



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA**

**CAUSE NO. 27 OF 2018**

**ELIZA JEMUTAI CHEBOI.....CLAIMANT**

**VERSUS**

**BOARD OF MANAGEMENT KAMOI**

**SECONDARY SCHOOL.....RESPONDENT**

**JUDGMENT**

1. Bungoma Cause No. 27 and 28 of 2018 were on 26/7/2018 consolidated with Cause No. 27 to be the Lead file. The two claimants testified in support of their respective cases.

2. C.W.1 Eliza Jemutai Cheboi, testified that she worked for the respondent as a Secretary from 11/5/2010. C.W.1 adopted a witness statement dated 26/3/2018 as her evidence in Chief. C.W.1 also produced exhibits "1" to '7' annexed to the Statement of Claim in support of her case.

3. C.W.1 testified that she worked for the respondent diligently and with dedication until the 6/2/2018 when the respondent terminated her employment unlawfully and unfairly.

4. At the time of termination C.W.1 earned Kshs.8,160 per month.

5. C.W.1 stated that on 3/2/2018, the respondent conducted a sham re-evaluation exercise with a view to review the salary of C.W.1. The claimant and a few other support staffs were selected to go through the review process. On 3/2/2018 C,W.1 received a letter of termination on grounds that C.W.1 was unsuitable to continue working for the respondent.

6. C.W.1 stated that she believed she was victimized following threats by the Principal and his Secretary to deal with C.W.1 after the Principal had made sexual advances at C.W.1. and C.W.1 had refused and warned the Principal that she would raise the matter with the Deputy Principal and the members of Board of Management, if he did not desist from such advances.

7. C.W.1 stated that sometimes in the year 2017, she had found the Principal and a student in his office in a compromising position. The office was locked. That the Principal then took away the spare key from C.W.1 and issued her with fresh threats that should he hear about the incident, her services would be terminated.

8. That the issue was raised in another forum and the Principal continued to issue threats to C.W.1.

9. Upon termination, C.W.1 reported the dispute to the Labour office but the respondent ignored a letter to the school by the Labour Officer.

10. C.W.1 issued a demand letter to the respondent which was not heeded hence the suit.

11. C.W.1 prays for the following reliefs: -

(i) Declaration that the termination C.W.1 was by way of redundancy declaration .

(ii) Reinstatement to her employment without loss of salary and benefits.

(iii) In the alternative payment of terminal benefits and compensation as set out under paragraph 17 of the Statement of Claim including

*(a) One month salary in lieu of notice - Kshs.17,847.54.*

*(b) House allowance*

*(c) Underpayments.*

*(d) Refund of unremitted National Social Security Fund (NSSF) dues.*

*and*

*(e) Compensation for the unlawful termination.*

12. C.W.2 Sammy Kiptoo Kipkore testified that he was presently a farmer and was previously employed by the respondent. C.W.2 adopted a witness statement dated 26/3/2018 as his evidence in Chief. C.W.2 also produced exhibits '1' to '8' attached to the Statement of Claim in support of his suit.

13. C.W.2 testified that he was employed by the respondent as a watchman on 3/11/2008. That he worked diligently and with dedication until 6/2/2018 when the respondent unlawfully and unfairly terminated his employment. That at the time of termination C.W.2 earned Kshs..7,140 per month.

14. C.W.2 testified that he was together with C.W.1 selected to go through a process of re-evaluation on 3/2/2018 with a view to review his salary. That a few other staff were also selected for the process. C.W.2 stated that the process was a sham aimed at terminating their employment.

15. That on 6/2/2018, C.W.2 together with C.W.1 received letter of termination on the ground that he was unsuitable to continue working for the respondent.

16. That dissatisfied with the letter, C.W.2 sought audience with the Principal who instead was rude to him and ordered him to leave the school premises and ordered the day watchman not to allow him to the school. C.W.2 reported the complaint to the Labour Officer. The respondent ignored invitation by the Labour Officer to deal with the matter.

17. C.W.2 wrote a demand letter through his advocate which was unheeded by the respondent hence the suit. C.W.2 seeks the following reliefs:-

(a) A Declaration that C.W.2's services were unlawfully and unfairly terminated.

(b) Reinstatement without loss of benefits and salary.

(c) In the alternative, payment of terminal benefits set out under paragraph 15 of the Statement of Claim including:-

*(a) One month salary in lieu of notice Kshs.9,458.81.*

*(b) House allowance.*

*(c) Overtime dues.*

*(d) Underpayments*

*(e) Compensation for unlawful termination.*

*(f) Certificate of Service.*

18. The respondent filed statement of defence to both suits on 23/5/2018. The claimants filed replies to the statements of defence in which they joined issue with the defendant on material aspects of the suit.

19. The respondent called R.W.1 James Sambasi to testify in respect of the consolidated suit.

20. R.W.1 stated that he was the Principal of the respondent school and knew the claimants in the suit. R.W.1 testified that C.W.1 worked as a typist at the school but she was no longer there. R.W.1 adopted a witness statement filed on 23/5/2018 as his evidence in Chief in this matter. R.W.1 also produced exhibits filed on the list of documents in support of the defence case. R.W.1 stated that C.W.2 was a watchman and he knew him. R.W.1 adopted a witness statement filed on 23/5/2018 as his evidence in Chief in respect of C.W.2.

21. With respect to C.W.1, R.W.1 testified that C.W.1 was hired by the respondent on 1/5/2010 on temporary basis.

22. That on 2/12/2017, the Board of Management discussed among other items qualifications of support staff. The respondent resolved to vet them in order to get value for their money.

23. By a letter dated 15/2/2018, R.W.1 was instructed by the Chairman of the respondent to inform all the support staff to prepare for the exercise which was to be held on 15/2/2018.

24. That on 3/2/2018, that all the members of support staff, including C.W.1 were present for the exercise and C.W.1 was informed the purpose of the exercise and that some issues relating to her relationship with co-workers and the teachers had been raised and that she had repeatedly reported to work late despite having been severally warned. That C.W.1 was given opportunity to defend herself. The respondent resolved to terminate the services of C.W.1 and that she be paid one-month salary in lieu of notice.

25. R.W.1 stated further that C.W.2 was also present for the same re-evaluation exercise on 3/2/2018. That C.W.2 was informed the purpose of the exercise and that some issues regarding loss of school items while he was on duty had been raised.

26. That C.W.2 was accorded opportunity to explain those issues but his explanation was unsatisfactory.

27. That the respondent resolved to terminate the employment of C.W.2 for dishonesty in his duties and that he was to be paid one month salary.

### **Determination**

28. The issues for determination are: -

**(a) Whether the employment of C.W.1 and C.W.2 were terminated for valid reasons following fair procedure.**

**(b) Whether C.W.1 and C.W.2 are entitled to the reliefs sought.**

29. From the testimony of R.W.1 the employment of C.W.1 and C.W.2 were terminated for reasons of misconduct. From the testimony by R.W.1 the two claimants were not notified of any intended disciplinary process but were instead notified by the respondent of an intended fresh vetting of all support staff in order for the respondent to get value for money. C.W.1 and C.W.2 were therefore not notified of any charges against them before the meeting held by the respondent on 3/2/2018 in which all support staffs were present. C.W.1 and C.W.2 and all other support staff were not served with notices to show cause. C.W.1 and C.W.2 were not aware of any intended disciplinary process against them until when the two were ambushed in front of the rest of support staff with alleged undocumented charges of misconduct against them. The two were the only support staff asked to respond to the undocumented charges and were subsequently terminated from employment for failure to provide satisfactory answers to the respondent.

30. The claimants told the Court that this process conducted by the respondent was a sham, intended to eliminate targeted support staff for nefarious reasons. The Court agrees fully with the testimony of C.W.1 and C.W.2 that the respondent completely failed to put in place a proper, just and fair procedure in terms of Section 41 of Employment Act, 2007, to institute disciplinary action if at all, against any and or all the support staff.

31. This is a classic case of mob lynching by an employer who should know better since the respondent is a public body guided by the Principles of good governance enshrined under Chapter thirteen (13) of the Constitution on Public Service.

32. Article 232(1) on the Values and Principles of Public Service provides:-

(i) The values and principles of Public Service includes:-

(a) ***high standards of professional ethics.***

(b) .....

(c) .....

(d) .....

(e) ***Accountability for administrative acts.***

and

33. Article 236 provides:-

**“A public officer shall not be-**

**(a) *Dismissed, removed from office, demoted in rank or otherwise, subjected to disciplinary action without due process of law”***

34. The respondent is a board in a public institution and all the staff serving under it are public officers who deserve respect and to be treated justly, fairly and with dignity.

35. The conduct of the respondent in the circumstances of this case violated all the above principles and values in respect of its entire support staff and C.W.1 and C.W.2 in particular.
36. The conduct by the respondent also amounted to unfair labour practice in violation of Article 41(1) and (2) (a) and (b) of the Constitution of Kenya, 2010.
37. The respondent has failed to prove that it had a valid reason to terminate the employment of the claimants in violation of Section 43(1) and (2) as read with Section 45 of the Employment Act, 2007.
38. Furthermore, the respondent violated Section 41 of the Employment Act, 2007, in that the procedure adopted to terminate the employment of the claimants was unfair and in violation of the Rules of natural justice.
39. The respondent did not adduce any evidence to counter the claim of the two claimants set out explicitly in their Statement of Claim and restated in the witness statements by the two employees. Indeed R.W.1 did not offer any answer at all to the claims of house allowance; underpayment; unremitted National Social Security Fund (NSSF) dues; payment in lieu of leave days due and overtime adduced by C.W.1 and C.W.2 in their evidence before Court. These claims however would only be limited to the last three years from the date of filing suit. The rest are time barred by dint of Section 90 of the Employment Act; 2007.
40. Accordingly the Court finds that the termination of employment of the claimants was unlawful and unfair and both are entitled to compensation in terms of Section 49(1) (c) and (4) of the Employment Act, 2007. The Court deems the remedy of reinstatement inappropriate in the circumstances of this case, due to the fact that the respondent is a small institution with daily interactions by all staff in their operations which would make relationships between the claimants and management untenable. Accordingly, compensation is appropriate in the circumstances of the case. In this respect C.W.1 had served the respondent from the year 2010 to 2018, a period of about 8 years. C.W.2 on the other hand served the respondent from the year 2008 up to the year 2018, a period of about 10 years.
41. The two were terminated on similar circumstances and the Court finds that both did not contribute to the termination. The two were underpaid and victimized after giving good service to the respondent over the years they had served. They were not paid their terminal benefits except one month pay in lieu of notice upon termination. The two suffered loss and damage and unfair curtailment of career progression till retirement. The two did not receive compensation for the unlawful job loss and both wished to continue serving the respondent. The Court has considered the Court of Appeal decision in **Ken freight East Africa Limited -vs- Benson K. Nguti – Civil Appeal No. 31 of 2015** in which the Court of Appeal upheld an award of 12 months' salary in compensation to an employee who had served 14 years. **Patrick Makau Kyule -vs- Kevian Kenya Limited** in which Ndolo, J. awarded 8 months' salary in compensation to an employee who had served 14 years with good record and **Juliet Ndanu -vs- East Africa Growers Limited** in which Maureen Onyango, J. awarded 12 months' salary in compensation to an employee who had served 11 years.
42. Upon consideration of all these factors aforesaid, the Court awards C.W.1 8 month's salary in compensation for the unlawful termination and awards C.W.2 10 months' salary in compensation for the unlawful termination.
43. In addition the Court awards the two claimants the terminal benefits as set out in their statement of claim and witness statements but only limited to three (3) years period to the date of filing suit.
44. In the final analysis judgment is entered in favour of the claimants against the respondent as follows: -

A. **Eliza Jemutai Cheboi**

- (a) House allowance (2015 to 2018) Kshs.108,248.82
- (b) Underpayment (2015 to 2018) – Kshs.272,058.7
- (c) 8 months compensation – Kshs.142,783.52 (17,847.94. x 8)

**Total:** - Kshs.523,091.04.

- (d) Certificate of Service.

B. **Sammy Kiptoo Kipkore**

- (a) House allowance (2015 to 2018 – Kshs.61,278.06
- (b) Overtime (2015 to 2018) – Kshs.635,184.
- (c) Underpayments (2017 to 2018) – Kshs.8,680.4
- (d) Leave due (2015 to 2018)  $\underline{21} \times 8225.05 \times 3 = 17,272.65$ .

Total award: – Kshs.722,415.06.

- C. Certificate of Service to both claimants within 30 days of judgment.
- D. Interest at Court rates from date of judgment till payment in full.
- E. Costs of the consolidated suits.

Dated and delivered at Nairobi this 14<sup>th</sup> day of April, 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 15<sup>th</sup> 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. Wamalwa for claimants

Mr. Waweru for Respondent.

Chrispo: Court clerk