



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI
CAUSE NO. 1160 OF 2014

(Before Hon. Lady Justice Hellen S. Wasilwa on 9th June 2016)

EZEKIEL MURIITHI NYAMU.....CLAIMANT

VERSUS

**(BEATRICE GATHONI ITIBI) (Sued on behalf of the Board of Governors
Kabete High School).....1ST RESPONDENT**

ATTORNEY GENERAL..... 2ND RESPONDENT

JUDGMENT OF THE COURT

1. This Claim was filed by the Claimant in person via a Memorandum dated 11th July 2014 and filed on the 14th of July 2014. The claim is supported by the Verifying affidavit of the Claimant Mr. Ezekiel Muriithi Nyamu and seeks the following prayers:

i. Sum of Kshs. 391,363.40 being payment of

one months salary pay in lieu of notice	Kshs.	10,970.00
Accrued annual leave (10,970/30 x 21 x 1)	Kshs.	7,679.00
Holidays (132 hours x 10,970 x 2 x 1/225 x 18)	Kshs.	231,686.40
12 days worked in May 2013 (10,970/30 x 8)	Kshs.	4,388.00
Unremitted NSSF amounts	Kshs.	5,000.00
Compensation for unlawful dismissal (10,970 x 12)		<u>Kshs.131,640/=</u>

TOTAL **Kshs.**
391,363.40

ii. Certificate of Service

- iii. *Costs of this suit*
- iv. *Interest in (i) above*
- v. *Any other relief as court may deem just*

Facts of the Claim

2. The Claimant was employed by the Respondent on or about the 1st of January 1996 at a monthly salary of Ksh. 2,839.00 and he served in this position until 7th May 2013 when the school was robbed and the Claimant was called in to make a statement with the Kingero Police post which he did.
3. The Claimant reported back on the 9th of May 2013 and was asked to go back for further statements. However, he was detained at the post but with no charges brought, he was later cleared and released. He was issued with a clearance report for the Officer Commanding Police Division (OCPD) Kingero Police Station exonerating him from all charges.
4. The Claimant attempted to resume his employment but was denied access to the school and informed investigations were still being carried out and he would only resume once they were concluded. He stood as suspended for 6 months as from the 9th of May 2013 until the outcome of such investigations and a meeting by the Board of Governors. At the said meeting, it was resolved that the Claimant's services be terminated.
5. The Claimant submits that he served the Respondent diligently without complaint. He further states that his termination came without due regard to the law and suffered loss and damages. He had been cleared of any wrong doing by the police and therefore his termination was unjust.
6. He further submits that he is yet to receive communication from the Board of Governors on his suspension and continues to suffer mental and financially. The Claimant states that he had issued demand letters but got no response.
7. He prays for the Court to award as prayed.
8. The Respondent filed a Response to the Statement of Claim dated 30th of September 2014 and filed on the 1st of October 2014.
9. They admit that the Claimant was under their employment in the stated period but deny that the employment was diligent without any issues as he had been issued with several warning letters with regards to negligence of his duties.
10. They further submit that following the theft on the 8th of May 2013, the Claimant was seen to have failed to perform his employment duties and was procedurally terminated and his final dues issued to him.
11. They therefore submit that the claim is erroneous and misplaced, lacks merit and should be dismissed with costs.
12. To support their case, the Respondent called in two witness, the first RW1 was Beatrice Gathoni Gitibu, Principle of Kabete High School, who admitted that the Claimant was in their employment and testified that he was indeed under suspension following the theft of 7th May 2013, she further testified that the Claimant was not paid his terminal dues as he was a member of NSSF. She further testified that the Claimant had come into work late on several occasions leading to his being issued with several warning.
13. RW1 also testified that she did not sack the Claimant as she had no authority to do so and no dismissal letter had been issued as the case had not been finalized.
14. The second witness was David M Irungu who testified on the events of the night of the robbery on the

7th of May 2013. He confirmed that indeed there was a robbery and that the Claimant alerted him as to the presence of intruders, helped him look around the school as he alerted the police.

15. The witness testified that the Claimant was otherwise competent and keen at work and was unaware that there were any disciplinary warnings made against him.

16. Having considered evidence of both parties, I find the issues for determination to be as follows:

1. *Whether there were valid reasons to dismiss the Claimant.*
2. *Whether Claimant was accorded due process before his dismissal.*
3. *What remedies if any the Claimant is entitled to.*

17. On the 1st issue, the Respondents have in their evidence stated that the Claimant has not in fact been dismissed. RW1 the Respondent's Principal stated that she has no powers to dismiss him but he is on suspension since May 2013 following a robbery in the school.

18. The Respondent's 2nd witness on his part stated that the Claimant was a diligent worker with no incidences and therefore contradicting RW1. The reason for the suspension if any is that there was theft at Respondent's school and since he was the guard, it was considered that he didn't do his duties well to prevent the theft.

19. The Claimant on his part has stated that he was investigated by the police on this theft and not found culpable.

20. In essence though the Respondents insist that the Claimant was not dismissed, he has been out of employment since 2013 without any communication from the Respondents to date.

21. The Respondents response has even indicated that he was dismissed and paid all his terminal dues. Parties are held on their pleadings and as it were, the Respondents have admitted that he was terminated under paragraph 8 of their defence. That being the case and finding, there is no communication to that effect to the Claimant. There is no valid reason that made the Respondents terminate the Claimant's services.

22. On the 2nd issue, the Respondents aver that the Claimant was accorded due process but the Claimant denies this. The Respondents have however not demonstrated that they took the Claimant through a disciplinary process. The minutes of such a meeting are not annexed. The hearing envisaged is that provided for under Section 41 of Employment Act:

“(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”.

23. There is no proof that the Claimant went through such a hearing process. In this case, this Court finds that the Claimant was not accorded due process.

24. Having found as above, I find that the termination of the Claimant was unfair and unjustified as

provided for under Section 45(2) of Employment Act which states as follows:

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.***

25. In that respect, I find for the Claimant and award him as follows:

1. ***1 months salary in lieu of notice = 10,970/=.***
 2. ***Accrued annual leave 21 days = 7,679/=.***
 3. ***12 days worked in May 2013 = 10,970 x 8/30 = 4,388/=***
 4. ***Unremitted NSSF amount = 4,400/=***
 5. ***12 months salary as compensation for unlawful termination = 12 x 10,970 = 131,640/=***
- TOTAL = 159,077/=**
6. ***Plus costs and interest.***
 7. ***The Respondents will meet costs of this suit.***

Read in open Court this 9th day of June, 2016.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

No appearance for Claimant

No appearance for Respondent