



**Muchai v Kijabe Girls High School (Cause 1461 of 2016)
[2023] KEELRC 202 (KLR) (31 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 202 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1461 OF 2016
J RIKA, J
JANUARY 31, 2023**

BETWEEN

DAVID KIMANI MUCHAI CLAIMANT

AND

KIJABE GIRLS HIGH SCHOOL RESPONDENT

JUDGMENT

1. The claimant filed his statement of claim on July 21, 2016.
2. He states that he was employed by the respondent school as a watchman, on August 1, 2014.
3. He was dismissed by the respondent after working for 1 year and 3 months. His last consolidated monthly salary was Kshs 13,594. Termination was not based on valid reason, and fair procedure. He prays the court to grant the following orders: -
 - a. Declare that termination was unfair and unlawful.
 - b. Declare that the claimant is entitled to retirement benefits.
 - c. Monthly salary from the date of termination to conclusion of the matter.
 - d. Costs.
 - e. Interest.
 - f. Any other suitable relief.
4. The respondent filed a statement of response on October 17, 2019. It denies everything, save for the description of the parties, and the fact that there is no other dispute pending in court, between the parties. It is pleaded that if the claimant was an employee of the respondent, termination of his contract was justifiable and procedurally fair.



5. The claimant gave evidence and closed his claim, on January 21, 2022. Mercy Kibata, Principal of the respondent school, gave evidence and closed the respondent's case, on October 6, 2022. The claim was last mentioned on November 30, 2022, when parties confirmed filing and exchange of their submissions.
6. The claimant adopted as his evidence-in-chief, his witness statement dated July 27, 2016, and 3 documents, exhibits 1-3. Cross-examined, he stated that he was not in casual employment. He was not offered, and declined, terminal benefits. The respondent was remitting NSSF contributions. He seeks salary to-date, because he was not issued a notice of termination. He does not seek salary based on work he has performed.
7. School Principal Mercy Kibata, adopted her witness statement in her evidence-in-chief. She became familiar with the claimant, from his employment records. He was a security guard. His contract was terminated for gross misconduct. He used to visit teacher's residences, when they were not in. The respondent paid NSSF contributions. The claimant did not work after termination, to justify salary payment in arrears. He was offered notice pay, which he did not collect. Cross-examined, she told the court that she did not know the claimant personally. He visited teacher's residences in their absence. He was offered notice pay of 1 month. The Principal did not know if he was given a hearing. There were no warnings in the claimant's file. Redirected, the Principal clarified that she was not an employee of the respondent, when the claimant's contract was terminated.
8. The issues are whether the claimant was an employee of the respondent; whether the respondent terminated his contract unfairly, or at all; and whether he merits the remedies sought.

The Court Finds: -

9. Although the respondent pleads that the claimant was not its employee, the School Principal told the court that she came to know the claimant through the claimant's employment records. The school retained claimant's personnel file, and this was because the claimant was an employee of the respondent.
10. The Principal corroborated the claimant's evidence that he was a security guard at the school and that his contract was terminated by the respondent for gross misconduct. There is ample evidence that the claimant was an employee of the respondent, and that the respondent terminated his contract.
11. Procedure adopted by the respondent in terminating the claimant's contract, was flawed. There was no hearing. He was not called upon to answer to any letter to show cause why he should not face disciplinary action. There were no charges presented to the claimant. He was not invited to any disciplinary platform, and advised of his procedural rights under section 41 of the *Employment Act*. Procedure did not meet the minimum statutory threshold of fairness under sections 41 and 45 of the *Employment Act, 2007*.
12. Sections 43 and 45 of the *Employment Act* on substantive justification were disregarded. The Principal told the court that the claimant was guilty of the offence of gross misconduct. The allegation was that, he visited teachers' residences in their absence.
13. No single teacher, whose residence was illegally accessed by the claimant was named. No teacher is recorded to have made any complaint to the school, about the claimant's unwelcome visits. It is not disclosed when the claimant made the visits. What did he do in these houses he visited, and why would any teacher leave his or her house open for strangers to come in, and walk out at their leisure? The allegation was unsubstantiated. There was no proof of valid reason, to justify termination.



14. Both parties agree that the claimant was subscribed to the NSSF and logically would be entitled to pension under that regime. There is no need for the court to declare that he is entitled to retirement benefits. Declaratory orders are not given just for the sake of it. The law declares the claimant to be entitled to pension.
15. Why would an employee whose contract has been terminated, expect to be paid salary after termination, until the dispute he has presented in court on termination is concluded? This prayer is absurd. The filing of the claim, did not have the effect of reinstating the claimant. He ceased to be an employee of the respondent on November 23, 2015, when his contract was terminated. he did not render any service after this, to warrant remuneration.
16. He does not plead compensation or notice, expressly. He however pleads any other suitable remedy. The court has concluded that termination was unfair in substance and procedure. The respondent offered the claimant notice pay of 1 month, upon termination. The claimant worked for 1 year, 3 months. There is no evidence to show any blemish on his record. He did not inform the court whether he mitigated loss of employment by securing alternative job. He did not inform the court for how long he expected to go on working.
17. He is granted notice of 1 month at Kshs 13,594 and compensation for unfair termination equivalent of a month's salary, at Kshs 13,594. He is granted costs and interest at court rate from the date of judgment, till payment is made in full.

It is Ordered: -

- a. It is declared that termination was unfair.
- b. The respondent shall pay to the claimant notice and compensation for unfair termination equivalent of a month's salary each, at Kshs 13,594 respectively, total – Kshs 27, 188.
- c. Costs to the claimant.
- d. Interest allowed at court rate from the date of judgment, till payment is made in full.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI, UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 31ST DAY OF JANUARY, 2023.

JAMES RIKA

JUDGE

