant was ever employed by the Respondent

iii. Whether the Grievant was wrongly, unfairly and unlawfully terminated

The Respondent submitted that the Claimant lacked *locus standi* to institute the proceedings herein. It was the Respondent's position that no evidence had been tendered to show that the Claimant was a member of the union. The Respondent submitted that the Claimant did not have a recognition agreement between the Union and the supposed employer of the Grievant. The Respondent relied on the case of **Law Society of Kenya v Commissioner of Lands & 2 Others [2001] eKLR** for the definition of *locus standi* where the court held that it relates to the significant right to be heard. The Respondent also relied on the case of **Kenya Union of Employees of Voluntary and Charitable**

Organisations (KUEVACO) v Board of Governors & Maina Wanjigi Secondary School [2015] eKLR where the court extensively dealt with the issues surrounding recognition of a trade union. The Respondent submitted that the suit had been instituted against an entity that did not exist in law. Reliance was placed on the case of **Maurice Ooko Otieno v Mater Misericordiae Hospital [2004] eKLR** for the proposition that a suit needs to be brought against a legal entity. The Respondent submitted that the Grievant was never an employee of the Respondent. The Respondent submitted that the Grievant claims to have worked for 7 years yet waited until the alleged termination to claim underpayment, leave, unpaid public holidays and house allowance. The Respondent relied on the case of **Fred Mudave Gogo v G4S Security Services (K) Ltd [2014] eKLR** for the proposition that there were aspects of the claim that were time barred. The Respondent thus sought that the claim be dismissed and the Claimant to bear costs of the suit.

11. The matter before court is one where the court has to determine a number of issues. The issues to be determined in my view revolve around the following 4 issues

- i. Whether the Claim is properly before the Court
- ii. Whether the Grievant was ever employed by the Respondent
- iii. Whether the Grievant was wrongly, unfairly and unlawfully terminated
- iv. Whether the Grievant is entitled to the relief sought

Whether the Claim is properly before the Court

12. The Claimant sued on behalf of Mr. Peter Baraza, the Grievant, who is stated to be its member. It is averred that the Claimant is a trade union and that it represents its member the Grievant. There is no evidence of membership displayed. The Grievant indicates that he joined the Claimant union in 2002. No documentation was availed to prove the membership. How were his union dues paid? The Respondent cited the case of **KUEVACO v Board of Governors & Maina Wanjigi Secondary** where the court stated that without recognition, a trade union cannot file a dispute within the meaning of the Labour Relations Act. In the case before the court, there is no proper basis for the union to have mounted the case on behalf of the Respondent.

Whether the Grievant was ever employed by the Respondent

13. The Claimant alleges the Grievant was an employee of the Respondent. The Respondent is pleaded to be Damacrest Academy under the sole proprietorship of one Eliud Wamakima. The Grievant was from all accounts engaged to man the gate leading to a compound where the school is sited. The Claimant avers the Grievant was employed in the year 2007 and the papers presented to court as evidence of the existence of the school relate to the year 2010. He could not have been employed by a non-existent entity. In any event, the pleadings clearly show that the entity sued is not the legal person that ought to have been sued if there was a claim against the school. In the case of **Maurice Ooko v Mater Hospital** above, it was held that *the law requires suit be brought against a legal entity*. The Grievant was not indicated to be an employee of the Respondent on the payroll of the school. If indeed he was underpaid and was a member of the union, why did he wait for 7 years before raising his concerns?

Whether the Grievant was wrongly, unfairly and unlawfully terminated

14. The Claimant asserts that the Grievant was wrongfully and unlawfully terminated. If indeed the Grievant was relieved of his duties in the manner described in the suit and as narrated in court, it would seem the dismissal was unfair. However, the claim is directed against the Respondent who is not the employer. If the dismissal was to be proper, there would have had to be notice and cause for the dismissal.

Whether the Grievant is entitled to the relief sought

15. The Grievant filed the suit after the alleged termination and claims overtime, unpaid public holidays, rest/off days as well as house allowance. In a claim for the relief sought, a party should file the suit within three years of the cause of action accruing. The Grievant should not have waited for 7 years to claim the dues he was entitled to. He should have raised the matter to his employer through the union. The Grievant in this case is however unsuited against the Respondent who is not his employer and is wrongly sued. In the final result the suit is dismissed but with no order as to costs.

It is so ordered.

Dated and delivered at Nairobi this 1st day of December 2017

Nzioki wa Makau

JUDGE