



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 187 OF 2018**

*(Before Hon. Justice Mathews N. Nduma)*

**KENYA TERTIARY & SCHOOLS WORKERS UNION - KEWATSU.....CLAIMANT**

**VERSUS**

**THE BOARD OF MANAGEMENT NYANGORI BOYS HIGH SCHOOL.....RESPONDENT**

**JUDGMENT**

1. The suit was filed on 10<sup>th</sup> May 2018 by the claimant's Union on behalf of grievant namely:

- a. Bilal Mustapha Deroni
- b. Gideon Kipyaker Owinto
- c. Joel Kiptarus Nyangari
- d. Benson Ologoro
- e. Martin Saina
- f. Haron Kiprof

2. The claimants seek compensation and payment of terminal benefits arising from alleged unlawful declaration of redundancy and termination of the grievants, who served as security guards for the respondent school until their termination.

3. The parties entered into a consent to dispense with oral testimony and proceed by way of written submissions based on the pleadings, list of documents and written statements duly filed by the parties.

4. In terms of the statement of claim, the grievants were employed on diverse dates between 15<sup>th</sup> August 2005 and 1<sup>st</sup> September 2015 as security guards. The grievants served continuously and were active members of the claimant union until a new principal Mr. Kugo Ibrahim Bwamu declared them redundant and terminated their services by a letter dated 26<sup>th</sup> January 2017.

5. The letter which is annexure '3' to the statement of claim indicated that the termination was effective from 31<sup>st</sup> January 2017. The claimants were, therefore given about three days' notice of termination. The letter did not state the reason for the termination. The grievants were to be paid one-month salary in lieu of notice.

6. The claimant union reported a dispute to the Ministry of Labour and a conciliator was appointed on 28<sup>th</sup> August 2017. The parties made the submissions to the conciliator who then made a report dated 15<sup>th</sup> March 2018 with findings and recommendations as follows: -

7. That the grievants who were union members were employed as security guards by the respondent. That the respondent terminated their employment without following laid down procedure and the respondent to:

- i. Compensate the grievants in terms of section 40 of the Employment Act, 2007.

ii. Pay equivalent of six months' compensation to the grievants for unfair termination of employment.

8. According to the conciliator management had undertaken to pay the grievants:-

i. One-month salary in lieu of notices.

ii. Payment in lieu of leave days not taken

iii. Gratuity for years worked and

iv. Issue them with certificate of service, but there was no evidence that the promise was fulfilled hence the dispute came to court.

9. The respective claims for each grievant are set out under paragraph "D" in the statement of claim. The claimants pray that the grievants be awarded accordingly: -

### **Response**

10. The respondent filed a statement of response to the claim on 11<sup>th</sup> June 2018 in which the respondent admits having employed the grievants as "unprofessional security guards." The respondent denied that the grievants were members of the Claimant union. The respondent at paragraph 7 of the response admits having terminated the employment of the grievants under section 40 of the Employment Act 2007 and alleges that it followed laid down procedure in effecting the terminations.

11. The respondent state that it paid the grievants their terminal dues including salaries, notice pay and gratuity and that the respondent does not owe the grievants any further terminal benefits. The respondent rejected the recommendations by the conciliator and prays the suit be dismissed.

12. The respondent attached six documents to its response including letters of employment of the grievants; certificate of service dated 26/1/2017 given to the grievants the letters of termination dated 26/1/2017 and payment vouchers in respect of the claimants dated 26/1/2017 as follows:-

i. Haron Kiprop

a. Leave pay Kshs. 5,424 for 2016.

b. Leave pay for 2014 Kshs. 4,674.

ii. Gideon Owinto

a. Gratuity for 6 years worked Kshs. 22,826.

iii. Benson Ologoro

a. Leave pay for 2016 Kshs. 5,481.

iv. Joel Kiptarus

a. Leave pay for 2016 Kshs. 3,807.

v. Mustapha Deroni

a. One-month notice pay Kshs. 11,706.

vi. Martin Saina

a. One-month notice pay Kshs. 9,234

13. No other documentation in proof of payment of terminal benefits were presented by the respondent and the respondent did not present any evidence to rebut the claim by the grievants that they were owed and not paid terminal benefits set out in the statement of claim.

14. The respondent pray that the suit be dismissed with costs.

### **Determination**

15. The issues for determination are: -

a. Whether the respondent followed the mandatory procedure set out under section 40 of the Employment Act 2007 in terminating the employment of the grievants on grounds of redundancy.

b. Whether the grievants are entitled to the reliefs sought.

16. In answer in issue (a) above, it is common cause that the grievants were declared redundant by the respondent under section 40 of the Employment Act, and were issued with letters of termination dated 26/1/2017 which letters reflect on the face of the document were received on 31<sup>st</sup> January 2017 the last day of service.

17. It has been proved by the claimant Union that the respondent did not give the union or the grievants at least one-month notice of the intention to declare the grievants redundant.

18. It has also been shown that the respondent did not report the intended termination on grounds of redundancy to the union as is required under section 40 of the Act.

19. The respondent has admitted in its pleadings and submissions that it terminated the employment of the grievants with the intention of replacing them with professional guards because the grievants were not professional.

20. The respondent did not adduce any evidence to substantiate these allegations. The respondent, by its evidence has demonstrated that it had no valid reason in terms of section 40 read with section 43 and 45 of the Employment Act 2007 to declare the grievants redundant.

21. The Claimant has therefore discharged the onus placed on it under section 47(5) of the Employment Act, 2007 to show on a balance of probabilities that the termination of the grievants on grounds of redundancy was wrongful and unfair. The claimant has demonstrated that no fair procedure was followed by the respondent in effecting the terminations.

22. The grievants were simply served with letters of termination without notice, with not prior consultations and without payment of the mandatory terminal benefits set out under sections 40(1) of the employment Act, 2007.

23. The court finds therefore that the termination of the employment of the grievant was unlawful and unfair and the grievants are entitled to compensation in terms of section 49(1) (c) and 4 of the Act.

24. The grievants are also entitled to payment of terminal benefits set out under paragraph 'D' of the statement of claim and the court finds accordingly.

### **Compensation**

25. All the grievants lost their employment unlawfully and unfairly on the same day and in the same manner. All the grievants served as security guards for the respondent school. The grievant did not contribute to the termination and were not compensated for the job loss. The claimant did not receive the statutory benefits they were entitled to under section 40 of the Employment Act, 2007. The grievants received letters of termination on the same day they were sent home without any notice consultation of preparation.

26. Grievants suffered loss and damage in equal measure, the only difference being the period of service each one of them had given to the respondent before termination.

27. The Court has considered the case of **Kenya Union of Domestic, Hotels, Educational Institutions and Allied workers (KUDHEIHA) –VS- Lenana Mount Hotel, ELRC cause no. 60 of 2007 in which Rika J.** awarded the grievants the equivalent of 12 months' gross salary for unlawful and unfair dismissal, the grievants having been dismissed by their employer for joining a rival Union.

28. In the present case the claimant alleged that the grievants were victimised for joining the Union which claim was not rebutted sufficiently by the respondent.

29. The court awards the grievants compensation as follows: -

#### **I. Bilal Mustapha Deroni**

a. Who had served for 21 years from 13<sup>th</sup> August 2005 equivalent of 6 months' salary (11,330.10 X 6) kshs. 67,980 as claimed.

b. Gratuity calculated at 18 days' salary for each completed year of service in terms of the regulations of wages order (Security services) 1998 in the sum of Kshs. 152,073.81

c. Severance pay in terms of section 40 of the Employment Act @ 18 days for each completed year of service in the sum of kshs. 152,673.80.

d. Notice pay in the sum of kshs. 11,330.10, the claims for leave pay and overtime were not proved and are dismissed.

Total Ksh. 383,458.30

## **II. Gideon Kipyaker Owinto**

- a. The grievant served the respondent for 5 years and 4 months and the court awards his compensation equivalent to five (5) months' salary in the sum Kshs. 56,650.50.
- b. Gratuity for 5.4 years in the sum of kssh. 39,104.70.
- c. Severance pay in the sum of Kshs. 39,104.70.
- d. Notice pay in the sum of Kshs. 11,330.10.

Total Kshs. 146,190

## **III. Joel Kiptarus Nyangari**

- a. The grievant had served the respondent for one year and four months and is awarded compensation equivalent to one month's salary in the sum of Kshs. 11,330.10.
- b. Gratuity in the sum of Kshs. 10,138.25.
- c. Severance pay in the sum of Kshs. 10,138.25.
- d. Notice pay in the sum of Kshs. 11,330.10.

Total Kshs. 42,936.70

## **IV. Benson Ologoro**

- a. The grievant had served the respondent for 5.4 years and the court awards him equivalent of five month's salary in compensation in the sum of Kshs. 39,104.70.
- b. Gratuity in the sum of Kshs. 39,104.70.
- c. Severance pay in the sum of Kshs. 39,104.70.
- d. Notice pay in the sum of Kshs. 11,330.10.

Total Kshs. 128,644.

## **V. Martin Saina**

- a. The grievant was employed on 1<sup>st</sup> November 2013 and had served for 3 years only. The court awards him the equivalent of three months' salary in compensation in the sum of Kshs. 33,990.30.
- b. Gratuity pay in the sum of Kshs. 22,811.05.
- c. Notice pay in the sum of Kshs. 11,330.10.

Total Kshs. 90,942.50

## **VI. Haron Kiprop**

- a. The grievant was employed on 1/12/2012 and had served for 4 years only. The court awards him the equivalent of four months' salary in compensation in the sum of Kshs. 45,320.40.
- b. Gratuity in the sum of Kshs. 30,052.70.
- c. Severance pay in the sum of Kshs. 30,052.70.
- d. Notice pay in the sum of Kshs. 11,330.10.

Total Kshs. 116,755.90

30. For the avoidance of doubt the justification for the compensation and payment of terminal benefits is the same in respect of all the six grievants as set out above.

VII. The award for compensation is payable with interest at court rates from date of Judgment whereas interest is to be calculated from the date of filing suit in respect of other terminal benefits set out above till payment in full.

VIII. Costs to follow the event.

**Dated, Signed and Delivered at Nairobi this 17th Day of September 2020**

**Mathews N. Nduma**

**Judge**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**Mathews N. Nduma**

**Judge**

**Appearances:**

Japhet Aqua for claimant Union

Mr. Odego for Respondent

Chrispo: Court Clerk.