



Kosgei v Board of Management (Mindililwo Special School) (Cause 44 of 2018) [2025] KEELRC 1596 (KLR) (22 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1596 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
CAUSE 44 OF 2018
MA ONYANGO, J
MAY 22, 2025

BETWEEN

JAPHET C KOSGEI CLAIMANT

AND

BOARD OF MANAGEMENT (MINDILILWO SPECIAL SCHOOL) RESPONDENT

JUDGMENT

1. Vide his Amended Memorandum of Claim dated 16th July 2021 and filed in Court on the same day, the Claimant sued the Respondent seeking compensation for alleged unfair and unlawful termination of his employment. He also sought to be paid his terminal benefits.
2. He avers that he was employed by the Respondent in October 2007 as a cook a position he held until April 2016 when the Respondent unfairly terminated his employment. It was his case that during the course of his employment, he was underpaid as he was paid a salary of Kshs. 4,213 and allowances totaling to Kshs 6,388.
3. According to the Claimant, the Respondent unfairly terminated his services without regard to the procedures set out in the *Employment Act* and the statutory requirements for procedural and substantive fairness. He contended that his dismissal was unfair and unlawful as it violated the provisions of section 41(1), 44(4), 45(2) and 43 of the *Employment Act*.
4. The Claimant faulted the termination of his employment on the following grounds: -
 - i. The Respondent did not give the Claimant termination notice as provided under section 35 of the *Employment Act*
 - ii. The Respondent dismissed the Claimant without proving that the reason for the termination was valid



- iii. The Respondent failed to pay service gratuity to the Claimant contrary to section 35(5) of the Employment Act
 - iv. The Respondent failed to pay the Claimant his 12 months' wages for loss of employment as provided under section 15(c) of the Labour Institution Act
 - v. The Respondent never explained to the Claimant the reasons for termination as required under section 41(1) of the Employment Act
 - vi. The Respondent did not act in accordance with justice and equity in terminating his employment as required by section 45
5. The Claimant particularized the terminal dues owed to him as hereunder: -
- i. One month pay in lieu of notice Kshs 12,071
 - ii. Compensation for unfair termination Kshs 144,857.28
 - iii. Service pay/Gratuity Kshs 41,987.60
 - iv. Leave prorata Kshs 2,449.27
 - v. Underpayment Kshs 325,507.60
 - Total Kshs 526, 873.39
6. Consequently, the Claimant sought the following reliefs :
- i. Reinstatement and payment of rightful salary and allowances from October 2007
 - ii. An order for payment of such sum as would constitute underpayment contrary to the statutory provisions during the subsistence of the employment service with the Respondent
 - iii. Declaration that the Claimant's termination from employment was unlawful, unprocedural and unfair in the circumstances
 - iv. An award of Kshs 526,873.39 as particularized in paragraph 5 above
 - v. Certificate of service
 - vi. Costs and interests of this suit
 - vii. Any other relief that this court may deem fit and just to grant
7. In response, the Respondent filed an Amended Memorandum of Defence dated 4th April 2022 denying the averments made by the Claimant in his claim. The Respondent averred that the Claimant's claim for underpayment is time barred and against the provisions of section 90 of the employment Act.
8. It is also the Respondent's contention that the Claimant was summarily dismissed from employment due to gross misconduct and as such he is not entitled to reinstatement due to his misbehavior.
9. The Respondent stated that the Claimant was terminated from employment on a valid reason and that he was taken through a disciplinary hearing before the Board of Management prior to him being summarily dismissed from employment.
10. The Respondent asserted that the Claimant is not entitled to the reliefs he is seeking. The court was urged to dismiss the Claimant's suit with costs.



Claimant's Case

11. The Claimant testified on 12th October 2023 as CW1 and adopted his witness statement recorded on 25th January 2018 as his evidence in chief. He also relied on the list of documents he filed in court dated 25th January 2018 in support of his case.
12. In his testimony, the Claimant stated that he was employed by the Respondent on 1st October 2007 as a head cook at a salary of Kshs 4,213 and allowances of Kshs. 2,175. It was his case that he left employment on 14th April 2016, during the school holidays after he was called by the Respondent's secretary to pick his termination letter. The Claimant stated that the termination letter issued to him indicated that it was effective from the date of the letter, that is 14th April 2016. He also maintained that he was not paid his terminal dues.
13. The Claimant told the court that after receiving the termination letter, he went to the labour office and reported to the union, that the union officials visited the Respondent and it was agreed that the Respondent would pay the Claimant his terminal dues but this was not done.
14. He prayed to the court to grant him the prayers he is seeking in his Amended Statement of Claim.
15. On cross-examination, the Claimant stated that the termination letter issued to him did not state the reason for the termination. When referred to the warning letters dated 14th November 2012 and 8th February 2011, the Claimant stated that he wrote an apology after he was issued with the same. In response to the warning letter dated 15th October 2012, the Claimant stated that he never left work as he left for home when the school closed.
16. He testified that he never committed any act of misconduct, that had he been at fault, he would have been called to respond to the charges, which he was not.
17. In response to the letter dated 12th March 2015 which he addressed the Board, the Claimant stated that it was with regard to an allegation that he had not cooked supper for pupils. He explained that he did not do so as there was no firewood. It was his evidence that he was never called for a disciplinary hearing after the incident.
18. The Claimant maintained that after he was terminated from employment, he went to report the unfair termination to the Union and the union officials scheduled a meeting with the Respondent at the school where it was agreed that the Respondent was to pay the Claimant his terminal dues which dues were never paid prompting the Claimant to file the instant suit.
19. It was the Claimant's testimony that he did not attend the meeting between the board and the union officials. He also stated that he signed an employment contract when he was employed and that the contract did not state that he was entitled to gratuity.
20. On re-examination, the Claimant told the court that the issue in his letter dated 12th March 2015 was that the firewood was wet and so he was unable to prepare dinner for the pupils. He stated that it is the responsibility of the school to provide firewood. The Claimant also reiterated that he did not attend the meeting held on 19th March 2016.
21. The Respondent did not call any witnesses in defence at trial despite being granted numerous adjournment and opportunities. Counsel for the Respondent closed his case as he was unable to secure the attendance of his witness(es).



22. Parties were directed to file written submissions but a perusal of the record reveals that only the Claimant filed submissions dated 27th February 2024. I have considered the submissions in writing this judgment.

Determination

23. Having carefully considered the pleadings, the evidence and the submissions on record, I find that the issues that fall for this court's determination are; _
- i. Whether the reasons advanced by the Respondent for the termination of the Claimant's employment were valid and fair,
 - ii. Whether the procedure followed was fair,
 - iii. Whether the reliefs sought are merited.

Whether the reasons advanced by the Respondent for the termination of the Claimant's employment were valid and fair

24. It is not denied that the parties herein were engaged in an employment relationship until 14th April 2016 when the Respondent terminated the employment of the Claimant citing gross misconduct.

25. Section 45 (1) and 2 of the *Employment Act* provides that: -

- “(1) No employer shall terminate the employment of an employee unfairly.
- (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.”

26. Section 43 (1) of the *Employment Act*, 2007 further provides that:

- “1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.”

27. The Claimant was terminated from employment vide a termination letter dated 14th April 2016 whose contents are reproduced hereunder: -

Japhet Chemitei,
Cook, Mindililwo Special School



PO Box 422-30700

ITEN

Dear sir,

RE: TERMINATION OF DUTIES

We regret to inform you that your employment with Mindililwo Special School is hereby terminated immediately from the day of Thursday the 14th April, 2016.

Despite verbal and written warnings about your performance and conduct in the course of duty, you have not obtained the performance objectives/ Duties you were given during employment.

Please you are required to return any school property (keys) to the school secretary.

As part of your Separation from Mindililwo special school and per institutional policies, you will be paid two (2) weeks' severance pay. Please also note that all other benefits will end on the termination date and day including your NHIF and NSSF. Should you have any questions about your termination, please contact secretary to the BOM Mindiliwo Special School. References:

Letters Reports 08/2/2011 25/2/2015 15/10/2012 5/3/2015 25/2/2015 4/3/2015

Min:4/25/2/16e'

Mindililwo special school wishes you the best in your future employment

Yours sincerely,

Signed

Isaiah Kipkangor

Head teacher/ Secretary BOM

28. From the above letter, the reasons for the termination of the Claimant's employment were not explicitly stated but the letter refers to warning letters that had been issued to the Claimant dated 8th February 2011, 15th October 2012, 25th February 2015, 5th March 2015 and 4th March 2015.
29. During cross-examination, the Claimant acknowledged that he was issued with the warning letters dated 8th February 2011 and 15th October 2012 which letters he responded to, apologizing to the Board. However, with regard to the other warning letters filed in the Respondent's list of documents, the Claimant denied service of the same. I have looked at the documents filed by the Respondent in its list of documents filed on 5th July 2018 and there is no indication that the Claimant was served with the said letters. In particular, I have analyzed the last show cause letter dated 2nd September 2015 where the Claimant was cited for insubordination and was required to show cause within 7 days.
30. The Claimant in his testimony denied that he was issued with the said letter and no evidence was tendered before court to prove that the Claimant was indeed served with that letter. In addition, the letter is dated 2nd September 2015 and the termination letter which was to take effect immediately, were issued together on 14th April 2016. The Respondent did not tender any evidence whether the Claimant showed cause within the 7 days as stated in the letter dated 2nd September 2015 and what was the outcome thereafter. To my mind, the show cause letter dated 2nd September 2015 could not have been the basis of the termination of the Claimant on 14th April 2016.



31. Having weighed the evidence tendered by the Claimant against the documents tendered in court by the Respondent, I am satisfied that the Claimant has proved on a balance of probabilities that the termination of his employment was without valid reason.

Whether the procedure followed was fair

32. Section 41 of the *Employment Act*, 2007 provides that: -

- “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

33. The Claimant contended that he was not taken through a fair procedure before he was terminated from employment. The Respondent on the other hand averred that the Claimant was taken through a disciplinary process before his employment was terminated. In support of this position, the Respondent in its pleadings relied on the minutes extract of 25th February 2016 and the minutes of the meeting held on 19th May 2016.
34. From a perusal of the minutes extract of 25th February 2016, there is no indication that the Claimant was present nor that he was an agenda in that meeting. The meeting held on 19th May 2016 was also in the absence of the Claimant. Further, the meeting was held after the Claimant had already been terminated from employment. The meeting of 19th May 2016 cannot be said to be a disciplinary hearing. On this basis, I find that the termination of the Claimant’s employment was not in compliance with the procedure set out under section 41. As such the termination was unfair within the meaning of section 45 of the *Employment Act*.

Whether the reliefs sought are merited.

35. The Claimant has proved that he was unfairly and unlawfully terminated from employment. In his Statement of Claim, he prayed for several remedies which I will address in separate heads.
- a. Declaration that the Claimant’s termination from employment was unlawful, unprocedural and unfair in the circumstances
- Having found that the Claimant was terminated without a valid reason or fair procedure, I make a declaration that his termination was unfair and unlawful.
- b. Reinstatement
- Section 49 (3) (a) of the *Employment Act* provides for reinstatement if the termination or summary dismissal is found to be unfair. However, section 12 (3) (vii) of the *Employment and Labour Relations Court Act* provides that an order for reinstatement is only permitted within



3 years of the separation. The Claimants' employment was terminated in June 2017. It is now nine years since. This prayer is therefore not available to the Claimant.

c. Terminal benefits

i. One month pay in lieu of notice

The claimant as a cook had his wage regulated under in April 2016 at Kshs 6752.50. The Claimant was also entitled 15% of the basic salary as house allowance making a gross of Kshs 1,013. In sum, I award the Claimant Kshs. 7,765.40 as notice pay as provided under section 35 of the Act.

ii. Compensation for unfair termination

Having found that the termination of the employment of the Claimant was unlawful and unfair, this court is clothed with jurisdiction to award compensation. Section 49 of the Employment Act provides for remedies for wrongful dismissal and unfair termination. Section 49(1) (c) of the Act caps the maximum compensation for wrongful dismissal or unfair termination at twelve months of gross salary. The Claimant worked for the Respondent for over 9 years. Taking into account the length of the Claimant's service and relevant factors under section 49(4) of the Act, I award him maximum compensation equivalent to 12 months' salary at a sum of Kshs. 93,184.50

iii. Service pay/Gratuity

The Claimant has not adduced a contract of service that would shed light as to whether gratuity was incorporated therein. The prayer for gratuity thus fails. Having been a member of NSSF as reflected in his pay slip, he is also not entitled to service pay.

iv. Leave prorata

The court has considered the evidence on record and awards the Claimant the prayer for leave pro rata at Kshs. 1,818.00

v. Underpayments

The Claimant testified that he was employed by the Respondent as a cook earning a basic salary of Kshs 4,213 all through the course of his employment.

I have looked at the wages orders being legal notice no. 38 of 2016, legal notice 98 of 2010, legal notice 64 of 2011, legal notice no 71 of 2012, legal notice no. 197 of 2013 and legal notice no 117 of 2015 and I find that the Claimant was indeed underpaid.

Under the wage orders in October 2007-30th April 2009 under All Other Areas, the Claimant was entitled to Kshs. 3,778 plus 15% house allowance making a total of Kshs. 4,344.70 and he was paid Kshs 4,213. The underpayment between 1st October 2007 to 30th April 2009 was therefore Kshs 131.70. for 7 months the Claimant was underpaid by Kshs. 2,502.30

Under the Wage Order from 1st May 2010 to 30th April 2011, the Claimant was entitled to Kshs 4,779.40. The Underpayment was Kshs 6,796.80

Under the Wage Order from 1st May 2011 to 30th April 2012, the Claimant was entitled to Kshs 5,377.40. The Underpayment was Kshs 13,972.80

Under the Wage Order from 1st May 2012 to 30th April 2013, the Claimant was entitled o Kshs 6082.00. The Underpayment was Kshs 22,428.00



Under the Wage Order from 1st May 2013 to 30th April 2015, the Claimant was entitled to Kshs 6,933.35. The Underpayment was Kshs 32,644.20

Under the Wage Order from 1st May 2015 to 30th April 2016, the Claimant was entitled of Kshs 7,765.40. The Underpayment was Kshs 42,628.50

The total underpayments was Kshs. 120,972.60 which I hereby award.

d. Certificate of service

Pursuant to section 51 of the Employment Act, the Claimant is entitled to a Certificate of service.

36. In conclusion, judgment is hereby entered in favour of the Claimant against the Respondent as follows:-

- i. I make a declaration that the termination of the Claimant from employment was unfair and unlawful.
- ii. The Claimant is awarded:-
 - a. One month pay in lieu of notice Kshs. 7,765.40
 - b. 12 months' compensation for unfair termination Kshs. 93,184.50
 - c. Leave prorata Kshs. 1,818.00
 - d. Underpayment Kshs. 120,972.60

37. The Respondent shall issue a Certificate of Service to the Claimant within thirty days of this judgment.

38. The Respondent shall bear the Claimant's costs of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 22ND DAY OF MAY 2025

MAUREEN ONYANGO

JUDGE

-

8

ELD ELRC NO. 44 OF 2018 JUDGMENT

