



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CASE NO. 265 OF 2016

KENYA UNION OF DOMESTIC, HOTELS,

EDUCATIONAL INSTITUTIONS, HOSPITAL

& ALLIED WORKERS.....CLAIMANT

VERSUS

B.O.M DEB GICHICHE PRIMARY SCHOOL.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent on behalf of the Grievant John Njiru Musa. A dispute was reported to the Cabinet Secretary for Labour and Miss L. Mburu appointed as conciliator. The Claimant assert that the Grievant was arrested for the offence of failing to prevent a felony at the school and was released after 3 days without charge. The Claimant averred that the Grievant had been employed as a watchman in July 2006 earning Kshs. 4,000/- a month. The Claimant averred that the Grievant was dismissed verbally and that the Respondent resorted to the arrest as the Claimant was demanding salary arrears and salary increment. The Claimant thus sought the following relief for the Grievant – Kshs. 4,000/- as one month's salary in lieu of notice, salary for October and November 2015 – Kshs. 8,000/-, annual leave for 9 years – Kshs. 36,000/-, compensation for 3 days in custody – Kshs. 30,000/-, 12 months compensation for unlawful dismissal – Kshs. 48,000/-, underpayment from 2010 to 2015 – Kshs. 339,708/-.

2. The Respondent did not file a defence though the AG through Mr. Muthuri appeared at the hearing. Mr. Muthuri informed the court that he had attempted to negotiate the matter with a view to settle but he did not get instructions and even was unable to get documents for the response. He stated he thus lost touch with the Respondent and was unable to represent it. He was excused from proceedings.

3. In his testimony, the Grievant stated that he was seeking a payrise when the Respondent dismissed him. He stated that he was notified of the theft by the head teacher and he recorded a statement with the Police and was arrested. He testified that he was incarcerated for 3 days and was released without charge. He stated that his pay was below the wages guideline and he thus sought payment of the sums in his claim.

4. The Claimant proved that there was no reason for termination of service by the Respondent. His dismissal was oral and in his mind it was on account of his push for a payrise. Even if he was suspected of theft, the Respondent ought to have accorded him the safeguards under the law. In the case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** my sister Mbaru J. observed thus:

Section 41 of Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice.

The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets.

5. In the instant case, there was no hearing and there is no proof an attempt to undergo the rigours of the procedural and substantive fairness under the law. The Grievant herein was not even issued with a letter of termination making the termination of his employment both procedurally and substantively unfair. The Claimant sought relief for the Grievant that went beyond the statutory limits of such a claim and he can only recover in accordance with the law. He is therefore entitled to notice, pay for October and November 2015, compensation for unlawful dismissal and costs of the suit. In compensation I will award him the maximum amount as the dismissal by the Respondent was callous and effected with malice. He was incarcerated with no basis and suffered ignominy on account of his agitation for his rights to better pay. He entitled to receive payment for the underpayment he suffered but only between 2013 and 2015 amounting to Kshs. 73,392/-.

6. In the final analysis I enter judgment for the Claimant against the Respondent for:-

- a. One month's salary in lieu of notice Kshs. 4,000/-
- b. Salary for October and November 2015 – Kshs. 8,000/-
- c. Underpayment between 2013 and 2015 – Kshs. 73,392/-
- d. 12 months salary compensation – Kshs. 48,000/-
- e. Costs of the suit.
- f. Certificate of service.

It is so ordered.

Dated and delivered at Nyeri this 13th day of June 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the Original

Deputy Registrar