



**KUDHEIHA Workers Union v St. Teresa’s Girls Secondary School (Cause 134 of 2017) [2022] KEELRC 13300 (KLR) (25 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13300 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 134 OF 2017  
SC RUTTO, J  
NOVEMBER 25, 2022**

**BETWEEN**

**KUDHEIHA WORKERS UNION ..... CLAIMANT**

**AND**

**ST. TERESA’S GIRLS SECONDARY SCHOOL ..... RESPONDENT**

**JUDGMENT**

1. The claimant union brought the instant suit on behalf of two grievants who it avers, are its members. The 1<sup>st</sup> grievant is Bernard Makori Omoga while the 2<sup>nd</sup> grievant is Judy Emily Njiru. The claimant avers that both grievants were employees of the respondent, having been employed on diverse dates.
2. That the two grievants were dismissed from employment on February 10, 2014 and the claimant took up the matter and reported a trade dispute to the Cabinet Secretary, responsible for Labour matters. Subsequently, the dispute was placed before a conciliator. That the conciliation proceedings were unsuccessful hence the conciliator issued a certificate of unresolved dispute.
3. The claimant contends that the respondent violated the provisions of the law by failing to involve the union during the disciplinary proceedings.
4. The claim against the respondent is for salary underpayments, service gratuity, notice pay, annual leave travelling allowance and commuter allowance.
5. Opposing the claim, the respondent stated that the grievants were dismissed on grounds of misconduct and insubordination and that they were given an opportunity to defend themselves. The respondent further states that the claim has no merit and is a waste of court’s time.
6. The matter proceeded for hearing on May 9, 2022 and both sides called oral evidence.



### **1<sup>st</sup> Grievant's Case**

7. The 1<sup>st</sup> grievant testified as CW1 and at the start of the hearing, sought to rely on his witness statement together with the documents filed with the claim, to constitute his evidence in chief. He also produced the said documents as his exhibits before Court.
8. He told the Court that he was employed by the respondent as a store keeper. That he was issued with a letter of appointment dated 29<sup>th</sup> May, 2007 although he had commenced his employment sometimes in 2004. That he was earning a monthly salary of Kshs 2,830.00 and was not being paid house allowance and was not given a house by his employer.
9. That all was well in the employment relationship until 7<sup>th</sup> May, 2013 when he was called to the respondent's principal's office. That the principal verbally suspended him from duty for a period of one month and thereafter issued him with a letter of suspension on 18<sup>th</sup> November, 2013, upon his written request. That in the letter of suspension, he was alleged to have left work before the stipulated time. He termed the said allegations as untrue.
10. He further testified that he was later subjected to a disciplinary hearing before the respondent's Board of Management and was not allowed representation by a union official or representative. That there was no proof that he had committed the allegations against him.
11. That on February 10, 2014, he was issued with a letter of summary dismissal. That he was not paid terminal dues upon termination and was not issued with a certificate of service. He asked the Court to allow his claim as prayed.

### **2<sup>nd</sup> Grievant**

12. The 2<sup>nd</sup> grievant testified as CW2. Similarly, she proceeded to rely on her witness statement together with the documents filed with the claim, to constitute her evidence in chief. She also produced the said documents as her exhibits before Court.
13. CW2 testified that she was employed by the respondent as a store man II, Job Group E. That she was issued with a letter of appointment dated October 23, 2008. That her starting salary was Kshs 7,518.00 and was not consolidated hence she was not paid house allowance.
14. That her relationship with her employer was good until when she was summarily dismissed on allegation that she left work before the designated time. That the dismissal was preceded by her suspension on November 18, 2013.
15. That she appeared before the respondent's Board of Management and was not represented by a member of her union.
16. That following her dismissal, she was not paid terminal dues nor issued with a certificate of service. She asked the Court to allow her claim as prayed.

### **Respondent's Case**

17. The respondent called oral evidence through Mr Charles Kimathi who testified as RW1. He identified himself as an Advocate of the High Court of Kenya and the Chairman of the respondent's Board of Management. He asked the Court to adopt his witness statement as his evidence in chief.
18. He testified that the 1<sup>st</sup> grievant was employed as a school store keeper in March 2004 starting on a basic salary of Kshs 2,830/- per month. That his appointment was subject to the terms and conditions



of service of persons employed by the Board of Governors Order established under the Education Act Chapter 211.

19. That on January 14, 2011, the 1<sup>st</sup> grievant was informed of change of his duty by the Deputy Principal who instructed him to take up the duties of one of the staff working in the kitchen who was off duty for 3 days. That he refused to pick up the letter of change of duty and to work as instructed hence he was issued with a letter dated January 17, 2011, requiring him to show cause why disciplinary action should not be taken against him for refusing to perform his duties assigned to him. That he refused to obey his employer and did nothing to that effect.
20. That further, on March 18, 2011, he was issued with another letter summoning him to appear before the School Board of Management on the 25<sup>th</sup> day of March, 2011. The purpose of the meeting was for him to explain why he had refused to perform duties that had been assigned to him on January 14, 2011.
21. That the meeting was held as scheduled and he was allowed to call a representative of his choice. That he called Mr Francis Ngige as his preferred witness. That after appearing before the Board, he gave an apology which the Board accepted. That he was informed that he would be given a last chance and any case of gross misconduct in the future would lead to automatic dismissal.
22. That unfortunately, the 1<sup>st</sup> grievant did not improve on his conduct and on November 18, 2013, he was issued with a letter of suspension due to negligence of duty and gross insubordination. That among the issues of great concern was that he had left the school compound during working hours without permission and refused to explain in writing as directed by the Principal and had disobeyed a direct order not to resume work without providing an explanation.
23. That the 1<sup>st</sup> grievant appeared before the Board on February 6, 2014 in the presence of one Ms. Tecla Koskei as his witness. That during the hearing, he admitted to the charges of negligence of duty and gross insubordination hence his dismissal by the Board.
24. With regards to the 2<sup>nd</sup> grievant, RW2 told Court that she was employed on October 23, 2008 as a Stores Man II Job Group E starting on a monthly salary of Kshs 7,518.00.
25. That on September 20, 2011, she was issued with a letter arising out of complaints on improper stores record and management. That the letter required her to give a proper explanation due to irregularities noted between book balances and actual balances on items like sugar, rice, maize, books etc, and exaggerated requisitions leading to wastage of maize flour and further explain why the stores were dirty and disorganized.
26. That the 2<sup>nd</sup> grievant responded to the said letter but the response was unsatisfactory hence was informed as much through a letter dated October 5, 2011.
27. That on the same date, another letter was issued to her through which she was cited for gross misconduct for issuing stale meat to be cooked for the students yet the same had been found to be unfit for human consumption. That she was thus asked to show cause why disciplinary action was not to be taken against her. That yet again, she was not able to give a proper explanation and as a result, on January 25, 2012 she was given a detailed list of her duties and responsibilities which she was expected to perform diligently.
28. That as a result of the 2<sup>nd</sup> grievant's poor performance and gross insubordination she was issued with a letter of suspension on November 18, 2013.



29. That consequently, on February 6, 2014, she appeared before the Board, accompanied with her witness, Ms. Tecla Koskei. That during the hearing, she admitted to the charges against her.
30. That consequently, the Board relived her of her duties on the basis of failing to perform her duties as per its expectations of the Board and for failing to qualify for the post of store keeper as per the interview conducted on March 28, 2012.
31. It was his further testimony that the grievants never claimed underpayment during the employment relationship and that they were paid what was due to them. That all statutory deductions were duly remitted to the relevant institutions and the grievants had no pending leave days.

### **Submissions**

32. The claimant submitted that the respondent's Board flouted the provisions of section 41 of the *Employment Act*. That the grievants were not invited to appear before the Board in accordance with clause 6(c) of the Collective Bargaining Agreement (CBA) between the Ministry of Education and the claimant. The claimant placed reliance on several authorities including Kisumu Cause No 156 of 2013 *KUDHEIHA v Sinaga Gils Secondary School* and Nairobi Cause No 291 of 2010 *KUDHEIHA v Muranga High School*.
33. It was submitted on behalf of the respondent that there were sufficient grounds to terminate the grievants' employment in accordance with section 44 of the *Employment Act*. That further, due procedure was followed in effecting the termination of the grievants. It was the respondent's further submission that the Basic Education Act came into effect on April 8, 2015 whereas the grievants were dismissed in 2013 and 2014 hence the same do not apply to them. In support of its submissions, the respondent cited several authorities including *Moi Teaching and Referral Hospital v James Kipkonga Kendagor* (2019) eKLR, *Swaleh David v Premier Cookies Limited* (2021) eKLR and *Banking Insurance and Finance Union (Kenya) v Barclays Bank of Kenya Ltd* (2014) eKLR.

### **Analysis and determination**

34. From the pleadings on record as well as the evidentiary material placed before me, it is apparent that this Court is being called to determine the following twin issues:
  - a. Whether the grievants' termination from employment was unfair and unlawful.
  - b. Are the grievants entitled to the reliefs sought?

### **Unfair and unlawful termination?**

35. Sections 41, 43, 45 and 47(5) of the *Employment Act* provide the legal parameters for determining whether an employee's termination from employment was fair. The thread running through these provisions is that a termination ought to be both substantively and procedurally fair.
36. In a nutshell, substantive fairness entails proof of reasons for which an employee was terminated, while procedural fairness is the process applied in effecting such termination. I will first consider substantive fairness.

### **Substantive fairness**

37. Section 43(1) of the *Employment Act* (Act) requires an employer to prove the reasons for termination and failure to do so, such termination is deemed to be unfair. Additionally, section 45 (2) (a) and (b) of the Act provides that a termination of employment is unfair if the employer fails to prove-



- a. that the reason for the termination is valid;
  - b. that 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; ...
38. The crux of section 45 (2) (a) and (b), is that it is not enough to spell out the reasons for termination. The same ought to be fair and valid and the burden rests on the employer to prove as much.
39. The reasons leading to the termination of the 1<sup>st</sup> grievant as per his letter of summary dismissal, was negligence of duty and gross insubordination. The specific acts of insubordination and negligence stemmed from his letter of suspension dated 18<sup>th</sup> November, 2013 through which it was alleged that his work as a grounds man was wanting in that:
- a. The compound was untidy;
  - b. Areas around the building needed attention (weeding and cutting grass);
  - c. He left over 1000 seedlings to dry up due lack of watering; and
  - d. Not tending to the newly planted trees.
40. The 1<sup>st</sup> grievant was further accused of leaving the school compound at 2:00 pm without permission and resurfacing at 4:00 pm. That when asked to explain his whereabouts, he alleged that he had gone to purchase airtime.
41. Save for the oral evidence of RW2, the allegations against the 1<sup>st</sup> grievant were not corroborated. Considering the nature of the allegations raised against the 1<sup>st</sup> grievant, it was imperative that the same be supported by further evidence beyond the testimony of one witness. For instance, there was mention of the school bursar being present when the 1<sup>st</sup> grievant was initially questioned by the school principal concerning his absence from school during working hours. Being an eye witness, one wonders why the said bursar not called in as a witness? Why wasn't he required to prepare a written statement to corroborate the allegations against the 1<sup>st</sup> grievant?
42. In absence of evidence to support the allegations against the 1<sup>st</sup> grievant, I cannot help but find that the respondent has failed to discharge its evidential burden under sections 43 and 45 (2) (a) and (b) of the Act.
43. Turning to the 2<sup>nd</sup> grievant, the record bears that she was also accused of negligence and gross insubordination with the specific allegations being that she failed to keep proper records and that some ledgers were missing. She was also accused of failing to perform her duties properly when she was assigned the duty of cleaning the laboratories and the dining hall. The 2<sup>nd</sup> grievant was further accused of leaving her workplace at 4:00 pm, before the designated time.
44. From the record, it is apparent that the issue regarding the disparities in the store records had arisen on 20<sup>th</sup> September, 2011, when the 2<sup>nd</sup> grievant was required to give a written explanation to that end.
45. The 2<sup>nd</sup> grievant had this to say in her written explanation dated January 30, 2012:

“Re: Disparities In The Stores And Store Ledgers

Kindly refer to the above subject and your oral instructions to me today January 30, 2012, the I respond to you in writing.



1. It is true, the squared books, Ruled Exercise books, plain books are not balancing. This is because when the books were bought by the supplier, the package inside was incorrect because they had packed 96 exercise books instead of 144 Exercise books and these(sic) I realised in December holiday when I was going through my ledgers.
  2. About the rice, the rats are a threat in the stores because they poke on the sacks thus causing a lot of wastage in the store, hence reducing the actual measure. Potatoes also are stored on the floor and by the time they are over, half of them are rotten.”
46. In order to determine whether the respondent had a valid reason to terminate the 2<sup>nd</sup> grievant’s employment on grounds of negligence and failing to perform her duties properly, it is imperative to revisit her duties, which entailed:
- a. Maintaining the ledger books and inventory for the permanent and expendables;
  - b. Receiving and ascertaining the goods and services delivered and offered in the school;
  - c. Issuing textbooks and other materials;
  - d. Keeping a record of all materials received in the school;
  - e. Stamping the delivery notes and ensure that the invoice corresponds to the delivery;
  - f. Ensuring the quality and quantity before acceptance; and
  - g. Maintaining the books and stress in good condition.
47. Going by the 2<sup>nd</sup> grievant’s explanation, it is evident that she admitted to negligence on her part in that she confirmed that the package delivered by the supplier was incorrect as it contained 96 exercise books instead of 144, and that she only realized the same in December when going through the ledgers.
48. This admission by the 2<sup>nd</sup> grievant was quite damning on her part and indeed, confirms that she was not keen in the performance of her work. As highlighted above, part of her duties was to ensure the quality and quantity of the goods before acceptance. One then wonders how the quantity of the exercise books delivered escaped her attention for that long until much later in December? If at all, she was keen in the performance of her duties, this is something that she should have ascertained before acceptance of the said exercise books.
49. It is also evident that the allegations of negligence and improper performance of duty against the 2<sup>nd</sup> grievant were raised by two different school principals of the respondent, the first being a Mrs. Situma and the second being Mrs. Ikambili. This proves that her negligence in the performance of duty was not a one off. This further lends credence to the respondent’s assertions that the 2<sup>nd</sup> grievant was negligent in her duty and performed her duties in an improper manner.
50. In light of the foregoing, I am led to conclude that the respondent had a fair and valid reason to commence disciplinary action against the 2<sup>nd</sup> grievant. Her termination was therefore not unfair.

## ii. Procedural fairness

51. Beyond proving the reasons for an employee’s termination, an employer is required under section 45(2) (c) of the Act to subject an employee to a fair process prior to termination. The specific requirements of a fair hearing are provided for under section 41 of the Act. In this regard, the 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 in the presence of a union representative or an employee of own choice.
52. The grievants have not denied appearing before the disciplinary hearing convened by the respondent's Board. Their only contention was that they were not accompanied by a union representative.
  53. It is notable that the 1<sup>st</sup> grievant admitted during cross examination, that he was accompanied by a colleague by the name Francis Ngigi. On her part, the 2<sup>nd</sup> grievant admitted during her testimony in chief and in cross examination, that she was accompanied by Ms. Tecla Koskei during the disciplinary hearing.
  54. Section 41 (1) of the Act entitles an employee to be accompanied to a disciplinary hearing by another employee or a shop floor union representative of his or her choice. Therefore, it is not mandatory for the person accompanying the employee to be a union representative. The requirement for representation may well be achieved through appearance with a fellow employee as in the case herein.
  55. To this end, the absence of a union representative during the grievants' disciplinary hearing did not render the process unfair.
  56. The 1<sup>st</sup> grievant further contended that he was only issued with a letter of suspension and not a show cause letter. This is not entirely true. Why do is say so? From the record, the letter of suspension was elaborate and contained details of the allegations raised against the 2<sup>nd</sup> grievant. Therefore, the said letter served more than a singular purpose as it first notified him of the allegations facing him and communicated the issue of suspension. In addition, he was notified that he would be invited to appear before the Board at a date to be advised.
  57. The upshot of my findings is that the process applied in terminating the grievants' employment was fair and the respondent cannot be faulted to that extent.
  58. With regards to the 1<sup>st</sup> grievant, the respondent despite subjecting him to the procedural requirements under section 41 of the Employment Act, failed to prove that it had valid and fair reasons to terminate his employment. His termination was therefore unfair.
  59. On the other hand, the Court finds that the termination of the 2<sup>nd</sup> grievant was fair and lawful as the respondent has proved that it had justified reasons to terminate her employment and in so doing, applied a fair process.
  60. I now turn to determine the reliefs available to the grievants.

### **Appropriate Reliefs**

61. Having found that the 1<sup>st</sup> grievant's termination though procedural was substantively unfair, the Court awards him compensatory damages equivalent to four (4) months of his gross salary. This award takes into consideration the years of service with the respondent.
62. The 1<sup>st</sup> grievant is further awarded three month's salary in lieu of notice in line with Clause 6 (a) (ii) of the CBA exhibited by the claimant.
63. With regards to the 2<sup>nd</sup> grievant the Court will not make any award of compensatory damages having found that her termination was not only procedural but was substantively fair. In the same breath, the award of one month's salary in lieu of notice to the 2<sup>nd</sup> grievant, does not lie.



64. Both grievants' claim in regards to underpayments succeed for the reason that Regulation 4 of the *Education (Board of Governors) (Non-teaching Staff) Regulations*, Legal Notice No 262 of August 26, 1993 provides that "persons belonging to a professional cadre and employed by the board shall be employed on such terms and conditions of service similar to those recommended for equivalent posts in the civil service."
65. What this means is that the grievants were entitled to the salary payable to officers serving in equivalent posts in the civil service. It thus follows that they were also entitled to benefit from any salary review across the civil service.
66. The 1<sup>st</sup> grievant was appointed on May 29, 2007 and was paid Kshs 2,830.00 and placed on scale C. In this regard, the circular dated August 13, 2008 from the office of the Prime Minister referenced "Harmonization of Terms and Conditions of Service for Public Service: Review of Salaries for Civil Service" provided the salary payable for Job Group C as Kshs 8,259.00. A subsequent Circular dated June 25, 2012 reviewed the salary upwards to Kshs 9,660.00.
67. The 2<sup>nd</sup> grievant was appointed on October 23, 2008 and placed on job group E and was earning the sum of Kshs 7,518.00. The circular dated August 13, 2008 from the office of the Prime Minister, provided the salary payable for Job Group E as Kshs 9,721.00 and through a further Circular dated June 25, 2012 the salary was reviewed upwards to Kshs 11,370.00.
68. The foregoing confirms the grievants' assertions that the respondent was underpaying their salary, hence they are entitled to payment of salary arrears being the difference of what they were supposed to earn and what was paid to them.
69. The grievants are further entitled to salary for the months of November and December, 2013 and January, 2014 as the respondent did not prove that the same was paid.

## Orders

70. In the end, I enter Judgment in favour of the claimant against the respondent and the Court makes the following award in favour of the grievants:

### 1<sup>st</sup> Grievant

- a. Compensatory damages in the sum of Kshs 46,680.00 which sum is equivalent to 4 months of his gross salary.
- b. Underpayment in the sum of Kshs 120,456.00 from May, 2008 to December, 2013.
- c. Three months salary in lieu being Kshs 35,010.00.
- d. Payment of salary for the months of November-December, 2013 and January 2014, being Kshs 35,010.00.
- e. The total award is Kshs 237,156.00.
- f. Interest on the amount in (e) at court rates from the date of Judgement until payment in full.

### 2<sup>nd</sup> Grievant

- a. Underpayment in the sum of Kshs 182,058.00 from May, 2008 to December, 2013.
- b. Payment of salary for the months of November-December, 2013 and January 2014 being Kshs 43,650.00.



- c. The total award is Kshs 225,708.00.
- d. Interest on the amount in (c) at court rates from the date of Judgement until payment in full.

71. As the employment relationship has not been disputed, the grievants are entitled to certificates of service in accordance with section 51 of the [Employment Act](#).

72. The respondent shall bear the costs of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25<sup>TH</sup> DAY OF NOVEMBER, 2022.**

.....

**STELLA RUTTO**

**JUDGE**

**Appearance:**

For the Claimant Mr Kamuye

For the Respondent Ms. Mwangi

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 March 15, 2020 and subsequent directions of April 21, 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

