



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 2035 OF 2012

(Before Hon. Justice Hellen S. Wasilwa on 19th March, 2018)

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATION INSTITUTIONS,
HOSPITALS & ALLIED WORKERS.....CLAIMANT**

-VERSUS-

SALVATION ARMY PRIMARY SCHOOL.....RESPONDENT

JUDGEMENT

1. The Claimant Union herein filed suit on behalf of Erastus Yogo Otieno claiming damages for unlawful termination and payment of terminal dues.
2. They aver that the Claimant was employed by the Respondent on 4.4.1978 as a Kitchen hand at a salary of 755.00 per month until 15.1.2012, when his services were terminated.
3. The Claimant states that he reported the trade dispute to the Minister for Labour under Section 4 of the Trade Disputes Act who accepted the dispute and appointed a Conciliator. Summons were issued to the parties to attend meetings and the Employer on 26.2.2010 accepted to reinstate the Grievant as a grounds man. That the Respondent failed to honour the agreement to reinstate the Grievant and they wish for the Court to order the Respondent to honour the same and in the alternative the Grievant to be paid damages and terminal dues.
4. The Respondent admitted the employment relationship and state that the Grievant was dismissed summarily for the offence of stealing sugar. That he was subjected to due process of the law as he was subjected to the Board of Governors meeting and deliberations and witnesses adduced evidence to the effect that sugar was lost by virtue of the Claimant's employment. They pray for the Claim to be dismissed with costs.
5. In submissions the Claimant submits that the allegations of theft were not proved as the Grievant was working in the school shamba and no letter was served on the Grievant showing that he had been moved to the Kitchen. It is submitted that minutes of 19.8.2005 min no, 8, min no. 9, letter no. 11 and min. 12 are not signed and the same should not be accepted into evidence.
6. That the Grievant had worked for the Respondent for 32 years and therefore prays for gratuity, pro rata leave for 5 months, annual leave for 2003, 3 months notice and compensation for unlawful termination.
7. On behalf of the Respondent it is submitted that the Claimant was dismissed for theft and this was not the first time he had been accused of stealing. Further that due process was followed and as such a claim does not lie.
8. I have examined all evidence of the parties plus the submissions filed. The Respondent aver that the Grievant was dismissed on 26th August 2005 for stealing sugar. They submitted that the Claimant is not entitled to prayers sought because he did not resign but was dismissed.
9. From the evidence and pleadings, I note that the Claimant was initially employed in 1978 as a kitchen hand but was later terminated in 2005. The termination was reported as a dispute to the Ministry of Labour and after the conciliation process, the Grievant was reinstated and re-engaged as a grounds man on 18.12.2009 with effect from 1.1.2010.
10. On 15.1.2010 however, the Grievant was again dismissed on the new re-engagement and asked to pursue the dismissal case of 2005 to the end. The letter dismissing the Claimant however refers to a BOG meeting of 23.11.2010 and it is not clear how this minute dismissed the Claimant on 15.1.2010 yet the letter is dated 15/1/2010.

11. After the 2nd dismissal, the Claimant reported another trade dispute which dispute was never resolved hence this case.
12. From the pleadings, the Grievant was dismissed on 2 different occasions – 1st in 2005 and then in 2010. In the first instance, under the operative Labour regime, the Grievant was not given any notice before dismissal.
13. There is no indication that it was established that he had stolen sugar and even if that was done, he was reinstated and re-engaged. The re-engagement means that he was to be put in the same position he occupied before the dismissal in 2005 and then proceed to work upto 2010. From 1978 to 2010 this translates to 32 years of service.
14. Under the old Trade Disputes Act, the Grievant it was not mandatory to have a disciplinary hearing before dismissal. Service pay was however payable as it is under the Employment Act 2007. In the circumstances I award claimant his service pay/gratuity calculated at 15 days salary for each year worked= $\frac{1}{2} \times 7000 \times 32 = 112,000/=$.
15. On leave prayed for for 5 months, the Grievant has not explained how and which months. I therefore do not find this prayer proved and I decline to award him.
16. After 2010, the Grievant was to be subjected to the new Employment Act 2007 before termination. Section 41 of Employment Act was to be followed. The Grievant was never subjected to any hearing and neither was he informed as to why he was being terminated. In the circumstances and pursuant to Section 45(2) of Employment Act 2007, I find his dismissal in 2010, unfair and unjustified and I declare it so.
17. I award him 12 months salary for unfair termination = $12 \times 7,000 = 84,000/=$.
18. I also award him 1 months salary in lieu of notice = 7,000/=.
19. His prayer for the unremitted Elimu Sacco contribution for 1990 to 1994 is not awarded as this prayer is time barred.
20. Total **awarded = 203,000/=** plus costs and interest at Court rate with effect from the date of this judgement.

Dated and delivered in open Court this **19th day of March, 2018.**

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Parties