



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**CAUSE NO. 140 OF 2014**  
*(Before Hon. Lady Justice Maureen Onyango)*  
**KENYA UNION OF DOMESTIC HOTELS EDUCATIONAL**  
**INSTITUTIONS HOSPITALS AND ALLIED WORKERS..... CLAIMANT**  
**-Versus-**  
**MAJIWA SECONDARY SCHOOL.....RESPONDENT**

**JUDGMENT**

The Claimant is a trade union registered under the Labour Relations Act with a mandate to represent workers in both private and public educational institutions including primary and secondary schools, polytechnics, training centres, universities and colleges. The Respondent is a public secondary school established under the Education Act and is governed by a Board of Management. The Claimant derives its members from the non-teaching staff of the Respondent. This case is filed by the Claimant union on behalf of its member PATRICK LUMUMBA OBUDHO who was an employee of the Respondent, hereinafter referred to as the Grievant. The issue in dispute in this case is the wrongful dismissal of PATRICK LUMUMBA OBUDHO, the Grievant.

It is the Claimant's case that the grievant was employed by the Respondent on 2nd May 2001 as an Artisan at a consolidated of Kenya pounds 1128 per annum. He was suspended from duty by the Principal on 2nd September 2008 on allegation that he took leave without permission. The Claimant was invited to appear before he full Board of Governors meeting on 21st November 2008 at 12.00 noon. He was dismissed on 4th December 2008.

The Claimant union intervened on behalf of the Grievant and met the Respondent but no agreement was reached. The Claimant thereafter reported a dispute with the Minister for Labour on 15th February 2010. The Minister appointed a conciliator who invited the parties for a meeting on 18th November 2010 but no agreement was reached as a result of which the Claimant filed this claim on 2nd November 2011. The Claimant filed a Supplementary Memorandum on 19th August 2015.

The Claimant prays for the following remedies:

- |   |          |
|---|----------|
| 1. Notice of 3 months (4450 x 3)          | = 13,350 |
| 2. Service Gratuity as per CBA (4450 x10) | = 44,500 |
| 3. Pending leave days (63 days)           | = 11,125 |

4. Leave Travelling Allowance = 6,000

**Total =74,975**

5. 12 months compensation

On 19th August 2015 the Claimant filed a Supporting Affidavit of the Grievant in which he states that he was first employed by the respondent as a casual employee in January 1998 and then permanently in 2001. He states that a new Principal was posted to the school in 2005. He states that as soon as the new Principal reported he started plotting to dismiss the Grievant because he did not belong to the community. On 5th June 2006 the new principal accused him of stealing 8 bags of cement from the store but it was later confirmed that it is the school mason who did not count the cement properly. The Grievant States that on 16th January 2007 the Principal suspended him for causing damage to the school generator during night preps but the allegation was unfounded. he was reinstated by a letter from the principal dated 4th June 2007 but he was not paid salary withheld during the period he was on suspension. He states that he was finally dismissed by letter dated 4th December 2008 on allegations that were not true.

The Respondent was served with summons and memorandum of Claim but did not file response thereto. The Respondent was also served with all mention and hearing notices as is evident from the Affidavits of Service filed in court. The Respondent however did not attend court. The case therefore proceeded ex parte on 7th November 2016.

Among the documents contained in the memorandum and supplementary Memorandum of Claim are copies of the Grievant's letter of appointment, letter of leave without pay dated 2nd September 2008, warning letter on absenteeism dated 17th November 2008 letter of dismissal dated 4th December 2008 and correspondence on trade dispute. Also attached is Memorandum of Agreement between Ministry of Education, Science and Technology and KENYA UNION OF DOMESTIC HOTELS EDUCATIONAL INSTITUTIONS HOSPITALS AND ALLIED WORKERS (KUDHEIHA WORKERS) containing terms and conditions of service for non-teaching staff (hereinafter referred to as **Terms and Conditions of Service**). The other documents are the Grievant's letter of appointment and letter of suspension, correspondence between the claimant and Respondent and from the Ministry of Labour and Conciliator to the parties.

The case was fixed for hearing on 7th November 2016 and the Respondent was served with hearing notice as directed by the court. On 4th November 2016 Peres Odoyo & Company Advocates filed a Notice of Appointment. On the hearing day Ms. Adwar holding brief for Ms. Odoyo, Counsel for the Respondent applied for adjournment on grounds that counsel had just been instructed. The court declined to grant the adjournment as Respondent had all along been served and had not filed defence. The hearing proceeded ex parte.

Ms. Doreen Nyasio who was representing the Claimant opted to rely entirely on the pleadings which are being the memorandum of Claim and appendices thereto and the Supplementary Memorandum of Claim with appendices thereto. The case was fixed for delivery of judgment on 2nd March 2017 and the Claimant directed to serve the notice on the Respondent. On the 2nd March 2017 Ms. Odoyo appeared for the Respondent and pleaded with the Court to allow her put in a defence. The application was rejected and the Respondent granted leave to file written submissions only.

In the Respondent's submissions filed on 15th March 2017 it is submitted that the Grievant had been warned and suspended on many occasions over issues of misconduct including going on leave without approval, stealing, damaging the Respondent's property, absenteeism and being non-committal among other disciplinary issues. It is further submitted that the Claimant has shown from its documents on record that the grievant was guilty of disciplinary issues requiring the Respondent's intervention and that the intention to terminate his employment was communicated to the Grievant as provided in the Employment Act.

The Respondent further submits that the dispute herein was not handled as provided in section 47(1) if the

Act which provides that:

**47. Complaint of summary dismissal and unfair termination**

*(1) Where an employee has been summarily dismissed or his employer has unfairly terminated his employment without justification, the employee may, within three months of the date of dismissal, present a complaint to a labour officer and the complaint shall be dealt with as a complaint lodged under section 87.*

The Respondent submits that the present complaint was not reported to the Labour Office within 3 months as provided.

The Respondent further submitted that it is the statutory burden of the Claimant to prove its case as provided in section 47(5) that:

*(5) 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.*

The Respondent submitted that the Claim ought to be dismissed for the reasons stated.

On remedies the Respondent submitted that the Claimant is not entitled to the prayers sought.

**Determination**

There is no dispute that the Grievant was employed by the respondent as confirmed by his letter of appointment dated 24th May 2001 and as confirmed by the Respondent in the written submissions. It is also evident that the Grievant was invited to appear before the full Board of Governors on 21st November 2008. However it is not clear whether the Grievant was given an opportunity to defend himself and present his case when he appeared before the Board. The letter of dismissal further does not state the grounds of dismissal and only refers to a "stern warning" of 21st April 2007 which had lapsed by the date of the dismissal letter as warning letters are only valid for 12 months under the Regulation of Wages and Conditions of Employment (General) Order.

Section 41 sets out the procedure for fair dismissal as follows:

**41. Notification and hearing before termination on grounds of misconduct**

*(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.*

*(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.*

The record reflects that the Respondent did not comply with section 41. Further, as I have already pointed out there was no compliance with section 43 which provides as follows:

### **43. Proof of reason for termination**

*(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.*

*(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.*

For these reasons the dismissal of the Claimant was unfair.

The Respondent's counsel raised the issue of the Claimant's failure to comply with section 47 of the Employment Act. Being a trade union, the Claimant filed this suit pursuant to the provisions of section 62 of the Labour Relations Act. Section 47(1) is therefore not applicable to the claim.

### **Remedies**

The Claimant prayed for notice of 3 months. Under Clause 6 of the **Terms and Conditions of Service** the Grievant is entitled to 3 months salary in lieu of notice having worked for more than 5 years. According to the Memorandum of Claim the Grievant's last salary was Kshs. 4450. I therefore award him **Kshs. 13,350** being salary in lieu of notice.

The Claimant prayed for 63 leave days. This was not controverted by the Respondent. I award the Grievant pay in lieu of annual leave at the rate of 21 days pay per year at **Kshs. 11,125**.

The Claimant further prayed for service gratuity for 10 years in the sum of **Kshs. 44,500**. Having worked from 1998 to 2008 the Grievant is entitled to service gratuity at the rate of one twelfth of each completed month of service based on the last salary as provided in the Terms and Conditions of Service. I award him Shs.44,500.

The Claimant further prayed for leave travelling allowance. The Grievant is not entitled to the same as the Terms and Conditions of Service provide for payment of leave travelling allowance only where an employee proceeds on at least half of the leave due for the year.

The Claimant further prayed for compensation. Having found the dismissal unfair and taking into account the Claimant's length of service I award him 12 months' salary as compensation in the sum of **Kshs.53400**.

### **Conclusion**

In summary, I find that the dismissal of the Grievant was unfair and award him a total of **Kshs. 122,374** as more specifically set out herein above.

**Dated, Signed and Delivered this 15th day of JUNE, 2017**

**MAUREEN ONYANGO**

**JUDGE**