



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT & LABOUR RELATIONS COURT**  
**AT KISUMU**  
**CAUSE NO. 1 OF 2013**

*(Before Hon. Lady Justice Maureen Onyango)*

**KENNEDY SHILAHO SHIBEKA.....CLAIMANT**

**-Versus-**

**THE CHAIRMAN, BOARD OF GOVERNOR,**  
**SIGALAGALA TECHNICAL TRAINING INSTITUTE.....RESPONDENT**

**JUDGEMENT**

By a Memorandum of Claim filed on 16th January, 2016 the Claimant alleges that he was wrongfully dismissed by the Respondent and seeks the following remedies;

- (a) Reinstatement into employment or in the alternative damages for breach of contract.
- (b) Leave pay 21 days for period worked.
- (c) Overtime pay.
- (d) Off day pay.
- (e) Severance pay.
- (f) One month's salary in lieu of notice.
- (g) Computation for the claimant shall be availed at the hearing hereof.

The Respondent filed a statement of Response on 11th March, 2013 denying the allegations of the claimant. The Respondent avers that the Claimant failed to disclose material facts and prays that the entire claim be struck out for disclosing no cause of acting and for being an abuse of court process.

The case was originally heard ex parte by my sister Wasilwa J. but the ex-parte Judgement delivered on 30th April, 2014 was set aside by consent of the parties on 6th July, 2015. The case was thereafter fixed for hearing on 1st March 2016 when it was heard.

The Claimant testified on his behalf and the Respondent's testimony was given by EVANS SANDE, a Senior Clerical Staff of the Respondent. The parties thereafter had and exchanged written submissions.

## **Claimants Case**

The Claimants Case is contained in his Memorandum of Claim, his viva voce evidence and the written submissions filed on his behalf by his counsel Mr. Ombaye instructed by M/s K. S. Ombaye & Company Advocates.

The Claimant was employed as Institute Bursar by the Respondent, the Board of Governors of Sigalagala Technical Training Institute on 1st October, 2007 on probationary terms. He was confirmed on 2nd January, 2008. He was upgraded twice, first on 30th March, 2011 and the second upgrading on 28th June, 2012.

On 15th August 2012 he received a letter of suspension on grounds that he had "authorised for the vehicle of Mr. Calistus Shishemi to be driven into the polytechnic's premises by your driver Mr. Bosco."

Before the suspension on 14th August 2012 there was a special Executive Board meeting which was discussing a theft incident that occurred on 10th July, 2012. 2 starters, alternator and steering wheel were stolen from 2 institution buses. The Special Board Meeting called some drivers and the security guards who were on duty at the time of the theft. Some employees were suspended and eventually 2 employees were charged with the theft.

Towards the end of the Special Board Meeting the Claimant was called to the meeting and asked to give any information he had on the stolen items and he responded that he did not have any information other than the fact that the theft had taken place.

The Claimant also testified that on 27th July, 2012 in the evening he was called by the office messenger who informed the claimant that a driver was driven into the school behaving like a crazy person. He learnt later that the person who drove them to the school was a taxi driver by the name Bosco. The driver's name was Calistus and the vehicle he was being driven in belonged to the driver. The driver's employment had been terminated.

The Claimant called the new driver of the institute who was away and directed him, to go to school and find out if there was any emergency that he could handle.

The Claimant later learnt that the new driver found Calistus unconscious and drove him to Kakamega.

While still on suspension, on 18th October, 2012 the Claimant received a letter of dismissal dated 16th October 2012. The letter is reproduced below:-

*Mr. Kennedy Shilaho Shibeka*

*BOG/P. No.053*

*Sigalagala Polytechnic*

*P. O. Box 2966-50100*

**KAKAMEGA**

*Dear Sir*

**RE: DISMISSAL FROM EMPLOYMENT**

*In a Board of Governors meeting held on 5th October, 2012, it was decided and resolved that your services of being a Bursar of this institution should be terminated forthwith. The reasons for the same are:*

1. *You are a prime suspect in regards to the stolen items of the vehicles KAY 098V and KBJ 403U thus the two starters, alternator and a power steering.*
2. *You were given an opportunity to appear before the Board of Governors on 14th August 2012, but you did not give a satisfactory explanation as regards to the disappearance of the said items.*
3. *You authorized for the vehicle of a former driver by the name Mr. Calistus Shihemi to be driven into the polytechnic's compound.*
4. *Your association with a former driver who is a prime suspect is also wanting and leaves a lot to be desired.*

*All the above is tantamount to negligence of duty and therefore the Board of Governors (Manager) has decided to terminate your services*

*w e f 16th October, 2012, with loss of benefits, if any, because of your gross misconduct.*

*Thank you.*

*Yours faithfully,*

*Mr. Josphat K. Sawe*

**PRINCIPAL/SECRETARY, BOG/PTA**

It is the Claimant's contention that the reasons given in the letter of termination are not valid reasons for such dismissal, that nothing shows the Claimant stole from his employer, or that the meeting held on 14th August, 2012 was a disciplinary hearing for the Claimant. It is further the Claimant's contention that he did not authorise the former driver, Calistus into the Respondent's premises and there was no proof that he did. The Claimant avers that he was the supervisor of all drivers and his relationship with them was official. He states that the name of the driver he is accused of having an association with and who was a prime suspect is not given in the letter of dismissal.

The Claimant avers that he was dismissed without notice or a hearing and the summary dismissal was therefore unlawful.

### **Respondent's Case**

The Respondent's Case as contained in the Response to the Memorandum of Claim, the Viva Voce evidence of Evans Sande and its written submissions filed on 23rd March, 2016 by Mr. Ojienda instructed by Mr. Ojienda & Company Advocates.

It is the Respondent's case that the Claimant was lawfully and reasonably dismissed as per section 44 of the Employment Act on grounds that he was a prime suspect with regard to the theft of two starters, alternator and power steering from the Respondent's vehicles KAY 098V and KBJ 405U, that the Claimant was given an opportunity to appear before the Respondent' Board of Governors on 14th August 2012 but failed to give satisfactory explanation regarding the theft. It was further the Respondents case that the Claimant authorised the vehicle of a former driver Calistus Shihemi to be driven into the Respondent's compound and that the Claimant showed close association with the said former driver who was a prime suspect, a situation that was undesirable to the Respondent. The Respondent submitted that the decision to dismiss the Claimant was based on evidence and facts presented before the Board after thorough investigations, that the conduct of the Claimant amounted to gross misconduct warranting his dismissal without notice or warning, that the termination was fair both by reason and procedure and in compliance with section 45(2) of the Employment Act.

The Respondent relied on the following cases:-

**1. *Concut Pty Ltd versus Worrell [2000] HCA 64***

**2. *National Union of Mineworkers and Another and the Commission for Conciliation Mediation and Arbitration, case No.JR 2512 of 2007***

**3. *JUDY NJOKI v DHL EXCEL SUPPLY CHAIN (K) LTD[2012]Eklr***

**4. *Industrial Court of Kenya Cause Number 635 of 2010 between Dede Esi Annie Amanor-Wilks v. Actionaid International [2014] eKLR***

The Respondent submitted that it is a principle of law that a contracting party does not intend to abandon any remedies for breach of the contract arising from operation of the law as was held in the Australian case of **Concut Pty Ltd v Worrel**, and that the Claimant's misconduct was incompatible with the interests of the Respondent.

The Respondent relied on the S.A case of **National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and 2 others** to demonstrate that employment relationship can only exist in an atmosphere of trust and subject to an employee acting in good faith.

The Respondent further relied on the case of **Judy Njoki v DHL Excel Supply Chain (K) Ltd** in which the court upheld the summary dismissal of the Claimant on grounds of gross misconduct and failure to subject herself to the disciplinary process by abandoning duty upon receiving a notice to show cause without responding to the notice.

Lastly the Respondent relied on the case of **Dede Esi Anni Amanor-Wilks v Actionaid International** in which the court held that employee incompatibility is a fair reason for termination of employment arguing that the Claimant's implication in the loss of the starters, alternator and power steering of the Respondent's vehicles made him incompatible and therefore he should not be reinstated as prayed.

### **Procedure for Termination**

Section 41 of the Employment Act provides for the procedure for termination of employment. An employer must inform the employee, nay, explain to the employee in a language he understands, the reasons why the employer is contemplating the termination on grounds of misconduct, poor performance or physical incompatibility in the presence of a shop steward or a fellow employee of the employee's choice. The employer must thereafter listen to the representations of the employee and the person accompanying him, before making a decision to terminate the employment.

In the present case the claimant was not informed about any charges against him. He was never called to a disciplinary hearing. All that the Respondent did was call the Claimant to a meeting discussing the theft that occurred at the institution and ask if he had any information about it. Thereafter he was suspended without pay on grounds that he authorised a vehicle of Calistus Shishemi into the Respondents premises, driver by the Claimant's driver. The Claimant was never asked about allowing Calistus into the compound. The minutes of the meeting held on 18th July 2012 do not make any reference to the Claimant, or to the unlawful authorisation of Calistus into the premises.

The Claimant was mentioned in the minutes of the Board of Governor's meeting held on 14th August, 2012 in the security officer's report as follows:-

a) The security officer, Mr. Leonard Khisa reported that on 27th July 2012 at around 5.10 p.m. he received a call from the institutes's bursar, Mr. Kennedy Shilaho, instructing him to open the main gate for a private vehicle KAH 739 carrying people who would give information about the lost items from the two institutes's buses.

b) The security officer opened the gate for the private vehicle which he realized belonged to as suspended driver - Mr. Calistus Shehemi.

- c) Inside the vehicle was Mr. Calistus Shihemi and it was being driven by a Mr. Bosco who is the personal driver to the bursar, Kennedy Shilaho.
- d) The vehicle was driven to the parking bay.
- e) He realized that Mr. Calistus seemed unconscious.
- f) Mr. Bosco then told the security officer that they had been to another suspended driver's house with Mr. Calistus where the three of them i.e. Mr. Calistus, Mr. Bosco and Mr. Sefi had taken some "medicine" administered by a witchdoctor in a bid to identify the person who stole the items from the institutes buses.
- g) He said Mr. Bosco told him that the witchdoctor had instructed them that whoever amongst them would be affected by the "medicine" and eat grass would be the one who stole the lost items from the institute's buses.
- h) He then called the Deputy Principal who arrived at the scene immediately.
- i) He said the Deputy Principal tried interrogating Mr. Calistus but he couldn't speak.
- j) Students and some outsiders began arriving at the scene.
- k) Mr. Calistus was taken to Kakamega Police Station on security grounds in the company of the D/Principal, Mr. Jahonga (a teacher), Mr. Khisa, Mr. Muliro (a Headman). Miss Miheso (a teacher) and 2 Administration Police Officers. Mr. Calistus was later taken to Kakamega Provincial Hospital where he was handed over to his close relatives for care and treatment.
- l) He reported that at about 12.15 a.m. (mid night), he received a call from the bursar who told him that Mr. Calistus had been found guilty of the theft of the lost items.
- m) He further told members that the bursar said that the people who supported Mr. Calistus such as the Deputy Principal and the Registrar would be disappointed to learn that Mr. Calistus was the culprit of the lost items.
- n) He reported that as the bursar talked on the phone, he, the security officer, put the phone on loud speaker and those who were around him were able to hear him talk. These were Mr. Eliud Kipkoech (the institute's electrician), administration police officer - Shinyalu Mr. Otieno and Mr. Wekesa Aggrey, the Exams Officer.

In the minutes of the Board meeting held on 5th October 2012 the only mention of the claimant is that;

*"The association of Mr. Kennedy Shibeka with a former driver who is a prime suspect is wanting and leaves a lot to be desired."*

The Claimant was never called at the meetings of 14th August and 5th October 2012, and was never issued with a show cause letter or requested to respond to the charges in both the letter of suspension and the letter of dismissal. Although the minutes make reference to terms and conditions of service for the Respondent's employee's, none was availed to the court or referred to by the parties during the hearing.

Evans Sande, the Respondent's witness, attended the meetings held on 18th July and 14th August 2012 in which he is described as HRM, Sigalagala Polytechnic, and HRM respectively. It is not clear why during the hearing he informed the court that he is a Senior Clerical Staff and did not mention that he was also the Respondent's HRM (which presume refers to Human Resource Manager). The witness testified that the only connection the Claimant had with the theft is that he talked to the security officer at the time who allowed the vehicle carrying Calistus into the compound. The witness also testified that the meeting held on 14th August, 2012 authorised the suspension of the Claimant.

Although the minutes do not bear the Claimant's name as in attendance, there is an item under the heading "Bursars Report" under which it is stated that;

- a) He confirmed that he was aware of the theft that had occurred on 10th July, 2012 in the institute.
- b) He also confirmed that he was aware of the vehicle that was driven into the institute on 27th July 2012 evening.
- c) He admitted that the vehicle that was driven into the institute on 27th July 2012 belonged to a suspended driver and it was driven into the institute's compound by his (bursar's) personal driver called Bosco.
- d) He reported that his personal driver called him and told him about an incident that occurred between him (Bosco), Mr. Calistus and Mr. Sefi at Mr. Sefi's home involving a witchdoctor to determine the theft case.
- e) He said one of the drivers i.e. Mr. Calistus, was affected.
- f) He said he instructed his driver to drive Mr. Calistus to the institute.
- g) He also confirmed that he was aware that Mr. Calistus was on suspension.
- h) He also confirmed that he instructed the security officer to open the gate for the vehicle carrying the affected driver into the institute's bus park.
- i) He also admitted that he did not consult any of the senior administration officers before instructing the security officer to open the gate for the suspended driver to be brought into the institute's compound.
- j) He confirmed that so far he has not volunteered any information to any of the administration and management officers in the institute about the theft of the lost items.
- k) He said that he did not call the Security Officer, Mr. Khisa on 28th July, 2012 at 12.15 a.m.
- l) He told members that so far, he has no idea of the whereabouts of the lost items.
- m) He apologized for acting without authority.

The Claimant was not asked about the source of the report attributed to him in the minutes of 14th August, 2012.

Mr. Sande however admitted under cross examination that the Claimant's problem was allowing the driver to be driven into the compound. He stated the Claimant was not in charge of records at the gate and he did not know if the Claimant was involved in the alleged witchcraft. He stated the driver was an employee of the school and there was nothing to bar the driver from entering the school compound. He admitted the Claimant was not called to any meeting before suspension.

From the foregoing it is evidence that the Respondent did not comply with the provisions of section 41 before dismissing the claimant and therefore there was no procedural fairness in the process leading to the dismissal of the Claimant.

### **Grounds for Dismissal**

From the evidence that I have already summarised above, the claimant was not heard before he was dismissed. The grounds in the letter of dismissal are not the same as those in the letter of dismissal

except grand number 3. Mr. Sande in his evidence under cross examination conceded that there was nothing wrong with allowing the driver who was still an employee into the compound. Mr. Sand further conceded that he was not aware about any report linking the claimant to the theft, or evidence that the claimant stole. He further conceded that the board meeting that the Claimant attended did not recommend his dismissal and that there is nothing wrong with the Claimant's association with the former driver.

The Respondent's own witness therefore confirmed that the grounds of dismissal of the Claimant were not valid.

I accordingly find and declare that the Respondent failed to prove valid reasons for dismissal of the Claimant. The upshot is that the Claimant's dismissal by the Respondent was unfair both procedurally and substantively.

### **Remedies**

The Claimant prayed for reinstatement back to employment or in the alternative damages for breach of contract. However at the hearing he stated that he no longer wishes to be reinstated and would seek only compensation for the unfair termination.

Having found that the Claimant was unfairly terminated he is entitled to compensation and notice as provided in section 49 of the Employment Act. The Claimant also testified that he never took leave, a fact that the Respondent's witness stated he was unable to controvert as he did not have the Claimant's employment records. The witness was also unable to controvert the Claimant's claim that he worked overtime including during public holidays for which he was never compensated.

The Claimant is however not entitled to severance pay which is only payable to employees declared redundant. Section 10 and 74 of the Employment Act require employers to keep records and provides as follows:-

#### **74. Records to be kept by employer**

*(1) An employer shall keep a written record of all employees employed by him, with whom he has entered into a contract under this Act which shall contain the particulars—*

*(a) of a policy statement under section 6(2) where applicable;*

*(b) specified in section 10(3);*

*(c) specified in section 13;*

*(d) specified in sections 21 and 22;*

*(e) of an employee's weekly rest days specified in section 27;*

*(f) of an employee's annual leave entitlement, days taken and days due specified in section 28;*

*(g) of maternity leave specified in section 29;*

*(h) of sick leave specified in section 30;*

*(i) where the employer provides housing, particulars of the accommodation provided and, where the wage rates are deconsolidated particulars of the house allowance paid to the employee;*

*(j) of food rations where applicable;*

*(k) specified in section 61;*

*(l) of a record of warning letters or other evidence of misconduct of an employee; and*

*(m) any other particulars required to be kept under any written law or as may be prescribed by the Minister.*

Section 10(6) and (7) provide as follows:-

*(6) The employer shall keep the written particulars prescribed in subsection (1) for a period of five years after the termination of employment.*

*(7) If in any legal proceedings an employer fails to produce a written contractor the written particulars prescribed in subsection (1) the burden of proving or disproving an alleged term of employment stipulated in the contract shall be on the employer.*

Having failed to produce the relevant records or to controvert the evidence of the Claimant on leave, overtime and rest days, the Claimants contention must be admitted as stated in his evidence.

Prayers for gratuity and salary to date of filing submissions by the Claimant are rejected as they were never prayed for and in any event have not been justified. The prayer for public holidays and overtime having been continuing injuries and in the absence of records are granted for 12 months only based on Claimants last salary of Shs.31,995 together with house allowance of Shs.5,000 and medical allowance of Shs.1,090. Overtime being based on basic pay is calculated based on Rule 6 of the Regulation of Wages and Conditions of Employment (General) Order which provides as follows;

*6. (1) Overtime shall be payable at the following rates -*

*(a) for time worked in excess of the normal number of hours per week at one and one-half times the normal hourly rate;*

*(b) for time worked on the employees normal rest day or public holiday at twice the normal hourly rate.*

*(2) For the purpose of calculating payments for overtime in accordance with subparagraph (1), the basic hourly rate shall, where the employees are not employed by the hour, be deemed to be not less than one two-hundred-and twenty-fifth of the employee's basic minimum monthly wage.*

*(3) Notwithstanding subparagraphs (1) and (2) of this paragraph and paragraph 5, overtime plus time worked in normal hours per week shall not exceed the following number of hours in any period of two consecutive weeks -*

*(a) one hundred and forty-four hours for employees engaged in night work;*

*(b) one hundred and sixteen hours for all other adult employees.*

## **Conclusion**

The court therefore awards as follows:-

### **(a) Compensation**

Having worked for 5 years and taking into account all relevant circumstances of this case it is my opinion that compensation of 7 months gross salary is reasonable. I therefore award the Claimant Shs.266,595.

### **(b) Leave**

Leave entitlement for 5 years worked by the Claimant at the rate of 21 days per year is 105 days. This comes to  $(38,085/30 \times 105) = 133,297.50$ . I award the Claimant Shs.133,297.50 on account of annual leave.

**(c) Overtime and off day pay**

Having not proved hours worked overtime on a daily basis I will award the Claimant payments of overtime only for one rest day per week at double rate for 52 week as provided in the general order. As I stated above, this is only granted for the last 12 months worked. I award the claimant Shs.110,916 under this head based on double daily rate of basic pay  $(31,995.30 \times 52 \times 2)$ .

**(d) Public Holidays**

This too will be awarded for the final year only at double the daily rate of pay for the 11 public holidays in a year at Shs.23,463.

**(e) Notice**

I award the Claimant one months gross salary of Shs.38,085 in lieu of notice.

**(f) Severance Pay**

The Claim for severance pay is dismissed.

**(g) Costs and Interest**

The Respondent shall pay Claimant's costs and interest shall be charged on decretal sum from date of judgement.

**Judgement Dated, signed and delivered this 21st day of July, 2016**

**MAUREEN ONYANGO**

**JUDGE**