



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 169 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

RICHARD NYAANGA NYAKUNDI.....1ST CLAIMANT
BENARD MOGAKA SIMBA.....2ND CLAIMANT
MS. LINNET M. ORIKU.....3RD CLAIMANT
MS. REGINA KEMBO NYANGARESI.....4TH CLAIMANT

VERSUS

THE CHAIRMAN, BOARD OF GOVERNORS
RIOTERO SDA MIXED SECONDARY SCHOOL.....RESPONDENT

JUDGMENT

The claimants are former employees of Riotero SDA Mixed Secondary School, an educational institution established under the Education Act, whom they have sued through the Chairman of the Board of Governors.

The first claimant RICHARD NYAANGA NYAKUNDI was employed by the respondent as a Laboratory Technician on 19th July 2012 on temporary basis and confirmed into permanent employment on 1st October 2012.

The second claimant BENARD MOGAKA SIMBA was employed on 1st June 2010 as a Watchman. He was confirmed on permanent terms of employment on 1st June 2011.

The third claimant LINET ORIKU was employed as School Librarian on 1st March 2011 and confirmed to permanent status with effect from 2nd June 2012 by letter dated 29th January 2013.

The fourth claimant REGINA KEMBO NYANGARESI was employed on 1st June 2010 as a Cook. She was confirmed to permanent terms of employment with effect from 1st June 2011.

On 30th September 2013 the respondent's Board of Governors (BOG) support staff numbering 12 wrote to the BOG through the Secretary, who was the School Principal seeking a salary review. The letter which was accompanied by the names, identity card numbers and signatures of the employees threatened that –

“We therefore urge you to take this request seriously or else we shall be compelled to use all means at our disposal to demand for our right.

We hope that you are going to cooperate to avoid any inconvenience that may arise.”

Following receipt of the letter, the employees wrote another letter, to which they appended their signatures, apologising for using impolite language to request for salary review.

On 18th October 2013, eleven (11) workers out of 12 workers of the school, with the exception of the Accounts Clerk, wrote another letter titled “RE: STRIKE NOTICE” in which they stated that –

“We as the support staff have agreed that we shall boycott our duties as from Tuesday – 22nd October 2013. This has been brought about by the fact that the Board has not responded to our letter dated 3rd October 2013.

We therefore feel belittled and neglected. We are not going to accept any kind of intimidation to suppress our efforts to demand for our rights.”

The Principal, upon receiving the strike notice, called the workers to a meeting on 20th October 2013 and warned them against proceeding with the strike which he termed illegal. He urged them to allow the BOG deliberate on the issue and also allow candidates time to do their exams.

On the morning of 22nd October 2013, which was also the day the school’s candidates were starting their KCPE examinations, the employees who had signed the strike notice reported for duty and congregated at the gate.

Following the withdrawal of their services by the 11 workers, the Principal after consultation with BOG, hired temporary staff (three cooks and three watchmen) to ensure services were not interrupted and also informed the Area Chief, the District Education Officer, Labour Officer, Education Director and the elected leaders.

The Principal then suspended all the striking workers on the advice of the BOG to await a full meeting of the BOG to hear their disciplinary cases. The workers were called for disciplinary hearing on 4th December 2013 and after hearing the 11 workers reinstated 7 and issued warning letters to them after they tendered apology. The four claimants herein were however dismissed from service.

The first claimant was dismissed for inciting the workers, the second claimant because he was not willing to resume duty unless his salary was increased, the third claimant was also not willing to resume duty unless her salary was reviewed upwards while the fourth claimant refused to write a letter of apology and was also not willing to resume duty unless her salary was reviewed.

At the hearing in court, all the claimants testified. The respondent called the School Principal, JAMES OMWENGA who testified on its behalf. The parties thereafter filed and exchanged written submissions.

Both the evidence adduced in court and the facts as contained in the pleadings are summarised in the facts above which are not contested, but for minor discrepancies in the testimony of the witnesses. All the claimants however testified in addition, that when they were called before the BOG they were asked questions but were not allowed to present their defence.

Determination

The issues for determination are whether the dismissal of the claimants was fair and whether they are entitled to the remedies sought.

Fair Termination

The claimants pleaded that the termination of their employment was unlawful, draconian, against the labour laws and the constitution. From the facts, it is not demonstrated that the respondent complied with Sections 41 of the Employment Act or that there was proof of the grounds of termination as stated in the letters of termination. The claimants testified that when they appeared before the BOG they were asked questions but were not allowed to state their defence. The respondent merely states that the claimants appeared before the BOG but state noting about what transpired at the BOG meeting.

As provided under Section 47(5) of the Employment Act, it is the burden of the respondent to prove that it followed fair procedure and that there was valid reason. I find that the respondent has not discharged this burden. I thus find that the termination of the claimants was unfair in terms of Section 45(2) of the Employment Act.

Remedies

The claimants prayed for the following remedies –

- a) 1st claimant – unpaid salary of Kshs.7,000 per month as from 25th October 2013 to entry of judgment herein.
- b) 2nd claimant – unpaid salary of Ksh.7,000 per month as from 6th December 2013 to entry of judgment herein.
- c) 3rd claimant – unpaid salary of Ksh.7,000 per month as from 25th October 2013 to entry of judgment herein.
- d) 4th claimant – unpaid salary of Ksh.5,000 per month as from 6th December 2013 to entry of judgment herein.
- e) Interest and costs.

f) Any other alternative relief the Court may deem fit to grant.

Having found that the termination of employment of the claimants was unfair, they are entitled to all withheld salary from date of suspension to date of termination. They are further entitled to notice. They are however not entitled to salary after the date of termination.

I therefore award the claimants the following –

1. Richard Nyaanga Nyakundi

Notice..... Kshs.7,000.00
Withheld salary October, November and 6 days of
December 2013..... Kshs.15,909.10
Total Kshs.22,909.10

2. Benard Mogaka Simba

Notice..... Kshs.7,000.00
Withheld salary October, November and 6 days of
December 2013..... Kshs.15,909.10
Total Kshs.22,909.10

3. Linet M. Oriku

Notice..... Kshs.7,000.00
Withheld salary October, November and 6 days of
December 2013..... Kshs.15,909.10
Total Kshs.22,909.10

4. Regina Kembo Nyangaresi

Notice..... Kshs.5,000.00
Withheld salary October, November and 6 days of
December 2013..... Kshs.11,363.70
Total Kshs.16,363.70

The respondent shall pay costs.

In his testimony respondent's witness, JAMES OMWENGA stated during cross-examination that the salary for the claimants were not paid because they were supposed to forfeit their benefits. This means that the salaries which the claimants were supposed to be paid at the time of termination was deliberately withheld. For this reason, I grant the claimants interest from date of termination.

DATED AND SIGNED AT NAIROBI ON THIS 17TH DAY OF MAY 2019

MAUREEN ONYANGO

JUDGE

DATED AND DELIVERED AT KISUMU ON THIS 8TH DAY OF JULY 2019

MATHEWS NDERI NDUMA

JUDGE