



**Kenya Union of Domestic Workers, Hotels, Educational Institutions And Hospital Workers Union(KUDHEIHA) v BOM Lirhandha Girls High School (Employment and Labour Relations Cause 16 of 2023) [2023] KEELRC 2519 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2519 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 16 OF 2023**

**JW KELL, J**

**OCTOBER 18, 2023**

**BETWEEN**

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

**AND**

**BOM LIRHANDA GIRLS HIGH SCHOOL ..... RESPONDENT**

*(FORMERLY BUNGOMA CAUSE E030 OF 2022)*

**JUDGMENT**

1. The Claimant is a trade union registered and recognised under the Laws of Kenya to represent domestic workers, workers in the hotels, non-teaching staff in educational institutions and hospital workers.
2. The Claimant on 11<sup>th</sup> November 2022 filed the Statement of Claim dated 7<sup>th</sup> November 2022 at Bungoma, supported by the Verifying affidavit sworn on even date by the Branch Secretary of the Claimant’s Kakamega Branch Mr. Thomas Mboya.
3. The suit had been triggered by the termination of employment of the Claimant’s members from employment by the Respondent; Miriam Magozi as Copy typist and Henry Shilovele as driver. Vide the Statement of Claim, the Claimant has prayed for the following reliefs:

Regarding Miriam Magozi

- a. Payment of terminal dues as follows:-

Gratuity Kshs. 16,755 X 15= 251,325

Unpaid salaries for May, June, July August and September Kshs. 16,755 X 5=83,775



- b. Maximum Compensation for loss of employment pursuant to sec.  
Ksh.  $16,755 \times 12 = 201,060$
  - c. Unpaid basic pay during the period of suspension from July 2021 to July 2022  
Kshs.  $12,807 \times 12 = 153,684$
  - d. Notice pay as per the CBA between Kudheiha/Ministry of Education  
Ksh.  $16,755 \times 4 = 67,020$   
Grand Total = 756, 864  
Regarding Henry Shilovele
  - a. Payment of terminal dues as follows  
Gratuity Kshs.  $14,354 \times 15 = 215,310$   
Unpaid salaries for May, June , July, august and September  
Kshs.  $14,554 \times 5 = 71,770$
  - b. Maximum Compensation for loss of employment pursuant to Sec.  
Ksh.  $14,354 \times 12 = 172,248$
  - c. Unpaid basic pay during the period of suspension from Feb 2021 to July 2022  
Ksh.  $14,354 \times 17 = 244,018$
  - d. Notice pay as per the CBA between Kudheiha/Ministry of Education  
Ksh.  $14,354 \times 4 = 57,416$   
Grand Total-760,762
4. Further filed together with the Statement of Claim on 11<sup>th</sup> November 2022 is the Claimant's list of witnesses, witness statements of Miriam Isoyi Magozi and Henry Lusuli Shilovele both dated 7<sup>th</sup> November 2022, the undated list of documents and the Claimant's documents (comprising of various documents that were eventually adopted by the court as Claimant's Exhibits).
  5. The claim was opposed. The Respondent on 13<sup>th</sup> December 2022 filed a Response to claim dated 6/11/2022 through the Office of the Attorney General & Department of Justice.
  6. The Respondent on 17<sup>th</sup> April 2023 filed the Statement of Linda M.M.Zalo dated 12<sup>th</sup> April 2023, the Respondent's List of documents dated 31<sup>st</sup> January 2023 accompanied by documents that were eventually adopted by the court as the Respondent's Exhibits. The Respondent on 7<sup>th</sup> July 2023, filed the witness statement of Charles Bahati Amonyela dated 6<sup>th</sup> July 2023 to substitute that of Linda M.M.Zalo as per the court order of 27<sup>th</sup> April 2023.
  7. By an order dated 20<sup>th</sup> April 2022, this matter previously filed at Bungoma as Cause E030 of 2022 was transferred to Kakamega for hearing and determination.

### **Hearing And Evidence**

8. Miriam Magozi(CW1) was heard orally on the 12<sup>th</sup> July 2023 when she testified as the Claimant's first witness of fact in her case, produced her evidence as the claim filed, the claimant's list of documents filed on 11<sup>th</sup> November 2022 (comprising of various documents that were eventually adopted by the



court as the Claimant's Exhibits (C- Exhibits 1- 12 )and her witness statement dated 7<sup>th</sup> November 2022. CW1 was cross-examined by the State counsel for the respondent, Mr. Tarus.

9. Henry Shilovele(CW2) was heard orally on the same day, 12<sup>th</sup> July 2023, when he testified as the Claimant's Second witness of fact in his case, produced his evidence as the claim filed, the Claimant's documents filed on filed on 11<sup>th</sup> November 2022 (comprising of various documents that were eventually adopted by the court as the Claimant's Exhibits (C- Exhibits 1- 12 )and his witness statement dated 7<sup>th</sup> November 2022. CW2 was cross-examined by the State counsel for the respondent, Mr. Tarus.
10. The Respondent's case was heard on the same day, 12<sup>th</sup> July 2023 where its witness Charles Bahati Amonyela (DW1) testified on oath as the Respondent's witness of fact and adopted his written witness statement dated 6<sup>th</sup> July 2023 as defence evidence in chief, and produced defence documents as the Respondents' list of documents dated 31<sup>st</sup> January 2023 (comprising of various documents that were eventually adopted by the court as its Exhibits (D-Exh-1 to 10). DW1 was cross-examined by Claimant's Representative, Mr. Kamuye.

### **Claimant's case in summary**

11. CW1, Miriam Magozi was a Copy Typist employed on 12/2/ 2007 at a starting gross salary of Kshs. 5000(C-Exh-1), until she received a letter to proceed on compulsory leave on 15/06 2021(C-Exh-2) accusing her of incitement of students to strike and parents against the management. She replied denying the allegation in her letter of 16/06/ 2021(C-Exh- 3). She was invited to attend disciplinary hearing through the letter of 28/06/2021(C-Exh-4) which she received on 29/06/2021. She was suspended through the letter of 20<sup>th</sup> July 2021(C-Exh-6). She argues that the Union pleaded for her to recalled to work vide the letter of 2<sup>nd</sup> August 2021(C-Exh-7) but there was no response from the Respondent. That she remained on suspension until investigations were completed and she was called to write a statement by the DCI. That she was dismissed on 27<sup>th</sup> July 2022)(pg. 23 of claim). She informed the union and they proceeded to Conciliation (Pg. 17 to 21 of Claim). CW1 states that she had worked for ten years and seeks justice and also salary arrears.
12. CW2 stated that he was initially employed as driver on 2<sup>nd</sup> November 2007 (pg. 24) until 20<sup>th</sup> February 2021 when he was re-assigned to work as a gardener and/or cleaner as the Bus he drove was not use. CW2 stated he was not given protective gear and when he went to the hospital at Kakamega Referral Hospital where the doctor requested that CW2 be retired on medical grounds(Pg- 26 of claim). CW2 states he delivered the letter to the school and the Board stated that the hospital letter by Dr. Juliet Bwire of the county Government Referral Hospital was a forgery which prompted him to return to the hospital to obtain another letter and was given a sick-off.
13. CW2 states he received the letter to attend the disciplinary hearing dated 9/06/2021(pg.28) and the disciplinary proceedings held on 9/7/2021. He states he did not refuse to work. That he wrote a letter dated 12<sup>th</sup> July 2021 (pg.29 of claim) after the union advised the Respondent he retires on medical grounds. Henry stated that he was dismissed from service through letter of 27/07/2022 (pg.36 of claim). He stated that he was unwell and cannot work and therefore seeks his benefits.

### **The Respondent's case**

14. The Respondent's case is that Miriam Magozi(CW1) was an employee of the respondent and was sent on compulsory leave through the letter of 15/06/2021 pending investigations for inciting students to go on strike. That she was summoned to attend disciplinary hearing during which she was accompanied by union representatives. The Respondent states that CW1 was suspended and after due process she



was dismissed on justified grounds and in accordance with the provisions of the Employment Act. That CW1 appeared before the Disciplinary Committee as evidenced by the minutes of 10<sup>th</sup> January 2022 and 22<sup>nd</sup> July 2022( Respondent's bundle of documents filed on 31<sup>st</sup> January 2023). The Respondent states that CW1 was not entitled to any basic pay during suspension and that she was paid house allowance, medical allowance in line with Public Service Commission HumanResource Policies and Procedures Manual, 2016. That CW1 additionally organised people to demonstrate on the date of the hearing of her case before the Board.

15. The Respondent states that Henry Shilovele(CW2)was invited to attend the disciplinary hearing on 9/06/2021 for having absconded work since 20/02/2021 and was also accompanied by union officials. That he appeared before the Disciplinary Committee as evidenced by the minutes of 10<sup>th</sup> January 2022 and 22<sup>nd</sup> July 2022( Respondent's bundle filed on 31<sup>st</sup> January 2023).That he had been served with the show cause letter as to why disciplinary action should not be taken against him, but he failed to respond. That CW2 was dismissed from employment for valid reasons and due process was followed and that the same was not a summary dismissal as alleged. The Respondent states that no demand to sue was ever issued before the claim was filed.
16. The Respondent states that the Claimant's termination was justified and within the provisions of the Employment Act.

### **Written submissions**

17. The court gave directions for filing of written submissions after the hearing. The parties complied. The Claimant's written submissions dated 10<sup>th</sup> September 2023 were drawn by the Claimant and filed on even date. The Respondent's written submissions dated 8<sup>th</sup> August 2023 were drawn by Office of the Attorney General & Department of Justice and filed on even date.

### **Determination**

#### **Issues for determination.**

18. The Claimant in its written submissions identified the following issues for determination:-
  - a. Whether suspension and later dismissal of Miriam Magozi was unlawful.
  - b. Refusal by the school Board of management to honour payment of terminal benefits to Henry Shilovele Lisuli contrary to the law.
  - c. Whether the Respondent should pay costs of the suit.
19. The Respondent in its written submissions identified the following issues for determination:-
  - a. Whether the Claimant's members were lawfully terminated of their employment.
  - b. Whether the Claimants are entitled to the reliefs sought.
20. The Court having considered the issues addressed by the parties in their submissions and pleadings was of the considered opinion that the question of whether the Grievants were former employees of the respondent was not in dispute and thus the issues to be addressed in the determination of the dispute were as follows:-
  - a. Whether the termination of employment of the Grievants by the respondent was lawful and fair.
  - b. Whether the Grievants are entitled to the reliefs sought.



### **Claimant's submissions**

21. The Claimant submitted that CW1 worked well with the previous principals of the Respondent and the point of departure was when she participated in mobilising members to join the claimant on 29<sup>th</sup> December 2020.
22. The Claimant submits that the charges cited in the letter of 28/6/2021(C-Exh-4) against CW1 being incitement and gross misconduct were different from those in the Dismissal letter which were: inciting students to strike and inciting parents and guardians against the school management; and claims that the same was unfair labour practice. The Claimant submits that it informed the Respondent to recall CW1 (C-Exh-6) as there was no evidence against her, but the Respondent proceeded to dismiss her. The Claimant submitted that its representations before the Respondent were ignored contrary to Section 41(2) of the Employment Act that requires the employer to consider representations of any person chosen by the employee.
23. The Claimant submitted that the termination of CW1 was unfair and against justice and equity as per section 45 of the Employment Act. The claimant argued that, Henry(CW2) was of ill health and had provided the Respondent with the recommendation that he retires on Medical grounds but the Respondent proceeded to harass him requiring him to resubmit his medical records and through disciplinary proceedings that eventually ended in his dismissal. That CW2 was unfit during the said period and thus entitled to his dues as he ought to have been retired and not dismissed.
24. The Claimant urged that grievants were entitled to their claims as prayed as they were unfairly dismissed.

### **The Respondent's submissions**

25. The respondent submitted that the grievants Miriam (CW1)and Henry(CW2)were lawfully terminated from employment based on substantive and procedural fairness on basis that they both appeared before the Respondent's disciplinary Board, were given opportunity to defend themselves and were accompanied by union representatives. That the Respondent had justified the reasons for their termination.
26. The Respondent submitted that the grievants were not entitled to Gratuity as claimed as service gratuity can only be paid over and above NSSF where there is a Collect Bargaining Agreement which was not provided by the Claimant. To buttress this point, they relied on the Court Of Appeal Decision In Board Of Management Ng'araria Girls Secondary School v Kudheiha (2017)eKLR.
27. The Respondent submitted that there was no CBA produced that entitled the grievants to notice pay and Gratuity and other reliefs sought were unavailable to the grievants as they were lawfully terminated.

### **Reasons for dismissal**

28. Miriam Magozi alleged that she was unfairly terminated from employment as she did not incite any students to strike. Henry Shilovele alleged that when he was reassigned to work as a gardener and cleaner, he was not provided with protective wear and he became sick and the doctor advised he retires on medical grounds.
29. The respondent argues that Miriam incited students and parents against the school and management and witnesses testified and Henry on the other hand, absconded work and failed to perform duties assigned to him.



30. The question is thus whether the dismissal of the two was lawful.

### Relevant Judicial Holdings /legal provisions

31. Substantive/procedural fairness.

32. 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.

33. 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 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.”

34. Lord Denning in *British Leland 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..” The court upholds the authority to apply in testing the reasonableness of the reason for the termination of the employment contracts in the instant claim.

Substantive fairness

Miriam Magozi(CW1)

35. Miriam argued that she did not incite students or parents against the management. She had been suspended from 15<sup>th</sup> June 2021 and a hearing conducted on 9<sup>th</sup> July 2021. There are no minutes of the hearing held on 9<sup>th</sup> July 2021 before the discipline committee.

36. Her suspension was extended until investigations are concluded. Miriam in the letter of 16/6/2021 requested that witnesses be availed for her cross-examination(pg. 12 of claim).

37. The dismissal letter states that temporary orders were obtained by the Claimant that halted the disciplinary process against her or other staff and the said application for the temporary orders was dismissed on 22<sup>nd</sup> March 2022. The same were not produced, but the claimant did not refute this position.(Pg.23).

38. The Respondent produced minutes of 10<sup>th</sup> January 2022 of the Full Board and the Minutes of 22<sup>nd</sup> July 2022 of the Discipline Committee that indicate that CW1 attended. It was recorded in the minutes of 22<sup>nd</sup> July 2022, that there were witnesses (6 in total) that confirmed that Miriam had incited them to



strike because the school had failed to provide students with bread, beef and rice. One witness Bridgit Inyanje(witness 6) stated that Miriam told her “ Why are you not going on strike and yet the school is not providing special diet”.

39. The minutes indicate that Miriam cross-examined the witness who maintained that Miriam had indeed told her that “even Alliance had gone on strike for eating one egg instead of two.’ Other witnesses confirmed the same position ; witness no. 2 Afandi Passkazzy Mise, confirmed Miriam had told parents not to listen to the Deputy Principal and the parents should be harsh and wild and indeed one parent tried to undress before the Deputy Principal. Witness No. 3 Joan Anunda was a former head student who testified that Miriam told them not to be quiet yet there was no beef in school and quoted Miriam who had said “ Mukae Tu Kama Mawe, hawa wanawake wasiwalettee ujinga”
40. The minutes confirm that the Miriam had been notified of the said meeting through SMS, WhatsApp and the School Principal had called her.
41. The Claimant did not refer to these minutes during hearing relating to the allegations against Miriam, or refute the allegations from the witnesses who had appeared before the disciplinary committee on 22<sup>nd</sup> July 2022. Based on the evidence in the said minutes the court holds that a reasonable employer would have dismissed this employee. The reasons for dismissal of Miriam are held as valid and lawful.  
Henry Shilovele (CW2)
42. Henry argued that he was sick and the doctor had recommended that he should retire on medical grounds.
43. The Respondent alleged that Henry absconded work from 20<sup>th</sup> February 2021 after he was assigned duties as per the show cause letter of 8<sup>th</sup> March 2021. Henry did not respond to the show cause letter and was invited for disciplinary hearing through the letter of 9<sup>th</sup> June 2021. He attended the disciplinary hearing. Through a letter of 12/7/2021 he wrote a letter seeking for his terminal dues and forwarded a recommendation letter from the hospital (Pg 26 of claim) and Medical attendance card (pg-26). The Respondent in the dismissal letter indicated that Henry appeared for a disciplinary meeting on 29.5.2022 for absconding work and was terminated his employment on the 27<sup>th</sup> July 2022 after the Disciplinary committee found that he had not convinced them of the reasons for his absence.
44. From perusing the minutes of 10<sup>th</sup> January 2022(pg.6) before the full Board, Henry argued that he had been given work that was dusty and he was not provided with safety equipment and he confirmed that he was going to the clinic but had not been given a sick off.
45. In the minutes of 22<sup>nd</sup> July 2022(full board), Henry brought the medical letter to be retired on medical grounds on 2<sup>nd</sup> March 2021, even with the claims that the said letter was forged, a look at the attendance card( back page of Pg-26); Henry had been attending the clinic since 3<sup>rd</sup> June 2020. The issue of forgery of medical letter was not an issue in the claim and the same had arisen at the disciplinary stage, no efforts to prove forgery were addressed.
46. The respondent alleges Henry had been assigned work on 20<sup>th</sup> February 2021.That he requested for a sick-off from the Deputy Principal on a day not disclosed and never reported back to duty which prompted the issue of the letter of 8<sup>th</sup> March 2021.
47. Henry alleged during the hearing that he was in school until 1<sup>st</sup> March 2021 and he gave the Respondent notice he was sick on 2<sup>nd</sup> March 2021 when he produced the recommendation that he should retire.



48. The issue is when he was served with the letter of 8<sup>th</sup> March 2021, he was asked why he had not come to work which at that point was six days after he absented himself from place of work from 2<sup>nd</sup> March 2021.
49. The court holds that there was no valid reason why Henry had failed to go to work and the production of the letter stating the need to retire on medical reasons was not conclusive reason for his absence.
50. The court finds that the decision as to whether or not to retire Henry on medical reasons was on the employer and not on him. He should have awaited the acceptance of the said recommendation by the employer. Henry acknowledged he received the show cause letter but failed to respond.
51. The court holds that the continued absence from work by Henry without permission was a ground for dismissal. In the letter of 12<sup>th</sup> July 2021, there were no medical notes attached thereof or reference to which notes he submitted. Henry alleged that on being assigned the duty as a cleaner or gardener he was not provided with protective gear, there is no proof that he became sick from the work assigned to him and there was no proof that he sought to be reassigned his duties.
52. Henry therefore wilfully failed to do the work assigned to him and absented himself from his work station without permission. The letter recommending his retirement on medical grounds was not a response to why he absent himself from duty without the authority of his employer. Henry was asked to provide proof of his medical condition through medical notes but never supplied the same. The onus of producing the medical notes as to why he was absent from work was on him and not on the employer.
53. By virtue of Section 44(4)(a)(b)& (e) of the Employment Act, the Respondent was within its right to dismiss Henry from employment and the reasons thereof were reasonable. Section 44(a,b,e)states as follows:-
- (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—
- (a) without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;
- (b) during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly; .....
- (e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer; ....”
- Procedural fairness
54. Section 41 of the Employment Act which 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.”

### **Miriam**

55. Miriam was sent on compulsory leave on 15 June 2021 for incitement pending investigations. She denied the incitement allegations in the letter of 16 June 2021. She was invited to the disciplinary hearing through letter of 28/06/2021 and attended the hearing on 9<sup>th</sup> July 2021 before the discipline committee. The suspension was extended further on 20<sup>th</sup> July 2021 on the provisions of the *Public Service Commission Human Resource Policies and Procedures for Public Servants*, 2016, Regulation k7(2).
56. The Disciplinary Procedure in the Public Service Commission Human Resource Policies and procedures for public servants, 2016, Regulation, K.3(4) states:- “(4) Disciplinary cases should be dealt with promptly and finalized within a period of six (6) months. Where it is found impracticable to do so the Authorized Officer shall report individual cases to the Public Service Commission explaining the reason for the delay.”
57. The Respondent in the dismissal letter states that temporary orders were obtained by the Claimant that halted the disciplinary process against her or other staff and the said application for the temporary orders was dismissed on 22<sup>nd</sup> March 2022, and which then meant that the disciplinary action could not be taken against Miriam.
58. The minutes of 10<sup>th</sup> January 2022 of the full Board of the Respondent indicated that Miriam was in attendance and the Board pointed out that the DCI had escalated Miriam’s case to the ODPP to decide whether or not to prosecute Miriam. Another the hearing before the Disciplinary Committee was held on 22<sup>nd</sup> July 2022 when six witnesses appeared in support of the claims of incitement.
57. The court finds that Miriam was invited to the hearing and was given opportunity to ask the witnesses questions. That she was represented member of the union at the hearing who also asked questions. (pg. 5& 7 of minutes of 22<sup>nd</sup> July 2022). Miriam was dismissed from employment thereafter on 27<sup>th</sup> July 2022.
59. Miriam was given the reason for her suspension as incitement. She responded denying the allegations. At the hearing of 22<sup>nd</sup> July 2022, witnesses appeared for her cross-examination and union representatives present were able to present their opinion. Miriam did not allege that she was not taken through disciplinary proceedings but confirmed she was accompanied by union representatives. In the upshot the court holds she was subjected to procedural fairness before the dismissal.

### **Henry**

60. Henry was issued with a show cause letter for absence from duty on 8th March 2021 which he failed to reply to prompting the invite to the first disciplinary hearing vide letter of 9/6/2021. He attended the discipline committee and was asked to provide evidence of his alleged medical condition by producing medical notes. He attended another meeting before the Full Board on 10<sup>th</sup> January 2022,



61. The dismissal letter indicates that Henry attended a disciplinary hearing on 29.5.2021 and the proceedings from the said meeting captured in the minutes of 22<sup>nd</sup> July 2022. There was a union representative in the meeting. The court holds there was procedural fairness in the termination of the employment of Henry.

**Issue b). Whether the grievants are entitled to the reliefs sought.**

62. Claims by Miriam Magozi

e. Payment of terminal dues as follows:

Gratuity Kshs.  $16,755 \times 15 = 251,325$

Unpaid salaries for May, June, July August and September Kshs.  $16,755 \times 5 = 83,775$

**Gratuity**

63. Relying on the decision cited by the Respondent, Board Of Management Ng'araria Girls Secondary School v Kudheihia (2017)eKLR (G.B.M. Kariuki, Sichale, & Kantai, JJ.A)the Court of Appeal held:-

“Section 35(6) of the Employment Act, 2007 disentitles an employee from double payment of Social Security benefit from NSSF and a service pay scheme established under clause 31 of the CBA. However, be that as it may and as rightly held by the trial Judge “... section 35 of the Employment Act 2007 does not preclude parties from entering an agreement for retirement benefits or gratuity over and above the statutory NSSF arrangement”.

But should an employee then benefit from a CBA as well as the NSSF contributions as decreed by the Employment Act.?

In the persuasive authority of the then Industrial Court Case No. 871 of 2012, Rika, J. held as follows:

“This law is intended to ensure employees do not enter into retirement without social security. At the same time, the interest of employers is safeguarded, through the restriction on employees being paid double social security benefits. Service pay is therefore payable under Section 35(5) only to employees who are not covered under the different social security mechanisms elaborated under section 35(6).”

In that case the court found that the claimant was entitled to enter into a CBA and which agreement provided superior terms vis-à-vis the NSSF contributions and further that so as not to unnecessarily punish an employer, the NSSF deductions would be deducted from any benefits accruing in respect of the NSSF contribution.”

64. During the hearing Miriam admitted that NSSF contributions were deducted and no CBA was produced that prove that she was entitled to Gratuity payment.

65. The Appointment letter of 12/2/2007 did not have a provision for payment of gratuity for Miriam to be entitled to the said claim after dismissal. The letter of employment did not refer to any collective bargaining agreement. It was the respondent's case there was no CBA between the parties. The claimant did not file any document as evidence of the CBA. The witness statement referred to a CBA between the Ministry of Education and the Claimant. The court took notice that indeed there used to exist such a CBA. However, from case research the said CBA had since expired as held in *Kenya Union of Domestic, Hotels, Educational Institutions, Hospital & Allied Workers v Ministry of Education* (Industrial Court Cause No 26 of 2009) cited by Justice Ndolo in *Kenya Union of Domestic Workers*,



*Hotels Educational Institutions, Hospital and Allied Workers (Kudheiba) v Cabinet Secretary, Ministry of Science and Technology & 2 others* [2022] eKLR. The court holds that there is no such CBA hence the employment rights of the grievant herein were governed by her employment contract and the Employment Act. The employee was on NSSF and under section 35(6) of the Employment Act. There is no basis for the claim for gratuity. The claim for gratuity fails.

### **Unpaid salaries**

66. There was no indication of which year the salary claimed was payable, and no basis is given. During hearing Miriam claimed, the school stated it had no money from the exchequer and they were sent on leave during the period. submissions are not pleadings and parties are bound by their pleadings.

67. The Respondent pointed the court to cause no., Kakamega ELRC No. 35 of 2023, Kudheiba v Board of Management Lirhanda girls High School, which matter addresses the issue of arrears and which is pending for parties negotiation. Since the issue is for determination before another suit before the court, the same cannot be decided before this court in any event, based on the subjudice rule. The issue will be determined in that suit.

f. Maximum Compensation for loss of employment pursuant to sec.  
Ksh.  $16,755 \times 12 = 201,060$

68. Since the dismissal was justified. Miriam is not entitled to compensation.

g. Unpaid basic pay during the period of suspension from July 2021 to July 2022  
Kshs.  $12,807 \times 12 = 153,684$

69. The Public Service Commission Human Resource Policies and procedures for public servants , 2016, Regulation k7(2) relied on by the Respondent provides that:-

“Suspension

K.7 (2) Where an officer is suspended from the exercise of the functions of his public office, he shall be entitled to full house allowance, medical benefits and no basic salary.

(4) Where disciplinary or criminal proceedings have been taken or instituted against an officer under suspension and such an officer is neither dismissed nor otherwise punished under these regulations, the whole or any salary withheld shall be restored to him upon the termination of such proceedings with effect from the date the salary was stopped.”

70. During the hearing Miriam acknowledged she received her house allowance and medical benefits and since she was eventually dismissed the Court holds that she is not entitled to the unpaid basic salary during the period of suspension.

h. Notice pay as per the CBA between Kudheiba/Ministry of Education  
Ksh.  $16,755 \times 4 = 67,020$

71. Since Miriam was summarily dismissed, she was not entitled to Notice pay. I already held there was no evidence of existence of valid CBA between the parties and if notice pay was due the terms of letter of employment and the Employment Act would apply.

Claims by Henry Shilovele

e. Payment of terminal dues as follows



Gratuity Kshs.  $14,354 \times 15 = 215,310$

Unpaid salaries for May, June, July, August and September

Kshs.  $14,554 \times 5 = 71,770$

### Gratuity

72. From the finding in Board Of Management Ng'araria Girls Secondary School v Kudheiha (supra) during the hearing Henry admitted that his NSSF Contributions were deducted and no CBA was produced that proved that a Gratuity payment was to be paid. The letter of employment did not refer to any CBA. It was the respondent's case there was no CBA between the parties. The claimant did not file any document as evidence of the CBA.
73. Henry in his witness statement referred to a CBA between the Ministry of Education and the Claimant. The court took notice that indeed there used to exist such a CBA. However from case research the said CBA had since expired as held in *Kenya Union of Domestic, Hotels, Educational Institutions, Hospital & Allied Workers v Ministry of Education* (Industrial Court Cause No 26 of 2009) cited by Justice Ndolo in Kenya Union of *Domestic Workers, Hotels Educational Institutions, Hospital and Allied Workers (Kudheiha) v Cabinet Secretary, Ministry of Science and Technology & 2 others* [2022] eKLR. The Court holds that there is no such CBA hence the employment rights of the grievant herein were governed by his employment contract and the Employment Act. The employee was on NSSF and under section 35(6) of the Employment Act.
74. By relying on the PSC Circular PSC/ADM/13/(28) that was titled "Entitlement to Terminal benefits on dismissal", the benefits available to an employee could only be paid to them if they were entitled to the same under their contract, and the same was not awarded by the said circular. The Appointment letter of 2/11/2007 did not have a provision for payment of gratuity for Henry to be entitled to the said claim after dismissal. There were no other retiring awards available to him as per his contract and he could not therefore claim them from a vacuum. During hearing, Henry alleged that previous employees were paid gratuity, but did not provide any proof. The claim for gratuity fails.

### Unpaid salaries

75. There was no indication of which year the salary claimed was payable, and no basis is given. But in the submissions, the period is stated to be in 2020 during the Covid 19 Period. During hearing Henry claimed, that during the said period they worked when called to do so, but were otherwise at home and were not paid any salary.
76. The Respondent pointed the court to Cause No. Kakamega ELRC No. 35 of 2023, Kudheiha v Board of Management Lirhandu girls High School, which matter addresses the issue of arrears and which is pending for parties negotiation. Since the issue is for determination before another suit before the court, the same cannot be decided before this court in any event, based on the subjudice rule.
- f. Maximum Compensation for loss of employment pursuant to Sec.  
 $Ksh. 14,354 \times 12 = 172,248$
76. Since the dismissal was justified Henry is not entitled to compensation.
- g. Unpaid basic pay during the period of suspension from Feb 2021 to July 2022  $Ksh. 14,354 \times 17 = 244,018$ .



77. There was no letter suspending Henry that was produced. Having absconded work, he was not entitled to receive a salary for a period he was not working.

h. Notice pay as per the CBA between Kudheisha/Ministry of Education  
Ksh.14,354 X4=57,416

78. Since Henry was summarily dismissed, he was not entitled to Notice pay. Additionally, the basis of this claim being the CBA relied on by the Claimant was not produced before the court and the court held the CBA cited by Henry in the statement had long expired.

### **Conclusion**

79. The court holds that the termination of the employment of the grievants was lawful and fair. The entire claim fails for reasons given in the judgment. I make no order as to costs.

It is so ordered.

**DATED, SIGNED & DELIVERED IN OPEN COURT AT KAKAMEGA THIS 18<sup>th</sup> October, 2023.**

**JEMIMAH KELI,**

**JUDGE.**

In The Presence Of:-

Court Assistant : Lucy Macheso

For Claimant : Shiraku h/b Kamuye for the union

For Respondent:- Mr. Tarus, Senior State Counsel

