



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 1211 OF 2014

(Formerly HCCC No.181 of 2001)

(Before Hon. Justice Hellen S. Wasilwa on 29th October, 2018)

APOLLO OKOTH MWANGA.....CLAIMANT

VERSUS

KENYA INSTITUTE OF EDUCATION.....RESPONDENT

JUDGEMENT

1. This claim was initially filed by the Claimant on 6/2/2001 through a Plaint in the High Court of Kenya at Nairobi as HCCC No. 181/2001 through M/S Nyamogo and Nyamogo Advocates. The case was finally transferred to this Court on 14/7/2014 by Hon Onyancha J for hearing and determination.
2. The Claimant's case is that he was employed by the Respondent on 17.7.1990 as per his appointment letter dated 16/7/1990 (document No. 3 on his list of documents).
3. The letter was signed by the Director - Kenya Institute of Education (KIE). He later signed an agreement on 16/1/2001 but had started work on 16/6/1990 and received his 1st appointment letter on 17.7.1990.
4. He avers that his salary then was 3,575/= per month but received yearly increments and was entitled to gratuity of 27% of the total payment of 30 months. He worked for Kenya Institute of Education (KIE) for 5 years.
5. He contends that he was later summarily dismissed because of alleged absenteeism yet he had been sick and that his employee knew of the sickness as evidenced by his sick sheet (documents No. 5). It is his evidence that he was treated at Kenyatta National Hospital and was now able to resume duties.
6. He avers that he resumed work after the treatment and that one Ben Agolla was his immediate boss. He contends that no letter was written to him by Mr. Mochoge – the Principal Administrator Officer through his Boss Agolla.
7. It is his contention that Mr. Mochoge acted contrary to procedure because of the hatred he had against him for marrying a lady who was Mochoge's relative contrary to Mochoge's wish. The lady was forced to leave his house and Mr. Mochoge then started subjecting him to torture.
8. He contends that he received various letters to show cause but no action was taken to take him through any disciplinary procedures. He avers that he had been suspended on 10/3/1995. He then wrote a letter on 25/8/1995 asking for the status of his case. He was then dismissed on 29/8/1995.
9. It is his contention that he was unfairly dismissed and he wants this Court to find so and order the Respondent to compensate him.
10. The Respondents filed their defence on 8/7/2001 through the firm of L.G Kimani and Company Advocates denying they unlawfully dismissed the Claimant nor that he suffered any loss and damage as contained in his Plaint. They asked this Court to dismiss this case with costs.
11. The Respondent also filed an Amended Defence on 21/11/2011 where they aver that the Plaintiff was throughout his employment with

the defendant subject to numerous disciplinary complaints on grounds of absenteeism, lateness, insubordination and fraudulent claims.

12. They also content that the Respondent is not a body corporate capable of being sued in its own name.

13. The Respondent also called one witness the Assistant Director Human Resource of the Kenya Institute for Curriculum Development who stated he was an employee of the Respondent in 2008 being employed by the Respondent as a Clerical officer.

14. He averred that the Principal of Respondent wrote him a letter on absenteeism and he was then interdicted on 21/2/1995. His case was then deliberated upon on 4/4/1995. The Claimant thereafter presented some medical certificates.

15. The Institute wrote to Kenyatta National Hospital to confirm the validity of the said documents. The report from Kenyatta National Hospital showed that the documents were not valid. The report was then presented to the disciplinary committee on 27/7/1995 and he was thereafter dismissed from work.

16. He contends that there is no record of any complaint between the Claimant and Mr. Mochoge. He contends that the claim by the Claimant is not valid. In cross-examination, the witness stated that he had no problem with the sick sheet issued to the Claimant.

17. The Parties herein filed their respective submissions. I have considered the evidence and submissions of the Parties. The issues for consideration are:-

1. Whether there were valid reasons to dismiss the Claimant.

2. Whether the Claimant was accorded a fair disciplinary process.

3. Whether the Claimant is entitled to the remedies sought.

18. On the first issue, the Claimant's dismissal letter indicated that he was being dismissed due to absenteeism. The letter indicated as follows:-

“Consequent upon your prolonged absenteeism which stretched between 9th February, 1995 and 28th April, 1995, a total of 78 days, and your subsequent suspension through our letter Ref. No. KIE/A/2/767/209 dated 10th March, 1995, it has now been decided that you be summarily dismissed forthwith from the services of Kenya Institute of Education Governing Council.....”.

19. The letter was dated 29th August 1995. The Respondent annexed certain documents as proof that the Claimant was absent from duty at certain times. The 1st of such letter is dated 10.8.1994 where he was accused of being absent from duty from 20th April 1994 to 24th April 1994 (5 days). On the same date is another letter of 10.8.1994 on absenteeism detailing absenteeism from duty by the Claimant on 22nd June and 25th June 1994 (four days) and also between 26th July and 31st July 1994 (six days).

20. He was also accused of being given 30 days sick off when the maximum allowed for his calibre was 21 days. He was further accused of not forwarding his sick off sheet to his employer within 48 hours. It is not clear whether these letters were responded to but on 16/2/1995 another letter was written to Claimant alleging absenteeism from 26th January 1995 to 9th February 1995.

21. He produced a sick sheet showing he was on off duty for two weeks with effect from 26.1.1995 which was beyond the 48 hours allowed.

22. From the 9th to 16th February 1995 the Claimant was again absent. All these letters show that the Claimant was indeed a chronic absentee from work. He knew and had previously been informed that in case of sickness and being granted sick off, he was to notify his employer within 48 hours, which he again did not do.

23. The Claimant was asked to explain her absenteeism through a show cause letter and he produced a letter from a doctor indicating that he had been sick.

24. The Respondent have disputed the sickness and sought to reply on a letter from Kenyatta national Hospital dated 19.5.1995 indicating that the documentation from Kenya National Hospital showing that the Claimant has been in sick off was not valid.

25. That notwithstanding, this Court notes that this letter is dated 19.5.1995 but the minutes of the disciplinary that dismissed the Claimant were held on 4/4/1995.

26. The Claimant was never called to this meeting tough. This means that he was not given an opportunity to present his case. It is my finding that due to lack of an opportunity to be heard, he was unfairly treated.

27. Due to this fact, I award him 12 months salary for unfair termination = 12 x 10,800 = 129,600/=.

28. The Respondent will pay costs of this suit.

Dated and delivered in open Court this 29th day of October, 2018.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Muraya holding brief for Kamaara for Respondent – Present

No appearance for Claimant