



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 118 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

KENYA UNION OF DOMESTIC HOTELS EDUCATIONAL

INSTITUTIONS HOSPITALS AND ALLIED WORKERS CLAIMANT

-VERSUS-

ORTUM 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 thus derives its members from the non-teaching staff of the Respondent. This case is filed by the Claimant union on behalf of its member DAVID TEGSHO KILIMARIONO who was an employee of the Respondent, hereinafter referred to as the Grievant.

The issue in dispute in this case is the unlawful suspension from service of DAVID TEGSHO KILIMARIONO.

It is the Claimant's case that the grievant was employed by the Respondent on 1st September 2004 as an accounts clerk in the service of the Board of Governors. His consolidated salary was Kshs. 10,339 per month. On 27th November 2006 the Grievant was suspended from work on allegations that some school monies had disappeared from his office between January and September 2006. On 22nd October 2007 the Grievant was arrested and charged with stealing by servant in Kapenguria.

The Grievant was acquitted under section 87(a) of the CPC for lack of witnesses. The Grievant was immediately rearrested and charged in another court in Kitale. The court in Kitale declined to hear the case and directed that the Grievant be tried at Kapenguria where the Grievant was again acquitted under section 202 of the CPC on 8th February 2011.

On 28th February 2011 the Claimant's Branch Secretary wrote to the Respondent to lift the Grievant's suspension and release his withheld salary arrears but the Respondent failed to do so. The Claimant reported a dispute to the Minister for Labour on 21st July 2011 and Mr. W.K. Yegon of Kitale Labour Office was appointed as a conciliator on 18th August 2011. By letter dated 30th August 2011 the Conciliator invited both parties to a meeting on 15th September 2011. On 31st October 2011 the Conciliator issued a certificate referring the matter to the Industrial Court (now the Employment and Labour Relations Court).

The Claimant prays for the following remedies:

1. Notice of 2 months	=	20,900
2. Salary while on suspension 10,450x 92 months	=	961,400
3. Salary arrears 1st August 2006 to October 2006	=	31,350
4. Hardship allowance 7880x30%x118 months	=	278,952
Total	=	1,295,602
5. Compensation for loss of job		

The Respondent was served with summons and Memorandum of Claim but did not enter appearance or file response. 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 the Hearing date Ms. Doreen Nyasio who was representing the Claimant opted to rely entirely on the pleadings which are constituted by the memorandum of Claim and appendices thereto and the Supplementary Memorandum of Claim with appendices thereto.

Among the documents contained in the memorandum and supplementary Memorandum of Claim are the proceedings and ruling in **Kapenguria PMCR CASE No. 793 OF 2007** and **Kapenguria PMCR CASE 1035 OF 2009**. The other documents are circular on New Salary Scales for Civil Servants effective 1st July 2008. 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.

Determination

There is no dispute that the Grievant was employed by the respondent as confirmed by his letter of appointment dated 28th September 2004. The Grievant was suspended indefinitely from performing duties as accounts clerk by letter dated 27th November 2006 "*pending investigations into the allegations that some school monies disappeared from your office as from January to September 2006.*" The letter of suspension required the Grievant to report to his station of work every Monday and Friday.

It is the Claimant's contention that the suspension was unlawful because it was for a period longer than 6 months. Under the Terms and Conditions of Service there is no provision for suspension. However Clause 8 provides for interdiction as follows:

- (a) Where the Board is satisfied that an employee should cease to exercise the powers and functions of his duties, the board may interdict an employee from the exercise of those duties provided proceedings which may lead to this dismissal are being or about to be taken or that criminal proceedings are being instituted against him.
- (b) An employee who is interdicted shall receive such salary not being less than half of his basic salary.
- (c) Where disciplinary or criminal proceedings have been taken or instituted against an employee under interdiction and such an employee is neither dismissed nor otherwise punished under these regulations the whole of any salary withheld under paragraph (b) of this clause shall be restored to him upon the termination of such proceedings.

(d) If any punishment other than dismissal is inflicted the employee of board of Governors shall be refunded such proportion of the salary withheld as a result of his interdiction.

(e) An interdicted employee of the Board may not leave the station without permission of the Board.

(f) The Board shall serve on the employee a notice of interdiction specifying the allegation made against him with a copy of Union Branch Secretary, Secretary General, Provincial Education officer and Permanent Secretary, Ministry of Education Science and Technology.

(g) The Union Branch Secretary or Secretary General together with the complainant shall attend the Board of Governors meeting which will discuss the case of an interdicted employee.

(h) Interdiction period should not exceed 6 months, unless it is a police case, otherwise the employee shall be reinstated unconditionally.

The suspension was therefore unlawful in so far as it should have been an interdiction and not a suspension. Again as is provided in Clause 8 the Grievant should have been reinstated and all withheld salary released upon his acquittal. The failure of the Respondent to reinstate and pay the Grievant salary withheld during the interdiction is therefore unlawful and constitutes unlawful termination with effect from the date of the second acquittal on 8th February 2011 and I find and hold accordingly.

Remedies

The Claimant prayed for notice of two months. Under Clause 6 of the Terms and Conditions of Service the Grievant is entitled to 2 months salary in lieu of notice. According to the Memorandum of Claim the Grievant's last salary was kshs. 10,450. I therefore award him **Kshs. 20,900** being 2 months' salary in lieu of notice.

The Claimant further prayed for salary withheld during suspension at Kshs. 961,400. Having been suspended on 27th November 2006 to 8th February when he was acquitted the 2nd time, the Grievant is entitled to withheld salary for 52 months. Based on salary at the rate of Kshs. 10,450 per month, I award him **Kshs. 543,400**.

The Claimant further prayed for salary arrears from 1st August 2006 to October 2006 at Kshs. 31,350. No explanation has been given for the arrears. It is therefore not clear how the arrears arose. I dismiss the prayer as it has not been proved.

The Claimant further prayed for hardship allowance. No hardship allowance is mentioned in the body of the Memorandum of Claim and no explanation was given on how the same was derived. I therefore dismiss the prayer as it has not been proved.

The Claimant prayed for compensation for loss of employment. Under section 49 of the Employment Act the Grievant is entitled to compensation having found that he was unfairly terminated. He had been in employment for barely 2 years at the time he was suspended. It is therefore my opinion that two months' salary is reasonable compensation in the circumstances and I award him **Kshs. 20,900**.

Conclusion

In summary, I find that the indefinite suspension of the Grievant was unlawful and that the refusal of the Respondent to reinstate him following his acquittal constituted unfair dismissal and award him a total of Kshs. 585,200 as more specifically set out herein above.

Dated, Signed and Delivered this 8th day of June, 2017

MAUREEN ONYANGO

JUDGE