



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF**  
**KENYA AT NAIROBI**  
**CAUSE NUMBER 572 OF 2012**

**KUDHEIHIA WORKERS ..... CLAIMANTS**

**VERSUS**

**MACHAKOS TECHNICAL SCHOOL FOR THE BLIND.....RESPONDENT**

**RULING**

1. By a Memorandum of claim filed on 4<sup>th</sup> April, 2012 the claimant union averred that the grievant Mr. Robert Musau was employed by the respondent as a cook on 1<sup>st</sup> May, 1999 at a monthly salary of 2,260/-. He was provided with housing accommodation at the school and that his terms of employment were subject to the CBA between the claimant union and the Ministry of Education, Science and Technology.
2. The grievant was suspended from employment on 3<sup>rd</sup> July, 2010 on allegations of drunkenness and insubordination. It was alleged that on 3<sup>rd</sup> July, 2010 the grievant left his workmate in the kitchen and went ahead to drink which the grievant denied.
3. On 13<sup>th</sup> September, 2010 the grievant was summoned to appear before the executive board of Governors meeting on 18<sup>th</sup> September, 2010 for disciplinary action. Since the letter was not copied to the claimant union, the grievant opted to report the matter to the union branch secretary at Machakos.
4. On 5<sup>th</sup> November, 2010 the respondent wrote to the grievant informing him to move out of the school compound and await full board's response to the grievant's union since he had taken up the matter with the union.
5. On 22<sup>nd</sup> October, 2010 the grievant was dismissed from employment on the basis of warning letters issued on 28<sup>th</sup> March, 2009 and 13<sup>th</sup> July, 2009 and on allegations of drunkenness. According to the claimant union, clause 5 of the CBA gave the duration of warning letter of 9 months which had since expired.
6. The claimant union further pleaded that the warning letters were defective as the respondent did not follow the right laid down procedure when issuing the warning letters. That is to say the letters were neither copied to the shop steward nor the Union's Branch Secretary contrary to clause 5(i), (iii) of the CBA. The claimant further averred that the respondent violated clause 6 (c) of the CBA by dismissing the grievant before being heard and without involving the claimant union.
7. In its memorandum of response filed on 13<sup>th</sup> June, 2013 the respondent averred that the grievant was dismissed, following problems manifest in performance of his duties. Further that his dwindling performance had elicited several verbal and written warnings that were never headed by the grievant. According to the respondent the grievant had been warned severally on drunkenness while on duty and insubordination including fighting with a colleague at work. The respondent further averred that the grievant himself acknowledged misconduct on his part through several letters in which he conveyed his apologies in reply to the warning letters by the Principal and Cateress of the respondent institute.
8. According to the respondent, the grievant's dismissal was lawful and justified as the respondent followed the laid down procedures and requirements by presenting the matter before the Executive Board Meeting and the Board of Governors for deliberation and action. Further the grievant was invited to the said meetings in connection with the disciplinary issue.
9. In his oral evidence, the claimant further stated that he was called before the Board of Governors but did not attend. It was his evidence that he was accused of being drunk while on duty. He denied being warned. In cross-examination he stated that he was warned about work performance severally. He admitted that he used to drink but not while at work. He further stated that he apologized in response to the warning letters. He denied fighting while on duty.

10. The respondent's 1<sup>st</sup> witness Mr. Justus Mutisya informed the court that he was a member of the respondent's Board.

11. Around 2010 the grievant case was brought to the Executive Board who reviewed the same and found that in 2001 the grievant was warned over drunkenness. The Principal kept warning him verbally but he never changed so the matter was brought to the Board. He further stated that the grievant always admitted he was drunk. The Board of Governors in 2010 decided to dismiss the claimant. According to him the claimant was paid all his salary upon dismissal. He further stated that the respondent did not have a recognition agreement with the claimant union. In cross-examination he stated that the grievant was called to the Board of Governors meeting and was heard.

12. The Respondent's second witness Nduku Mutua informed the court that she was the Respondent's Principal. It was her evidence that the respondent caters for the blind. According to her the grievant had a drinking problem and was warned severally. She produced the warning letters as evidence.

13. In cross-examination she stated that the warnings were documented but there were also verbal warnings. She stated the warning letters were not copied to the Union because there was no recognition agreement between the union and the respondent.

14. The claimant union signed a CBA with the then Ministry of Education, Science and Technology in March, 1986. This CBA was to remain in force until 30<sup>th</sup> June, 1988.

15. By a legal notice number 263 of 1993, the Minister then for Education the late Honourable Joseph Kamotho gazetted an amendment to the Education (Board of Governors) order in which it was stated as follows:

*“The education (Board of Governors) order is amended by deleting regulation 17, and substituting it with the following:*

*The Board may enter into an agreement of recognition with any trade union competent to negotiate terms and conditions of service for and on behalf of any section of the employees of the Board, and the Board shall sign such agreement on its own behalf.”*

16. The effect of the amendment order was to transfer the responsibility of entering into recognition agreement and CBA negotiations from the parent Ministry to the respective BOG's. To this extent, the claimant union cannot seek reliance on the CBA between themselves and the parent Ministry entered into in March, 1986 to extend to the respondent. In any event the said CBA expired on 30<sup>th</sup> June, 1988. The claimant union did not produce in court what action they took to enter into recognition agreement with the respondent in line with the amendment order and for 22 years before the accrual of the present cause of action in October, 2010. In the circumstances the CBA entered into between the claimant union and the parent Ministry in March, 1986 and terms thereof does not apply to this case. In any event the claimant was employed on 1<sup>st</sup> May, 1999 long after the expiry of the said CBA and after the gazetting of the amendment order.

17. Concerning the termination of the claimant's service, under Section 43 of the Employment Act, in a claim arising out of termination of a contract, the employer shall be required to prove reason or reasons for termination and where the employer fails to do so, the termination shall be deemed to have been unfair.

18. Subsection 2 further stipulates that the reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of an employee. Being drunk or intoxicated during working hours is a ground for summary dismissal. The grievant did not deny that he used to drink but all he said was that he never used to drink while at work or report to work drunk.

19. In cross-examination however the grievant contradicted himself when he admitted that he received several warning letters on drunkenness and responded by way of apology. An apology is not a denial of an allegation. It is an admission of the charge but a request for pardon and a chance to make amends. The court therefore finds that there existed valid grounds for terminating the grievant's services.

20. On the issue of procedure for termination, under the Employment Act, there may exist valid reasons to terminate the service of an employee however such termination may still be found to be unfair if the laid down procedure for termination in the contract document or Employment Act is not followed. The grievant's letter of appointment does not make reference to termination procedure hence resort will be made to the Employment Act. Section 41 of the Act provides as follows:

*“subject to Section 42(1) an employer shall before terminating the employment of an employee, on grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.”*

Subsection 2 further provides

*“... an employer shall before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance and the person, if any, chosen by the employee within subsection (1) make.*

21. Through a letter dated 13<sup>th</sup> September, 2010, the respondent summoned the grievant to appear before the Executive Board of Governors on 16<sup>th</sup> September, 2010 in connection with an impending disciplinary issue.

22. Although it was not disputed that the grievant had a drink problem, the letter makes no reference to the charge nor does the letter inform

the grievant of his right to be accompanied with an employee of his choice to the meeting. This was contrary to the provisions found under Section 41 of the Employment Act cited above. However, this procedural mistep did not under the circumstances of the grievant occasion him undue prejudice. The grievant himself conceded he had a drink problem and further admitted receiving warning letters over it to which he responded by apology. The court therefore awards him two months' salary as compensation for the procedural lapse.

23. In conclusion the court hereby enters judgment against the respondent for Kshs. 17,726/-. There will be no orders on costs.

24. It is so ordered.

**Dated at Nairobi this 25<sup>th</sup> day of January, 2019**

**Abuodha Jorum Nelson**

**Judge**

**Delivered this 25<sup>th</sup> day of January, 2019**

**Abuodha Jorum Nelson**

**Judge**

**In the presence of:-**

.....for the Claimant and

.....for the Respondent.

**Abuodha J. N.**

**Judge**