



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 86 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

KUDHEIHA WORKERS..... CLAIMANT

VERSUS

ST. CATHERINE MIXED BOARDING PRIMARY

SCHOOL.....1ST RESPONDENT

CATHOLIC DIOCESE OF MACHAKOS T/A MAKUENI

CATHOLIC MISSION..... 2ND RESPONDENT

JUDGMENT

The Claimant herein is a trade union duly registered under the Labour Relations Act, 2007. The 1st Respondent is a church-based learning institution registered under the Education Act (now repealed) by the Basic Education Act, 2015. The 2nd Respondent is a Catholic Church institution under which the 1st Respondent is managed.

The Claimant herein filed the instant Claim by way of a memorandum of claim which was amended on 29th November, 2017, alleging the unfair termination of Daniel Mbwika, the grievant herein.

The Claimant contends that the grievant was employed by the Respondent from 13th February 2003 in the position of a night watchman earning a basic salary of Kshs.1,500 exclusive of house allowance and was attached to St. Catherine Mixed Boarding School.

The Claimant contended that the grievant performed his duties diligently and to the Respondents satisfaction as a result of which his salary was increased over time with his last salary being Kshs.4,500 and a house allowance of Kshs.500 per month.

On 2nd July, 2011 the 1st Respondent transferred the grievant from St. Catherine Boarding Primary School to work at the Sister of St. Joseph and the Old Fathers House within the same complex, in the same position of night watchman effective from 8th July, 2011. That the grievant performed his duties at his new post well until 3rd February, 2012 when he was given one month notice of termination following an incident where a student of the Primary school sneaked out from the boys' dormitory under his watch on 20th January, 2012. He (the grievant) was to report to the director's office on 2nd March, 2012 for clearance.

The Claimant reported a dispute to the Minister for labour in compliance with Section 62 of the Labour Relations Act, and a conciliator appointed. It is further the Claimant's contention that the Respondents failed to attend the conciliation meeting thus prompting the filing of the instant Claim.

In the Amended Memorandum of Claim the claimant sought the following reliefs:

a. This Court finds in favour of the Claimant as against the Respondents that since the Respondents had no grounds for terminating the grievant's services they be ordered to reinstate him back to duty without loss of salary.

b. IN THE ALTERNATIVE the Respondents be compelled to pay and compensate the grievant the following:

i. UNDERPAYMENTS AS PER CBA JOB GROUP V

1. With effect from 1st January 2009 to 31st December 2009

7,538 – 4,500 = 3,038 x 12..... Kshs.36,456

2. With effect from 1st January 2010 to 31st December 2010

8,066 – 5,500 = 2,566 x 12..... Kshs.30,792

3. With effect from 1st January 2011 to 31st December 2011

8,474 – 6,500 = 1,944 x 12..... Kshs.23,688

4. With effect from 1st January 2012 to 28th February 2012 8,474 – 6,500 = 1,974 x 12..... Kshs.3,948

TOTAL AMOUNT FOR UNDERPAYMENTS Kshs.94,884

ii. The balance of two months not paid in lieu of notice as per the CBA Clause 16(a)(i)

Kshs.8,474 x 2 months..... Kshs.16,948

iii. Service gratuity Clause 17 (b)

8,474 x 28 days x 9 years..... Kshs.229,362.90

30 days

iv. House allowance Clause 1 (a)

1. With effect from 1st January 2009 to 31st December 2009

1,500 x 12..... Kshs.18,000

2. With effect from 1st January 2010 to 31st December 2010

1,800 x 12..... Kshs.21,600

3. With effect from 1st January 2011 to 31st December 2011

1,300 x 12..... Kshs.15,600

4. With effect from 1st January 2012 to 28th February 2012

1,300 x 2..... Kshs.2,600

TOTAL AMOUNT FOR HOUSE ALLOWANCE Kshs.57,800

v. Leave Travelling Allowance for 2 years

For 2011 and 2012 = 2,300 x 2..... Kshs.4,600

vi. Compensation for unfair termination of Twelve Months

8,474 x 12 months..... Kshs.101,688

Grand Total to be Paid Kshs.505,282

The Respondents through its Response to the Amended Memorandum of Claim filed in Court on 7th May, 2018 through the firm of B. M Musau and Company Advocates contends that it has never signed a recognition agreement or negotiated any collective bargaining agreement with the Claimant herein and is therefore a stranger to the Recognition Agreement and Collective Bargaining Agreement at appendix 1 of the memorandum of claim which the claimant relies on.

The Respondents further aver that the recognition agreement referred to by the Claimant was signed between the Claimant and the Catholic Secretariat in 2002 and therefore the same cannot be binding on them.

The Respondents contends that the grievant was employed by the 1st Respondent as a night watchman on a one year contract which was subsequently renewed. That during the subsistence of the grievant's second contract a boy escaped from the school at night and the grievant failed to give any explanation despite several requests to do so. Consequently, the grievant's employment was terminated and all his dues paid at the time of his separation. The Respondents contends that the Claim against it ought to be dismissed with costs.

At the hearing on 1st April 2019 and 4th June 2019, the grievant testified on behalf of the Claimant and the Respondents called one witness to testify on their behalf.

Claimant's Case

DANIEL MUTUA MBWIKA, the grievant testified that he was employed as a night watchman from 13th February, 2003 until 2nd March 2012 when his services were terminated following an incident where a boy escaped from the school compound while he was on duty.

Daniel stated that his duty was not to guard the gate to the dormitory and that from his post, he could not man the said gate as it was about 100 metres from the gate of the sisters and father's house that he was guarding.

He stated that following his termination he reported the matter to the Claimant union who in turn reported to the Ministry of labour and went for meeting but they were unable to agree.

The grievant urged this Court to allow his Claim as drawn.

On cross examination the grievant confirmed that he joined the Claimant union in the year 1997 and that he reported his case to the said union being its member.

On further cross examination, the grievant reiterated that the dormitory gate was far from his duty post and he did not see what had transpired.

The grievant testified that his last salary was Kshs.6,500.

He stated that he did not respond to the Respondent's letter of inquiry on what transpired as he was not aware what happened.

On re-examination the grievant stated that on his transfer to the mission another watchman was employed at the school.

Respondent's Case

RW1, FR. PAUL MUNGUTI, the priest in charge of Makueni Catholic Mission testified on behalf of the Respondents herein. He adopted his witness statement filed on 20th November, 2018 as his evidence in chief in which he reiterated the averments made in the Respondents' response.

RW1 testified that the Bishop of the Diocese had never signed any CBA with the Claimant union. He stated that the grievant was terminated following an incident on 20th January 2012 after the grievant failed to give his explanation.

RW1 further testified that the grievant's contract was terminated on 3rd March 2012 and that the contract was to come to an end on 1st May 2012.

RW1 further testified that the grievant in his own testimony stated that he was a member of the Claimant union in his previous employment.

On cross examination RW1 averred that the grievant was paid all his dues at the time of his separation with the Respondent as evidence by annexure 5 (a) and (b) of the Response.

RW1 stated that the old father's house gate that was manned by the grievant shared a gate with the boys' dormitory where a boy escaped under the grievant's watch.

Submissions by the Parties

It is submitted by the Claimant that there is a valid recognition agreement between the Claimant and the Respondents the later having signed the same through its Kenya Catholic Secretariat. The Claimant further submitted that after recognition parties have negotiated several Collective Bargaining Agreements. It urged this Court to find that a recognition agreement and collective bargaining agreement was in existence between the Claimant union and the

Respondents.

The Claimant further contended that the termination of grievant's employment was unfair and unlawful as it was done contrary to the

mandatory provisions of Sections 41, 43 and 45 of the Employment Act, 2007. The Claimant relied on the Court findings in the cases of **Josephine Ayemba Musonye Vs Jitendra Rishi (2019) eKLR**, **Bernard Ngugi Vs G4S Security Services Kenya Limited (2013) eKLR** and **Evans Mogute Nyakundi Vs China Road and Bridge Corporation (K) Limited (2013) eKLR**.

The Claimant further submitted that it is entitled to the reliefs sought in Claim herein.

Respondent's Submissions

The Respondents submitted that the Claimant Union has no *locus standi* to prosecute this matter as there is no CBA between itself and the union. The Respondents cited several judicial decisions among them the land mark case of **Law Society of Kenya Vs Commissioner of Lands & 2 others (2001) eKLR**.

The Respondents further submitted that there was a valid reason to terminate the grievant as under his watch a student sneaked out of school, an issue that raised a lot of concerns between the school and the boy's parents.

The Respondents further submitted that fair procedure as provided under Section 41 of the Employment Act, 2007 was adhered to as the grievant was given an opportunity to defend himself prior to his termination but failed to do so. the Respondents relied on the cases of **Walter Ogal Anuro Vs Teachers Service Commission (2013) eKLR** and **Jackson Butiya Vs Eastern Produce, Cause No. 335 of 2011**.

The Respondents further submitted that the Claimant's claim for compensation for unfair termination of 12 months is without merit as at the time of his termination the Claimant had only one month left to his contract and being a fixed term contract there was no guarantee of its renewal. The Respondents relied on the cases of **Anne Theuri Vs Kadet Limited (2013) eKLR** and **Geoffrey Bisera Vs Mutsimoto Motor Co. Limited (2019) eKLR**.

The Respondent contended that the grievant is not entitled to the reliefs sought in the Amended Claim and in particular he is not entitled to the relief of reinstatement his position having since been filled by another person. the Respondent relied on the Court of Appeal decision in the case of **Kenya Power & Lighting Company Limited Vs Aggrey Lukorito Wasike (2017) eKLR** and that of **Mathew Munyao & 133 Others Vs General Plastics Limited (2018) eKLR**.

The Respondents further submitted that the Claim for underpayments as per the CBA is unjustified, unsubstantiated, unmerited and are not supported in law. They urged this Court to dismiss the same.

It is further the Respondents' contention that the grievant having been paid his dues at the time of separation his claim for payment of two months' salary in lieu of notice is unmerited and urged the Court to dismiss the same.

The Respondents further submitted that the grievant is also not entitled to service gratuity the same having been paid at the end of his contract as a token of appreciation. It is further submitted that the grievant cannot benefit from a CBA that is not signed between the Claimant union and the Respondents herein. The Respondents cited the cases of **Michael Onyango Vs Steel Structures Limited (2019) eKLR** and **John Mulinge Mutuku Vs Kartasi Industries Limited (2019) eKLR**.

On the claim for house allowance the Respondents submitted that the same ought to be dismissed as it is tantamount to unjust enrichment by the grievant as the Claimant seeks to have the Respondents bound by a CBA they had not signed. Further that the union has failed to prove membership of the grievant.

On the Claim for Leave travelling allowance for 2 years the Respondents contend that the same is unjustified and no basis has been laid for the same as the grievant's employment contract does not provide for the same. The Respondents relied on the judicial decisions in the cases of **Dennis Mokomba Nyangacha Vs Riley Services Limited (2018) eKLR** and **Geoffrey Bisera Vs Mutsimoto Motor Company Limited (2019) eKLR**.

The Respondents further submitted that the grievant is also not entitled to compensation for unfair termination his termination having been done in a fair and procedural manner. The Respondents relied on the case of **Mathew Lucy Chesura Vs Poverelle Sisters of Belgamo T/A Blessed Louis Palazzalo Health Centre (2013) eKLR**.

The Respondents urged this Court to dismiss the Claim in its entirety with costs to the Respondents.

Analysis and Determination

Having considered the facts, evidence, submissions and authorities cited by the parties, the issues for determination are –

1. Whether the Claimant has *locus standi* to prosecute this claim.
2. Whether the termination of the Claimant's employment was valid both procedurally and substantively.
3. Whether the Claimant is entitled to the reliefs sought.

The Claimant contended that there was a recognition agreement between it and the Respondents that is signed through the Catholic Secretariat on 7th June 1990, that consequently there have been several negotiations of Collective Bargaining Agreements (CBAs) with emphasis being placed on the CBA signed on 21st March, 2011.

The Claimant further contended that the grievant is its member a fact that was reiterated in his evidence when he confirmed joining the said union while working for a previous employer.

It is on this basis that the Claimant union filed the instant Claim against the Respondents herein on behalf of its member.

The Respondents on the other hand contended that the Claimant union has no *locus standi* there being no recognition agreement and/or collective bargaining agreement between itself and the Claimant union. It was further the Respondents' assertion that delegated power was given to Bishops of each parish in the year 2006 to enter into negotiations and sign CBAs on behalf of their parishes, and that the Respondent never entered any recognition nor negotiated any collective bargaining agreement with the Claimant.

They further submitted that the Claimant is therefore a stranger and/or a bystander in this proceedings and therefore lacks the capacity to institute the instant Claim.

In the case of **Kenya Shipping, Clearing and Warehouses Workers Union Vs Africair Management and Logistics Limited (2016) eKLR** it was held:

“The obligation of the Trade Union to represent its Members in and out of Court, and the right of the Members to representation in work related grievances and disputes, flows from the membership of the Employee to the Trade Union. These are obligations and rights created by membership. Recognition is between the Trade Union and the Employer. Membership creates a relationship between the Trade Union and its Members. The two relationships are not the same thing, and do not have the same legal effect. Trade Unions collect regular membership fees from Employees, and the Employees in return, enjoy the representation and protection of the Trade Union under the Union Constitution and the law. Membership allows the Employees to have the Trade Union's legal representation in Court, while Recognition allows the Union to collectively bargain with the Employers, for the benefit of Members, and all Unionisable Employees.”

I thus find the claimant had locus standi to file this suit on behalf of the grievant who testified that he was a member of the claimant union.

I however do not think that the claimant has proved that the CBA produced by the claimant is binding on the respondent as the claimant did not submit the list of the institutions that are subject to the CBA. The title of the CBA is specific that it applies to “*The specified Churches and/or/institutions as per appendix 1 to this agreement...*” which appendix 1 is not attached to the CBA in the court record. The Diocese of Machakos is further not a signatory to the CBA.

Whether the claimant's termination was fair

The evidence on record shows the claimant was not taken through

the disciplinary process as set out in Section 41 of the Employment Act, 2007. No evidence was availed to the Court to support there having been a disciplinary process as alleged by the respondent that was followed. The claimant testified that he was suspended and then issued with the letter of termination. This was confirmed by RW1.

In the case of **Walter Ogal Anuro v Teachers Service Commission (2013) eKLR** where the Court held that:

“... For a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. Substantive justification has to do with establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer to effect the termination.”

I thus find that the termination of the grievant's contract was unfair.

Reliefs

Having been unfairly terminated, the claimant is entitled to notice. The acknowledged that the grievant was given notice as it has only prayed for “*the balance of two months not paid in lieu of notice.*” The grievant's contract provided for termination notice of one month and the letter of 3rd February stated that the leave he was given together with one month's notice.

The prayer for leave travelling allowance fails as the grievant's contract did not provide for the same.

The grievant is however, entitled to compensation, having been unfairly terminated. Considering that he had worked for the respondent from 2003 to 2012 and that his contract was terminated unfairly, further that he was not paid any terminal dues upon separation, I award him compensation of 10 months' pay in the sum of **Kshs.70,000**. This is based on his last salary of Kshs.6,500.00 consolidated with Kshs.500.00 that he was earning at the time of termination.

There was no proof of underpayments as the claim was based on the CBA that was not applicable to the claimant. I have further confirmed that he was not paid below the consolidated stator minimum wage for 2011.

In conclusion, I declare the termination of the claimant's employment unfair and award him Kshs.70,000.

There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF FEBRUARY 2020

MAUREEN ONYANGO

JUDGE