



REPUBLIC OF KENYA



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Mbogo v Board of Management Gatero Girls Secondary School (Cause 09 of 2015) [2023] KEELRC 2385 (KLR) (5 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2385 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE 09 OF 2015
DN NDERITU, J
OCTOBER 5, 2023

BETWEEN

DOMINIC KIBIRA MBOGO CLAIMANT

AND

THE BOARD OF MANAGEMENT GATERO GIRLS SECONDARY SCHOOL RESPONDENT

JUDGMENT

1. In a statement of claim dated 17th January, 2015 filed through Gakuhi Chege & Co Advocates the claimant prays for: -
 - i. A declaration that the claimant's suspension from employment is unfair and unprocedural.
 - ii. An order for payment to the claimant of all the withheld salary dues from April, 2014 to date less statutory deductions.
 - iii. An order for claimant's unconditional reinstatement to the employment of the Respondent
 - iv. Costs of the cause
 - v. Any other or better relief deemed fit by the honourable.
2. Together with the statement of claim was filed a verifying affidavit, a statement by the claimant, and a list and bundle of the listed documents in support of the claim.
3. On 19th March, 2015 the respondent entered appearance through Hon. Attorney General and filed a response to the claim on 30th March, 2015. In the said response the respondent prays that the claimant's cause be dismissed with costs for want of merits.
4. The claimant filed a reply to the response on 28th April, 2015 reiterating the contents in the statement of claim.



5. In addition to the response to the claim the respondent filed a witness statement by John Mwangi (RW1) who testified as the only witness for the respondent. A list of documents and copies of the listed documents was also filed by the respondent.
6. This cause came up for hearing in open court on 18th July, 2022 when the Claimant (CW1) testified and closed his case. The defence was heard on 23rd January, 2015 with RW1 testifying and the respondent's case was closed.
7. Counsel for the claimant, Mr. Chege, addressed and summed up his client's case by way of written submissions filed in court on 9th February, 2023. Counsel for the respondent, Miss Shirika, did not file any submissions or at least no submissions are found in the file for the respondent.

II.The Claimant's Case

8. The claimant's case is expressed in the statement of claim, the oral and documentary evidence of the Claimant (CW1), and the written submissions by his Counsel and the same is summarized as hereunder.
9. In his statement of claim, the Claimant pleaded that he was engaged by the Respondent as a groundman in 1993 and was confirmed permanent and pensionable vide a letter dated 5th May, 1994.
10. On 17th April, 2014 the claimant was suspended from duty on allegations of laziness and laxity and that he could only work under strict supervision which supervision the respondent had no means of enforcing. He was directed to report back on 8th May, 2014.
11. He alleges that when he reported back on 8th May, 2014 as directed he met with the chair, secretary, and one member of the respondent and they insisted that he was to write a letter of resignation. He states that he refused to hand in the letter of resignation as a result of which he was told to go home after which the respondent did not contact him again.
12. On 8th August, 2014 the claimant instructed his counsel on record to write to the respondent demanding that the indefinite suspension be lifted and that he be paid salary arrears and other due allowances. He states that the respondent did not respond to this demand but on 10th November, 2014 the respondent wrote to him demanding an explanation in regard to the allegations contained in the suspension letter of 17th April, 2014.
13. The claimant pleads that the indefinite suspension is unfair and unlawful and the same amounts to wrongful, unfair, and unlawful dismissal. It is for the foregoing reasons that the claimant filed this cause in court on 19th January, 2015 seeking for the reliefs stated above.
14. He produced in court his pay-slip for the months of December, 2013 confirming that his gross pay as at the time of the indefinite suspension was Kshs.10,625/= but the pay-slip for January, 2014 indicates his gross salary as Kshs.8,275/=. No explanation has been offered for this disparity. The pay-slip for April, 2014 shows that he was paid nothing for that month. He states that from there on the respondent refused to pay his monthly salary, not even half pay while he was on suspension, and he cites the non-payment of salary as confirmation of the pleaded constructive dismissal.
15. In his oral testimony in court on 18th July, 2022 the claimant reiterated the foregoing contents of the statement of claim as restated in his filed statement and produced the filed documents as exhibits 1 to 4. He stated that he worked for the respondent for over 20 years and yet the respondent thanklessly dismissed him wrongfully, unfairly, and unlawfully without affording him due process and for no lawful reason(s).



16. He alleged that the principal, Mrs. Mundia, who was posted to the school in 2013 hated him for no apparent reason and that she wanted him out to employ a person of her choice. He stated that he had served under four other principals before Mrs. Mundia and that he had no disciplinary issues for all that time.
17. In cross-examination the claimant stated that he was born in 1961 and displayed his National identity card as requested by counsel for the respondent. He therefore stated that had he not been unlawfully terminated he would have worked till his retirement age of 60 years by 2021. Other than the letter of suspension, the claimant denied receiving any other correspondences from the claimant before and after the suspension. He insisted that he was not heard by the respondent on 8th May, 2014 or any other time or at all. He reiterated that on this date he reported back to work but met with the chair, secretary, and one member of the Respondent who demanded from him to tender a letter of resignation a demand that he declined to comply with as he considered the same unfair and unlawful.
18. It is on the basis of the foregoing that the claimant is seeking for the reliefs recited above. The submissions by his counsel shall be considered in the succeeding parts of this judgment.

III. The Respondent's Case

19. The respondent's case is expressed in the response to the claim and the oral and documentary evidence adduced through RW1 and the respondent's case is summarized as hereunder.
20. In the filed response to the claim the respondent denies all the allegations levelled against it by the claimant and more so that it is liable for the alleged unfair and unlawful termination or wrongful dismissal of the claimant from employment. It is pleaded that the claimant, on 8th May, 2013 when he was invited to the meeting with members of the respondent, expressed his displeasure on the working conditions that he had been subjected to. It is pleaded that the respondent gave the claimant a chance to put his grievances in writing but instead of so doing the claimant allegedly went away never to return to the school.
21. It is the respondent's case that the claimant was not dismissed or terminated but he deserted duty from 8th May, 2013 after failing to hand-in his written explanation as requested by the respondent in the meeting held on that date. It is pleaded that the suspension was fair and lawful and the same was allegedly lifted on 8th May, 2013. The respondent pleaded that the claimant was never terminated but he opted to desert duty hence terminating his own services without notice.
22. In his testimony on 23rd January, 2023 RW1 stated that he is a former chair of the respondent and confirmed that the claimant was its employee and that as at the time he left the service of the respondent in 2018 the claimant was on suspension awaiting disciplinary action. He alleged that the claimant had a bad disciplinary record and that he had been issued with several warning letters.
23. RW1 alleged that during the executive meeting of the respondent on 8th May, 2014 the claimant expressed his desire to retire and that he was directed to put his request in writing but he left and never came back. He alleged that after 14 days of desertion the claimant was declared a deserter and the position was open for filling with another employee. Without any substantiation RW1 claimed that the claimant was given a fair hearing and subjected to due process.
24. In cross-examination RW1 confirmed that the claimant was not issued with a notice of termination. He alleged that the claimant was invited for a disciplinary hearing on 26th February, 2015 but he did not avail minutes for the alleged meeting.



25. In response to a question by the court on what efforts the respondent made to trace the claimant after he allegedly deserted duty, RW1 claimed that several letters were written to the claimant to report back to work but RW1 did not avail any of the alleged letters.
26. It is on the basis of the foregoing that the respondent has prayed that this cause be dismissed with costs.

IV. Issues For Determination

27. Upon thorough and careful examination and consideration of the pleadings filed, the oral and documentary evidence tendered from the Claimant and RW1, and the submissions by counsel for the claimant, the court identifies the following issues for determination –
 - a. Was the Claimant unfairly and unlawfully terminated or wrongfully dismissed by the Respondent or did he desert duty?
 - b. Is the Claimant entitled to the reliefs sought in the claim?
 - c. Who meets the costs in this cause?

V. Dismissal/termination

28. The terms of engagement of the claimant by the respondent are not in dispute. The claimant was engaged by the respondent as a groundman in 1993 and worked as such until 17th April, 2014 when he was suspended from duty. His last undisputed paid gross salary is that of Kshs.8,275/= for January, 2014 although the gross salary for December, 2013 was Kshs.10,625/=. It is in the considered opinion of this court that in calculating any dues that may be payable to the claimant this court should and shall indeed apply the higher gross salary as the same is a more favourable term to the claimant, the employee. It is the finding and holding of this court that the inferior gross pay for January, 2014 must have been as a result of deductions that were not explained by either party but there is no way that the gross salary of the claimant could have decreased without any explanation from the respondent whatsoever.
29. The parties disagree as to what happened after the suspension. The claimant asserts that when he attended the executive meeting of the respondent on 8th May, 2014 he was put under pressure to write a letter of resignation. He adamantly refused to comply and as a result he was sent home on indefinite suspension. He testified that he did not hear from the respondent again and his salary was not paid from that point. He states that he was never called for a hearing and as such the indefinite suspension coupled with non-payment of the salary amounted to constructive dismissal which in his view under those circumstances justified his filing of this claim in court.
30. On the other hand, the respondent pleads and proffers through RW1 that it is the claimant who offered to resign but refused to hand in the letter of resignation. However, the respondent through RW1 alleges that on 8th May, 2014 when the claimant appeared before the executive committee of the respondent he was required to explain in writing why he was not performing his duties as expected. This departure and disparity points towards insincerity on the part of the respondent as to what exactly happened.
31. RW1 stated that after 14 days of the alleged desertion by the claimant the respondent decided to fill the vacancy that had been created by the claimant. In the same breath he alleged that the claimant was given a fair hearing in a disciplinary hearing held on 3rd March, 2015. If the respondent had decided to fill the vacancy in May, 2014 what purpose was the alleged hearing of March, 2015 to serve? Further, the respondent did not avail the minutes of the alleged disciplinary hearing.
32. No letter of dismissal or for lifting of the suspension has been availed by the respondent and the only logical conclusion and holding that this court should arrive at is that the respondent sent the claimant



on indefinite suspension from 8th May, 2014. It is hypocritical on the part of the respondent that in a letter dated 10th November, 2014 it purported to remind the claimant to explain his unsatisfactory performance at work yet RW1 confirmed in his testimony in court that upon expiry of 14 days from 8th May, 2014 the respondent decided to fill the vacancy. Curiously, in this letter of 10th November, 2014 the respondent does not mention that the claimant had offered to resign. To compound and further confirm the insincerity on the part of the respondent it had by 10th November, 2014 received the demand letter by the claimant's counsel which it refused and or neglected to respond to, yet the same is not mentioned at all.

33. The claimant had served the respondent for over 20 years and he was at the risk of losing all his pension and other benefits if he walked away from the employment. For whatever reason the respondent appears to have been determined to kick out the claimant by all means possible. It is the respondent who constructively dismissed and terminated the claimant for placing him on indefinite suspension and failing and refusing to pay his monthly salary. In any event, the respondent failed, refused, and or neglected to subject the claimant to due process both in substance and procedure.
34. This court comes to the logical and reasonable conclusion and holds that the respondent unfairly and wrongfully dismissed the Claimant without notice and without affording him both substantive and procedural fairness as envisaged by the law under Sections 41, 43, 45, and 47 of the *Employment Act* (the Act).
35. Counsel for the claimant has correctly submitted on the above cited provisions in buttressing the argument that the dismissal was completely unfair and unlawful. No notice of termination was issued and the claimant was not subjected to disciplinary hearing as envisaged under the Act, Article 47 of the *Constitution*, and Sections 4 to 6 of the *Fair Administrative Action Act*.
36. The following authorities - *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR, *Jane Nyandiko v Kenya Commercial Bank* (2017) eKLR, and *Pamela Nelima Lutta v Mumias Sugar Co. Ltd* (2017) eKLR in my view support the claimant's case that he was wrongfully dismissed when the respondent decided to fill the vacancy and constructively by placing him on indefinite suspension and failing to pay his monthly salary.
37. Counsel for the claimant has cited *Coca Cola East & Central Africa Limited v Maria Kagai Ligaga* (2015) eKLR on constructive dismissal and the court agrees that by its conduct the respondent unfairly and unlawfully terminated the claimant.
38. This is rather a straight forward matter which in my view the respondent should have settled without waiting to be sued in court. There is no iota of evidence that the claimant was engaged in the alleged misconduct and there is no evidence that he was subjected to a disciplinary hearing. Is that not the hallmark of an unfair and unlawful dismissal? As long as matters such as this one keeps on coming to court, with the party obviously and clearly in the wrong failing and or refusing to settle the matter at the earliest, it will be rather difficult for our courts to deal with and eliminate the backlog of cases in their portfolio.
39. The court has said enough in demonstrating that the claimant's dismissal was wrongful, unfair, and unlawful. This is so because no notice of termination was served upon the claimant and he was not subjected to due process. It is so held and declared.



VI. Reliefs

40. Having held that the Claimant was wrongfully, unfairly, and unlawfully dismissed for lack of notice, substantive, and procedural fairness, this court shall now consider each of the reliefs sought as hereunder.
41. Prayer (i) is for a declaration that the indefinite suspension of the claimant from work by the respondent is unfair and un-procedural. As noted above the prolonged suspension ultimately resulted in wrongful, unfair, and unlawful dismissal. Without reproducing what has already been concluded in the foregoing parts of this judgment it is hereby declared that the prolonged suspension of the claimant and the resultant dismissal was unfair, un-procedural, and unlawful.
42. Prayer (ii) is for an order of payment of all withheld salary from April, 2014 to date (presumably date of filing the cause). According to a letter by the respondent dated 10th November, 2014 the claimant was still its employee as at that time. There was no notice of termination issued. Yet no salary was paid to the claimant as from April, 2014. In the interest of justice and fairness, this court shall presume that the respondent, as testified by RW1, dismissed the claimant 14 days after the suspension when it decided to fill the vacancy. The letter of 10th November, 2014 was clearly a dishonest attempt by the respondent to cover up and sanitize the injustice that it had visited upon the claimant.
43. In the circumstances, the court shall combine prayers (ii) and (v) and award the claimant one month's salary in lieu of notice and compensation for the wrongful, unfair, and unlawful dismissal. In regard to the notice pay the claimant is awarded Kshs.10,625/= based on the pay-slip for December, 2013. The claimant worked and was in employment of the respondent for the month of April, 2013 and he is awarded the unpaid salary in the sum of Kshs.10,625/=.
44. In regard to reinstatement, the court notes that it is not possible for this court to order reinstatement for three reasons. One, the parties have not expressed interest in working together again. Two, the claimant is over 60 years of age and he now cannot be engaged as he should be retired. Three, the period of three years within which the court may order reinstatement is long gone.
45. On compensation, this court has carefully considered the factors provided for under Section 49(c) of the Act. The claimant worked for the respondent for over 20 years and had only three years to retire as at the time of the dismissal. He had no time or opportunity left to look for work and it must have been very painful and frustrating for him to be wrongfully, unfairly, and unlawfully dismissed in the manner that it happened without any terminal benefits or pension. It is sad that after serving the respondent for that long the respondent did not deem it fit to voluntarily pay to him his terminal dues.
46. For all the above reasons, this court takes and holds the view that this is an appropriate case for award of the maximum compensation under Section 49(1)(c) of the Act. The claimant is awarded as follows – Kshs.10,625/= * 12= Kshs.127,500/=. This amount is subject to statutory deductions.

VII. Costs

47. Costs follow the event and therefore the Claimant is awarded costs of this cause.

VIII. Disposal

48. In final disposal of this cause, this court issues the following orders: -
 - a) A declaration be and is hereby issued that the indefinite suspension of the claimant and the subsequent dismissal was wrongful, unfair, and unlawful.



- b) The claimant is awarded a total of Kshs.148,750/= made up as follows –
- i. Salary arrears for the month of April, 2014 Kshs. 10,625/=
 - ii. Salary in lieu of noticeKshs. 10,625/=
 - iii. Compensation for wrongful, unfair, and unlawful dismissalKshs.127,500/=
- TotalKshs.148,750/=
- c) Costs of the cause to the claimant.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 5TH DAY OF OCTOBER, 2023.

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DAVID NDERITU
JUDGE

