



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**  
**CAUSE NO. 76 OF 2016**

*(Before Hon. Lady Justice Maureen Onyango)*

**POLYCARD MBAGAYA MUMIA..... CLAIMANT**

**-Versus-**

**CHAIRMAN, TREASURER & SECRETARY**

**BOARD OF GOVERNORS, SAINT IGNATIUS,**

**MUKUMU BOYS HIGH SCHOOL..... RESPONDENT**

**J U D G E M E N T**

By Statement of Claim dated 22nd March 2016 the Claimant avers that he was Employed by St. Ignatius, Mukumu Boys High School, a public secondary learning institution within the Republic of Kenya as a watchman with effect from February 2006 up to about 21st March 2007 when he was confirmed. He thereafter worked diligently up to 27th June 2011 when he was redeployed to the school kitchen following an altercation between him and the school head teacher. He worked until 25th May 2013 when he was served with a letter suspending him from work indefinitely. Aggrieved by the letter of suspension the Claimant caused a demand notice to be written to the Respondent which the Respondent failed to respond to. He prays for the following orders:

1. A declaration that the Claimant's continued indefinite suspension by the Respondents with no pay is unlawful.
2. An Order that the Respondents do forthwith:-
  - a) Unconditionally reinstate the Claimant to his last position.
  - b) Pay the Claimant
    - i. Three (3) months salary while on suspension from April to June 2011, (3 x 11,296). Kshs.33,888.00
    - ii. Salaries since March 2013, when suspended up to when reinstated, currently standing at (11,296 x 36 months) Kshs.406, 656.00
    - iii. Costs of the Suit.
    - iv. Interest on 2 b (i) to (iii) herein above at Commercial rate from date of suit until payment

in full.

The Respondent filed a Memorandum of Response in which it admits employing the Claimant by letter dated 8th February 2005 but denies that the Claimant worked diligently as alleged in the Statement of Claim. The Respondent avers that the Claimant was involved in several infractions of discipline as a result of which he received several warning letters. The Respondent avers that the Claimant was summoned to appear before the school board on 22nd May 2011 where he apologised and was issued with a final warning letter dated 15th June 2011. He was thereafter redeployed from security to catering section by letter dated 27th June 2011.

The Respondent denies the other allegations of the Claimant and aver the Claimant's employment was terminated by letter dated 31st May 2013 following his failure to appear before the Board for a disciplinary hearing.

The case was heard on 15th December 2016 when the Claimant's testimony was taken and on 23rd January 2017 when the Respondent's evidence was taken. The parties thereafter filed and exchanged written submissions.

### **Claimant's case**

It is the Claimant's case that he was employed by the Respondent as a watchman in 2006. Sometime in March 2011 the head teacher arrived at the school gate in a vehicle at around 11 pm while drunk and asked the Claimant to give him the keys to the gate. The Claimant asked if he had done anything wrong. The Claimant testified that he declined to hand over the keys to the head teacher. The head teacher called the Deputy Head teacher who persuaded the Claimant to hand over the keys to the head teacher. The head teacher thereafter directed the Deputy Head teacher to drop the Claimant home and directed the Claimant to see him in the office the following day. When he went to the office the following day he was told to stay at home. He stayed at home without pay for 3 months before he was summoned to appear before the Board. When he appeared before the Board he explained what had happened. After hearing him the Board reinstated him but redeployed him to the kitchen.

The Claimant testified that on 25th March 2013 he was called to the office and issued with a letter suspending him indefinitely without pay. He testified that the allegations in the letter of suspension were not true. He testified further that before that date he had not been issued with any warning letter. He stated that one of the allegations is that he stole a kilo of meat when he was already on suspension. He testified that allegation no. 4 that he was drunk on Monday 11th March 2011 was also not true as that date was a Sunday and he was not drunk. He testified that when he received the letter he thought it was a vendetta by the head teacher because of the earlier incident in 2011 when he reported that the head teacher came to school drunk. He testified that he was never arrested for the offence of theft.

He testified that after suspension he was never called for a disciplinary hearing even though he went to ask to be reinstated several times. He testified that he even spoke to the Chairman Dr. Ayisi who advised him to talk to the head teacher but he was never called back. He testified that he decided to file suit thereafter and instructed his advocate to send a demand letter which was not responded to.

The Claimant denied seeing the letters annexed to the Respondent bundle as Annexure dated 3rd March 2008, letter dated 1st April 2009 and letter dated 27th June 2011 all of which are warning letters addressed to the Claimant. The Claimant also denied receiving the letter dated 16th May 2013 inviting him to appear before the Board for a disciplinary hearing. He further denied ever seeing annexure 11 a report on theft and served with the letter of termination at Annexure 13 of Respondent's bundle. He testified that he was forced by the head teacher to write the apology at annexure 10 of the Respondent's bundle before he was redeployed in 2011 and pointed out that in the apology he did not refer to any offence because he had committed none.

The Claimant maintained that he was still on indefinite suspension as he had not received the letter of termination of his employment. He prayed for reinstatement and payment of 3 months during suspension,

payment of salary from date of suspension, costs and interest.

Under cross examination the Claimant stated that he was aware of terms and conditions of service of the Respondent. He also stated that the minutes of the board meeting do not reflect that he reported that the head teacher was drunk.

In the written submissions filed on behalf of the Claimant it is contended that there is no satisfactory evidence to support the Respondent's allegation that the Claimant was terminated as the letters inviting the Claimant for hearing, the minutes of the Board meeting held on 31st May 2013 and the letter of termination produced by the Respondents are not signed and authenticated.

It was further submitted that the Claimant was not given an opportunity to defend himself on the allegations in the letter of suspension most of which related to several years past and others of future dates. It was submitted that indefinite suspension on no pay is unfair labour practice and an affront to the Constitution. It was submitted that the suspension was therefore null and void and the only remedy available is the reinstatement of the Claimant.

The Claimant relied on the decision in the case of *MARY CHEMWENO KIPTUI V KENYA PIPELINE COMPANY LIMITED* in which the court stated that "*...suspension is ultimately a right due to an employer... and the suspension period is a time available to an employer to control as the employee can be summoned back to work any time or to undertake disciplinary proceedings or upon terms given by an employer*".

It was submitted that the suspension period was in the control of the Respondent to investigate the matter and either reinstate the employee or call him for disciplinary proceedings.

The Claimant urged the court to lift the suspension and order reinstatement of the Claimant.

### **Respondent's Case**

The Respondent's witness, DENIS OPOKI MUNYENDO, the head teacher of the School testified that when he was posted to the school in 2007 he found the Claimant was already working at the school. He testified that the Claimant was appointed on 8th February 2005 on Terms and Conditions of the Board of Governors which he was aware of. He testified that the Claimant appeared before the Board in 2011 because of misconduct after failing to open the gate for him when he arrived at the school from a workshop at around 10 pm. He hooted at the gate until the deputy head teacher who was on night patrol heard and opened the gate for him after taking the keys from the Claimant who was drunk and incapable of opening the gate. Because the Claimant was not able to work he asked the Deputy Head teacher to drop the Claimant home in the school van. That it was because of that incident that the Claimant appeared before the board in 2011. The Board found him guilty but decided to give him another chance. He was reinstated but redeployed to work as a cook.

The head teacher described the Claimant as a bully, intelligent but in a crafty way. He testified that there were allegations that the Claimant allowed pilferage of food stuff through the gate. He also allowed students to go out through the gates. He further testified that the Claimant had a drinking weakness and when drunk he was discourteous to visitors. That the Claimant was given several warnings for various acts of misconduct and at one time was asked to write a letter of apology.

He testified that when the Claimant was posted to the kitchen the school started receiving reports of students missing food. Investigations were carried out which disclosed that the Claimant was one of the cooks who pilfered food. He was also found to have been reporting late and serving meals late. That there was also a report of serving raw food which at one time almost led to a riot. That it was on the strength of these cases of misconduct that the Claimant was suspended and informed in the letter of suspension that he would be invited to appear before the Board of Governors.

The Head teacher testified that the Claimant was invited to appear before the Board of Governors on 31st

May 2013 by letter dated 16th May 2013 but he failed to do so. That the Board was briefed of the issues against the Claimant and decided to terminate his employment. He testified that the Claimant was served through the messenger/clerk as was the norm.

The head teacher testified that he did not receive the demand letter from the Claimant's advocates.

Under cross examination The Head Teacher stated that there was no evidence that the warning letters annexed to the Respondent's bundle were served on the Claimant. He denied that he is the one who came to the school drunk and was reported by the Claimant to the Board in the incident that occurred in 2011 leading to the Claimant's suspension and subsequent redeployment from security at the gate to the kitchen. He admitted that he had not brought the minutes of the Board meeting at which the Claimant's redeployment was decided.

The Head Teacher stated that the Claimant's letter of suspension dated 23rd March 2013 indicated that the suspension is indefinite. He stated that there was no evidence that the Claimant was served with the letter inviting him to appear before the Board on 31st May 2013 and the letter of termination of service and that the copies of the letters filed in court are not signed. He further stated that the 3rd and 4th charges in the Claimant's letter of suspension were for acts committed between March and July 2012. He denied that he was on a revenge mission against the Claimant because he had sworn to teach the Claimant a lesson for reporting him to the Board.

In the written submissions filed on behalf of the Respondent it is submitted that the Respondent tendered evidence that the Claimant did not perform his duties diligently and that the Claimant was invited for a disciplinary hearing which he failed to attend leading to the termination of his employment. It was submitted that the Claimant was not on indefinite suspension as he alleged. The Respondent prayed that the Claim be dismissed with costs.

### **Determination**

I have carefully considered that pleadings and evidence on record. I have also considered the written submissions filed on behalf of the parties. The issues for determination are whether the termination of the Claimant's employment was fair and if he is entitled to the remedies sought.

### **Fair Termination**

Fair termination constitutes both fair procedure and valid grounds for termination as provided in sections 41, 43 and 45(2) of the Employment Act.

In the present case the Claimant was not given a hearing. According to RW1 the Claimant was invited to the disciplinary meeting but did not attend. He admitted that there was no proof that the Claimant was served with the letter inviting him for the disciplinary hearing. The Claimant denied receiving the letter inviting him for disciplinary hearing.

Besides the foregoing, the letter of termination does not state the grounds for termination but refers the Claimant to the decision of the Board made on 31.5.13. The letter does not state the specific grounds for termination but refers to the letter of suspension of 21.3.13 in which the Claimant was accused of a litany of charges as follows-

1. On the evening of 23<sup>rd</sup> Saturday February 2013 you prepared raw food (ugali) supper for the students.
2. On 12<sup>th</sup> Tuesday March 2013 and 9<sup>th</sup> March 2013 respectfully you delayed serving students breakfast.
3. On 5<sup>th</sup> April 2012, 25<sup>th</sup> May 2012 and 6<sup>th</sup> July 2012 you stole maize worth ½ bag while on duty.

4. On 11<sup>th</sup> Monday March 2012 you reported on duty while drunk.
5. On 16<sup>th</sup> Thursday May 2013 you stole 1kg of meat for students which led a number of students to miss.
6. Your relationship with colleagues is wanting causing quarrels and abusive words.

The letter of suspension did not invite the Claimant to respond to the charges and the suspension was for an indefinite period as stated in the letter. Even the letter inviting the Claimant to appear before the Board, which he has denied receiving and which RW1 conceded has no proof of service upon the Claimant, does not indicate the grounds for which the Claimant was to appear before the Board.

Section 41 and 43 are clear that the Claimant must be informed of the charges against him and be given an opportunity to respond to the charges in the company of a union official or fellow employee of his choice. The foregoing was not complied with. Neither did the Respondent comply with section 43 which requires the employee to be informed of the reasons for termination.

The only conclusion that can be drawn from the foregoing is that there is no proof of compliance with both section 41 and 43 making the termination of the Claimant's employment unfair under the provisions of section 45(2) of the Act. I therefore hold and declare the summary dismissal of the Claimant by the Respondent unfair.

## **Remedies**

Under section 49 of the Employment Act an employee who has been unfairly terminated is entitled to-

*(a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;*

*(b) where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the*

*Proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or*

*(c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.*

*(3) Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to—*

*(a) reinstate the employee and treat the employee in all respects as if the employee's employment had not been terminated; or*

*(b) re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.*

The Claimant prayed for a declaration that his continued indefinite suspension by the Respondent was unlawful. A suspension cannot be indefinite. At some point a line must be drawn to bring the indefinite suspension to an end. In the present case it is apparent that the Claimant's employment or the suspension, was brought to an end vide the termination of his employment, albeit, unfairly. Having declared the termination unfair, the Claimant's prayer is redundant.

The Claimant further prayed for unconditional reinstatement. Reinstatement is only available to the

Claimant within 3 years from date of termination and the Claimant must prove the existence of "exceptional circumstances" to be entitled to the remedy. I do not think there were any exceptional circumstances in this case that have been proved by the Claimant. I thus decline to grant an order of reinstatement. As he is not entitled to reinstatement, I will instead award him the alternative remedy of compensation. Having been in the employment of the Respondent for about 8 years it is my opinion that 8 months' salary would be reasonable compensation. I therefore award the Claimant Kshs. 90,368.00 as compensation.

The Claimant further prayed for 3 months salary in lieu of notice, salary for March 2013 and costs.

Having completed more than 5 years service he is entitled to 3 months salary in lieu of notice as provided in the Terms and Conditions of Service for the Respondent produced in Court by the Respondent as Appendix D2. Accordingly I award him Kshs. 33,888.

Having been terminated on 31st May 2013, after suspension without pay from 25th March 2013, the Claimant is entitled to salary from 25th March 2013 to 31st May 2013 which I award him at Kshs. 32,006.00 and I award him the said sum.

The Respondent will also pay Claimant's costs for the suit.

**Dated and signed and delivered this 20<sup>TH</sup> day of JULY, 2017**

**MAUREEN ONYANGO**

**JUDGE**