



**Kenya Union of Domestic, Hotels, Educational Institutions and Hospital
Workers v Board of Management Friends College Kaimosi (Cause
102 of 2021) [2022] KEELRC 3990 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3990 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
CAUSE 102 OF 2021
JW KELL, J
SEPTEMBER 22, 2022
FORMERLY KISUMU ELR CAUSE NO. E037 OF 2021

BETWEEN

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS
AND HOSPITAL WORKERS CLAIMANT**

AND

BOARD OF MANAGEMENT FRIENDS COLLEGE KAIMOSI RESPONDENT

JUDGMENT

Issue : Unlawful and unfair termination of employment Grievant: Evans Mwandih.

1. The claimant, a trade union registered in the Republic of Kenya to represent domestic, hotels, educational institutions and hospital workers filed a claim dated March 15, 2021 and received in court on the April 14, 2021, on behalf of the grievant, Evans Mwandih, against the respondent seeking the following reliefs:-
 - a. Order of reinstatement of the claimant and payment of all benefits for the period the grievant has been out of employment.
 - b. Payment of terminal dues as follows:-
 - i. Maximum compensation for loss of employment
 - ii. Gratuity for the two years served
 - iii. Compensation for all the public holidays served
 - iv. Compensation for annual leaves not taken



- v. Compensation for house allowance
 - vi. Compensation for overtime worked during period of employment
 - vii. Compensation for paternity leave not taken by Musita
 - viii. Compensation for all underpayments during the period of service
 - ix. Salary arrears if any
 - x. Payment in lieu of notice
 - xi. Certificate of service
 - xii. Costs of the suit
 - xiii. Any other relief the court deems fit
2. In addition, the claimant filed together with the statement of claim verifying affidavit of Thomas Mboya, the branch secretary, the claimant's list of witnesses, witness statement of Evans Mwandih, the claimant's list of documents and the bundle of documents.
 3. The claim is opposed by the respondent who filed reply dated May 13, 2021 to the statement of claim together with respondent's list of documents dated May 13, 2021 and the bundle of documents therein.

Hearing and Evidence

4. The case for both parties was heard on the May 11, 2022.
5. The claimant's witness of fact, Evans Mwandih, testified on oath as CW1 by adopting his written statement dated August 1, 2019 and filed in court on the April 14, 2021 as his evidence in chief and produced documents under his list of documents dated March 1, 2021 marked as claimant's exhibits numbers 1 to 14. CW1 was cross-examined by Senior State Counsel, Mr Tarus, for the respondent and on re-examination the claimant closed its case.
6. The respondent called as its witness of fact, Hesborn Ehaji , finance officer of the respondent who testified on oath as RW1 and adopted his witness statement dated March 15, 2022 and filed in court on the March 17, 2022. RW1 produced respondent's documents under list of documents dated May 13, 2021 marked as exhibits K1 to K12. RW1 was cross-examined by the representative of the claimant, Mr Kamuye and after re- examination the respondent closed its case.
7. The court directed the parties to file written submissions after the hearing. The claimant's written submissions drawn by Justin Wainungu Kamuye for the claimant are dated June 3, 2022 and filed in court on the June 28, 2022. The respondent's written submissions drawn by Gilbert Tarus, Senior State Counsel for the Hon Attorney General are dated June 21, 2022 and filed in court on the June 23, 2022.

The claimant's case

8. The claimant submits that the dispute was formalised, went through all necessary procedures until issuance of a certificate of disagreement by the Vihiga County Labour Officer. That the process for termination of the grievant was unfair , unlawful and against the spirit of natural justice, existing labour practices and the collective bargaining agreement between the parties hence he is entitled to compensation and the other prayers sought.



The respondent's case

9. The respondent's case is that the grievant was lawfully terminated after hearing by the college senior management committee on the February 1, 2019 and later by the full board meeting where he was given opportunity to defend himself on the allegations levelled against him where he was found guilty of negligent of duty and his services were then terminated. The respondent produced evidence in support of its position that the claimant was not entitled to any of the reliefs sought.

Determination

Issues for determination

11. The claimant addressed the question as to whether the claimant was entitled to the following reliefs namely:-
- i. Maximum compensation for loss of employment.
 - ii. Payment of gratuity for the number of years worked.
 - iii. Payment in lieu of notice.
 - iv. Certificate of service.
 - v. Costs.
 - vi. Any other relief the court deems fit.
12. The respondent in its written submissions identified the following as the issues for determination:-
- i. Whether the termination followed the due process.
 - ii. Whether the termination was valid and fair.
 - iii. Whether the claimant should be reinstated back to employment .
 - iv. Whether the claimant is entitled to dues particularized in paragraph 2(i-xii) of the prayers.
13. The court having heard the case by both parties and considering the issues addressed by the parties in their written submissions is of the considered view that the issues placed before it by the parties for determination of the dispute are as follows:-
- a. Whether the termination of the employment of the grievant was lawful and fair.
 - b. Whether the claimant is entitled to reliefs sought.

SUBDIVISION - a. Whether the termination of the employment of the grievant was lawful and fair

The relevant law

14. Section 43 of the *Employment Act* addresses proof of reason for termination as follows:-
- “(a) in any claim arising out of termination of 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.



- (b) The reasons or reasons for termination of contract are the matters that the employer at the time of termination of the contract genuinely believe to exist and which caused the employer to terminate the services of the employee.”
15. Section 44 (4) of the [Employment Act](#) provides for justifiable and lawful grounds for dismissal from employment, *inter alia* if:-
- (a) Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of work,
 - (b) During working hours, by becoming or being intoxicated and employee renders himself unwilling or incapable to perform his work properly,
 - (c) an employee willfully neglects to perform any work which it was his duty to perform or if he carelessly and improperly performs any work which was his duty under his contract to have performed.....”
16. Section 45 (2) of the [Employment Act](#) provides that a termination of employment by an employer is unfair if the employer fails to prove:-
- a. The reason for the termination is a fair reason:-
 - i. Related to the employees conduct, capacity or compatibility or
 - ii. Based on the operational requirements of the employer.
17. Section 46 of the [Employment Act](#) provides for reasons that do not constitute fair reasons for dismissal.
18. Section 47(5) of the [Employment Act](#) provides for burden of proof in claims for wrongful dismissal as follows:
- “
- “(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.”
- Thus the obligation of the employee is discharged upon proving wrongful dismissal has occurred and the burden then shifts to justify the grounds of termination.
19. Section 41 of the [Employment Act](#) provides for procedural fairness as follows:- ‘41. (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 this explanation.”
20. The claimant pleaded that the formal process was followed until issuance of a certificate of disagreement by Vihiga County Labour Officer. That on the July 26, 2019 the claimant wrote to the management of the respondent requesting for a meeting to discuss the grievant’s case under clause No 6 subsection (b) of the current CBA with the management but the management through its letter dated July 12, 2019 claimed that the board had final authority hence no meeting could be possible.



The court looked into Clause 6 of the CBA(Appendix 13 of the claimant’s exhibits) and noted that it concerns acting allowance hence not relevant to the instant case.

21. The claimant submits that the action of the respondent amount to unfair labour practice. During his testimony the grievant adopted his statement dated August 1, 2019 and filed in court on the April 14, 2021. In the statement the grievant said the union was not invited to listen to his case.

The respondent’s position.

22. RW1 produced exhibit ‘K7’ being the letter of termination of employment of the grievant dated May 13, 2019 in which the grievant was summarily dismissed from employment following full Board of Governors meeting held on the March 30, 2019 where the grievant had been invited and appeared represented by Felix Khalwale , the shop steward.
23. The termination of employment letter gave reason of the termination as follows:- ‘ You willfully neglected to perform your duties carefully and properly as was expected of you by failing to diligently inspect the college bus KBJ 241U on the January 19, 2019 when it was being driven out. Your negligence occasioned loss of college food stuffs (one bag of beans and one of maize) which were pilfered’.
24. The letter further states that, ‘This amounts to gross misconduct which is a justifiable ground for summary dismissal in accordance with section 44 of the *Employment Act*’.
25. During cross-examination, CW1 admitted that he was the watchman at the school gate on the January 19, 2019 when the bus exited and the maize and beans were lost. CWI told the court that he checked the bus and only saw the driver and students. CWI admitted that he was called to the board for discipline where he explained himself and was found guilty.
26. RW1 produced the minutes of the disciplinary meeting of March 30, 2019 (K6) where it is indicated that in attendance was among others the grievant, Mr Evans Mwandishi, and Mr Felix Khalwale stop steward (KUDHEIHA) (the claimant). It is also stated that the grievant admitted to gross negligence of duty and it was resolved he be summarily dismissed.
27. RW1 on cross examination reiterated same reason for termination under the letter(K7) and said this was a summary dismissal.

The court determination

28. Considering the evidence by both parties, the court finds that there were valid reasons for the summary dismissal of the grievant from employment of the respondent as stated in the letter of termination of employment dated May 13, 2019 (K7) and as reflected in the disciplinary hearing minutes of March 30, 2019 (K6). The court finds the employer complied with the provisions of section 43 and 45 of the *Employment Act* on the validity and justification of the reasons for the termination of the employment of the grievant.
29. The court further finds that the reasons for termination of negligence falls under the provisions of section 44(4) (c) of the *Employment Act* which states, ‘ An employee willfully neglects to perform any work which it was his duty to perform or if he carelessly and improperly performs any work which was his duty under his contract to have performed.....’
30. The court finds there was procedural fairness as the letter of termination disclosed the grievant was invited for hearing and was accompanied by the shop steward and this is reflected in the minutes for the disciplinary hearing held on the March 30, 2019 (K6). During cross examination of RW1 the



representative of the union did not challenge this position. CW1 on the other hand admitted he was invited for hearing and appeared before the employer disciplinary committee before the termination was effected.

31. The court was satisfied that the process followed in the termination of the employment of the grievant met the mandatory requirements of procedural fairness as stated under section 41 of the *Employment Act*. The employee was explained in a language they understood the reasons for which the employer was contemplating termination of the employment and given opportunity to make their case and was accompanied by the shop steward at the hearing (exhibits K6 and K7).
32. The court finds that the employer received the appeal by the grievant and the same was considered and communicated to the grievant vide letter dated July 8, 2019 (appendix 10). The appeal was rejected as no new evidence was presented.
33. Consequently, the court finds and determines that the termination of the employment of the grievant was lawful and fair.

SUBDIVISION - b. Whether the claimant is entitled to reliefs sought.

a. Order of reinstatement of the claimant and payment of all benefits for period the claimant has been out of employment

34. The court having found that the termination of the employment of the grievant was lawful and fair, the order or reinstatement is not available and the same is disallowed.

b .prayer for payment of terminal dues as follows:-

i. Maximum compensation for loss of employment

35. The claimant submits that the termination procedure was unfair considering the termination letter issues to the grievant by the employer was dated May 13, 2019 and the same backdated the date of the termination to be effective April 1, 2019 contrary to the negotiated CBA.
36. The court finds that the claimant is entitled to notice pay in lieu of the backdated summary dismissal date.
37. The court having found that the termination of the employment of the grievant was lawful and fair, the order for compensation is not available and the same is disallowed.

Gratuity for the two years served

38. During the hearing the claimant amended this prayer to state that CW1 worked for 9 years and stating that it was an error in the prayer on number of years worked. CW1 told the court that worked from April 1, 2010 to April 1, 2019. The court finds the correction of the error on years served from 2 under the prayer to 9 years is justified.
39. The claimant stated that the grievant was entitled to gratuity under clause 30 of the CBA. RW1 during cross-examination told the court gratuity was only payable to staff in good standing. On further cross-examination RW1 admitted there was no exemption under clause 30 of the CBA.



The response

40. On re-examination RW1 stated that the CBA applies from 2017 to 2019 when the grievant was dismissed. As at time of dismissal the grievant had worked for 3 years. RW1 admitted that termination was not an exemption to payment of gratuity.

Court determination

41. The Collective Bargaining Agreement (CBA)(appendix 13) between the parties was effective from July 1, 2017 to remain in force upto June 30, 2019 (clause 44). RW1 admitted that the grievant had served 3 years within the CBA. The CBA is a binding agreement between the parties.
42. Clause 30 of the CBA states as follows:- ‘payment of service gratuity for the employees employed by the Board of management who retires shall be paid at the rate of 1st last month salary for each year of service.’”
43. Clause 31 provides for grounds of service gratuity as follows:-
- (a) Minimum of five (5) years of continuous service.
 - (b) Attainment of fifty five (55) years of age or compulsory retirement age of sixty years for the normal and sixty five (65) years for the disabled.
 - (c) On health grounds
 - (d) On public interest
44. The court interprets clause 31 of the CBA to mean that an employee who leaves service of the respondent within 5 years of continuous service from effective date of the CBA is entitled to gratuity for all years served. That means an employee leaves service having not served for 5 years of continuous service would not be entitled to gratuity. This finding is consistent with the judgment of my sister Judge Maureen Onyango in *Bakery, Confectionery, Food Manufacturing and Allied Workers Union v United Millers Limited* [2019] eKLR which I uphold and where the judge stated as follows:-
- “The clause in contention is 5(2)(i) which provides that an employee who is terminated by the company or who resigns shall be entitled to fifteen (15) days’ pay for each completed year of service based on the employee’s earnings as at the date the contract terminates. Subsection 5(2)(ii) provides for qualifying period of 2 years effective from the date of the CBA while sub clause (ii) protects employees from termination in a manner to deprive them of the benefit. My understanding of clause 5(2)(ii) as read with 5(2)(ii) and 5(2)(iii) is that should an employee’s employment be terminated within two years of the coming into force of the CBA they will not be entitled to benefit from the service pay while if they leave service after two years from the effective date they would be entitled to the service pay for all years worked from date of employment without any further limitations as there are no other limitations except that in clause 5(2)(ii).”
45. In the instant case, the CBA is effective July 1, 2017. The grievant was dismissed from employment effective April 1, 2019. This was less than 5 years of continuous service. The court finds and determines that the grievant is consequently not entitled to gratuity.



iii. Compensation for all the public holidays served and annual leaves not taken.

46. These two items were only pleaded as prayers. There is no ground laid on the basis of the prayers in the main claim or the witness statement of August 1, 2019. The witness CW1 did not lead any evidence on the heads of claims. Section 47(5) of the *Employment Act* provides for burden of proof in claims for wrongful dismissal as follows:
- “(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds of the termination of employment or wrongful dismissal shall rest on the employer.”
47. The claimant had a burden to prove the claim for compensation of the public holidays and annual leaves not taken which burden they would have discharged by pleading in the main claim and in the witness statement that they were not paid. Then burden then would have shifted to the employer as the custodian of records under section 74 of the *Employment Act*. The claimant failed to substantiate the claim and thus the prayers are hanging and the court has no basis to evaluate and award.
48. The prayer for compensation for public holidays is disallowed.
49. On the prayer for annual leaves not taken , though the claim was not pleaded in the main claim but prayers. The respondent submits that its exhibits K10(A-G) was evidence that the claimant applied for leave and the same was approved for the years 2011 to 2018. The claimant did not lead evidence to the contrary.
50. The court finds and determines, based on the admission by the employer, that the claimant is only entitled to annual leave for 3 months of service in 2019 thus $3/12 \times 11,524 = \text{Ksh } 2,881/-$.
51. The claimant is awarded Kshs 2,881/- annual leave in arrears.

Compensation for house allowance

52. This is only in the prayer and no details pleaded. Housing allowance is a statutory right under section 31.(1) of the *Employment Act* which states:- ‘An employer shall at all times, at his own expense, provide reasonable housing accommodation for each of his employees either at or near to the place of employment, or shall pay to the employee such sufficient sum, as rent, in addition to the wages or salary of the employee, as will enable the employee to obtain reasonable accommodation.’
53. The respondent submits that as per payroll produced in court (exhibit K11) the grievant was paid housing allowance of Kshs 2,000/- hence the claim should be dismissed.
54. The court having looked into the said payroll (K11) finds and determines that the grievant was paid housing allowance of Kshs 2000/-. There is no basis to question the paid amount. The claim for housing allowance is disallowed.

Compensation for overtime worked during period of employment and for paternity leave

55. These two items were only pleaded under prayers. There is no ground laid on the basis of the prayers in the main claim or the witness statement of August 1, 2019. The witness CW1 did not lead any evidence on the these items. The court is of the opinion that allegation for overtime and paternity leave



compensation require strict proof by the employee in form of pleading of the overtime worked and of the child born with respect to the paternity leave. The claim on the 2 items fails for lack of prove.

v. Compensation for all underpayments during the period of service

56. This item on underpayment only appears in the prayer. The respondent submits that the grievant was paid the statutory minimum wage. It is not substantiated how the grievant was unpaid in the main claim and no evidence was led on the item.
57. The court finds it has no basis to find on the underpayment. The item is disallowed for lack of evidence.

vi. Salary arrears if any

58. The court finds that this is a lazy pleading on the part of the claimant. At the minimum the claimant ought to have established from the grievant whether he was owed any salary arrears. At no stage did the grievant raise the issue of salary arrears.
59. The court notes that the respondent replied on all other reliefs sought other than salary arrears. The payroll produced was for January 2019 (K11).
60. The letter of suspension dated February 8, 2019 does not address payment of salary while on suspension.
61. The court gives benefit of doubt to the claimant and finds salary arrears for the months of February and March as the dismissal was effective on the April 1, 2019.
62. The court finds and determines that there is no prove of payment of salary in the months of February and March 2019 and awards the same at basic salary as envisaged in clause 11(b) of the CBA. The employee was suspended effective February 11, 2019 (k1) Thus 10 days worked and basic salary to apply for rest of the month of February and basic salary in March thus $10/28 \times 11524 = (4115.70)$ plus rest of February basic salary $7294 \times 18/28 = (4689)$ March 7294 Total award on arrears being (Kshs $4115.70 + 4689 + 7294$) total award on salary arrears Ksh 16,098.70.

Claim for payment in lieu of notice

63. The claimant submits that clause 9 of the CBA between the parties states that, ‘in the normal circumstances , it shall be a condition that employment shall be terminated by either party giving written notice or pay in lieu of such notice as follows:- ‘ii. for an employee who has completed five(5) years of continuous service and above but less than ten(10) years, 4 months notice or four month’s pay in lieu of notice.’”
64. During cross-examination RW1 admitted that the grievant was terminated from service through summary dismissal and was entitled to four(4) months’ notice.
65. The court already found that the dismissal having been backdated the grievant was entitled to notice pay.
66. The effective date of the CBA is relevant under this item. The continuous service means service under the CBA consistency with the authority cited earlier of my sister Judge Maureen Onyango in *Bakery, Confectionery, Food Manufacturing and Allied Workers Union v United Millers Limited* [2019] eKLR . Consequently, the court finds that the relevant provision under the CBA is clause 9(A)I which states: ‘for any employee who has completed his period of probation but with less than five(5) years 3 months’ notice or 3 months’ pay in lieu of notice’”.



67. The court finds and determines that the grievant was entitled to 3 months' payment in lieu of notice. As per the payroll (k11) the grievant's gross salary in January 2019 was Kshs 11,524. The court finds and determines the payable notice amount is Kshs $11,524 \times 3 = \text{Ksh } 34,572/-$

Certificate of service

68. The claimant submits that the certificate of service has not been issued as per the CBA.
69. Issuance of certificate of service is a statutory right of an employee notwithstanding the circumstances of exit from employment. Section 51(1) of the *Employment Act* states:- An employer shall issue to an employee a certificate of service upon termination of his employment, unless the employment has continued for a period of less than four consecutive weeks."
70. The grievant having served with the respondent for 9 years is entitled to his certificate of service from the respondent in the terms stated under section 51(2) of the *Employment Act*.
71. The court orders the respondent to issue the claimant with the grievant's certificate of service within 14 days of this judgment.

Costs of the suit

72. The claimant submits that it is entitled to costs as the respondent failed to tackle the dispute as per the CBA.
73. The court finds and determines that there is no basis of assessing costs due to the union and moreover the union is not charged any fees to file pleadings in this court. Costs is a discretionary award which the court finds, is not proper to exercise in the favour of the claimant in the instant case. The item is disallowed.

Any other relief the court deems fit

74. The court declines any other relief.

Conclusion and disposal

75. The claimant has partially succeeded in their claim. The court enters judgment for the claimant against the respondent as follows:-
- a. Award of Kshs 2,881/- annual leave in arrears.
 - b. Award of notice pay equivalent of 3 months gross salary of Ksh 34,572/-
 - c. Award for salary arrears for 10 days worked in February and while on suspension 18 days in the month of February and in the month of March making total award for sum of Kshs 16,098.70/-
(a, b and c (total award of Kshs 53,551.70) subject to statutory deductions)
 - c. Interest is awarded at court rates from date of judgment until payment in full.
 - d. Certificate of service of the grievant to issue within 14 days of the judgment.
 - e. No order as to costs.
76. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 22ND SEPTEMBER, 2022.



J W KELI,

JUDGE.

In the Presence Of:-

Court assistant : Brenda Wesonga

For claimant:- Kamuye

For respondents: Mr Tarus

