



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 304 OF 2018

ZACHARY OLUOCH OCHUODHO

CLAIMANT

v

BOARD OF MANAGEMENT, GENDIA HIGH SCHOOL

RESPONDENT

JUDGMENT

1. Zachary Oluoch Ochuodho (the Claimant) was employed by the Board of Management, Gendia High School (the Respondent) as a security officer on or around 1 January 2014 (he was later deployed to the kitchen as a cook).
2. On 11 July 2017, the Claimant was admitted to Kendu Adventist Hospital suffering from malaria, and he was discharged on 16 July 2017.
3. The Claimant resumed duty on 17 July 2017, and on 24 July 2017, the Respondent issued him with a warning letter allegedly for misconduct (showing arrogance to the bursar and inciting staff).
4. The letter also directed the Claimant to sign and hand over to the Principal, certain documents (leave application form) or face disciplinary action.
5. On 28 July 2017, the Respondent suspended the Claimant pending disciplinary action by the Board, and the reason given was failing to comply with the terms of the warning letter.
6. The Claimant was invited to appear before the Board through a letter dated 16 October 2017.
7. The hearing did not proceed because on 29 May 2018 because the Claimant did not attend, and the Respondent, therefore, invited the Claimant to attend a new hearing on 31 May 2018. The Claimant attended the hearing.
8. On 3 October 2018, the Claimant instituted these proceedings alleging unfair termination of employment and breach of contract.
9. The Respondent filed a Response on 6 November 2018, contending that the termination of the Claimant's employment was fair.
10. The Cause was heard on 8 October 2019 when the Claimant testified and 1 March 2021 when the Respondents 4-witnesses testified.
11. The Claimant filed his submissions on 25 March 2021, whilst the Respondent filed its submissions on 27 April 2021.
12. The Court has considered the pleadings, evidence and submissions.

Unfair termination of employment

Procedural fairness

13. The Claimant challenged the procedural fairness of the termination of his employment on the ground that he was not notified in advance of the reasons for the disciplinary hearing.
14. The Respondent served the Claimant with a warning letter dated 24 July 2017. The warning outlined 2 allegations against the Claimant and also instructed him to sign and hand over certain official documents (leave forms) to the Principal within 24 hours.
15. The Claimant did not comply, and on 28 July 2017, he was suspended to await a disciplinary hearing before the Board.

16. The Claimant eventually appeared before the Board and made representations.

17. Section 41 of the Employment Act, 2007 requires the employer to afford the employee an opportunity to make representations before making a decision to terminate the contract.

18. The Court is satisfied that the Respondent was in substantial compliance with the requirements of procedural fairness because the Claimant was informed of the allegations to confront and was thereafter invited to appear for an oral hearing where he appeared and made oral representations.

Substantive fairness

19. The principal reason why the Claimant was dismissed was that he refused to sign a leave form to proceed on annual leave.

20. The Respondent's third witness, the bursar, stated that he prepared annual leave forms and issued the same to all non-teaching staff, but the Claimant refused to sign, and he cascaded the issue to the Principal.

21. The Respondent's first witness, the Principal, testified that the Claimant and 2 other employees were requested to apply for leave during the school holidays and that the Claimant (and another employee) refused to sign the forms, but upon his explanation, the other employee signed but the Claimant declined.

22. The Principal further testified that he wrote to the Claimant on 28 July 2017 to sign and return the forms, but he did not comply.

23. The second witness called by the Respondent was the Claimant's fellow cook. He testified that the Claimant informed them in the kitchen that he would not sign the leave forms.

24. The Claimant had in his testimony stated that he had filed the leave form, but when he took it to the Principal, he refused to approve it.

25. The Claimant's colleague in the kitchen testified that the Claimant informed them that he would not sign the leave form. The Claimant did not question or interrogate the testimony.

26. The testimony corroborates and gives credence to the testimony by the Principal and the Bursar that the Claimant declined to sign the leave forms.

27. The conduct of the Claimant amounted to insubordination. He failed to take lawful instructions from his superiors.

28. While annual leave is a statutory entitlement, the employer has an interest, depending on the exigencies of duty as to when the employee takes the leave.

29. The Court finds that the Respondent has established valid and fair reasons to dismiss the Claimant.

30. Compensation and salary in lieu of notice are thus not available to the Claimant as remedies.

Breach of contract

Overtime

31. The general law of employment leaves it to the parties to agree on the hours of work beyond which overtime would be payable.

32. The Claimant did not produce any contractual agreement on overtime.

33. However, the Labour Institutions Act and the Regulations made thereunder prescribe working hours for certain sectors of industry or work,

34. The Claimant did not disclose which particular Regulation applied in the sector the Respondent operated in, and the Court cannot speculate on it.

35. The Claimant having failed to establish an evidential or legal foundation to this head of the claim, relief is declined.

Gratuity

36. The Claimant did not lay any contractual or legal basis for entitlement to gratuity, and relief is once again declined.

Certificate of Service

37. A certificate of service is a statutory entitlement, and the Respondent should issue one to the Claimant within 21-days.

Conclusion and Orders

38. From the foregoing, and save for a certificate of service which the Respondent should issue to the Claimant within 21-days, the Court finds no merit in the Cause, and it is dismissed with no order on costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 2ND DAY OF JUNE 2021.

RADIDO STEPHEN, MCI Arb

Judge

Appearances

For Claimant Gadhia & Otieno Co Advocates

For Respondent Amos O. Oyuko & Co Advocates

Court Assistant Chrispo Aura