



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

CAUSE NO. 181 OF 2014

GEORGE WAKWEIKA MUNYILA.....1ST CLAIMANT

PETER WANYAMA MAKOKHA.....2ND CLAIMANT

SAUL MULONGO SIMIYU.....3RD CLAIMANT

LEONARD WAFULA WANDABWA.....4TH CLAIMANT

WILLIAM MUTANDA TUMBU.....5TH CLAIMANT

VERSUS

THE PRINCIPAL

FRIENDS SCHOOL KAMUSINGA.....1ST RESPONDENT

THE BOARD OF MANAGEMENT

FRIENDS SCHOOL KAMUSINGA.....2ND RESPONDENT

JUDGMENT

The five (5) Claimants brought this suit vide a Memorandum of Claim filed on 25th July, 2014 seeking declaration that the Claimants termination from employment was wrongful and unfair and they be paid compensation. In addition, the claimants sought payment of terminal benefits including unpaid salary and payment in-lieu of leave days not taken. The Claimants further sought costs and interest.

The claimants were employed by the Respondent on diverse dates and worked continuously until their employment was terminated between 5th February, 2014 and 24th April 2014. The Claimants recorded in their statements dated 4th July, 2014 and filed on 25th July, 2014, detailing their respective cases.

The 5th Claimant testified under oath as CW1 and said only himself remained in the suit since the other four had been re-employed by the respondent and had withdrawn their suit. The 5th claimant relied on his recorded written statement filed on 4th 7.2014 which was adopted as his evidence in chief.

CW1 told the court that he was employed by the Respondent as a driver from June 1996 and worked continuously until 24.4.2014. That the Claimant earned Kshs 16,600 per month at the time of termination. He produced letter of employment marked Exb. 'I'.

CW1 told the court that on the material day he reported to work and was told by the watchman at the gate that his employment had been terminated. CW1 tried to see the Principal but was unable to. He walked back to Webuye and came back to school on 30.4.2014 in an attempt to see the principal but was unable.

CW1 said that he received a letter dated 4.4.2014 in which he was accused of taking students of Lugulu girls to Kisumu in the school bus and had a road accident. The Claimant was suspended from work.

The Claimant reported back to work on 30.4.2014, but was stopped by the watchman and told that the principal had hired another driver. The Claimant continued to report to work but was not assigned any duties. That the Claimant remained on half salary and on suspension until he filed suit. He received a letter terminating his employment dated 1.11.2016 which was sent to his home two years after the suspension.

The Claimant was not paid any terminal benefits. He told the court that he worked well with three different principals. That the current one started writing letters to him and wrongly terminated his employment.

That he received ½ salary for seven months from April, 2014 until September, 2014 when the ½ salary was stopped.

After another 7 months in April, 2015 the Respondent started paying the Claimant again but did not pay arrear salary. The Claimant was paid full salary until November, 2016. The salary was then stopped and Claimant was given a Letter of Termination. That the Claimant was called to a disciplinary hearing but he did not attend since he was already in court.

That the Claimant did not go on leave for four years and Claims in Lieu thereof. He worked from 8 a.m. to 5 p.m. and at times up to 6 p.m.

The Claimant prays for payment of service pay for 21 years. The Claimant was registered with NSSF from 1996 and same was remitted. The Claimant collected his pension dues upon reaching 55 years old.

The Claimant was paid salary of Kshs 20,000 per month.

Under cross examination the Claimant stated that they were three drivers and that they took teachers home at night in shifts.

Claimant stated that he received a warning letter from the new principal on 4.3.2014. He denied knowledge of other earlier warning letters shown to him allegedly written by previous principals.

He admitted having received a notice to attend a disciplinary hearing dated 5.4.2015 but did not attend since the matter was already in court.

The Claimant responded to the letter in writing to that effect. He was kept on suspension for a long time.

Claimant got a reminder to respond to notice to show cause dated 31.3.2015. He then got a Letter of termination dated 1.11.2016.

The Claimant stated that he was replaced immediately upon being suspended. The purported disciplinary process was just a farcade

The counsel for the Respondent Mr. Ombito informed court that they did not intend to call any witness and closed the defence without offering any evidence in rebuttal to the Claimant's case. Both parties then filed written submissions.

Determination:

The issues for determination are:-

- (i) Whether the Claimant's employment was terminated for a valid reason and in terms of a fair procedure.
- (ii) Whether the Claimant is entitled to the reliefs sought?

The 5th Claimant worked for the Respondent as a driver for a period of 21 years from 1996 until 4.4.2014 when he received a letter of suspension from the principal. He was kept on suspension and on half (1/2) pay for a period of over seven (7) months. The ½ salary was stopped in September, 2014.

The Respondent resumed paying the Claimant full salary in April 2015 without paying the arrear salary until November, 2016. The Claimant's employment was then terminated by a letter dated 1.11.2016.

The Claimant had received a notice to attend disciplinary hearing on 5.4.2015 but did not attend because he had already been replaced. He had been placed under suspension for a long time and had already filed this suit.

The respondent did not adduce any evidence in rebuttal to the testimony by the Claimants.

The issue for determination is whether the Claimant has discharged the onus placed on him under Section 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya as read with Section 47 (5) of the Employment Act 2007 to prove on a balance of probabilities that his employment was unlawfully and unfairly terminated.

The Claimant has proved that he was placed on suspension for an inordinately long period on ½ pay and was immediately replaced by another driver while he was under suspension.

That he was called to a disciplinary hearing many months down the line and after he had already filed this suit.

The court is satisfied that the belated disciplinary process had been overtaken by events since the Claimant had already been replaced and had remained without work for almost 12 months by the time he was called to attend a hearing on 5.4.2015.

That the termination of the Claimant's employment was without notice, without any fair process being followed in that the belated disciplinary process was in itself an unfair labour practice in violation of Article 41 and 47 of the Constitution of Kenya 2010.

A fair disciplinary process must be conducted expeditiously, and before an employee has been replaced. Keeping an employee at home for over a year in itself a constructive dismissal and subsequent attempt to conduct disciplinary process to sanitize the illegal process will not do.

Accordingly, the termination of the employment of the Claimant was unlawful and unfair. The Claimant had served the Respondent for 21 years. Claimant told the court that he had a relatively clean record until a new principal came to the school who was bent to replace him and he did so unlawfully.

The court finds that there were aggravating circumstances in this matter including failure to pay notice pay, leave pay for four years, and replacing the Claimant while still held him under suspension.

The court awards the Claimant Under Section 49 (1) (c) and (4) of the Employment Act, the equivalent of twelve months salary in compensation for the unlawful and unfair termination of employment in the sum of Kshs (16,600x12) 199,200.

The Claimant is also awarded Kshs 16,600 in lieu of one month notice.

The rest of terminal benefits have not been properly pleaded and were not provided on a balance of probability either. The same are dismissed.

In the final analysis, judgment is entered in favour of the Claimant against the respondent as follows:-

- 1) Kshs 16,600 in lieu of one months notice.
- 2) Kshs 66,400 (16,600 X4) in lieu of 4 months Leave not taken.
- 3) Kshs 199,200 being equivalent of 12 months salary in compensation
- 4) Total Kshs 282,200
- 5) Interest at court rates from date of filing suit till payment in full in respect of (1) and (2) above and from date of Judgment in respect of (3) above till payment in full.
- 6) Costs of the suit.
- 7) Certificate of service within 30 days.

DATED, SIGNED and DELIVERED at BUNGOMA this 29TH day of MARCH, 2019.

HON. M. N. NDUMA, JUDGE

EMPLOYMENT AND LABOUR RELATIONS COURT

BUNGOMA

Appearance:

Mr. Omondi for Claimant

Mr. Ombito for Respondent

Chrispo: Court Assistant