



REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR  
RELATIONS COURT AT MOMBASA  
CAUSE NUMBER 600 OF 2016

**BETWEEN**

WILSON MZAME KILEI .....  
CLAIMANT

**VERSUS**

ABU HUREIRA ACADEMY .....  
RESPONDENT

*Rika J*

*Court Assistant: Benjamin Kombe*

*Hezron Gekonde & Company Advocates for the Claimant*

*Balala & Abed Advocates for the Respondent*

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JUDGMENT

1. The Claimant filed his Statement of Claim on 12<sup>th</sup> August 2016. He states he was employed by the Respondent as a Cleaner, in September 2002. He earned a monthly salary of Kshs. 12,320. His contract was terminated by the Respondent, without notice or cause, on 17<sup>th</sup> January 2014. He seeks the following orders against the Respondent:-

- a) 1 month salary in lieu of notice at Kshs. 12,320.
- b) 12 months' salary in compensation for unfair termination at Kshs. 147,840.
- c) General damages for wrongful termination.
- d) Any other suitable relief.
- e) Costs.

2. The Respondent filed its Statement of Response on 3<sup>rd</sup> October 2016. Its position is that the Claimant

was summarily dismissed for valid reason, and dismissed fairly. He was paid 1 month salary in lieu of notice. His Claim has no merit, and should be dismissed with costs to the Respondent.

3. Parties agreed in Court on 17<sup>th</sup> October 2016, that the dispute is considered and determined on the strength of the record. They confirmed the filing of their Submissions on 25<sup>th</sup> November 2016.

**Claimant's Case: -**

4. He states he worked for the Respondent for 12 years and expected he would go on working until he retired. The Respondent terminated his contract of employment alleging the Claimant was involved in an improper affair with a schoolgirl at home. It was alleged the Claimant went underground after his illicit affair. It is not true that the Claimant had any such affair.

5. He was not served with a letter to show cause why, disciplinary action should not be taken against him. Termination was premeditated, and the Claimant was victimized. Warning letters relied upon by the Respondent in its attempt to justify termination issued without giving the Claimant an opportunity to respond. He was denied the right to defend himself. Sections 41, 43 and 45 of the Employment Act 2007 were disregarded. The Claimant prays the Court to allow the Claim.

**Respondent's Case:-**

6. The Respondent submits it is not disputed the Claimant was employed by the Respondent as a Cleaner, effective the year 2002, earning a salary of Kshs. 12,320, as at the date he left employment, 15<sup>th</sup> January 2014. It is accepted the Respondent terminated the Claimant's contract through a letter dated 15<sup>th</sup> January 2014.

7. The Claimant neglected to perform some of the duties assigned to him. He was issued warning letters, culminating in termination. Termination satisfied the requirements of Section 45 of the Employment Act 2007. He failed to reply to a succession of warning letters, and could only blame himself for the outcome. He received January 2014 salary in lieu of notice. He does not merit compensation as termination was fair and lawful.

**The Court Finds:-**

8. Parties are in agreement that the Claimant was employed by the Respondent as a Cleaner. He worked from September 2002 up to 18<sup>th</sup> January 2014, when his contract was terminated by the Respondent.

9. The reasons justifying termination are stated in the letter of termination as follows:-

*"... you are well aware that you have been having problems in your work, on which numerous warnings were already given...this termination was triggered by your recently alleged involvement in having a bad relationship with a schoolgirl at your home, which made you go into hiding last week....since we are keeping schoolgirls here, we no longer feel safe from the same happening here too..."*

10. This is the justification offered by the Respondent for its decision to terminate Claimant's contract as required of an Employer under Section 43 and 45 of the Employment Act 2007.

11. There were 5 warning letters issued in the years 2008, 2009, 2010, 2011, and 2013. In the first, the Claimant was warned about negligence of duty, making improper ethnic comments, and having problems with a workmate. The letter is dated 25<sup>th</sup> July 2008. The Claimant was warned if he did not cease from repeating the particular offensive acts, his services would be terminated without further warning.

12. The 2<sup>nd</sup> letter of 2009 was in relation to alcoholism, with the Claimant advised again, if he repeated the offence, his services would be terminated.

13. The 3<sup>rd</sup> warning was about the Claimant being involved in a racket where water was sold from the school borehole to outsiders. Repeat of anything similar, the Claimant was warned, would result in his dismissal without warning.

14. Fourthly the Claimant was warned again about negligence, and told if he engaged in negligence again, his contract would be terminated without further warning.

15. The 5<sup>th</sup> warning, also expressed to be a last warning was indicated to involve negligence of duty. It is dated 7<sup>th</sup> November 2013.

16. These warnings were unrelated to the decision made on 15<sup>th</sup> November 2015. The offence over which each letter issued, was separate from the other. No letter issued as a result of the Claimant failing to rectify his behaviour as warned in the previous letter. The letters issued independent of the other. None was stated to be first, second or third warning. All were expressed to be final warnings. Warning letters do not in themselves, constitute valid reason for termination. The offence, or offences, over which the Employee has been warned, must be shown to have some relation to the offence over which he is dismissed, if they are to be considered as part of justification for termination decision.

17. The presence of numerous warning letters is not on its own, valid termination reason.

18. The 2<sup>nd</sup> reason was that the Claimant engaged in some kind of illicit affair with a schoolgirl at his home, went underground, and his conduct was a danger to the schoolgirls of Abu Hureira Academy.

19. This was a serious charge, which required the Respondent to investigate with a degree of seriousness, commensurate with the gravity of the charge.

20. There is no record of investigations carried out. The incident is not assigned a date of occurrence. The source of the allegations against the Claimant is unknown. There is no evidence what 'bad relationship with a schoolgirl entailed.' There was no letter to the Claimant from the Respondent, requiring him to explain any 'bad relationship with a schoolgirl.' There were no charges under Section 41 of the Employment Act 2007. There was no hearing granted to the Claimant, with or without a workmate of his choice or trade union representative. There was no disciplinary hearing of any shade.

21. Numerous warnings, even if shown to be valid, did not permit the Respondent to summarily dismiss the Claimant, without the procedural guarantees created under Section 41 and 45 of the Employment Act 2007.

22. Termination was unfair for lack of valid reason and fair procedure.

**23. *The Claimant is allowed the equivalent of 12 months' salary in compensation for unfair termination at Kshs. 147,840.***

24. The Respondent explains that notice issued under the letter of termination. The salary for January 2014 was paid in lieu of notice. The Claimant acknowledged this upon receiving the letter of termination.

25. The letter of termination is dated 15<sup>th</sup> January 2014, and indicates termination was with immediate effect. It was without notice. The Claimant would be entitled to salary for 15 days worked in January 2014, and 1 month salary in lieu of notice. The Respondent paid to the Claimant 1 month salary, which was 15 days' salary in excess of the days worked. The other way to look at it is that the Respondent paid to the Claimant 15 days' salary, and 15 days' salary in lieu of notice. ***This item is properly resolved by an order granting the Claimant 15 days' salary in lieu of notice, at Kshs. 7,101.***

26. No reason has been given showing the Claimant should be paid general damages for unlawful termination, in addition to compensation for unfair termination. The prayer for general damages is rejected.

27. No order on the costs.

**IT IS ORDERED:**

*a) Termination was unfair.*

*b) The Respondent shall pay to the Claimant equivalent of 12 months' salary in compensation for unfair termination at Kshs. 147,840 and notice pay at Kshs. 7,101- total Kshs. 154,947.*

*c) No order on the costs.*

Dated and delivered at Mombasa this 24<sup>th</sup> day of February 2017.

James Rika

Judge