



REPUBLIC OF KENYA

EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 15 OF 2017

(Before D. K. N. Marete)

KENYA UNION OF DOMESTIC, HOTELS,

EDUCATIONAL INSTITUTIONS, HOSPITALS

AND ALLIED WORKERS (KUDHEIHA).....CLAIMANT

VERSUS

THE B.O.M GETARWET SECONDARY SCHOOL.....RESPONDENT

JUDGEMENT

This matter was brought to court by way of a Memorandum of Claim dated 13th April, 2016. The issue in dispute is therein cited as;

“Unfair termination of service of Geoffrey Tonui contrary to sec. 41, 43 & 45 of employment act, 2007 and clause 8 and 6 of the Collective Bargaining Agreement”

The respondent in a Reply to Memorandum of claim dated 23rd May, 2017 denies the claim and prays that it be dismissed with costs.

The claimant's case is that she is a registered trade union that represents *inter alia* non teaching staff in educational institutions managed by Boards of Management. It has a duly signed recognition and Collective Bargaining Agreement with the Ministry of Education, Science & Technology.

The claimant's further case is that the grievant, one, Geoffrey Tonui, a union member was employed as a cook through a letter dated 6th June, 2003. This was at a salary of Kshs.3,000.00 per month and he was placed on 6 months probation pending confirmation. He served diligently until 7th May, 2005 when he was informed of a transfer from the kitchen to work at the school gate as a watchman.

The claimant's other case is that the grievant worked faithfully until 22nd July, 2008 when he was redeployed to the duties of cook. He handed over to Mr. Pius Rotich as guard or watchman.

The claimant's further case is that the grievant worked faithfully as a cook until 4th April, 2014 when a female student by the name Margaret Nkawaitei (a form 4 student) brought him a battery of a mobile phone to charge claiming that she had been sent by a P.T.A teacher called Mr. Mutai for him to charge. She was to come back two days later complaining that the teacher was unhappy for not having received the charge battery of which the grievant handed over to her to return to the teacher.

Later, the school authorities conducted an impromptu search whereby several students were found to be in possession cell phones and on interrogation they reported that it was the grievant who had been aiding them to keep the phones inasmuch as none were found in his possession. The grievant was summoned by the school principal who interrogated him on the alleged battery charging issue. He was thereon verbally suspended/interdicted and asked to await further communication from the board. He was not issued with a suspension letter which is a violation of his right to fair labour practices that demand writing on any disciplinary issue.

The claimant's other case is that on 7th June, 2014 the grievant received a letter informing him to appear before a disciplinary committee on 9th June, 2014 but the letter did not state the offences for which he was to answer and also gave him only two days to appear before the board. At the hearing, he was informed of an internal memo dated 16th March, 2011 prohibiting use of mobile phones and other electronic devices within the school compound and that the alleged battery had been used in a mobile phone by students to facilitate exam leakage.

Upon interrogation on the subject, he was requested to leave and await formal communication from the board.

The grievant was later issued with a termination letter dated 10th June, 2014. This was on grounds of abetting mobile phones charging from the said student. He was also paid Kshs.36,040.00 being 3 months in lieu of notice and a further Kshs.10,000.00 being a token on humanitarian grounds with instructions to handover school property to the bursar.

The claimant further avers that the grievant reported the matter to the union who set out on a process of negotiation with the respondent and thereafter conciliation but this was all together unsuccessful.

She prays as follows;

4.1 That, its our humble prayer that this Honorable Court finds the Respondent in breach of sec 41 of Employment Act 2007 on account or procedural impropriety clause 8 of the parties C.B.A & Article 41 of Kenya's constitution on every persons right to fair labour practice.

4.2 That, the employee was condemned unheard and the reason for termination was not proved beyond reasonable doubt and the union was barred from presentation contrary to C.B.A and sec 41 of Employment Act 2007.

4.3 That, the court finds the termination unfair and unlawful & orders the employee to be reinstated without loss of benefits or on the contrary be paid terminal dues as per the parties C.B.A & as stated below:-

4.4 That, the court may order any award it deems fit and just.

4.5 That, the cost of this suit be borne by the Respondent

(FROM 6TH/JUNE/2003 – 10TH/JUNE/2014) 11 YRS)

a) Pay in lieu of notice

(as per C.B.A clause 6 (a) (i) (3 months)

7,960.00 x 3 months =2,388.00

b) Unpaid ½ salary during suspension

(from 8th/April/2014 – 10th June/2014/2 months

3,980.00 x 2 months =7,960.00

c) Service gratuity (for 11 yrs).

(C.B.A clause 31)

7,960.00 x 11 yrs =87,560.00

d) Underpayment of wages (for 3 yrs)

(D.P.M circular No 16/4a vol. 1 x (33)

(From 30th/may/2011 To 30th/J/2012)

8,039.00 (legal notice)

-7,960.00 (Actual paid)

Less 79.00 x 13 months =1,027.00

(M.S.P.S 2/6/4a vol. x/(2)

(From 11th/July/2012

To 10th/June/2014)23 months

9,420.00 (legal notice)

-7,960.00(Actual paid)

Less 1,460.00 x 23 months = 33,580.00

e) Unpaid House Allowance (for 3 yrs)

(O.P.18/1A/viii/141)

(From 6th/June/2011

To 6th/June/2014) 3 years

2,000.00KSH X 12 Months x 3 years =72,000.00

f) Unpaid Medical Allowance

(D.P.M/personnel circular No 11)

375.00 x 12 months x 3 yrs =13,500.00

g) Maximum compensation for unlawful

Loss of employment

7,960.00 x 12 months =95,520.00

TOTAL 335,027.00

The respondents case is a denial of the claim. She particularly denies the existence of a Collective Bargaining Agreement or other agreement inter parties as expressed in paragraph 2.1 – 2.4 of the claim and puts the claimant into strict proof thereof.

The respondent further denies diligent performance on the grievant and further avers that the grievant acted contrary to school rule No. 19 and also an internal memo to all staff dated 16th November, 2011. He on several occasions charged a mobile phone belonging to a student, Margaret Nkawaitei, in contravention of the school rules.

The respondent further avers that the termination of the claimant was in writing and occasioned by unexplained reasons for being in possession of batteries and mobile phones belonging to students well knowing that this was not allowed or authorized. The termination from employment was lawful and occasioned by the grievants unexplained reasons for being in possession/aiding/abetting charging of mobile phones belonging to students being well aware that this was illegal as per memo dated 2nd February, 2014.

The claimant in answer to the Respondents Reply to the memorandum of claim cites a case of feigning ignorance of the validity of existing CBA between herself and the Ministry of Education Science and Technology. The Collective Bargaining Agreement between the claimant and Ministry of Education Science and Technology applies in the circumstances of this case. This court takes note of this situation.

This matter came to court variously until the 25th April, 2018 when the claimant in the absence of the respondent call for a determination on the basis of the pleadings filed in court.

The issues for determination therefore are;

1. Was the termination of the employment of the grievant wrongful, unfair and unlawful?
2. Is the claimant entitled to the relief sought?
3. Who bears the costs of this claim?

The 1st issue for determination is whether the termination of the employment of the grievant wrongful, unfair and unlawful. The parties hold diametrically opposed positions on this.

The claimant in her Memorandum of Claim forments a case unlawful termination of employment and enlists the following list of documents in such support;

1. Union's Constitution
2. Recognition Agreement of C.B.A between KUDEIHA & Ministry of Education, Science & Technology.

3. Check off signed by employees & authority to deduct & remit union dues on the same
4. Appointment and confirmation letter of employee
5. Letter on change of job designation
6. Letter on disciplinary hearing/termination letter/copy of cheque issue
7. Letter on report of dispute to headquarters/Ministry of Labour/conciliator correspondence & certificate of unresolved disputed
8. Court precedent on the same (cause No. 103 of 2010) Kariti Secondary School vs Kudheihia

The respondents in defence have filed a Respondent's Witness Statement by Joice

Chirchir besides the following list of documents;

1. Copy of Minutes dated 6th January, 2014
2. Copy of School Code of Conduct dated 2nd February 2014
3. Copy of Suspension Letter dated 11th April 2014
4. Copy of Apology Letter dated 10th April 2014
5. Copy of Minutes dated 10th April 2014
6. Copy of Letter dated 7th May, 2014
7. Copy of Apology Letter dated 28th May, 2015
8. Copy of Minutes dated 1st December, 2014
9. Copy of Minutes dated 9th June, 2014
10. Copy of Letter of Termination of Service dated 10th June 2014
11. Copy of Minutes dated 4th August, 2014
12. Copy of Letter dated 20th January, 2015

These resoundingly catapult the respondent's case against the claimant. In the minutes of Non Teaching Staff Meeting held on 6th January, 2014 at minute 5/014, non teaching staff, the grievant included were taken through the schools code of conduct. This ensured that the staff were versed and knowledgeable on their requirements and expectations at the work place. This came out as follows;

MIN 5/014 CODE OF CONDUCT

In every work place there are policies to be used in as guideline to meet the objective. This policies enable workers to:

- 1. To know your roles, to the work in the right time, right place and right manner.*

We should not drink and come to our work place.

Insubordination

Sexual harassment

Desertion of duties.

- 2. To know the school rule were urged and regulation. Members were carried through the school rules and regulation guiding the students. All member were urged to support the administration by ensuring that the student adhered to all the rules. Members were told to be keen especially on the use of electronics e.g Phones and CDs.*

Further, the respondent in her document headed Getarwet Girls Secondary School code of conduct at rule 19 provides that all electronic

devices, e.g mobile phones are forbidden.

The respondent further displays disciplinary steps and proceedings on the grievant at a meeting held on 10th April, 2014 at the school in which a verdict of suspension of the grievant was made and issued.

That the conduct of the grievant had occasioned immense disruption of the school programmes through cheating in the pre-mock 2014 Eagle Examinations is clearly spelt out in a letter dated 7th May, 2014 to the school principal by the chairperson, Eagle Team of Schools. Besides, Margaret Nkawaite, the form four student implicated in this misconduct severally wrote and apologized to the school on account of her misconduct.

The grievant cannot therefore be heard to complain that he was not aware of his misconduct or taken through appropriate disciplinary hearing. The respondents case controverts this in its presentation and display of documentary evidence culminating in the Minutes of Full Board Meeting held on 1st December, 2014 in which under minute 04/12/2014 – Gross Misconduct of Geoffrey Tonui ID No.21035657 where the board agreed on *inter alia* a summary dismissal of the grievant with effect from 10th June, 2014.

The claimant's case is hollow and holds no water. There is overwhelming evidence against it. It must fail. I therefore find a case of lawful termination of employment and hold as such.

The 2nd issue for determination is whether the claimant is entitled to the relief sought. She is not. This is on account of losing her case of unlawful termination of employment.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the claim.

Delivered, dated and signed this 18th day of May 2018.

D.K.NJAGI MARETE

JUDGE

Appearances

1. Mr. Joseph Okwach for the claimant union.
2. Mr. Kirui instructed by J.K. Kirui & Company Advocates for the respondent.