



Kenya Union of Domestic Workers, Hotels, Educational Institutions and Hospital Workers Union(KUDHEIHA) v Board of Management - Mukumu Girl’s High School (Employment and Labour Relations Cause E014 of 2023) [2024] KEELRC 1018 (KLR) (16 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 1018 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA

EMPLOYMENT AND LABOUR RELATIONS CAUSE E014 OF 2023

JW KELL, J

APRIL 16, 2024

BETWEEN

**KENYA UNION OF DOMESTIC WORKERS, HOTELS,
EDUCATIONAL INSTITUTIONS AND HOSPITAL WORKERS
UNION(KUDHEIHA) CLAIMANT**

AND

**BOARD OF MANAGEMENT - MUKUMU GIRL’S HIGH
SCHOOL RESPONDENT**

JUDGMENT

1. The Claimant is a trade union registered and recognized under the Laws of Kenya to represent domestic workers, non-teaching staff in schools, non-medical workers in hospitals, and workers in the hotel industry. The Grievants in the instant case were non-teaching staff in the Respondent school whose services employment contracts had been terminated.
2. By a Notice of motion application brought under Certificate of Urgency under the vacation rules, dated 15th August 2023 and filed on 11th August 2023(which the Court notes are dated days after the date of the pleadings), the Claimant sought orders that:-
 - a. Spent
 - b. Spent
 - c. The Honourable Court be pleased to issue temporary orders restraining the Respondent from harassing, suspending, terminating, or otherwise preferring disciplinary action of any kind (Constructive dismissal towards members of the Respondent on the basis of the tragedy that lead to loss of lives of students and a teacher without sound investigations and proof



beyond possibility of doubt to implicate the staff pending hearing and determination of this application.

- d. The Respondent is stopped from recruiting new staff following advertisement of the positions and invitation by interested applicants before hearing and determination of this application.
 - e. The Honourable Court orders the Respondent to stop unfair labour practices.
 - f. The costs of this application be aware to the Claimant
 - g. Any other relief the Court deems fit.
3. The application was based on the grounds on the face of the application and the supporting affidavit sworn by Thomas Mboya on 15th August 2023 that: -
- i. The Non-Teaching staff of the Respondent joined the Claimant union on 7/5/2021 (App.1) and both the Claimant and the Respondent voluntarily signed a Recognition Agreement dated 24th January 2022 (App.2).
 - ii. That the members of the Claimant discharged their duties dutifully until March 2023, when a tragedy struck the Respondent School, resulting in the illness and death of students and a teacher in unclear circumstances.
 - iii. That after the incident, many measures were taken by the Ministry including the change of the school's management, and the Respondent alleged that the non-teaching staff were involved in the saga leading to disciplinary measures that resulted in unfair terminations, compulsory leaves, and suspension (App. 3) of eight non-teaching staff namely: -
 - a. Nobert Indongolio- Cook
 - b. Rael Ongaya- Kitchen Hand
 - c. Mildred Mutsami- Nurse Aid
 - d. Stella Masanga- School Nurse
 - e. Valence Nyabera-Store Keeper
 - f. Ferdinand Ikunza-Cook
 - g. Sheillah Ondego- Cateress
 - h. Madeline Mukhebi-Cateress
 - iv. That the Claimant made efforts to meet the management (App. 4) to stall the constructive dismissal of the Claimant's members on account of the tragedy without investigations by relevant authorities, but shockingly, the Respondent advertised all positions in the school on 9th August 2023(App. 5).
 - v. That unless compelled to stop the harassment, violence, compulsory leaves, suspensions, and unfair termination based on the tragedy without investigations, then the Claimant's members will be subjected to extremely unfair labour practices contrary to Article 41 of *the Constitution* of Kenya, the Recognition Agreement signed on 24th January 2022, Labour laws and ILO Conventions.



4. The Notice of Motion Application was also accompanied by a Statement of Claim dated 15th August 2023 supported by the Verifying affidavit sworn on even date by the Branch Secretary – Kakamega & National Treasurer of the Claimant, Mr. Thomas Mboya.
5. The claim was grounded on the same grounds as per the application above, of the unfair termination, compulsory leave and suspension of the Claimant’s members outlined above and the Claimant prayed for the following reliefs:-
 - a. The Honourable Court be pleased to order for unconditional reinstatement of the terminated employees,
 - b. In the alternative, the Respondent be compelled to pay the affected employees all terminal dues including but not limited to Gratuity for years served, Notice pay, Annual leaves, Public Holiday’s worked, overtime, Certificate of service, maximum Compensation for loss of employment, All salary arrears.
 - c. The Honourable Court orders the Respondent to stop unfair labour practices (constructive Dismissal) towards members of the Respondent on the basis of the tragedy that lead to loss of lives of students and a teacher without sound investigations and proof beyond possibility of doubt to implicate the staff.
 - d. The costs of this application be awarded to the Claimant
 - e. Any other relief the Court deems fit.
6. Also filed together with the Statement of Claim is the Claimant’s list of witnesses, list of witness statements, list of Documents, all dated 15th August 2023, and its Bundle of Documents.
7. On 30th August 2023, the Respondent entered an appearance through the Hon. Attorney General.

Hearing Directions

8. The Court on 19th September 2023 directed that both the application and the claim be determined concurrently.
9. The Respondent on 19th September 2023, through the Hon. Attorney General, filed a Replying affidavit sworn by Sr. Jane Mmbone Amukoye on 18th September 2023.
10. On 2nd October 2023, the Claimant filed the witness statements of Nobert Atanasi Indongolio, Rael Ongaya Andati, Mildred Mulionye Mutsami, Stella Rophina Masanga, and Madeline Naliaka Mukhebi all dated 23rd September 2023. All the witness statements were accompanied by the appointment letter and termination of service letters for all witnesses.
11. On 9th October 2023, the Respondent filed its Response dated 3rd October 2023, accompanied by the witness statement of Gabriel Fwaya dated 4th October 2023, and on 11th October 2023, filed its list of documents dated 4th October 2023 and its bundle of documents.

Hearing

12. The Claimant’s case was first heard on 12th October 2023 when Nobert Indongolio (CW1), Rael Ongaya (CW2), Mildred Mutsami (CW3), Valence Nyabera (CW4), and Madeline Mukhebi (CW5) testified on oath, and all adopted their written witness statement dated 23rd September 2023, apart from Valence Nyabera, who had no witness statement but was a grievant in the statement of claim. They were cross-examined by the Respondent’s counsel Mr. Tarus. On 6th February 2024, the Claimant’s case



resumed when the Claimant removed Ferdinand Ikunza as a grievant from the claim. Stella Rophina (CW6) testified on oath, adopted her witness statement, and was cross-examined by the Respondent's counsel Mr. Tarus.

13. The Respondent's case was heard on 6th February 2024, when its witness Gabriel Fwaya (DW) testified on oath as the Respondent's witness of fact. He adopted his statement dated 4th October 2023 as his defence evidence in chief and produced the documents in the Respondent's list of documents as the Defence exhibits D Exh- 1 to 10. DW was cross-examined by Mr. Kamuye of the Claimant.

The Claimant's Case

Nobert Atanasi (CW1)

14. CW1 testified that he was a cook and he had been called to a hearing and he testified.
15. CW1 testified that he was informed of the allegations against him but he did not understand them. Mr. Thomas Mboya was present during the hearing and a shop steward Maximilla Avakala was present. That he was issued with a termination letter with the reason for his termination as that the food he cooked led to food poisoning of children.
16. CW1 testified that he was not aware whether his contract provided for gratuity, but he was aware that those who retire get gratuity, and that his letter of termination states that he was to get a severance pay.
17. CW1 further testified that he had worked even when schools were closed because there were workers in school. He confirmed that though he prayed for a holiday allowance, he did not explain which holiday he was claiming and that the school paid NSSF for him.
18. CW1 testified that the school never called him upon termination to pay him any money and he was not aware whether the school and the union had a CBA.
19. CW1 testified that he had applied for leave with a form, though no evidence was in Court, and confirmed that he was aware that he had been replaced as a cook.
20. CW1 testified that he never made a demand before coming to Court and that he had been served with a showcause letter before his dismissal, and he had responded although his response was not filed.
21. CW1 confirmed that he received his termination letter (Pg.24 of Claimant's bundle) and that he did not collect the notice pay indicated in his termination letter, and prays for reinstatement or compensation as he has no source of income.

Rael Ongaya (CW2)

22. Rael (CW2) testified that she was employed in 2017 as a casual cleaner until 23rd March 2023, when she was re-designated as a Kitchen hand. She was given a compulsory leave based on the reason that school parents had complained. She testified that she had no letter to show she had been engaged earlier, apart from the three months preceding her termination. CW2 confirmed she had been served with a show cause letter, called for a disciplinary hearing, defended herself, and was then dismissed.
23. CW2 testified that the union pleaded for her to be retained, although she was asked to read page 28 of the Respondent's minutes where the Union officials although given an opportunity did not speak for her, a position she confirmed. She stated that she was not involved in the minute's preparation and testified that she never applied for leave.



Mildred Mutsami (CW3)

24. Mildred (CW3) testified that she was employed on 1st August 2011, and she was served with a show cause letter, to which she responded. She appeared before the Board of Management, accompanied by a union official and shop steward and she was heard, and the union prayed that they be reinstated. She was however dismissed. She testified that her employment letter (page 8 of Claimant's documents), did not have a gratuity provision, but she was aware that there was a CBA in place, although she did not know when the same had been signed.
25. CW3 testified that there was no public holiday allowance in her letter of employment although she had been paid for it before. She testified that she had applied for leave although the evidence was at home. She testified that she received a termination letter which had a month's salary pay and severance pay, although she did not collect the pay. She stated that her letter stated that she would be paid gratuity and severance pay of Kshs. 292,846.40/-.

Valence Nyabera (CW4)

26. Valence (CW4) testified that she was employed as an assistant storekeeper paid Kshs. 9,666/-, and her records are kept by the school. She testified that there was a sickness at the school and she was sent on compulsory leave. That she was issued with a show cause letter. She responded and was called to the disciplinary hearing during which the union also attended. The union asked that they be retained but she was dismissed. She testified that the reason for insubordination was stated in her termination letter and she never admitted to the allegation.
27. CW4 testified that she was in charge of the store, where the spoilt maize was stored. She was aware the government had ordered that the maize be destroyed. She testified that the maize is procured through a procurement process by the school and her work was only to receive the maize as received by the Bursar.
28. CW4 testified that she was not aware of whether there was another occupant of her position as she sought to be reinstated. She did not see the reason for her termination. She testified that those who retire or are dismissed are paid gratuity and she had applied for leave once and not on subsequent times.
29. CW4 testified that there was no agreement to be paid a holiday allowance and that she did not understand the question of collecting her monies under the termination letter. She prayed for reinstatement or her benefits.

Madeline Mukhebi (CW5)

30. Madeline (CW5) testified that she was employed as a Cateress on 27th October 2017. She testified that her employment contract did not have a gratuity or holiday allowance, and she rested on the school's closure in response to whether she applied for leave. She testified that she did not specify any years she had not taken leave. She testified that she got a show cause letter and she was invited before the Board of Management on allegations of an unclean kitchen. She testified that the allegations of leftovers given to workers had been approved by the former principal.
31. CW5 testified that the food prepared was not of poor quality and in the case of beans which had weevils, she had discussed the issue with the principal. That the old stock food was not mixed with new stock food. That the storekeeper was responsible for buying food with the administration and all she was to do was to requisition for what she needed. That she was in charge of vegetables which she had suppliers of, and always utilized old stock first.



32. CW5 testified that she was not aware that her position has since been filled or that people had appointment letters.
33. CW5 acknowledged she was heard before her termination, although she was harassed at the disciplinary. She was offered terminal benefits in her termination letter but never collected them. She prayed to be reinstated.

Stella Rophina Masanga (CW6)

34. Stella (CW6) testified that she was employed in 2021 as a nurse. Her contract was terminated because she was negligent and failed to keep records. That she was called for a hearing and heard. She testified that the union was present at the hearing and not during interrogations and that the union gave its representations.
35. CW6 testified that she her employment was thereafter terminated and was offered terminal benefits of a Month's salary notice Kshs. 25,500 and Kshs. 12,750 as gratuity. She did not collect the dues. She testified that she is not aware whether she had been replaced, and prayed to be reinstated.

The Respondent's Case.

36. Gabriel Fwaya (DW) testified that he was the current chairman of the Disciplinary, Integrity Committee of the Respondent. That the Board is responsible for disciplinary matters and listens to the union and all parties, but its decision is final. DW testified that after the incident that happened at the school, the Board met on 15th May 2023(D-Exh1) to decide the action to take against Grievants through investigations(D-Exh-3).
37. It was DW evidence that on 29.5.2023(D-Exh-2), the disciplinary committee issued show cause letters(D-Exh-8) to its non-teaching staff(D-exh-10-Appointment letters) and on 13.6.2023(D-Exh-5) on reviewing the responses to the show cause letters(D-Exh-4) it resolved that some of the responses were not satisfactory and invited the grievants Nobert Indongolio, Rael Ongaya, Mildred Mutsami, Stella Masanga, Valence Nyabera and Madeline Mukhebi for disciplinary hearing on 26th June 2023 before the board(D-Exh-7) and the board resolved to dismiss them.
38. DW testified that the allegations against all the Grievants were not fabricated but were evidenced by the government report and the Board had to act, and proceeded to suspend and eventually terminate the services of most of the employees. He testified that Sheillah Ondego is still in the Respondent's employ, as all cases were dealt with on a case-to-case basis. He testified that an advertisement was made for the positions of the Grievants and that there was no victimisation.
39. DW testified that, although the government report which indicated the allegations against the Grievants was not produced in Court, they extracted information from the said report and set it out in the show cause letters of the employees.
40. DW testified that the decision to terminate the services of the Grievants was of the Board and not based on the reports. When asked why the Government reports were not filed in Court yet they were not privileged, he did not have a response.
41. DW testified that the Recognition agreement dated 24th October 2022 was not in place as the Board of Management was disbanded and they had started afresh. He testified that the union was represented by Thomas Mboya, who was present before the termination.



42. DW testified that, although the Claimant's advice as regards one Nobert, was not captured in the minutes, there was a resolution to that effect. He testified that the Claimant did not sign the minutes, as they are only signed by the Secretary and chairman, and the minutes are not disputed by the attendees.
43. On whether he had seen the letter dated 2nd August 2023(App. 4)- Demand), DW indicated that he could not confirm that the same was received, as it was addressed to the Principal and was sent after the terminations.
44. DW testified that they advertised for all the approved positions and as per pages 45-49 of the claim, there were 21 positions advertised.
45. DW testified that he did not employ his relatives in the said positions as it is not his home county and no interest was declared by any board member.
46. DW testified that the Grievants were issued with certificates of service but the same were to be collected upon clearance, but most of them have failed to clear and collect their final dues and certificates.
47. DW testified that Rael Ongaya was to be paid one-month notice pay as she had not worked for more than twelve months.
48. DW testified that they paid gratuity if the same was contained in the appointment letter, and on account of Mutsami, whose letter of 28th June 2023 contained a gratuity payment, he said he could not confirm the same unless he saw the appointment letter.
49. DW was referred to the Respondent's list of documents (Minutes of 26th June 2023-D-Exh-6) on page 32, under the item "General Observations" Bullet 4, and he read that "the terminated workers were to be paid the gratuity and be issued with Certificates of Service."
50. DW testified that the Grievants could not be reinstated and he confirmed that among the terminated employees, only the bursar cleared, and they were awaiting the other employees to clear with the school.
51. DW testified that the school has no CBA with the Claimant union and the CBA issue was the subject of a Court case.
52. It was the Respondent's case that the dismissed employees were issued with Certificates of Service (pg. 87 to 92 of the Respondent's documents), paid one month's salary in lieu of notice, and were offered a humanitarian payment as they were all members of the NSSF(D-Exh-9) and had worked for less than 10 years and there was no gratuity in their contracts.
53. The Respondent states that cheques were drawn for these payments but the Grievants refused to collect them.
54. The Respondent's case is that the prayer for reinstatement cannot stand as the positions were advertised and have since been filled.
55. The Respondent testified that Ferdinand Ikunza was charged with a criminal offence and on his plea of guilt, he was fined twenty thousand and thus the management was in line in suspending him. That Sheillah Ondego still works for the Respondent and ought not to be a grievant in the claim.

Written Submissions

56. The Court directed that parties file their submissions after the hearing. Parties complied. The Claimant's written submissions dated 1st March 2024 were filed by Justin Kamuye, Industrial Relations



Officer of the Claimant on 5th March 2024. The Respondent's written submissions dated 4th March 2024 were filed by Senior State Counsel, Gilbert C. Tarus on 5th March 2024.

Determination

Issues for determination

57. The Claimant identified the following issues for determination in the claim: -
- a. Whether the dismissal of unfair termination(sic) of Nobert Indongolio, Rael Ongaya, Mildred Mutsami, Stella Masanga, Valence Nyabera, and Sheila Ondego was unfair.
 - b. Whether the Respondent should pay costs of this suit.
58. The Respondent identified the following issues for determination in the claim: -
- a. Whether the affected employees were lawfully terminated from their employment.
 - b. Whether the said employees can be reinstated back to employment.
 - c. Whether the Claimant's affected members are entitled to the reliefs sought.
 - d. Whether the Claimant are entitled to any costs.
59. The Court having heard the evidence and considered the issues addressed by the parties in their submissions was of the considered opinion that the issues placed by the parties before it for determination in the dispute were as follows:-
- a. Whether the Grievants were unfairly terminated from employment.
 - b. Whether the Claimant is entitled to the reliefs sought.

a). Whether the Grievants were unfairly terminated from employment.

60. The Claimant states that the Termination of the Grievants was unfair as the Respondent did not provide reasons for the termination to the Grievants. The Respondent states that they issued the Grievants with the reasons for their termination and the Respondent had valid reasons to dismiss the Grievants.

Analysis.

61. The Court found that Show cause letters(D-Exh-8) were sent to all the Grievants and during the hearing, all Grievants confirmed that they received the show cause letters. No responses to the show cause letter were supplied as evidence, but the minutes of 13th June 2016(D-Exh-5 pg. 16 to 19) indicated that the Grievants replied before the Sub-Committee on Discipline Ethic, and Integrity; Madeline on 13th May 2023; Stella had replied (no date); Valence replied (no date), Mildred replied (no date), Nobert replied (no date) and Rael responded (no date).
62. All the Grievants herein were employees of the Respondent school employed in different sections (D-Exh-6 pg. 26-30). The Grievants were later issued with Termination letters (C-Exh-4 Pg. 24/25,28/31,33, 34, 36, & 39) on issues raised in their show cause letters after a disciplinary hearing on 26th June 2023 respectively.
63. Nobert Indongolio (CW1) was the Head Cook and had been accused of issuing death threats, negligence of duty, insubordination, and unprofessional conduct, by giving students bread secretly in dark corners, he admitted the kitchen was untidy and admitted that they had been asked to pay 25 kilos



of rice that were lost and though he denied, he was never in a relationship with a member of staff i.e. Janet Miroyo, against the school policy.

64. Rael Ongaya (CW2), a Kitchen Hand, was accused of having been illegally engaged as an employee, and she admitted that she had been living with the former principal as a mother and said that she used to be a casual worker until she was employed in 2022 on a permanent basis. She used to clean the toilet, and the kitchen and to serve food.
65. Mildred Mutsami (CW3), a Nurse Aid, was accused of negligence of duty as she could not provide a record of the sick children on the date of 27th March 2023, nor did she have a record of ailments and their prevalence to help in mitigating the situation. The sick bay was also found to be unhygienic by the Quality assurance team and medical records were not up to date.
66. She was accused of stating that students were malingering to avoid examinations and parents on Parent's Day complained that the nurse refused to treat their children when they went to the sick bay.
67. Valence Nyabera (CW4) was an Assistant Store Keeper and was accused of insubordination, fraud, and negligence of duty, for having failed to attend summons during the investigation, which she states she received notice from the bursar late as the meeting was for 10 am and the notice was given at 8. am. She was accused of being at the center of the problem. She was accused of negligence of duty as she failed to inspect the cereals delivered to the store. Valence was accused of having allowed fumigation by a non-prequalified person, and the cereals stored at the store had weevils, high content of moisture and Malathion which she did not report. That she had mixed old and new stock, and her failure to attend meetings. After the disciplinary hearing she prayed that she be paid all her terminal benefits and given her Certificate of Service vide letter of 26th June 2023(Pg. 35 of Respondent's documents). She was also accused of issuing less food to kitchen staff against the indicated record and had once bragged she had six million.
68. Madeline Mukhebi(CW5), a Cateress was accused of negligence of duty and indecisiveness for having failed to ensure the kitchen was clean, admitting that she had mixed old cereals with new ones on the advice of Valence, for having allowed food handlers to prepare food when their food handling certificates had expired, admitting that she allowed poor quality food to be prepared for students, although she argues she had informed the former principal and the cereals with weevils disposed of; she was also accused of having given workers school foodstuffs and given them gate passes for the same without authority, and in a past incident, the workers had all paid for rice which had been taken from the school on her authority.
69. Stella Masanga (CW-6) a School Nurse, was accused of having failed to inform the school administration, that students were sick, she failed to produce a record of the students who were sick or hospitalized and she admitted she could not report to the principal as they had a strained relationship, as at one time the principal had pinched her.

The standard of proof

70. The employment claims are civil in nature and thus the standard of proof is on a balance of probabilities. The test of reasonableness also applies as envisaged under section 45(4)b to the extent that the termination is unfair if“(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee”.
71. Section 43 of the *Employment Act*, 2007 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.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

Section 45 (2) of the 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 fair -
 - (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.”

72. As rightly stated in *Josephine M. Ndungu & others v Plan International Inc* (2019) eKLR where the Court observed: - ‘68. Under section 47(5) of the *Employment Act*, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the fall corners of the legal threshold set out by section 45 of the Act. The said provision bars employer from terminating employee’s contract of employment except for a valid and fair reason and through a fair procedure. A reason is valid and fair if it relates to the employee’s conduct, capacity and compatibility or based on the employer’s operational requirements...”
73. The reasons for the Grievants’ termination were set out in their show cause letters and termination letters as outlined above and the issues arising from all the show cause letters and termination letters related to each of the Grievants’ specific roles within the Respondent school and their actions were within the operational confines of the employer (Section 45).
74. The Court in determining whether a reasonable employer would have reached the decision it did in the circumstances is guided by the test defined by Lord Denning in *British Leyland UK Ltd V Swift* (1981) I.R.L.R 91 where the reasonableness test was defined to wit: - ‘the correct test is: ‘was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if the reasonable employer might reasonably have dismissed him, the dismissal was fair...”
75. The Court finds that the circumstances surrounding the Grievants’ dismissal relate to an incident relating to a case where it was said some students and a teacher in the Respondent school died from what was termed as food poisoning and investigations into the incident led to investigations culminating in the dismissal of the Grievants in this case.



76. The Grievants were issued show cause letters relating to their involvement in the preparation and storage of the food and also in the treatment of the sick students thereafter.
77. The Respondent stated that there was the death of a teacher and several students arising from the incident and as a reasonable employer after hearing from its employees would have reached the decision reached by the Respondent, based on the presentations by each of the grievants during the disciplinary hearing, which the grievants did not deny, was an account of their responses as indicated in the minutes produced by the Respondent.
78. The Court finds that the reason for the termination was valid considering the underlying circumstances which in the case of the Grievants showed their contribution whether directly or indirectly in the preparation of food and treatment of students that resulted in the death of students and a teacher. The Respondent had a fair reason to terminate the Grievants' employment, and the reason related to their conduct. The Grievants as outlined in their show cause and termination letters, failed to adhere to or meet the operational requirements of the Respondent, which required due care and diligence in ensuring the health and safety of students and others in the school was observed; by ensuring food was prepared in a clean environment and that sick students were treated accordingly and records on their ailments kept for observation.
79. The Court finds that under section 43(2) of the *Employment Act*, the reason or reasons for terminating the Grievants' employment were necessitated by the circumstances that the Respondent at the time of termination of the contracts genuinely believed to exist, and which caused the Respondent to terminate the services of the Grievants.
80. The Court having analyzed the facts and the law holds that the Respondent proved on a balance of probabilities valid reasons(substantive fairness) for the termination of the Grievants' employment.

Procedural Fairness

81. For a termination of employment services to the pass fairness test, it must be shown that there was not only substantive fairness for the termination but also procedural fairness.
82. The Claimant states that the process was unfair, as the Respondent failed to consider the union's representations during the disciplinary hearings as their input was not considered as is evidenced by the fact that the same was not outlined in the minutes of the full board.
83. The Claimant states that the Respondent based the grievants' termination on a report of the Ministry of Education and Health, yet they never produced the report. The Claimant claims that for Rael Ongaya, the school had employed her, and it could not then claim that she was illegally engaged and that Rael was not allowed to be heard before the sub-committee in the union's presence. For Mildred., Stella, and Madeline, the Claimant states that they were not heard before the sub-committee in the union's presence.
84. The Respondent submits that the procedure to terminate the Grievants was fair, as it undertook investigations, all the 6 grievants were given show cause letters and they refused to reply, but they appeared before the Sub-committee on Management, discipline, Ethics and Integrity as evidenced in D-Exhibit 1 to 5. All the Grievants were summoned before the Full Board (D-Exh-7), where the Union's representative Thomas Mboya appeared and made representations, and the Board decided to terminate the Grievants without any bias.
85. In *Josephine M. Ndungu & others v Plan International Inc (2019) eKLR (supra)* the Court observed that - "Fair procedure, on the other hand, refers to, but not limited to, affording the employee an



opportunity of being heard before the termination. Upon discharge of the said burden on a balance of probability, the employer assumes the burden of proof, under sections 43(1), 45(2), and 47(5) of the Act, to justify the reason for the termination and prove that a fair procedure was followed.” The Court holds that the 4 corners of legal threshold referred to in the foregoing decision are stated in section 45)2(b) of the *Employment Act* namely: - (i) related to the employees conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer;”

86. Section 41 of the *Employment Act* provides as follows: -

“(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 the 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.”

87. The Grievants were all dismissed on 28th June 2023((C-Exh-4 Pg. 24/25,28/31,33, 34, 36, & 39)). All the Grievants confirmed that they were served with show cause letters all dated 2nd June 2023(D-Exh-8). None of the Grievants stated that they filed any written responses to the show cause letters. Rael and Stella Masanga were sent on compulsory leave as per the letter of 12th June 2023.

88. Through summons dated 21st June 2023(D-Exh-7), all the Grievants were invited to appear before the full Board on 26th June 2023. The Grievants confirmed that they appeared before the full Board on 26th June 2023 as exhibited by the minutes of that day(D-Exh-6) and the Union Representatives were present and gave their representations.CW6 testified that the union was not at the interrogation stage but it was there during the hearing. The minutes indicate that Mr. Thomas Mboya as the Claimant’s representative was present and Mr. Maximilla Avakala, a shop steward, and Phelistus Omboche, the Organising secretary of the Claimant was also present. The Claimant states that the union’s representations were not noted down, but on page 31 of the Respondent’s documents (D-Exh-6), Maximilla Avakala, the shop steward was recorded to have said “that some of the cases that had been listened to were very serious but some the board could forgive and give a second chance If the worker asked for forgiveness and for those who were to be dismissed the board should not leave them without anything but should be given their dues as they had families...”

89. The Court finds that pursuant to Section 41 of the *Employment Act* (“the Act”), the Grievants were issued with show cause letters, and invited to the disciplinary meeting. During the Disciplinary meeting, Mr. Thomas Mboya and Phelistus Omboche, were the Union’s representatives and a shop Steward Maximilla Avakala appeared before the disciplinary hearing in the company of all the Grievants.

90. By dint of Section 41 of the Act, once the employer has given the reasons he is considering terminating an employee, he is mandated to, “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.”



91. The Grievants' shop steward informed the Board that "some of the cases that had been listened to were very serious but some the board could forgive and give a second chance If the worker asked for forgiveness and for those who were to be dismissed the board should not leave them without anything but should be given their dues as they had families..."
92. The Court holds that the Respondent complied with the procedural tenets under Section 41 of the Act having heard all the Grievants and the Claimant's shop steward's representations. The Claimant's opinion that the union was not heard cannot stand. The Court finds that the Respondent duly complied with procedural fairness before the termination of the employment of the Grievants.

b). Whether the Claimant is entitled to the reliefs sought

93. The Court had directed that the application and statement of claim be heard and determined concurrently.
94. The Claimant had sought for the reliefs that: -
95. In the Application: -
 - c. The Honourable Court be pleased to issue temporary orders restraining the Respondent from harassing, suspending, terminating, or otherwise preferring disciplinary action of any kind (Constructive dismissal towards members of the Respondent based on the tragedy that lead to loss of lives of students and a teacher without sound investigations and proof beyond possibility of doubt to implicate the staff pending hearing and determination of this application.
 - d. The Respondent is stopped from recruiting new staff following advertisement of the positions and invitation by interested applicants before hearing and determination of this application.
 - e. The Honourable Court orders the Respondent to stop unfair labour practices.
 - f. The costs of this application be aware to the Claimant
 - g. Any other relief the Court deems fit.
96. The Court opines that that orders C and D in the application were overtaken by events and the outcome of issue 1 will address prayer e.
97. In the Statement of Claim: -
 1. The Honourable Court be pleased to order for unconditional reinstatement of the terminated employees,
 2. In the alternative, the Respondent be compelled to pay the affected employees all terminal dues including but not limited to Gratuity for years served, Notice pay, Annual leaves, Public Holiday's worked, overtime, Certificate of service, Maximum Compensation for loss of employment, All salary arrears.
 3. The Honourable Court orders the Respondent to stop unfair labour practices (constructive Dismissal) towards members of the Respondent on the basis of the tragedy that lead to loss of lives of students and a teacher without sound investigations and proof beyond possibility of doubt to implicate the staff.
 4. The costs of this application be awarded to the Claimant



5. Any other relief the Court deems fit.

Analysis and Findings

98. During the hearing, DW testified that the Grievants' positions had already been advertised(C-Exh-5) and the positions occupied by new occupants. Prayers c and d of the application were therefore overtaken by events and the Court will not belabor to consider the same.
99. The Claimant stated that the Respondent dismissed the Grievants without investigations, which amounts to unfair labour practices, and prayed that the Respondent reinstates all the Grievants.
100. The Court found that the Respondent had a valid reason in dismissing all the Grievants and the Respondent had undertaken investigations into the Grievants' conduct, issued them with show cause letters, invited them to a hearing, and Grievants were heard before their termination. The representations of the shop steward were taken and recorded.
101. The termination was lawful and procedurally fair and thus no unfair labour practice occurred. The Respondent acted within the law in undertaking disciplinary measures based on the incident of food poisoning at the Respondent's school.
102. Based on the circumstances leading to the Grievants' dismissal the Court finds that the employer employee relationship between the parties has broken down and trust between the Grievants and the Respondents lost. DW testified also that the Grievants' positions have already been occupied.
103. Guided by the Court of Appeal's holding in Kenya Airways Limited v Aviation Workers Union Kenya & 3 Others [2014] eKLR, the Court set out the relevant factors to be taken into account when considering reinstatement under section 49(4) of the *Employment Act* as: -

“...the wishes and expectation of the employee; common law principle that there should be no order of specific performance in a contract of service except in very exceptional circumstances; the practicability of the reinstatement; any compensation paid by the employer; and chances of the employee securing alternative employment.”
104. The prayer for reinstatement is not available to the Grievants as their termination from employment has been held to be fair and lawful, the trust relationship with employer having broken down and their positions have already been occupied.
105. There was a prayer in the alternative, that the Respondent be compelled to pay the affected employees all terminal dues including but not limited to Gratuity for years served, Notice pay, Annual leaves, Public Holiday worked, overtime, Certificate of service, Maximum Compensation for loss of employment, All salary arrears.
106. The Grievants' termination was found to be lawful and the Grievants did not set out the particulars on account of Annual leaves, Public Holidays worked, salary arrears, and overtime, they claimed in their statement of claim and during the hearing all the Grievants confirmed that they had no particulars of the said items.
107. The Grievants are not entitled to maximum compensation as their termination was fair.

On the claim for gratuity and notice pay

108. The Grievants during the hearing confirmed that their letters of appointment did not have a clause on gratuity. However, they testified that employees who left the Respondent's employ were paid gratuity



- although they had no evidence. The Respondent states that the Grievants used to contribute to NSSF and thus not entitled to Gratuity and the payment of gratuity is not mandatory unless it is a term of contract which was not the case for the grievants and relied on the decision in Nelson Keshei V Narok County Government and another (2019).
109. The Respondent in its minutes of 26th June 2023(D-Exh-6 pg. 32 of the Respondent’s documents under General Observations, stated that: - “the terminated workers were to be paid the gratuity and be issued with Certificates of Service.” (emphasis given)
110. Additionally, in termination letters the Respondent committed to pay the grievants various terminal dues as outlined in each of their termination letters as below: -
- i. Nobert Indongolio (CW1)

The Respondent stated he could be paid a one-month salary in lieu of notice of Kshs. 19,320/- and severance pay of half his basic salary for the nine years he worked of Kshs 86, 940/-.
 - ii. Rael Ongaya (CW2)

The Respondent stated that she would be paid a one-month salary in lieu of notice of Kshs. 11,200/-. CW2 had served for approximate 3 months before the termination hence not entitled to service pay. The Court upholds the letter of termination of service 1 month notice pay of Kshs. 11,200/-.
 - iii. Mildred Mutsami (CW3)

The Respondent stated that she would be paid a one-month salary in lieu of notice of Kshs. 26,622.40/- and a Gratuity of his basic salary for 11 years of Kshs. 292,846.40/-.
 - iv. Valence Nyabera (CW4)

The Respondent stated that she would be paid a one-month salary in lieu of notice of Kshs. 26,622.40/- and a severance pay of half her basic salary for 5 years of Kshs. 62,538.45/-.
 - v. Madeline Mukhebi (CW5)

The Respondent stated that she would be paid a one-month salary in lieu of notice of Kshs. 26,620/- and a severance pay of half salary for 5 years of Kshs. 66,550/=.
 - vi. Stella Masanga (CW6)

The Respondent stated that she would be paid a one-month salary in lieu of notice of Kshs. 25,500/- and a gratuity of half his basic salary of Kshs.12,750/-.
111. The Court holds that the Respondent having committed to pay the Grievants various terminal dues cannot go back on their word and DW confirmed during the hearing that the termination letters had the terminal dues and that the employees had refused to clear and collect their dues. DW confirmed that the decision of the Board prevails and the Board agreed to pay the terminated Grievants the dues in their respective termination letters.
112. The Court shall adopt the Respondent’s grant of terminal dues to the grievants CW1 to CW 6. The Court notes that the Respondent used the word “severance pay” which is only available under section 40(1) of the *Employment Act* in the event of termination by redundancy. The Court believes that, flowing from the related letters of termination on the incident where the majority of affected employees were granted gratuity, the employer meant to pay gratuity and not severance pay to the grievants.



113. Ferdinand Ikunza named in the claim was removed from the list of grievants and Sheillah Ondego did not testify in the case and DW confirmed that she was still engaged by the Respondent and was thus not among the grievants.

Certificate of Service

114. The Respondent in the replying affidavit by Sr. Jane Mmbone Amukoye sworn on 18th September 2023 confirmed that the Certificates of Service for the Grievants were ready (JAA- 2B(a), 2B(b), 2B(c), 2B(d), 2B(e) and 2B(f). The grant of a Certificate of Service is a statutory right under Section 51 of the Employment Act and the Respondent is to give the Grievants their Certificate of Service unconditionally.

115. In conclusion, the Court, having dispensed with the Notice of Motion Application, now enters judgment in the claim dated 15th August 2023 as follows: -

1. The dismissal of the grievants Nobert Atanasi Indongolio, Rael Ongaya Andati, Mildred Mulionye Mutsami, Valence Nyabera, Stella Rophina Masanga, and Madeline Naliaka Mukhebi from employment by the Respondent was lawful and fair.
2. The Respondent to pay the grievants within 30 days from the date of this judgment as follows: -
 - i. Nobert Atanasi Indongolio, -Notice pay of Kshs. 19,320/- and gratuity of Kshs 86,940/-.
 - ii. Rael Ongaya Andati, - Notice pay of Kshs.11,200/-.
 - iii. Mildred Mulionye Mutsami, Notice pay of Kshs. 26,622.40/- and Gratuity of Kshs. 292,846.40/-.
 - iv. Valence Nyabera- notice pay of Kshs. 26,622.40/- and gratuity of Kshs. 62,538.45/-.
 - v. Stella Rophina Masanga, - Notice pay of Kshs. 26,620/- and Gratuity of Kshs. Kshs. 66,550/=.
 - vi. Madeline Naliaka Mukhebi- Notice Pay of Kshs. 25,500/- and a gratuity of Kshs 12,750/-.
3. The Respondent to issue the Grievants their Certificates of Service pursuant to Section 51 of the Employment Act.

116. Considering the nature of the employment and events leading to the termination I exercise my discretion on costs and hereby order each party to bear own costs in this claim.

117. It is so ordered.

DATED, SIGNED, AND DELIVERED ON THE 16TH DAY OF APRIL 2024 IN OPEN COURT AT KAKAMEGA

J.W. KELI

JUDGE

IN THE PRESENCE OF

C/A Lucy Macheso

For Claimant:- Kamuye



For Respondent: -Simiyu h/b Tarus

