



**Evans Nyamira Bichanga v Board of Management Nyaturago High School
(Cause 168 of 2018) [2022] KEELRC 1774 (KLR) (29 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1774 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 168 OF 2018**

**S RADIDO, J
JUNE 29, 2022**

BETWEEN

EVANS NYAMIRA BICHANGA CLAIMANT

AND

BOARD OF MANAGEMENT NYANTURAGO HIGH SCHOOL . RESPONDENT

JUDGMENT

1. Evans Nyamira Bichanga (the claimant) was employed as a school driver on August 6, 2015 by the board of management, Nyanturago High School (the respondent).
2. On January 3 January, the secretary of the respondent requested the district mechanical engineer, Homa Bay, to conduct a suitability test to determine whether the claimant was fit to drive a school bus.
3. The district mechanical engineer conducted the test and issued a report on January 12, 2018.
4. The report indicated that the claimant was not suitable to serve as a government vehicle driver at the time of employment in 2015 because he lacked a Kenya Certificate of Secondary Education Certificate, a first aid certificate, and a suitability certificate.
5. The report further indicated that at the time of the test in 2018, the claimant still lacked a Kenya Certificate of Secondary Education qualification and first aid certificate. According to the report, the certificates were part of the requirements to drive a government vehicle.
6. On January 19, 2018, the respondent advertised for the position of school driver, and on January 29, 2018, it issued a show-cause notice to the claimant.
7. The allegation was desertion of duty. The claimant was requested to report on duty by February 31, 2018 (probable should have been January 31, 2018) or consider his contract no longer valid.



8. The claimant sought legal advice, and his advocates wrote to the respondent on February 21, 2018, contending unfair termination of employment (the respondent did not reply to the demand).
9. The claimant, after that, moved the court on April 18, 2018, alleging unfair termination of employment.
10. The respondent filed a response on August 27, 2018, and the claimant filed a Reply to the response on September 4, 2018.
11. The cause was heard on March 22, 2022, when the claimant testified and May 5, 2022, when the respondent's secretary testified.
12. The claimant filed his submissions on May 26, 2022, and the respondent on June 17, 2022.
13. The court has considered the pleadings, evidence, and submissions.

Unfair termination of employment or repudiation of contract?

14. Section 35(1)(c) of the *Employment Act*, 2007 requires an employer to issue a written notice of termination of employment. However, before deciding to terminate, section 41 of the Act obligates the employer to allow the employee to make representations.
15. Sections 43 and 45 of the Act place an obligation on the employer to prove the validity and fairness of the reasons for terminating an employment contract.
16. The respondent advertised for the position then held by the claimant on January 19, 2018, before it issued the notice to show cause dated January 29, 2018.
17. The respondent also gave the claimant an ultimatum to resume work or consider himself out of a job.
18. Since it is the respondent who asserted that the claimant deserted work, it was under an obligation to show that the claimant had left employment with an intention not to return at all (see *Société Générale, London Branch v Geys* (2012) UKSC 63).
19. The respondent advertised the claimant's position before the ultimatum it had given him had expired.
20. The respondent did not allow its ultimatum to run its course. It did not demonstrate in court where and how it formed a conclusion that the claimant would not resume work by its set deadline. Its conduct signalled that it had taken the penultimate decision to separate from the claimant.
21. The court finds that the respondent's conduct and decision were not in accord with justice and equity as contemplated by section 45(4)(b) of the *Employment Act*, 2007.
22. Having arrived at the conclusion above, the court does not find it necessary to examine the effect of the claimant's suitability test as a factor in the separation.

Reinstatement

23. The claimant did not place before the court any evidence that he had fulfilled the requirements to drive a government vehicle, and the court finds that reinstatement would, therefore, not be appropriate.

Compensation

24. The claimant served the respondent for about 3 years and in consideration of the length of service, the court is of the view that the equivalent of a 2-months' salary as compensation would be appropriate (monthly salary was kshs 12,000/-).



Salary in lieu of notice

25. The court also awards the claimant 1-month pay in lieu of notice.

Certificate of service

26. A Certificate of service is a statutory entitlement, and the respondent should issue one to the claimant.

Conclusion and orders

27. The court finds and declares that the respondent unfairly terminated the claimant's employment and awards him:

- i. Compensation kshs 24,000/-
 - ii. Pay in lieu of notice kshs 12,000/-
- TotalKshs 36,000/-

28. The respondent to issue a Certificate of service within 21-days.

29. No order on costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 29TH DAY OF JUNE 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For claimant Ochoki & Co Advocates

For respondent Ms Osebe, litigation counsel, office of the Attorney General

Court assistant Chrispo Aura

