

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 184 OF 2017

BENSON MACHARIA MWANGI.....CLAIMANT

VERSUS

THE BOARD OF GOVERNORS

KANGEMA HIGH SCHOOL.....RESPONDENT

JUDGMENT

1. The Claimant herein sued the Respondent in 2005 at the Senior Principal Magistrates Court at Murang'a. In his plaint he averred that he was employed on 9th September 1983 where he worked as a cook and later as a night watchman earning Kshs. 5,650/- as at the time of his termination. The Claimant averred that his termination was effected without adherence to the laid down procedure and without him being paid his full dues. He averred that the dismissal was in total violation of the collective bargaining agreement (CBA) between the Ministry of Education and the office of the trade union KUDHEIHA. He claimed the gratuity, unpaid salary and for breach of contract therefore he prayed for salary in lieu of notice and any portion of salary withheld, gratuity and unpaid salary for the remaining term, general damages for loss of work and declaration that the termination was illegal, costs of the suit and any other relief the court may deem fit to grant. The Respondent's defence was that the Claimant's suit did not disclose any cause of action. The Respondent averred the Claimant had not pleaded whether he was dismissed or simply terminated. The Respondent averred that the Claimant was lawfully dismissed for misconduct in that he reported for duty on several occasions while drunk before he was referred to the Board of Governors who heard him and finally dismissed him. The Respondent averred that the so-called collective bargaining agreement between the Ministry of Education and the trade union did not at any time apply to the Claimant's employment with the Respondent. The Respondent averred that it followed all the relevant provisions of the law as well as good practice and the Claimant cannot be heard to complain so as to benefit from his own misconduct. The Respondent urged the dismissal of the suit with costs.

2. The suit was transferred to this Court in 2016 after a miscellaneous application was presented and registered in 2017 when the primary file was forwarded by the SPM's Court Murang'a. Since transfer there was a delay before the Claimant was finally heard in 2019. The delay was wholly attributable to the parties as there was a hiccup or the other arising every time the Court listed the matter for hearing.

3. The Claimant testified that he was dismissed on 19th July 2001 and that he was working as a watchman at the time. He earned Kshs. 7,500/- and was dismissed by the principal when he was found at the dining room taking porridge. He stated that the principal accused him of coming late to work. He testified that he denied the allegations and that the claim was for his terminal benefits for 21 years of service, notice, service gratuity and compensation and costs of the suit. The Respondent or its witness did not attend the hearing or file any submissions.

4. The Claimant's suit was not supported by any evidence as he neither filed a list or bundle of documents to support his contention about the non-payment of terminal dues. He did not produce anything to bolster his case against the Respondent despite the long period it was in courts. In the court records I have noted 3 occasions when this court granted the Claimant an opportunity to file documents and he only filed one payslip for the month of March 2002. That payslip showed that he earned Kshs. 5,350/- a month comprising of basic salary, house allowance, NSSF dues less the statutory deductions and the Claimant's union dues and contribution to the welfare association. He did not deem it necessary to avail documents to show the manner or mode of termination. He did not therefore discharge his burden to prove the dismissal was unfair, unlawful or in contravention of the Constitution. The suit is therefore only fit for dismissal. Granted the chequered history it has had no costs will be granted to the Respondent for the dismissal since it failed to participate in the suit.

It is so ordered.

Dated and delivered at Nyeri this 14th day of November 2019

Nzioki wa Makau

JUDGE