



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 116 OF 2014**

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL**

**INSTITUTIONS, HOSPITALS AND ALLIED  
WORKERS.....CLAIMANT**

**VERSUS**

**THE BOARD OF MANAGEMENT MUGURU SECONDARY  
SCHOOL.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 22<sup>nd</sup> July, 2016)

**JUDGMENT**

The claimant union filed the memorandum of claim on 08.09.2014 alleging the unfair termination of its member Rose Wangari Kamau, the grievant. The claimant prayed for judgment against the respondent for service gratuity Kshs.684,398.00; 3 months' pay in lieu of notice Kshs.78,969.00; underpayments of Kshs.454,609.00; three years' pay the claimant would have worked to reach 50 years retirement age Kshs.947,628.00; 12 months' pay compensation for unfair termination Kshs.315,876.00 ; and total claim Kshs.2,481,480.00.

The respondent filed the statement of response on 18.11.2014 through Wambui Ndumia & Company Advocates. The respondent prayed that the claimant's suit be dismissed with costs. The respondent subsequently changed its advocates to Kimunya & Company Advocates. The claimant filed the reply to response on 03.12.2014.

The grievant was employed by the respondent by the letter of appointment dated 19.08.1985 as an accounts clerk or typist and effective 01.09.1985. By the letter dated 18.11.1988 she was appointed to position of copy typist. By the letter dated 22.01.1997 the grievant was promoted to Job Group D. By the letter dated 16.09.2003 the grievant was promoted to the position of the bursar. By the letter dated 17.09.2004 the grievant was appointed to the procurement or tendering committee.

The grievant testified that on 26.01.2012, the respondent's school principal asked her to arrange payment of debts. The grievant testified that she then went to the bank to confirm the balances. The grievant's further evidence was that the principal had assigned a certain school cook to collect school fees without the grievant's involvement. The cook had been collecting the fees and handing it over to the principal. So on 26.01.2012 she had to go to check on the respondent's bank accounts at Equity Bank and Kenya Commercial Bank to confirm if there was money to pay debtors. Upon collecting the bank statements she went back to school and at the door step to her office, the principal asked for the keys to her office. At

that time she had not prepared the trial balance for December 2011. The grievant's evidence was that she refused to hand the office key to the principal because doing so would expose her office to interference and that she would hand over the key only in presence of the board members as the employer, and, the auditor and the education officer as the professionals who knew about the job. The principal thereafter convened a meeting involving a board member known as Kihara, the vicar in-charge of the school, the deputy principal and they discussed the grievant. The District Education Officer arrived at about 2.00pm on 26.01.2012 and the grievant testified that the Officer harassed her to give in the key to her office but she declined. At that moment, the grievant testified that the principal came to the grievant's office, the grievant walked towards the school gate and the deputy principal asked her to lock the door to her office as the principal threw at her the letter dated 26.01.2012.

The letter was addressed to the grievant by the principal also being the respondent's secretary. The letter suspended the grievant from duty with effect from 26.01.2012 on account of gross misconduct. The letter stated that the grievant had showed insubordination to the office of the principal by not carrying out her duties as required, for example, refusing to hand in the trial balance for December 2011 despite a request to do so on 21.01.2012; she had said that she would not hand in books of accounts unless in presence of the auditor and a board member; and that she said she would not carry out any other duty unless the board was summoned. The letter further stated that the grievant used abusive language to the principal every time she was summoned to explain about accounting issues, for example, accusing the principal of using demonic powers to distract the claimant from her work; and accusing the principal of ill motives to have the claimant sacked. Further, the letter stated that on 26.01.2012 at 1.15pm two executive members of the board, the principal, and the deputy principal summoned the grievant to the principal's office so that the grievant could be heard about the foregoing accusations but the grievant adamantly and blatantly refused to appear insisting on the full board, the office of the District Auditor and the District Education Officer's presence. Thus, the letter suspended the grievant from duty and out of the school compound for 14 days until the full board meeting to conclude about her misconduct.

On 27.01.2012 the grievant was called to handover to the District Auditor and she was given the letter dated 27.01.2012 conveying that the board had decided to amend the suspension as per the letter of 26.01.2012 to compulsory leave of one month from 27.01.2012 to 24.02.2012 but concluding that it was compulsory leave for 21 days ending 24.02.2012. The letter directed the grievant to hand in, on 27.01.2012, all books of accounts to an officer from the district audit office. The grievant handed over on that date at about 3.00pm.

The grievant testified that she was paid up to February 2012. By the letter dated 23.02.2012 the compulsory leave was extended from 25.02.2012 to 25.03.2012 but the grievant was not paid for March 2012.

At the board meeting of 14.02.2012 the grievant had attended but she testified that she was not allowed to speak at the meeting. Subsequently the grievant received the termination letter dated 14.03.2012 as delivered to her by the school watchman. She was dismissed effective 14.03.2012 on account of insubordination, gross misconduct and undermining the board.

The grievant lamented in her evidence that the principal assigned all the claimant's duties to a cook one Nyambura Josephine and the principal required the grievant to train the said Nyambura about the grievant's duties but which was not the grievant's responsibility. The principal had opened a secret account, she kept payment vouchers and the cook collected cash and took it to the principal and not the grievant. Thus the grievant's case was that she had prepared an incomplete trial balance for December 2011 because the principal withheld all payment vouchers in her desk and she had released them to the grievant on 18.01.2012.

The grievant had written the letter dated 25.11.2011 to the respondent's chairman. In that letter she raised numerous grievances against the principal. First, the development vote head had been mixed up because receipts had not been properly recorded. Second, money withdrawn from bank was given to the principal who did not sign the relevant imprest voucher and instead the principal inserted a third party's name and the voucher never came back to the grievant to show the third party had received the money. Third, when

the grievant prepared the monthly trial balances the principal withheld them beyond the stipulated deadlines. The principal gave conflicting instructions on preparation of payroll and budget and the principal prepared the same in contravention of the set procedures so that it was after the board failed to approve the same that the principal asked the grievant to amend. Further the operation and tuition trial balances were done by somebody else but said to have been done by the grievant. The claimant lamented in that letter that such improper accounting could land her into trouble despite her 26 years of good service. She wondered why she had been relieved off her duties without explanation or reason and she was aggrieved by the principal who had given away her duties and then blamed her for failures in the work. The grievant concluded by requesting the respondent's chairman to understand her problems and to give her guidance about her position as the school's bursar. The grievant's evidence was that the chairman received the letter, he did nothing and the grievant was dismissed before the board convened to deliberate her grievance.

The school principal RW1 confirmed in her evidence that the board had complained about the insufficiency of the financial statements at the meeting of 22.10.2011. RW1 testified that on 26.01.2012 the grievant failed to provide the December 2011 trial balance and she started shouting in the school premises and she insisted on a full board so as to present the trial balance. The District Education Officer advised that the grievant be suspended. The grievant then handed over on 27.01.2012 as per the grievant's evidence. RW1 had reported to the school in September 2011 and she had issues on how grievant handled imprest matters. RW1 testified that RW1 wanted to determine whom to pay and the grievant to process and sign the vouchers. As for the cook Josephine RW1 had found her working at the bursar's office in September 2011 when RW1 reported so that RW1 did not know that the said Josephine was a cook. RW1 denied keeping Vouchers and receipts away from the grievant. RW1's case was that on 14.02.2012 the claimant attended full board meeting and she was concerned that some members were absent. At that meeting the grievant accused the principal of misappropriation and getting angry, she failed to explain the events of 26.01.2012. The board then decided that the grievant gets dismissed. Instead of conveying the termination decision, RW1 testified that she decided to extent the compulsory leave to allow the grievant to cool down. RW1 then testified that the grievant thereafter never came back to the school. The grievant was dismissed without having to appear before the board again.

The **1<sup>st</sup> issue** for determination is whether the summary dismissal was unfair. The court has considered the evidence on record. RW1 testified that clause 8(f) of the collective agreement required involvement of the union before the grievant could be suspended. Thus, the court finds that the disciplinary process leading to the summary dismissal of the grievant was irregular *ab initio* because it was founded upon the suspension that breached the collective agreement. It is clear from the evidence that there was no shop floor union representative at the disciplinary hearing as required by section 41 of the Employment Act, 2007. The court returns that the termination was unfair due to the cited procedural irregularities.

Section 46(h) of the Act provides that an employee's initiation or proposed initiation of a complaint or other legal proceedings against the employer except where the complaint is shown to be irresponsible and without foundation, does not constitute a fair reason for dismissal. The grievant submitted to the chairman of the respondent her complaint or grievances against the principal by her letter dated 25.11.2011. The grievances in that letter are substantially the matters that constituted the differences between the grievant and the principal RW1 on 26.01.2012 and the subsequent suspension, compulsory leave and then the summary dismissal. The court returns that the grievant had grievances that were responsible and with good foundation. RW confirmed, in line with the grievant's complaints, that the board had complained about the insufficiency of the financial statements at the meeting of 22.10.2011. It is clear that the grievances were real. The court has considered the grievant's otherwise clean record of service and finds that it was after RW1 reported to the school in September 2011 that the grievant's performance started to be questioned by the respondent. The court considers that if the respondent addressed the grievant's complaints then the flow of events in the case would have been very different. The court returns that the termination was unfair because it was as well founded upon an unfair reason in terms of section 46 (h) of the Employment Act, 2007. While making that finding the court upholds its opinion in **Grace Gacheri Muriithi –Versus- Kenya Literature Bureau (2012) eKLR** as follows,

**“To ensure stable working relationships between the employers and employees, the court**

**finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer's operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer's operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer's operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust."**

The 2<sup>nd</sup> issue for determination is whether the claimant is entitled to the other remedies as prayed for. The court has considered the pleadings, the evidence and the submissions on record and makes findings as follows:

a) The court has considered the prayer for underpayments in view of the civil service salary levels that may have applied to the grievant but was not paid as per the new salary scales for civil servants effective 01.07.2006 and as per the relevant government circular DPM/SAL.COM.16/1/4A/VOL.VIII/(84) dated 27.06.2006. It is clear that regulation 4 of the Education (Board of Governors) (Non-Teaching Staff) Regulations, 1993 provides that persons belonging to a professional cadre and employed by the board shall be employed on such terms and conditions of service similar to those recommended for equivalent posts in the civil service and as per the applicable scheme of service. Nevertheless the court finds that the claimant is not entitled as claimed and as prayed for. First it is not clear how the claimant as a bursar is said to be in Job Group J as pleaded in the computation in the statement of claim. The letter promoting her to bursar dated 16.09.2003 does not designate the job at Job Group J and the claimant has not filed a civil service scheme establishing that the job of a bursar as she was promoted to was at the material time pegged at Job Group J. Second, the claimant was dismissed on 14.03.2012. The claim for underpayment throughout her service was a continuing injury requiring her to file suit by or before 14.03.2012 as per time of limitation of 12 months for continuing injuries in section 90 of the Employment Act, 2007. The suit was filed on 08.09.2014 so that it was time barred as far as the claim for the continuing injury of underpayment was concerned. Even if the cause of action is reckoned to have accrued on 24.05.2013 when the conciliator issued the certificate of unresolved trade dispute, the suit would still be outside the 12 months statutory period of limitation for such continuing injury. Thirdly and finally, throughout the subsistence of the employment, there appears not to have been any grievance by the grievant about underpayment. The claim and prayer for underpayment will therefore fail.

b) As per the collective agreement the court finds that the grievant is entitled to 3 months pay in lieu of the termination notice making **Kshs.53,460.00** as prayed for at 17,820.00 per month.

c) The court has considered the claimant's long and dedicated service of over 26 years. The claimant wished to continue in employment and to enjoy honourable and dignified retirement but for the unfair termination. The court returns that in view of those considerations and that the respondent failed to attend to the grievant's complaints and the grievant did not contribute to her termination, the grievant is awarded 12 months' gross salaries under section 49(1)(c) of the Employment Act, 2007 being Kshs.17,820.00 per month making **Kshs.213,840.00** for unfair termination.

d) As per collective agreement the claimant is entitled to service gratuity at 30 days for each of the 26 years of service at Kshs.17,820.00 per year making **Kshs.463,320.00**.

e) The court returns that the claimant has not established any bar to her mitigating her lost future earnings flowing from the termination and thus, the claim for 3 years' pay for lost future earnings

will fail as the compensation for unfair termination in that regard is sufficient.

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

- 1) The declaration that the respondent's termination of the grievant's contract of service by the letter of summary dismissal dated 14.03.2012 ref. no. MUG/S/14/2012 was unfair.
- 2) The respondent to pay the grievant **Kshs.730, 620.00** by 01.09.2016 failing interest at court rates to be payable thereon from the date of this judgment till full payment.
- 3) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 22<sup>nd</sup> July, 2016.**

**BYRAM ONGAYA**

**JUDGE**