



**Kenya Union of Domestic Hotels, Educational Institutions and Hospital
Workers (KUDHEIHA) v Steu Ry Memorial School (Cause E017 of 2021)
[2022] KEELRC 3991 (KLR) (22 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 3991 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
CAUSE E017 OF 2021
ON MAKAU, J
SEPTEMBER 22, 2022**

BETWEEN

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

AND

STEU RY MEMORIAL SCHOOL RESPONDENT

JUDGMENT

1. The claimant is a trade union and brings this suit on behalf of its member Mr Daniel Kosgei (grievant). The grievant was employed by the respondent as a security guard in 2002 earning kshs 5,500 per month. In 2014, the grievant was verbally retired but he was re-engaged in the same role and worked until February 28, 2020 when he was served with a termination letter by the respondent. The respondent also gave him a certificate of service dated March 3, 2020 confirming that the grievant served it for 17 years from 2002 to 2019.
2. The claimant further averred that the grievant was never paid his terminal dues and the matter was referred to the ministry of labour for conciliation and thereafter the parties entered into an agreement that the respondents pay the grievant gratuity totaling kshs 127,200 less kshs 19,000 already paid. However, the respondent failed to pay hence this suit.
3. The suit seeks the following reliefs: -
 - a. That the court finds the respondent in violation of the statutes and directs that the grievant be paid all his terminal dues as stated below:-
 - i. Service gratuity for 17 years - clause 31 of CBA
 $11,200 \times 17 \text{ years} = \text{kshs } 190,400$



- ii. 3 Months' pay in lieu of notice - clause 6 (a) of CBA
11,200 x 3 months = kshs 33,600
- iii. 30 days' special terminal leave – clause 11 (b) of CBA
= kshs 11,200
- iv. Unpaid travelling allowance for 3 years
4,00 x 3 years = kshs 12,000
- v. Unpaid house allowance for 3 years
2,500 x 36 months = kshs 90,000
- vi. Unpaid medical allowance for 3 years
457 x 36 months = kshs 16,452
- vii. Underpayment of wages contrary to DPM circular for 3 years from July 1, 2017 to July 1, 2018
11,200 actual paid
12,790 legal notice
Less 1,590 x 12 months = kshs 19,080.00
From July 1, 2018 to July 1, 2019
11,200 actual paid
13,090 legal notice
Less 1,890 x 12 months = kshs 22,680.00
From July 1, 2019 to December 30, 2019
11,200 Actual paid
13,510 Legal notice
Less 2,310 x 6 months = kshs 13,860.00
TOTAL = kshs 375,672.00
- b. Costs of the suit be borne by the respondent.

- 4. The respondent is in denial and avers that the grievant enjoyed all his rights while in employment including NSSF, NHIF, and salary which was reviewed from time to time.
- 5. Further, the respondent admits that it retired the grievant in 2014 and re-employed him until the time it discharged him due to financial constraints. However, it denied the claim for terminal dues contending that the grievant was paid the same by the NSSF under section 35 (6) of the *Employment Act*. It also averred that some claims made are time-barred under section 90 of the Act.
- 6. The suit went to full hearing when the grievant testified as CW1 but the respondent relied on the written statement by its Secretary Mrs. Lilian Kagendo dated December 7, 2021.

Evidence

- 7. The grievant reiterated the facts in the statement claim set out above including how he joined the respondent in 2002 and retired in 2014. However, due to lack of funds to pay his terminal dues the



Head teacher asked him to continue working which he did until he was given a termination letter dated February 28, 2020. Again he was not paid his terminal dues and he reported the matter to the claimant union. The case was then referred to the Ministry of Labour but the head teacher said she had no money to pay. The dues are still owing according to the grievant.

8. On cross-examination, the grievant stated that he was first employed by the respondent's affiliated hospital in 1997 before being transferred to the school. He confirmed that in 2014 when he retired he was 60 years, but, he was retained on the payroll and continued working.
9. He admitted that the employer contributed to NSSF for his retirement and that he was paid kshs 90,000 by the NSSF in 2021.
10. He further contended that the dispute was conciliated upon thrice and an agreement was reached for him to be paid kshs 136,000. He contended that the school wrote a cheque for kshs 30,000 but he rejected it. Therefore he maintained that the sum of kshs 136,000 contained in the agreement entered on May 18, 2021 has not yet been paid.
11. Mrs. Kagendo confirmed in her written statement that the grievant was employed by the respondent in 2002 as a watchman without any written contract. She further confirmed that the grievant retired in 2014 but he was re-employed until 202 when he was discharged due to financial constraints. She also contended that the grievant was paid his salary and allowances amounting to kshs 300,000 in addition to his NSSF benefits.
12. She further stated that under section 35 (6) of the *Employment Act*, the grievant is not entitled to any further benefits since he was a beneficiary of the NSSF. She also contended that the matter was fully settled between the parties herein before the Conciliator at the sum of kshs 106,000 but the claimant returned the first cheque that was written.

Issue for Determination

13. There is no dispute that the grievant was employed by the respondent from 2002 to 2014 and again from 2014 to February 28, 2020. There is also no dispute that the grievant was offended by the termination on February 28, 2020 and the dispute was referred for conciliation. It is further without dispute that the parties herein entered an agreement before the conciliator that the respondent pays the grievant gratuity of kshs 127,200 less kshs 19,000 already paid.
14. The issues for determination are: -
 - a. Whether the termination of the contract of service on February 28, 2020 was unfair and unlawful.
 - b. Whether the claimant is entitled to the reliefs sought

Unfair Termination

15. Under section 45 of the *Employment Act* termination of employment of an employee is unfair if the employer fails to prove that it was grounded on a valid and fair reason related to the employee's conduct, capacity, and compatibility or based on the employer's operational requirements; or if the employer fails to prove that a fair procedure was followed.
16. According to the respondent's letter dated February 25, 2020, the reason for the termination was the financial constraint. In my view, the reason cited was redundant, and therefore the employer ought to have complied with the mandatory procedure set out under section 40 of the *Employment Act*.



17. The respondent ought to have served a notice to the claimant union and area labour officer 30 days before the effective date of the layoff. The respondent was also supposed to pay the grievant's salary in lieu of notice plus severance pay before the effective date. The above mandatory procedure was not followed and that rendered the termination unfair within the meaning of section 45 of the act because it was not done in accordance with a fair procedure.

Reliefs

18. In view of the foregoing the claimant is entitled to salary in lieu of notice under section 35 read with section 49 (1) of the act. He did not seek compensation for unfair termination or severance pay and therefore the same are not granted.

19. The two witnesses agreed that an agreement on payment of kshs 127,200 as gratuity was reached on May 18, 2021 before a conciliator. It was further agreed that kshs 19,000 had already been paid leaving kshs 106,200 as the amount due. Finally both witnesses agreed that a cheque for kshs 30,000 being part payment of the kshs 106,200 was issued but the same was rejected. It follows that the sum of kshs 106,200 is still owing and the claimant is entitled to that amount.

20. The claim for leave, traveling allowance, medical allowance, house allowance, and underpayment for 3 years based on clauses of the CBA produced as exhibit are declined because it has not been shown that the grievant's contract of service was founded on the CBA which was signed in 1986 before the grievant was employed by the respondent. The CBA is also older than the respondent who came into being in 2002 going by the evidence by CW1 who stated that he was transferred to the school in 2002 after it was started. For the same reason, I award the claimant only one month's salary in lieu of notice since no evidence was tendered to support the claim for 3 months' salary in lieu of notice.

21. In conclusion I enter judgment for the claim against the respondent as follows: -

Notice kshs 11,200

Gratuity kshs 106,200

22. The claimant is awarded costs plus interest at court rate from the date of filing the suit. The award is subject to statutory deductions.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 22ND DAY OF SEPTEMBER, 2022.

ONESMUS N MAKAU

JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE

