



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

CAUSE NO. 86 OF 2017 (FORMERLY KSM CAUSE NO. 319 OF 2015)

MACTILDA WESONGA KOKONYA.....CLAIMANT

VERSUS

THE CHAIRPERSON, THE SECRETARY BOARD OF

MANAGEMENT MUNGORE GIRLS SECONDARY SCHOOL.....RESPONDENT

JUDGMENT

1. The suit was filed on 26/8/2015 by the claimant at Kisumu being Kisumu Cause No. 319 of 2015 and was transferred to Bungoma on 30/9/2017 as Bungoma Cause No. 86 of 2017.

2. The claimant prays for the following reliefs: -

- (a) Reinstatement to work without loss of benefits.
- (b) Three months' salary for being suspended without pay and salary from date of termination to date of reinstatement.
- (c) Payment in lieu of leave.

In the alternative,

- (d) General damages for unlawful dismissal.
- (e) Payment of salary arrears.
- (f) Severance pay.
- (g) Notice pay.
- (h) Service gratuity.
- (i) Costs of the suit.

3. The respondent filed a statement of defence on 5/11/2015 in which the particulars of claim and the reliefs sought are denied and the claimant put to strict proof thereof.

4. C.W.1 Mactilda W. Kokonya, the claimant adopted a witness statement dated 8/8/2015 as her evidence- in- chief and testified that she was employed by the respondent by a letter of appointment dated 6/12/1989 as a Matron, housekeeper, caterer and Kitchen help. That she further got a 2nd letter dated 6/1/1992. That she worked continuously until 12/6/2013 when she was dismissed from work at 7.35 in the evening.

5. C.W.1 testified that herself and her colleagues had resumed work from April school holidays and found that some items had disappeared from the store.

6. The staff were issued a warning letter whilst at home and C.W.1 was accused of selling food stuffs to students. C.W.1 stated that she had a

letter from the school authorizing her to sell food to students. C.W.1 was further accused of keeping bad records but she said that it is the store keeper who kept records and not herself.

7. On 11/7/2013, C.W.1 was called to a hearing and was asked to write an apology letter and go back to work. C.W.1 denied having stolen any school items from the store but admitted that she sold food stuffs to students since the principal had authorized her to do so. C.W.1 stated that she had worked for five (5) different principals. C.W.1 agreed to stop selling food to students. The meeting of 11/7/2013 was by Parents and Teachers Association (PTA). C.W.1 was told that she would be called before a full Board meeting. However, that did not happen.

8. C.W.1 was then served with a letter of summary dismissal before being called before a Board meeting. The letter of dismissal is dated 7/8/2013 and was backdated to 2/8/2018.

9. C.W.1 reported the dispute to the Labour Officer at Bungoma. C.W.1 had worked for 23 years and was paid Kshs.7,700 salary per month. C.W.1 was offered Kshs.33,000 terminal benefits which she refused to take.

10. C.W.1 stated that she awaited to collect her pension upon reaching 55 years. C.W.1 denied having signed a consent to withdraw the case. C.W.1 stated that she never went on leave since the year 1990. That she was not given notice of termination nor was she paid in lieu of leave.

11. C.W.1 states that the dismissal was unlawful and unfair.

12. Under cross-examination C.W.1 testified that Principal Ezekiel Ambiolech allowed her to sell snacks to students. That the authority was verbal. That she had retailed food stuffs to students for a long time. That the decision was made to stop outsiders from vending in the school. C.W.1 had a gate exit to the kitchen and sold at 6a.m in the morning, 10 a.m and 6 p.m. interval. C.W.1 stated that the students had 10 a.m. tea break; 10 Oclock lunch and 6 p.m. dinner.

13. C.W.1 stated that her supplier had medical authority to sell foodstuffs. C.W.1 added that the store keeper Mr. Benedict kept store records and not herself. C.W.1 stated that she also made Tea for teachers and served them with lunch. C.W.1 stated that she did not supervise the storekeeper. C.W.1 stated that she did not have a pays lip but a voucher was used upon payment of salary and an employee would sign. C.W.1 stated that the school kept the vouchers, and did not issue copies to employees. C.W.1 stated that her main duty was to take care of students. That her duties were general including being a house keeper, caterer and ensure that the food served to students was good. That she looked at the welfare of the students regarding any sickness and cleanliness of the dormitories. C.W.1 stated that the workers were served with the food left after the students had eaten. C.W.1 ensured that the food cooked was enough for that purpose. C.W.1 ensured that there was no food theft. C.W.1 said she had served diligently and well in these roles for a period of 23 years. That during that period, there was no strike at the school and everything went well. C.W.1 supervised the cooks and did not witness any theft from them.

14. C.W.1 stated that on 25.1.2013, there was an inspection and she was present. That the inspectors found 5 kilograms of raw beef in a bowl and 2 kilograms of cooked beef. C.W1 stated that these were left over after service of food. C.W.1 stated that the cooks made the food and she was not involved and that one Ignatius, a cook was responsible. C.W.1 added that it is not true that the beef was 5 kilograms. That it was little left over food.

15. C.W.1 denied that on 11/6/2013 there was an incident of milk theft. C.W.1 stated she was not aware of that. C.W.1 denied that 11 kilograms of meat was recorded upon receipt of 14 kilograms on 11/6/2017. C.W.1 denied that on 8/6/2013, 2 kilograms of beef was recorded but none had been supplied. C.W.1 stated that was the work of the store keeper. C.W.1 denied that on 11/6/2013, 2 kilograms of beef was recorded but 4 kilograms had been bought. C.W.1 admitted that she kept the record of meat received and gave the store keeper to keep it. C.W.1 stated that she appeared before the Parent and Teachers Association (PTA) but not the Board. C.W.1 reiterated that she was told that she would be called before the Board.

16. C.W.1 stated that herself and one Dennis Wekunda and the milk man Ignatius were called to the Parents and Teacher Association (PTA) meeting. C.W.1 wrote a letter upon being requested by the PTA to the effect that if food was stolen by the cooks she was not aware. C.W.1 said the letter was written and given to her to sign. C.W.1 stopped selling food. C.W.1 testified that three meetings were held at the Labour office. That the employer attended and agreed to pay C.W.1 Kshs.33,000 terminal benefits which C.W.1 refused.

17. C.W.1 denied having known that her junior staff were stealing school food. C.W.1 stated that the school had a weighing machine and they weighed food supplied. C.W.1 stated that she was never caught with stolen meat or any item at the school. C.W.1 stated that food was at times brought in her absence and that the store keeper had the key to the store. C.W.1 stated that she lived outside the school and the school had security personnel to ensure safety of the school and all property.

18. R.W.1 Emily Were Okhoba adopted a witness statement dated 15/10/2015 as her evidence in Chief. R.W.1 testified that she knew C.W.1. That C.W.1 worked for the respondent and her work was terminated following theft at the school. That C.W.1 had received several warnings. That theft involved beef and other foodstuffs. That C.W.1 was called before the Board of Management for a disciplinary hearing. R.W.1 produced exhibit '1' to '14' in support of her testimony. The documents were filed in a list dated 3/11/2015.

19. R.W.1 testified that C.W.1 wrote a letter of apology admitting her mistake and asked the Board to forgive her. R.W.1 stated that the Board deliberated the matter and decided to dismiss C.W.1.

20. R.W.1 stated that the matter was reported to the Ministry of Labour and the school had received a letter of demand from C.W.1's advocate. R.W.1 testified that Conciliation failed and the matter came to Court.

21. R.W.1 stated that the Ministry of Labour calculated the terminal benefits of C.W.1 at Kshs.33,267 and a Certificate of Service which the school provided. R.W.1 stated that the sum of Kshs.33,267 was paid.

22. R.W.1 under cross examination stated that she joined the school on 2/1/2012. R.W.1 testified that at the time C.W.1 had no disciplinary record. R.W.1 stated that the store keeper kept food stuffs. That his name was Benedict Wesonga. R.W.1 stated that she had no minutes of the hearing accorded to C.W.1 before Court. R.W.1 stated that two cooks had stolen food stuffs. That the cooks were warned and told to pay for the food stuffs. R.W.1 stated that the cooks implicated C.W.1. R.W.1 stated that that C.W.1 lived near the school. That watchman checked the workers coming in and out of the gate. R.W.1 stated that C.W.1 did not sign the agreement at the Labour office. That Kshs.33,267 was deposited at the Labour office. That C.W.1 was summarily dismissed.

23. R.W.1 stated that C.W.1 was asked to write a letter of apology dated 1/7/2013. R.W.1 denied that the apology letter was a pre-condition for reinstatement. R.W.1 stated that C.W.1 paid Kshs.900 for the stolen items. That C.W.1 had accepted to pay. R.W.1 stated there was a school canteen managed by a teacher. R.W.1 stated that C.W.1 served food not in the school menu to the students including chapatis. R.W.1 stated that she asked C.W.1 to stop selling food to the students but she had refused. R.W.1 stated that the school has a cateress. R.W.1 denied being a relative of the cateress. R.W.1 stated that prior, C.W.1 served as Matron and Cateress. R.W.1 stated that C.W.1 was not paid during suspension. R.W.1 stated that apology by C.W.1 was voluntary and that all her dues were paid and C.W.1 has no further claim against the school.

Determination

24. The issues for determination are: -

(a) Whether the respondent had a valid reason to summarily dismiss the claimant and if the respondent followed a fair procedure in doing so.

(b) What remedies are available if at all, to the claimant.

25. On 15/1/2013 C.W.1 received a warning letter from R.W.1, a new Principal of the School regarding theft of school property and especially food items from the boarding store. R.W.1 alleged in the said letter that on 15/1/2013, the Deputy Principal while on the routine inspection of students' meals found 5kgs of uncooked meat, 2 kgs of cooked meat and 6kgs of maize flour kept aside and not used to prepare student's food for the day. That this theft reduced student's meals ratio to be served. That investigations showed that food was to be shared by C.W.1 and the cooks. C.W.1 was charged Kshs.900 as part payment of those stolen items and C.W.1 was served with a warning letter that a repeat of this theft would result to disciplinary hearing before the Board.

26. R.W.1 produced another warning letter dated 12/6/2013, served on C.W.1 in which she alleged several reports of theft and unprofessional behaviour against C.W.1 had been reported in the kitchen where C.W.1 headed. R.W.1 stated that she was completely unsatisfied with the work performance of C.W.1 and outlined 8 items of dissatisfaction including theft of students' food; over ordering of quantities of food; making wrong entries; selling of foods from outside to the students; giving false reports to administration, reduction of students' food ratios; using careless language and being unmindful of personal and general hygiene standards.

27. P.W.1 told C.W.1 that despite several verbal warnings and a written warning letter dated 15/1/2013, C.W.1 had continued to disregard her advice.

28. R.W.1 suspended C.W.1 until C.W.1 received official communication from the school. R.W.1 asked C.W.1 to treat the letter as extremely serious warning.

29. R.W.1 also produced a letter dated 10/7/2013 inviting C.W.1 before the Board of Governors on 11/7/2013 to answer charges levelled against C.W.1 in the letter dated 12/6/2013.

30. R.W.1 produced letter dated 11/7/2013, written by C.W.1 titled "**Apology letter to the Board of Governors**". In the letter C.W.1 promises the Principal and her deputy that theft of students' food will never happen again; wrong records of food will not be done again and that C.W.1 will be very keen in ordering the exact food quantity for the number of students. That C.W.1 would stop selling food from outside school to the students.

31. C.W.1 prayed that her apology be considered.

32. The Principal produced a letter dated 12/7/2013 in response to the letter of apology by C.W.1 dated 11/7/2013 in which she acknowledges receipt of the letter of apology from C.W.1 and promised that the Board of Governors would consider the same and revert to the C.W.1.

33. R.W.1 produced the letter of dismissal dated 7/8/2013 in which it is communicated to C.W.1 that she had been found guilty of all the 8 charges outlined in the letter dated 12/6/2013 upon C.W.1's appearance before the Executive Board of Management on 12/7/2013. That the full Board of Management meeting held on 2/8/2013 had resolved to summarily dismiss C.W.1 from the school service.

34. R.W.1 also produced a report from the Ministry of Labour where the respondent agreed to pay to the claimant Kshs.33,267 comprised of one month salary in lieu of notice; three months' salary compensation; 12 days salary for June, 2013 and provide the claimant with a Certificate of Service.

35. The Agreement is signed by the respondent on 13/5/2014 but the claimant refused to sign. A Certificate of Service dated 15/1/2011 confirming that C.W.1 worked for the respondent from 1/1/1990 to 2/8/2013 was also produced by R.W.1.

36. It is apparently clear from the evidence adduced by R.W.1 that the letter dated 12/6/2013 written to C.W.1 by R.W.1 was not a Show Cause letter but was a “*serious warning*” being a 2nd warning written to C.W.1 by R.W.1 within a period of six (6) months. R.W.1 confirmed in her testimony that C.W.1 had not received another warning from the respondent before the one dated 15/1/2013. It is common cause that C.W.1 had served the respondent as a Matron for a period of 23 years at the time with good record, there being no evidence to the contrary.
37. R.W.1 did not request C.W.1 to respond in writing to the raft of 8 charges levelled against her on 12/6/2013. Instead R.W.1 placed C.W.1 on indefinite suspension and by a letter dated 10/7/2013 summoned C.W.1 to appear before the Board of Governors the following day on 11/7/2013 to answer to charges levelled in the letter dated 12/6/2013. R.W.1 did not advise C.W.1 to bring a representative of choice as is provided under Section 41 of the Employment Act, and indeed, the notice itself was in the Court’s view very short considering the raft of generalized, charges with no specific particulars of acts and or omissions committed on specified dates by C.W.1.
38. R.W.1 did not produce any record of proceedings by the Board of governors on 11/7/2013, which minutes are mandatory as a tool of school governance.
39. The Court is left with no alternative but to believe the testimony by C.W.1 that all the members of the Board did was to delude C.W.1 to write a letter of apology for the unspecified offence levelled against her which the Board then proceeded to use to find C.W.1 guilty of all the generalized 8 offences against C.W.1 without any prove at all and summarily dismissed C.W.1 on 7/8/2013. It is opportune to point out that C.W.1 did not appear before the full Board of Management and the minutes of the alleged meeting of full Board on 2/8/2013 were also not produced by R.W.1.
40. There is indeed no proof before the Court that the Board of Management met on 11/7/2013 and 2/8/2013 as alleged by R.W.1 or at all and if they did meet, what agenda was discussed and what resolutions were made by the Board.
41. The respondent is mandated under Section 41,43, and 45 of the Employment Act to demonstrate that it had a valid reason to summarily dismiss the claimant. The respondent is bound under Section 45 not to dismiss the claimant for no valid reason.
42. The respondent has failed to discharge the onus placed on it under Section 43(1) and (2) as read with Sections 45 and 47(5) to prove that it had a valid reason to dismiss the claimant from employment.
43. The Court accepts the credible evidence by the claimant that she was deluded to write an apology for unspecified charges which she did not commit as a ruse to justify the unlawful conduct of the respondent to dismiss the claimant summarily from employment.
44. The Court accepts the testimony by the claimant that indeed she had served the school well as a Matron for a period of 23 years under 5 different Principals. That she was victimized by R.W.1 who had now employed a cateress to replace her. The Court accepts that the claimant had authority to sell food stuffs not provided by the school to the students during breaks. The Court takes judicial notice of this old practice in most government schools over the years which may not be good practice today. This however was not then a justifiable reason to dismiss the claimant from employment.
45. The claimant has discharged the onus placed on her under Section 47(5) of the Employment Act, and Sections 107 and 108 of the Evidence Act, Cap. 80 Laws of Kenya to prove on a balance of probabilities that she was unlawfully and unfairly dismissed from employment.
46. The Court finds that the claimant is entitled to compensation under Section 49 (1) (c) and (4) of the Act, since reinstatement to employment is untenable due to the long passage of time from the date of her dismissal.
47. In this respect, the Court recognizes the attempted settlement of the dispute by the Labour office, Bungoma and partly adopts the terms of the settlement that was approved by the respondent but rejected by the claimant.
48. Accordingly the Court awards the claimant terminal benefits comprising of: -
- (a) Kshs.4,506 in lieu of leave days not taken.
 - (b) Kshs.6,523 in lieu of once month notice.
 - (c) Kshs.2,609, being salary for 12 days worked in June, 2013.
 - (d) Grant of Certificate of Service.
49. With regard to compensation for unlawful and unfair dismissal, the Court has taken into account the 23 years unblemished service, by the claimant to the respondent; the unprocedural manner in which the respondent dealt with the issues raised against the claimant; the lack of proof of the general allegations made against her to the extent that the Court finds that the claimant did not contribute to the summary dismissal; the lack of good faith by R.W.1 in the manner she had dealt with the claimant; the fact that the claimant has not received her terminal benefits to date though the same was deposited with the labour office; the fact that the claimant desired to continue with her employment to retrenchment; the fact that the claimant did not get alternative employment and that the claimant has suffered loss and damage as a result of the unlawful conduct by the respondent.
50. The Court has considered similar cases of **Ken Freight East African Limited -vs- Benson K. Nguti - Civil Appeal No. 31 of 2015** in which the Court of Appeal confirmed maximum compensation of the equivalent of 12 months’ salary for the unlawful and unfair dismissal of

the claimant and the case of **Amalgamated Union of Kenya Metal Workers -vs- South End Motors – Cause No. 223 1 of 2017** in which Maureen Onyango, J. awarded the grievant the maximum compensation of 12 months' salary in recognition of the 24 years served by the grievant.

51. The Court considers this an appropriate case to award the claimant maximum compensation of the equivalent of 12 months' salary in compensation for the unlawful and unfair dismissal in the sum of Kshs. (6,523 x 12) – 78,276.

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

(a) Kshs.78,276 in compensation.

(b) Kshs.4,566 in lieu of leave.

(c) Kshs.6,523 in lieu of one month notice.

(d) Kshs.2,609 being salary for June, 2013.

Total amount – Kshs.89,625.

(e) Interest at Court rates from date of filing suit till payment in full in respect of (b) (c) and (d) above and from date of filing suit in respect of (a) above.

(f) Costs of the suit.

53. For the guidance of doubt, the claims for severance pay and payment of Gratuity and Service pay were found to be without merit since this was not a retrenchment and the claimant has testified that she awaits her retirement benefits upon attainment of 55 years. These claims were therefore not granted for want of proof.

DATED AND DELIVERED AT NAIROBI THIS 14TH 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 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

Claimant in person.

Mulwa for Respondent

Chrispo: Court clerk