



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT BUNGOMA

CAUSE NO. 36 OF 2018 (Formerly Kisumu Cause No. 246 of 2014)

JOHN M. MUCHAI.....CLAIMANT

VERSUS

THE SECRETARY B.O.G BUNGOMA HIGH SCHOOL.....RESPONDENT

J U D G M E N T

The Claimant seeks General damages for unlawful termination for employment, salary arrears for November, 2005 to April 2006, one month salary in lieu of notice, gratuity and overtime.

The Respondents denied liability vide a statement of defence dated 11.5.2005.

The suit was filed at the CM's court Bungoma in 2009. The matter was subsequently transferred to this court.

Both parties filed witness statements and list of documents and testified in support of their respective cases.

The Claimant was employed as Accounts Clerk and rose to the position of Bursar in Bungoma High School. The school was subject to Annual Audit checks.

In the year 2005,an Audit of the Books of Account was conducted in respect of the financial records for the year 2004.

The Audit report by the District School Auditors unearthed loss of school funds to the tune of Kshs 9,631,095 which was blamed on the Claimant.

The Claimant in his evidence testified that he was employed by the Defendant in 1993 as Accounts Clerk and was later promoted to a Bursar in 1997. That he earned Kshs 15,355 per month.

That he earned the same amount when he was summarily dismissed in 2006.

That at the time he was dismissed he had not been paid accrued salary for 6 months in the sum of Kshs 92,136 from the date of suspension.

That subsequently, the Provincial Audit Team visited the school and prepared an Audit Report dated 31.2.2005 which was provided to the Ministry of Education, Nairobi in 2007. The report held the Principal of the school accountable for the loss of funds in the sum of Kshs 9,631,095. The Audit Report

recommended recovery of the amount from the principal.

The report showed that the principal received cash payments daily and signed for it in the cash books. That he was the Principal Accounting Officer of the school.

The Claimant testified that the report superseded the District Audit Report which had earlier implicated the Claimant on 18.10.2005.

That the report was sent to the Provincial Director of Education who ordered for another Audit Report hence the second report was done.

The Claimant testified that he was not liable for the loss of money at the school and the summary dismissal was not for a valid reason and it was unlawful and unfair.

RW1 Samuel Kaunda Ogwenyo testified for the Respondent and told the court that he was the Principal Bungoma High School but was not at the school when the Claimant was dismissed. That he relied on the records he found when he reported to the school in 2017.

RW1 stated that the Claimant as the Bursar was responsible for

- (a) writing books of accounts
- (b) Collecting fees and Banking
- (c) Advising Board of Management and Principal on Finances
- (d) Making Cash and Bank reconciliations.

He told the court that from the Audit Reports in the year 2005, approximately Kshs 6,295,488 was not accounted for. The Claimant was suspended after receipt of this report and was asked to explain the loss to the Board of Governors. The Board considered the explanation by the Claimant and reached the conclusion that the Claimant did not keep proper books of accounts and did not supervise properly the officers under him including the Accounts Clerk and other Clerical staff.

The Claimant was paid salary up to November 2005. That the Claimant was entitled to half salary during the period of suspension.

That the Claimant was head of non-teaching staff and he prepared all documents with regard to staff leave. That all non-teaching staff took leave during school holidays. That from the records the Claimant took all his leave and is not entitled to payment in lieu of leave.

It was discovered that the Claimant had printed Receipt Books twice and the receipt books were not entered in the official counterfoil Register. Those omissions facilitated the losses incurred by the school. From the record, there was no provision for payment of overtime to the Claimant or any other staff. It is impracticable to accumulate overtime for 23 years and when the Claimant was the head of the finance office. That the Claimant did not provide evidence of the overtime hours worked.

That all the claims made by the Claimant are without basis and the suit be dismissed with costs.

Determination.

- i. Was the Claimant summarily dismissed for a valid reason and in terms of a fair procedure?
- ii. Is the Claimant entitled to the reliefs sought.?

Issue 1.

The question as to whether the Claimant in the position of Bursar was responsible for the massive financial loss at the school with others including the principal and the account clerk and staff was answered adequately in the Audit Report conducted by the District School Auditor. The report was signed by Mr. J.W Matumba and provided to the Provincial Director of Education on 18.10.2005. The Auditors concluded that a total of Kshs 10,542,579.25 could not be accounted for by the Claimant in his books for the year 2004 and 2005.

The District Auditors concluded that the principal was in the school for just the period covered by the Audit, that is 2004 and 2005. That the Bursar was in the school for over 20 years. Therefore the Bursar was to blame for the lapse in proper keeping of books which led to misappropriation of cash and the massive loss discovered.

The team noted seven receipt books were missing and neither the Bursar nor the Accounts Clerk could account for the books. That some of the receipt books missing had been printed twice. All the seven receipt books in question had not been recorded in the current counterfoil receipt books register. The Bursar did not submit the counterfoil register used in 2004 even though the Bursar admitted before the Board that he had it.

The report also indicated that after persistent request by the Auditors the Claimant brought duplicate copies of the missing receipt books.

Clearly, the report lists many omissions by the Bursar which led or contributed mainly to the loss of funds that the school lost.

The Claimant was not candid in his testimony and only sought to blame the new principal for the loss that occurred in the year 2004 to 2005. The Claimant could not lawfully shift his responsibilities to the principal even though the Principal was the Principal Accounting Officer of the school.

It is the Bursar in his professional capacity who had the responsibility to ensure books are kept, cash is banked and reconciliation is done. If the principal hindered the Claimant in any of these responsibilities the Claimant had to report to the Board immediately. There is no evidence before court that the Claimant had complained to the Board that his duties were being obstructed by the new principal in the year 2004 and 2005.

The Claimant has failed to prove on a balance of probabilities that the summary dismissal was not for a valid reason. To the contrary the testimony by RW1 and especially the District Audit Report dated 8.10.2005 point to his guilt and direct contribution to the massive loss that the school incurred under his watch.

Reliance on a subsequent report by a provincial team dated 31.12.2005 and provided to the Ministry of Education Nairobi, in 2007 long after the Claimant had been dismissed, does not negate that the Board of Governors summarily dismissed the Claimant for a valid reason and the Board had given the Claimant opportunity to explain himself. The Claimant's explanation was deemed by the Board to be unsatisfactory hence the summary dismissal.

It is the considered finding by the court that the Claimant was dismissed lawfully following a fair procedure. The Claimant is therefore not entitled to grant of general damages in respect of the summary dismissal.

Notice pay.

The summary dismissal was warranted and the Claimant is not entitled to payment in lieu of one month termination notice.

Unpaid leave allowance for 21 years.

The Claimant was the head of subordinate staff including himself. He was head of school finance and he did not provide any evidence to justify payment of leave allowance for a period of 21 years. The Claimant has not proved on a balance of probabilities that he was owed in lieu of leave and the prayer is dismissed.

Overtime allowance for 23 years.

The Claimant did not provide any evidence that he was entitled to overtime for the 23 years he served. The Claimant could not explain how the claim was not resolved for 2 years whilst he was the head of administration and finance. The Claimant's evidence was rebutted by the testimony of RW1. The same lacks merit and is dismissed.

Gratuity for 13 years.

The Claimant testified that he had earned gratuity for a period of 13 years at the rate of Kshs 15,355 per year. This claim was not challenged sufficiently by the Respondent.

The Claimant proved this claim on a balance of probabilities and is awarded Kshs 199,615 being service gratuity applicable to Board staff in High Schools.

Salary Arrears from November to April, 2005

The Claimant was under suspension during the period and did not receive salary. RW1 told the court that the Claimant was entitled to half salary during this period. The Claimant earned Kshs 15,355 per month. Half salary for six months adds up to Kshs 46,065. The court awards the Claimant accordingly.

In the final analysis Judgment is entered in favour of the Claimant as against the Respondent as follows:-

- (a) Kshs 199,615 service gratuity.
 - (b) Kshs 46,065 arrear half(1/2) salary for the period November, 2005 to April, 2006.
- Total award Kshs 245,680.

For the avoidance of doubt the rest of the reliefs sought are dismissed for lack of merit.

- (c) Interest at court rates from date of filing suit till payment in full.
- (d) The Respondent to pay half the costs of the suit.

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

HON. M. N. NDUMA

JUDGE

EMPLOYMENT AND LABOUR RELATIONS COURT

BUNGOMA

Appearances:

Mr. Kituyi for the Claimant

J.O Makali for Respondent

Chrispo: Court Assistant.