



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 150 OF 2013

(Formerly Cause No. 1039 of 2011 at Nairobi)

JOHN ENEMAI BIBILONDO.....CLAIMANT

-VERSUS-

CHRIST THE KING ACADEMY..... 1ST RESPONDENT

CATHOLIC DIOCESE OF NAKURU.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 17th October, 2014)

JUDGMENT

The memorandum of claim was filed on 30.06.2011 through Gordon Ogola & Associates. The claimant prayed for:

- a. Notice pay Kshs. 4, 792.00.
- b. Normal overtime between 1.05.2008 to 31.12.2008 Kshs. 128, 448.00.
- c. Rest days between 1.01.2005 to 31.12.2009 Kshs. 102, 758.40.
- d. Public holidays for 1.01.2005 to 31.12.2008 Kshs. 17, 510.40.
- e. Compensation under section 49 of the Employment Act, 2007 at Kshs. 5,510.00 per month making Kshs. 66, 120.00.
- f. Certificate of service.
- g. Costs
- h. Any other relief the court may deem necessary to grant.
- i. The court to find the dismissal was wrongful and to convert it to normal termination.

The memorandum of response was filed on 26.08.2011 through Rodi Orege & Company Advocates. The respondents prayed that the claim be dismissed with costs. The amended memorandum of response and counterclaim was filed on 24.07.2013. The respondent's counterclaimed for Kshs. 62, 000.00 being loans advanced to the claimant; costs of the counterclaim and interest. The claimant filed a response to the memorandum of response and counterclaim. He pleaded that he owed an initial loan of Kshs. 62, 000.00 but averred that at termination he had repaid part of it so that the outstanding amount was Kshs. 32, 000.00.

The claimant testified that he was employed by the respondents on 1.01.2005 as a gate guard reporting at work from 5.00am to 6.30 pm. Before reporting at the gate he was assigned early morning duties to clean the respondent's school toilets and he testified that he worked 7 days every week including on public holidays without rest days or off day. The claimant testified that he earned about Kshs.6, 000.00 as at

23.01.2009 when he was terminated from employment.

On 5.01.2009 the Principal granted the claimant permission to take his daughter to join Form one at St. Monicah Chakol High School on 6.01.2009. The permission for one week was verbal and one Murungaru Kamau was assigned to relief the claimant during his period of absence. The claimant testified that he was away on leave for one week to complete his daughter's admission process. The claimant had called the Principal Mrs. Njoroge on the cell phone to allow him 4 more leave days to put up his cow for sale to deal with the school fees deficits and the claimant testified that the Principal had disconnected without answering. The claimant testified that he did not understand the meaning of the Principal's action of disconnecting the telephone call.

The claimant testified that he reported back for duty on Sunday 19.01.2009 and reported to the Principal on 20. 01.2009 for assignment of duty. The Principal advised the claimant to go back home and to report back at 8.00am for his letter. The claimant complied and he was given the computation of his terminal dues being JBK III showing the claimant's net dues was Kshs. 2, 124.00.

It was the claimant's evidence that he was not given chance to explain why he had delayed on leave. The claimant admitted that he had a SACCO loan of Kshs. 62, 000.00 and SACCO shares valued Kshs. 32, 000.00 which could be used to set off part of the loan as claimed so that he repays 30,000.00. The claimant testified that prior to the school employment he had been employed by a security firm and deployed to the school. It was his testimony that he applied to be employed by the school in December 2004 and the school employed him in January 2005 but the appointment letter dated 1.01.2008 was issued belatedly and he had signed it on 23.09.2008.

The respondent's witness was Virginia Njoroge (RW) the respondents' Principal since 1999. It was her testimony that the respondent was employed in 2008 as a day watchman. She disputed that the claimant had asked for permission as alleged but that he was absent from 5.01.2009 to 20.01.2009. The Board was scheduled to meet on 26.01.2009 to deliberate the claimant's case but the claimant had decided to write the resignation letter dated 23.01.2009. RW testified that she then issued the warning letter dated 26.01.2009 but which the court notes did not address the issue of absence from duty between 5.01.2009 to 20.01.2009. RW further testified that the claimant worked 6 days a week from 6.00am to 6.00pm. She further testified that whenever the claimant worked on public holidays he was paid. The respondent did not file the letter redeploying the claimant as per the Board's decision that RW testified was made on 26.01.2009.

The court has considered the pleadings, the evidence and the submissions and makes the following submissions on the issues in dispute.

The **1st issue** for determination is whether the claimant was terminated from employment and whether the termination was unfair. The court in determining the issue is confronted with conflicting account of the circumstances leading to the cessation of the employment relationship between the parties. The court in such cases, first considers if the account by the employer is plausible and if not, the court will consider if the employee's account is plausible and if not, the court will consider of the parties, whose account is most likely to be plausible. The court has considered the evidence and pleadings. The claimant has denied ever resigning. The respondent at paragraph 10 of the claim admits that the claimant was given leave as per the claimant's testimony but RW denied that the claimant had not been given leave. The respondent says after resignation, the claimant was to be redeployed on grounds other than the alleged absence from duty without permission.

The court finds that it is unreasonable and not believable for the employer to purport to redeploy an employee who like in the instant case, the employer says, had already resigned from employment. The court further finds that the respondent could not have acted without initiating a disciplinary action in circumstances whereby, as alleged, the claimant had been absent without permission from 5.01.2009 to 20.01.2009 and further defied the alleged redeployment. It is not clear why the respondent never filed the minutes of the alleged board meeting of 26.01.2009. The court finds that RW's evidence was incoherent and irrational as it was not believable.

The court upholds its opinion on soft landing in Malachi Ochieng Pire – Versus- Rift Valley Agencies, Industrial Cause No. 22 of 2013 at Nakuru [2013]eKLR where in the judgment it was stated thus, “The court has considered the submission and evidence of a soft landing to conceal the alleged poor performance and finds that it is not open for the employer to waive its authority to initiate disciplinary action in appropriate cases and in event of such waiver, nothing stops the employee from enforcing the entitlement to fair reason and fair procedure in removal or termination. The court holds that where the employer is desirous of waiving the disciplinary process or due process in event of poor performance, misconduct or ill health for whatever grounds, it is necessary to enter into an agreement such as a valid discharge from any future liability to the employee in view of the otherwise friendly or softer or lenient termination. Whereas, such soft landing is open to employer’s discretion, it is the court’s considered view that in an open and civilized society, employers hold integrity obligation to convey truthfully about the service record of their employees and swiftly swinging the allegations of poor performance or misconduct never raised at or before the termination largely serves to demonstrate that the employer has failed on the integrity test thereby tilting the benefit of doubt in favour of the employee in determining the genuine cause of the termination.”

In the present case, the respondent’s incoherent account cannot be trusted and the court finds that the claimant’s account was coherent and trustworthy. The court finds that the claimant was verbally terminated by RW when RW asked the claimant to go back home on 20.01.2009. It is obvious that the termination was without a notice and a hearing as envisaged under section 41 of the Employment Act, 2007 and the court finds that it was unfair. The court has considered that the claimant did not contribute to his termination; he had a legitimate expectation to continue in employment; he was forced out of employment in a manner that was seriously repugnant to human dignity in view of the account on record; and therefore the court finds that the claimant is entitled to 12 months gross salaries at 5,850.00 per month making **Kshs.70, 200.00**.

The 2nd issue for determination is whether the claimant is entitled to the other remedies as prayed for. The court makes findings as follows:

- a. The court finds that the claimant is entitled to the notice pay Kshs. 5, 850.00 in view of the unfair termination. .
- b. Normal overtime between 1.05.2008 to 31.12.2008 Kshs. 128, 448.00. WR testified that the claimant worked from 6.00am to 6.00pm. That was 12 hours instead of the statutory 8 hours per day. The court has considered the evidence on record and finds that there is no reason to doubt that the claimant was employed in January 2005. The court finds the claimant’s claim for overtime of **Kshs. 128, 448.00** is reasonable and justified in view of the many extra hours the claimant undisputedly worked.
- c. The claimant prayed for rest days between 1.01.2005 to 31.12.2009 Kshs. 102, 758.40. The court has considered the evidence. RW testified that the claimant was at all material time the only day watchman and he worked for 6 days per week. That evidence cannot be believable. The court finds, as testified by the claimant, he worked 7 days a week especially that he was the only day watchman. The claimant is entitled to **Kshs. 102, 758.40** as prayed for.
- d. The claimant prayed for public holidays for 1.01.2005 to 31.12.2008 Kshs. 17, 510.40. RW testified that the claimant was paid for work performed on public holidays but no evidence of such payment was provided. The court finds that the claimant is entitled to the **Kshs. 17, 510.40** as prayed for.
- e. The claimant prayed for a certificate of service. The respondent urged that the claimant was issued a certificate of service dated 13.02.2009 showing service effective 1.01.2008. The court finds that the purported certificate of service was misleading and the claimant is entitled to a proper certificate of service showing that he was employed in January 2005.

The 3rd issue is whether the respondent is entitled to the prayer for Kshs. 62, 000.00 in the counterclaim. The claimant admitted that he owed the loan and further that Kshs. 32, 000.00 be offset from his value of shares so that he repays Kshs. 30, 000.00. The parties did not file the relevant documents on the Sacco contributions and repayment of the loans so as to support their respective positions. The court finds that

the claimant took a loan of Kshs. 62,000.00 and the respondent will file in court all the relevant repayment documents and the value of the claimant's shares for an account to determine the outstanding loan as at the time the claimant was terminated.

In conclusion, judgment is entered for the parties for:

1. The declaration that the respondent unfairly terminated the claimant's employment.
2. The declaration that the claimant took a loan of Kshs. 62,000.00 and the respondent will file and serve in court within 7 days all the relevant documents on the repayment and the value of the claimant's shares for an account to determine the outstanding loan.
3. The respondent to pay the claimant **Kshs. 318, 916.80** less the amount of the outstanding loan found due under order (2) above; and the respondent to pay the due amount by 1.12.2014 failing, interest at court rates to be payable thereon from the date of the judgment till full payment.
4. The respondent to deliver to the claimant the proper certificate of service by 1.12.2014.
5. The respondent to pay 75% of the claimant's costs of the suit.

Signed, dated and delivered in court at **Nakuru** this **Friday, 17th October, 2014.**

BYRAM ONGAYA

JUDGE