



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 260 OF 2013

JAMES OKOTH WASONGA.....CLAIMANT

- VERSUS -

**THE COMMERCIAL DIRECTOR KENYA EDUCATION TRUST
LIMITED PEMBROKE HOUSE.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 4th April, 2014)

JUDGMENT

The claimant **James Okoth Wasonga** filed the memorandum of claims on 15.08.2013 through Ndeda and Company Advocates. The claimant prayed for judgment against the respondent for:

- a) Payment of overtime arrears since the employment as the overtime was paid less than the overtime hours worked.**
- b) Compensation based on section 49(1) (c).**
- c) Compensation based on section 49 (4) (f) (g) and (h) because the claimant was put in police cells for 3 days and set free without charge and is a witness in the criminal case.**
- d) The respondent to pay the costs of the suit.**

The respondent **the Commercial Director, Kenya Education Trust Limited, Pembroke House** filed the response to memorandum of claims on 23.09.2013 through Mukite Musangi & Company Advocates. The respondent prayed that the claim be dismissed or struck with costs to the respondent; and any other or further relief the court may deem fit and just to grant. The claimant filed a reply to the response on 31.10.2013.

The case was heard on 18.12.2013 and 25.03.2014. The claimant testified to support his case and the respondent's witness was Robert Ackrill Munton Breare, the respondent's school director.

The respondent employed the claimant as a security guard in May 1995. The working hours were 6.00 am to 6.00 pm or 6.00 pm to 6.00 am depending with the shift the claimant was assigned to work.

On 27.02.2013, the claimant reported at work at 6.00 pm. He attended a meeting convened by the

supervisor and also attended by 3 other night guards. The claimant was assigned to guard the office area for that night. That night the headmaster's office was broken into and it was part of the claimant's assigned area. The claimant testified that his patrol office area was rather large including dormitory, staff offices, classrooms and office block. The police came in at 5.00 am and investigated the crime. The claimant was arrested on 28.02.2013 and was released on 2.02.2013 at 1.40 pm. The claimant testified that the investigating officer told the claimant that the claimant was innocent. The claimant's evidence was that he was not aware of the stolen items or that girls being students aged 18 years from the UK had been held hostage for about 45 minutes on the fateful night.

On 3.02.2013, the claimant reported on duty at 6.00 am to 6.00 pm. A week later, on a Wednesday, the claimant testified that his supervisor called Kamau advised him not to report on duty the following day. The claimant did not report on duty thereafter through March, 2013 but was paid full salary for that month. The claimant was not paid the salary for April, 2013 and did not work that month. On 13.05.2013, the claimant received the termination letter and it was dated 6.4.2013. After the termination, the claimant testified that the respondent paid him Kshs.129,817.65 being the terminal dues and it was his testimony that the gratuity was doubtful because it was overtaxed as confirmed by the Kenya Revenue Authority **(KRA)**.

RW testified that the robbery on the fateful night lasted about 45 minutes and yet the claimant heard or saw nothing. RW the claimant failed to patrol, he did not hear the break-in and the respondent decided to terminate the claimant's employment with payment of terminal dues. The applicable collective agreement provided for payment of pay in lieu of termination notice; and leave due but not taken and service pay. RW stated that the claimant was paid terminal dues less the bank loan and statutory deductions.

RW testified that upon appeal, the claimant wanted to be heard. He was heard and his case was that the termination had been harsh. RW testified that the overtime was paid as part of the gross monthly pay to enhance the employees' creditworthiness to access bank loans. The KRA conveyed the claimant had been over taxed by Kshs.40,000.00. RW testified that the cheque of Kshs.57,661.00 that the claimant declined to accept included the sum of over taxation. RW testified that if the claimant accepted the cheque, then the respondent would not owe him any more money. RW testified that a former employee and a serving employee were found culpable of the robbery. RW's testimony on cross-examination was that the claimant was dismissed for poor performance (failing to raise alarm) as a guard and not for aiding in the robbery.

The only issue for determination in the case is whether the claimant is entitled to the remedies as prayed for. The court has considered the pleadings, the evidence, and the submissions and makes the following findings:

- a) The claimant was dismissed on account of inability to perform his duties adequately as expected on the night of 27.02.2013. The termination letter of 6.04.2013 is clear that the claimant attended the meeting of 27.03.2013 at which the poor performance was discussed. The claimant appealed and he was heard. The court finds that the respondent complied with due process and the reason for the termination was valid. The claimant at the time of the disciplinary action and at the hearing before court failed to exculpate in view of the allegations levelled against him, he failed to establish that due process of fairness had been breached and the respondent established that the reason for termination was valid. The court finds that the termination was not unfair.
- b) The claimant prayed for payment of underpaid salaries. In his testimony, the claimant stated that he was not aware of the amount of underpayment involved. The court finds that throughout the employment period, there was no dispute on the pay and the prayer will fail.
- c) The claimant prayed for payment of overtime. RW testified that the claimant worked with a two hour rest and the overtime was paid on monthly basis to enhance the claimant's creditworthiness so as to access better bank loans. There is no ground to doubt the evidence by RW. Further, during the subsistence of the employment, there is no evidence of a grievance by the claimant about the overtime pay as claimed. The court finds that the claim will fail.

d) The court finds that the claimant is entitled to **Kshs.57,661.00** as admitted by the respondent. The court considers that the respondent took steps to pay after the claimant had moved to court and that conduct on the part of the respondent will have a bearing on the costs.

In conclusion, the court makes judgment and orders:

- a) The respondent to pay the claimant **Kshs.57,661.00** in 7 days, failing, interest to be payable at court rates from the date of the suit (23.09.2013) till full payment.
- b) A declaration that the claimant's termination from employment by the respondent was not unfair.
- c) The respondent to pay 25% of the costs of the suit.

Signed, dated and delivered in court at **Nakuru** this **Friday, 4th April, 2014.**

BYRAM ONGAYA

JUDGE