



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.2069 OF 2016

JOHN KIARIE ING'ANGI..... CLAIMANT

- VERSUS -

NAISULA HOLDINGS LIMITED (TRADING AS NAISULA SCHOOL).....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 26th October, 2018)

JUDGMENT

The claimant filed the memorandum of claim on 10.10.2016 through Babu & Nyanga Associate Advocates. The claimant prayed for judgment against the respondent for:

- a. The sum of Kshs. 565, 530.00 being in lieu of notice Kshs. 35,000.00; October 2015 pay Kshs. 35,000.00; accrued annual leave for 3 years Kshs. 73, 500.00; compensation for wrongful termination Kshs. 420, 000.00; NSSF payment for October 2015 Kshs. 1, 080.00; and NHIF payment for October 2015 Kshs.950.00.
- b. Costs of the suit.
- c. Interest on (a) and (b).
- d. Any other relief as the Court may deem just.

The respondent filed the memorandum of response on 27.11.2017 through Ogola Okello & Company Advocates. The respondent prayed that the claim be dismissed with costs to the respondent.

The partial judgment by consent of parties was entered at the hearing on 09.07.2018 for the claimant against the respondent for payment of:

1. Kshs. 35,000.00 in lieu of notice.
2. Kshs. 30, 333.00 pay for October 2015.
3. NSSF for October 2015 Kshs. 1, 080.00 be remitted accordingly.
4. Kshs. 950.00 NHIF for October be paid to the claimant.
5. Issue of leave and compensation to go to full trial.

The **1st issue** for determination is whether the claimant is entitled to compensation for unfair termination. There is no dispute that the claimant was employed by the respondent in mid September 2012 as a grounds man and confirmed as a permanent employee in January 2013. The claimant's case is that in October 2015, without notice and without reason the respondent dismissed the claimant. The claimant testified that 26.10.2015 at around 11.00am the respondent's management told the claimant that they did not need the claimant's services any more. He testified that he was told to pack and leave within 30 minutes and he complied. His testimony was that prior to termination, he had requested for leave. There was no notice or disciplinary hearing and he was promised notice pay but the promise was not honoured.

The respondent's witness (RW) testified that on 18.10.2015 he received a report that the claimant and another member of staff had been seen carrying away school property – the two having worked in alternate shifts. RW further testified that on 18.10.2018 the claimant was not at work and the claimant's co-worker in issue confessed taking the items in issue on claimant's instructions because the claimant had arranged

for a ready market. Further that the claimant had confessed to RW that he was involved in the theft and he had apologised. The claimant was then suspended from duty on 18.10.2015 for 2 weeks. On 26.10.2015 the school director instructed that the claimant gets dismissed. In cross examination RW testified that the theft was on 17.10.2015 and on 18.10.2015 the claimant came to school and that the claimant said he had stolen on behalf of his workmate known as Aseli.

The Court has observed the contradictory evidence by the respondent. First it is not explained by RW why the claimant would be out of school premises at the material time whereas he was housed in the school. Second no record on the inventory of stolen items was filed as well as the guards' occurrence book record on the alleged incident but which the claimant stated existed. Thirdly, RW on one hand says the claimant allegedly gave instructions to a co-worker to steal and then on the other hand testified the claimant allegedly stole on behalf of the co-worker. RW gave no details of the items that were allegedly stolen except mentioning in cross examination that it was paint. The Court finds that the respondent's evidence was incoherent on the circumstances of the termination and there is no reason to doubt the claimant's account. The Court finds that the respondent has failed to establish the reason for termination as per section 43 of the Employment Act, 2007. Further, the Court returns that the respondent, in view of the alleged misconduct, failed to comply with section 41 of the Act on a notice and a hearing. The Court returns that the termination was unfair in substance and procedure.

The claimant had served for 3 years; he desired to continue in employment; and he did not contribute to the termination of the contract of employment. The Court has considered the aggravating factors that the claimant left without being paid terminal dues including for the days worked and he had to suddenly vacate the housing accommodation within 30 minutes. In such circumstances the Court returns that he is awarded to 12 months' salaries in compensation under section 49 of the Employment Act, 2007 making **Kshs. 420, 000.00** as prayed for.

The **2nd issue** for determination is whether the claimant is entitled to pay in lieu of 3 years' leave. The respondent urged that the claimant took leave during vacation but the claimant stated that he was involved in maintenance works and his work intensified during school vacation. Further, the claimant stated that it was just after he requested to go on leave that the respondent decided to terminate his contract of service. The Court returns that the claimant is trustworthy in his account and he was not accorded annual leave as per section 28 of the Act. He is awarded **Kshs. 73, 500.00** as prayed for.

In conclusion judgment is hereby entered for the claimant against the respondent for:

1. The respondent to pay the claimant **Kshs. 493, 500.00** by 15.12.2018 failing interest to be payable thereon from the date of this judgment till full payment.
2. The respondent to pay the claimant the costs of the suit.

Signed, dated and delivered in court at **Nairobi** this **Friday 26th October, 2018.**

BYRAM ONGAYA

JUDGE