



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT BUNGOMA

CAUSE NO. 82 OF 2017

[FORMERLY KISUMU CASE NO. 195 OF 2014]

(Before Hon. Justice Mathews N. Nduma)

PATRICK LUMUMBA LUMULA.....CLAIMANT

VERSUS

BOARD OF MANAGEMENT EREGI TEACHERS

TRAINING COLLEGERESPONDENT

JUDGMENT

1. The claimant was employed by the respondent as a security guard with effect from 27th June 2006. The claimant was retired in Public interest on 16th March 2014.
2. On 24th February 2014, the claimant was suspended for two weeks for allegedly mistreating staff, insubordination and banning persons to enter the college. The claimant was called to a disciplinary hearing before the Board of Management on 11th March 2014. The claimant explained himself in the said hearing and denied all allegations made against him. The claimant testified that the persons who were said to have complained about the claimant's conduct were not disclosed and were not called to testify at the disciplinary hearing.
3. On 16th March 2014, the claimant received a letter from the respondent which retired the claimant in public interest.
4. The claimant states that the termination of his employment was unlawful and unfair in that it was not for a valid reason and fair procedure was not followed to retire the claimant in public interest. Claimant terms his retirement as a malicious scheme by the respondent so as to deny him his rightful dues on account of his long service and the fact that he had served in an acting capacity for over six years without salary increment.
5. The claimant invoked Articles 28, 29 and 41 of the constitution as having been violated by the respondent in the manner they treated him. Furthermore, the claimant alleged breach of the collective bargaining agreement (CBA) between the respondent and KUDHEIHA and in particular clause 5 which provides for issuance of at least four (4) warnings before an employee is dismissed for misconduct and clause 6 (c) which provides for a hearing before a full board with representation from the Union Branch Secretary or Secretary General.
6. Claimant testified that these provisions were not followed before he was retired in public interest.
7. The claimant earned Kshs. 9,055 per month at the time of retirement. The claimant testified that he ought to have been earning Kshs. 19,934 since he was security officer in-charge which position is pegged at job Group G. The claimant seeks payment of arrears for that underpayment calculated at Kshs. 10,879 per month.
8. The claimant testified that he worked diligently and without blemish for the entire period of six years. The employment was terminated at age 53 and the claimant ought to have retired at age 60. He claims salary for the remainder of the unserved term of 7 years.
9. The claimant prays for service gratuity in terms of the security services wage order which provides for 18 days salary for each completed year of service calculated at the current salary of Kshs. 19,934. Furthermore the claimant testified that he was entitled to payment in lieu of leave not taken in the year 2014 in the sum of Kshs. 19,934 and special leave as per clause 10 (d) of the CBA in the sum of Kshs. 19,934.

10. The salary difference between Grade 'G' and 'C' has been computed at Kshs. 1,011,747.
11. The claimant also claims overtime worked during the period of 7 years and 9 months calculated at Kshs. 164,787. These are hours worked over and above the normal 8 hours per day. The claimant also claims for payment of an extra hour worked every Friday for the entire period in the sum of Kshs. 20,598.
12. The claimant further testified that he worked during public holidays and Christmas days and was not paid double salary. He claims Kshs. 104,432 and 148,820 respectively for the unpaid dues.
13. In addition the claimant prays for compensation for unlawful dismissal calculated at the proper salary in job group G.
14. The claimant produced exhibits set out in paragraph 27 of the memorandum of claim in support of his case.
15. In particular, the claimant produced letter of appointment as a security guard dated 27th June 2006 at a salary of Kshs. 5,796.
16. The claimant also produced his pay slip for the month of September and October 2013 which show his gross salary to be Kshs. 12,355, made up of Kshs. 9,055 basic salary, Kshs. 2,300 house allowance, Kshs. 600 medical allowance, Kshs. 200 commuter allowance and Kshs. 200 being NSSF contribution by the employer. The Claimant was a union member and union dues were deducted as per the pay slips.
17. The pay slip for January 2014 also provides for the same gross pay of Kshs. 12,355.
18. The claimant produced a letter dated 20th November 2006 which appointed him as acting security guard in-charge. The letter said that that was an internal appointment that did not carry any monetary gain on the salary.
19. The letter went on to add responsibilities on the claimant as follows:

“You will be expected to supervise the other security guards in the Department including training them in matters related to security. Because of your wide experience in this area you will be of great assistance to the other guards. Meanwhile you will continue to perform your normal duties as security guard”
20. On 21st March 2007, the claimant wrote to the Board of Management seeking to be confirmed in the position of security guard in-charge. In the letter the claimant stated that as a security guard, he was confirmed in job Group C on 31st December 2006. The claimant requested to be confirmed in the higher job group. The claimant did not get a response. On 14th January 2010, the claimant wrote another letter to the Board of Management requesting to be confirmed in the job of security officer in-charge which he had been performing since 20th November 2006.
21. On 16th February, 2012, the claimant wrote a further letter seeking to be confirmed and paid as security guard in-charge. All these letters were not acted upon by the Board of Management.
22. The claimant produced letters dated 7th June 2012 in which he was commended by the Principal of the College for his role in the organization and coordination during the Kenya Teachers Colleges Sports Association held at Eregi College from 23rd to 24th May 2012. By a letter dated 25th June 2012, the claimant was appointed member of the core team for ISO Certification. Claimant also produced letter dated 28th January 2013 from the claimant showing that himself and his team worked from 24th December 2012 to 2nd January 2013 for ten (10) days.
23. The claimant received a letter of commendation from the same principal of the college dated 27th June 2013 for a job well done during the year ending 30th June 2013. A letter dated 26th July 2013, requested the claimant titled security in-charge to increase supervision of the security guards to ensure spot checks on the assigned areas is up to date.
24. A memo dated 23rd December 2013 shows that security team worked during Christmas and New Year 2014 break. The rest of staff went home.
25. After all this, the claimant testified that all of a sudden and on 7th February 2014, he received a letter from Finance and Administrative Officer Mr. Wanjala, accusing him of defiance and gross insubordination for barring unnamed person from entering the college compound. Claimant was accused of failing to provide the unnamed Authority with security confidential risk details on the person barred.
26. The claimant was accused of continuing to bully the staff working under him and threatened to sack them.
27. Mr. Wanjala accused the claimant of behaving in a manner “belittling my office and the entire administration. Lack of respect, failure to seek directive from the same before you act and art of “know it all” denotes usurping powers you do not have”.
28. Wanjala warned the claimant to change failing which he would be recommended for further disciplinary action to the Authority.
29. On 11th February 2014, Mr. Wanjala wrote to the claimant as a follow up to the letter dated 7th February 2014. Mr. Wanjala stated that the claimant was required in that letter to respond on the issues raised in the letter. The claimant was given up to 12th February 2014 to

reply. The claimant responded vide a letter dated 11th February 2014. On 24th February 2014, the claimant was suspended for an indefinite period on three allegations set out in the letter. Claimant was invited to appear before the Board for a hearing on 11th March 2014.

30. On 10th March 2014, following the claimant's appearance before the Board, he received the letter retiring him in public interest. The letter said that the claimant lacked due diligence in performance of his duties. He failed to account for the malicious allegations he had made about his supervisors for not taking lawful instructions from the authority and for mistreating staff.

31. The claimant's dues were to be computed and paid.

Defence

32. Statement of defence was filed on 4th September 2014 and RW1 Leonard Onguto Odedo, the bursar of the respondent college testified that he was employed at Eregi College in 1994. That he had known the claimant since the 1st July 2006. He relied on his witness statement dated 13th July 2018 as his evidence in chief. RW1 said he was head of non-teaching staff including the claimant. That the claimant earned Kshs. 5,796 all-inclusive and he accepted the terms and conditions of service.

33. That in August 2009 the respondent developed its terms and conditions and by a letter dated 19th August 2009, the claimant was subjected to the said terms and conditions which he duly accepted. The claimant was placed on job group ETTC-1 with a salary of Kshs. 6,670.

34. The Board reserved the right to alter the terms and conditions of work including allocating duties to the claimant without any monetary adjustments of salary.

35. The claimant was suspended several times including vide letters of 21st August 2009 and 24th February 2014. That the claimant was defiant. That the claimant was on 16th March 2014 retired in public interest as he had attained 50 years.

36. The claimant was paid final dues in the sum of Kshs. 27,165 on termination date which was 23rd April 2014. That the suit be dismissed.

37. Under cross examination RW1 said there was no pension for Board teachers and other workers. That gratuity was paid calculated at a month's salary for each completed year of service. That the college deducted and remitted NSSF. That the claimant was employed as security guard and he was elevated to security guard in-charge. That the elevation did not carry any monetary benefit. That the claimant supervised 10 security officers. He also trained the security officers. He attended meetings as a section head. The letters show that the claimant was a section head. That he was retired in public interest. RW1 did not attend the disciplinary hearing. RW1 could not tell if any complainant was called to the disciplinary hearing. That the position of security in-charge was advertised and filled after the claimant left. The position was placed on job group F. That the claimant was represented at the disciplinary hearing by a shop steward. That the CBA came into force from 1st July 2013 to 30th June 2015.

Determination

38. The parties filed final submissions and the issues for determination are:

- a. Whether the claimant's retirement in public interest was for a valid reason and done following a fair procedure.
- b. Whether the claimant is entitled to the reliefs sought.

Issue a

39. By a letter dated 21st August 2009, the claimant was placed on suspension for gross insubordination of the Board of Management in that he "failed to take lawful instructions from the Board of Governors who are your employer by refusing to sign your letter on new salary scales, Terms and conditions of service"

40. Refusal to accept new salary scales by the claimant does not constitute a known offence under the Employment Act. This does not constitute insubordination. An employee is entitled to refuse terms of employment which he considers inadequate. This was not a valid reason to suspend the claimant.

41. On 24th February 2014, the claimant was served another letter of suspension for alleged mistreatment of staff under him. The letter alleged insubordination by malicious allegations on some staff and banning persons to enter the college. The claimant was directed to hand over all the college property under him to the Finance and Administrative Officer. The claimant was advised in the letter that the Board of Management would review his case within two weeks.

42. The claimant testified that the three allegations above were not specified and no persons were summoned at the hearing to clarify the three stated offences. The claimant stated that this was a malicious campaign against him for refusing to accept inadequate salary. The court notes that the three offences are vague and embarrassing for lack of particulars of persons allegedly mistreated, malicious allegations referred to and persons who the claimant had allegedly banned from the college. Again these were not valid reasons to suspend the claimant.

43. Earlier on 7th February 2014, the claimant had received a warning letter from Finance and Administrative Officer in that on 3rd February

2014 he barred unspecified person to enter the college compound. The claimant was said to have continued to bully unspecified staff and that the claimant had displayed "I know it all" attitude and behaving in a manner belittling to the office of the finance and administrative officer.

44. The claimant termed the conduct by the finance and administrative officer to be malicious, vindictive and aimed at pushing the claimant out of his work.

45. In the same month and on 11th February 2014, the claimant had written an explanation in response to the letter dated 7th February 2014. The claimant stated that as the security officer in-charge it was his mandate to guard the college and where necessary to deny access to the college persons deemed to have no lawful business in the college.

46. The claimant in particular explained why on 22nd November 2013 he had disallowed a lady who tried to enter the college at 10.30 p.m in the night access.

47. On 3rd February 2014, he had stopped one Gerald from carrying out a sack of grass for the college compound as per instructions given to him and all security staff by the chief principal on 2nd February 2014 not to allow people to carry grass out of the college compound.

48. The security also revoked a letter given to one Bekan on 5th February 2014 to collect food remains from the kitchen on security ground.

49. The claimant testified that the finance and administrative officer who had an interest in all these cases was not happy and had embarked on a scheme to victimize the claimant.

50. The claimant insisted that he discharged his duties as per the mandate given to him and had done no wrong.

51. On 16th March 2014, the chief principal officer wrote to the claimant informing him that following the claimant's appearance before the Board of Management on 11th March 2014, on charges of gross insubordination as per the letter dated 24th February 2014, the claimant had been retired in public interest. He had been found guilty of the three allegations made against him.

52. RW1, was Mr. Leonard Onguko Odedo the bursar of the respondent college since 1994. RW1 did not have personal knowledge of the allegations made against the claimant by the Finance and Administrative Officer and the principal of the school. Neither the Finance and Administrative Officer nor the principal were called to refute the testimony by the claimant that he was victimized for doing his work which touched on the personal interests of the Finance and Administrative Officer. RW1 was not involved in the disciplinary process that led to the retirement of the claimant. Largely the testimony by the claimant was not adequately controverted and the court is satisfied that there was no sufficient justification to retire the claimant in public interest at the age of 50. No public interest was proved by the respondent to validate the early forced retirement of the claimant. The forced retirement was an unlawful and unfair termination of employment in violation of Sections 36, 43, 44, and 45 of the Employment Act 2007.

53. The claimant was faced with vague and embarrassing allegations contained in the letter dated 24th February 2014.

54. The claimant had responded to similar charges on 11th February 2014 made against him by a letter dated 7th February 2014. It is not clear why similar charges were revived after a warning letter had been earlier given to the claimant in the letter dated 7th February 2014 by the Finance and Administrative Officer. The conduct by the respondent amounted to double jeopardy and therefore unlawful and unfair. The letter of 7th February 2014 had concluded the matter. It boggles the mind what inclined the revival in the letter dated 24th February 2014.

55. The claimant is entitled to compensation in terms of section 49(1) and (4) of the Employment Act 2007.

Issue b

56. What remedies are available to the claimant?

Compensation

57. The claimant was victimized by the finance and administrative officer. The claimant has proved malice by the said officer against him. The claimant had a clean record. He did not contribute to the termination. He was not paid terminal benefits upon termination nor was he compensated for the job loss. The claimant had served the respondent as a supervisor without pay for the promotion. He was underpaid. The claimant served diligently for a period of about 8 years. The claimant lost career growth prospects unlawfully and he suffered loss and damage. The court has also considered similar cases of unlawful dismissal and awards the claimant the equivalent of ten 10 months salary in compensation for the unlawful and unfair termination in the sum of Kshs. (19,934x10)199,340.

Service Gratuity

58. In terms of the Regulation order for terms and conditions of service in the security sector the claimant is entitled to gratuity calculated at 18 days salary for each completed year of service. The court awards the claimant gratuity for 7 years completed service. The claimant was promoted from a security guard to a supervisor which was a leap from job grade 'G' to job grade 'C'. This fact was admitted by RW1 but the claimant did not receive the requisite salary for a period of 7 years and 9 months. The court finds that the claimant was entitled to salary attributed to job group 'C' in the sum of Kshs. 19,934 per month. The court therefore awards the claimant gratuity calculated at Kshs.

19,934 per month for completed years of service in the sum of Kshs. 83,722.

Underpayments

59. The claimant was underpaid by Kshs. 10,879 per month since he was placed in job group 'C' but paid a salary of job group 'G' for a period of 7 years and 9 months. The court awards the claimant arrear salary resulting from underpayments in the sum of Kshs. 1,011,747.

Overtime (f, g, h, i)

60. The claimant was in a supervisory position in job Group 'C' though he was underpaid in job group 'G'. The claimant has not proved that he was entitled to payment of overtime as a supervisor. This claim lacks merit and is dismissed.

61. This verdict applies to the claims set out under paragraphs (f), (g) (h) and (i) of the memorandum of claim in that the claimant failed to prove with specificity that he worked particular days be they holidays or Fridays and was not paid overtime. These claims are dismissed for want of proof.

Annual Leave 2014.

62. The claimant was retired in public interest on 16th March 2014. The claimant claims payment of annual leave for the entire 2014. The court finds that the claimant is only entitled to prorata leave for the three (3) months served in the year 2014. The court awards the claimant Kshs. 4,983 in respect of the prorata leave not taken in the year 2014.

63. In the final analysis, judgment is entered in favour of the claimant against the respondent as follows:

- a. 10 months compensation Kshs. 199,340.
- b. Service gratuity Kshs. 83,722.
- c. Underpayments for Kshs 1,011,747.
- d. Annual leave 2014. Kshs. 4,983.

Total award Kshs. 1,299,892.

e. Interest at court rates from date of filing suit in respect of (b) (c) (d) above and from date of judgment with respect to (a) above till payment in full.

f. Costs of the suit

Judgment Dated, Signed and delivered this 26th day of September, 2019

Mathews N. Nduma

Judge

Appearances

Mr. Maguti for claimant.

Mr. Fwaya for respondent

Joy – Court Clerk