



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 215 OF 2016

PIUS MULONGO.....CLAIMANT

VERSUS

THE PRINCIPAL ST. LUKES

BOYS HIGH SCHOOL - KIMILILI.....1ST RESPONDENT

THE CHAIRMAN BOARD OF MANAGEMENT

ST. LUKES BOYS HIGH SCHOOL - KIMILILI.....2ND RESPONDENT

JUDGMENT

1. The suit was filed on 26/7/2018 by the claimant praying for an Order in the following terms:

(a) A declaration that the employment of the claimant by the respondent was unfair for failing to comply with the mandatory provisions of the Employment Act, 2007 and the Constitution of Kenya, 2010.

(b) Judgment be entered for the claimant in terms of paragraph 8 of the Statement of claim as follows: -

(i) Payment in lieu of notice – Kshs.12,400

(ii) Equivalent of 12 months damages for wrongful dismissal.

(iii) Under payment for the entire period of service.

(iv) Severance pay – kshs.165,333.

2. The claimant testified as C.W.1, that he is at present a farmer based in Bungoma. That he was previously employed by the respondent as an office manager on 17/2/2000. That he worked until the 29/3/2016 when his employment was terminated on allegation that C.W.1 was rude to the employer.

3. On 29/3/2016, C.W.1 was issued with a letter of suspension. C.W.1 testified that he was accused of leaving school before knock-off time on 29/2/2016. C.W.1 stated that the school had a clocking in and clocking out logbook. That he reported to work at 5.30 a.m. and left school at 4 p.m. daily.

4. That C.W.1 was paid Kshs. 12,700 per month.

5. That C.W.1 was paid ½ salary during the period of suspension.

6. That on 16/6/2016, the claimant was dismissed from employment.

7. C.W.1 testified he was invited to the Board to defend himself by a letter dated 7/6/2016. The claimant was to appear before the Board on 16/6/2016.

8. C.W.1 stated that he was told he could go to the meeting with a representative. That a union representative was barred by the Principal Mr. Patrick Wandili.

9. That on 14/6/2016, in the Boardroom, the respondent made fresh allegations against C.W.1 which C.W.1 did not know.
10. C.W.1 testified further that he was accused of threatening to shoot the principal. That C.W.1 told members of the community that the school leaks examinations and that C.W.1 had poor relationship with his co-workers.
11. C.W.1 testified that he denied all those allegations since they were not true.
12. C.W.1 stated that he was chased out of the Boardroom.
13. C.W.1 testified that National Social Security Fund (NSSF) was not paid for him regularly. That National Hospital Insurance Fund (NHIF) was also not paid regularly and so he was denied medication.
14. C.W.1 stated that he was sick and hospitalized on the day the respondent alleged that he was seen loitering out of the school. C.W.1 stated he had obtained sick-off.
15. C.W.1 stated that he claimed service gratuity for 10 years and that he was not given leave. That C.W.1 claimed underpayments, damages for wrongful dismissal, cost and interest. C.W.1 further claimed notice pay. C.W.1 stated that the claim is as set out in the statement of claim at paragraph 8.
16. C.W.1 was cross-examined by Mr. Kraido advocate, for the respondent. Under cross-examination – C.W.1 admitted he was paid one-month salary in lieu of notice and said that claim be removed. C.W.1 insisted that the disciplinary process was not proper.
17. C.W.1 stated that he was suspended on 29/3/2016. That he appeared for a disciplinary hearing subsequently. C.W.1 stated he was not asked to respond to the allegations in the letter of suspension but new allegations were made against him regarding threat to shoot the Principal, poor work relationship with co-workers and that C.W.1 had alleged that the school cheated exams.
18. C.W.1 admitted he had previous warnings but those issues were resolved and he had continued working. That was on 12/20/2015 and 17/1/2014. C.W.1 admitted that he had been redeployed on 19/1/2015 to be a grounds man but he continued to do the same work.
19. C.W.1 insisted that he was a very good worker during the time he served but the principal witch-hunted him from the year 2013.
20. The claimant stated that he suffered loss and damages as a result of the dismissal. That his children suffered also for lack of facilitation. C.W.1 said the new principal did not want to work with old staff hence the witch-hunt.
21. C.W.1 admitted that he did not explain the underpayment. C.W.1 stated that National Social Security Fund and National Hospital Insurance Fund were not regularly remitted.
21. C.W.1 stated under re-examination he had no time to prepare for fresh allegations made against him in the Boardroom.
22. That the dismissal was unlawful and unfair.
23. The respondent despite having filed a statement of response to the claim on 30/9/2016 and counsel for the respondent having cross-examined the claimant did not call any witness to rebut the evidence tendered before Court by C.W.1 against the respondent.
24. All the material facts tendered by C.W.1 in his testimony before Court against the respondent remain rebutted.
25. The Court has no basis to doubt the veracity and the truthfulness of the testimony by the C.W.1 that he was suspended by a letter dated 29/3/2016 which letter was produced before Court as Appendix 1(b) on specific allegations stated in that letter being on 13/3/2015, 13/6/2013; 17/1/2014, 2/11/2015, 15/2/2016, he had committed various offences in respect of which he had apologised and or given a warning.
26. That on 29/2/2016 and 1/3/2016 C.W.1 had worked partially for a few hours and left school early without permission before the normal time of 5 p.m.
27. The letter said that the claimant had been rude to his fellow workers and to his supervisor, the caterer.
28. It is on the basis of all this that the claimant was suspended. C.W.1 was not requested to respond to the allegations but was informed that he would be invited to appear before the Board of Management to defend himself.
29. The claimant admitted that he appeared before the Board but stated he was ambushed with new allegations including that he had threatened to shoot the principal and that he was not allowed to enter the Boardroom with a Union representative.
30. In the letter of dismissal produced as Appendix '2' dated 16/6/2016, the reasons for dismissal were set out as follows: -
 - (i) Lack of respect for authority. You rudely answered the board of management including saying that you had no idea why you were appearing before the board.

(ii) You have received warning letters more than twice.

(iii) You occasionally left duty before time.

(iv) You initially apologised and promised never to be involved in mistakes.

31. Section 41(1) of the Employment Act, provides that an employee faced with a disciplinary offence be permitted to have a representative of choice at the hearing. This did not take place in this case.

32. Section 43(1) and (2) provides that the employer bears the burden of proving that the employee was dismissed and or terminated for a valid reason. The employer has to tender evidence to prove this and the employee bears the burden of rebuttal under section 47(5) of the Act.

33. The respondent failed to tender any evidence to prove that the dismissal of the claimant was for a valid reason and that the claimant was dismissed from employment following a fair procedure.

34. Accordingly, the Court finds that the claimant has proved on a balance of probability that he was constantly, victimized by the new principal since the year 2013 by being accused falsely and given regular warning letters and that he was suspended on false allegations and that during the disciplinary hearing he was faced with fresh charges for which he had no time to prepare.

35. The testimony by the claimant having not been rebutted, the Court finds that the dismissal of the claimant violated Sections 41, 43 and 45 of the Employment Act, and the dismissal was therefore unlawful and unfair.

36. The claimant is entitled to compensation in terms of Section 49(1) (c) and (4) of the Employment Act, 2007. In this respect the claimant had served the respondent for a period of 10 years. The claimant lost his employment on false allegations. The claimant did not receive terminal benefits upon dismissal except one-month salary in lieu of notice. The respondent failed to tender evidence to show that the claimant contributed to the dismissal.

37. The claimant lost means of livelihood and he suffered pain and loss for failure to provide for himself and his children by fact of the dismissal. The claimant's social elements of National Social Security Fund and National Hospital Insurance Fund were not regularly paid and he suffered loss by fact of non-remittance of these statutory benefits.

38. The Court considers the case of **Juliet Ndanu –vs- East Africa Growers Limited in Employment & Labour Relations Cause No. 754 of 2012**, in which Maureen Onyango J. awarded the claimant 12 months' salary for unlawful dismissal and Court of Appeal at Nairobi, **Civil Appeal No. 234 of 2013** between **Freight in-Time Limited –vs- Rosebell Wambui Munene**, in which the Court of Appeal reduced a 12 months' compensation by Employment & Labour Relations Court to the respondent to 6 months' compensation. The respondent had served for 2 ½ years.

39. In the present case, having considered all factors including that the claimant was now doing subsistence farming and was unemployed, the Court awards the Claimant the equivalent of 10 months' salary in compensation in the sum of Kshs. 12,400 x 10)= 124,000.

Terminal Benefits

40. The claim for Notice Pay and underpayment were not proved and are dismissed for want of proof.

41. The claimant has proved that his National Social Security Fund was not regularly remitted by the respondent. In terms of Section 35(5) and (6) of the Employment Act, 2007, the claimant is entitled to payment of service pay (*pleaded as Severance pay*) limited to the equivalent of 15 days' salary for each completed year of service. The Court awards the claimant Kshs.(12,400x1/2 x 10) = 62,000.

42. In the final analysis judgment is entered in favour of the claimant against the respondent as follows: -

(a) Compensation – Kshs.124,000.

(b) Service pay - Kshs.62,000.

Total award Kshs.186,000.

(c) Interest at Court rates from date of judgment till payment in full.

(d) Costs of the suit.

DATED AT NAIROBI THIS 11TH DAY OF MARCH, 2021

MATHEWS N. NDUMA

JUDGE

ORDER

In view of the declaration of measures restricting court of operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this Judgment has been delivered to the parties online with their consent. 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 has 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 18 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.

MATHEWS N. NDUMA

JUDGE

Appearances:

Mr. Omondi for Claimant

Mr. Knaido for Respondent

Chrispo: Court clerk