



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT
NAIROBI

CAUSE NO.1249 OF 2014

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

VERSUS

CHAIRMAN B.O.M. MUHURI MUCHIRI HIGH SCHOOL.....RESPONDENT

JUDGEMENT

Issue in dispute – unfair termination of 4 grievants

1. Francis Kinyua Gakunya
2. Michael Gatimu Ndirangu
3. David Muriithi Njeru
4. George Murunga

The claimant is a registered trade union representing employees in the domestic, hotels, education institution and hospitals. The grievants are members of the claimant. The respondent is an education institution where the grievants were employed. The parties herein have a collective bargaining agreement (CBA).

The grievants were employed by the respondent on different dates as Security Guards. The grievants were all terminated from their employment by the respondent on 1st February, 2012.

The 1st grievant, Francis Kinyua Gakunya was employed on 25th September, 2006 at a wage of Kshs.4, 000.00 per month. The wage was increased to Kshs 7, 721.00 together with Kshs.3, 000.00 per month at the time of termination of employment.

2nd grievant, Michael Gatimu Ndirangu was employed on 4th May, 2010 at a wage of Kshs.6,000.00 which was increased to Kshs 8,000.00 per month at the time of termination of employment.

3rd grievant, David Muriithi Njeru was employed on 12th April, 2009 at a wage of Kshs 7,000.00 and which was increased to Kshs10,000.00 per month at the time of termination of employment.

The 4th grievant, George Murunga was employed on 12th May, 2010 at a wage of Kshs.6,000.00 which was increased to Kshs 8,000.00 at the time of termination of employment.

The grievants were not issued with letters of employment. On 1st February, 201 the grievants were issued with termination notices on the grounds of redundancy and without payment of terminal dues.

The claimant reported a dispute with the minister and a conciliator was appointed but the respondent refused to attend at the scheduled meetings.

The claim is that the respondent violated section 9 of the Employment Act, 2009 by failing to issue the grievants with letters and or contracts

of service. The verbal and unprocedural termination of employment was unfair and without justification and in violation of section 45 of the Act. There was violation of clause 6(c) of the CBA.

The claimant is seeking the following;

1st grievant

- i) One month notice pay Kshs.7,7721.00
- ii) 5 years leave Kshs.38,605.00
- iii) Overtime 575 hours Kshs.18,400.00
- iv) Compensation Kshs.92,562.00

2nd grievant

- i) One month notice pay Kshs.8,000.00
- ii) Unpaid house allowance 20 months Kshs.60,000.00
- iii) 84 off days Kshs.22,399.00
- iv) Compensation Kshs.24,000.00

3rd grievant

- i) One month notice pay Kshs.10,721.00;
- ii) 33 public holidays Kshs.16,962.00;
- iii) 575 overtime work hours Kshs.18,400.00;
- iv) 3 years untaken leave days Kshs.23,163.00
- v) Compensation at Kshs.46, 326.00.

4th grievant

- i) One month notice pay Kshs.8,000.00
- ii) 20 months house allowance Kshs.60,000.00
- iii) 84 off days Kshs.22,399.60
- iv) Compensation Kshs.24,000.00

In support of the claims the claimant's witness was the 4th grievant, George Murunga who testified that all the grievants were employed by the respondent as Security Guards each earning a salary of Kshs.8,000.00; Kshs.11,296.00; Kshs.8,000.00; and Kshs.8,000.00 respectively for the 4 grievant.

On 1st February, 2012 all the grievants were dismissed from the employment of the respondent without any written notice, reasons or a hearing. The witness was in the morning shift when all the guards were called by the principal and said that he was tired with their service. A private security firm had been contracted to offer services which the claimant had been undertaking and that the grievants could chose to work with the new company or leave the respondent's premises. There was no written offer payment of terminal dues and the union was not invited to make presentations to the respondent. The union reported a dispute but the respondent refused to attend.

The witness also testified that the respondent advertised for a security service and gave a contract to Radiant Security Limited.

The respondent school principal then asked the grievants to reapply for their jobs so that their employment files/records could be appraised but at the time the grievants were already at work and did not require reapplying for their jobs as directed. The termination of employment which followed these events was not justified and or with notice. No terminal dues were paid.

Upon cross-examination, the grievant testified that he was not employed on 1st September, 2011, such records were only filed by the respondent as part of records updates when a new principal was appointed. The claimant had been at work all along. Salaries were paid through the bank and pay slips submitted for some months. The defence that the grievants were employed for only 5 months is wrong as the application letters filed by the respondent had been on the understanding that the respondent was updating its records. The grievants had been employed at different times.

The grievant also testified that the respondent had the right to hire a private security company but ought to have procedurally terminated existing security guards contract and paid terminal dues.

Defence

In response, the respondent's case is that the grievants were engaged by the respondent as guards on casual basis on 1st September, 2011 pursuant to applications dated 4th August, 2011 for the positions of guard. The grievants were terminated on 31st January, 2012. The alleged violations of sections 9, 45 and 46 of the Employment Act have no merits. The termination of employment followed the respondent contract with a security firm, Compliant International Security Limited and as a result of which the services of the four grievants who were casuals was no longer required.

The defence is also that the respondent was not party to the CBA with the claimant, which is with the Ministry of Education and as such the respondent is not bound by its terms and conditions.

The respondent advertised job vacancies long after the grievants were terminated as casual guards and a contract was entered with Complaint Internal Security Limited for one year expiring on 31st January, 2013. The claims made lack merit and should be dismissed with costs.

In evidence the respondent called Misheck Kimathi Mwangera, a Teacher and Principal of the respondent school. Mr Mwangera testified that he was posted to the respondent school in December, 2011 and found the grievants as casual employees. This was a practice of the respondent where they had been employed on 1st September, 2011 upon application. The witness made the grievants apply for their jobs as there was no work record. Upon termination of employment, the board of directors approved a one month pay but the grievants refused to collect.

Mr Mwangera also testified that the respondent had taken a decision to hire and contract a private security firm, a company which could be held liable in the event of an incident and therefore the board approved and he called the grievants to his office and communicated the decision to terminate their casual employment. The claims made for payments are not genuine as casual employees are not entitled to notice, allowances or terminal benefits.

At the close of the hearing, both parties filed written submissions.

Determination

The grievants assert that they were employed on various dates by the respondent ranging from

25th September, 2006;

4th May, 2010;

12th May, 2010; and

12th April, 2009 respectively.

Upon employment the respondent directed them to reapply for their positions and on 4th August, 2011 they applied so as to have their files updated. Following such applications, the claimants were terminated in their employment on 31st January, 2012 and the respondent hired a private security firm, Compliant International Limited.

The defence is that the grievants were only casual employees of the respondent from 1st September, 2011 to 31st January, 2012. The respondent also asserts that they have no CBA with the claimant union and what exists is only a CBA with the Ministry of Education and thus not binding on the respondent.

On this evidence, there are records filed by the claimant is apparent that the grievants were in the employment of the respondent long before the application for employment on 4th August, 2011. There are pay slips for March, 2011; June, 2011; and January, 2012. Such salary payments are by the respondent. This evidence has not been challenged in a material way. The fact of these records having been issued to the grievants before the alleged employment on 1st September, 2011 confirms the claims that employment existed before such application and employment in September, 2011.

The claimant union is registered under the provisions of the Labour Relations Act, 2007. The CBA governing the parties herein is one signed between the claimant and the Ministry of Education, Science and Technology on 18th March, 1986 and which follows the recognition of the claimant union by all boards of governors established under the Education Act, Cap 2011. Such CBA and recognition granted the claimant union the right to represent employees under such sector as part of its mandate.

The respondent is an education institution established under the Education Act Cap 211 and falls under the jurisdiction of the parties in the recognition and CBA of 18th March, 1986. The respondent cannot extricate itself from the purview of the CBA and claim it was not party to which that was freely and mutually entered into by the Ministry governing educational institutions and on whose behalf terms and conditions of employment were entered into. Therefore, pursuant to the provisions of section 48 of the Labour Relations Act, 2007 where a trade union enjoys such recognition, all employees of the union members are mandated to comply and ensure union dues deductions and remittance to the trade union.

In this case, even where the grievants did not have a check-off payment to their union through their salary, the fact of unionisation is not challenged.

The respondent's defence is that the grievants were casual employees despite applications submitted on 4th August, 2011. Such averments are made to support the defence that such casual employment was then terminable when the respondent took up a private security company to undertake duties previously been carried out by the claimant. From 1st September, 2011 to 31st January, 2012 the employment runs for five (5) continuous months.

Who then is a casual employee in law?

Section 37 provides that;

37. (1) notwithstanding any provisions of this Act, where a casual employee-

(a) works for a period or a number of continuous working days which amount in the aggregate to the equivalent of not less than one month; or

(b) Performs work which cannot reasonably be expected to be completed within a period, or a number of working days amounting in the aggregate to the equivalent of three months or more, the contract of service of the casual employee shall be deemed to be one where wages are paid monthly and section 35(1) (c) shall apply to that contract of service.

Section 2 of the Employment Act, 2007 then defines a casual employee as follows;

...a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time.

This nature of employment was put into perspective in the case of **Krystalline Salt Limited versus Kwake Mwakele & 67 others [2017] eKLR** with a finding that Casual employment entails engagement for a period not longer than 24 hours at a time and payment made at the end of the day.

In addressing the matter of who a casual employee is, the court in the case of **Kenya County Government Workers' Union versus County Government of Nyeri & another [2015] eKLR** relied on its earlier case of **Peter Wambugu Kariuki & 16 Others versus Kenya Agricultural Research Institute [2013]eKLR** and held as follows;

A casual employee is defined under section 2 of the Employment Act, 2007 to mean a person the terms of whose engagement provides for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time. The court has considered the material on record and finds that the petitioners were not casual workers because they were engaged for a longer period than twenty four hours at a time. They served for many days without any break in their service. Each of the petitioners served for more than three continuous months and the respondent was required to reduce their contract of service in writing as provided for in section 9 (1) of the Act.

And further,

The court considers that the foregoing standards that govern employment in the public service essentially discourage and abolish casual employment in the public service. Casual workers do not qualify as public officers within the tests set in the standards for employment of public officers. For instance, by nature of casual service within the meaning assigned in the Employment Act, 2007, casual workers do not and cannot enjoy the constitutional protection of public officers from victimization or discrimination for performing their duties and entitlement to due process in event of termination as provided for in Article 236 of the Constitution and section 41 of the Act. Further, recruitment and selection process in engagement of casuals opens itself to failure to meet the constitutional and statutory tests of participation, competition, merit, inclusivity, representation, integrity, competence and suitability. In delivery, casual workers are unlikely, and are invariably unable, to comply with the relevant public service codes of conduct, ethics and integrity which are at the core of good public service delivery. Casual employment in the public sector easily falls prey to likely corrupt practices as manifested in leptoctracy in remuneration processes; favoritism or nepotism or bribery or cronyism in appointment processes; unprofessional service delivery through intellectual dishonesty to preserve the employment; and exclusion of competent and suitable persons from otherwise permanent employment. The pretended casual worker is dejected and de-motivated as it happened in this case because the legal protections are undermined in the casual employment relationship. Thus, in event of temporary duties, it is the opinion of the court that employers in public service would rather invoke public procurement laws and engage private sector service providers to avoid contravention of the constitutional and statutory provisions on public employment and whose framework does not only discourage but in effect abolishes casual employment in the public service.

In this case where the grievants remained in the service of the respondent upon their applications on 4th August, 2011 and on the evidence apparent to the court that such employment had been in force before such date, the status of being 'casual employees' had ceased by

operation of the law and pursuant to section 37 of the Employment Act, 2007. The right due under the Employment Act, 2007 became due to the grievants to the tenure of their employment with the respondent.

On this basis, before termination of the grievants' employment, the respondent was bound the mandatory provisions of section 41, 43 and 45 of the Employment Act, 2007. This required the respondent to issue notice giving the reasons leading to termination and where indeed the respondent required hiring the services of a private security firm, lawfully end the grievants' employment by declaring them redundant and by payment of their terminal dues.

The respondent was also lawfully required to ensure that the termination of employment was communicated to the claimant union with whom their existed a lawful relationship vide the CBA applicable with regard to the respondent being an educational institution and the Ministry of Education, Science and Technology has had a CBA with the claimant. Such CBA is binding upon the respondent.

In this case there was no effort to give termination notice as required under section 35 of the Act or give the grievants a hearing as required under section 41 of the Act. Such is on the basis that the grievants were causal employees. As set out above, such is a misapplication of the law and this effectively led to the termination of employment being procedurally and substantively unfair and contrary to section 45 of the Employment Act, 2007 which requires that;

45 Unfair terminations

(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) That the reason for the termination is valid;

(b) That the reason for the termination is a fair reason—

(i) Related to the employee's conduct, capacity or compatibility; or

(ii) Based on the operational requirements of the employer; and

(c) That the employment was terminated in accordance with fair procedure

Where employment is terminated unfairly, compensation is due under the provisions of section 49 of the Employment Act, 2007. In this case the respondent submitted that the appropriate compensation should be for 2 months to one month gross wage for each grievant. However, noting there was no procedural justice and the respondent had a chance to keep the claimants in employment but opted to dismiss then so as to employment a private security firm without flowing due process, a compensation of 10 months gross wage for each grievant is an appropriate remedy herein.

Each grievant shall be awarded such compensation based on the last wage earned.

Notice pay is due in a case where fair procedure is not followed and or a payment made in lieu of notice. The grievants shall be awarded such notice pay in terms of section 35 of the Employment Act, 2007.

The grievants have also made claims with regard to overtime hours worked, pay for untaken leave days, work for off days not taken and work during public holidays. On the findings above that the grievants were taken as causal employees and thus the respondent did not find the need to accord them the rights due in law and in terms of the CBA applicable to them, these claims as made are justified. On the finding that the grievants' employment became protected pursuant to section 37 of the Employment Act, 2007 the rights under section 28 to take annual leave or pay in lieu thereof; section 27(2) on taking a rest day or payment in lieu thereof; section 37(2) with regard to work during a rest day and during a public holiday or payment in lieu thereof and work overtime without pay, such claims having been quantified are due.

Accordingly, judgement is hereby entered for the claimant representing the grievants with a declaration that termination of employment was unfair.

1st grievant Francis Kinyua;

i) One month notice pay Kshs.7,721.00

ii) 5 years untaken leave days Kshs.38,605.00

iii) Overtime 575 hours Kshs.18,400.00

iv) Compensation Kshs.77,210.00

2nd grievant Michael Gatimu Ndirangu

i) One month notice pay Kshs.8,000.00

ii) Unpaid house allowance 20 months Kshs.60,000.00

iii) 84 off days Kshs.22,399.00

iv) Compensation Kshs.80,000.00

3rd grievant George Murunga

i) One month notice pay Kshs.10,721.00;

ii) 33 public holidays Kshs.16,962.00;

iii) 575 overtime work hours Kshs.18,400.00;

iv) 3 years untaken leave days Kshs.23,163.00

v) Compensation at Kshs.100,721.00.

4th grievant David Mureithi Njeru

i) One month notice pay Kshs.8,000.00

ii) 20 months house allowance Kshs.60,000.00

iii) 84 off days Kshs.22,399.60

iv) Compensation Kshs.80,000.00

The Claimant is also awarded costs of the suit.

Delivered in open court at Nairobi this 18th day of May, 2018.

M. MBARU JUDGE

In the presence of:

Court Assistant:

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