REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO.1688 OF 2014

KUDHEIHA WORKERS.....CLAIMANT

VERSUS

THE BOARD OF MANAGEMENT

NDUMBERI SECONDARY SCHOOL.....RESPONDENT

JUDGEMENT

Issue in dispute – unfair termination of employment, James Nene (1st grievant) and Jane Wanjiku (2nd grievant).

1. The claimant is a registered union representing workers in schools institutions among others. The respondent is an education institution composed of board of management to manage the institution.

2. The claimant and the respondent through the Ministry of Education negotiated and signed a Collective Bargaining Agreement on 18th March, 1986. Clause 32 of the CBA made provision for the continuity of the same where no other CBA was agreed upon or there was a revision to the same.

3. The relationship between the parties to the CBA had a turn when the Ministry of Education transferred powers of employment to the individual board of management through Legal Notice No.263 of 26th August, 1993. The Minister also published Legal Notice No.262 on 3rd September, 1993.

4. By a letter dated 9th July, 2003 the 1st grievant was employed by the respondent. He was appointed as Watchman without specified terms and conditions of his employment following the board of management interviews. The grievant was served with a letter of termination on the grounds of retirement and under the cover of overstaffing through letter dated 22nd February, 2012. He was earning Kshs.3, 720.00 as basic salary; Kshs.1, 200.00 house allowance and Kshs.700.00 as a medical allowance. His terminal dues were computed at Kshs.56, 760.00.

5. At the time of his termination, the 1st grievant was earning a basic wage of Kshs.6, 850.00; house allowance at Kshs.1, 500.00 and a medical allowance of Kshs.800.00 per month.

6. The 2nd grievant was employed by the respondent on 15th March, 2002 as a Storekeeper/Copy Typist as a basic salary of Kshs.4,900.00; Kshs.1,200.00 as house allowance and Khs.700.00 as Medical allowance. On 20th January, 2012 by a handwritten communication to the grievant she was directed to report to the school principal on 23rd January, 2012. On 27th January, 2012 the grievant was summoned by the respondent to answer to various allegations. On 1st February, 2012 the grievant was suspended for

2 weeks and directed that the respondent would communicate to her on or before 16th February, 2012.

7. Before the grievant left for the duration of suspension, she was required to clear by writing a report for the stock taking and this was signed by 3 people. On 16th February, 2012 there was no communication by the respondent and the grievant was directed to collect a further communication on 21st February, 2012. On 22nd February, 2012 the grievant got a note indicating she should remain patient. On the same day the grievant received a letter by the respondent on her retrenchment with effect from equal date and she should collect her terminal due on 29th February, 2012.

8. On 22nd February, 2012 the respondent issued a circular to all employees directing them to hand in professional certificates and testimonial by 24th February, 212. The employees were also required to explain their membership with the union.

9. The reason of the respondent being overstaffed and the allegations that the grievant was accused of insubordination were not addressed. The terminal dues were used to offset the bank loans and co-operative credits. The respondent then proceeded to advertise for jobs held by the grievants in a notice of 14th November, 2012.

10. The claimant reported a dispute to the Minister on 29th January, 2014. A conciliator was appointed. The respondent refused a=to attend. The conciliator issued a Certificate on 9th May, 2014.

11. The claim is that the grievants were targeted by the respondent due to their union membership and activities. The 1st grievant had not attained the retirement age, there was no warning or notice before termination.

12. The 2nd grievant was never taken through procedural requirements of the law. The alleged suspension was not addressed and the resulting termination was not procedural.

Claims

1st grievant

a) Underpayments 2007 to 2012 Kshs.181,182.00;

b) Days worked Kshs.11,733.00;

c) Service gratuity Kshs.144,000.00;

d) House allowance Kshs37,000.00;

e) Notice pay Kshs.50,610.00;

f) Retirement leave Kshs.15,000.00;

g) Compensation Kshs.192,000.00;

h) Commuter allowance Kshs.34,200.00;

i) Leave travelling allowance Kshs.8,000.00; Less paid kshs.56, 760.00

Total due Kshs.617, 965.00.

2nd grievant

a) Underpayments 2007 to 2012 Kshs.259,306.00;

b) 22 days worked Kshs.13,431.70;

c) Service gratuity Kshs.183,160.00;

d) House allowance kshs.37,000.00;

e) Notice pay Kshs.54,954.00;

f) Commuter allowance Kshs.34,200.00;

g) Leave travelling allowance Kshs.8,000.00;

h) Compensation Kshs.219,792.00

Less paid Kshs.77, 850.00

Total due Kshs.766, 193.70.

13. The claimant is also seeking for costs of the suit.

14. The grievant testified in support of the claims.

15. The 1st grievant testified that upon his employment by the respondent he worked diligently. He joined the union to help negotiate his low wage. He paid to the union directly as he was afraid. When the union official came to the respondent premises, the respondent demanded to know when the grievants had joined the union and they were terminated from their employment. The grievant was at work and at 11am he was called and issued with a letter of termination. He had just taken a bank loan and the respondent principal had supported it. He was not due to retire and was therefore surprised to learn the reason used to terminate his employment. All his terminal dues went to offset the loans and left with nothing. The bank loan remained unpaid with Kshs.15, 000.00 and the bank has been following him up to pay the balances. The sudden termination was unfair and the computation was terminal dues was not correct.

16. The 2nd grievant testified that upon employment she worked diligently and joined the union where she was paying her dues directly. When the respondent principal realised that the grievants was unionised a grudge developed. The grievant would collect union dues from her colleague and together with the 1st grievant organise for remittances. The two got victimised for unionisation.

17. The grievant was summoned by the principal over various allegations and then directed to sign the minute. She declined to sign as the record was not correct. She was accused of insubordination and issued with a letter of suspension. The grievant was also required to hand over her store stocks. She was to be called for hearing by the board of management but was not given a hearing.

18. On 22nd February, 2012 the grievant was retrenched. She was called to collect terminal dues but that computation was not correct.

Defence

19. In response the respondent's case is that they have never entered into a Recognition Agreement with the claimant union and there is no CBA between the parties.

20. On 22nd February, 2012 the respondent issued a circular for all employees to hand in their testimonials and certificates. The respondent wanted to come up with an analysis and or breakdown of the claimant's union membership in the institution for administrative purposes and for their records and never

was it meant to intimidate and or frighten the employees.

21. Where the claimant had dues owing to Co-operative bank, such was with the express authority of the claimants.

22. The claimants were terminated from their employment by the respondent in February, 2012 and advertisement was placed in November, 2012 a period of 9 months past. The respondent cannot be accused of any malice. The respondent advertised for the posts of Store keep/Driver; housekeeper and cook. The claimants were watchman and storekeeper/librarian. The claimants did not apply for the advertised positions.

23. The respondent rely on the provisions of section 45(2) of the Employment Act, 2007 where a termination is lawful with prove that that there as a valid reason for termination. The claim should therefore be dismissed with costs.

24. In evidence the respondent's witness is Veronica Nyaguthii Mwai, the Principal and testified that the 1st grievant was last employed by the respondent as a grounds man and what problems with his discipline. While the grievant was serving as a Watchman he had security lapses when he was sent to buy bread by students which was against the school rules. There was a problem of students' boxes disappearing and the respondent felt he was not doing his job well. The grievant apologised for his conduct and he was changed to the grounds and a security firm was contracted.

25. At the time the policy was to have staff and student ratios at 1 to 30 and at the time this was at 1 to 11 which was not economical. With the question of discipline and warnings, the services were terminated. The board of management address all disciplinary cases. In this case the grievants were retired due to overstaffing and all terminal benefits were paid.

26. Both parties filed written submissions.

27. The claimant has reiterated the claims made.

28. The respondent submit that the termination of the employment of the grievants was fair and in accordance with section 45(2) of the Employment Act, 2007. The reasons for termination was retirement due to overstaffing and retrenchment due to overstaffing respectively for both grievants. The grievants were also terminated from employment following cases of misconduct and which was addressed by the board of management.

29. Under section 35 and 36 of the Employment Act, 2007 where the employer issues notice or payment in lieu of notice, the termination is lawful. Clause 6 of the CBA between the claimant and the Ministry of Education allowed for termination of employment on notice.

30. Both grievants received their terminal dues in full and final settlement and cannot make new claims herein.

Determination

30. The filing of the suit herein by the claimant for the grievants who are their members is not contested.

31. The claimant has attached a CBA of 18th March, 1986 between the union and Ministry of Education covering the sector enjoyed by the claimant union. The respondent has relied on this CBA at clause 6 to justify the termination of the grievants. The CBA between the parties was to remain in force until the parties entered into a new agreement or by mutual agreement there was variation of its terms.

32. The sacrosanctity of a CBA is to be protected by the court unless there is evidence that the intention of the parties were not articulated in the agreement. Article 41 of the constitution, 2010 protect unionisation and under the same the right to enter into collective bargaining.

33. The grievants were unionised under the claimant. Though the date of joining the claimant union is not stated, at the date of their employment commencing on 14th July, 2003 and 1th March, 2002 respectively. Such was within the period when the CBA enjoyed by the claimant union was in force.

34. Retirement of the 1st grievant is herein justified by the respondent on the grounds of overstaffing. The 2nd grievants termination of employment is justified on the grounds of retrenchment due to overstaffing.

35. Retirement of an employee from his employment is purely on the grounds of age. Where the contrary has to apply, the party alleging that termination is due by virtue to retirement has the burden of prove and or demonstration as to how such arise outside the age requirement. The justification given by the respondent is that there was overstaffing and hence the 1st grievant was affected. Ms Mwai in her evidence also testified that the 1st grievant had cases of miscount which was put into account in deciding to retire him from his employment.

36. The letter issued to the 1st grievant by the respondent and dated 22nd fairy, 2012 read in part as follows;

> *RETIREMENT*
>
> *Following a meeting of Board of Governors on 11th February 2012 under the minute 2/2012 of the meeting on staffing on the same day, it was decided that you proceed for retirement due to overstaffing in the school w.e.f. 23rd February, 2012.*
>
> *The policy of the ministry of Education is that the non-teaching staff and the students' ratio should be 1:30 but currently it stands at 1:11.*
>
> *As per our discussion today 22nd February 2012, it was observed that your deployment from being a night watchman to a ground's man due to unavoidable restructuring of the security department has been quite challenging for you due to different skills required. …*

37. The policy of the Ministry of Education directing on the student and non-teaching staff ratios is not attached. Even where it was, the respondent does not make any effort to set out how many non-teaching staff or number of students existed at the time and thus leading to the drastic decision affecting the grievants employment. In any event, the identification of the grievant amongst his peers, cadre of staff, functions or duties is not set out.

38. What then was the basis and rationale of the identification of the 1st grievant as the sole person and grounds man for retirement? Section 5 (2) of the Employment Act, 2007 provides as follows;

> *(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.*

39. Even where a case for discrimination against the grievants is no set out, where the respondent failed to justify the basis and reason for setting apart and separate the grievants for termination particularly on the ground of retirement, such is a matter specifically outlawed as being discriminatory and cannot find good basis herein.

40. Retrenchment has been defined under section 2 read with section 40 of the Employment Act, 2007;

> *the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment*

41. In this regard, the Court of Appeal in the case of **Kenya Airways Limited versus Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR**. Held as follows;

> *A reading of **Section 40** of the **Employment Act** makes it clear that employers have a statutory right to declare redundancy provided that such an act is justified. Once it is justified, the implementation of the redundancy decision is then governed by the criteria set out in that Section and, as the Industrial Court stated in the case of **Kenya Union of Commercial Food & Allied Workers v. British American Tobacco (K) Ltd,7** by the redundancy provisions in the CBA between the parties where there is one.*

42. It is therefore not sufficient for an employer to refer the reason of restructuring as the basis for termination of employment. Section 40 (1) (a) stipulates,

> *1. An employer shall not terminate a contract of service on account of redundancy unless the employer complies with the following conditions;-*
>
> > *a) Where the employee is a member of a trade union, the employer notifies the union to which the employee is a member and the labour officer in charge of the area where the employee is employed of the reasons for and the extent of the intended redundancy, not less than a month prior to the date of the intended date of termination on account of the redundancy.*

43. In the **Kenya Airways case,** cited above, the Court of Appeal went further to hold as follows;

> *… the provision [section 41(1) (a) of the Employment Act, 2007] does not specify the format or the details to be contained in the notice. What is required is that the employer issue a notice to the union, as well as to the Labour Officer in charge of the employment area of the employee specifying the reasons for and the extent the redundancy. Finally it is specified that a one months' notice is required to be given.*

44. In this case, the respondent does not make any effort to demonstrate what measures were taken to address the mandatory provisions of the law set out under section 40 in addressing the alleged retrenchment and need to terminate the employment of the grievants as a result. In **Jane I Khalachi versus Oxford University Press E. A Ltd, Cause no.924 of 2010** held that;

> *Courts have held that employers have the prerogative to determine the structures of their businesses and therefore make positions redundant. Positions and not employees, become redundant. When the position becomes redundant, the employee can be re-deployed, which means the employee is given another job, or the employee is retrenched, meaning the employee loses the job altogether. 'Reorganisation' is not defined in our law books. Dictionary describe 'reorganization' to include ''significant modification made to legal, ownership, or operational structures of a company to make it more profitable.'' Although not expressly defined under the Employment Act 2007, 'reorganization' is contemplated by section 45 [2] as a fair termination reason. The provision refers to Operational requirements of the employer.*

45. As such, for the respondent to rely on the reason of retrenchment as a valid ground leading to the termination of the grievant, the motions of the law under section 40 should have been taken into account. I find no case warranting retrenchment, the reason given that there was a policy of the Minister for Education requiring students and non-teaching staff be of a particular ratios is not outline to show how such specifically affected the grievants.

46. The motions and procedures outline under section 40 of the Employment Act, 2007 are mandatory. Before an employer can commence redundancy, retrenchment or restricting with the possibility of abolition of any office and thus affect the employment of individual employees, there are notices which should be issued to the trade union representing the employees as well as to the Labour Officer responsible for the area. In the case of **Agnes Ongadi versus Kenya Electricity Transmission**

Company Limited [2016] eKLR the court held;

> *A redundancy must therefore be justified before an employer can commence recruitment of new officers to replace existing employees who have on-going contracts of employment and hold substantive offices in similar capacity as the advertised position. The justification of the redundancy is upon the employer as this cannot be applied as a general term so as to lay off employee on a whim as held by the Court of Appeal in* ***Kenya Airways Limited versus Aviation and Allied Workers Union Kenya and Others [2014] eKLR.***
>
> *A restructuring or abolition of office are not matters that just happen. They require serious considerations by the employer and based on the positions held by various officers, all efforts must be shown to have been made to retain or redeploy such officers as to abolish office and then advertise for recruitment of persons with similar skills or abilities without giving a consideration internally, would be to abuse the very essence of a restructuring and purpose of abolition of office as held in* ***Aviation and Allied Workers Union 7 Others versus Kenya Airways Limited, Cause No.1616 of 2014.***
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> *This position is given affirmation by the Court of Appeal in the same Case upon the employer going on appeal as cited above.*

47. The evidence by the respondent that the Board of Management met on 11th February, 2012 and made a decision to terminate the employment of the grievants due to overstaffing if thus without good grounds, the same cannot be justified in view of the applicable law, the requisite notices were not issued and ultimately the decision taken to the detriment of the grievants is unlawful and ended in the unfair termination of employment.

48. I find no material evidence to support the defence that the grievants were terminated following misconduct. Section 41 of the Employment Act, 2007 requires the employer to invite an employee whose conduct is in question to a hearing and present should be the union represented of the employee should be allowed to bring another employee of his or her choice. There is no evidence of compliance in this case.

Remedies

49. For the termination of employment that lacked in substance and due process, section 49 of the Employment Act, 2007 allow compensation of up to 12 months based on the gross wage. In this case, noting the violations against the grievant, each shall be awarded the maximum compensation.

50. The grievants have since been paid for days worked in February, 2012; notice pay of 3 months, annual leave days and computed in the letters of termination. However the application of such computation is based on a basic wage not stated. All dues shall herein be assessed to be paid less what is acknowledged.

51. Underpayments herein are based the CBA between the claimant and the minister of Education. Without challenge to the applicable CBA and the circulars of government, the grievants are awarded underpayment claimed at kshs.181, 182.00 and 259,306.00 respectively.

52. Service gratuity pay is a term of the CBA. The respondent failed to attach the pay slips with regard to the grievants monthly salaries. In accordance with section 10(6) of the Employment Act, 2007 the duty is upon the employer to submit all work records relevant to each claim. In the absence of payment of the statutory dues for the grievants, each is hereby awarded Kshs.144, 000.00 and 183,160.00 as gratuity respectively.

53. House allowances is payable under the provisions of section 31 of the Employment Act, 2007 where housing is not provided for by the employer. In the CBA house allowances, notice pay, commuter and leave travel allowances are payable.

54. As noted above, there is a clear case of discrimination against the grievants but the claimant did not

address this aspect at all in the pleadings, evidence or submissions. I will not award.

Accordingly, judgement is hereby entered for the claimant against the respondent in the following terms;

1) A declaration that the grievants were unfairly terminated from their employment with the respondent;

1st grievant

a) Compensation awarded based on last due total gross wage at Kshs.16,870.00 all being Kshs.202,440;

b) Notice pay for 3 months Kshs.50,610.00;

c) Underpayments 2007 to 2012 Kshs.181,182.00;

d) 22 Days worked in February, 2012 Kshs.12,372.00;

e) Service gratuity Kshs.144,000.00;

f) House allowance Kshs37,000.00;

g) Retirement leave Kshs.15,000.00;

h) Commuter allowance Kshs.34,200.00;

i) Leave travelling allowance Kshs.8,000.00;

2nd grievant

a) Compensation based on the last payable gross wage at Kshs.18,316.00 all being Kshs.219,792.00;

b) Notice pay of 3 months Kshs.54,948.00

c) Underpayments 2007 to 2012 Kshs.259,306.00;

d) 22 days worked in February, 2012 Kshs.13,431.70;

e) Service gratuity Kshs.183,160.00;

f) House allowance kshs.37,000.00;

g) Commuter allowance Kshs.34,200.00;

h) Leave travelling allowance Kshs.8,000.00;

2) The dues payable to grievants shall be paid less Kshs.56, 760.00 and 99,643.00 respectively acknowledged by each grievant.

3) The claimant is awarded costs.

Delivered in open court at Nairobi this 7th day of November, 2017.

M. MBARU JUDGE

In the presence of:

David Muturi & Nancy Bor – Court Assistants

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