



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT
NAKURU
CAUSE NO. 137 OF 2014

JOSEPHAT MARK SHIMENGA.....CLAIMANT

V

ROOTS ACADEMY LTD.....RESPONDENT

JUDGMENT

1. Josephat Mark Shimenga (Claimant) was employed by Roots Academy Ltd (Respondent) either in 2007 (Claimant's contention) or in 2009 (Respondent's contention) as a watchman. He was not issued with a written contract. Sometime in January 2014, the employment relationship came to an end.
2. On 6 May 2014, the Claimant sued the Respondent, and he stated the issues in dispute as
 1. Unfair termination
 2. Notice
 3. Underpayment
 4. Normal overtime
 5. Off duties
 6. Public holidays
 7. Annual leave for 6 years 9 months
 8. Gratuity.
3. The Respondent filed its Response on 5 June 2014, but on 9 June 2014, the Claimant filed an *Amended Memorandum of Claim* in which the Respondent was introduced (the amendments were subject of a preliminary objection which was overruled on 5 December 2014), and this prompted the Respondent to file another *Response* on 17 December 2014.
4. The Claimant filed a *Response to the Memorandum of Defence* on 1 April 2015, and the Cause

was heard on 24 February 2016.

5. The Claimant filed his submissions on 18 March 2016, while the Respondent's submissions were filed on 18 April 2016.
6. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *when did the employment relationship commence, whether the termination of the Claimant's employment was unfair, whether the Claimant was underpaid, whether the Claimant worked overtime, whether the Claimant had outstanding leave by time of separation, whether the Claimant is entitled to gratuity and appropriate remedies/orders.*

Commencement and end of relationship

7. The Claimant stated in his testimony that he was employed by the Respondent sometime in 2007 (verbal contract). The Respondent's Manager on the other hand testified that the Claimant was employed in 2009.
8. Section 9 of the Employment Act, 2007 which came into operation on 2 June 2008 obligates every employer to reduce into writing an employment contract if it is to run for more than 3 months.
9. Although there was no legal obligation to draw up a written contract before the commencement of the Employment Act, 2007, the Court can logically conclude relying on the provisions of section 10(3) & (7) of the Act, and the fact that the Claimant was the weaker party that the employment relationship started in 2007.

Whether termination of employment was unfair

10. The Respondent's case was that the Claimant was not dismissed but deserted work as expected on 1 January 2014, and therefore on 18 January 2014, the Labour Officer was informed of his failure to report back on duty.
11. The Claimant on the other hand contended that he did not abscond from duty and that he was dismissed by a Manager on 3 January 2014, without being asked to show cause for any absence.
12. The Respondent's witness stated that on learning of the separation, a union (KUDHEIHA) of which the Claimant was a member intervened, and it was agreed that the Claimant would report on duty on 1 February 2014, but the Claimant did not report to work.
13. The Claimant annexed several documents to his pleadings. These included letters from KUDHEIHA dated 6 January 2014 and 13 January 2014 addressed to the Respondent alleging that the Claimant's employment had been terminated verbally.
14. The Respondent did not deny receiving the letters, and in light of the inconsistent versions given by the witnesses, the Court can conclude that the employment of the Claimant was first terminated verbally around 3 January 2014.
15. And because there was no suggestion by the Respondent at all that a hearing as contemplated by section 41 of the Employment Act, 2007 was conducted, the initial dismissal was procedurally unfair.
16. Despite the conclusion reached, there is material on record to show that the union and the Respondent met and agreed that the Claimant would be paid (and he was paid on 29 January 2014), and that he would resume duty on 1 February 2014.
17. Although the Claimant disowned the agreement reached with the Union, he was not being honest, otherwise there is no way he could have collected the wages on 29 January 2014, without being

aware of the outcome of negotiations between his union and the Respondent.

18. In the Court's view, the unfairness of the dismissal was overtaken by events with the subsequent agreement between the Union and the Respondent under which the Claimant was to be paid and resumed duty (he took money but did not resume work).

19. It is clear the Claimant did not want to cooperate with the Respondent in reaching a fair outcome to the employment dispute. That cooperation is part of trust and confidence expected in an employment relationship.

20. This conduct on the part of the Claimant will impact the remedies the Court will eventually grant.

Underpayments

21. The Respondent contended that the claim for underpayments did not lie because the Claimant had computed this head of claim based on remuneration applicable within a municipality while its business was operated outside the borders of a municipality (Nakuru).

22. It was upon the Claimant to demonstrate that the area within which the Respondent's school was/is situated was within the boundaries of Municipal Council of Nakuru.

23. That material was not placed before Court, and the Court is therefore unable to determine whether the Claimant was underpaid.

Overtime

24. Although all the parties agreed that the Claimant was a day time watchman, there was no agreement on whether he served as a turn boy at some point.

25. As to the working hours, the Claimant testified that he would report to work at 5.30 am and leave at 4.00 pm or sometimes at 6.00 pm (6.00 am to 6.00 pm during school holidays).

26. The Employment Act, 2007 has not prescribed daily or weekly working hours.

27. The prescription on working hours is left to various Regulations of Wages Orders, which apply to specific sectors/industries and parties agreement.

28. In the instant case, the Claimant did not disclose which particular Wages Order prescribed the working hours for the Court to be able to determine whether he worked overtime.

29. The Claimant, equally did not disclose whether there were contractually agreed working hours.

30. The Court is of course aware and has taken judicial notice in many instances of the notorious fact that watchmen generally work 12 hour shifts in this country, but such notice can only be taken where proper foundation is laid.

Leave

31. The Claimant's testimony that he did not go on leave for the years he was employed by the Respondent was countered by the Respondent's witness that he was going on leave for 3 weeks during school holidays and for which a duty roster was prepared.

32. The muster rolls produced corroborate the Respondent's version about employees going on staggered leave during public holidays, and the Court is of the view that it is more probable that the Claimant took his annual leave.

Gratuity

33.No evidential, contractual or legal basis for gratuity was placed before Court.

Compensation

34.Compensation, pursuant to section 49(1)(c) of the Employment Act, 2007 is a discretionary remedy.

35.In the Court's view considering the fact that an agreement was reached for the Claimant to resume duty but failed, it would not be appropriate or fair to award compensation.

Conclusion and Orders

36.Considering the foregoing, the Court reluctantly reaches the conclusion that the Claimant does not merit any of the reliefs sought with the consequence that the Cause is dismissed with no order as to costs.

Delivered, dated and signed in Nakuru on this 22nd day of July 2016.

Radido Stephen

Judge

Appearances

For Claimant Ms. Kerubo instructed by Korongo & Co. Advocates

For Respondent Mr. Kahiga instructed by Mirugi Kariuki & Co. Advocates

Court Assistant Nixon