



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kenya Union of Domestic, Hotel, Educational Institutions and Hospitals
Workers v Board of Management Kiangochi Secondary School (Cause
E020 of 2024) [2025] KEELRC 949 (KLR) (27 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 949 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE E020 OF 2024
ON MAKAU, J
MARCH 27, 2025

BETWEEN

**KENYA UNION OF DOMESTIC, HOTEL, EDUCATIONAL INSTITUTIONS
AND HOSPITALS WORKERS CLAIMANT**

AND

**BOARD OF MANAGEMENT KIANGOCHI SECONDARY
SCHOOL RESPONDENT**

JUDGMENT

Introduction

1. The Claimant is a registered trade union and brought this claim on behalf of its member, Mr. William Muriuki Muiyuro (the grievant) alleging that he was unfairly dismissed by the respondent in contravention of section 35, 41 and 43 of the *Employment Act*. The dispute was referred for conciliation at the labour Office but it was not resolved. Therefore, the claimant is now before the court seeking the following reliefs:
 - a. Underpayment of salary for the last five years
 - i. March 2023- May 2022 $(11,123.60 - 7070 = 4,053.60 \times 11 \text{ months}) = \text{Kshs.}44,589.60$
 - ii. April 2022 -May 2018 $(9,931.74 \times 48 \text{ months}) = \text{Kshs.}186,323.52$
 - b. Pay in lieu of notice = $\text{Kshs.}11,123/=$
 - c. Annual leave for 5 years $9,672.70 \times 21/30 \times 5 = \text{Kshs.}33,854.45$
 - d. Off days for five years $9,672.70 \times 4 \times 12 \times 5 = \text{Kshs.}77,381.60$
 - e. Pending salary for 2020 (2 months) $8,636 \times 2 = \text{Kshs.}17,272$



- f. Unremitted NSSF dues 2012/2013 = Kshs.7,200
 - g. Service gratuity for six years the grievant served the Respondent institution Kshs.9,672x11= Kshs.106,392 (sic)
 - h. Twelve months compensation for unfair and unlawful termination Kshs.9,672x12= Kshs. 116,064
Total=Kshs.582,928.17
 - i. The Respondent to bear the costs of the suit
 - j. Any other remedy that the court may deem fit and just.
2. The respondent denied the allegation that it terminated the grievant's employment and averred that the claimant failed to report back to work after the criminal case he was facing was terminated. Therefore, it averred that the claimant's case is vexatious, frivolous and an abuse of the court process, and that it should be dismissed with costs.

Evidence

3. The claimant called William Muriuki, who testified as CW1 and adopted his undated witness statement as his evidence in chief and produced 13 documents in the bundle dated 24/5/2024 as exhibits. In brief, his case was that he was verbally employed by the Respondent in 2012 as a night guard at salary of Kshs.5,700 but later it was increased to Kshs.7070. He was reporting to work at 6.00 pm and leave at 6.00am including weekends and public holidays.
4. On 29th May 2021, there was a theft of school property and he was suspended pending investigation vide principal's letter dated 31/5/2021. On 4th June 2021, he was arrested and charged with the offence of failure to prevent a felony contrary to section 392 of the Penal Code but he was acquitted 23rd December 2022.
5. After the acquittal, he reported to the Respondent seeking reinstatement but the principal informed him to wait for the board of management to sit and decide his fate. He kept visiting the school until 23/3/2023, when the principal told him that the only help she could give him was a letter to go for his benefits from the NSSF. The letter from the principal indicated that his employment was terminated on 30th May 2021.
6. The grievant was aggrieved by the said letter because all through he knew he was on suspension. It was now clear that the employer had terminated his employment under the guise of suspension and in fact replaced him with another person.
7. On cross examination he stated that he reported back to see the principal and spoke with her severally after the termination of the criminal case but he never wrote any letter to formally request to report back to work. He also never received any termination letter from the employer, or any letter lifting the suspension. However, after persistent follow up to be returned to work, the principal gave him the letter dated 23/3/2023 indicating that his employment was terminated on 31st May 2021. He maintained that the termination was unfair because he was not even informed about the same.
8. Respondent's principal, Rose Irene Muthoni, testified as RW1. She adopted her written statement dated 25/8/2024 as her evidence. She then clarified that the grievant was never issued with a dismissal letter. She added that on 23/3/2023, the grievant requested for a letter to take to NSSF and she gave him the same. She contended that the claimant was never terminated, but rather he absconded from duty.



9. In cross examination, she reiterated that she joined the school in July 2024 after the letter dated 23rd March 2023 was issued to the grievant. She stated that the school's record showed that the grievant asked for a letter and he was given. However, she did not have copy of the said request by the claimant.
10. She maintained that there was no record of termination at the school records except the letter of recommendation dated 23rd May 2023 which indicated that the grievant's last day of work was 30th May 2021. She stated that the grievant's criminal case ended on 23rd December 2022 and he never went back to the school.
11. She stated that the grievant was suspended on 30th May 2021, the date when the criminal case began. She stated that the grievant was not barred access if accompanied by security. She admitted that the Respondent was aware of when the case ended but did not issue a letter to lift the suspension.
12. She stated that the grievant's salary as at the time of exit was Kshs.7070 per month. She stated that at the time of the grievant's exit the salary for night watchman was about Kshs.9,000. She stated that the school is within the interior of Murang'a (other area) and not in city or municipality. She confirmed that he was not housed by the school and that the salary was all inclusive.
13. She contended that the grievant used to go for leave during school holidays as there were people to stand for him. She contended that there were two watchmen but she did not have any documents to support the same. She confirmed that the school is a government school under the Ministry of Education and the government provides funds to pay workers.
14. She confirmed that the grievant was not paid anything during his suspension as his last salary was in April 2021 and denied that he was constructively terminated. She maintained that the grievant did not ask for reinstatement after the criminal case ended. She reiterated that the letter given to the grievant on 23/3/2023 was a mere recommendation letter and not a dismissal letter.

Submissions

15. The Claimant submits that the grievant's case is a clear case of constructive dismissal for reasons that the grievant was suspended from work pending determination of the criminal case and barring him from accessing the school. Further the Respondent failed to pay him salary during the pendency of the criminal case and after his acquittal. The Respondent also failed to write a reinstatement letter to the grievant upon his acquittal and instead upon persistent follow up, he was issued with a certificate of service dated 23rd March 2023 stating that his employment ended on 30/5/2021. For emphasis, reliance is placed on the case of *Tresor Ltd vs Glen Kipngetchi Eldoret* [2022] KEELRC 2729 (KLR).
16. As regards the alleged failure by the grievant to report to work after the end of the criminal case, it is submitted that such allegation is incorrect and illogical as it is the Respondent which failed to lift the suspension after conclusion of the criminal case. It was submitted that, the fact that the grievant collected the letter from the principal, meant that he presented himself to the school following the conclusion of the criminal case.
17. As regards the Circular dated 22nd June 1996 produced as an exhibit, it was submitted that the same was one of the ministerial directives specifying terms and conditions for all BOM employees including the Respondent.
18. It was further submitted that the claimant had the right to earn half salary while on suspension, pursuant to clause 5 of the said Circular. For emphasis, reliance is further placed on *Arsybel Masabule Wanyonyi v The Principal Kamusinde Secondary School & another* [2024] KEELRC 648 (KLR).



19. As regards the reliefs sought, it was submitted that the claimant is entitled the claim for underpayment of salary based on the minimum salary prescribed by the Wages Orders plus house allowance of 15% of the basic salary. For emphasis, reliance was placed on section 48(1) (a & b) of the *Labour Institutions Act*.
20. It was further submitted that the claimant is entitled to one-month salary in lieu of notice, pursuant to section 35 (1c) of the *Employment Act*.
21. It further submitted that the claimant was entitled to annual leave of 21 days pursuant to section 28 of the Act and despite the allegation by RW1 that the grievant took all his leaves, she did not produce any documentary evidence to prove the grievant took his leave.
22. As regards the claim for off days, it was submitted that the grievant worked seven days a week as a night watchman contrary to section 27(2) of the Act which entitles an employee to at least one rest day per week. Consequently, it was submitted that he is entitled to compensation for the rest days for a minimum of 5 years.
23. It was further submitted that RW1 confirmed that the grievant was not paid anything during his suspension and thus, he is entitled to half salary from May 2021 to December 2022.
24. It was also submitted that the grievant is entitled to salary for July and August 2020 when there was a break due to covid-19.
25. It is submitted that although there is no dismissal letter, it is clear that the Respondent ended the grievant's employment for no valid reason and without following a fair procedure contrary section 45 of the Act. Consequently, it was submitted that the claimant is entitled to the prayer for compensation for unfair termination.
26. It was further submitted that the prayer for service gratuity is merited pursuant to clause 20 of the circular dated 27th June 1996 which provides payment of gratuity to employees of Board of Governors now BOM. Besides, the respondent failed to remit NSSF contributions for several months in the years 2012, 2013 & 2021 amounting to Kshs.7,200.
27. The Respondent submitted on the issues whether the Claimant was unlawfully terminated and whether the Claimant is entitled to the reliefs sought. On the first issue, it is contended that the grievant never returned to the Respondent after exoneration until he went seeking a recommendation letter. It was therefore submitted that the claimant did not prove that he was unlawfully dismissed.
28. It was further submitted that the claimant did not prove the elements of constructive dismissal as discussed *Enid Nkirote Mukire vs Kenya Yearbook Editorial Board* [2022] eKLR, and *Kenya Union of Sugarcane Plantation & Allied Workers v Othira* [2024] KEELRC 843 (KLR).
29. It was contended that the claimant never resigned at any point as he was only suspended pending conclusion of the case. It was further argued that upon being cleared of the criminal charges, the claimant absconded without lawful cause or leave and left the Respondent was left with no other option but to summarily dismiss him but still it did not. It is therefore contended that the Claimant has not been able to prove by way of evidence wrongful or unfair termination.
30. As regards the second issue, the Court was urged to decline the prayer for compensation for unlawful termination on ground that no evidence was tendered to prove the alleged termination. For the same reason the court was urged to decline the claim for salary in lieu of notice.



31. It was further submitted that the claim for leave and off days is not merited since the claimant took leave and off days as and when he failed to turn up for employment. It was further argued that the claimant failed to prove by evidence that he never took his leave and off days.
32. It was also submitted that the claim for pending salaries for July and August 2020 has not been substantiated by way of evidence. It was further submitted that the claim for service gratuity is not payable as there is no contractual provision for the same. Besides clause 20 of the Circular dated 27th June 1996 by the Ministry of Education did not entitle the claimant to gratuity.
33. Finally, it was submitted that claim for the unremitted NSSF contribution is only recoverable by the NSSF itself as it has the power even to levy penalties for unremitted dues.

Analysis

34. I have considered the pleadings, evidence and submissions presented by the two sides and the issues falling for determination are:
 - a. Whether or not the grievant was unfairly and unlawfully dismissed from his employment, and
 - b. whether or not he is entitled to the reliefs sought herein.

Unfair and unlawful termination

35. Section 45 (2) of the [Employment Act](#) provides that: -

- “(2) A termination of employment by an employer is unfair if the employer fails to prove:
- (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - i. related to the employee’s conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.”

36. The respondent denied that it dismissed the grievant and maintained that he absconded employment after acquittal from his criminal case. However, the grievant contended that he was dismissed without his knowledge. He testified that after the criminal case against him was dismissed, he reported back to the respondent but the principal told him to wait for a decision from the Board. He visited the school on several occasions until the principal gave him the letter dated 23/03/2023 which indicated that his employment was terminated on 30th May 2021. The letter stated that:

“23/03/2023

To whom it may concern

This is to certify that Mr. William Muriuki Muiyuro was an employee of this school from 12th JUNE 2012 TO 30th MAY 2021. Any assistance accorded to him will be highly appreciated.



Thank you

...

Principal”

37. RW1 testified that the above letter was not a dismissal letter but rather a recommendation letter issued to the grievant upon his request. However, the grievant denied the allegation that he requested for the letter and maintained that the principal gave him the letter as the only assistance he could give to help him get his benefits from NSSF. RW1 did not rebut the said evidence since the letter was issued before she was posted to the school. She also did not produce copy of the grievant’s request for the recommendation letter. Her evidence was just hearsay. Consequently, I find that the grievant did not abscond from duty after his acquittal from criminal charges, but he was dismissed by the respondent with effect from 31st May 2021 because the certificate of service stated that he worked up to 30th May 2021. It follows that the suspension letter dated 31st May 2021 was in fact a termination letter in disguise.
38. The question that follows is whether the termination was grounded on valid reason, and whether fair procedure was followed. The grievant contended that he was dismissed without his knowledge only to learn about the same through the certificate of service dated 23rd March 2023. He was not informed about the reason for the termination nor was any given before this court. The procedure followed was also not fair since the grievant was not given a chance to be heard and the termination was communicated in an unfair manner.
39. In the case of *Postal Corporation of Kenya v Andrew K. Tanui* [2019] eKLR the Court of Appeal held that:

“Four elements must thus be discernible for the procedure to pass muster: -

- i. an explanation of the grounds of termination in a language understood by the employee;
- ii. the reason for which the employer is considering termination;
- iii. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
- iv. hearing and considering any representations made by the employee and the person chosen by the employee.”

40. Also, in *George Musamali versus G4S Security Services Kenya Ltd* [2016] eKLR Abuodha J stated that:

“ 14. A termination of employment takes two stages. First there must be a valid and justifiable reason for termination and once this is established, the termination must be carried out in accordance with the procedure laid down in the employers’ human resource manual or as set out in the *Employment Act* or both. The most important thing to be ensured is that there is a valid or justifiable reason for termination and that the termination must be conducted by following a fair procedure. This includes furnishing the employee with the charges he or he is facing and affording them an opportunity to defend themselves. It does not matter whether the employee’s guilt is apparent on the face of the record. He or he must be heard no matter how weak or useless his or her defence might seem to be. However, the conduct of the disciplinary



hearing does not have to take the rigour of a Court trial. It suffices that the employee was notified of the charges and afforded an opportunity to respond before the decision to dismiss is made.”

41. In the instant case, it is apparent that the Respondent has not discharged the burden of proving that the reasons for dismissing the grievant were valid or that it took him through due procedure before the termination. Consequently, I find that the respondent terminated the grievant’s employment unlawfully and unfairly.

Reliefs sought

42. In view of the foregoing conclusion, I find that the claimant is entitled to damages under section 49 of the Employment Act. The grievant was employed by the respondent which is a public school and as such his employment was governed by the Guidelines given by the Ministry of Education dated 27th June 1996 (Exhibit 2). Clause 11 of the said guidelines entitled the grievant to three months’ notice or salary in lieu of notice since he served for more than 5 years before the termination of employment. However, he prayed for only one-month salary in lieu of notice.
43. He is further awarded six months gross salary as compensation for the unfair termination considering his long service of 9 years without any record of indiscipline, also the fact that he stayed for over one year without any pay not knowing that he had been dismissed, and also because he is entitled to an award of gratuity.
44. As regards the claim for service gratuity, clause 20 of the 1996 Circular provides for payment of gratuity at rate of one-month basic pay for every year worked on condition of attainment of over 5 years of service. Consequently, the grievant is entitled to service gratuity for 9 years served.
45. As regards the claim of accrued leave days and off days, the Claimant prayed leave for a period of five years but there are no particulars of the said period. Consequently, the claim fails.
46. The claimant also prayed for salary for two unspecified months in 2020. Without pleading the particulars of the months, the claim is vague. It is also time barred by dint of section 90 of the Employment Act which provides for limitation period of three years for all claims founded on employment contract.
47. As regard the claim for underpayment, the claimant produced the Wage Order of 2022 to prove that the respondent underpaid the grievant’s salary. However, I have already made a finding that the grievants employment was terminated on 30th May 2021. It follows that the applicable wage order was not the one of 2022 and therefore the claim of underpayment has not been substantiated by evidence save for house allowance which has not been sought.
48. Finally, the claimant prayed for the unremitted NSSF dues totalling to Kshs.7200 for 2012/2013 but I decline the same for being time barred by dint of section 90 of the Employment Act.

Conclusion

49. I have found that the claimant has proved a case of unfair termination of employment against the respondent. I have further found that the claimant is entitled to compensatory damages and terminal damages. Consequently, I enter judgment for him against the respondent for payment of the following:
-
- a. Notice.....Kshs.7070 + 15% as housing Kshs.8,130.50
- b. Compensation...Kshs.8,130.50 x 6 months Kshs.48,783.00



c. Gratuity.....Kshs.7070 x 9 years Kshs.63,630.00

Total Kshs.120,543.50

d. The award is subject to statutory deductions but in addition to costs plus interest at court rates from the date of this judgment.

DATED, SIGNED AND DELIVERED AT NYERI THIS 27TH DAY OF MARCH, 2025.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

