

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CASE NO. 171 OF 2018

NGECHU MUNGARA WACHIRA.....CLAIMANT

VERSUS

BOARD OF GOVERNORS

ST. FRANCIS KIAWAITHANJI SECONDARY SCHOOL...RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for failure to pay the Claimant his accrued salary and benefits. The Claimant averred that he was employed by the Respondent as a night guard earning a basic salary of Kshs. 4,500/- and that while guarding the Respondent's premises on 24th November 2014 thieves broke and stole assorted goods at the school. He averred that he was seriously assaulted during the robbery and as a result of the injuries sustained given time off to recover. The Claimant averred that while recovering from the injuries he sustained, the Respondent reported to Gichira Police Station as a result of which the Claimant was arrested and charged in Nyeri Chief Magistrate's Criminal case No. 330 of 2015 with the offence of school breaking and neglect to prevent a felony but was acquitted under Section 210 for lack of evidence. He averred that by a letter of 7th January 2015 the Respondent interdicted him without pay awaiting the appearance of the Claimant before the BOG. He averred that since service of the interdiction letter he has not been paid his salary and/or served with any notice to appear before the Respondent to show cause why his services should not be terminated. The Claimant averred that the failure to pay his salary from January 2015 is unprocedural, illegal and unlawful. The Claimant thus sought a declaration that the interdiction letter was unlawful and irregular, an order for payment of the loss of income of Kshs. 4,500/- per month from 7th January 2015 till the withdrawal of the interdiction letter and in the alternative payment of the accrued benefits to the Claimant, costs of the suit plus interest at court rates.

2. The Respondent averred in its defence that the Claimant was in its employ from 16th February 2004 till 25th November 2014. The Respondent averred that on the night of 24th and 25th November 2014 theft took place at the Respondent while the Claimant was on duty guarding the school. The Respondent averred that as a result of the theft the Claimant was given a chance to give an explanation on 25th November 2014 in an urgent Board of Governors and Parents Teachers Association meeting as to what had transpired. The Respondent averred that after the meeting there were recommendations made among them a resolution to report the theft incident to Gichira Police Post for investigations to bring the culprits to book. The Respondent averred that the Claimant was to report back no later than 19th December 2014 but the Claimant never reported to work prompting the Respondent to write the interdiction letter of 7th January 2015. The Respondent invited the Claimant to appear before the Executive Board on 17th March 2015 but the Claimant failed to appear prompting the Respondent to write a dismissal letter dated 18th March 2015. The Respondent averred that the dismissal was on account of gross misconduct which justified the dismissal of the Claimant and the suit ought to be dismissed with costs to the Respondent.

3. The Claimant and the Respondent's witness Jane Njoki Nderitu testified. The Claimant stated that he was injured when thieves broke into the school and that he was given time to seek treatment. He denied meeting the Board of Governors. He acknowledged receipt of the letter interdicting him but denied receipt of the letter inviting him for a disciplinary hearing or the dismissal letter. He stated that his last salary was in November 2014 but conceded he sought payment from January 2015. He testified that he was not recalled back to work after the incident. He stated that he suffered a head injury and on being referred to the P3 form produced he conceded no injury was noted. He stated that he did not receive any correspondence from the Respondent until June 2015.

4. The Respondent's witness testified that she was a teacher at the Respondent and that she knew the Claimant. She stated that the Claimant was excused from work for 2 weeks to enable him get better. She testified that the Claimant was suspended from duty without pay for absconding duty. She was referred to the letters of invitation to hearing and the dismissal letter and conceded that both did not have the postal address or telephone number of the Claimant on the face of the letter. She insisted that the envelope was properly addressed and the Claimant had received the first letter she wrote. She wondered how he did not get the other 2. She stated that the Claimant deserted and was interdicted for it. She testified that he was paid for the time worked and that after the desertion he was dismissed and he never came to work. She acknowledged receipt of the letter from the union (KUDHEIHA) but stated that she had no obligation to respond to the letter as he was not an employee at the time. She stated she received the letter from the lawyer which had no signature or rubber stamp and she did not reply to it. She testified that she posted all the letters to the Claimant and he received them and even responded to the interdiction letter. She stated that the Claimant only disowned the letters that were not favourable. That marked the end of oral testimony and the parties were to file submissions.

5. The Claimant submitted that he was interdicted but was not aware of the hearing due in March 2015. The Claimant submitted that the letters the Respondent alleges to have sent do not have his address or contacts on them. He submitted that the Respondent's witness had indicated that there was a board meeting that took place on 17th March 2015 but no minutes were available to show that a meeting actually took place. The Claimant submitted that in the absence of evidence that a board meeting took place on 17th March 2015 the Claimant was never given a hearing as to why his employment should be terminated as envisaged under Section 41(1) of the Employment Act. The Claimant submitted that even if, of which there is no such evidence tendered before this court, the board met on 17th March 2015, the

Respondent did not discharge its burden that there existed grounds for terminating the Claimant's employment as provided for under Section 43 of the Employment Act. The Claimant submitted that he was entitled to the prayers in his claim including service for each year worked as well as costs of the suit.

6. The Respondent submitted that the Claimant had deliberately misled the court by telling untruths. The Respondent submitted that the Claimant sought payment of salary from January 2015 yet in his testimony he insisted he had not received pay from November 2014 which he contradicted in his testimony. The Respondent submitted that the interdiction letter was issued in January 2015 and the union wrote on 9th January 2015 confirming that the interdiction letter was received after 7th January but before 9th January yet the Claimant stated that he had not received any communication from the Respondent until June 2015. The Respondent submitted that the Claimant also lied about his injuries as he stated he was seriously injured yet he had only notation for a headache and swelling on the P3 form. The Respondent submitted that the Claimant never went back to work from 25th November 2015 and never gave any notification to the Respondent. The Respondent submitted that the Claimant absconded duty and that this was sufficient cause for summary dismissal from employment under Section 44(3) of the Employment Act. The Respondent submitted that the actions by the Claimant amounted to gross misconduct in terms of Section 44(4) (a) justifying the dismissal. The Respondent submitted that the remedies sought by the Claimant cannot be granted as his claim was unmerited. The Respondent urged the dismissal of the suit with costs.

7. The Claimant was misplaced in filing the claim as his cause of action is time barred. Under Section 90 of the Employment Act it is provided as follows:-

90. Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (Cap. 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.

The acts complained of being non-payment of salary and benefits are continuing injury covered under the provisions of Section 90 of the Act. The Claimant ought to have filed his claim no later than 24th November 2015. His suit was filed on 27th April 2018. Even if he had sought to recover on account of his dismissal, he had not been paid salary from January 2015 and he therefore ought to have filed a suit seeking recompense by latest 7th January 2018. His suit is therefore hopelessly out of time and is dismissed. However there will be no order as to costs.

8. This decision was rendered online with the waiver of Order 21 Rule 1 and 3 of the Civil Procedure Rules and in line with the Chief Justice's Practice Directions to Mitigate COVID-19 dated 16th March 2020 and the Kenya Gazette Notice 2357 of 20th March 2020 issued in Vol. CXXII No. 50. In line with the Practice Directions of the Chief Justice and the statement he made in the NCAJ address to the Nation of Kenya when the Judiciary and the other stakeholders in the administration of justice agreed to scale down operations to mitigate the effects of COVID-19, execution of the judgment is automatically stayed for 14 days.

It is so ordered.

Dated and delivered at Nyeri this 24th day of April 2020

Nzioki wa Makau

JUDGE