



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAIROBI
CAUSE NO.1010 OF 2014
KENYA UNION OF DOMESTIC, HOTELS,
EDUCATIONAL & HOSPITAL WORKERS (KUDHEIHA).....CLAIMANT
Versus
JOYTOWN SPECIAL PRIMARY SCHOOL.....RESPONDENT

JUDGEMENT

The issue in dispute – unlawful dismissal of Eva Wangui Wainaina

1. The claim is filed by KUDHEIHA for the grievant, Eva Wangui Wainaina. The Claimant has a Collective Bargaining Agreement (CBA) with the Ministry of Education Science and Technology under which the Respondent schools is registered as a public educational institution.
2. The Grievant was employed by the Respondent on 1st July, 1985 as a Copy Typist (job Group G) as per the CBA and at a salary of Kshs.1, 070.00 per month. On 10th January, 2013 the Grievant was dismissed from her employment with the Respondent on unsubstantiated grounds of insubordination. At the time the Claimant was earning Kshs.15, 700.00 as a Typist with a basic salary of Kshs.10, 150.00 and allowances of Kshs.5, 550.00.
3. On 4th October, 2012 the Grievant was issued with a letter of indefinite suspension from duty by her Head Teacher, Mr James Ngugi Macharia on allegations of insubordination. By letter dated 9th October, 2012 the Grievant was invited to attend a meeting on 18th October, 2012 for interrogation and to hand over school properties in her possession.
4. On 22nd October, 2012 the Grievant received a letter extending her suspension for 2 months and also informed her of compulsory terminal leave in December, 2012 and giving her the option to retire by way of application. The Claimant intervened and wrote letter dated 5th November, 2012 and asked him Respondent to comply with the provisions of section 41 of the Employment Act and clause 8 of the CBA. The Respondent responded by dismissing the Grievant on 10th January, 2013.
5. The Claimant reported a dispute with the Minister, a conciliator invited the parties to attend but the Respondent was uncooperative. The conciliator issued Certificate of non-resolved dispute. The Claimant thus escalated the matter to the court.

6. The claim is that the Respondent acted unfairly by dismissing the Grievant without following the law and particularly the provisions of section 41, 43, and 45 of the Employment Act and the applicable provisions of the CBA between the parties. The Grievant had served the Respondent for over 28 years and the Respondent made effort to force her to retire. From 1st July, 2012 the Grievant was entitled to earn basic salary of Kshs.19,323.00 with 13% of the same as house allowance per the DPM circular MSPS2/6/4A dated 25th June, 2012 but the Respondent kept on paying the Grievant Kshs.15,700.0 and thus underpaid her by Kshs.6,521.75 for 6 months.

7. The Claimant is seeking the reinstatement of the Grievant without loss of benefits and in the alternative a payment of 12 months' salary in compensation for wrongful dismissal and notice pay. The Grievant is also entitled to service gratuity for 28 years for which the Respondent has accepted to pay as per the dismissal letter. A claim for ½ pay of salary for 2 months when the Grievant was on suspension and a certificate of service under section 51 of the Employment Act. The Claimant is also seeking for costs.

8. In evidence, the Grievant testified that upon her employment by the Respondent she served diligently until 4th October, 2012 when she was suspended from duty. This was based on allegations that she had written a letter on "no change yet" but this was a false allegation as she had not written such a letter. On 18th November, 2012 the Grievant was called to appear before the Board of Governors and told to hand over all the Respondent property. She was not given a chance to call her union or a co-worker. The board told her to explain the source of the "no change yet" letter but she had no knowledge of the letter. She had not been given a copy. She reported this matter to the Claimant union and a dispute was reported to the Minister but the Respondent was not cooperative.

Defence

9. In defence, the respondent's case is that the Grievant was an employee of the Respondent until her dismissal. She was called for hearing by the Board but did not convince them of her innocence who endorsed the suspension and dismissal.

10. That there is no recognition between the parties herein or a CBA entered. The Grievant was summarily dismissed and no compensation is due. The Respondent complied with the provisions of section 45 and 44(4) of the Employment Act and the dismissal was justified.

11. In evidence, the Respondent witness was James Ngugi Macharia, a teacher and Head Teacher at the Respondent school. He joined the school in June, 2011 where he met the claimant. She was at the examination room on deployment by the head teacher's office due to misconduct and a new secretary for the head teacher was employed. The Grievant as a Typist.

12. That on 1st October, 2012 the Minister for Education, Hon. Mutula Kilonzo invited all special schools to Kenya Institute of Especial Education (KISE) to brief him on the challenges facing the schools. Each school was to present a report. The witness delegated his speech writing to Ms Hilda as the Grievant had been deployed to the computer laboratory. Hilda was to do the speech on behalf of the head teacher.

13. When printing the speech, a letter titled "no change yet" came up. When Hilda did the speech, she went to the Claimant to have it typed, the Grievant was taking her time on it and the team leaving for the minister's meeting was getting late. Hilda decided to print the speech herself and the Deputy Head teacher insisted that the speech be printed at the school. When the speech was downloaded from the flash disc that the Grievant had, the letter on "no change yet" came out instead.

14. That the Grievant had the subject flash disc but lied that this was not from her. The Grievant used this same flash disc for her work – she would type and use it to print at the head teacher's office. In Hilda's speech, the Grievant had hidden the subject letter of "no change yet" inside the pages. The witness thus took the speech and decided to read it to the Minister. He also demanded that Hilda should explain why she wanted to embarrass the head teacher before the Minister by submitting the letter of "no change yet".

15. Mr Macharia also testified that he summoned the Board on 3rd October, 2012 to interrogate Hilda and he deputy head teacher, Ms Goretti and the grievant. The Grievant accepted that this was her work and was thus suspended on 4th October, 2012. The board met on 18th October, 2012 the Grievant was called for hearing, she defended herself and admitted she had written the subject letter. She asked the board if her benefits can be paid as she had completed 50 years.

16. This was a case of gross misconduct and summary dismissal was the sanction. The Respondent school had suffered a poor reputation with the Teachers Service Commission and the Ministry of Education as well as with the sponsor, the Salvation Army over letter that were confidential and were leaked and only the Claimant had knowledge of it as her position required that she types such letters.

17. That the Grievant was never underpaid. The Respondent got grants from the Ministry of Education and only paid in accordance with limited funds. The Claimant was earning Kshs.10,150.00 basic pay and allowances all totalling to Kshs.15,000.00 she was dismissed on 31st December 2012 and full salary paid; gratuity earned was computed but the Grievant was supposed to write to the board for her gratuity for the Ministry to clear and be paid. The Respondent has been willing to pay terminal benefits based on the Ministry of Education gratuity package; 3 months' notice pay; and ½ pay during suspension.

Submissions

18. The Claimant submit that the summary dismissal of the Grievant did not comply with the provisions of section 41(2) of the Employment Act. The allegation made that she had written a letter in insubordination circumstance "no change yet" was never proved to have emanated from her and in any case, she was never given a fair hearing. Based on the applicable CBA, the Claimant union was never called at the hearing. The Claimant has replied on the case of **BIFU versus Co-operative bank of Kenya Ltd [2013] eKLR**.

19. The Respondent in submissions reiterated their evidence.

Determination

20. Summary dismissal of an employee is allowed pursuant to the provisions of section 44 of the Employment Act. However, before applying such a sanction, an employer should comply with the provisions of section 41(2) of the Act;

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

21. This is to ensure that before an employee is terminated from her employment, a chance has been given to give a defence and the same considered on its merits. Further section 41(2) of the Act contemplate that in giving the employee a hearing, the safeguards contemplated under section 41(1) of the Act in terms and the employee having the chance to call a witness and colleague of choice is present. Where the employer is not able to hear and accord an employee the rights due under section 41 of the Act, such are matters the employee should demonstrate at the hearing.

22. The essence of this is to be found under **Section 45 (1)** of the Employment Act which provides;

No employer shall terminate the employment of an employee unfairly.

23. In this regard, **Section 47 (5)** of the Act, provides;

For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee while the burden of justifying the grounds for the termination of employment or

wrongful dismissal shall rest on the employer.

24. From this provision, it is clear that the employee has to establish a *prima facie* case that a wrongful or unfair termination has taken place and once that has been done, the evidential burden shifts to the employer to show on a balance of probability that the reason for termination was justified.

25. It is the claimant's case that the Grievant was dismissed without the involvement of the union and contrary to the provisions of the CBA. That the allegations made against the Grievant were never proved and if anything, when a hearing was called by the board, another employee was found culpable.

26. In this regard, the Respondent submitted the minutes of the Board held on 18th October, 2012. With regard to the proceeding for Ms Hilda Nkirote, it was recorded that;

She was assigned the duty to prepare issues concerning the curriculum by the head teacher to be presented during the meeting with the Minister for Education at KISE on ...

Initially she wanted to go with the flash disk as KISE to print it there but the Deputy Head teacher Mrs Kabocho insisted it be printed at the school for the head teacher's secretary so that a copy can be left in the file

after it was printed, head teacher's secretary noted there was a letter in between the pages addressed to permanent secretary and she became suspicious and left a copy in the computer.

Immediately teacher Hilda noted the secretary had noticed, she plucked the contentious copy and put it in her hand bag.

She immediately left the office with other copies and left the flash disk with deputy head teacher for her to be printed the school copy.

After the secretary notified the head teacher about the strange letter, he followed the bus up to the DEO's gate and withdrew the written speech from teacher Hilda ...

27. With regard to the hearing of the grievant, the Board minutes are noted that;

At around 9.00a, Hilda requested her to type the speech which she did

Hilda insisted that she can print at KISE

They formatted the document together

Both Hilda and Eva were arguing about who put the letter in the speech.

28. It is apparent from these proceedings as captured, though not very well, that teacher Hilda had knowledge of the subject letter as when printing the same at the secretary's office, she acted in a suspicious manner and made effort to withdraw it and keep it in her hand bag. This is the same person who had been given the responsibility of writing the speech to the minister by the head teacher. How then was the Grievant aware of such proceedings for her to type the subject letter in the manner and style set out and include the same in a speech meant to be by teacher Hilda?

29. The Board sanctions are also telling. Hilda was to be given a warning letter while the Grievant they stated;

Members instructed the head teacher to go to the labour Officer and Kudheihia offices to seek more advice about a worker who is always found in mistakes of Eva's nature.

She has been a prime suspect of the author of most of the letter that are associated with the school.

30. Were these findings based on any evidence? Were these findings in relation to the summons before the board on 18th October, 2012 as regards the subject letter of “no change yet” that was the subject of discussion?

31. Based on the findings of the board with regard to the conduct of Ms Hilda, to infer ill-motive upon the Grievant due to her past conduct that was not the subject of the hearing on 18th October, 2012 was erroneous. The extraneous matters considered that were not brought to the attention of the Grievant at the hearing and which related to matters outside what was for consideration was an unfair labour practice. The findings made against Ms Hilda establishing that she was interrelated with the problematic letter to the Minister and who had been given the duty to write the speech and when printing the same the letter surfaced, to use that against the Grievant without any written confession on her part as alleged by Mr Macharia in his evidence is contrary to the procedural and substantive justice required under section 41, 43 and 45 of the Employment Act.

32. I therefore find that the resulting summary dismissal of the Grievant based on erroneous findings, lacks justification and not based on any tangible evidence against her. This was malicious and targeted at denying her right to work and earn an honest living. Such is unfair and contrary to section 45 of the Employment Act.

33. The reasons set out in the letter of dismissal have not been proved. Their validity have therefore be put into question. The reasons that the Claimant authored a letter spreading falsehood information about the Respondent is not supported by any iota of evidence noting the circumstances under which Ms Hilda was found culpable. Also the allegation that the Grievant was insubordination various administrators of the Respondent for a long time is not supported by any evidence. Ultimately, to use such reason for the dismissal of the Grievant is unlawful as there is no substance.

34. The Respondent also allege that they have no recognition or collective agreement with the claimant. The Respondent in these proceedings was represented by the office of the Attorney General. The Claimant enjoys Recognition with the respondent’s line ministry which covers all registered public academic institutions and the Grievant was a member of the claimant. the pay slip issued to the Grievant for September, 2012 indicate union dues were deducted- a key feature and recognition that the Respondent was aware at all material times that the Grievant was unionised.

35. At the board hearing on 18th October, 2012 there is recognition that the advice of the Union, KUDHEIHA should be obtained before dismissal. However this was not done and in any event, this was being considered after the fact of hearing and making a decision against the grievant. This is not what section 41 of the Employment Act contemplates. When the Respondent established that the Grievant ought to be disciplined in any manner, the Claimant union ought to have been informed and involved in the disciplinary process. To fail to invite the Claimant union at the hearing on 18th October, 2012 was to fail to comply with a mandatory provision of the law as required under section 41 of the Employment Act. The proceedings then that took place without compliance with the law became unlawful

36. As such the remedies sought for compensation for unfair termination of employment is due.

Remedies

37. In the letter of dismissal dated 10th January 2013 the Respondent offered to pay;

- a. 1.2 pay for the months the Grievant was on suspension – October to November 2012;
- b. Full pay for December, 2012; and
- c. Gratuity due upon attaining 50 years.

38. The Claimant is seeking for unconditional reinstatement of the grievant. However, noting the

evidence of the Respondent witness Mr Macharia and the circumstances leading to the unfair dismissal of the grievant, to order her reinstatement back to her former workplace would be to pitch her up for frustrations and further unfair treatment. The matters leading to her dismissal and the work environment is apparent that it is not conducive for her work performance. As there exists alternative remedies available, such will be put into account.

39. The claim for underpayment was however challenged. The Respondent assert that the Claimant basic pay was kshs.10, 150.00 and for 28 years, the gratuity due is kshs.248, 200.00. The Claimant assert that vide circular MSPS 2/6/4A Vol.X/ (2) there was a salary realignment for civil servants. This circular was issued to all permanent secretaries in all ministries and dated 25th June, 2012. This circular has not been challenged by the respondent. In any case, the office of the Attorney General, being the representative of the Respondent in these proceedings, in matters set out in the subject circular is the responsible office to advice.

40. It is not disputed that the Grievant was in Job Group G and under such the circular re-aligning the salaries placed her at Kshs.19, 323.00 per month. The basic salary at the time of dismissal was Kshs.10, 150.00 per month and the Claimant union had negotiated the due allowances to Kshs.5, 550.00.

41. The pay slip note that the Grievant gross pay was kshs.15, 700.00 but this does not factor the re-alignment required as at 25th June, 2012 at Kshs.19, 323.00 which creates an underpayment of Kshs.3, 623.00 for 6 months until dismissal. All the due underpayment amounts to Kshs.21, 738.00.

42. All the dues owing to the Grievant shall therefore apply noting the last payable wage of kshs.19.323.00.

43. The gratuity due was supposed to be assessed at the gross wage of Kshs.19, 323.00. For the 28 years, the Grievant is entitled to the sum of Kshs.541, 044.00 in service gratuity.

44. On the finding that the Grievant was unfairly dismissed from her employment compensation is due. On the gross wage of Kshs.19, 323.00 per month, the payment of 10 months compensation is appropriate. This amount to Kshs.193, 230.00.

45. Notice pay is due in a case where summary dismissal is found to be unfair. Notice pay for 3 months is hereby awarded at kshs.57, 969.00.

In conclusion, judgement is hereby entered for the Claimant against the Respondent in the following terms;

- a. The termination of the Grievant is hereby declared to be unfair;**
- b. Compensation is awarded at kshs.193,230.00;**
- c. Service gratuity awarded at Kshs.541,044.00;**
- d. Notice pay at kshs.57,969.00;**
- e. Underpayment for 6 months at kshs.21,738.00;**
- f. ½ pay for October and November, 2012 awarded at Kshs.19,323.00;**
- g. Full December, 2012 salary at kshs.19,323.00 [if not paid];**
- h. The Grievant shall unconditionally be issued with a Certificate of Service within the next 7 days from the date hereof; and**
- i. Costs of the suit awarded to the claimant.**

Delivered in open court at Nairobi this 19th day of January, 2017.

M. MBARU

JUDGE

In the presence of
