



**REPUBLIC OF KENYA**

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

**CAUSE NO. 7 OF 2012**

**(Formerly Cause No.568 of 2011 in the Industrial Court at Nairobi)**

**DUNCAN MUNGUTI**

**MAINA.....CLAIMANT**

**-VERSUS-**

**THE BOARD OF GOVERNORS, MUGEKA SECONDARY  
SCHOOL.....RESPONDENT**

**(Before Hon. Justice Byram Ongaya on Friday 9<sup>th</sup> September, 2016)**

**JUDGMENT**

The claimant filed the memorandum of claim on 14.04.2011 through Muchoki Kang'ata & Company Advocates. The claimant subsequently changed its advocates to J.N. Mbutia & Company Advocates.

The claimant prayed for judgment against the respondent for:

- a) Notice Kshs.13, 426.00.
- b) Accrued annual leave Kshs.108, 440.80.
- c) Unpaid salary Kshs.13, 426.00.
- d) Underpayment Kshs. 771, 120.00.
- e) House allowance Kshs.241, 668.00.
- f) Service gratuity Kshs.77, 457.70.
- g) Unfair dismissal Kshs. 161, 112.00.
- h) Any other order deemed fit to grant.

The respondent filed the memorandum of response on 23.02.2016 through F.O. Makori, Litigation Counsel, for the Attorney General. The respondent prayed that the memorandum of claim against it be dismissed with costs.

The claimant was employed by the respondent as an accounts clerk effective 04.10.2001. The claimant

was assigned to keep books of accounts and to maintain stores. He was paid Kshs.7, 000.00 per month and all inclusive.

The respondent scheduled a meeting for 26.11.2010 and the claimant arrived early on that date to arrange for the meeting. The school principal summoned the claimant at about 9.00am and handed to the claimant the letter dated 24.11.2010 inviting the claimant to appear before the respondent the same date, 26.11.2010, at 10.00am without failure. The claimant attended the meeting and was given another letter dated 24.11.2010 alleging chronic absenteeism by the claimant thus for 7 days from 15<sup>th</sup> to 22<sup>nd</sup> June 2010, for 22 days from 5<sup>th</sup> August to September during the August holidays, 3 days from 11<sup>th</sup> to 13<sup>th</sup> October, 3 days from 19<sup>th</sup> to 21<sup>st</sup> October, and 5 days from 8<sup>th</sup> to 21<sup>st</sup> November. The letter invited the claimant before the Board of Governors to prove why disciplinary measures should not be taken against the claimant. The claimant denied absence from duty on the specified dates and the Board advised him to go home and to wait for a letter on further steps in the matter. On 05.01.2011 the claimant received the letter on summary dismissal dated 26.11.2010. The letter stated that it had been decided that the claimant be summarily dismissed from his job as the accounts clerk due to gross misconduct and ineptitude as per minute 5/11/10 of 26<sup>th</sup> November 2010 by the respondent.

The claimant testified that he had not been absent from duty as was alleged. Further, he did not have a smooth relationship with the school principal because the school principal withdrew large sums of money and failed to give the claimant the relevant records on the withdrawals. The principal then required the claimant to update the accounts records without the necessary supporting evidence. In documents filed in court the claimant showed that such withdrawals by the principal included a sum of Kshs.325,566.00 as set out in the particulars of malice in the memorandum of claim. By the letter of 11.01.2011 the claimant reported his said concerns to the Provincial Director of Education. The claimant also testified that the principal had withdrawn Kshs.1, 400,000.00 being a grant to the school by the Ministry of Education but relevant records had not been provided. The claimant's case was that it was his concerns about the improper application of school funds that the respondent decided to maliciously terminate his employment and that he had never been absent from duty on the alleged dates.

The respondent relied on the documents on file as confirmed by RW, the respondent's principal at the time of the hearing of the case. The principal or a member of the respondent at the time of the claimant's disciplinary hearing was not called to testify.

The **1<sup>st</sup> issue** for determination is whether the termination was unfair. The court has considered the material on record including the submissions made for the parties. The court has revisited the respondent's minutes of the meeting held on 26.11.2011. The relevant record is at minute 5/11/2010. Prior to the claimant being allowed into the meeting, several issues about his service record and the allegations against him were discussed. The summary of those issues is as follows:

- a) The claimant's personal file lacked the relevant letter of appointment.
- b) The claimant's work was shoddy and had been subjected to corrections.
- c) The claimant was allegedly involved in chronic absenteeism.
- d) Property and money had been lost from the office.
- e) The claimant had been lazy and had failed to complete books of accounts for 3 years and failed to prepare the trial balances.
- f) The claimant lacked respect for authority for example writing a disrespectful letter to the respondent asking for a salary increment.
- g) Failure to update the principal on the submissions of NHIF and NSSF statutory subscriptions.

A document detailing the conduct of the claimant was then tabled and the claimant was called into the meeting. The record shows that the claimant was then required to explain why he could not perform to expected levels. The record shows the accountant stated that he had performed well.

The court finds that there is no reason to doubt that the only allegations that the claimant received related to the alleged chronic absenteeism. The court further finds that throughout the respondent's deliberations on 26.11.2011 the respondent failed to specifically deliberate and establish the veracity of the alleged chronic absenteeism. Instead, the record of the meeting shows that the respondent preliminarily deliberated the general allegations against the claimant and whose particulars were never addressed to the claimant prior to the meeting or at the meeting. The court returns that the procedure adopted by the respondent to terminate the claimant's employment failed to afford the claimant a fair opportunity to defend himself. Further and more important, the court finds that as at the time of termination, the respondent has failed to show that the alleged chronic absenteeism had been established as was levelled against the claimant. The materials on record show that the allegations remained simply that; mere speculative propositions that were not established at all. In the circumstances the court returns that the termination was unfair for want of a valid reason for termination as envisaged in section 43 of the Employment Act, 2007. The court has considered the claimant's otherwise dedicated service. The court has considered that the aggravating factor that the principal had made it difficult for the claimant to work as narrated in the claimant's evidence. The court has further considered that the claimant never contributed to the termination and he desired to continue in employment. Thus he is awarded **Kshs.84, 000.00** being 12 months' gross salaries at Kshs.7, 000.00 per month under section 49(1) (c) for the unfair termination.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to the other remedies as prayed for. The court makes findings as follows:

- a) The claimant is entitled to **Kshs.7, 000.00** in lieu of the one month termination notice under section 35(1) (c) of the Employment Act, 2007.
- b) The claimant served for 9 years without taking annual leave and is awarded **Kshs.63, 000.00** at a month's pay for each year served under section 28 of the Act.
- c) The claimant is awarded **Kshs.7, 000.00** being unpaid salary for November 2011 during which the claimant worked but was not paid.
- d) The claimant failed to establish and to justify the alleged underpayment of Kshs.771, 120.00 and the prayer shall fail.
- e) The claimant testified that the agreed consolidated pay was Kshs. 7,000.00 per month and the prayer for house allowance Kshs.241, 668.00 will therefore fail as lacking justification. Section 31 (2) of the Act entitled the parties to agree to such consolidated pay and there was no evidence that the pay did not include an element or intention that the claimant provides himself reasonable housing accommodation.
- f) The claimant was a member of NSSF and did not submit on gratuity as prayed for and the prayer is deemed to have been abandoned as unjustified.

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

- a) The respondent to pay the claimant a sum of **Kshs.161, 000.00** by 01.12.2016 failing interest to be payable thereon at court rates till full payment.
- b) The respondent to pay costs of the suit.

**Signed, dated and delivered in court at Nyeri this Friday, 9<sup>th</sup> September, 2016.**

**BYRAM ONGAYA**

**JUDGE**