



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 343 OF 2013**

**FELIX KIPKEU KIYENG .....CLAIMANT**

**v**

**MOI TEACHING AND REFERRAL HOSPITAL ..... RESPONDENT**

**JUDGMENT**

1. Felix Kipkeu Kiyeng (Claimant) commenced legal proceedings against Moi Teaching and Referral Hospital (Respondent) on 14 October 2013 alleging unlawful termination of employment and seeking pay in lieu of notice, service gratuity, compensation and unpaid overtime, totalling Kshs 380,077/-.
2. On 14 October 2013, the Claimant filed documents he sought to rely on.
3. On 14 November 2013, the Claimant filed an Amended Memorandum of Claim.
4. The Respondent filed a Response on 18 June 2014, together with Documents to be relied on.
5. The Cause was heard on 16 December 2014 and on 23 February 2015. Each side called 2 witnesses. At the close of the hearing, the Claimant was directed to file his submissions before 13 March 2015 and the Respondent before 27 March 2015. The Claimant only filed his submissions on 20 April 2015 with an explanation of misfiling of files in the office.
6. The Court has considered the pleadings, documents tendered and testimony by the witnesses and identified the issues arising for determination as, *when the employment relationship commenced, whether the termination of Claimant's employment was unlawful, whether Claimant was underpaid and appropriate remedies.*

**Commencement of employment relationship**

7. The Claimant pleaded in the initial Memorandum of Claim that he was employed by the Respondent in 2006. In the witness statement, he stated that he got an appointment letter on 27 March 2008.
8. In testimony, he testified that he was employed on 27 March 2008 and was issued with an appointment letter as a security guard.
9. In cross examination, the Claimant stated that prior to getting the appointment letter, he had worked with the Respondent for 2 years.
10. In the Response, the Respondent pleaded that the Claimant was employed on 24 March 2008. The Respondent's Deputy Human Resources Manager testified that the Claimant was employed on 26 March 2008 and the appointment letter was dated 27 March 2008.
11. The Claimant's letter of appointment was annexed to the Memorandum of Claim. It is dated 27 March 2008, and it states as may be material that

Following your successful performance on Casual basis, I am pleased to inform you that the Hospital Management has decided that you be offered an appointment in this institution as Security

Guard II. This appointment is effective from 26<sup>th</sup> March, 2008 and will be on a one-year probation period.

12. The appointment letter corroborates the Claimant's testimony that he started working with the Respondent 2 years earlier.
13. For legal purposes, the Court therefore finds that the effective date of employment of the Claimant was 2006 as legally the Claimant could not have been a casual for 2 years.

### **Whether termination of employment was unlawful**

14. The Claimant's pleaded case is that the Respondent did not comply with section 40 of the Employment Act, 2007 when it terminated his employment and thus the termination of employment was unlawful.
15. In testimony, the Claimant stated that he received a show cause letter dated 9 September 2010, and thereafter he received a letter terminating his employment dated 23 November 2010.
16. The Respondent in its pleadings contended that the services of the Claimant was terminated because it had been established that he had committed acts of gross negligence in his line of duty and that he had been issued with a show cause letter.
17. The Claimant's cause of action, as is clear from the pleadings was anchored on redundancy. Redundancy has been defined in the Employment Act, 2007 to mean the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment.
18. From the show cause letter, it is clear that the Claimant's case was not one of redundancy. The Respondent was accusing him of theft (suspicion of having committed a criminal offence). He was taken through a disciplinary process.
19. The Response must have put the Claimant and his counsel on notice that the termination of employment was because of the Claimant's conduct and it was involuntary on his part.
20. The Claimant however did not bother to amend his pleadings to be in line with the information within his purview (show cause letter, termination letter and the pleadings).
21. The evidence led during hearing did not support the Claimant's pleadings at all.
22. The Rules of this Court expressly provide that a party should outline the laws or any policies founding the cause of action.
23. Pursuant to section 47(5) of the Employment Act, 2007, an employee has a low threshold burden to prove that an unfair termination of employment/wrongful dismissal has occurred. The Claimant did not discharge this burden.
24. The Court has no option but to find that the Claimant has failed to furnish evidence to support his pleadings and therefore the cause of action for unlawful termination of employment for failure to comply with section 40 of the Employment Act, 2007 must fail.

### **Whether Claimant was underpaid**

25. The Claimant pleaded that he was grossly underpaid having regard to the Regulation of Wages (General) (Amendment) Orders in force.
26. The Claimant produced his pay slips for April and July 2009. Apart from these pay slips, no evidence was tendered as to the Claimant's wages.
27. The Claimant did not prove which of the Regulation of Wages Orders applied to him. But according to Legal Notice No. 70 of 2009, Regulation of Wages (General)(Amendment) Order, 2009, the prescribed minimum wage for a day watchman in Eldoret was set at Kshs 5,655/-.
28. The Claimant was earning a basic wage of Kshs 8,799/- in April 2009. He could not have been underpaid.

### **Appropriate remedies**



