



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI
CAUSE NO. 733 OF 2012

ROBINSON MUTEMBEI CLAIMANT

-VERSUS-

AKIBA SCHOOL RESPONDENT

JUDGEMENT

The Claimant herein **ROBINSON MUNGAI MUTEMBEI** filed a claim against the Respondent **AKIBA SCHOOL** by Memorandum of Claim filed on 2nd May 2012 alleging that he was employed by the Respondent as a driver at a Salary of Shs.8,500/= per month from August 2008 and worked with loyalty and diligence until April 2011 when the Respondent unlawfully terminated his services without notice and refused to pay his terminal benefits. He seeks orders for payment of Shs.228,650 made up of:-

- (i) Service (Kshs.12,750)
- (ii) Gate keeping dues (Kshs.132,000)
- (iii) Travelling Allowance (Kshs.21,000)
- (iv) House Allowance (Kshs.45,900)
- (v) Unrefunded money (Kshs.10,000)
- (vi) Van remittance (Kshs.7,000)

He further claims maximum compensation for wrongful dismissal in the sum of Kshs.102,000.

The Respondent filed defence on 8th June 2012 in which it denies the claim and avers that the termination of claimant's services was fair. The Respondent avers that the Claimant failed to perform his contract and was terminated for gross misconduct.

The case was heard on 4th February 2013, 22nd February 2013 and 6th March 2013. The Claimant testified on his own behalf while the Respondent called 3 witnesses, **EDITH WANJIKU GITAU (RW1)**, **PATRICK MUTURI WANYOIKE (RW2)** and **JOSEPH NDUNGU GATHOGO (RW3)**.

In his testimony the Claimant testified that he was employed by the Respondent on 1st August 2005 as a bus driver at a salary of Kshs.7,000/= and left employment on 20th April 2011. His last salary was

Shs.8,500/=, that he was dismissed without reason and was paid Shs.14,549/= as terminal dues. He testified that he was robbed in the bus of a spanner and jack and when he reported to the Manager the Manager did not believe. The Manager deducted Shs.10,000 from his salary by installments of Shs.1,000/= per month.

On 26th March 2011 he was sent to carry class 8 pupils on a Saturday and arrived at the school at 5.30 a.m. and found the caretaker with 2 other people fetching water with a "Mkokoteni (handcart)". The caretaker insulted him and called him "Shetani huyu" and refused to allow him to enter the school. He was only let in after pleading for a while. He reported the matter to the Manager who told him that is a matter between him and the caretaker. He decided to report to the Chief who summoned the caretaker. The caretaker reported to the Chief with the Manager. The case was heard and the Claimant asked the Chief to pardon the caretaker.

The Claimant testified that he used to relieve the caretaker while the caretaker was on leave and worked from 6 a.m. to 6 p.m. when he handed over to the night watchman. He testified that he was dismissed when he told the Manager that he did not want to do the gate keepers job. The Claimant further testified that he was never paid lunch allowance when he travelled on official duty to Mombasa, Eldoret, and whenever the school bus was on hire.

He further claimed Shs.500 lunch allowance per day for trips to Menengai on 19th March 2011, Langata Animal Orphanage on 16th August 2010, Motor Vehicle Inspection on 18th August 2008, Motor Vehicle Inspection on 19th June, 2009, On 31st July 2010 when he took the school van for inspection, on 16th December 2008 when vehicle was hired by Wa Njenga Family, hire by Kangemi Women's group, Akiba children to Uhuru Gardens on 10th September 2012, St. Pauls Church on 28th November 2009, Urafiki Children's School on 24th April 2009, Mugwe Family, Grace Harvest Academy on 7th October 2012, PCEA Kangemi Church on 9th October 2009.

He further claimed Shs.1,000 per day for trips to Mombasa (8 days), Eldoret (3 days). He further claimed Shs.1,000/= refund for fueling the bus when he was sent to E.W. Gitau. He claims a total sum of Kshs.21,000 as travel allowance. He further claims Shs.7,000/= van remittance deducted from his terminal dues and Shs.10,000 for lost spanner and jack recovered from his salary. The Claimant further claims shs.45,900 house allowance and Shs.102,000 compensation for unlawful dismissal.

The Claimant produced a tabulation of his claim and receipts for hire of the bus on the days when he drove the bus while on hire.

On being questioned by the Court the Claimant stated that he started manning the gate 1 week after employment until he was terminated. That he was fed by good Samaritans when he went to Mombasa for the school trip, that he kept receipts for hire of the bus when he was warned by a policeman to be careful as he was likely to be dismissed. He further stated that the Respondent did not refund him fees for renewal of this driving licence. He further stated he was dismissed because he was old.

RW1 the Managing Director of the Respondent testified that she employed the Claimant as a bus driver. That when he was employed the Claimant used to sweep the compound, tend the flowers and grass, relieve the caretaker while on leave and that was why his contract was renewed from 1st April 2009, with a 10% increase in salary. She testified that the Claimant used to go on trips that while on trips the students used to sleep in school dormitories while the teacher who was the trip master was given money to buy anything that was required. She testified that the Claimant was not given travelling allowance. The Claimant was however given Shs.200 for day trips. She testified that while on Mombasa trip the Claimant was expected to eat with the students, that she was not aware the Claimant did not have food.

She testified that she was aware about the disagreement between the Claimant and the caretaker, and also disagreements between the Claimant and other staff members.

She testified that she informed the Claimant of the reasons for dismissal as stated in his letter of

termination. That the Claimant was paid his terminal benefits, that the Claimant was not entitled to an allowance on days he took the vehicles for inspection. She confirmed that the Claimant was not paid house allowance. She testified that the Claimant is not entitled to service as he was paid service, that the school does not owe the Claimant money for van remittance.

RW2 testified that he was the Deputy Managing Director of the Respondent, that he knew the Claimant who was an employee of the Respondent for 3 years that the Claimants reporting time was before 7 a.m. That the Claimant used to take pupils on trips and was provided with meals which was also taken by staff, that when they travelled to Mombasa the students were provided with a place to sleep by the Ministry. He stated the Claimant had original receipts because he was the one making payments. He testified that the reason for termination of the Claimants employment was because he lost some items and was also not good at taking instructions.

That the Claimant was entitled to service which he was paid at 15 months' salary, and that the Claimant was also paid leave.

He confirmed that the Claimant assisted the gate keeper, that travelling allowance was not paid to the Claimant. He also testified that Shs.10,000 was recovered from the Claimant for lost items. In cross examination RW2 admitted receiving the Claimant's complaint against the caretaker, that after that the Claimant was asked to take leave which he did from 16th April to 24th April 2011. That the Claimant was supposed to take over from caretaker and work from 6 a.m. to 6 p.m. He further admitted that the Claimant was never paid any travelling or meal allowances while on official duty. He also stated that he was not aware the Claimant did not take food cooked for pupils at school.

RW3 JOSEPH NDUNGU GATHOGO testified that he is the caretaker of the Respondent that the Claimant reported to work between 5 a.m. and 6 a.m, that there was a day the Claimant reported to work at 4.00 a.m. and he woke up when the Claimant was talking to himself accusing the caretaker and the Askari of being thieves. He stated the Claimant used to assist him at the gate. In cross examination he denied abusing the Claimant the day the Claimant arrived at the school early to go and pick class 8 pupils.

I have considered the pleadings and the evidence before me. The issues for determination are whether the Claimant was unfairly terminated and whether he is entitled to the reliefs sought.

1. Whether the Claimant was unfairly terminated.

The Claimants letter of termination is reproduced herebelow.

20/4/2011

Mr. Robinson Mwangi Mutembei

P.O. Box

NAIROBI

Dear Mr. Mutembei

Re: ----- Termination of Employment

The School Management is hereby writing to inform you that your services as the school Driver have been terminated with immediate effect, due to the following issues which have arisen during your term of service in this school:-

- i) Loss of essential vehicles' equipments namely, spare wheels and jacks.*
- ii) Poor co-ordination of your areas of designation as a driver with the rest of the departments*

(iii) Lack of proper rapport with the fellow employees that has brought conflicting relationship at work place.

(iv) Failure to respect any other responsibilities assigned to you by the Directing Officers, notably occasional use of abusive language and poor maintenance of the vehicles assigned to you.

As you are aware you have been given verbal warnings and directive memos for the above mentioned issues without change or response on your part.

We attach herewith your terminal dues.

Yours faithfully,

MRS. EDITH GITAU

MANAGING DIRECTOR

The letter refers to verbal warnings and directive memos. The Respondent called 3 witnesses none of whom referred to the verbal warnings. The Respondent also submitted a bundle of documents and none of them were directive memos. The letter of termination did not refer to any hearing before the termination of employment. The reasons for termination in the letter are none specific especially the grounds of poor co-ordination, lack of proper rapport and failure to respect any other responsibilities assigned to him. For the termination to be fair, the Claimant should have been referred to specific incidents and should have been asked to respond to those issues. The letter of termination as given does not meet the requirements of Section 41 and 45 of the Employment Act for failure to give the Claimant an opportunity to respond to the charges leveled against him and for lack of clarity on the specific incidents leading the Respondent to conclude that the Claimant was guilty of poor co-ordination, lack of proper rapport and failure to respect responsibilities assigned to him. On the issue of loss of essential vehicle equipments, the incident was an old one for which the Claimant had been surcharged in 2009. It was therefore not a ground for dismissal in 2011 as it constitutes double jeopardy while at the same time punishing an employee after an inordinately long period of lapse of about 2 years.

I find that the dismissal of the Claimant was unfair both substantively and procedurally.

2. Whether the Claimant is entitled to the prayers sought.

The Claimant prays for the following:-

- i) Service
- ii) Gate Keeping dues
- iii) Travelling allowance
- iv) House allowance
- v) Unrefunded money
- vi) Van remittance
- vii) Compensation

I now consider the specific heads

i) Service

It is the Respondent's evidence that the Claimant was paid the sum of Shs.3,750 for 2008, Shs.4,000 for 2009 and Shs.4,250 for 2010 as service pay.

Service pay is however supposed to be based on the last salary for the whole period. I also note that the basic minimum statutory wage for a driver of a heavy commercial vehicle for 2010 was Shs.15,216. The service pay should have been based on this rate and would work out at $Kshs.15,216 \times 15 \div 3 = Kshs.22,824$.

The Claimant was paid Shs.12,000.

He is therefore awarded the difference in the sum of Kshs.10,824.

2. Gate keeping dues

The Claimant asked for payment of gate keeping dues. I however find that he was not entitled to be paid the same as if he was a hired hand to manage the gate. Instead he should have been paid overtime since he was forced to work more hours than the normal 52 hours a week as provided in the Regulation of Wages (General) Order.

Both the Claimant and the Respondent's witnesses confirmed that the Claimant worked on average between 6.30 a. and 6.30 p.m. It is during these hours that he did the gate keeping. The way to compensate him for the gate keeping is therefore to pay him overtime. He was working an average of 72 hours per week at 12 hours per day instead of the statutory 52 hours per week. For these reasons he worked an extra 20 hours per week.

Although the Claimant performed the gate keeping services and did the overtime for the whole of the period he worked, for 3 years, I will grant him overtime for only 1 year, the remaining two years to cover periods when he was off duty, on trips or on leave. His hourly rate is $(15,216 \div 225 \text{ hours per month}) = 67.60$. For overtime of 20 hours per week he would be entitled to $20 \times 52 \text{ weeks} \times 67.60 = 70,304$.

I award the Claimant the sum of Kshs.70,304 as overtime.

3. Travelling allowance

The Claimant has claimed for Shs.500 for day trips and Shs.1,000 for longer trips. In my opinion this is reasonable. According to the Regulation of Wages (General) Order, an employee is entitled to travelling allowance when working outside his normal duty station. The Respondent confirmed through the testimony of RW1 and RW2 that the Claimant was never paid travelling allowance. The Respondent has also not contested that the Claimant was on duty away from his normal duty station on the dates mentioned by the Claimant. I therefore find that the Claimant has proved the claim and award him Shs.21,000/= as claimed.

4. Unrefunded money

The Claimant has prayed for Shs.10,000 being money wrongfully deducted from his salary for jack and spanner which was recovered from Claimant's salary. There is no evidence that the Claimant was asked to explain how the jack and spanner got lost and that he was unable to give a reasonable explanation of the circumstances under which the loss occurred. The Respondent did not deny recovery of the money from the Claimant's salary.

I therefore find that the Claimant is entitled to a refund and give judgement to the Claimant in the sum of Kshs.10,000/=.

5. Van Remittance

The Claimant seeks refund of Kshs.7,000 recovered from his terminal dues as van remittance. According to the Respondents tabulation of terminal benefits, the deduction is reflected as lost equipments. No other particulars were given.

I find that the deduction was unlawful and that the Claimant is entitled to a refund of the same as no deduction can be made by an employer from an employee's salary except as provided under Section 19 of the Employment Act. I therefore find that the Claimant is entitled to a refund of the said sum of Kshs.7,000/=.

(6) House Allowance

The Claimant prays for payment of Kshs.45,900 as house allowance. Section 31 of the Employment Act provides that an employer should provide an employee with accommodation or pay a reasonable house allowance. The employer may also pay a consolidated wage. In the case of the Claimant he was paid a consolidated salary as follows:-

1/8/2008 - Kshs.7,500

1/4/2009 - Kshs.8,000

1/4/2010 - Kshs.8,500

The Claimant was a bus driver and is therefore classified as driver, heavy commercial vehicle.

The minimum wage for the relevant period excluding 15% house allowance as follows:-

1/5/2008 to 30/4/2009 - Kshs.11,723

1/5/2009 to 30/4/210 - Kshs.13,833

1/5/2010 to 30/4/2011 - Kshs.15,216

The Claimants consolidated salary (inclusive of 15% house allowance) should therefore have been as follows:-

1/8/2008 to 30/4/2009 - Kshs.13,481.45

1/4/2009 to 30/4/2010 - Kshs.15,907.95

1/5/2010 to 30/5/2011 - Kshs.17,498.40

The Claimant was therefore under paid as follows:-

1. From: 1/8/2008 to 30/4/2009

$Kshs.13,481.45 - 7,500 = 5,981.45$ per month

He is therefore entitled to $Kshs.5,981.45 \times 9$ months = 53,833.05

2. From 1/5/2009 to 30/4/2010

$Kshs.15,907.95 - 8,000 = 7,907.95$

He is therefore entitled to $Kshs.7,907.95$ for 12 months = 94,895.40.

3. From 1/5/2010 to 30/4/2011

Kshs.17,498.40-8,500=8,998.40 per month

Kshs.8,998.40 x 12 = 107,980.80

The total amount of underpayments is therefore Kshs.256,709.25 which I award him.

7. Compensation

The Claimant seeks compensation of 12 months' salary in the sum of Kshs.102,000.

I find that 12 months compensation is excessive considering the period of service of the Claimant which was just under 3 years. I find that 3 months' salary is reasonable compensation and award him Kshs.52,495.20 being 3 months gross salary based on the minimum consolidated wage for heavy commercial driver at the rate of Kshs.17,498.40 per month.

8. Certificate of Service

Section 51 of the Employment act requires every employer to issue a certificate of service to any employee who has served for more than 4 weeks. The Respondent is directed to issue a certificate of service to the Claimant.

In summary therefore judgement is entered for the Claimant against the Respondent as follows:-

1)	Service	-	Kshs.10,824
2)	Gate Keeping dues	-	Kshs.70,304
3)	Travelling Allowance	-	Kshs.21,000
4)	Unrefunded money	-	Kshs.10,000
5)	Van Remittance	-	Kshs.7,000
6)	House allowance (under payments) -	Kshs.256,709.25	
7)	Compensation	-	Kshs.52,495.20
		TOTAL:-	Kshs.428,332.25
8)	Certificate of Service		

Orders accordingly.

Read in open Court and signed on this 14th day of May 2013.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

Robinson Mwangi Mutembei

In the presence of:- _____ Claimant in person

Zembi Odera h/b

_____ for Enonda for Respondent