



**Kenya Union of Domestic, Hotels, Educational Institutions and
Hospital Workers (KUDHEIHA) v Shimba Hills Secondary School (Cause
84 of 2019) [2023] KEELRC 2438 (KLR) (12 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2438 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
CAUSE 84 OF 2019
AK NZEI, J
OCTOBER 12, 2023**

**BETWEEN
KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS
AND HOSPITAL WORKERS (KUDHEIHA) CLAIMANT
AND
SHIMBA HILLS SECONDARY SCHOOL RESPONDENT**

JUDGMENT

1. The Claimant sued the Respondent on 15/11/2019 vide a Memorandum of Claim dated 22/10/2019, shown to have been amended on 19/6/2020 by introducing an averment that the Claimant was terminated vide a letter dated 31/1/2018. The amended Memorandum of Claim did not include the reliefs (prayers) part. The rest of the Memorandum of Claim remained as initially filed. In the conventional presentation of pleadings, it would be urged that the initial memorandum of claim ceased to exist once an amended one was introduced. But in its specialized nature and character, this Court cannot ignore a pleading that exists on record. Rule 38 of the Employment and Labour Relations Court (Procedure) Rules is called in aid. The Claimant pleaded that he was employed by the Respondent on 1/6/2007 at Job Group F and worked diligently until his employment was terminated vide a letter dated 31/1/2018.
2. The Claimant pleaded that at the time of the grievant’s (Isaac Nyamasyo’s) termination, the grievant was earning a gross salary of ksh. 13,777. That the termination was unlawful and unfair, was without valid reasons and was in total disregard of Sections 41,43,45 and 49 of the Employment Act and Section 48 of the Labour Institutions Act; and that the grievant was not issued with a certificate of service.
3. The Claimant set out the grievant’s claim against the Respondent as follows:-
 - a. total wage underpaymentksh. 129,230



- b. unpaid salary for January, February and 12 days worked in March 2019.....ksh. 45,310
 - c. maximum compensation for unlawful terminationksh. 226,572
 - d. compensation for off days and public holidays workedksh. 67932
 - e. leave not taken (2017 annual leave).....ksh. 18,881
 - f. two months salary in lieu of notice (CBA Clause 6(ii)).....ksh. 56,643
 - g. declaration that termination of the Claimant’s employment by the Respondent was unfair.
 - h. certificate of service.
4. Other documents filed by the Claimant included the grievant’s affidavit in verification of the claim, filed on 10/8/2022 with leave of this Court, the grievant’s witness statement dated 22/10/2019 and an evenly dated list of documents, listing 12 documents. The listed documents included the grievant’s letter of employment (appointment) dated 23/4/2008, conditions of employment dated 10/1/2008, letter of summary dismissal dated 31/1/2018 and an extract of a Recognition Agreement and CBA between KUDHEIHA (the Claimant) and the Ministry of Education, shown to have been signed in 1986, The Court was not addressed on whether or not the said CBA was still valid.
 5. The Respondent entered appearance on 19/12/2019 and filed a statement of Response on 21/7/2020. The Respondent pleaded that the grievant’s performance of duties was not depended on the Respondent school’s student activities calendar as the school expected the grievant’s duties to be performed even when the students had broken for school holidays.
 6. The Respondent further pleaded that the grievant did not perform his duties diligently, and that on 8/7/2013 and 24/7/2013, the grievant was issued with letters of “professional misconduct” and “irresponsible behavior” respectively, and was on 25/3/2017 called upon to show cause why action could not be taken against him for failing to report on duty for over 3 weeks without permission. The Respondent further pleaded that the grievant absconded duty between 1/11/2017 to 2/1/2018, forcing the Respondent to allocate his duties to other non-teaching staff members.
 7. It was the Respondent’s pleading that vide a letter dated 17/1/2018, the Respondent invited the grievant for a hearing on 31/1/2018 to answer to charges of absenting himself from work, and that the Respondent heard representations from both the grievant and his supervisor, upon which the grievant was summarily dismissed.
 8. The Respondent denied having terminated the grievant’s employment unfairly and further pleaded that the grievant had been unwilling to clear with the Respondent and to hand over; and that the Respondent did not hear from the grievant until 3/5/2018 when it received a letter from the Claimant Union herein.
 9. The Respondent further pleaded that the grievant was earning a consolidated salary of ksh. 18,875 and not ksh. 13,777 as alleged by the Claimant; and called for the grievant’s claim to be dismissed with costs.
 10. Other documents filed by the Respondent included a witness statement of one Job Mwadime dated 11/12/2020 and an evenly dated list of documents; listing documents which included the Respondent’s certificate of registration, the grievant’s application for employment dated 24/1/2007, letter to show cause dated 17/1/2018, minutes of a meeting dated 31/1/2018 and the termination letter dated 31/1/2018, among others.



11. Trial opened on 5/12/2022 when the grievant adopted his filed witness statement and produced in evidence the documents referred to in paragraph 4 of this judgment. Cross-examined, the grievant testified that he was never required to work on Sundays, that he was terminated on 12/3/2018 and that he worked in January and February, though he had testified that he was terminated on 31/1/2018. That his Union advised him not to leave duty until he was issued with a termination letter.
12. The grievant further testified that he had not made a claim for having worked on public holidays, and that his salary as at December 2017 was ksh. 13,777, and not ksh. 18,875 as stated by the Respondent; though he had not exhibited bank statements in that regard despite telling the Court that his salary was being send to his Equity Bank account. Further, the grievant denied having seen the letter dated 17/1/2018 exhibited by the Respondent, asking him to attend a sitting with the Respondent's BOM accompanied by a Union official.
13. The Respondent called one witness, Job Mwadime (RW-1), who adopted his filed witness statement as his testimony and produced in evidence the Respondent's documents referred to in paragraph 10 of this Judgment. The witness testified that he was the grievant's supervisor, and that a disciplinary hearing on the grievant, which the witness (RW-1) attended, was held on 31/1/2018, and that the grievant had been invited to attend vide a letter dated 17/1/2018, which the grievant did not sign. That the grievant was not given a certificate of service because he never cleared with the Respondent School.
14. Cross-examined, RW-1 testified that the letter dated 17/1/2018 was given to the grievant by the Principal's Secretary, and that he had nothing to show that it was given to him. The witness admitted that his name and that of the grievant were not listed in the minutes of the meeting held on 31/1/2018 as having been among those who attended the meeting. That it was stated in the said minutes that the grievant was absent from duty for 92 days while his termination letter stated that he had been absent for 61 days. The witness further testified that he had nothing to show that he had called/telephoned the grievant when he failed to report on duty during the period in issue.
15. Having considered the pleadings filed and evidence presented by parties herein, issues that present for determination, in my view, are as follows:-
 - a. whether termination of the grievant's employment was unfair
 - b. whether the grievant is entitled to the reliefs sought.
16. Before delving into the above stated two issues, it is important to first address the issue of the grievant's gross salary as at the time of his termination. The Claimant pleaded, and the grievant testified that his monthly salary at the time of termination was ksh. 13,777, while the Respondent pleaded and testified that the grievant earned a monthly salary of ksh. 18,875 as at the time of termination. None of the parties addressed the Court on the issue of whether or not the Respondent was issuing the grievant with an itemized pay statement during the period of employment pursuant to Section 20 of the [Employment Act](#).
17. The grievant testified that his salary was being send to his Equity Bank account by the Respondent, but he did not produce in evidence any copies of his bank statement. It was, therefore, the grievant's word against the Respondent's word on an issue as crucial as an employee's salary. It is worth noting that the Respondent filed in Court some unsigned bundle of documents which it alleged were copies of the payroll. On a balance of probability, however, I agree with the Respondent that the grievant earned a monthly salary of ksh. 18,875 as at the time of termination.
18. On the first issue, the Respondent did not demonstrate the validity of the reasons given for the grievant's termination, and did not demonstrate that fair procedure was followed in effecting the



termination. No daily work attendance register was produced in evidence by the Respondent to show absenteeism on the part of the grievant, and nothing was produced pointing to any form of communication between the Respondent and the grievant during the alleged period of absenteeism. Nothing was produced in evidence to back up the Respondent's allegation that the grievant's duties were given to other non-teaching staff during the grievant's alleged absence from duty.

19. Further, procedural fairness in effecting termination of the grievant's employment was not demonstrated. Section 41 of the *Employment Act* was not shown to have been complied with. The alleged show cause letter dated 17/1/2018 was not shown to have been served on the grievant, and the grievant was not shown to have been given an opportunity to formally respond to the accusations allegedly levelled against him. Although RW-1 alleged that the alleged show cause letter dated 17/1/2018 was given to the grievant by the Principal's Secretary though he did not sign in acknowledgement, the alleged secretary was not called to give evidence in that regard.
20. Further, the alleged letter dated 17/1/2018, which the grievant denied seeing or receiving, purported to combine a show cause letter and an invitation to attend a disciplinary hearing. I have severally said, and I repeat it here, that a show cause letter, which is a statement of accusation or charge sheet, should never be combined with a notice to attend a disciplinary hearing. The two are different, and they serve different purposes. The show cause letter issues first, and an employee is given an opportunity to formally respond to the accusations within a reasonable time. It is only after the time given to respond lapses that an employee should be invited for a disciplinary hearing, with reasonable time being given to him to prepare for the hearing and to get a witness if he wishes to call one. Anything short of this is unfair. I recently stated as follows in *Zablon Nyambane Okwoyo v Bank Of Africa* [2023] eKLR:
 - “ 18. A charge sheet in labour laws is a memorandum of charges (acts and omissions alleged to have been committed by the employee) and consists of allegations and facts which the person issuing it wishes to establish against the employee.

A formal charge sheet (formal accusation) of alleged misconduct, negligence (acts of omission) in labour laws seeks to fulfil one of the basic principles of natural justice that a fair and reasonable opportunity of being heard must be given to a person alleged to have misconducted himself or committed a breach of the law or set regulations.
 34. Further, in my view, a show cause letter setting out charges levelled against an employee ought not to be combined with a disciplinary hearing notice. The two serve different purposes, and should be issued separately, each giving the employee adequate time to deal.”
21. I find, hold and declare that termination of the Claimant's employment was procedurally and substantively unfair. It was held as follows in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR:-
 - “...for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination.”
22. Section 41 of the *Employment Act* address the procedure, while Sections 43 and 45(2) address validity and/or justification for the termination.



23. On the second issue, and having found that termination of the Claimant's employment was unfair, I award the grievant the equivalent of eight months salary being compensation for unfair termination of employment, that is ksh. 18,875X18 = 151,000.
24. The claim based on alleged underpayment was not proved, and is declined. Further, this claim was not specifically pleaded and was not particularized in the Claimant's memorandum of claim, either as initially filed or as amended. It only appeared on the reliefs part of the memorandum of claim as initially filed. For a claim to be proved by evidence, it must have been pleaded. Evidence or submissions that are not based on pleadings serve no purpose.
25. The claim for ksh. 45,310 being salary for January, February and 12 days worked in March 2018 is allowed. The dismissal letter dated 31/1/2018 is not shown to have been served on the grievant until 12/3/2028. The grievant testified that he worked upto that date. That evidence was not rebutted by the Respondent.
26. The claim based on work allegedly done on off days and public holidays was neither pleaded, particularized nor proved. The same is declined. The claim based on allegedly untaken leave was also neither pleaded nor proved, and is declined.
27. The claim for three months' salary in lieu of notice was not proved, and the grievant is awarded ksh. 18,875 being one month salary in lieu of notice pursuant to Section 35(1) (c) of the Employment Act.
28. In sum, and having considered written submissions filed herein, judgment is hereby entered for the Claimant against the Respondent for:-
 - a. Compensation for unfair termination of employmentksh. 151,000
 - b. Unpaid salary for January, February 2018, and 12 days worked in March 2018.....ksh. 45,310
 - c. One month salary in lieu of notice.....ksh. 18,875

Total ksh. 215,185
29. The Respondent will issue the grievant with a certificate of service pursuant to Section 51(1) of the Employment Act within thirty days of this judgment.
30. The Claimant is awarded costs of the suit and interest at Court rates.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 12TH OCTOBER 2023

AGNES KITIKU NZEI

JUDGE

ORDER

This Judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of the applicable

Court fees.

AGNES KITIKU NZEI

JUDGE

