



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 316 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

EMMANUEL JOSHUA WAFULA CLAIMANT

-Versus-

THE CHAIRMAN B.O.G NAWANGA GIRLS

HIGH SCHOOL 1ST RESPONDENT

THE PRINCIPAL NAWANGA GIRLS

HIGH SCHOOL 2ND RESPONDENT

JUDGMENT

By his memorandum of Claim dated 21st August 2015 and filed on even date the Claimant states that on or about the year 2005 he was employed by the Respondents, the Chairman and Principal respectively, a public secondary school, in the position of farm worker. He was to be on probation for two years following which he was to be confirmed subject to satisfactory completion of probation. The Claimant remained in employment until 18th July 2014 when he was summarily dismissed by the Respondents.

The Claimant contends that the summary dismissal was unfair as he was not given an opportunity to defend himself both on 28th April and 14th July 2014 when he appeared before the full Board of Management (BoM). The Claimant contends that he was not issued with particulars of allegations against him before the hearing and was not allowed to defend himself at the hearing. He further contends that the Respondents violated the provisions of Articles 41 and 47 of the Constitution and without complying with the procedure set out in the Employment Act. He contends that the dismissal and refusal of the Respondents to pay his terminal benefits was unlawful and illegal and amounts to breach of contract.

The Claimant further contends that during his employment be the Respondents he was paid a salary of Kshs. 3000 a gross underpayment in contravention of the provisions of the law on statutory minimum wages.

He prays for the following:

- (a) A declaration that the termination of his employment by the Respondents was unfair for failing to comply with the mandatory provisions of the Employment Act and the Constitution
- (b) Judgment be entered for the Claimant against the Respondents as follows

- (i) Pay in lieu of notice
 - (ii) Damages for wrongful dismissal
 - (iii) Underpayments
- (c) Costs of this suit
- (d) Interest

The Respondent filed Response to the Claim denying that the Claimant was unlawfully dismissed from service. The Respondents contend that the dismissal of the Claimant was lawful and that he was given an opportunity to defend himself but chose not to do so. The respondents pray that the Claim be dismissed with costs to the Respondents.

At the hearing of the case the Claimant testified on his behalf while the Respondents called two witnesses, JANE M. MURIGI, the Principal and RUTH N. WAMALWA, the school secretary. The parties thereafter filed written submissions.

Claimant's Case

The Claimant testified that he was first employed by the Respondents as a grounds man on 8th December 2009. His first letter of appointment was however issued in 2010. He testified that he was promoted to the position of Farm Manager on 4th August 2010.

The Claimant testified that he was accused of reporting to work late. Employees were required to report to work at 8am. He testified that he reported to work as early as 3am to milk cows as the milk was used for breakfast. He did not clock in because the register for clocking was taken by the Principal and it was not at the gate at the time he reported to work.

He also testified that he was accused of refusing to receive a letter. He denied the accusation and explained that the letter was delivered to him while he was in the shamba and had dirty hands so he could not sign. He further explained that he wanted to read the letter and know its contents before signing. He denied throwing the letter or refusing to leave the Principal's office.

The Claimant testified that he used to be a member of KUDHEIHA Union but when the current principal was posted to the school she stopped union membership so he was not a member of any union at the time of dismissal. The Claimant testified that he was not informed of his right to attend the Board meeting with a colleague.

The Claimant testified that when he attended the Board meeting he was greeted by the member who was chairing the meeting as the chairman was not present and then he was asked why he was attending the meeting. He responded that he received a letter to attend. He was then told to go back to work. The following morning he was issued with the letter of termination at the gate when reporting for work.

He stated that the reasons for termination are not stated in the letter. He prayed that the court intervenes to enable him be paid his terminal dues and if possible, order his reinstatement as he was not at fault.

On cross examination the Claimant stated that there were changes in school management introduced by the new Principal which he did not like. He however denied refusing to clock in. He confirmed that his name does not appear in the Clocking in register for about one week.

He confirmed receiving the letter dated 20th June 2014 complaining about his failure to clock in. he confirmed not signing the letter immediately and that he had the letter when he was summoned to the Principal's office. He stated that the principal took the letter and told him to leave the office. He stated that at the time he was alone with the Principal after a teacher who was in the office earlier had left.

The Claimant stated that he went to the Ministry of Labour 3 times for conciliation meetings but the Principal did not attend. He stated that the Labour Officer told him about the cheque from the school when he inquired why the Principal was not attending the meetings and that he received the cheque under protest in October 2014. He denied that he got into trouble for failing to comply with rules and regulations and being rude to his boss.

In the submissions filed on behalf of the Claimant it is submitted that the dismissal of the Claimant was due to clocking in and not absenteeism or reporting to work late. It was submitted that RW1 confirmed that what she brought to court was not the minutes taken at the hearing of the Claimant's case but edited minutes prepared for purposes of this suit and therefore a sham. It was further submitted that the Claimant was underpaid as the minimum wage was Kshs. 6,999 yet he was paid Kshs. 6,650.

It was submitted that the Respondent did not comply with its Code of Conduct for Employees as the Claimant was not afforded a hearing and was never informed of his right to be accompanied by a fellow employee or a union official. The Claimant relied on the Case of ESTHER WAMBUI KARONGO V PALBINA TOURS AND TRAVEL LIMITED (2014). The Claimant relied on definition of insubordination by the Supreme Court of Mississippi in the case of SIMS v THE BOARD OF TRUSTEES HOLLY SPRINGS MUNICIPAL SEPARATE DISTRICT SCHOOL, 414 SO.2d 431[Miss. 1982] as "*a constant or continuing intentional refusal to obey direct or implied order reasonable in nature, and given by and with proper authority*". It was submitted that the Claimant's letter of dismissal did not disclose the particulars of insubordination and on the face of it does not disclose any verbal or non-verbal insubordination as defined in section 44(4)(e) of the Employment Act.

On remedies it was submitted that the Claimant is entitled to salary in lieu of notice as was held in the case of KENYA OIL FIELD SERVICES LTD V PETER NJOROGE (NBI CIV. APPEAL NO. 124 OF 1985 as follows:

The law is well settled that when the service contract contains a termination clause the measure of compensation or indemnity for unlawful dismissal is the period specified in the termination clause. Where there exists no termination clause the measure of compensation or indemnity for unlawful dismissal is for the reasonable period of notice depending on the nature of employment.

On the issue of damages the Claimant relied on the case of PRINCIPAL AND BOG MACHAKOS TEACHERS COLLEGE V WAMBUA MUANGE in which the Court stated:

It is settled law that the basic principle in assessing damages is that the employee must be put in the same position as if the employer had properly performed the contract. therefore, where an employee is dismissed summarily in breach of contract, the prima facie measure of damages is the sum which the employer would have had to pay in order to bring the contract to an end lawfully - that is to say, the sum payable in respect of the notice period or remainder of the term of the contract if it is a fixed term contract.

The Claimant further relied on the case of PATRICK NJUGUNA KARUIKI V DEL MONTE KENYA LIMITED Industrial Court Cause No. 953 of 2011 where the Claimant urged the Court to grant exemplary damages in addition to statutory compensation and anticipatory salaries. The Claimant prayed for damages in the sum of Kshs. 3,000,000.

Respondent's Case

RW1 JANE M. MURIGI, the Principal testified that the problem with the Claimant started when she introduced clocking in at the school and the Claimant resisted the new tool. On 13th June 2014 there was a group of workers including the Claimant who reported for work late. She wrote to ask them to explain why they were late. The others were remorseful and apologised but the Claimant was annoyed and from that day he stopped clocking in. RW1 testified that when the Claimant stopped clocking in she could not tell whether he was present or not. On the 7th day she got concerned and that is when she learned that the Claimant was not clocking in.

RW1 testified that morning milking was done by another employee by the name Enock who resided within the school compound and the Claimant milked in the evening. She testified that she used to take the clocking in register, sign it and give it to the secretary to return it to the gate so that all employees who came late were supposed to clock in then explain to their immediate boss or herself why they were late.

She testified that she served the Claimant with a letter dated 20th June 2014 on defiance. The letter was delivered through the secretary but was returned to her. The secretary informed her that the Claimant had refused to receive the letter. RW1 then asked the secretary to ask the Claimant to see her so that he could receive the letter. When the Claimant arrived at her office she was with another teacher and the secretary who was doing some photocopying. She asked the Claimant why he had not signed the letter and he responded it was because he did not know the contents. He asked the Claimant to sign then receive the letter and read the contents. She testified that the Claimant took the letter and tore it open, read it and then threw it on her desk in the presence of the Home science Teacher and the secretary. RW1 testified that she released the teacher so that she remained with the Claimant. After that the Claimant stood akimbo staring at her defiantly. She got concerned and left the office but the Claimant followed her. When she went back to her office she found the letter on her table. She was going for a seminar for one week and hoped that the Claimant would respond to the letter while she was away but when she returned she found that the Claimant had not responded. At that juncture she decided to refer the matter to the Board.

RW1 testified that she wrote a letter inviting the Claimant to appear before the Board. He received the letter and commented on it "**ingine tena**". He received the letter of invitation on 14th July and signed the delivery book. The Claimant appeared before the Board on 18th July 2014. The accusations against him were those stated in the letter of invitation. They were 7. The Claimant admitted the accusations as reflected at Minute No. 13 part B of Appendix 2 in the Response.

RW1 stated that the Claimant produced an exercise book in which he had recorded accusations against the Principal but he was told to limit himself to the accusations against him. The Board found him rude and arrogant and passed a resolution to terminate the Claimant's employment. RW1 wrote a letter of termination the same day as instructed by the Board. She asked the Claimant to hand over school property on 24th July 2014. She testified that the Claimant went to the school on 22nd July 2014 expecting to see her but she was not in. He caused a scene and teachers had to help the guard to get him out of the compound. RW1 testified that she stopped the Claimant from handing over after she received the letter from the Labour Office dated 27th August 2014. She responded to the Labour Officer explaining that she could not pay the Claimant's dues without authority from the Board. She later got authority to pay and delivered the cheque to the Labour Officer.

She testified that she received the letter inviting her for a conciliation meeting but the Labour Officer called and told her not to attend after she had delivered the Claimant's cheque to the Labour Officer.

RW1 testified that the Claimant's employment was terminated after he refused to obey authority. She denied that the Claimant was underpaid. She further denied that the Claimant was taking care of her personal animals. She stated that she had a few chickens and a kitchen garden behind her house but the Claimant did not manage her garden or chickens. She stated that the Claimant was malicious and wanted to malign her name.

She denied that the School owes the Claimant any money. She also denied that the Claimant's employment was terminated unfairly. She stated that the Claimant was just a difficult person.

RW2 RUTH N. WAMALWA testified that on 20th June 2014 she was sent by the Principal to deliver a letter to the Claimant. She went and called the Claimant to go to the office and sign for the letter but he told her he can't sign. RW2 reported back to the Principal asked her to call the Claimant to the office. When the Claimant arrived he opened the letter, read it then threw it on the Principal's table. He refused to sign the delivery book.

In the written submissions filed on behalf of the Respondents it was submitted that the Claimant was given an opportunity to be heard. It is submitted that due process was followed before terminating the

employment of the Claimant. The Respondents relied on the case of *JAMES MUGERA IGATI V PUBLIC SERVICE COMMISSION OF KENYA*[2014]eKLR where the court held that the dismissal of the Claimant was consistent with the law and dismissed the Claim.

The Respondents urged the court to dismiss the Claimant's claim with costs.

Determination

I have carefully considered the averments in the pleadings and the evidence adduced in court by the parties. I have further considered the written submissions filed in court on behalf of the parties by their counsel. The issues arising for determination are in my considered opinion are whether the termination of the Claimant's employment was fair both substantively and procedurally and whether the Claimant is entitled to the remedies sought.

Procedural Fairness

Fair procedure is provided for under section 41 of the Employment Act 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.

In the case of *Alphonse Machanga Mwachanya Vs Operation 680 Limited [2013] eKLR*, Radido J summarised the legal fairness requirements set out in Section 41 of the Employment Act, 2007 as follows:

- a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative;
- d) Where the employer has more than 50 employees, it has complied with its own internal disciplinary procedural rules.

In the present case it the Respondents did not comply with the requirements of section 41 as set out above. Secondly the minutes produced by the Respondents do not reflect what transpired at the meeting making it doubtful if the Claimant was given an opportunity to defend himself. According to the Claimant he was only asked why he was at the meeting and then told to go back to work. In the absence of minutes clarifying what questions were put to the Claimant and what the Claimant's responses were, the court is inclined to agree with the Claimant that he was not accorded a fair hearing. This issue is especially important taking into account that the person who accused the Claimant is the one who prepared the minutes and attended court to give evidence on behalf of the Respondents.

The court also notes that there was no explanation to the Claimant about the offences he was facing and

he was also not informed of the right to be accompanied to the hearing by a fellow employee or union official.

RW1 confirmed in her testimony that the Claimant was not allowed to read his accusations against her, meaning that he was not allowed to express his grievances against her which may have been relevant to the case. As is provided in section 45(4) of the Employment Act, a termination of employment shall be unfair where it is found that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

I find that the Respondent has failed to prove fair procedure in the termination of the Claimant's employment.

Valid Reason

Section 43 of the Act provides for proof of valid reason for termination 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.

Section 45(1) and (2) further provide as follows

45. Unfair termination

(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove—

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason—

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

Where an employee has not been accorded a fair hearing and has not therefore responded to the charges against him, there can be no proof or reasons for termination. In the present case the Claimant was never allowed to respond to the charges against him and there was therefore no proof of the grounds of termination.

I therefore find that the termination of the Claimant's employment was unfair for want of both procedural and substantive fairness.

Remedies

Having found the termination of the employment of the Claimant unfair he is entitled to pay in lieu of notice at one months' salary. He is also entitled to damages for wrongful employment which I award him

