



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**  
**CAUSE NO. 341 OF 2014**

*(Before Hon. Lady Justice Maureen Onyango)*

**POLYCARP SHITAKHA SHILAHO.....CLAIMANT**

**VERSUS**

**THE BOARD OF MANAGEMENT,**

**MUSINGU HIGH SCHOOL.....RESPONDENT**

**JUDGMENT**

The claimant filed the instant suit alleging that he was unfairly dismissed by the respondent. He prays for the following remedies –

1. That the Court do find that the Claimant who headed a very sensitive financial position and had served the Respondent for over 10 years his humble demand for procedural handing and taking over did not qualify in law as an act of insubordination to form a basis for summary dismissal. (sic)
2. That the Court to find that the Respondent’s summary dismissal merely because he requested to be supplied with reasons and procedure for the handing and taking over was unlawful.
3. That the Court do find that the Respondent’s action of continued withholding and failing to remit and or neglect to pay the Claimant his rightful terminal benefits and other unpaid salary and allowance is unlawful and untenable.
4. That as a result, the court do order the Respondent to pay the claimant all his terminal benefits and other unpaid dues as computed hereunder.

- (a) Salary underpayments.....Kshs.275,928
- (b) 5 Months’ salary in lieu of notice.....Kshs.129,475
- (c) Gratuity for 10 years served.....Kshs.258,950
- (d) Leave pay travelling allowance..... Kshs.8,000
- (e) Unpaid salary for February and March 2014..... Kshs.61,590

**Total                      Kshs.733,943**

The respondent filed a Memorandum of Response in which it denies the dismissal of the claimant’s employment was unfair. It prays that the claim be dismissed with costs.

At the hearing, the claimant testified on his behalf. The respondent called one witness ELPHAS ALIVA LUVASO (RW1), the Principal and Secretary to the Board of Governors. The parties thereafter filed an exchanged written submissions

## **Claimant's Case**

The claimant's case is that he was employed by the respondent, the Board of Governors of Musingu High School, as a School Bursar on 1<sup>st</sup> March 2005. That his starting salary was Kshs.8,965 in Job Group H in the salary scale 5,370 x 120 – 5,739 x 144 – 6,315 x 168 – 6,987 x 204 per annum. He served the school until 28<sup>th</sup> January 2014 when by a handwritten note that was unsigned, he was asked to hand over the office to the Accountant. The handwritten note is attached as Annexure PSS2 of the claimant's bundle of documents.

By his letter dated 29<sup>th</sup> January 2014, the claimant sought clarification and reasons for the handing over and pointed out that he was holding a sensitive office which required official communication and a handing over should be in the presence of a relevant authority such as the County Schools Auditors. The claimant avers that on 31<sup>st</sup> January 2014 he was ejected from office without any handing over and without being informed of the reasons for him to hand over. Later, on 18<sup>th</sup> February 2014 he was issued with a letter for his suspension. The grounds given in the letter of suspension were insubordination and incompetence.

The claimant was later summoned to attend a Board of Governor's meeting. Thereafter he received a letter of dismissal through the post office. The letter of dismissal was dated 14<sup>th</sup> March 2014 and stated that he was found guilty of insubordination and misconduct and that he had refused to hand over. The claimant testified that no instances of incompetence were brought to his attention and he was never charged for insubordination. He further stated that he was unable to hand over because the hand written note given to him was not signed and did not constitute valid authority for handing over such a sensitive office.

The claimant prays for judgment as prayed in his claim.

## **Respondent's Case**

It is respondent's case that the claimant was dismissed for insubordination, professional incompetence and gross misconduct. That the claimant was called for a meeting and appeared before the Board where reasons given for his dismissal were proved. That the claimant failed to go to hand over so that he could be paid his terminal benefits and instead filed suit in court.

RW1 testified that the claimant was not a member of the CBA (sic) and that he had a dispute pending at Kakamega Labour Office, which he reported but failed to attend to a meeting called by the Labour Officer. RW1 testified that the respondent had no problem with payment of the claimant's terminal dues.

Under cross examination RW1 stated he could not remember the date the claimant appeared before the Board but he had the minutes in his office. He stated that the Board took into account a report of auditors whose date he could not recall.

RW1 stated that he was aware the claimant complained against him to the DCIO, that some of the complaints were that the relationship between him and the claimant was sour. He denied that the claimant complained about misuse of funds or the school bus, or that he was making procurements without involving the claimant.

He testified that the claimant was not following instructions with regard to preparing documents and handing over. On incompetence, he testified that the claimant was not preparing trial balance in time and was complaining that he had not received some documents. He testified that some school money was being banked at the post office and some at the bank and the claimant complained about how money was withdrawn by RW1, the accounts clerk and the driver. RW1 conceded that over Kshs.2 million had been withdrawn from the accounts.

## **Determination**

The issues for determination are whether the dismissal of the claimant was unfair and if he is entitled to the remedies sought.

From the evidence on record, it is apparent that there was bad blood between the claimant and RW1, who was the school's Principal and secretary to the Board of Governors. It is further evident from the claimant's further list of documents that he had question certain financial irregularities which RW1 was not comfortable with leading to the unofficial handwritten notice, personally from RW1, which was not even signed, asking the claimant to hand over. When the claimant insisted on getting a formal notification to hand over and for the handing over to be done formally, he was physically ejected from the office. He was later served with a letter of suspension allegedly for insubordination and incompetence. From the evidence it appears that the claimant's refusal to hand over to the accounts clerk pursuant to the informal, unsigned note is what was treated as insubordination while his inability to prepare the financial documents as a result of documents not availed to him by RW1 to enable him prepare the financial documents was used against him and deemed as incompetence. When asked to explain the particulars of the charges against the claimant, RW1 cited the refusal to hand over and the failure to prepare trial balance. These however were never stated in the claimant's letter of suspension or dismissal even though he wrote to ask for the particulars.

I therefore find that there was no valid reasons for dismissal of the claimant.

On procedure, when RW1 was asked what transpired when the claimant appeared before the Board, he stated "*The claimant was called for a meeting to where appeared. The reasons given before were proved.*" He did not state what these reasons were. He did not state if the claimant was asked to defend himself or was allowed to respond to the issues that had been raised in the letter of suspension.

Section 41 of the Employment Act requires the employer to give an employee an opportunity to defend himself for charges that have been explained to him while Section 43 requires the employer to prove the grounds of termination. In the claimant's case the particulars of insubordination and gross misconduct appear to have been his refusal to hand over while the auditor's report which RW1 referred to was never availed to him nor the issues in the report that were used as a ground for his dismissal explained.

From the foregoing, the dismissal of the claimant was unfair both substantively and procedurally and I declare accordingly.

With respect to remedies, the claimant's letter of appointment states –

*“Employment is subject to the terms of any agreement between the Ministry of Education and the Domestic and Hotel Workers Union for the time being in force on the terms and conditions of service of persons employed by Board of Governors, established under the Education (Board of Governors) Order, 1964.”*

The claimant attached a copy of the CBA between the respondent and the union signed on 5<sup>th</sup> February 2013. According to the Agreement, he is entitled to four months' pay in lieu of notice having served for more than 9 years.

The claimant testified that his last salary was Kshs.25,020. I therefore award him Kshs.100,080 in lieu of notice.

The claimant further prayed for underpayments. He did not submit evidence to prove the underpayments if any. Underpayments is special damages that is subject to strict proof. Having failed to prove the same, I dismiss the prayer.

The claimant prayed for gratuity. Under the CBA, he is entitled to gratuity at one month's salary per year worked. Having worked for 9 years, I award him Kshs.225,180 as gratuity.

The claimant did not submit any evidence to prove leave pay or travel allowance. I therefore dismiss the said prayers.

The claimant is however entitled to salary for February up to 14<sup>th</sup> March 2014 while he was on suspension without pay, which I award him at Kshs.38,492.40.

**Judgment is therefore entered for the claimant against the respondent in the total sum of Kshs.364,752.40.**

In view of the fact that the salary was supposed to be paid upon termination, the same shall attract interest at court rates from date of filing suit, while the rest of the decretal sum shall attract interest from date of judgment.

The respondent shall pay the claimant's costs of this claim.

**DATED AND SIGNED AT NAIROBI ON THIS 22<sup>ND</sup> DAY OF MAY 2019**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 16<sup>TH</sup> DAY OF JULY 2019**

**MATHEWS NDERI NDUMA**

**JUDGE**