



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.203 OF 2015

(Before D. K. N. Marete)

FREDRICK OCHIENG NDUBI.....CLAIMANT

VERSUS

BOARD OF MANAGEMENT,

MOI GIRLS HIGH SCHOOL.....RESPONDENT

JUDGMENT

This matter was originated by way of a Memorandum of Claim dated 8th July, 2015. It does not disclose the issue (s) in dispute on its face.

The respondent in a Respondent Statement of Response dated 17th January, 2015 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that at all material times to this cause, he was employed by the respondent as a cook from the year 2003 to 10th December, 2012 when his employment was terminated without justification cause.

The claimant's further case is that the respondent in flagrant breach of S. 40 of the Employment Act, 2007 terminated his employment via a suspension letter dated 10th December, 2012. This was unlawful as follows;

- a) *The claimant trade union was not informed of the intention to declare the claimant redundant.*
- b) *No leave pay was given.*
- c) *Not compensated for unfair termination.*
- d) *No one month salary in lieu of notice was given.*
- e) *Was not paid his overtime dues.*
- f) *Was underpaid in cause of his working at the school.*
- g) *Unpaid public holidays.*

He prays as follows;

1. *One month pay in lieu of notice.....Kshs.7,915/=*
Basic salary.
 2. *Levies dues*
11 years unpaid leave due
8221x11 years.....Kshs.90,431/=
 3. *Severance pay*
15 days x yrs worked x basic/30 days
15 days x 12years x 7915/30days.....Kshs.47,490/=
 4. *Unpaid public holidays*
11days x years worked x basic/30 days
11days x 10 years x6461/30 days.....Kshs.23,690.33/=
 5. *Lost earning (what he could have earned before attending period of retirement)*
Gross pay x 12 months x 25 years
9102.25 x 12 x 25 years.....Kshs.2,730,675/=
 6. *Compensation for unfair termination Gross pay x 12 months*
9102.25 x 12 months.....Kshs.109227/=
- TOTAL CLAIM.....Kshs.3009428.33/=***

The respondent's case is that the claimant's employment is not terminated. He was only suspended and termination awaits the outcome of a decision of the respondent yet to be made. She therefore denies the claim and prays that the same be dismissed with costs.

This matter came to court severally until the 20th June, 2016 when the parties agreed on a disposal of the cause by way of written submissions.

The claimant's written submissions are a rendition of his case. It is his submission that he was served with a letter of suspension dated 10th December, 2012 and not paid any salary pending determination of Eldoret CMCr.C. No.5080 of 2012 where the respondent had wrongfully accused him. He was not paid half salary during the suspension.

The claimant further submits that the letter of suspension amounted to dismissal as he was not wanted or entertained in the school compound. He further submits that he is now acquitted of the criminal proceedings but despite this he is not allowed back into the school. The claimant also submits a case of underpayment and supports this with the letter of offer of deployment.

The respondent submits that the suspension of the claimant was occasioned by the criminal tendencies of the claimant culminating in his charge in Eldoret Cr.C.No.5080 of 2012. A decision was to be made on finalization of the criminal trial but to date, the respondent is not informed of the outcome. The claimant

has not in any way assisted in this, or at all. The respondent denies any termination of the claimant's employment and avers that he is still under suspension pending the outcome of the criminal proceedings.

The issues for determination therefore are;

1. Whether there was a termination of the claimant's employment by the respondent?
2. Whether the termination, if at all, was wrongful, unfair and unlawful?
3. Whether the claimant is entitled to the relief sought?
4. Who bears the costs of this cause?

The 1st issue for determination is whether there was a termination of the claimant's employment by the respondent. The claimant's case is that this is the case while the respondent submits an opposite scenario. It is the respondent case that the claimant is on suspension pending the outcome of the criminal proceedings against him. He has not as yet notified her of the outcome of the criminal proceedings to facilitate a decision on the subject.

The respondent's case sounds the more probable of the two. The claimant has not demonstrated a case of termination of employment. He has not even demonstrated constructive termination. He still has room to thrash out his employment issues with the respondent at leisure. I therefore find that there was no termination of the employment of the claimant by the respondent.

On a finding of no termination of employment, the other issues for determination fall by the way.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the claim.

Delivered, dated and signed this 14th day of November 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Nyamwega instructed by Nyamwega Osoro & Company Advocates for the Claimant.
2. Mr. Kiboi instructed by Kiboi Tuwai & Company Advocates for the Respondent.