



REPUBLIC OF KENYA
IN THE EMPLOYMENT & LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 53 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

ELIUD CHIKATI.....PETITIONER

-Versus-

THE CHAIRMAN, B.O.G. FRIENDS SCHOOL BOKOLI...1ST RESPONDENT

THE PRINCIPAL FRIENDS SCHOOL BOKOLI.....2ND RESPONDENT

J U D G E M E N T

The Claimant was employed by the Board of Governors of Bokoli Friends School as a watchman on 1st December 2004 and worked for the Respondent until 29th April, 2014 when he was summarily dismissed from employment. The Claimant argues in his Memorandum of Claim that the dismissal was unfair as the Respondents failed to comply with the Code of Conduct for Employees of Friends School Bokoli, a copy of which the Claimant annexed as an appendix to his Memorandum of Claim. The Claimant seeks the following remedies:-

- (i) Three months salary in lieu of notice Shs.44,400.
- (ii) Damages for wrongful dismissal Shs.177,600.
- (iii) Costs of the suit and interest.

The Respondents filed a defence denying the allegations by the Claimant. The Respondents aver that the Claimant was summoned to appear before the board on 28th April, 2014 by letter dated 25th April, 2014 and was duly informed of the charges against him. The Respondent avers that it complied with its Code of Conduct for Employees and that the claimant was found guilty of misconduct following which he was summarily dismissed.

At the hearing of the case the Claimant testified on his behalf. The 2nd Respondent testified on behalf of the Respondents. The parties thereafter filed and exchanged written submissions.

The Claimant testified that on 27th April 2014 he was called on his cell phone by the Respondent's messenger at around 8pm and informed that he was required to appear before the school board on 28th April, 2014. He went to school in the morning and was issued with a letter dated 20th April, 2014. The letter did not state why he should appear before the Board. He testified that when he arrived in the Boardroom he was not allowed to sit or say anything. He was told to go the following day to collect his

letter of dismissal.

He testified that earlier on 23rd April, 2014 some board members went to the school and told him that he should withdraw from the union or he would be sacked. He testified that he was dismissed because of engaging in union activities.

He denied that he received the letter summoning him for the meeting on 25th April, 2014 as indicated in the delivery book and stated that he was only shown where to sign in the delivery book which already had a date. He stated that on 26th September, 2008 he was issued with a letter prohibiting him from joining the union.

The Claimant testified that his last salary was Shs.9,500, that it was reduced from Shs.14,800 in 2012 when he was transferred to work in the bakery from his guarding duties. He complained about reduction of his salary and was told it was because he had joined the union. He testified that before he was dismissed, he was called for several meetings where he was threatened with dismissal if he did not withdraw from the union.

For the Respondent Mr. Conrad Walumbe Wanjala the 2nd Respondent, testified that the Claimant was issued with the letter summoning him for the disciplinary hearing on 25th April, 2014 and signed for it. That he appeared before the board and was given an opportunity to defend himself. He denied that the Claimant's salary was reduced from Shs.14,800 to Shs.9,300. He testified that after dismissal the Claimant was offered his terminal benefits but refused to accept the cheque. He stated that the Claimant was not entitled to the remedies sought except the amount that had already been offered to him as terminal dues.

Findings and Determination

I have considered the pleadings and the testimony of the Claimant and the 2nd Respondent. I have also considered the written submissions.

The issues for determination are whether the Claimant was unfairly dismissed and whether he is entitled to the remedies sought.

Section 41 of Employment Act provides that before an employer dismisses any employee, the employee must be given an opportunity to respond to charges against him. The charges must be in writing. The employee must be given the opportunity to be accompanied by a union official or a fellow employee to the disciplinary hearing and the employer must hear representations by the employee and by the person accompanying him to the disciplinary hearing.

In the present case the Claimant states that he was called on phone on the evening before the hearing and informed to appear before the Board the following day. He was issued with the summons on the day of the hearing and the summons did not state why he was appearing before he board.

Although the respondent denied issuing the summons on the day of the hearing, it is obvious from the summons itself that the Claimant was not informed of the charges against him or given an opportunity to be accompanied by either a union official or a colleague to the disciplinary hearing.

The letter merely states;

"RE: SUMMONS TO APPEAR BEFORE FULL BOM ON 28TH APRIL, 2014 AT 11.00 AM

You are hereby asked to appear before the full BOM meeting on the above mentioned date and time to clarify issues concerning the school workers."

Please expedite.

The letter is signed by the Principal/Secretary BOM, the 2nd Respondent herein who is also PW1. That does not constitute a summons to a disciplinary hearing as it does not state so.

The Respondents Code of Conduct for Employees of Friends School Bokoli also elaborately provides at clause 16 for procedure for disciplinary action 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 principal shall issue a 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 of 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 co-employee of the school. No outsider or legal practitioner shall be permitted 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.*

The Respondent's obviously did not comply with its own disciplinary procedure in the case of the Claimant.

The summary dismissal of the Claimant was both procedurally and substantively unfair as the claimant was never informed of the charges against him and there was no evidence or proof of the grounds stated in his letter of dismissal. It is also obvious from the Respondent's bundle that the Claimant was dismissed for engaging in union activities as alleged by the Claimant.

The Claimant prayed for notice and compensation. Having been unfairly dismissed and especially on grounds of union activity which is prohibited by section 47 of the Employment Act, sections 4 and 5 of the Labour Relations Act and Article 41 of the Constitution and taking into account his length of service, I award the Claimant 12 months gross salary as compensation. The Claimant is also entitled to 3 months salary in lieu of notice as provided at clause 17(a) of the Respondents Code of Conduct.

I therefore award the claimant a sum of Shs.111,600 being 12 months salary and Shs.27,900 being 3 months notice. The Respondents shall also pay Claimants costs of the suit and the decretal sum shall be subject to interest at court rates.

Dated, Signed and Delivered this 6th day of July, 2016

MAUREEN ONYANGO

JUDGE