



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 315 OF 2017

JAMES GIKARIA KARIUKI .....CLAIMANT

VERSUS

THE BOM GACHIKA SECONDARY SCHOOL....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for his alleged unlawful dismissal from employment. The Claimant averred that he was employed on or around 20<sup>th</sup> September 1988 as a cook for 16 years, later as a groundsman and lastly as a security officer earning a salary of Kshs. 13,757/- a month. The Claimant averred that he disagreed with the principal in 2017 when he verbally applied for leave but the principal informed him that he was not entitled to leave. The Claimant averred that his services were terminated through a phone call on 20<sup>th</sup> April 2017. He averred that the termination was unfair and illegal as he was never given notice or reasons for his termination and he was not informed of the elements of unsatisfactory services which led to his dismissal. The Claimant thus seeks judgment against the Respondent for general damages for the unlawful dismissal, annual leave allowance from 1988-2017 – Kshs. 385,196/-, one month's salary in lieu of notice – Kshs. 13,757/- and costs of the suit as well as interest at court rates.

2. The defence by the Respondent consisted of a general denial of each and every allegation in the claim. The Respondent averred that if the Claimant was at all terminated, then the same was done after following due procedure as laid down in the Employment Act.

3. The claimant adopted his statement, relied on his list of documents and testified that he was working when the principal started harassing him. He denied having absconded duty and stated that he was forced to write an apology letter. He also testified that he never used all his leave days.

4. The Respondent's witness Mr. Mathias Kimani Kigundu a teacher at the Respondent's school adopted his statement as evidence in chief and produced the list of documents filed by the Respondent in support of its case. The Respondent's evidence was not subjected to cross-examination as the Claimant and his counsel were absent though Counsel for the Claimant advised the Court at callover that he was ready for the defence case despite his client having failed to travel from Mombasa.

5. The Claimant submitted that according to the document 3 being the minutes of Board of Management that was produced by the Respondent, it was resolved that the Claimant be retired due to public interest and for allegedly failing to report students who were allegedly found engaging in sex within the school compound despite him being absent in the said meeting. The Claimant submitted that the decision to retire him was reached despite him writing an apology letter and thinking that the matter had rested. The Claimant submitted that he was never issued with any notice to retire him nor was he issued with a notice to show cause before the termination of his employment in public interest. The Claimant submitted that the Respondent had failed to comply with the laid out legal procedure as required by Section 41(1) & (2) of the Employment Act. The Claimant submitted that he was entitled to a fair administrative procedure under Article 47 of the Constitution and the Fair Administrative Action Act which provisions were violated by the Respondent. The Claimant submitted that the claim is merited and thus he is entitled to the prayers in his claim.

6. The Respondent submitted that the Claimant was issued with a letter of redundancy in accordance with the provision of Section 40(1)(b) of the Employment Act but he failed to state the same to the court. The Respondent submitted that no provision is made for an employee who is declared redundant to be given an opportunity to answer to any allegations as the cessation of work is not premised on disciplinary procedures but rather on the instance of the employer finding it not tenable to continue having an employment position that is no longer to continue existing. The Respondent submitted that the Claimant avoided testifying on the many leave application forms that he filled and were approved from 1989 to 2016. The Respondent submitted that the Claimant had failed to produce any rejected leave forms and that the Respondent's evidence that he took all his leave days remained uncontroverted. The Respondent submitted that the Claimant neglected his work leading to many security lapses and that he even wrote an apology. The Respondent submitted that the Claimant was informed of the redundancy and that he was to be retired in the public interest. The Respondent submitted that the Claimant was offered in his redundancy letter one month's salary in lieu of notice and all his terminal dues amounting to Kshs. 255,798/- but he refused to pick the same and instead moved to court citing unlawful termination. The Respondent submitted that no evidence was adduced by the Claimant to prove that the procedure for declaring an employee redundant was not followed. The Respondent submitted the Claimant's actions of absenteeism amounted to an act of gross misconduct that would justify summary dismissal under Section 44 of the Employment Act, but instead the Respondent had opted to scrap his position as it was no longer tenable to retain it due to several security lapses. It submitted that it was thus in the public interest that students' security be safeguarded. The Respondent submitted that the procedure of redundancy was followed as laid down under Section 40(1)(a)-(g) of the Employment Act. The Respondent submitted that the Claimant failed to prove unfair termination or wrongful dismissal contrary to Section 47(5) of the Employment Act. The Respondent submitted that the Claimant was issued with various warning letters, was asked to show cause why losses made during that period would not be deducted from his salary but all he did was to write a one paragraph apology with no explanation at all. The Respondent submitted that the remedies sought cannot be granted and urged that this claim be dismissed with costs. The Respondent cited the case of **Justus Miwani v Jiangxi & Hydro Power Construction Kenya Ltd [2019] eKLR** and that of **Heritage Insurance Company Limited v Christopher Onyango & 23 Others 2018 eKLR** and urged the

dismissal of the suit.

7. The Claimant was retired in the public interest. Retirement in public interest is not necessarily a result of disciplinary process and may result from an administrative decision by the employer. In this case as pointed out by the Claimant, there was a meeting at which it was determined that the Claimant be retired due to public interest and for allegedly failing to report students who were allegedly found engaging in sex within the school compound. He was not present at the meeting and neither was he heard prior to the decision to terminate his services. The Respondent asserts that he was declared redundant as his position was abolished. If this were so, the requirements of Section 40(1) of the Employment Act were not followed. In my view, this places the decision to terminate within the realm of an unfair and unlawful termination. The Claimant was offered terminal dues amounting to Kshs. 255,798/- but he declined to collect them. He shall be entitled to the sum as well as compensation for the unlawful dismissal. In the final analysis I enter judgment for the Claimant against the Respondent for:-

- i. Kshs. 255,798/- being terminal dues
- ii. 6 months compensation – Kshs. 82,542/-
- iii. Costs of the suit
- iv. Interest on i) and ii) above at court rates from the date judgment till payment in full.

It is so ordered.

**Dated and delivered at Nyeri this 22<sup>nd</sup> day of January 2020**

**Nzioki wa Makau**

**JUDGE**