



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

CAUSE NO. 49 OF 2018

[Formerly Kisumu E&LRC NO. 20 of 2016]

PATRICK KISANG CHEBURET..... CLAIMANT

VERSUS

BOARD OF MANAGEMENT BIWOTT MIXED DAY

SECONDARY SCHOOL..... RESPONDENT

JUDGMENT

1. The suit was filed on 26th June 2018 by the claimant seeking various reliefs set out as in the memorandum of claim.
2. The claimant testified under oath that he was employed by the respondent as Accounts Clerk on 7th March 2014. The claimant served the respondent until 3rd November 2017 when the respondent verbally suspended the claimant from his work. The claimant testified that the suspension was verbal, wrongful and unlawful. That the suspension was without pay and he had remained on suspension up to the time of filing suit. That the claimant earned Kshs. 8,600 monthly gross pay at the time of suspension.
3. The claimant was called to a disciplinary hearing in January 2018 and the claimant was further suspended by a letter dated 26th January 2018. The claimant was accused of insubordination by going on a school trip to Nairobi without authority of the Principal and secondly, the claimant was accused of taking accounts to the auditor without authority.
4. The claimant testified that he had fully responded to the two counts that the Principal had struck out the name of the claimant from the list of persons travelling to Nairobi but that fact was not communicated to the claimant until he had already travelled.
5. On the issue of submitting books of accounts for audit, the claimant explained that he had prepared the books of accounts in July and August 2017 and submitted them to the principal for signature. The accounts indicated that the principal had cash in hand in the sum of Kshs. 307,000. The principal kept postponing to sign the accounts and eventually refused to sign the books claiming that the amount stated to be with him was too high. Meanwhile he Auditor kept calling for the books and the claimant informed the principal that he had no choice but to present the books to the Auditor. The Auditor refused to accept the accounts since they had not been signed by the Principal. That the Auditor called the principal to ask why he had not signed the books of accounts.
6. Thirdly, the claimant was accused of attempting to defraud the school and he had explained that he had gone to cash a money order as part of his duty under instructions of the principal. That this was not an attempted fraud at all.
7. The claimant testified that the prolonged suspension without pay amounted to wrongful termination. The claimant prays that he be reinstated back to school without loss of his salary by lifting the suspension. In the alternative, the claimant be paid terminal benefits in the sum of Kshs. 8,351,985.80 as set out under paragraph 15 of the memorandum of claim including payment in lieu of notice; house allowance; underpayments; arrear salaries not paid; payment in lieu of leave days not taken; service gratuity and compensation for unlawful dismissal.

Reply to memorandum of claim.

8. The respondent filed a reply to the claim on 3rd October 2018 in which it denied having wrongfully and unlawfully suspended the claimant.
9. The respondent pleaded that the claimant was issued with notice to show cause on 3rd November 2017 and 19th June 2018 respectively. That the claimant had defended himself with respect to the notice to show cause dated 3rd November 2017 but that the response to the 2nd notice to show cause dated 19th June 2018 was still pending.

10. RW1 Willy Korio then testified in defence of the case stating that he was the principal of the respondent's school from May 2015 to date. He relied on a witness statement dated 21st May 2019 in which he states that the claimant was employed as accounts clerk on 7th June 2013 and had signed a contract of employment on 7th March 2014. That the claimant was issued a notice to show cause on 3rd November 2017 that informed the claimant reasons why disciplinary action has been taken against him and that he would be informed of the hearing date. That disciplinary hearing was held on the same date 3rd November 2017 and the claimant was suspended and was issued a further notice to show cause. That the claimant attended the hearing and was given opportunity to address the issues raised in the notice to show cause by the Board of Management at a meeting held on 26th January 2018. That the Board found that the claimant was at fault and was suspended for two weeks.

11. That upon this finding, new complaints were raised against the claimant that he had neglected to remit payments from students. That this necessitated new disciplinary action be taken against him and the matter was referred to the Executive Board for further actions.

12. That the Executive Board held a meeting on 19th June 2018 in which the disciplinary action was forwarded for hearing and determination to the full Board. The Board held a meeting and decided that the claimant needed to be further suspended and a new disciplinary hearing be held on 17th July 2018.

13. That the claimant did not attend the disciplinary hearing on 17th July 2018 and instead served the respondent with court summons.

14. That the suit is premature as there is still a disciplinary hearing pending. That it is not true that the employment of the claimant has been terminated. That the suit is premature and it be dismissed accordingly.

Determination

15. The issues for determination are:

- (a) Whether the suit was filed prematurely and the matter be referred back to the school for the internal processes to be concluded.
- (b) Whether the claimant is entitled to the reliefs sought.

Issue (a)

16. The claimant was first placed on suspension on 3rd November 2017 and was issued a notice to show cause. The claimant attended a disciplinary hearing on 26th January 2018 and was given opportunity to be heard. The Board of Management placed the claimant on two weeks suspension effective 29th January 2018 and the case was concluded. However, in the same letter dated 26th January 2018 in which the decision of the board to suspend the claimant for two weeks effective 29th January 2018 was communicated by the principal the claimant was again asked to respond to the same three issues that had been raised in the notice to show cause dated 3rd November 2017. It is noteworthy that the claimant had responded in writing to the issues raised in the letter of 3rd November 2017 and on the basis the disciplinary hearing of 26th January 2018 was held.

17. It is also noteworthy that upon expiry of the period of two weeks suspension on or about the 13th February 2018, the claimant was not allowed back to school by the principal and was not paid salary. The claimant remained at home contrary to the directive of the Board that had punished the claimant with a two weeks suspension. It is the court's finding that the conduct by RW1 to keep the claimant at home upon expiry of the two weeks suspension was arbitrary, unlawful and unfair.

18. RW1 kept the claimant away from work until he again purported to institute fresh allegations against the claimant by a letter dated 19th June 2018 to wit:

- (a) Receiving cash and not receipting.
- (b) Failure to submit statutory deductions
- (c) Withholding cheques.

19. It is noteworthy that the term of the full Board had by this time expired and RW1 purported to convene a full Board meeting on 17th July 2018 at 8.30 am for a disciplinary hearing of the claimant. RW1 has not responded to the testimony by the claimant that as at this time the term of the Board had expired. That RW1 had arbitrarily failed to lift the suspension of the claimant who continued to remain without a source of income at the whim of RW1.

20. RW1 has also failed to explain the testimony by the claimant that the real cause of the action taken unlawfully by the respondent was failure by the claimant to account for Kshs. 307,000 cash in hand and refusal to sign the books of accounts prepared by the claimant to be forwarded to the auditor.

21. It is the court's considered finding that the suspension meted on the claimant by the full Board ended on or about the 13th February 2018. That the further suspension done arbitrarily by RW1 was unprocedural, unlawful and unfair. Indeed RW1 lacked the mandate to refuse to implement a decision taken by the full Board. Accordingly, any further action taken by RW1 after 13th February 2018 was equally unprocedural, arbitrary and unlawful and was null and void *abinito*.

22. The claimant has proved on a balance of probabilities that he was in valid employment of the claimant at all material times upon expiry of the two weeks suspension.

23. Accordingly the claimant is reinstated back to school without loss of any salary and/or benefits with effect from 13th February 2018, the date the two weeks suspension by the Board expired.

24. Accordingly and in answer to issue (b) above, judgment is entered in favour of the claimant as against the respondent as follows:

(a) The two weeks suspension by the full Board expired on 13th February 2018 and the claimant be paid all arrear salaries from the said date to date.

(b) The claimant's employment was never terminated and he remains in full employment of the respondent.

(c) The claimant to compute and file arrear salaries due to him from 13th February 2018 to date within 30 days and the respondent to file any response on the computation within 30 days of service.

(d) The award is payable with interest at court rates from date of filing suit till payment in full.

(e) Costs of the suit.

25. For the avoidance of doubt, all the other reliefs sought by the claimant lack merit and are dismissed.

Judgment Dated, Signed and delivered this 29th day of January , 2020

Mathews N. Nduma

Judge

BUNGOMA

Appearances

Mr. Mwakio for claimant

Mr. Peter Kuria for Respondent

Chrispo – Court clerk.