



**Njoroge v Ngarariga Girls Secondary School (Cause 1267 of 2016)
[2022] KEELRC 12919 (KLR) (14 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12919 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1267 OF 2016
SC RUTTO, J
OCTOBER 14, 2022**

BETWEEN

SIMON MUNGAI NJOROGE CLAIMANT

AND

NGARARIGA GIRLS SECONDARY SCHOOL RESPONDENT

JUDGMENT

1. The claimant instituted the instant suit *vide* a memorandum of claim dated June 28, 2016, through which he avers that he was employed as a watchman at the respondent school, with effect from October 27, 2001. That he worked for the respondent for 14 years until August 19, 2015 when he was summarily dismissed. He has termed his dismissal as unlawful and unjustified hence he claims one month's salary *in lieu of* notice, monthly salary from the date of dismissal until the conclusion of the matter and retirement benefits.
2. The claim was defended with the respondent stating that the claimant was summarily dismissed upon being given adequate time to state his side of the story. The respondent further avers that the grounds for dismissing the claimant were lawful and that it followed due process as required under law. It further denied any role in the payment of the claimant's retirement benefits. Consequently, the respondent has asked the court to dismiss the suit with costs.
3. The court took the claimant's case on December 15, 2021 and thereafter set the matter for defense hearing on May 23, 2022 when the trial closed. During the hearing, each side presented oral evidence, through one witness respectively.

Claimant's Case

4. At the start of the hearing, the claimant sought to rely on his witness statement to constitute his evidence in chief. He also produced the documents filed together with his claim as his exhibits before court.



5. In his testimony before court, the claimant testified that the respondent did not give due regard to his views in arriving at the decision to dismiss him. That prior to that in 2015, there were allegations that his colleague was engaging in sexual intimacy with some of the students in the respondent school. That around the month of July, 2015, the students left the respondent's premises at night on suspicion that there was an impending strike and that some of the students were intending to burn down the school.
6. That on August 14, 2015, he was summoned for a hearing which was held on August 19, 2015 before the respondent's Board of Management. That the hearing was unfair as his side of the story was not considered.
7. It was the claimant's further testimony that he had lawfully worked for the respondent for 14 years and his dismissal was malicious, baseless and was under unclear circumstances. That after his dismissal, he pleaded with the respondent to pay him his lawful dues but it declined to do so. That he was 49 years old at the time of his dismissal and had not attained the age of retirement.

Respondent's Case

8. The respondent called oral evidence through Ms Juliana Wambui Mukundi, who testified as RW1. She identified herself as a former principal of the respondent school, having served as such between 2015-2019. She also adopted her witness statement and the documents filed on behalf of the respondent to constitute her evidence in chief. She also produced the said documents as the respondent's exhibits before court.
9. It was her testimony that the claimant was summarily dismissed on grounds of misconduct and negligence. That prior to that, the claimant had received several warnings. That he was given many chances to right his wrongs but he never changed his ways. That he was paid his salary upon dismissal hence the respondent does not owe him any dues.
10. RW1 further told court that the claimant was summoned to appear before the respondent's board and was given an adequate chance to tell his side of the story hence his dismissal was lawful. That the respondent wrote a letter dated August 19, 2015 to the National Social Security Fund (NSSF), requesting that the claimant be paid his retirement benefits. That as such, the respondent does not owe the claimant any dues and that he should follow up the same with the NSSF.

Submissions

11. It was submitted on behalf of the claimant that his dismissal was without any justifiable cause, against the rules of natural justice and the *Employment Act*. That as such, he is entitled to the prayers sought in the claim.
12. Citing the case of *Walter Ogal Anuro v Teachers Service Commission*, (2013) eKLR, the respondent submitted that it had justified the grounds for the claimant's termination, while the claimant had failed to prove that his termination was unfair. It further submitted that it does not owe the claimant any dues as the same were settled hence he should follow up with the NSSF for any outstanding dues. The respondent further submitted that the claimant is not entitled to salary from the date of his dismissal as he did not work during the stipulated time.

Analysis And Determination

13. Upon considering the issues arising from the pleadings, the evidentiary material placed before me and the submissions on record, the issues falling for the court's determination can be condensed as follows: -
 - a. Whether the claimant's termination was unfair and unlawful



- b. Is the claimant entitled to the reliefs sought?

Whether The Claimant's Termination Was Unfair And Unlawful

14. It is the claimant's case that his termination was unjustified, unlawful, unfair, wrongful and illegal.
15. In order to prove that a termination was fair, an employer must prove that there was substantive justification to warrant the termination of an employee and that the same was undertaken procedurally. As was determined in the case of *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination, but also procedural fairness. That said, I will proceed to apply the two tests to the instant case.

(i) Substantive Justification

16. The *Employment Act* (Act) addresses substantive justification under section 43(1), which requires an employer to prove reasons for termination, and in absence thereof, such termination is deemed to be unfair. Further, section 45 (2) (a) and (b) of the Act provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and is related to the employee's conduct, capacity or compatibility; or based on its operational requirements.
17. The Court of Appeal reiterated this position in the case of *Chairman Board of Directors (National Water Conservation and Pipeline Corporation) v Meshack M. Saboke & 2 others*, Nairobi civil appeal No 241 of 2015, as follows: -

“In light of the above provision, termination of employment will be unfair if the court finds that in all the circumstances of the case, it is based on invalid reasons or if the reason itself or the procedure of termination are themselves not fair. Section 43 of the *Employment Act* deals with proof of reasons for termination placing the burden on the employer to prove the reasons for termination failure to which termination is deemed unfair within the meaning of section 45.”

18. The reasons leading to the claimant's dismissal are discernible from his letter of summary dismissal which I will reproduce hereunder: -

“Re: Summary dismissal

I refer to your appearance before the board today August 19, 2015.

After interrogating the students concerning the strike that happened on July 22, 2015, quite a number of concerns were raised concerning you.

- i. That you and your colleague – Mr Mwangi, you were aware of the intended strike, and you did not report to anybody.
- ii. That you gave contradicting information of the events of the night with your colleague so that you appeared to be talking of a completely different school and night altogether.
- iii. That you deliberately failed to inform the principal of the students' departure even after you went to the dorms and confirmed truly the students had left.
- iv. That while the principal, deputy teachers, area chief and the police were busy taking roll call of the students who were left in the dorm, you took your



motorbike and left school at around 1 am without notifying anybody of your intention until today when you revealed it, and that you met with the BOM chairman.

- v. You also revealed that you had always known that your colleague had relationships with students, had been buying madazi for the students and giving them his phone to make calls and you never notified the office.
- vi. You knew that Mr Mwangi had been neglecting his duty by going to drink and the only person you notified was your colleague Mr Waime, who you said you warned Mr Mwangi with.
- vii. When asked why you didn't find it necessary to report, you arrogantly responded that each one of you had your own problems and you didn't want to add to his (Mwangi's) problems, but that fate had it that today was the day for all these things to come to the light.

Based on the above, the accusations amount to negligence of duty and gross misconduct which leads to summary dismissal.

The board therefore resolved that you be summarily dismissed with immediate effect. Hand over your working tools to the Bursar's office and get your August salary. After that you become persona non grata in the school.

Yours faithfully..."

19. What manifests from the reproduced letter of summary dismissal, is that the claimant was dismissed on account of two broad reasons that is, negligence of duty and gross misconduct.
20. As stated herein, an employer is required to prove that there was substantive justification to warrant an employee's termination. This basically entails proof of the reasons for termination through evidence. Ultimately, an employer must prove that the reasons for the termination were fair and valid.
21. In the instant case, the claimant was accused of negligence at different levels. First, he was accused of not reporting an intended strike by the students and that he deliberately failed to inform the school principal of the students' departure and left with his motorbike without notifying anybody. He was also accused of not informing the respondent that he was aware that his colleague was having illicit relationships with students and that a Mr Mwangi had been neglecting his duty and going to drink.
22. I have pored over the documentary and oral evidence presented by the respondent and I have not found any that substantiates the allegations levelled against the claimant. In short, the testimony of RW1 was not corroborated through evidence presented in whichever form or manner.
23. It is also notable that RW1 did not speak to the reasons for the claimant's dismissal. Her focus was on the past warnings issued to the claimant in regards to nonperformance of his duty, specifically when he failed to light the water boiler. It is worth noting that the same did not have a bearing on the claimant's dismissal, hence was of no probative value.
24. In a nut shell, it was not enough for the respondent to spell out the allegations constituting the reasons for the claimant's dismissal. It was incumbent upon the respondent to provide further evidence to support the allegations against the claimant and by failing to do so, the accusations against him remained unsubstantiated hence cannot be determined to be fair and valid. As it is, the respondent steered clear of the real reasons which led to the claimant's dismissal hence the same remained mere allegations.



25. Against this background, I find that the respondent did not satisfy the requirements of section 43(1) read together with section 45(2) (c) of the Act and as such, it has not proved that there was substantive justification to warrant the claimant's termination.

(ii) Procedural Fairness

26. Section 45(2) (c) of the Act provides that for termination to be fair, it ought to be in line with fair procedure. In this respect, section 41(1) of the Act requires an employer to accord an employee a hearing prior to termination. This procedure entails notifying the employee of the allegations he or she is required to respond to and thereafter granting him or her the opportunity to make representations in response to the said allegations.

27. It is common ground that the claimant appeared before the respondent's board of management for a disciplinary hearing. His contention was that he was not given an opportunity to present his case and that he was not allowed to utter a single word. He further stated that he was just reprimanded and asked to leave.

28. In light of the claimant's assertions, the respondent ought to have led evidence to prove otherwise. Quite to the contrary, it did not present any evidence to counter the claimant's assertions, for instance through minutes of the disciplinary hearing or through another witness to corroborate the testimony of RW1. Indeed, there was no documentary evidence to that effect. What was exhibited was in respect of past disciplinary hearings which were not relevant to the case herein.

29. In terms of the provisions of section 45(2) (c) of the Act, the respondent is required to prove that an employee's termination was in accordance with fair procedure. The respondent in this case failed to discharge its burden by proving that the procedure it applied against the claimant was fair.

30. To this end, I am led to conclude that the claimant's dismissal was not lawful.

31. The net effect of my findings is that there was no substantive justification to warrant the claimant's termination and further, there is no evidence that he was accorded procedural fairness. This fell short of the requirements stipulated under section 45 of the Act hence his termination was unfair and unlawful and I so find and hold.

Reliefs

32. Having found that the claimant's termination was unfair and unlawful, the court awards him one month's salary in lieu of notice.

33. The claimant has not proved his entitlement to monthly salary from the date of his dismissal until the date of conclusion of the suit. There is no justification for the same as it is not in doubt that he left the respondent's employment following his dismissal and did not render any services thereafter.

34. On the flip side, the claimant would have been entitled to compensatory damages for unfair and unlawful termination but he failed to pray for the same, hence the Court has no basis to make such an award. As was held by the Court of Appeal in *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR, the proper legal position is that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce.

35. As regards the claimant's retirement benefits, there is no evidence that he was entitled to benefits other than what was due to him by the NSSF. I do not therefore find any basis to award benefits to the claimant against the respondent. To this end, he is at liberty to pursue his benefits with the NSSF.



Orders

- 36. In the final analysis, I enter judgment in favour of the claimant against the respondent and he is awarded one (1) month’s salary *in lieu of* notice, being the sum of Kshs 10,486.00. Interest shall apply at court rates from the date of Judgment until payment in full.
- 37. The respondent shall also bear the costs of this claim.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF OCTOBER, 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Ngigi

For the Respondent Mr. Kioko

Court Assistant Abdimalik Hussein

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 March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

STELLA RUTTO

JUDGE

