



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 441 OF 2013

JACKSON KIPRUTO ARAP SOI.....CLAIMANT

-VERSUS-

THE PRINCIPAL, MERCY GIRLS SECONDARY SCHOOL,

KIPKELION.....1ST RESPONDENT

THE CATHOLIC DIOCESE OF KERICHO.....2ND RESPONDENT

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

JUDGMENT

The claimant filed the memorandum of claim on 10.01.2014 through Ndeda & Associates. The claimant prayed for:

- a. Notice pay Kshs. 5, 998.00.
- b. Welfare Kshs. 2,200.00.
- c. Normal overtime Kshs. 130, 827.00.
- d. Public holidays Kshs. 51, 627.20.
- e. Gratuity Kshs. 58, 136.40.
- f. 12 months compensation under section 49 (1) (c) of Employment Act, 2007 Kshs. 87, 084.00.
- g. Total Kshs. 335,872.60.
- h. The respondent to pay costs of the suit.
- i. The respondent to issue the relevant certificate of service under section 51 of the Employment Act, 2007.

The response to the memorandum of claim was filed on 7.03.2014 through Kiplenge & Kurgat Advocates. The respondents prayed that the claim be dismissed with costs. The claimant filed the reply to the response on 19.03.2014.

The claimant was employed by the respondents in February 1997 as a night watchman. At termination the claimant earned Kshs. 5, 998.00 being basic pay plus Kshs.720.00 house allowance. The claimant worked till 27.10.2011. On that day the claimant received a private visitor at about 6.00pm. It was meal time, the claimant shared dinner with the visitor at his place of work, the respondent's school. The claimant then handed the visitor keys to his residential house and the visitor proceeded to the house which was located outside the school compound.

On 2.11.2011 Father David Cheruiyot chaired a meeting attended by the school watchmen including the

claimant. The Father reminded the watchmen that visitors were prohibited and he directed the claimant to leave employment. The parties to the suit testified in agreement that the said Father David lacked powers to dismiss the claimant so that disciplinary powers had been vested in Sister Anne Peter Anyang' who was the school's Principal. The Bishop intervened and asked the claimant to report back at work but upon reporting, the claimant was locked out. At a meeting at the District Commissioner's office, the said Father upheld the claimant's dismissal. Subsequently the Principal asked the claimant to write an apology letter after which, he received no further response. The claimant testified that at termination he used to earn 5,000.00 and he was underpaid in view of the prevailing wage orders.

The respondent's 1st witness was Julius Kemboi, the Deputy Principal (RW1) and the 2nd witness was John Tanui, a watchman (RW2). RW 1 testified that the claimant allowed his visitor in school contrary to policy but he had not been dismissed by the school. RW1 testified that the claimant had not seen the Principal about his case and the Principal was the one vested with the disciplinary powers. RW2 confirmed that as the head guard he reported the claimant's case to Father David when the claimant allowed his visitor in school. Father David then told the claimant to handover and take leave from the school so that RW2 confirmed the claimant's account of the dismissal.

The **1st issue** for determination is whether the termination was unfair. The court finds that Father David usurped the Principal's disciplinary powers and pretended to dismiss the claimant from employment. The court finds that the dismissal was null and void *ab initio* and the court finds that in the circumstances there was no due process. The court has taken into account the long dedicated service rendered and the claimant's legitimate expectation to continue in employment and finds that claimant is entitled to 12 months compensation under section 49 (1) (c) of Employment Act, 2007 being **Kshs. 87, 084.00** as prayed for.

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

- a. As the termination was unfair the claimant is entitled to one month pay of **Kshs. 5, 998.00** in lieu of the termination notice.
- b. The claimant provided no evidence on welfare Kshs. 2,200.00; overtime Kshs. 130, 827.00; and public holidays Kshs. 51, 627.20 and the prayers shall fail.
- c. The claimant was a member of the National Social Security Fund and is not entitled to gratuity Kshs. 58, 136.40 as prayed for.
- d. The claimant is entitled to the order that the respondent shall issue the relevant certificate of service under section 51 of the Employment Act, 2007.

In conclusion, judgment is entered for the claimant against the respondents for:

1. The respondent to pay the claimant **Kshs.93, 082.00** by 1.12.2014 failing interest at court rates to be payable thereon from the date of the judgment till full payment.
2. The respondent to deliver to the claimant the certificate of service by 1.12.2014.
3. The respondent to pay costs of the suit.

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

BYRAM ONGAYA

JUDGE