



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAKURU

CAUSE NO. 466 OF 2014

ROBERT MUTURI MARUNGO.....CLAIMANT

VERSUS

THE BOARD OF GOVERNORS,

GATERO GIRLS HIGH SCHOOL.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. The Claimant herein filed a Memorandum of Claim dated 30th September, 2014, on the 3rd October, 2014 and Amended it on the 30th October, 2014 through the firm of Muthanwa and company advocates claiming unfair termination and to be compensated for the alleged unfair termination.

2. The summary of the claimant's case is that he was employed by the 1st Respondent on 1st day of August, 2001 as a cook earning a monthly salary of Kshs 2,580/- that rose to Kshs 10,988 at the time of his dismissal.

3. He stated that he was dismissed from employment on the 31st January, 2013 without any Notice or disciplinary hearing as provided for under the employment Act. He was also not paid any terminal benefits.

4. The claimant therefore prayed for judgment against the Respondents for;

i. A declaration that the termination of the claimant was unfair, wrongful, unlawful and illegal.

ii. Payments of; -

a) Underpayment of Kshs. 106,812

b) Annual leave of Kshs 23,075

c) severance pay of Kshs 60,434.

d) 12 months' compensation as per section 49(c) of the Employment Act of Kshs 131,856.

iii. Costs of the suit.

5. The 2nd Respondent on behalf of itself and the 1st Respondent entered Appearance on the 28th October, 2014 and filed a response to the claim on the 27th November, 2014 denying all the averments in the claim and put the claimant to strict proof thereof.

6. The Respondent stated that the claimant was lawfully and rightfully terminated from employment on 31st January, 2013.

7. Prior to the termination it is stated that the claimant had been suspended from duty as from 22nd November, 2012 for assisting students

with his mobile phone, purchasing credit for students and charging mobile phone batteries for students which acts affected the discipline of student and their performance negatively. Consequently, the 1st Respondent held a meeting on the 23rd January, 2013, where it resolved to dismiss the claimant from services and the said decision was communicated to him on the same day.

8. On 24th January, 2014 the claimant admitted holding mobile phone batteries for students and apologized to the 1st Respondent but the apology was not received well by the Respondent who in turn issued him with an official termination letter on 31st January, 2013.

9. The Respondents also stated that the claimant had been issue with several warning letters on various issues including the issue of charging phone batteries for students which he apologized and promised not to repeat but ended up making the same mistake that now costed him his job.

10. On the issue of underpayment, the respondents stated that the claimant was paid in accordance with the regulations of wages as from 2009 to 2012. It was stated that the claimant's salary increased from Kshs. 2,580 on employment to Kshs. 10,988 as at the time of termination, which pay was within the statutory limits.

11. On the leave pay prayed for, the Respondent averred that the claimant enjoyed all holidays student took that amounts to Three (3) months each year therefore the prayer for leave is without any basis.

12. On severance pay, the Respondents contends that the claimant was summarily terminated from employment and not dismissed for redundancy thus severance pay is not warranted.

13. The Respondents then prayed for the entire claim to be dismissed with costs to them.

14. The claimant in response to the respondents' response to claim filed a rejoinder on the 19th December, 2014 reiterating all the averments of his claim and in particular stated that the minutes of 23rd January, 2013 did not amount to disciplinary hearing as his side of story was never heard, further that he was merely informed of the outcome of the meeting.

15. During hearing the claimant, **Robert Muturi** testified that he was employed by the 1st respondent from the year 2001 as a cook, which employment was confirmed in the year 2002. He sought to rely on his witness statement and list of documents filed in court on the 3rd October, 2014.

16. On cross examination, he testified that he understood his work as a cook and knew also how to relate with students. He stated that he was not allowed to give his mobile phone to students, neither was he allowed to buy airtime for them. He contended that he was not involved in any of the said acts. He also stated that in his apology letter he stated that he found students with a mobile phone battery. He also testified that he was invited for a disciplinary hearing by the Board but that he was given a day's notice therefore could not secure an advocate or a representative of the Union. He therefore stated that the disciplinary proceedings were not proper and his dismissal was not warranted.

17. The Court directed parties to file submissions which the Respondent filed on the 5th October, 2021 while the claimant did not file any submissions.

Respondents submissions.

18. The Respondent submitted that the claimant was first employed in the year 2001 as a cook earning a salary of Kshs 2,580 and not Kshs 10,988 as alleged therefore his pay kept on rising till his termination in 2013.

19. It was submitted that the claimant was terminated from service for gross misconduct as contemplated under section 44 of the Employment Act. He argued further that the termination was warranted as the claimant breached his obligation under the employment contract.

20. It was also submitted that prior to termination, the claimant was issued with several verbal and written warning letters which claimant admitted the wrongdoing and wrote an apology letter but since the issue had earlier earned him a warning letter, the Respondent resolved to dismiss him from employment. They then cited the case of **Peter Mwaura Kinyoro v Ndungu Mwangi & Another [2019] ekr.**

21. On whether the termination of the claimant was unfair, it was submitted that the claimant was suspended and later on subjected to hearing before the Board of the 1st Respondent therefore due procedure was followed before the claimant was dismissed from service. In this they cited the case of **CMC Aviation Limited v Mohamed Noor [2015] ekr.**

22. The Respondent concluded that the claimant was lawfully dismissed from employment and therefore he does not deserve the reliefs sought in his claim.

23. I have examined the evidence and submissions of the parties herein. The issues for this court's determination are as follows;

a) Whether there were valid reasons to warrant claimant's dismissal.

b) Whether due process was followed before the claimant was terminated.

c) Whether the claimant is entitled to the remedies sought.

1 & 2 REASONS & DUE PROCESS

24. According to the dismissal letters issued to the claimant dated 31st January 2013, the reasons assigned to the claimants dismissal were that he had been assisting students with his mobile phone and purchasing airtime for them and charging their mobile batteries while on night duty.

25. The respondent indicated that the claimant had admitted in writing of this issue which had led to student unrest on 9/10/2012.

26. The respondent's witness gave evidence that the claimant had been warned of these acts. Indeed the respondent produced the letter dated October 2009 where the claimant had been warned about allowing students use his phone and he admitted through a letter of even date this mistake and also apologized.

27. He had also been implicated in a case of theft in July 2011. As concerns the issue that led to his dismissal, the claimant did not however admit the offence in writing as alleged.

28. The claimant was however issued with a show cause letter and he admitted that he found students with mobile phones chargers but didn't report them to the department Principal of the teacher on duty.

29. He was subjected to a disciplinary process. According to the minutes of the meeting however, the disciplinary process took a rather funny turn;- the board discussed the claimant's case and decided to dismiss him.

30. They then invited him in the meeting to communicate their decision to dismiss him.

31. In essence though, the claimant was dismissed unheard and in contravention of the provision of Section 41 of the Employment Act 2007 which states as follows;

"41. Notification and hearing before termination on grounds of misconduct

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make".

32. The respondents may have made a finding that the claimant was guilty of aiding students in school communicate with the phone which was forbidden and a valid reason for dismissal, the claimant was however not accorded an opportunity to be heard.

33. In the circumstances, the dismissal of the claimant was unfair and unjustified as per Section 45(2) of the Employment Act 2007 which states as follows;

"45. (1).....

(2) 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 employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure".

REMEDIES

34. In terms of remedies, I find for the claimant and award him as follows;

1. 1 month salary in lieu of notice = 10,988/=

2. Leave payment for 3 years as pleaded = 23,075/=

3. 3 months salary as compensation for unfair dismissal

= 3 x 10,988/=

TOTAL = 67,027/=

Less statutory deductions

4. The respondent will pay costs of interest at court rates with effect from the date of this Judgment.

Dated and delivered in open Court this **9TH** day of **NOVEMBER, 2021.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Wanjeri for respondent – present

Claimant – absent

Court assistant - Fred