



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 181 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

JOSEPH OMOLLOCLAIMANT

-Versus-

BOARD MANAGEMENT KISUMU BOYS HIGH SCHOOL ..RESPONDENT

J U D G M E N T

The Claimant filed this Claim alleging that he was unfairly terminated by the Respondent. He prays for Judgement against the Respondent as follows -

1. Three month's salary in lieu of notice Kshs. 31,690.80/-
2. Annual leave allowance Kshs. 10,563.60/-
3. House allowance for 20 months worked
(Kshs.10,563.60 x 1/3 x 20 months) Kshs. 73,945.20/-
4. 12 month's salary for wrongful and
unlawful termination of services
(Kshs.10,563.60 x 12 months) Kshs.126,763.20/-
5. Salary Underpayment from May 2013 to January 2015 as per relevant wage
regulations (Kshs.10,563.60 x 20 months)
less (Kshs.4,000 x 20 months) Kshs.131,372/-
6. Unpaid Overtime
(2 Hrs daily x 5 days x 4 weeks x 20 months)
=800 hrs (800hrs x Kshs.95.20 Hourly rate) Kshs. 76,160/-
7. Unpaid off duties 8 days @ month x 20 months

- 160 days. Kshs.507.75 x 160 days Kshs. 81,240/-

8. Unpaid Public holidays

(16 days x Kshs.507.75) Kshs. 8,112/-

9. Unpaid NSSF from

May, 2013 - January,2015 Kshs. 8,000/-

10. A Certificate of Service.

TOTAL TERMINAL DUES Kshs.547,846.80/-

The Respondent filed a defence denying that it ever employed the Claimant and prayed that the suit be dismissed with costs.

At the hearing of the case the Claimant testified for himself while the Respondent called Mr. DENNIS ABOK OLOO, the School Principal and Secretary of the Respondent, the Board of Management of Kisumu Boys High School. The Parties thereafter filed and exchanged written submissions.

Claimant's Case

The Claimant testified that he has worked in the Hospitality business since 1977. Currently he is head cook at cosmopolitan. He started working for the Respondent on 20th May, 2013 as a cook. He was not issued with a letter of appointment. He learnt about the vacancy from an internal advertisement, while working for Put Sarajero Security Company as a guard within the school compound, applied, was interviewed and recruited. As proof of employment the Claimant submitted a medical examination certificate for 2013, 2014 and 2015 for Food Handlers which states that he was from Kisumu Boys High School. He also submitted duty rosters for working in Kisumu Boys High School Kitchen prepared by Winnie Ongalo the cateress. The Claimant stated he was paid a monthly salary of Shs.4,000 in cash and signed a petty cash voucher which was retained by the Respondent. He worked 5 days a week from Tuesday to Saturday and was off on Sundays and Mondays as reflected on the duty rosters. He was not paid while off duty. He reported to work at 6.30 am or 7am and left duty between 6.45 pm and 7pm after serving dinner to students.

The Claimant testified that his problems started in December, 2013 when he was unable to pay house rent. He approached the Principal to increase his salary which he felt was too low and the Principal kept promising to do something about it but did nothing. On 29th January, 2015 he wrote a letter to the Principal asking for a salary increase. The next day being 30th January 2015 after receiving the letter, the Principal sent him away without issuing him with a letter of dismissal or a reason for the dismissal.

After being sent away the Claimant reported to the Ministry of Labour. The Labour Officer M/s. Hellen Maneno called the Principal on his cell phone number which the Claimant gave her and after discussing the issue of the Claimant, told him to go and see the Principal. The Principal then paid him cash Shs.20,000 for which he signed a petty cash voucher.

The Claimant testified that he did not sign the attendance register kept at the gate of the school as the Principal had instructed the guard at the gate not to allow him to sign.

The Claimant testified that his demand was for underpayments based on the General Order, and other demands as prayed in his claim together with costs and interest.

Respondents Case

Mr. Dennis Abok Aloo RW1 testified that he knew the Claimant as somebody who was seeking casual

work, that the Claimant worked for Put Sarajero Security Company and was given casual work occasionally by the Respondent for which he was paid in cash. He testified that he was not aware that the Claimant attended an interview for the position of a cook.

He testified that the school's workers are issued with letters of appointment and payslips and that payment of salary is made through the bank. He further testified that all employees sign a daily attendance register which he checks daily at 8am.

The Principal referred the court to the visitors attendance register signed by the Claimant as an employee of Put Sarajero and an attendance register for school workers which did not contain the Claimant's name.

The Principal further referred the court to Respondent's appendix 5 on Education Management Information System from Teachers Service Commission for year 2013 giving guidelines on ratio of employees to students that states that in 2013, there were no vacancies for non-teaching staff at Kisumu Boys High School.

He confirmed that school workers who handle food are required to have Food Handling Certificates but stated that the Certificate submitted by the Claimant did not have any evidence to prove that it had been received by the school.

The Principal testified that the responsibility of preparing the duty roster

was delegated to the School Cateress who as at 2013 was Winnie Ongalo but the duty roster attached to the Claimant's bundle of documents had nothing to prove that it was official.

Under cross examination the principal stated that the school kept records of casual workers which the Respondent had not submitted in those produced in court. He further stated he had not submitted copies of food handling certificates that were received from school workers and samples of duty rosters for the kitchen. He further stated he had not supplied copies of appointment letters issued to workers.

The Principal admitted that the attendance register produced in court by the Respondent was not for the period that the claimant alleged to have worked there and that he had not supplied to the court the payment vouchers for payment of the Claimant.

He further admitted that the Respondent's appendix 5 did not bear a school stamp.

Submissions

In the Claimant's written submissions it is submitted that the Claimant had proved that he was an employee of the Respondent, a fact that was admitted by the Respondent's witness and corroborated by the Food Handling Certificate and Kitchen duty rosters. That RW 1 further admitted that the Claimant worked for Put Sarajero before his employment by the Respondent.

It was submitted for the Claimant that the Respondent denied the authenticity of documents produced by the Claimant but failed to produce documents to prove that the Claimant's were not authentic.

It was submitted that the Respondent had a legal duty to produce documents of all workers, both regular and casual and relied on the case of **LAWI WEKESA WASIKE v MATTAN CONTRACTORS LIMITED**[2016]eKLR in which the court stated that -

"the practice of an employer failing to keep a record of its employees casual or permanent, on contract terms or open contracts is an act against its interest. Such a practice works against such an employer. It is contrary to the law. Such a record should be maintained at all material times pursuant to part X of the Employment Act and particularly at section 79 ...these provisions are set out in mandatory terms.They are to be adhered to without exception ... to keep such a record would vilify the respondent and or help the court assess the exact relationship between the

claimant and respondent. The court is left with the evidence of the claimant and the respondent without any record, the evidence of the claimant is to be believed"

The claimant urged the court to find that the Respondent was liable to pay him as claimed.

For the Respondent it was submitted that the letter of demand from the Claimant dated 29th January, 2015 has no evidence of receipt by the Respondent, that the Claimant did not submit any proof in writing that he reported his dismissal to the labour Office, that the Claimant did not deny that he worked for Put Sarajero in 2012 and requested for work from the Principal of Kisumu Boys High School to supplement his income, that the food handler's certificate produced by the claimant does not show that he was employed by the Respondent and there is no proof the Respondent sent him to obtain the certificate, that the duty roster does not bear a stamp of the Respondent to prove it was genuine.

It is further submitted that the Claimant failed to submit a payslip to prove his claim for underpayments or to prove that he was dismissed.

The Respondent relied on the case of **Stephen Wasike & Another v Security Express Ltd[2006]eKLR** wherein the court stated that -

"A party seeking justice must place before the court all material evidence and facts which considered in light of the law would enable the court to arrive at a decision as to whether the relief sought is available. Hence the legal dictum that he who alleges must prove."

The Respondent further relied on section 47(5) of the Employment Act which provides that -

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

It is the Respondent's position that the claimant failed to prove that he was an employee of the Respondent or that he was wrongfully dismissed and prayed that the case be dismissed with costs.

Findings and Determination

The issues for determination arising out of the pleadings, evidence and written submissions herein are first, whether or not the Claimant was an employee of the Respondent, secondly whether he was unfairly terminated and finally whether he is entitled to the prayers sought.

Whether the Claimant was an employee of the Respondent

It is the Claimant's case that he was employed by the Respondent as a cook following an internal advertisement of the position which he saw while working as a security guard for Put Sarajero within the compound of the Respondent, that he applied for the job, attended a job interview held in the school's computer room and was subsequently employed as a cook. To prove his allegation the claimant attached a copy of his food handlers medical certificate which states his address is Kisumu Boys High School and his designation a cook. He further submitted copies of duty rosters prepared and signed by the school cateress.

The Respondent denies that the Claimant was its employee. RW1 testified that the Claimant worked as a security guard for Put Sarajero within the Respondent's School compound and that he was only occasionally employed by the Respondent on casual basis.

According to section 74 of the Employment Act it is the duty of the employer to keep records of all its employees including the period for which employment is expected to continue where employment is not intended to be for an indefinite period as provided in section 10(3)(c). It was therefore the responsibility

of the Respondent to produce such records to prove that the claimant was indeed a casual employee. Failure of the Respondent to produce such records shifts the burden of disproving allegations of the claimant as provided in section 10(6) and (7) which provide that -

(6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.

(7) If in any legal proceedings an employer fails to produce a written contract or the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.

For these reasons the Respondent's contention that the claimant did not prove that he was its employee from 20th May, 2013 to 30th January, 2015 is misplaced as that burden of proof falls on the Respondent.

I am satisfied that the Claimant was an employee of the Respondent for the period 20th May, 2013 to 30th January, 2015 based on the Food Handling Certificate which indicates that the Certificate was issued to the claimant to work as a cook for the Respondent for the period 20th May, 2013 to 30th January, 2015. This was corroborated by the Kitchen Duty Roster signed by the cateress Winnie Ongalo. RW1 confirmed that Winnie Ongalo worked as such for the Respondent for the relevant period. I therefore find and hold that the Claimant was an employee of the Respondent from 20th May, 2013 to 30th January, 2015.

Whether the Claimant was unfairly terminated

The Claimant testified that he was relieved of his duties when he wrote the letter dated 29th January, 2015 seeking the enhancement of his salary. The letter which is self explanatory is reproduced below -

Joseph Omolo

Kisumu Boys' High School

P O Box 1973

KISUMU

Tel. 057-2020164

kisumuboyshigh@yahoo.com

29th January, 2015

To.

The Principal

Kisumu Boys' High School

P O Box 1973

KISUMU

Dear Sir,

I Joseph Omolo a subordinate staff, working as a cook in Kisumu Boys' High School in Kitchen department since 20th May, 2013 to date.

Sir, what I'm paid is too little as a cook and it's below the recommended labour gazetted minimum

wage. I get Kshs.4,000 per month.

Compared to my four fellow workmates doing the same duties like me, the same qualification like me and I work hard like them gets Kshs.11,000 Gross pay per month.

I therefore kindly asking (sic) you to do something about my pay/harmonise it like what my fellow colleagues get. I beg you because I have a family of five and I find it very hard to meet the expenses of their education in school like buying uniforms, text books and others. Thank you.

Yours faithfully

Joseph Omolo

In his testimony RW1 did not make any reference to the letter leaving the contents thereof unchallenged. Further RW1 did not contest the Claimant's evidence that he was dismissed following the writing of the letter, or that he paid the Claimant shs.20,000/- after the intervention of the Kisumu County Labour Officer Ms. Hellen Maneno.

The Respondent's contention that there was no letter reporting the dispute is misplaced as neither section 47 or section 87 both of which provide for reporting of disputes to the Labour Officer require such reports to be in writing. As the claimant explained, he went to the labour office and made his complaint to the Labour officer who asked him for the telephone number of RW1 and spoke to him while the claimant was still at the office.

Having failed to contest the evidence, I find that RW1 dismissed the claimant from work because he wrote to the Respondent complaining about his underpayment and discrimination. Section 46(h) expressly forbids the dismissal of an employee for reasons that an employee has initiated or proposes to initiate proceedings against his employer except where such complaint is either irresponsible or without foundation.

I therefore find that the claimant's dismissal was unfair within the provisions of section 45 and 46(h) of the Employment Act. It was also unprocedural as it was without a hearing.

Remedies

Having found that the claimant was unfairly dismissed, he is entitled to one months salary in lieu of notice and not 3 months salary as prayed. He is also entitled to payment in lieu of annual leave as provided in section 28 at 21 days per year or 1.75 days per month, underpayments (inclusive of house allowance) and public holidays. He is however not entitled to off duties as he testified that he was given 2 days off per week. He is also not entitled to a refund of NSSF not paid but rather to service pay in accordance with section 35(5) as read with section 35(6) which provide that where an employer fails to pay either NSSF, Pension or Provident Fund, or Gratuity or other Retirement Scheme, then the employee would be entitled to payment of service pay.

In summary therefore I award the claimant the following:-

1. Pay in lieu of notice Kshs.11,248.10 based on statutory minimum wage as at 30th January, 2015 inclusive of 15% house allowance.
2. Annual Leave from June 2013 to January 2015 (20 months) at 1.75 days per month (35 days) at Shs.470.60 per day as per General Order Shs.16,471/-.
3. Underpayments
 - (i) June 2013 to April 2014 (11 months)

$(11,248.10 - 4,000) \times 11 = \text{Shs.}79,729.10.$

(ii) May 2014 to January 2015 (9 months)

$(\text{Shs.}11,248.10 - 4,000 \times 9) = \text{Shs.}65,232.90/-.$

4. Overtime

The Claimant worked for 60 hours a week instead of the maximum of 52 weeks provided in Rule 6 of the Regulation of Wages (General) Order. He therefore worked 8 hours a week for 20 months being 80 weeks. At one and a half hours pay per hour this works out at

$(8 \times 80 \times 1.5) = 960$ hours at Shs.40.75 per hours - Shs.39,123.80.

5. Public Holidays

The Claimant prayed for 16 Public Holidays which the Respondent did not contest. 16 holidays at double pay as provided at Rule 6 of the Regulation of Wages and Conditions of Employment (General) Order works out to $(40.75 \times 2 \times 8 \times 16) = \text{Shs.}10,432.$

6. Service Pay (1 year) at 15 days per year worked

$(\text{Shs.}470.60 \times 15) = \text{Shs.}7,059.$

7. Compensation

The Claimant prayed for 12 months compensation. Having worked for only 20 months awarding him 12 months compensation would be unreasonable. Taking into account all relevant factors including the casualisation of his employment, his discrimination in pay and all factors set out in section 49(4) I award him 2 months salary as compensation at Shs.22,496.20

8. Certificate of Service.

The Respondent will issue the Claimant with a certificate of service as provided in section 51 of the Employment Act.

9. Costs and Interest

The Respondent will pay Claimants costs for this suit and the decretal sum shall attract interest at court rates from date of judgement.

Dated, Signed and Delivered this 10th day of November, 2016

MAUREEN ONYANGO

JUDGE