



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 536 OF 2014

(Originally Nakuru Chief Magistrates Court Civil Case No. 535A of 2007)

ANTHONY MUSINDI ANTOLE.....CLAIMANT

v

MUSTARD SEED SCHOOLS..... RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent before the Chief Magistrates Civil Court on 18 April 2007 alleging wrongful dismissal and seeking a total of Kshs 172,145/- being *pay in lieu of notice, accrued house allowance, severance pay and overtime*.
2. The Respondent filed a Defence on 24 May 2007 which prompted the Claimant to file a Reply to Defence on 18 July 2007.
3. On 25 February 2014, the Court ordered the suit to be transferred to it from the subordinate Court and it was eventually heard on 13 May 2015 when the Claimant testified. The hearing was adjourned to 16 June 2015 to enable the Respondent call its witnesses, but on this day, Mr. Tombe informed the Court that the Respondent wished to close its case without tendering any witness.
4. In his testimony, the Claimant stated that he was employed by the Respondent in August 2002 as a security guard. He produced a copy of the contract.
5. On the terms and conditions of service, the Claimant stated that as a guard he used to work from 6.00am to 6.00pm but was not getting paid overtime.
6. On the circumstances of separation, the Claimant informed the Court that on 4 May 2006, he was transferred to Busara Academy also run by the same person and that on reporting at Busara Academy, a guard called Dishon Shivangi told him that they had not been given instructions on the transfer and therefore he should consult the Headmaster.
7. He met the Headmaster Josphat Karanja but after consultations, the Headmaster told him there was no room for his services and he should go back to the Respondent.
8. On reporting back to the Respondent, the Respondent's Director, Esther Wangui instructed him to await further instructions. No instructions came and he consulted an advocate who wrote a demand letter but no resolution was forthcoming hence the present proceedings.
9. The Claimant stated he was seeking the reliefs outlined in the Claim.
10. In cross examination, the Claimant stated that he was working 6 days a week, was not given a dismissal letter and that the contract did not provide for transfer and that he was deducted National Social Security Fund contributions, that he was paid Kshs 12,269/- through his advocates and that he was earning Kshs 6,050/- at time of separation.

Evaluation

11. The written contract between the parties provided for termination notice to be given in writing 2

months in advance. The evidence is that no notice was given. The Respondent was therefore in breach of contract.

Appropriate remedies

Pay in lieu of notice

12. The applicable law at the material time was the Employment Act, cap. 226 (repealed). Under that statutory regime, an employer could dismiss an employee without cause provided damages equivalent to the notice period were paid.
13. The Claimant acknowledged that he was paid Kshs 12,269/-. A letter dated 5 March 2010 to the Claimant's advocate indicate the money was pay for days worked in May 2006, 26 days due (not clear what this is) and security refund.
14. The written contract provided for 2 months written notice. The Claimant was not given written notice of 2 months and would be entitled to an equivalent sum as pay in lieu of notice.

House allowance

15. The contract provided that the Claimant's wages were gross, so he cannot claim house allowance.

Severance pay

16. The Claimant did not establish that his position was declared redundant. Severance pay is therefore not applicable.

Overtime (normal and public holidays)

17. Under this head of claim, the Claimant sought a total of Kshs 91,029/-. His testimony on working hours and days was not challenged or controverted.
18. It is also a notorious fact of which judicial notice can and is taken herein that security guards in this country work 12 hours every day (2 shifts) and further the Respondent did not controvert the Claimant's testimony on work during public holidays.
19. The Court would find that the Claimant has made a case for an award of overtime as pleaded.

Conclusion and Orders

20. The Court finds and holds that the termination of the services of the Claimant was in breach of contract and awards him and orders the Respondent to pay him

a. 2 months wages in lieu of notice	Kshs 12,100/-
b. Overtime	Kshs 91,029/-
TOTAL	Kshs 103,129/-

21. Claimant to have costs of Kshs 30,000/-.

Delivered, dated and signed in Nakuru on this 20th day of November 2015.

Radido Stephen

Judge

Appearances

For Claimant Mrs. Kairu instructed by Sheth & Wathigo Advocates

For Respondent Mr. Tombe instructed by Mukite Musangi & Co. Advocates

Court Assistant Nixon