



**Kenya Union of Domestic Hotels Educational Institutions Hospitals
and Allied (KUDHEIHA) Workers v Kathonzweni High School (Cause
84 of 2015) [2023] KEELRC 2555 (KLR) (19 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2555 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 84 OF 2015
L NDOLO, J
OCTOBER 19, 2023**

**BETWEEN
KENYA UNION OF DOMESTIC HOTELS EDUCATIONAL INSTITUTIONS
HOSPITALS AND ALLIED (KUDHEIHA) WORKERS CLAIMANT
AND
KATHONZWENI HIGH SCHOOL RESPONDENT**

JUDGMENT

Introduction

1. This matter was initially heard by Makau J who took the Claimant's case. When I became seized of the matter, the parties agreed to proceed from where my brother Judge had stopped.
2. The matter came up for defence hearing but the Respondent chose not to call any witnesses. I directed the parties to file final submissions but only the Respondent complied. This judgment is therefore based on the parties' pleadings, the Claimant's testimony and the Respondent's submissions.

The Claimant's Case

3. The issue in dispute as stated by the Claimant Union in its Memorandum of Claim dated 23rd January 2015, is unfair dismissal of its members; Stephen Wambua Ntangili and Simon Mbela Mutiso (the 1st and 2nd Grievants), by the Respondent School.
4. The Claimant states that the 1st Grievant, Stephen Wambua Ntangili was employed by the Respondent on 19th May 2003 as a Cook, at a starting monthly salary of Kshs. 3400 plus a house allowance of Kshs. 800. According to the Claimant, Ntangili was deployed to work as a watchman after 7 years, a position he held until his dismissal from employment. At the time of dismissal, he earned a monthly salary of Kshs. 8,996 and a house allowance of Kshs. 1200.



5. The 2nd Grievant, Simon Mbela Mutiso was employed on 21st May 2003 as a watchman earning a monthly salary of Kshs. 3400 and a house allowance of Kshs. 800, which was later increased to Kshs. 8,996 and Kshs. 1200 respectively.
6. On 24th January 2013, the Principal of the School wrote to the Grievants inviting them to appear before the Executive Committee of the Board of Governors on 26th January 2013, to answer to charges in connection with the loss of the school DVD machine during the December 2012 holiday. The Grievants were subsequently dismissed by letters dated 5th February 2013 and 6th February 2013.
7. Attempts to resolve the matter at the parties' level did not yield fruit and the Union reported a trade dispute to the Cabinet Secretary for Labour on 23rd May 2013. The Claimant states that the Respondent did not attend conciliation meetings called by the Conciliator. The dispute was therefore not resolved at the conciliation stage, hence this claim.
8. The Claimant terms the Grievants' dismissal unfair on the following grounds:
 - a. The dismissal letters did not specify the exact date when the DVD machine got lost and/or who discovered it was missing;
 - b. The school keys were not in the custody of the Grievants;
 - c. There was no theft or break-in reported;
 - d. Those who were charged with the responsibility of carrying the school keys were left to continue serving the School despite being the main suspects;
 - e. The school management punished the Grievants by deducting Kshs. 2,000 from their February salaries to pay for the DVD and at the same time dismissing them contrary to Section 88(3) of the [Employment Act](#);
 - f. The Grievants were not given rest days, public holidays and leave days during the school holidays as required by law.
9. The Claimant asks the Court to convert the Grievants' dismissal to normal termination and direct the Respondent to pay each Grievant the following:
 - a. 3 months' pay in lieu of notice.....Kshs. 26,988
 - b. Service gratuity for 10 years.....89,960
 - c. Underpayment of house allowance for 3 years.....21,600
 - d. Medical allowance arrears.....13,500
 - e. Annual leave for 2 years.....14,393
 - f. Public holidays for 3 years.....17,992
 - g. Rest days for 3 years.....86,361
10. The Claimant also asks for costs of the suit.

The Respondent's Case

11. In its Memorandum of Response dated 17th August 2015 and filed in court on 18th August 2015, the Respondent admits having employed the Grievants from 2003 to 2013.



12. The Respondent avers that the 1st Grievant, Stephen Wambua Ndangili was initially employed to serve as a Cook. From the year 2009, he started serving the Respondent as a Watchman.
13. The Respondent lists a litany of past acts of misconduct by the 1st Grievant including; lending students his mobile phone, talking to girl students, smuggling students' food, helping students to pass information in and out of school, buying items for students at the market and reporting on duty while drunk.
14. The Respondent claims to have issued the 1st Grievant with warning letters upon which he wrote apology letters.
15. Regarding the 2nd Grievant, Simon Mbela Mutiso, the Respondent states that he was employed to work as a Watchman.
16. The Respondent accuses the 2nd Grievant of carrying out responsibilities for one Paul Kilungu, sleeping while on duty and colluding with Paul Kilungu to steal food from the kitchen. The 2nd Grievant was issued with a warning letter to which he responded by apologising for the misconduct.
17. The 2nd Grievant was also accused of neglecting his duties thereby making it possible for students to sneak out of school.
18. The Respondent states that the Grievants' employment was terminated for valid and fair reasons being gross misconduct while on duty and for stealing and/or failing to explain the loss of the school DVD.
19. The Respondent asserts that the 1st and 2nd Grievants were on duty in December 2012, when the School DVD machine was reported missing. The Respondent asked the Grievants to explain the disappearance of the DVD. In their responses dated 10th January 2013, the Grievants stated that they had no information on the missing DVD.
20. The Respondent asked the Grievants to appear before the Executive Committee of the Board of Governors where it was resolved that they be dismissed from employment.
21. The Respondent denies that the Grievants are entitled to the sums claimed in the Memorandum of Claim.

Findings and Determination

22. There are two (2) issues for determination in this case:
 - a. Whether the Grievants' dismissal was lawful and fair;
 - b. Whether the Grievants are entitled to the remedies sought.

The Dismissal

23. The Grievants' dismissal was communicated by separate letters. The 1st Grievant, was dismissed by letter dated 5th February 2013 stating as follows:

“STEPHEN WAMBUA NDANGILI

RE: SUMMARY DISMISSAL FROM YOUR JOB

Following your misconduct while at work for which you were served with official letters on 4/4/2007 and 3/11/2008 and even suspended from work on 2/11/2009 and more recently your failure to explain the issue of the school DVD while you were on duty over the



December 2012 holiday, the school Board of Governors has resolved to dismiss you from your job with immediate effect from 5/2/2013. (Min 4/26/01/2013).

You are therefore required to clear with the school and leave the premises.

(signed)

JOSEPH M. NZOKA

PRINCIPAL/BOG SECRETARY”

24. The 2nd Grievant was dismissed by letter dated 6th February 2013 stating thus:

“SIMON MBELA MUTISO

RE: SUMMARY DISMISSAL FROM YOUR JOB

Following your misconduct while at work for which you were officially warned on 26/10/2004 and you wrote apology letter twice (7/3/2006 and 19/6/2008) and a further warning on 23/7/2012 and above all your failure to explain the loss of the school DVD while on duty December 2012 holiday, the Board of Governors has resolved to dismiss you from your job with immediate effect from 6/2/2013. (Min 4/26/01/2013).

You are therefore required to clear with the school and leave the premises.

(signed)

JOSEPH M. NZOKA

PRINCIPAL/BOG SECRETARY”

25. My reading of these letters reveals that the Grievants were dismissed for accumulated instances of misconduct, culminating with the Grievants’ failure to explain the loss of the school DVD during the December 2012 holiday.

26. Section 43 of the *Employment Act* requires an employer to establish a valid reason for terminating the employment of an employee. This provision states as follows:

43. Proof of reason for termination

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.

In my view, the burden placed on the employer by Section 43 of the *Employment Act* is to demonstrate a specific reason that informed the decision to terminate employment.

27. In the present case, the Respondent appears to have relied on past offences over which the Grievants had been issued with warning letters to make the decision to dismiss the Grievants.

28. As held in *Karisa v Texas Alarms (K) Ltd* (Cause 292 of 2018) [2022] KEELRC 87 (KLR) (19 May 2022) (Judgment) a warning letter is by itself a disciplinary action meaning that once it is issued, the offences forming the subject matter of the warning letter are extinguished and cannot be used to punish



the employee again. In such a case, the warning letter can only be used to show the employment record of the employee, which the Court may take into account in making an award in favour of the employee.

29. Further, the Grievants testified and the Respondent did not controvert that they were surcharged for the lost DVD through deductions from their salaries. In its decision in *Kenya National Library Services Board v Beatrice N. Ayoti* [2014] eKLR this Court held that surcharge is a serious disciplinary action.
30. It follows therefore that once the Grievants were surcharged for the loss of the school DVD, no further disciplinary action could lawfully be taken against them for the same offence.
31. In the circumstances of this case, I have no hesitation in reaching the conclusion that the Respondent had no valid reason for dismissing the Grievants, as contemplated by Section 43 of the *Employment Act*. Any disciplinary process was thus misplaced and the procedural fairness requirements of Section 41 of the Act were not satisfied.

Remedies

32. Although in its prayers, all the Claimant asks for is that the Court converts the Grievants' dismissal to normal termination, a strong case of wrongful dismissal was made both in the body of the Memorandum of Claim and in the evidence adduced before the Court.
33. Pursuing the path of substantive justice, I will infer a claim for compensation from the pleadings and evidence and thereby award each of the Grievants six (6) months' salary in compensation. In making this award, I have considered the Grievants' long service moderated by their negative employment records. I have also taken into account the Respondent's unlawful conduct in punishing the Grievants twice for the same set of offences.
34. The claim for three (3) months' salary in lieu of notice was not supported by any evidence. I will therefore award each Grievant one (1) month's salary in lieu of notice as provided in Section 35(1) of the *Employment Act*.
35. No evidence was adduced to support the claims for service gratuity, underpayment, medical allowance arrears, annual leave, public holidays and rest days. These claims therefore fail and are disallowed.
36. In the end, I enter judgment in favour of the Grievants as follows:
 - 1st Grievant: Stephen Wambua Ndangili
 - a. 6 months' salary in compensation.....Kshs. 61,176
 - b. 1 month's salary in lieu of notice.....10,196Total.....71,372
 - 2nd Grievant: Simon Mbela Mutiso
 - c. 6 months' salary in compensation.....Kshs. 61,176
 - d. 1 month's salary in lieu of notice.....10,196Total.....**71,372**
37. These amounts will attract interest at court rates from the date of judgment until payment in full.
38. I further award the Claimant disbursement costs assessed at Kshs. 20,000
39. Orders accordingly.



DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF OCTOBER 2023

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JUDGE

Appearance:

Mr. Onwong'a (Union Representative) for the Claimant

Mr. Mwangi for the Respondent

