



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 63 OF 2017

JAMES MIUGO NYINGI.....CLAIMANT

VERSUS

AUGUSTINE **THE BOARD OF MANAGEMENT ST.**

SIRIMA SECONDARY SCHOOL.....1ST RESPONDENT

THE ATTORNEY GENERAL.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 8th December, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 08.03.2017 through Peter M. Muthoni & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration the termination was unlawful.
- b) Unconditional reinstatement by ordering the withdrawal of the purported termination letter dated 14.10.2016 forthwith or to deem the letter worthless or of no legal consequence in which event he be deemed to be still in the school's employment technically or legally.
- c) Consequential to prayer (b), payment of his earned and accrued salary arrears from the calendar month of October 2016 to-date.
- d) In alternative he be paid Kshs. 716, 436.00 being pay for 3 years pending retirement and he be deemed to have retired and terminal dues be worked including for the 3 years.
- e) Nine years service pay of Kshs. 179, 109.00.
- f) Overtime worked at an average of 3 hours for about 10 days per month making 30 hours per month for 72 months of service making 2160 hours at Kshs.82.92 per hour making Kshs.179, 109.00.
- g) 126 annual leave days Kshs. 167, 168.40.
- h) 10 annual public holidays at 10 days per year Kshs.40, 080.00.

- i) Total claim Kshs. 1, 281, 902.40 less Kshs. 96, 302.00 making Kshs.1, 185, 600.40 plus interest.
- j) General damages for distress (emotional pain, mental agony and anguish), plus interest.
- k) Costs plus interests.

The memorandum of response was filed on 07.04.2017 through P. Gisemba, Litigation Counsel, for the Attorney General. The respondents prayed that the claimant's suit be dismissed with costs.

There is no dispute that at the material time the respondent had employed the claimant as a driver in charge of the school bus. The school bus developed mechanical problems as per the respondent's minutes of the meeting held on 10.10.2016. The minutes state that the claimant advised the respondent's members that the school bus needed major repairs since it had serious mechanical problems. The minutes further state, **"....The members decided that the bus be grounded following the advice given by the Labour officer until funds are available. When the driver was asked whether he could take up another responsibility in the meantime, he declined. The members therefore decided that his service be terminated and that he be granted all his terminal benefits immediately he clears with the school."**

The respondent then addressed to the claimant a termination letter as follows:

"RE: TERMINATION OF SERVICE

On 10th October, 2016 you appeared before the Executive BOM members and during this meeting the members agreed to ground the bus, after your advice that the bus was highly damaged and required extensive repair. Similar advice was given by the proprietor of the shuttle garage Nanyuki who has been servicing the bus.

It was agreed that the bus will be taken back for repair before use. The BOM cannot predict when the bus will be operational due to financial constraints.

During the meeting the members inquired on whether you could be deployed to any other position and you declined. Unfortunately you had no other credentials but driving.

The members therefore decided to terminate your services on the basis of redundancy.

The BOM therefore requires that you clear with the school soonest possible to facilitate fast processing of your terminal benefits as per your annual contract which includes:

- a) One month salary in lieu of notice.**
- b) Gratuity for the six years service.**

We only reciprocate your kind gesture/service to the school by wishing you all the best.

Yours faithfully,

Signed

C.K. Rwigi

BOM Secretary

cc.BOM Chairlady"

The claimant testified that after the termination he was paid Kshs. 96, 302.00 as terminal dues and later he was paid for leave days due but not taken. He denied that the school bus had serious mechanical problem

and further denied that he had made such reports of defective bus to the respondent. He denied that he had been given an option to be redeployed as a messenger. He stated that he was willing to be redeployed to a messenger position. He admitted that he had been paid gratuity for the entire period of service. Further, all leave days had been paid for.

First, the court returns that the respondent failed to comply with the procedure for redundancy as prescribed in section 40 of the Employment Act, 2007. In particular, the respondent failed to prepare the claimant for the redundancy by way of a notice to the claimant and the labour officer as per section 40 (1) (b) of the Act. Further, the court returns that the respondent failed to file an expert report showing that the school bus was not serviceable or would be repaired at an exorbitant cost so that the bus would be grounded for a long time. In such circumstances, the court returns that the reason for the alleged redundancy and therefore the termination was not valid as at the time of termination and as envisaged in section 43 of the Act. In particular, the court observes that RW confirmed that the bus had been partially repaired and it could be driven though it was risky to move it. Accordingly, the court returns that the termination was unfair for want of due procedure and valid reason. It was unfair and unlawful.

Second, the court has considered the prayer for reinstatement. First, the respondent's witness and secretary (RW) confirmed that the respondent did not formerly offer the claimant alternative job of a messenger. Further, RW confirmed that the respondent had not engaged another driver and the office of driver in the respondent's establishment remained vacant. She further confirmed that the bus could move but the respondent feared the risk. Further, RW confirmed that the bus was partially repaired and no driver had been engaged. Taking the evidence into account together with the provisions of section 49(4) (a) to (m) of the Employment Act, 2007, the court finds as follows:

- a) The claimant is willing to continue in employment.
- b) The claimant did not contribute to his termination and the allegations of misconduct on the part of the respondent referred to during the respondent's proceedings was not subject of a disciplinary process and the court returns that the claimant's culpability in that regard was not established at all.
- c) The vacancy of a driver in the respondent's establishment is available and RW testified that no other person had been employed as a replacement to the claimant.
- d) The bus is partially repaired and shall eventually get fully repaired and the claimant is willing to perform other duties in the meantime.
- e) The respondent has already paid the claimant substantial terminal dues.

The court has particularly considered the payment already made to the claimant and returns that a reinstatement with full pay back would not balance justice. However, there is no reason to bar the claimant from being re-engaged by the respondent. The court considers that justice will be served if the claimant is re-engaged with full benefits as a driver but with the option that he may be assigned duties of a messenger until the bus is fully repaired.

Third, the court returns that the claimant failed, by way of providing sufficient evidence, to justify the prayers for overtime and pay for work on holidays. The prayers will fail. The court returns that the evidence was that he had fully been paid for due leave days and the prayer in that regard will fail. The prayer for general damages for distress was not justified by way of evidence and submissions and the same is deemed abandoned.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

- a) The declaration that the termination of the claimant's employment was unlawful or unfair.
- b) The claimant is hereby re-engaged as a driver in the respondent's establishment, with full prevailing pay and benefits, effective 01.01.2018, and, the period between the date of termination

and the date of re-engagement is treated as leave without pay so there is no break in the claimant's service.

c) For purposes of order (b) and until the school bus is fully repaired, the respondent to assign the claimant duties of a messenger or duties related to the work of a driver.

d) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at **Nyeri** this **Friday, 8th December, 2017**.

BYRAM ONGAYA

JUDGE