



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 50/2013

(formerly Nai 892/11)

(Before Hon. Justice Hellen Wasilwa on 5th February, 2014)

ANTHONY OCHIENG ONYANGO..... CLAIMANT

-VERSUS-

1. LWALA MIXED SEC. SCHOOL

2. PRINCIPAL LWALA MIXED SEC

3. B.O.G LWALA MIXED SEC. SCHOOLRESPONDENT

JUDGMENT

The claimant herein Anthony Ochieng Onyango filed his Memo of Claim on 7.6.2011 in person. The issues in dispute are as follows:-

- 1. Unfair summary dismissal of Mr. Antony Ochieng Onyango against Section 40(1), (2), (4) and Section 46(h) of the Employment Act 2007.**
- 2. Underpayment by the respondents against Regulation of wages and condition of employment (General Order) Legal Notice No. 42 of 2005, No. 38 of 2006 and Section 48 (1) (a) and (b) of the Labour Institutions Act 2007.**
- 3. Failure by the respondents to pay overtime against Section 48 (1) (b) of the Labour Institutions Act 2007 and Legal Notice No. 8 of 1988 order No. 7(a), (b) and order No. 9(2) of the Regulations of Wages (Protective security services order).**
- 4. Failure by the respondents to grant annual leave against Section 48 (1)(b) of the Labour Institutions Act 2007 and Legal Notice No. 8 of 1988 Order No. 10 of the Regulation of Wages (Protective Security Services Order).**
- 5. Failure by the respondents to grant weekly rest days against Section 48(1) (b) of the Labour Institutions Act 2007 and Legal Notice No. 8 of 1988 Order No. 8 of the Regulation of Wages (proactive security services order).**

The claimant contends that he was employed by the 1st respondent Lwala Mixed Secondary School in January 2000 as a night watchman at a salary of Ksh 1,500/= per month. The salary rose gradually to Ksh 2,500/= per month. There was however no formal contract between the claimants and respondents

stating the terms and conditions of employment. The claimant states that he was engaged to work for 12 hours each day hence 72 hours each week and was not paid overtime for the same. He also stated that during all that time in service of respondent he was never granted any annual leave. Further it is claimant's contention that he was grossly underpaid by respondents who failed to implement the Wages General Orders and Conditions of Employment as revised by the government from time to time.

On 31.7.2008 the claimant and other employees wrote a letter to the 1st respondent's chairman – the 3rd respondent to follow up on issue of adjusting their wages. The letter was addressed to the 3rd respondent through the 2nd respondent who is secretary to the board. The claimant was ordered to write an apology within 20 minutes after which he was summarily dismissed. The reason for the dismissal was basically due to the claimant's pursuit for adjustment of their wages and condition of employment to conform to the statutory minimum rates and conditions as provided by law.

It is claimant's contention that he served the respondent diligently for 8 years and 11 months and even on several occasions worked day and night when his colleagues were either absent or dismissed. He contends that he was unfairly summarily dismissed. He now claims to be paid Ksh 401,443.60 as computed under paragraph 1 – 25 of his Memo of Claim.

The claimant claims that he was underpaid contrary to the statutory minimum wages being Legal Notice No. 42 of 2005, and Legal Notice No. 38 of 2006. He also states that he worked without weekly rest days and without payment of overtime in contravention of Section 27(2) of Employment Act 2007 and Legal Notice No. 8 of 1988 Order No. 8 and Order No. 7(b) of the Regulation of Wages (*Protective Security Services Order*) all which provide for payment of any time worked on public holidays.

The respondents were served with summons to enter appearance and memorandum of claim on 7.6.2011. They failed to enter appearance and file any defence. They were subsequently served with a hearing notice to attend court for hearing on 15.1.2014. They failed to attend so the case proceeded for formal proof.

Having heard evidence of the claimant and upon considering his submissions, I find that from **Appendix 4** the 2nd respondent did write a letter to claimant dismissing him from work for gross indiscipline and insubordination. There is no letter of appointment whatsoever but due to this **Appendix 4**, there is proof that the claimant and respondents were in an employment relationship. The terms of this employment contract cannot be ascertained.

Under Section 9(2) of Employment Act 2007;

“An employer who is a party to a written contract of service shall be responsible for causing the contract to be drawn up stating particulars of employment and that the contract is consented to by the employee in accordance with sub – section (3).”

It is also important to note that under Section 10(7) of Employment Act 2007:-

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

Since there is no written contract displayed by the respondents, then this court assumes that what the claimant has stated is the truth unless otherwise proved by the respondent.

It is also true that the claimant was underpaid during the period he was employed contrary to the minimum wages as stipulated in the wages orders. Concerning leave, there is however no proof that he applied for and was denied leave and therefore his claim that he never proceeded on leave cannot stand.

He was never accorded any hearing before the dismissal. This is contrary to Section 41 of the Employment Act 2007. The reason given for the dismissal is insubordination and gross misconduct.

However, the misconduct alleged arises from his query of his right to a proper wage under the contract which does not amount to gross misconduct.

I find that the claimant has established his case as expected and I find for him and enter judgment as follows:-

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|--|----------|--------------------|
| 1. 1 month salary in lieu of notice based on Minimum Wage:- | = | Ksh 4,056 |
| 2. Underpayment arrears:- | | |
| (i) between May 2005 & May 2006 @ 452 X 12 | = | Ksh 5,424 |
| (ii) between May 2006 to November 2008 @ 806 X 26 | = | 20,956 |
| TOTAL | = | 26,380 |
| 3. Service gratuity at 15 days for each year worked | = | 2,056 X 8 = 16,488 |
| 4. 12 months salary as compensation for unlawful termination | = | 48,672 |

TOTAL = KSH 95,596.00

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The claim of overtime is not proved. The claimant will also be issued with a certificate of service and be paid costs of this suit by respondent.

HELLEN WASILWA

JUDGE

5/2/2014

Appearances:-

Obare h/b Nyabena for Claimant present

N/A for respondents

CC. Wamache