



**Kahiga & another v BOG Sagana Secondary School (Cause
256 of 2018) [2023] KEELRC 630 (KLR) (6 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 630 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
CAUSE 256 OF 2018
ON MAKAU, J
MARCH 6, 2023**

BETWEEN

ESTHER NJOKI KAHIGA 1ST CLAIMANT

SUSAN NJERI WARUI 2ND CLAIMANT

AND

BOG SAGANA SECONDARY SCHOOL RESPONDENT

JUDGMENT

1. The claimant is a trade union and brings this suit on behalf of its two members, Esther Njoki Kahiga and Susan Njeri Warui (herein after called the grievants). The claimant avers that the grievants were unfairly dismissed from employment by the respondent and seeks the following reliefs:-
 - a. Reinstatement; or
 - b. Payment of service gratuity as per the Collective Bargaining Agreement;
 - c. 3 months notice as per the CBA;
 - d. House allowance underpayment for 3 years as per the DPM Circular;
 - e. Salary underpayment for July 2014-July 2017 as per the DPM Circular;
 - f. 12 months salary compensation for loss of employment.
2. The respondent denied liability and averred that the grievants were dismissed fairly in accordance with the *Employment Act* and as such the suit should be dismissed with costs. It further averred that the suit was filed before serving a statutory notice and therefore it offends the mandatory provisions of Cap 39 and 40 of the Laws of Kenya.
3. The suit was disposed of by written submissions on the basis of the documentary evidence filed.



Evidence

4. The claimant filed written statement from each grievant plus 9 documents including appointment letters, suspension letters, minutes of the Executive Committee of the respondents Board, summary dismissal letters and requests for rehearing by the full Board.
5. Ms Esther Njoki Kahiga stated that she was employed by the school on 8th January, 2001 as a cook for a monthly salary of Kshs 1,200.00. She served for 17 years without receiving any warning letter until 7th July 2017 when she was served with a suspension letter on false allegation that she had stolen food stuffs from the kitchen store. The suspension came after the management convened a meeting which did not accord her a fair hearing to defend herself.
6. She then wrote a letter on 15th August requesting for a hearing by the full Board but the same was not responded to and instead, she was served with a dismissal letter dated 14th August, 2017. Her long service was not considered and she was not paid anything including notice. Intervention by the claimant union by the letter dated 8th August, 2017 did not bear any fruits and the union reported the matter to the Labour Office. However the matter was not resolved.
7. She concluded by stating that her monthly salary was Kshs 8,553.00 house allowance of Kshs 1,800.00 and medical allowance of Kshs 577.00 which was below what was recommended by the DPM Circular.
8. Ms Susan Njeri Warui stated that she was employed by the respondent on 7th January 2004 as cook and served for 14 years without any warning letter or complaint. She stated further that on 17th July, 2017 she was suspended on false allegation that she had stolen food stuffs from kitchen store. Thereafter the management convened a Board meeting but she was not given a fair hearing to defend herself.
9. On 15th August she wrote a letter requesting for a hearing by the full Board but no response was made. Instead she received a summary dismissal letter dated 14th August 2017. Her long service was not considered and she was paid nothing even for notice. The intervention by the claimant union did not bear any fruit and the matter was reported to the Labour office. However the matter was not resolved.
10. Finally, she stated that her monthly salary was Kshs 8,553.00, house allowance of Kshs 1,800.00 and medical allowance of Kshs 577.00 which was below what was recommended by the DPM Circular.
11. The respondent filed three witness statements. The school Principal Mr. James Kagunda stated that on 17th July 2017 he arrived at the school gate at 7.00am and the security guard informed him that he had a theft case he wanted to report. He then narrated how he caught the grievants red-handed stealing food stuffs in sacks. One sack contained 1 debe of potatoes, 3kgs of onions, 3 pieces of cabbages and 1kg of salt.
12. At 8.00am he went with the security guard to Sagana AP Station and officially reported the matter. By that time the grievants had not reported to him anything amiss in their work place. He then called the BOM Chairperson who works in Naivasha, and briefed her of the incidence. She then asked him to call a meeting of the Executive Committee of the Board.
13. The Executive Committee sat and summoned the grievant and told them to appear before the AP Station Sagana to record statements. They then arrested, interrogated and exhibits recovered from were photographed. Thereafter they were served with suspension letters citing the charges.
14. He stated further that on 12th July 2017, the BOM Executive Committee met to hear the grievants case. In the end they found the grievants culpable of theft among other offences. The full Board then met on 29th September, 2017 to hear the matter again after a request by the claimant union. The grievants



- attended with two officials of the union Mr. Joshua Kitheka and F.M Ngirigacha. The security guard Mr. Joseph Kamanda attended as a witness. The second grievant, Susan Njeri gave an evidence for 45 minutes but the first grievant Esther Njoki refused to testify and walked away followed by the union officials.
15. The Board then deliberated on the matter and reached unanimous verdict that the two grievants be given a summary dismissal for gross misconduct.
 16. The respondent's chairperson, Ms Milka Wanjiru Ngigi stated that on 7th July, 2017 at 9.00am the principal called him and informed her that the two grievants were caught by the security guard red-handed stealing from the kitchen store at 5.16am. They were caught with a sack containing 1 debe of potatoes, 3 pieces of cabbage, 3kgs of Onions and 1kg of salt. The principal told her that the grievants were still working but they had not reported to him anything amiss. She then instructed the Principal to convene a meeting of the Executive Committee of the Board to deal with the matter urgently.
 17. She further stated that on 12th July 2017, she chaired an executive committee of the Board and summoned the grievants to appear. The security guard was also invited as a witness. In the end the committee found the grievant guilty and reached a verdict of summary dismissal pending notification by the full Board.
 18. She further stated that on 29th September, 2017 the full Board met and invited the two grievants and the security guard for hearing. The security guard tabled his evidence and Susan Njeri (second grievant) failed to table credible evidence and she walked out together with union officials. Esther also refused to appear before the Board. In the end the Board unanimously reached a guilty verdict and recorded for summary dismissal of the two grievants.
 19. Lastly, Mr. Joseph Kamanda, Security guard, stated that he was on duty on the night of 6th and 7th July 2017. At around 5.16am, he saw two people carrying luggage behind the kitchen and he moved closer then challenged them to stop. One of them, Esther Njoki screamed saying "Kamanda don't cut me, I am Esther." However Susan ran away carrying a luggage and refused to stop despite warnings.
 20. He inspected Esther's luggage (a sack) and found 1 debe of potatoes, 3 pieces of cabbage, 1kg of salt and 3 kgs of onions. She then pleaded with him to let her go like her colleague. She even volunteered sexual favours to him in exchange for her liberty but he refused and detained her until 6.00am when the students started streaming in. He then confiscated the exhibits in the guard house and went to attend to students as Esther proceeded to her work at the kitchen.
 21. He further stated that the principal arrived at the school at 7.00am and he reported the theft to him. At 8.00am he went to the AP Station and made a report of the theft by the grievants. The report was registered as OB/NO/02/07/07/2017. Later in the afternoon he made another report at Sagana police station at 15.20 hours under OB/23/7/7/2017.
 22. He further stated that on 9th July, 2017, the grievants caused him to be summoned at Sagana Police station where he was harassed and intimidated by an officer named Mohammed in the presence of the grievants. The officer then told him that he was a Kisii and he should live kikuyus alone to earn their daily bread. He contended that the said statement amounted to hate speech, tribalism and obstruction to performance of his duties.
 23. Finally, he stated that on 29th September 2017, he was invited to full Board meeting to give evidence in presence of the two officials of the claimant union Mr. Kitheka and Mr. Ngirigacha. The two officials then cross examined him and thereafter Susan Njeri gave her evidence but Esther Njoki refused and left the meeting. Thereafter the Board made its final decision.



Submissions

24. The claimant basically summarized the evidence contained in the witness statements to urge that the dismissal was not grounded to valid reasons and fair procedure was not followed. Therefore they submitted that the dismissal was unfair and unlawful contrary to Section 45 of the [Employment Act](#) and the grievants are entitled to the reliefs sought. For emphasis they relied on the case of [Amalgamated Union of Kenya Metal Workers v Power Protection Ltd](#) (2022) eKLR where the court awarded compensation to the claimant for unlawful termination.
25. On the other hand, the respondent submitted that the reason for the termination was valid and the procedure followed was fair. It was submitted that Section 41 of the [Employment Act](#) was complied because the grievants were accorded a hearing in the company of union officials of their choice. It was further submitted that the grievants were caught red-handed stealing food stuffs from the kitchen store.
26. Finally, it was submitted that the claimants are not entitled to any reliefs under Section 49 of the Act because they have not proved that their dismissal was unfair and unjustified. It was further submitted that the grievants are not entitled to gratuity because they were members of NSSF and the employer was contributing for them. For emphasis reliance was placed on a number of precedents including [Kenfreight \(EA\) Limited v Benson K.Ngutu](#) (2016) eKLR where the Court of Appeal held that there must be valid reason before termination of employment and fair procedure must be followed.

Determination

27. The issues for determination are:
 - a. Whether the reason for the dismissal was valid and fair.
 - b. Whether fair procedure was followed.
 - c. Whether the claimant is entitled to the reliefs sought.

Reasons

28. The summary dismissal letter dated 14th August 2017 cited the reason for dismissal as follows:

“On the morning of 7th July 2017 at 5.16am you were caught red-handed by the security guard stealing from your place of work. You were immediately suspended by the Management and consequently asked to appear before the BOM Executive Committee on 12th day of July 2017...”
29. The security guard Mr. Joseph Kamanda saw the grievants carrying sacks containing food stuffs and ordered them to stop. The first grievant, Esther Njoki complied but the second grievant, Susan Njeri ran away. The security guard recovered the sack with the stolen items and kept it until the Principal arrived and they took them to the police station for official reporting.
30. The security guard narrated how the first grievant tried to induce him with sexual favours to let her go but he refused. Later how the two grievants tried to intimidate him using a police officer called Mr. Mohammed. The principal also saw the stolen items. The grievants did not rebut the above evidence by the security guard during the disciplinary hearing. Even before this court, they did not rebut the said evidence by the security guard. Consequently, I find and hold that the respondent has proved on a balance of probability that it dismissed the grievants for a valid and fair reason.



Procedure followed

31. Section 41 of the *Employment Act* 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.”

32. In this case the grievants were suspended by the letter dated 7th July 2017. The letter cited the reason upon which dismissal was being considered. On 12th July 2017, they were invited for a hearing before the BOM Executive Committee.

33. Upon request by the claimant union, they were invited for another hearing before the full Board. They attended with 2 officials of the union. Security guard gave his evidence and he was cross-examined by the union officials. Thereafter the second grievant gave her evidence but the first grievant refused to tender her evidence and left. The full Board considered the matter and ratified the decision by its Executive Committee.

34. The above summary of the disciplinary process reflects well with the procedure set out by Section 41 of the *Employment Act*. The employer informed the grievants their offence, and presented a witness against them during two disciplinary hearings and invited them in company of their union officials to make their representations. Their representations were considered before a verdict was made to dismiss them. Consequently, I find that the respondent has proved on a balance of probability that it afforded the grievants a fair hearing before the dismissal and I hold that the dismissal was done in accordance with a fair procedure.

Reliefs

35. In view of the finding that the respondent has proved that the dismissal was grounded on valid and fair reason and that a fair procedure was followed, it is a fact that the dismissal was fair and lawful. Consequently the claimant is not entitled to the remedies provided under Section 49 of the Employment namely, reinstatement, or salary in lieu of notice and compensation for unfair loss of employment.

36. The claim for gratuity has also not been substantiated by evidence. It is now trite law that gratuity is not provided by statute law and therefore it must be grounded on a contract of employment. The claimant alleged that Clause 3 of the CBA between it and the Ministry of Education provided for service gratuity. The CBA has not been produced as exhibit. Consequently the claim for gratuity has not been proved by evidence.

37. In conclusion, the court is of a considered view that the claimant has not proved its case on a balance of probability and the suit is dismissed with costs.



DATED, SIGNED AND DELIVERED AT NYERI THIS 6TH DAY OF MARCH, 2023.

ONESMUS N MAKAU

JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties 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

