



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**  
**CAUSE NO. 170 OF 2015**

*(Before Hon. Lady Justice Maureen Onyango)*

**WILSON SIMIYU.....CLAIMANT**

**-Versus-**

**1. THE CHAIRMAN B.O.G FRIENDSSCHOOL BOKOLI**

**2. THE PRINCIPAL FRIENDS SCHOOL BOKOLI.....RESPONDENTS**

**JUDGEMENT**

By his Memorandum of Claim dated 26th May, 2015 the Claimant alleges that he was unfairly dismissed by the Respondents and prays for payment of 3 months salary in lieu of notice in the sum of Shs.34,110/- and maximum compensation in the sum of Shs.136,440, costs and interest.

The Respondents filed their defence on 16th September 2015 denying that the summary dismissal of the Claimant was unfair. The Respondents prayed that the claim be dismissed.

At the hearing of the Claim the Claimant testified on his behalf and the 1st Respondent testified on behalf of the Respondents. The parties thereafter filed and exchanged written submissions.

**Claimants Case**

The Claimants Case as presented in the Memorandum of Claim, the evidence adduced in court and the written submissions is that he was employed by the 1st Respondent on 5th October 2013 as Chief Security Officer until 29th April, 2014 when he was summarily dismissed. The grounds for dismissal according to the letter of dismissal was;

1. Incitement.
2. Insubordination.
3. Disrespect to School Management.

The letter of dismissal stated that the Claimant would be paid Shs.20,760 vide cheque No.002799 which was enclosed.

The Claimant testified that he was invited to appear before the board on 28th April, 2014 to clarify a few

issues by letter dated 20th April, 2014. The summons to appear before the board was served on him on 26th April 2014. The claimant testified that when he appeared before the board he was unaware that it was a disciplinary hearing.

The Claimant testified that earlier, on 6th March, 2014 there was an offensive cartoon depicting the principal (2nd Respondent) as a non-performer and requiring him to leave the school. The Claimant testified that he informed the 2nd Respondent about the cartoon and after discussion a meeting was called and the issue was resolved.

The Claimant testified that on 21st April, 2014 three(3) board members were appointed to investigate who was recruiting workers to join the union. Their findings was that one of the workers forged signatures purporting that workers had joined the union.

The Claimant testified that during his disciplinary hearing the subject of discussion was about school workers joining the union but this was not stated in both the letter inviting him for the disciplinary hearing and the letter of summary dismissal. The claimant further testified that he was aware about the provisions of clause 16 of the code of conduct for Employees of Friend's School Bokoli on disciplinary procedure and that the Respondents did not comply with the provisions. The Claimant testified that he believed the reason for his dismissal was joining Kenya Union of Domestic Hotels Educational Institutions Hospitals and Allied Workers (KUDHEIHA WORKERS)

### **Respondent's Case**

The Respondent's Case is that the Claimant was summoned to appear before the board to clarify on several issues. He was served with the summons on 25th April, 2014 and it was during the proceeding before the Board that the truth was revealed. RW1 testified that the Claimant was given a chance to prepare and respond to the charges against him.

RW1 testified that the Claimant was never confirmed in his employment as his 4 months probation was extended, and that is why upon dismissal he was paid one months salary in lieu of notice and salary for April, 2014. The RW1 also testified that the Claimant was asked to produce release letters from his former employer but did not do so. He further testified that the Claimant is not entitled to damages as he was not wrongfully terminated.

Under cross examination RW1 admitted that there were a lot of lapses in the claimant's disciplinary process as he was not allowed to examine witnesses who gave evidence in his absence, was not informed of the charges against him before the disciplinary hearing and was not informed of his right to be accompanied by a fellow employee or union representative to the disciplinary hearing.

### **Issues and Determination**

The issues for determination as framed by the claimant are the following:-

- (i) Whether the Claimant was unfairly dismissed.
- (ii) Whether the Claimant was still serving under probation at the time of his termination.
- (iii) Whether the Claimant is entitled to three months notice.
- (iv) Whether the Claimant is entitled to damages for wrongful termination.

Section 41 of the Employment Act provides for the disciplinary procedure to be adopted before an employee is terminated or dismissed as follows;

#### ***41. Notification and hearing before termination on grounds of misconduct***

*(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.*

The Respondent's Code of Conduct also provides for disciplinary procedure at clause 16 as follows;

a) No order of punishment shall be issued without affording opportunity of hearing and giving explanation by the employee. In case of a misconduct, omission and or commission on the part of an employee, the principle shall issue as charge sheet giving the nature of misconduct requiring him to submit his explanation within a fixed period. After receipt of the explanation from the employee, the principal will consider the same and in case he finds it unsatisfactory or in the event of non-submission of any explanation or accepting the guilt, the principal may recommend action by the Board of Governors.

b) The delinquent employee shall present himself/herself at the assigned time to the Board for inquiry into the alleged misconduct against him when called upon to do so. If the employee charged with misconduct fails to appear at the inquiry session for reasons, which the Board considers unsatisfactory, the enquiry shall proceed ex parte in his absence.

c) The employee subjected to inquiry shall be permitted to be assisted by a or employee of the school. No outsider or legal practitioner shall be allowed to assist or defend him in the inquiry. The employee shall be permitted to cross-examine a witness deposing in support of the charges and also to produce witnesses, if any, in his defence. The principal may appoint any of the staff members as representative of the management to represent in the enquiry.

d) On the conclusion of the inquiry, the Board shall record its findings \_\_\_\_\_ and whether all or any of the charges levelled against the employee are established together with reasons, make a determination.

e) The employee concerned shall be furnished with a copy of the report of the Board by the principal in writing giving him/her notice stating the action proposed to be taken, if adverse, call upon him to mitigate the proposed action.

f) On receipt of the mitigation if any, made by the employee, the Board shall determine the penalty, if any, to be imposed on the employee and same shall be communicated to him in writing.

RW1 admitted that the disciplinary process adopted in the case of the Claimant did not comply with either the code of conduct or the Employment Act and that there were lapses.

Section 45(1) and (2) prohibit the unfair termination of employment. The section provides as follows;

#### **45. Unfair termination**

*(1) No employer shall terminate the employment of an employee unfairly.*

*(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.

The Summary Dismissal of the Claimant was therefore procedurally unfair. The grounds for termination were also not proved. The letter summoning the Claimant for the disciplinary hearing did not state the charges against the Claimant. The letter did not even state that it was a summons to the Claimant for a disciplinary hearing. The minutes of the disciplinary meeting however state as follows;

**WILSON SIMIYU MASINDE** - Chief Security Officer

- Employed on 5th October, 2013

**Charges:**

1. Complaining in every meeting for arrears the management was not aware of.
2. Complained the salary he receives was far too little.
3. Ever rumour mongering i.e. that the Bokoli is known for refusing leaders.
4. Ever at logger heads with fellow workers.
5. Ever agitating the issues of workers in an inciting manner - terming them as "**Maziwa lala**"
6. Found with an inciting leaflet - claimed was the students - which he rushed to the market to photocopy without the administration's knowledge. Still even after the office learning about the leaflet, he was not ready to give it to the Principal until forced.
7. Had no respect for his seniors and juniors equally - was the type of "know it all".
8. In-subordination, claiming the office never supported him when he reported theft cases, yet all his reports were listened to and a way forward taken collectively.

**Response:**

- He confessed that the school still owed some arrears but could not say the exact amount, he only said, was from October 2013 to January 2014 (four months)
- Could not say whoever forged workers' signatures on the KUDHEIHA List, even as a security officer, but claimed could only do that if given time.
- Denied to have delayed with the leaflet from the students, even photocopying it. He claimed that, that was formulation from the Principal.
- Claimed the school administration was part of his problems by being so slow to solve his problems/cases.
- He could not produce the release letter from his previous employer - Mumias Sugar company, he promised that he could only find it after two days. He was found very unreliable, rude and could be insecurity to the school by himself.

Following the conclusion of the cases, verdicts were drawn:- These were unanimously supported by all the members.

1. MR. CHIKATI ELIUD - He was to be given summary dismissal.
2. MS. CHETO BETTY - Was absolved.
3. MS. TOYWA IRINE - To be given a strong warning letter.
4. MR. NYANGESA STEPHEN - To be given a strong warning letter but given his appointment letter.
5. MS. SHIATI BEATRICE - Summary dismissal.
6. MR. MASINDE WILSON - Summary dismissal.

The letter of dismissal states that the grounds for dismissal are incitement, insubordination and disrespect to school management. The minutes of the disciplinary meeting do not reflect any of the grounds for which the Claimant was summarily dismissed.

Section 43 of Employment Act provides as follows;

#### ***43. Proof of reason for termination***

*(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.*

*(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.*

From the foregoing there was no proof of valid reason for dismissal. I therefore find and declare that the summary dismissal of the Claimant was unfair both procedurally and substantively.

#### **Probation**

The Respondents averred that the Claimant was still on probation at the time of his summary dismissal hence the payment of one months salary in lieu of notice instead of the 3 months salary provided for after probation in the Code of Conduct.

Section 42 of the Employment Act provides for probationary employment as follows;

#### ***42. Termination of probationary contracts***

*(1) The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.*

*(2) A probationary period shall not be more than six months but it may be extended for a further period of not more than six months with the agreement of the employee.*

*(3) No employer shall employ an employee under a probationary contract for more than the aggregate period provided under subsection (2).*

*(4) A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice.*

In the present case the probationary period was for 4 months and was never extended. It was the duty of

the Respondent to inform the Claimant of any extension of the probationary period which it did not.

The Respondents argue that because the Claimant was not confirmed, he was under probationary employment at the time of summary dismissal and the Respondents Code of Conduct provides for one months notice or payment of one months in lieu thereof.

Clause 17 of the Code of Conduct provides as follows;

- a) The Board of Governors may terminate the services of an employee on administrative grounds in the interest of the institution by giving three month's notice or salary in lieu of such a notice.
- b) A permanent employee, desirous of leaving the institution, shall give three working months notice or three-months pay in lieu of notice to the principal before leaving.
- c) Notwithstanding anything contained in this rule, no notice shall be necessary in the termination of service of a probationer.
- d) Notwithstanding what is stated above, the management reserves its right to refuse or to accept the resignation of an employee when disciplinary proceedings are pending against him or for a breach of contract or for any such reason.

It was argued for the Claimant that Clause 1 of the Claimants letter of appointment stated that his probation was for 4 months and may be extended if necessary. It was argued further that the Respondent did not establish that it sought the consent of the claimant before extending his probationary period.

The Employment Act is explicit on the manner of extension of a probationary period. Extension of a probationary period can only be for grounds of non-performance or non-suitability for the job, both of which cannot be presumed, but must be brought to the attention of the employee who must agree to the extension as provided under section 42 of the Employment Act. The Respondent who was responsible to inform the Claimant of the extension of his probationary period cannot hide behind its own failure to do so to disentitle the Claimant of a benefit, unless the employee is made aware and consents to extension of a probation, there can only be a presumption that the probationary period was successfully served and the employee presumed to have been confirmed. The corollary is that the employment contract of the employee ought to be terminated for failure to successfully serve the probationary period is mutually extended.

For these reasons I find and hold that the Claimant's probationary employment expired upon the expiry of the 4 months probationary period and he is deemed to have been confirmed into employment at expiry thereof.

The Respondent relied on the following authorities:-

1. Abraham Gumba v Kenya Medical supplies Authority Nairobi Industrial Court Cause No.1073 of 2012 (2014)eKLR. In this case the Court awarded the Claimant 10 months salary as compensation but rejected the prayer for general damages and anticipatory salaries.
2. Rift Valley Railways(K) Limited v Kiya Kalakhe Boru where the Court of Appeal upheld an award of compensation of 12 months salary.
3. Hosea Njeru Kagondo v Kenya Union of Commercial Food and Allied Workers [2012]eKLR. In this case the court held that all awards under section 49 of the Employment Act are subject to deduction of Income Tax.
4. Danish Jalang'o & Another v Amicabre Travel Services Limited [2014]eKLR. In this case the court held that an employee under probationary employment is not protected by the provisions of section 43 and 45 of Employment Act and Article 41 of the Constitution.

## Remedies

The Claimant prayed for 3 months salary in lieu of notice. The Claimant's last salary was Shs.12,730. He is entitled to Shs.38,190 which I award him.

The Claimant also prayed for maximum compensation in the sum of Shs.136,440 being 12 months salary.

The Claimant had worked for barely 7 months and under normal circumstances I would have awarded him minimal compensation. However in this case it is obvious from the minutes of the claimant's disciplinary hearing and from the testimony of the Claimant which was not controverted by the Respondent, that the dismissal of the Claimant and that of his other colleagues who were also subjected to the same disciplinary proceedings were actuated by their joining the membership of KUDHEIHA. The Claimant was accused by RW1 in his testimony of allowing Union officials entry into the school compound. The Respondent did not deny the Claimant's testimony that just a few days before the disciplinary hearing, that is on 21st April 2014, a committee of 3 board members was created to investigate the issue of union membership.

Article 41 of the Constitution protects the right of every employee to form, join and participate in the affairs of a trade union. Article 36 protects the freedom of association. Section 46 of the Employment Act also provides as follows:-

### **46. Reasons for termination or discipline**

*The following do not constitute fair reasons for dismissal or for the imposition of a disciplinary penalty—*

- (a) a female employee's pregnancy, or any reason connected with her pregnancy;*
- (b) the going on leave of an employee, or the proposal of an employee to take, any leave to which he was entitled under the law or a contract;*
- (c) an employee's membership or proposed membership of a trade union;*
- (d) the participation or proposed participation of an employee in the activities of a trade union outside working hours or, with the consent of the employer, within working hours;*
- (e) an employee's seeking of office as, or acting or having acted in the capacity of, an officer of a trade union or a workers' representative;*
- (f) an employee's refusal or proposed refusal to join or withdraw from a trade union;*
- (g) an employee's race, colour, tribe, sex, religion, political opinion or affiliation, national extraction, nationality, social origin, marital status, HIV status or disability;*
- (h) an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation; or*
- (i) an employee's participation in a lawful strike.*

(Emphasis added).

Dismissal on account of joining trade union membership or participation in union activities such as recruitment of members which the Claimant was accused of is therefore more than an unfair dismissal. It is a violation of a constitutional right guaranteed by the constitution and must be appropriately protected and its breach compensated.

For these reasons, I award the Claimant 12 months salary as compensation in the sum of Shs.152,760. I must clarify here that the figure awarded is higher than that prayed for by the Claimant as the Claimant used his net salary instead of gross salary as provided for in the Employment Act. The correct gross salary is contained in the salary schedules produced by the Respondent as an annexure to the written submissions.

### **Conclusion**

In conclusion, I make the following orders:-

1. Declare the summary dismissal of the Claimant unfair both substantively and procedurally for failure to prove both fair procedure and grounds of dismissal.
2. I award the Claimant 3 months salary in lieu of notice in the sum of Shs.38,190 and compensation in the sum of Shs.152,760 making a total award of Shs.190,950.
3. The Respondents shall pay the Claimant's Costs for this suit.
4. The decretal sum shall attract interest at court rates from the date of Judgement.

**Dated, Signed and Delivered this 14th day of July, 2016**

**MAUREEN ONYANGO**

**JUDGE**