



Kenya Union of Domestic, Hotels, Educational Institutions and Hospital Workers v Shivanga Secondary School (Employment and Labour Relations Claim 91 of 2021) [2022] KEELRC 12837 (KLR) (6 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12837 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CLAIM 91 OF 2021
JW KELL, J
OCTOBER 6, 2022
[FORMERLY KISUMU ELR CAUSE NO.20 OF 2019]

BETWEEN

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

AND

SHIVANGA SECONDARY SCHOOL RESPONDENT

JUDGMENT

Issue

Unlawful and unfair termination of employment

Grievant: Mr Wycliffe P. Mukhwana

1. The claimant, a trade union registered in the Republic of Kenya to represent domestic, hotels, educational institutions and hospital workers vide a claim dated February 25, 2019 and amended on the December 27, 2021, on behalf of the grievant, against the respondent sought the following reliefs:-
 - a. A declaration that the dismissal was unfair.
 - b. Payment of terminal dues (underpayments, gratuity) in accordance with the CBA negotiated between the Ministry of Education and KUDHEIHA (the claimant) lastly signed on the March 18, 1986 as per the attached calculations forwarded and received by the Hon Attorney General Kakamega on the June 23, 2021.
 - c. Maximum compensation for loss of employment



- d. Issuance of certificate of service
 - e. Costs of the suit
 - f. Any other relief the court deems fit
2. In addition, the claimant filed together with the statement of claim dated February 25, 2019, verifying affidavit of Thomas Mboya, the Branch Secretary Kakamega, the claimant's list of witnesses, witness statement of grievant, the claimant's list of documents and the bundle of documents.
 3. The claimant filed amended statement of claim dated December 27, 2021 and lodged in court on the February 14, 2022 together with further bundle of documents.
 4. The claim is opposed by the respondent who entered appearance through the office of the Honourable Attorney General on November 9, 2020 and filed reply dated April 23, 2021 to the statement of claim together with respondent's list of documents with the bundle of documents therein. The respondent filed further supplementary list of documents dated August 2, 2021 and filed in court on the August 4, 2021 together with the bundle of the documents. The respondent filed on February 17, 2021 its witness statement of Jotham Shitanda dated February 15, 2021.
 5. On the March 24, 2022 the respondent filed amended statement of response dated March 24, 2022 together with the minimum wage order of 2017. The respondent further on April 27, 2022 filed supplementary list of documents being NSSF statement.

Hearing and Evidence

6. The case for both parties was heard on the June 29, 2022.
7. The claimant's witness of fact was Wycliffe Peter Mukhwana who testified on oath as CW1 and adopted his written statement filed in court on the February 27, 2019 as his evidence in chief and produced documents under the claimant's list of documents dated February 25, 2019 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.
8. The respondent called as its witness of fact, Jotham Shitanda Muyaka, the Principal of the respondent who testified on oath as RW1 and adopted his witness statement filed in court on the February 17, 2021 as his evidence in chief. The witness produced as bundle of documents all documents filed in court by the respondents as their evidence.
9. The court directed the parties to file written submissions after the hearing. The claimant's written submissions drawn by Justin Wainu Kamuye for the claimant are dated July 26, 2022 and filed in court on the July 27, 2022. The respondent's written submissions drawn by Gilbert Tarus, Senior State Counsel for the Hon Attorney General are dated July 19, 2022 and filed in court on the July 21, 2022.

The Claimant's Case

10. The claimant was employed by the respondent vide employment letter dated February 11, 1999 as accounts clerk at a basic salary of Kshs 1,665/- per month without allowances and worked upto June 2017. That he worked well with two principals until the third principal, Mr Jotham Shitanda, was posted to the school in January 2014. That he started experiencing problems with the new principal accusing him of failure to sign register and coming late by letter dated July 7, 2014 and letter on duties and responsibilities dated June 10, 2015 all which replied to. That the claimant asked the principal why he was for the first time getting disciplinary letter and was told he and one Patisi had to go for



the new principle to work well. That when he was signed interdiction letter on January 25, 2017 Patisi had been given a letter of transfer on January 24, 2017. The grievant says a scheme was hatched against him until when he was terminated from employment vide summary dismissal. The grievant was paid terminal dues of Kshs 42,190 whose basis was not explained and he was denied the payment voucher. That he was interdicted and informed he was on half salary but what was paid did not amount to half salary. That he found a backlog from 1995 to February 1999 and was not paid for the extra time. That he was deducted Kshs 10,000/- from his salary on pretext he had squandered harambee money. That he was deducted NSSF for 44 months and the same was not remitted. That despite the frustrations by the Principal he had only one month backlog by time of interdiction in December 2017. That he was paid under the CBA. He asked the Union to intervene.

The Respondent's Case

The respondent, as per witness statement of Jotham Shitanda, admitted the grievant was their former employee dismissed from service following various warning letters of being late to work on various dates in the months of May and June 2014, and on January 23, 2016 he was warned for not presenting monthly trial balances to the executive board of management, for presenting incomplete trial balance to the full board of management of May 10, 2016, further warnings were issued to the grievant on the September 2, 2016 as well as October 14, 2016. That a board meeting was held on January 20, 2017 for disciplinary hearing on gross misconduct of the grievant whereupon a notice was issued on January 24, 2014. That hearing was scheduled for May 25, 2017 and the claimant's representative Mr Thomas Mboya together with the grievant arrived at the school before the meeting started and signed the visitors book but by the time of the meeting Mr Thomas Mboya had left hence did not attend the meeting. That the charges were read to the grievant who elected not to respond claiming the representative of the union had left. The Board resolved to terminate his services for gross violation reflected in the warning letter. RWI denied being malicious to the grievant.

Determination

11. Issues for determination
12. The claimant in its submissions addressed the following issues:
 - i. Whether the dismissal was fair
 - ii. Whether the grievant deserves gratuity as calculated
 - iii. Whether the grievant deserves maximum compensation
 - iv. Whether the grievant deserves annual leave for 2 years
 - v. Certificate of service
 - vi. Costs
 - vii. Any other relief the court deems fit
13. The respondent in its written submissions identified the following as the issues for determination:-
 - i. Whether the dismissal of the claimant followed the due process
 - ii. Whether the dismissal of the claimant was valid and fair
 - iii. Whether the claimant is entitled to terminal dues of gratuity and underpayments and;
 - iv. Whether the certificate of service was issued.



14. The court having heard the case by both parties and considering the issues addressed by the parties in the 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.
 - a. Whether the termination of the employment of the grievant was lawful and fair

The Relevant Law

15. 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.”
16. 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.....”
17. 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.
18. Section 46 of the [Employment Act](#) provides for reasons that do not constitute fair reasons for dismissal.
19. 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.

20. 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.’”

The Claimant Evidence on the Dismissal of The Grievant

21. The grievant (CW1) testified that he was summarily dismissed (appendix 9) and he appealed unsuccessfully against the dismissal (appendix 10). That there was a meeting between the union and management on terminal dues and it was agreed he be terminated in public interest and paid per letter of July 11, 2017(appendix 11).

Evidence on Cross-Examination of Grievant

21. During cross - examination CW1 confirmed he was issued with several warning letters. That on the May 23, 2016 he was warned of not writing books of accounts. CW1 confirmed that the meeting on books of accounts did not take place causing the letter. CW1 confirmed that the warning letter (appendix 2) was on reporting to work late and that he responded. CW1 confirmed that the warning letters were for coming late and not signing the register. CW1 said he reported late because he passed through the market to buy meat and added he had no evidence of having informed the school he would be late for that reason. CW1 confirmed he received the interdiction letter. CW1 confirmed he received invitation before the Board for disciplinary hearing. CW1 confirmed he attended the disciplinary hearing meeting on the June 16, 2017. CW1 told the court he did not defend himself at the meeting as the union representative was absent. That his representative came for the meeting and reached the school at around 9.30am. That he was invited to the meeting at around noon. That at noon when he was called alone to the meeting his representative remained at the school reception remaining at the reception. CW1 confirmed that his union representative, Thomas Mboya, remained at the reception. That the secretary instructions were specific he proceeds to the meeting. That he declined to defend himself for lack of union representative .

On why there was a letter by the union saying they waited for long and left, CW1 confirmed he said what he knew. CW1 told the court that when he left the meeting the said union representative Thomas Mboya was at the reception and he left him there.

The Respondent’s Evidence

22. The respondent’s witness (RW1) produced exhibits of warning letters , interdiction notice and summary dismissal letter (Respondent’s list of supplementary documents dated August 4, 2021). RW1 told the court he was strict with the grievant on his duty. On insubordination claim, RW1 attributed the same to failure of the grievant to talk when he appeared before the board. That the grievant was not remorseful in his response on the books of accounts to the Board. That the grievant was coming to work late and hence the warning letters.



Evidence on Cross-examination of RW1

23. RW1 told the court he was the principal of the school and that his personal relationship with the grievant was good. RW1 confirmed meeting with union on the July 7, 2017 and denied he agreed to dispense the terminal dues of the grievant. RW1 confirmed receipt of letter by the union of July 11, 2017 and said he responded to it but did not produce the response in court. RW1 denied that had a personal grudge with the grievant.

The Court Determination

24. It is not in dispute that the grievant was issued with several warning letters on his reporting to duty late a fact he admitted and stated he would pass through the market but had no evidence of the same. That he failed to do book of accounts on time and a warning letter was issued.
25. It was also not in dispute that the grievant was invited for disciplinary hearing which he attended accompanied by union representative one Thomas Mboya who remained at the reception when the grievant was called to the meeting. The union did not offer any explanation during the re-examination of CW1 on why the union representative remained at the reception yet he was at the school for the hearing. The court found the conduct of the claimant bizarre. The claimant in amended claim paragraph 12 stated though they went for the hearing they were not invited to the meeting. The respondent in paragraph 9 in response stated that the claimant was invited to the meeting but chose to remain outside. There was no further response by the claimant to this position. Was it deliberate act of sabotage of the disciplinary process considering the provision of section 41 of the *Employment Act*? The grievant informed the board meeting he would not talk without union representative but failed to disclose he left Thomas Mboya at the reception. The proceedings of the day were postponed.
26. Evidence on record after the meeting on disciplinary hearing was postponed, was that the respondent issued the grievant with a summary dismissal letter under section 44 of the *Employment Act*.

The claimant submits that while they appeared for the hearing it was evident the respondent wanted to conduct hearing with the grievant only(the court considered contents of the letter dated 2nd June 2107(appendix 8). The letter by Thomas Mboya states they were present but were kept waiting at the reception and allowed the respondent to continue with its business. This submission did not come out during cross examination of RW1 or at re-examination of CW1. CW1 told the court that the said Mr Mboya was still at the reception when grievant left the board meeting past noon. The court finds that the claimant deliberately failed to attend the disciplinary proceedings. The court finds that it was a statutory right of the grievant being member of union to be represented. Having raised the issue he ought to have been given another opportunity to appear for the hearing. The court is satisfied there were valid reasons leading to the aborted disciplinary process. The grievant admitted during cross-examination that at a meeting of the union and the respondent it was agreed his employment be terminated on public interest. The court finds the process was procedurally unfair.

b. Whether the Claimant is Entitled to Reliefs Sought

Compensation for Unfair Dismissal

27. The court having found that the process leading to dismissal was unfair, considered the conduct of the claimant and the warning letters against the grievant and his admission that the union agreed he be dismissed in public interest. The court finds that the claimant and grievant cannot be seen to benefit from their conduct of sabotaging the disciplinary hearing and the grievant from his conduct. The



claimant having agreed to termination of the grievant on public interest cannot turn around and ask for compensation for unprocedural dismissal.

28. The court finds that the grievant is only entitled to award of notice pay under section 49(1)(a) of the *Employment Act* for unprocedural unfairness of summary dismissal without notice and not compensation under 49(1)(c) which would apply if the reasons were not justified. In this case the reasons were reflected in the warning letters issued to the grievant which he as admitted to at the hearing.
29. The respondent submits that it has no CBA with the claimant. The respondent relies on the memorandum of agreement between Ministry of Education, Science and Technology and KUDHEIHA Workers of 1986. The respondent submits that the CBA was upheld in Industrial Court of Kenya at Nairobi Award Cause No 291 of 2010 KUDHEIHA Workers v Muranga High School where the court held that the claimant had a CBA with the Ministry of Education which bound the respondent, a public school and further the CBA was upheld by Justice Wasilwa in Industrial Court of Kenya at Kisumu Cause No 156 of 2013 *KUDHEIHA Workers v Sinaga Girls Secondary School*.
30. The court upholds the above decisions of the court and finds that the grievant was a member of the union and hence the CBA with the Ministry of Education applies in the instant case the Respondent being a public school

Claim for Underpayment

31. The claimant submits that he was underpaid. No evidence was led on the issue of underpayment during the oral hearing. The claimant submits that the grievant being a professional he ought to have been paid in tandem with Legal Notice No 39 of the Basic Education and specifically Basic Education Regulations of 2015 attached to its submissions. No evidence was led as to the grievant's job group hence the court is unable to apply the said scales for civil servants in the instant case. The respondent submits that there is no evidence before court since the claimant before dismissal was earning Kshs 13,426/- in comparison with the recommended remuneration for and qualification for non teaching staff job minimum pay of person with qualification of ACNCI/KATCI is Kshs.12,510/- and attaches the guidance. No evidence was produced of the earning of Kshs 13,426/- by either party.
32. The court considered the payroll of the respondent of June 2017 (respondent's exhibit 3) and the grievant was paid gross emoluments total Kshs 10,020/-. Under the guidance the minimum salary for the grievant was Kshs 12,510/- The court in absence of proof of any higher salary and considering the June 2017 pay roll finds and determines the minimum salary for the grievant was Kshs 12,510/- and applies the same in determination of terminal dues.
33. The respondent submit that the claimant did not plead or prove the grievant was entitled to underpayment and further states the claim for underpayment being a continuous injury is time barred for not being filed within 12 months of dismissal and to buttress their argument rely on the decision of *Kenya Union of Commercial, Food and Allied Workers v Generation Electric Allied Limited* (2019) eKLR where Justice Nzioki wa Makau stated as follows:-

‘ in regard to the underpayment claimed, the grievant did not raise the issue of underpayment during her employment as required during her employment and therefore waived her right to seek redress for the underpayments in previous years except for the final year of her employment in terms of section 90 of the *Employment Act* as underpayment is a continuing injury for which redress must be made within 12 months.’



34. The claimant was dismissed from employment vide letter dated June 16, 2017. The statement of claim was lodged in court February 27, 2019 which is outside the 12 months period.

The upholds the decision of the court by Justice Nzioki wa Makau and finds that the claim for underpayment is time barred.

Notice Pay.

35. The court finds and determines that the grievant being an accounts clerk was entitled to an all-inclusive minimum salary of Ksh 12510/- as per attached circular for non-teaching staff. The court declines to apply the calculations by the claimant as they were not produced as evidence in court.

36. The CBA (at page 16 of the claimant's amended statement of claim) under clause 6 provides for notice. The grievant had served from 1999 to 2017. Clause 6(a)(i) provides, "for any employee who has completed five years continuous service or more three months' notice or three months' pay in lieu of notice.

37. The court finds and determines that the claimant is entitled to notice pay equivalent of 3 months' salary computed at the minimum wages of Kshs 12,510/- for 3 months total Kshs 37,530/- .

Claim for Gratuity

38. On gratuity, the court having found the CBA was applicable considered the claim for gratuity under clause 31. The clause reads, 'payment of gratuity for the employees employment by the Board of Governors institutions who retired shall be paid at rate of one twelfth of each completed months of service based on his or her current salary.'

The respondent submits that the grievant was under NSSF which statement was produced in court as exhibit for the respondent. That the gratuity under the CBA is to be paid if one is retires which is ages of 55 to 60.

The CBA defines the grounds for payment of gratuity under clause 31 as follows:-

'a.

- i. Minimum of ten years of continuous service
- ii. Attainment of 50 years of age or compulsory retirement age of 55 years

b. Ill health

c. Public interests."

39. The court finds that the CBA was automatically incorporated into the terms of employment of the grievant by membership to the Union. The provision of section 35 (6) of the *Employment Act* is thus not a bar to the court awarding gratuity to the grievant who was also under the NSSF scheme.

40. The grievant was employed on the February 16, 1999 (appendix 1) and dismissed from service vide letter dated June 16, 2017. The complete months served are 10 in 1999 and 5 in 2017 plus 16 years x 12 total 207 months which is approximately 18 years of service. The Grievant thus served more than 10 years of continuous service. The court awards gratuity for 207 complete months of continuous service to wit $1/12 \times 207 \times 12510 =$ Total Kshs 215,797.50/-.

The claimant is awarded Kshs 215,797.50/ As gratuity for the grievant.



Conclusion and Disposition

41. The claimant has succeeded in their claim against the respondent. The court enters judgment for the claimant against the respondent as follows:-
- a. A declaration is issued that the dismissal of the grievant from service was procedurally unfair.
 - b. Award of notice pay equivalent of 3 months @12510/- gross salary total sum awarded Ksh 37,530/-.
 - c. Award for gratuity for total of 207 complete months served @ Kshs.12,510/- as last salary(minimum) total Kshs 215,797.50/-.
 - d. Awards above in b and c total award of Kshs 253,327.50/- less paid terminal dues amounting to Kshs 42,190/- is payable subject to statutory deductions.
 - c. Interest is awarded at court rates from date of judgment until payment in full if awarded amount is not paid within 30 days of the judgment.
 - d. Certificate of service of the grievant to issue within 14 days of the judgment.
 - e. No order as to costs.
42. It is so ordered.

DATED, SIGNED & DELIVERED IN OPEN COURT AT BUNGOMA THIS 6TH OCTOBER, 2022.

J. W. KELI,

JUDGE.

In The Presence of:-

Court Assistant : Brenda Wesonga

For Claimant:- Kamuye

For Respondents: Adwar for Attorney General

