



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO. 109 OF 2016

(Before D. K. N. Marete)

LILIAN NGENO.....1ST APPLICANT

RAPHAEL KIPKOECH MUTAI.....2ND APPLICANT

PAUL KIPKOECH KURGAT.....3RD APPLICANT

RICHARD KIRUI.....1ST APPLICANT

VERSUS

JULIANA YEGON.....1ST RESPONDENT

BOARD OF MANAGEMENT, MOI SIONGIROI

GIRLS HIGH SCHOOL.....2ND RESPONDENT

JUDGEMENT

This matter is brought to court vide a Statement of Claim dated 20th June, 2016. The issue in dispute is thereon cited as;

Wrongful, unlawful, unfair, malicious and unconstitutional termination of the claimant's contract of employment.

The Respondent in a Reply to Statement of claim dated 2nd February, 2016 denies the claim and prays that the same be dismissed with costs.

The claimants' case is that at all material times to this cause, there was an established employer/employee relationship in which the claimants were appointed as Accounts clerk, Security Officer, Cook and Grounds man respectively.

The claimants' further case is that they worked diligently and were recognized as honest hard workers but to their shock and dismay were served with letters of termination of employment on 8th June, 2016. They were not issued with warning letters or even accounted fair hearing on termination. Again, no reason(s) for the termination were issued either.

The claimants' case further comes out as follows;

10. The Claimants aver that they were not only denied the concrete substantial reasons for termination by the Claimants but were also not allowed to access the evidence upon which the Respondents relied in making the decision to terminate the Claimants employment.

*12. The Claimants aver that the termination of employment was not only unreasonable but was also arbitrary and a fortiori a breach of contract and the law, the same draws back to the basic **rules of natural justice**.*

13. That the claimant aver that they were not given any valid/written reasons for termination of the Employment by the Respondents as per Sections 41 and 43(1) of the Employment Act No. 11 of 2007 which right to be heard is further reiterated in Article 47 and 50 of the Constitution of Kenya, 2010 and the principles of natural justice and therefore the Respondents' actions amounts to unfair termination within the confines of section 45 of the Employment Act, 2007.

It is their penultimate case that the respondents in terminating their employment acted in contravention of the Employment Act, 2007 as follows;

19....

- a. *Unfairly terminating the employment of the Claimants without giving them any warning or fair hearing.*
- b. *Unfairly terminating the Claimants' employment without according them tangible reasons known by law the reasons for such wrongful dismissal contrary to section 41 and 43 of the Employment Act.*
- c. *Unfairly targeting the employment of the Claimants as a punishment for claimants' knowledge of Exams mal-practice at the school.*
- d. *Dismissing the claimants wrongfully and unfairly contrary to section 45 of the Employment Act.*
- e. *Withholding and refusing to pay the Claimants their terminal dues since they were terminated with notice.*

They pray as follows;

- a. *A declaration that the termination of Claimants Appointment was unfair, illegal, wrongful and unlawful.*
- b. *The court do hereby reinstate the Claimants to their terms of service with full disbursements of their benefits from date of termination up to the date of reinstatement.*
- c. *Costs and interest of the claim.*

The respondent's case is a denial of the claim.

They particularly deny paragraph 6 of the claim on or diligent service by the claimants and aver that their respective work records were blemished by perennial acts of negligence, theft and other acts constituting gross-misconduct.

The respondent's further case is that the claimants' dismissal on 8th June, 2016 was because they were implicated in an incident where the 2nd Respondent's institution lost 2 bags of sugar (50kg) each, one bag of rice (50kg), 284kg of finger millet and 4kg of wheat flour between 20th November, 2015 and 28th December, 2015 when the school was closed for the 2015 December holiday.

It is also their other case that this theft was never brought to their attention by the claimants but was discovered when the school opened for first term in January, 2016. The claimants, who had been implicated, were questioned and a decision was taken that they be suspended there and then. This was also due to the fact that they were on duty during the period in which the loss was supposed to have occurred.

The respondent's other case is that the matter was reported to the police – Chebunyo Police Station but the police communicated back their reluctance to proceed with the matter but instead recommended administrative action in so dealing.

It is the respondent's further case that contrary to the claimants' allegations at paragraph 17 of the claim, and despite the action of summary dismissal for gross misconduct, they were indeed compensated and did not leave employment empty handed. This is as follows;

18. In reference to the Claimants' averment in paragraph 17 of the Statement of Claim, the Respondents aver that contrary to the Claimants' allegations, they duly considered the respective payments due to the Claimants and, on a purely gratuitous basis determined that notwithstanding the Claimant' summarily dismissal for acts amounting to gross misconduct they would nonetheless be paid their respective terminal dues as particularized hereunder;

- i. *Paid three months' salary in lieu of notice;*
- ii. *Paid the remaining half salary for the period they were on suspension;*
- iii. *Paid half salary for every completed year of service;*
- iv. *Paid leave allowance; and*
- v. *Issued with Certificate of Service.*

Further that – upon computation of their respective dues it was determined that the Applicants were entitled to payments in the following proportions:

- a. *Lillian Yegon (1st Claimant.....Kshs 113,667/=*
- b. *Raphael Kipkoech Mutai (2nd Claimant.....Kshs 145,627/=*

c. Paul Kipkoech Kurgat (3rd Claimant).....Kshs 98,767/=

d. Richard Kirui (4th Claimant).....Kshs.40,410/=

Which sums were paid to the respective Claimants herein and receipt thereof duly acknowledged. Annexed hereto and marked JY 11 & 12 are copies of Cheque Deposit Slips drawn in favour of the Claimants and a Bundle of payment Vouchers dated 13/06/2016 signed by the Applicants in acknowledgment of receipt of their respective dues.

The respondent's in the penultimate forment a case of lawful termination and controvert paragraphs 19 and 21 of the claim as follows;

20. The Respondents denies the contents of paragraphs 19 & 21 of the Statement of Claim and avers that the Claimants' dismissal was fair, reasonable and justifiable since:

a. The Claimants were implicated in an incident where the Respondent's institution lost sugar and millet when they were on duty during the period within which the loss was found to have occurred. See annexure, "JY 3" being a copy of an extract from the Duty Rota book for the period between 1st November, 2015 and 6th February, 2016, in verification of the assertion that the claimants were on duty in their respective capacities as, Account, Clerk-in charge of the Institution's storage facilities, Security Guard, Kitchen Staff and Grounds man when the aforementioned sugar and millet were lost.

b. The Respondents were summoned to attend a disciplinary hearing on 18th January 2016 whereupon the decision to suspend their employment was reached after their representations were heard and the matter referred to the police for further action. The police on their part however remitted the matter back to the Respondents and recommended that administrative action be taken against the Respondents. See Annexures JY 1, 6, 7 and JY 5.

c. Further the Claimants were invited to attend a disciplinary hearing 30th May, 2016 before the Institution's Board of Management when they were heard in the presence of their union representative (KUDHEIHA) one PHILIP RUTO and the proceedings thereof duly taken. See annexures "JY 6 & 7" being copies of the Claimant's respective summons to attend the disciplinary hearing and the minutes/proceedings thereof.

d. During the disciplinary hearing held on 30th May, 2016, the Claimants did not offer any reasonable explanation on how the sugar and the cereals, aforementioned, were lost under their watch. Further that, none of the Claimants led any exonerating evidence despite attributing the loss to an "inside job" hence the finding that they were culpable for the loss. The Respondents thus contend that the Claimants' summary dismissal was lawful, justifiable and reasonable in the circumstances.

e. Further to the foregoing, the Respondents state that the 1st Claimant had previously been issued with a warning letter on account o her negligent conduct and unwarranted dereliction of the duty. Annexed hereto and marked, "JY 6" is a copy of the letter dated 14/12/2015 evidencing as much.

f. In view of the above, the dismissal of the Claimants from employment was reached upon conclusion of a fair disciplinary process in which the claimants had been afforded hearing on two occasions i.e 18/01/2016, before their suspension from duty pending investigation by the police and on 30/05/2016 when they were heard by the 2nd Respondent, and reasons for their termination set out in their respective termination letters. See Annexures marked JY 1, 2a & b, 6 & 7.

The matter came to court variously until the 31st January, 2018 when the parties agreed on a determination by way of written submissions. They also sought leave of court to regularize their written submissions hitherto filed in court.

The issues for determination therefore are;

1. Was the termination of the employment of the claimants wrongful, unfair and unlawful?
2. Are the claimants 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 claimants was wrongful, unfair and unlawful. The claimants in their written submissions bring out a case of unlawful termination in that the respondent failed to comply with Section 41, 43 and 44 of the Employment Act, 2007 as follows;

41. (1).Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

43(1) In any claim arising out of termination of a contract, the employer

shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be

deemed to have been unfair within the meaning of section 45.

44 (1) Summary dismissal shall take place when an employer terminated the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

They further seek to rely on the celebrated authority of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited (2014) eKLR** where Mbaru, J. observed as follows;

Section 41 of Employment Act is couched in mandatory terms. Where an employer fails to follow these mandatory provisions, whatever outcome of the process is bound to be unfair as the affected employee has not been accorded a hearing in the presence of their union representative or in the presence of a fellow employee of their own choice. The situation is dire where such an employee is terminated after such a flawed process without a hearing as such termination is ultimately unfair. The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets.

The respondents did not furnish any written submissions as agreed on 31st January, 2018 when the matter came for hearing. This could have been inadvertent or that they chose to rely on their case as spelt out. In this, the respondents *in toto* deny the claimants case. In their Reply to Statement of Claim aforesaid they annex the following documents in support of the defence case;

1. Minutes of the Executive Board Meeting held on 18/01/2016 in the board room.
2. Letters of suspension from duty dated 25/01/2016 in respect of all the claimants.
3. Letters of termination of service dated 8/06/2016 in respect of all the claimants.
4. Security duty rosters for diverse dates for November and December, 2015 (Term 3) indicating when the claimants and other staff were on duty.
5. Security duty rosters for diverse dates for January and February, 2016 (Term 1) indicating when the claimants and other staff were on duty.
6. Letter dated 4/03/2016 from the Directorate of Criminal Investigations directing that this matter be handled administratively by the school.
7. Letters of invitation to appear before a full board meeting dated 23/05/2016 in respect of all the claimants.
8. Minutes of the full board meeting held on 30/05/2016 in the school boardroom.
9. Letter of negligence of duty dated 14/12/2015 in respect of Lilian Ngeno, Accounts Clerk.
10. Letters of appointment dated 9/06/2016 in respect to Peter Cheruiyot (Cook) and Caren Chepkurui (Accounts Clerk).
11. Agreement for provisions of security services dated 11th June, 2016 between the respondent and Lavington Security Limited.

This documentation, and particularly the very elaborate minutes of the Full Board Meeting held on 30th May, 2016 by the respondents doubtlessly implicate the claimants to the theft of school materials as alleged by the respondents. The claimants were taken through the motions of a disciplinary hearing but were not able to exonerate themselves. Culpability in the matters they were accused of amounted to gross misconduct on their part and therefore a justification for summary dismissal from employment.

A scrutiny of the respective cases of the parties brings out a case in favour of the respondents. This is because the respondent's case clearly outweighs that of the claimants. It is whole, total and in all ways outweighs that of the claimants.

The claimants allegations of not being given reasons for dismissal or even being awarded an opportunity to ventilate their cases is a lie and unfounded. This is teltale and does not hold water. It is totally rebutted by the overwhelming case and evidence of the respondents. Where does this leave us? Not anywhere but a finding of a case of lawful termination of employment in the circumstances. And this answers the 1st issue for determination.

The 2nd issue for determination is whether the claimants are entitled to the relief sought. They are not. Having lost on a case of unlawful termination of employment, they are not entitled to the relief sought.

I am therefore inclined to dismiss the claim with orders that each party bears their own costs of the claim. And this eclipses all issues for determination.

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

D.K.Njagi Marete

JUDGE

Appearances

1. Miss Sigei holding brief for Lagat instructed by Ham Lagat & Associates Advocates for the Claimants.
2. Mr. Koech for the res instructed by Bett & Company Advocates for the Respondents.