



Kenya Union of Domestic, Hotels, Educational Institutions & Hospital Workers (KUDHEIHA) v BOM Cheptenye Boys High School (Cause E011, 12 & 13 of 2021 (Consolidated)) [2022] KEELRC 13024 (KLR) (27 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 13024 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
CAUSE E011, 12 & 13 OF 2021 (CONSOLIDATED)
ON MAKAU, J
OCTOBER 27, 2022

BETWEEN

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

AND

BOM CHEPTENYE BOYS HIGH SCHOOL RESPONDENT

JUDGMENT

1. The claimant has instituted separate suits against the respondent on behalf of its five members Mr Edwin Kipyegon, Alphonse Kipkirui, Japheth Too, Mrs Edith Chebet and Roseline Langat (herein after referred to as the grievants). The suits were consolidated on January 27, 2022 and they all prayed for:
 - a. That the court finds that the respondent violated provisions of statutes and grievants be reinstated unconditionally without loss of benefits.
 - b. Payment of all monies, allowances and benefits under the CBA including: -
 - i. Salary *in lieu* of notice
 - ii. Days worked (if any)
 - iii. Accrued annual leave due (if any)
 - iv. Unpaid leave travelling allowances (3years)
 - v. Service gratuity
 - vi. Unpaid medical allowance



- vii. Unpaid/underpaid wages and house allowance
 - viii. Maximum Compensation for unlawful loss of employment.
- c. Costs of the suit and certificates of service.
2. The facts of the case are that Mr Edwin Kipyego was employed as a posho mill attendant on March 5, 2013 until January 2018 when he was transferred to the Security department as a security officer. While on duty on the night of October 17, 2019 the Deputy Principal found him with 40 pieces of chapatis and he took them away. The grievant was also invited to the office the following day to explain why he had in his possession the said chapatis. He never found the Deputy Principal but the Principal who told him to go home until he was called back. After waiting for two months he felt frustrated and terminated his contract by his letter dated November 7, 2019. The employer never served him with any dismissal letter or certificate of service. His salary was Kshs 7,234 and he served for 7 years and a half.
 3. Mr Alphonse Kipkirui Too was employed by the respondent on May 12, 2009 as a security officer. On November 17, 2019, while on duty at the school gate, the Deputy Principal accused him of being absent from his work station the previous night when he went round the school. The deputy principal further told him that it was not the first time he was absent from work. He then told him to go home at once and report to the office the following day. When he visited the office, he found the principal and the deputy who just told him to go home. His request for a letter was ignored and was told to do what he was told. Since then, he was not called but another person was employed to replace him. Therefore he contends that he was condemned unheard contrary to section 40 of the *Employment Act* and article 50 of the *Constitution* of Kenya 2010. He worked for 10 years and a half and he was earning Kshs 8,634.
 4. Roseline Chebet Langat was employed as cook on May 8, 2012. In May 2019, she was assigned an assistant and they worked harmoniously for one month. In June 2019, differences arose when the assistant refused to perform her duties as per the duty roster. Intervention of the cateress was invoked but it bore no fruits and the matter was referred to the Principal. Despite advice by the principal to work harmoniously, the assistant did not comply. Thereafter the grievant fell ill and the doctor recommended for lighter duties but differences with her assistant continued and she was suspended vide the letter dated August 2, 2019. The suspension was indefinite and the reason the constant squabbles in the kitchen. The letter did not state that salary will be paid during the suspension. She was also required to go for arbitration before their church elders, provincial administration and present a written report to the respondent to inform the next cause of action.
 5. Following the intervention by the claimant union, the grievant was invited to a disciplinary hearing but since he did not have any report from her spiritual leaders and provincial administration, no hearing took place. No dismissal letter was given by the employer but the claimant contends that the grievant was condemned unheard by being silently dismissed by the principal through usurpation of the powers of the Board of Management.
 6. Mrs Edith Chebet was employed by the respondent as assistant store keeper on November 1, 2011. Through the letter dated March 27, 2018, she was notified that her employment would be terminated on account of redundancy with effect from April 30, 2018. The letter was not copied to the trade union or the area labour officer but it was copied to the BOM Chairman and the bursar. She was never paid severance pay as promised or issued with certificate of service. She served for 6 years 5 months and her salary was Kshs 7500.
 7. Mr Japheth Too was employed by the respondent as a Lab Technician on February 15, 2006 and worked until March 27, 2018 when he also received a letter notifying him that his employment would terminate on April 30, 2018 of account of redundancy. The letter was not copied to the trade union



- and the area labour officer, but was copied to the BOM Chairman and the Bursar. He started with a salary of Kshs 5400 but later it was raised to Kshs 12,420. He served for 20 years and 2 months.
8. The union reported the respective matters to the Cabinet Secretary Laour and a conciliator was appointed to resolve the matter. However, the respondent was adamant and the matters were brought to court. They accuse the employer of violating their right to fair hearing before termination of their contract of employment and pray for the reliefs sought.
 9. The respondent has filed defence denying the allegations by the claimant and prayed for the suit to be dismissed with costs.
 10. The suit went to full hearing where both sides gave evidence and thereafter filed written submissions.

Evidence

11. The claimant called all the five grievants as its witnesses. Mr Japheth Too testified as CW1 who stated that he was employed on February 15, 2006 by the respondent as a lab assistant earning Kshs 5400 per month. The contract was never reduced into writing and he was also not paid house allowance, medical allowance or leave travelling allowance. He was a member of the claimant union to which he paid subscriptions directly from July 12, 2017 when he joined to June 2018. He paid the subscription that way to avoid victimization.
12. On March 27, 2018, he was served with a letter terminating his employment on ground of redundancy. The letter was not copied to the labour officer but the BOM and the bursar. He was not paid any terminal dues after the termination despite his long service of over 12 years nor was he issued with a certificate of service. As at the time of the separation, his salary was Kshs 12, 420 per month.
13. He testified that the letter referred to a circular from the ministry but according to him the circular did not talk of redundancy. The matter was referred to conciliation before the Labour office Kericho but he was not paid anything. The termination has caused loss on him therefore he prays for the reliefs set out in his suit.
14. On cross examination, he admitted that he was given one month notice by the respondent before the termination.
15. Mrs Edith Chebet testified as CW2 and stated that she was employed by the respondent on November 1, 2011 as a store Keeper earning Kshs 7500 per month. No other allowances were paid to him and the contract was also not reduced into writing. Her services were also terminated by a letter dated March 27, 2018 on account of redundancy. No terminal benefits were paid to her upon termination. Therefore she prayed for the reliefs sought in her suit.
16. On cross examination, she stated that she joined the claimant union on July 10, 2017. She admitted to receiving one month notice before the termination.
17. Mr Alphonc Too testified as CW3 and stated that he was employed by the respondent on May 12, 2009 as a security officer but he was never issued with any appointment letter. His duties included manning of the school compound and the students' security. His monthly salary was Kshs 4300 without any allowances. He was a union member paying his subscriptions through check off system.
18. He testified further that on November 17, 2019, as he was reporting to work, the Deputy Principal told him to go back home and report to the office on November 19, 2019 to explain why he was absent from work on November 16, 2019. When he reported on November 19, 2019, the deputy principal told him to go home until he was called back but he did not receive any call. He contended that he



- was on night duty on the November 16, 2019 doing patrol and the deputy principal never called him via telephone.
19. He denied the allegation in the defence that on July 30, 2018 he was found asleep while on duty. He denied also that he was served with a show cause letter for the said conduct. He further denied that he left the main gate open on October 26, 2018 and an intruder entered the school. He contended that on the said night they were three guards, he was guarding the lower gate, another guard was manning the main gate while the last was guarding the teachers, dormitories and administration area.
 20. He further stated that the police arrested the intruder and only interrogated the guard at the main gate. He further stated that no document has been filed to show that he was found guilty for the intrusion by the armed stranger.
 21. He admitted that he was not issued with any suspension or termination letter by the respondent but maintained that his services were terminated and lost income. He was also not issued with a certificate of service. As at the time of the termination he was earning Kshs 8834 per month.
 22. He contended that he was not paid terminal dues after the separation despite the matter having gone to the labour officer for conciliation. Therefore he prayed for the reliefs sought in his suit.
 23. On cross examination, he denied that he served a resignation letter. He admitted that there was a lapse while on duty when an intruder came to the school through the main gate. He maintained that he was manning the lower gate on the said night. He reiterated that on the material date he was manning the lower gate but he was supposed to remain in one place but patrol the area also.
 24. He further reiterated that on November 19, 2019 he was told by the deputy principal to go away and wait until he was called back but he was never received any call. He maintained that he was never heard but admitted that he never wrote any protest letter thereafter.
 25. Mr Edwin Kipyegon testified as CW4 and stated that he was employed by the respondent on March 5, 2013 as a security officer for a monthly salary of Kshs 5000 with no allowances. He was also not issued with any appointment letter. he was a member of union and his subscription was paid through check off.
 26. He testified that on October 17, 2019, the deputy principal found with 42 chapatis while on duty and told him to report to the office the following day. When he went to the office he found the principal and the deputy but they just told him to go away and never to return. He had not been told to come to the officer with a fellow employee. He was also not served with any show cause letter on December 7, 2019, he wrote a resignation letter so as to be paid his dues.
 27. He testified that the chapatis found in his possession was for his daughter's birth day party the following day. He maintained that he was not heard before the dismissal. He also denied that he left the door of a dormitory open and contended that the theft occurred in a different dormitory from the one he was guarding. However, he admitted that he heard that students' property was stolen from the dormitory.
 28. He testified that he reported the matter to his trade union and a dispute was reported for conciliation but even then, he was paid nothing. He was also not issued with certificate of service. He contended that he served for 7 years and his salary at the time his exit was Kshs 7234 per month. Therefore he prayed for the reliefs sought in his suit.
 29. On cross examination, he admitted that he he wrote a resignation letter.
 30. Finally, Mrs Rosaline Langat testified as CW5 and she told that court that she was employed by the respondent as cook in May 2012. Her monthly salary was Kshs 4000 but no house allowance or any



- other allowance was paid to her nor was she given any appointment letter. The salary was later increased to kshs 7000. She was a member of union and paid subscription through check off.
31. After working for 7 years, Ms Winnie Cherotich was employed to help her but after one month she started to differ with her for refused to do assigned duties. On June 23, 2019, they differed until the cateress came in but still Winnie refused to do her duties. The matter was escalated to the principal and Winnie apologised and promised to do her duties.
 32. CW5 further testified that on July 9, 2019, she fell down and suffered injuries and thereafter she suffered from cerebral malaria. After treatment, the doctor recommended that she be allocated light duties but Winnie insisted that everyone will do her usual duties which led to fresh differences. The cateress referred the matter to the Principal and she was suspended vide the letter dated August 2, 2019. The suspension was for indefinite period and she was not paid any salary. The letter directed her to bring a report from church, chief and the union.
 33. He further testified that he was summoned to appear before the board but when he went with a union official, the principal and the board chased them away saying that the union was a stranger to the school. The matter was referred for conciliation but the employer refused to appear thrice.
 34. On cross examination, she admitted that she was given a suspension letter and that she had misunderstanding with her colleague. She also admitted that she did not file any report from the church or police or chief as directed by the principal. She relied on the letter on record as proof that the employer was summoned to the conciliation but failed to attend.
 35. The respondent did not avail its witnesses but it relied on the written statement by its witness Mr Charles Ochengo as its evidence. The witness is the Principal of the school and claimant conceded to the nature of testimony tendered.
 36. In brief the witness admitted that all the grievants were employees of the respondent. As regards Mr Japheth Too and Edith Chebet, she testified that they were retrenched following a Circular number MoE HQs3/13/3 from the ministry of Education. In his view, the termination was lawful since it gave the grievants one month notice vide the letter dated March 27, 2018. Finally, he contended that the grievants were not members of the union as at the time of their retrenchment and they only learned of their membership through the letter from the union dated August 27, 2018.
 37. As regards the other three grievants, the witness stated that they were to blame for the termination of their services. He stated that Mr. Alphonse Too performed his duties of security guard negligently including on July 5, 2018 when he left the gate open at dawn and a man wielding a machete entered the school threatening to harm the students before police rescued them; on July 30, 2018 when he was found asleep in the Laboratory at dawn; on October 26, 2018 he left the gate he was manning open and 120 boys left the school at dawn; in September 2019 he left he was found sleeping in the lower staffroom at dawn and when he was asked to explain the matter he absconded never to report back again.
 38. The witness further stated that Mr Edwin Kipyegon likewise performed his security duties negligently in that on July 22, 2019 he reported to work at 7.40 pm instead of 6,30 pm; again he failed to lock lower dormitories' gate and some students gained entry, broke into others boxes and stole their property; on October 6, 2019 he failed to report to work in the evening as scheduled and failed to notify his seniors; and that he was found selling chapatis to students at night and he was directed to see the deputy principal the following morning but he disappeared until November 7, 2019 when he left a resignation letter with the school secretary. The resignation was made two days after he was served with a show cause letter demanding a response within 14 days.



39. Finally, the witness stated that Mrs Rosalia Langat sharply disagreed with her fellow cook Ms Winnie Cherotich on 23rd June and quarrelled and they were warned after being summoned in the Principal's office. They two repeated the same quarrels on August 2, 2019 threatening to fight. Before then Rosalia had absented herself from work and said she had been admitted in hospital for treatment of an illness which she said had been inflicted on her by Winnie. She further said that a pastor who prayed for her told her that winnie had paid a preacher kshs, 1000 to pray for her to fall sick, which allegation Winnie denied. The two were suspended and referred to the pastor for arbitration and report the alleged threats to security agency and local authority and report back with a written report that they had complied with the instructions given but they disappeared alleging that they have been sacked.
40. The claimants did not file any submissions after the hearing but the respondent filed. The submissions by the respondent merely repeats the foregoing explanations and urges the court not to interfere with separations. The court was also urged not to award the claimants the reliefs sought in the respective suits.

Issues For Determination And Analysis

41. I have carefully considered the pleadings, evidence and submissions and found no dispute that the claimants were employed by the respondent. The issues for determination are:
- a. Whether the redundancy of the two grievants in Cause No E013 of 2021 was unlawful and unfair.
 - b. Whether the three grievants in Cause No E011 & 12 of 2021 voluntarily resigned or they were constructively dismissed by the respondent.
 - c. Whether the claimant is entitled to the orders sought.

Redundancy of the grievants in Cause E013 of 2021

42. Redundancy has been defined under section 2 of the *Employment Act* as:

“the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practice commonly known as abolition of office, job or occupation and loss of employment”.

43. From the foregoing definition, it is clear that when it comes to termination on account of redundancy, the reason for the termination cannot be blamed on the employee. The reason must relate to an involuntary happening or cause that is beyond the employer's control or which is inevitable in relation the employer's operational requirements. In this case, the reason was cited in the termination notice dated March 27, 2018as follows:

“following the Ministry of Education circular number MOE HQS/3/13/3 on guidelines for implementation of free day secondary education, and the subsequent review of non-teaching staff establishment by the board of management, i wish to inform you that your services to the school as ... will end on April 30, 2018on account of redundancy.

Your severance will be worked out and paid accordingly.

...”



44. The Circular is dated October 19, 2017 and relevant paragraph is number 5.0 which stated as follows: -
- “The taskforce recommended that MOE disburses funds to support NTS. To minimize the cost of secondary education it is necessary to rationalize the recruitment of NTS as recommended by the taskforce report. It shall be the responsibility of the boards to hire Non-Teaching Staff at terms commensurate with qualification and capacity to pay.”
45. The above paragraph cited qualification and capacity to pay as the factors for the school boards to consider when hiring non-teaching staff. The termination notice to the two grievants laid off herein did not state which of the two factors set out in the above circular was used as the ground for the redundancy. The grievants had served as lab assistant and assistant storekeeper respectively. The respondent did not also tender any evidence to show that there were other persons serving in the said positions nor has any evidence been given to show that the positions were abolished. Consequently, the court finds that the respondent has failed to prove that the reason for the termination was valid and fair to justify termination of services of the grievants for no fault.
46. Besides, the court finds that the procedure followed in terminating the employment on account of redundancy was contrary to the mandatory procedure set out under section 40 of the *Employment Act*. The said requires that the employer must serve at least one month notice to the employee or his trade union (if a member), and the area labour officer. In this case, the area labour officer was never served and therefore a crucial procedural step, of consultation, was skipped.
47. While discussing the purpose of serving a prior statutory notices of redundancy, the Court of Appeal in the *Kenya Airways Limited v Aviation & Allied Workers Kenya & 3 Others* [2014] eKLR stated as follows:
- “The purpose of the notice under section 40 (1) (a) and (b) of the *Employment Act*, as is also provided for in the said ILO Convention No 158 – Termination of Employment Convention, 1982, is to give the parties an opportunity to consider “measures to be taken to minimise the terminations and measures to mitigate the adverse effects of any terminations on the workers concerned such as finding alternative employment.” The consultations are therefore meant to cause the parties to discuss and negotiate a way out of the intended redundancy, if possible, or the best way of implementing it if it is unavoidable. This means that if parties put their heads together, chances are that they could avert or at least minimise the terminations resulting from the employer’s proposed redundancy. If redundancy is inevitable, measures should be taken to ensure as little hardship as possible is caused to the affected employees.” [Emphasis added]
48. The respondent further failed to pay the grievants their terminal benefits that accrued from the said redundancy including severance pay, salary in lieu of notice and any other benefits as provided by the said section 40 of the *Act*. Consequently, the court finds that the respondent has failed to prove that the termination of the grievants’ employment was done in accordance with a fair procedure.
49. Having found that the employer has failed to prove that the termination was grounded on a valid and fair reason related to the employer’s operational requirements, and that a fair procedure was followed, the court finds that the redundancy of the two grievants in Cause No E013 of 2021 was unlawful and unfair.



Voluntary resignation or unfair dismissal of the other three grievants

50. Section 47(5) of the *Employment Act* places the burden of proving unfair termination on the employee who alleges that he was so dismissed while the employer must justify the reason for the termination. The employer has a further burden of proving that a fair procedure was followed under section 45 of the *Act*. The question that begs for answer herein is whether the claimant has proved that the grievants were dismissed by the employer.
51. The claimant's case is that the three grievants were verbally suspended verbally for alleged misconduct, in manner that they deemed to amount to constructive dismissal. However the employer contends that the Mr Edwin Kipyegon and Alphonce Too performed their security duties negligently, absconded duty and engaged selling food stuffs to students and when they were summoned to the office to explain themselves they disappeared completely save for the former who served a resignation letter dated November 7, 2019.
52. Mr. Edwin Kipyegon admitted that he was found with 42 pieces of chapatis while on duty at night and that he was directed to go to the office the following day. Likewise, Mr Alphonce Too admitted that on November 17, 2019, the deputy principal accused him of absence from work on November 16, 2019 and told him to go to the office the following day to give an explanation. The two allege that they went to the office as directed but they were just told to go back home and wait until they were called back. The principal has denied that allegation and stated that the grievants never went to the office as directed by the deputy principal but just disappeared. The grievants have not produced any evidence, either documentary or eye witness to prove that, indeed they went to the office as directed.
53. Mrs Rosalia Langat, on the other hand, was involved in repeated quarrel with her fellow cook and also absented herself from work. When she reported back she alleged that she fell ill and was admitted in hospital. She attributed her predicament on her fellow cook Ms Winnie who allegedly paid a pastor to cast a spell on her. In fear that the ladies might one day injure one another with knives or other means in the kitchen, the two were given a suspension letters to sort the spiritual matters before the pastor and also report the alleged threats to the security agency and local authority. They were then required to come back with report form the pastor and the security agency showing that they complied. Rosalia never returned to the office with or without a report that she had complied with the instructions given in the suspension letter.
54. Having considered the evidence on record, the court finds that the claimant has not proved on a balance of probability that the grievants' employment was terminated by the employer. On the contrary the court satisfied that the evidence supports a finding that it is the three grievants who voluntarily resigned from the employment to evade disciplinary process at the shop floor. The resignation for Rosalia Langat and Alphonce is implied from their conduct while that of Edwin Kipyegon is expressly contained in his resignation letter dated December 7, 2019.

Reliefs

55. In view of the foregoing finding that the claimant has failed to establish that the grievants in Cause E011 and E012 of 2021 were unfairly and unlawfully dismissed, I decline to find that respondent violated any statute. I also decline to order their reinstatement or award compensation under section 49 of the *Employment Act*.
56. Finally I dismiss the two suits entirely because the other reliefs sought have not been particularised, quantified and proved by evidence.



57. As regards the claim in Cause E013 of 2021, I have already found that the redundancy was unlawful and unfair and therefore, the grievants are entitled to relief under section 49 of the Act. The separation occurred on April 30, 2018 which is more than 3 years limitation period within which the court can order reinstatement under section 12 of the Employment and Labour Relations Court Act. Consequently, I award the alternative prayer for compensation.
58. The termination was not for any fault on the grievants' part. Edith Chebet served for 6 years five months and therefore I award her 6 months gross salary as compensation for unfair termination. She will also have one month salary in lieu of notice. Japheth Too served for over 20 years and therefore his long service entitles him to higher compensation than his colleague. I award him 12 months gross salary plus one month salary *in lieu* of notice. I decline to base this award on the collective agreement produced because it has not been established that it applied to the grievants and the respondent herein.
59. The rest of the reliefs sought are declined because they have also not been particularised, quantified and proved by evidence.
60. In the end, I enter judgment in favour of the claimants as follows:

Edith Chebet

Notice Kshs 7,500

Compensation Kshs 52,500

Total Kshs 60,000

Japheth Too

Notice Kshs 12,420

Compensation Kshs 149,040

Total Kshs 161,460

The above awards are subject to statutory deductions. Since both parties have succeeded in one or two of the consolidated suits, I direct that each shall bear its own costs.

Dated, signed and delivered at Nyeri this 27th October, 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

