



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.263 OF 2015

(Before D. K. N. Marete)

DOUGLAS ONYONGO OGETO.....CLAIMANT

VERSUS

THE BOARD OF MANAGEMENT NYANGWETA

S.D.A MIXED SECONDARY SCHOOL.....RESPONDENT

JUDGMENT

This matter was originated by way of a Memorandum of Claim dated 13th November, 2016. It does not disclose an issue in dispute on its face.

The respondent in a Reply to Memorandum of Claim dated 24th December, 2015 denies the claim and prays that the same be dismissed with costs.

The claimant's case is that he was suspended by the respondent on 25th May, 2015 after a twelve and a half year (12½) stint of service. At the time of suspension his gross salary was Kshs. 19,000.00.

The claimant's further case is that the conduct of the respondent and the suspension are illegal, demeaning, embarrassing and punitive and these should not be encouraged in a civilised society. His further case is that he is willing to go back to work and in the alternative seeks compensation for loss of earnings till retirement at 60.

The claimant further avers that the inaction of the respondent is an affront to S. 35, 41, 44, 45, 49 and 51 of the Employment Act, 2007. It was unlawful, unwarranted and is a threat to the fundamental freedoms of workers. It is also discriminative and violates the rights of the claimant and is contrary to the constitution.

He claims as follows;

1. *Reinstatement of the Claimant to his position without loss of benefits. IN THE ALTERNATIVE compensation for loss of prospective future earnings till retirement.*
2. *A declaration that the purported disciplinary proceedings are a nullity.*

3. Salary arrears from the date of suspension to date.
4. A maximum compensation for wrongful dismissal as per Section 49 (c) of the employment Act.
5. A Certificate of Service as per Section 51 of the Employment Act.
6. Costs and interest.
7. Any other relief this Honourable court may deem fit to grant.

The respondent denies the claim and adds that;

“The Respondent admits the contents of paragraph 4 of the memorandum of claim save to add that the claimant upon learning of the criminal investigations and upon receipt of the notice to explain his performance elected to opt out besides, failing or refusing to answer to the allegations. The respondent avers that the complaints leveled against the claimant include and are not limited to physical assault to a teacher, collection of funds and expenditure without authorization, failure to produce original Kenya Certificate of Secondary Education certificate, refusal to issue receipts for money collected and threatening teachers authorized to collect the fees, preparing payroll and implementing and commencing implementation without authorization, implementing salaries increment without authorization or ratification. Receiving fees vide personal M-pesa number, failing to disclose personal conflict to the tendering committee, failing to issues workers with receipts in respect of school fees deductions from salaries, writing offensive SMS to the principal, taking iron sheets and bags of cement from an hardware and billing the school.”

The respondent further that;

“Paragraph 8&9 the memorandum of claim are admitted. The respondent, however, avers that the claimant's claim/suit is defective, incompetent, fictitious, bad in law and same craving from dismissal. An application seeking to strike out and or dismiss the same shall lie as the earliest opportunity.

She therefore prays that the claim be dismissed with costs.

The matter came to court severally until the 7th May, 2016 when it was agreed on a disposal of the case by way of written submissions.

The claimant in his written submissions reiterated his case as claimed. The respondent however rebutted this by submitting that the termination was due to misconduct in the performance of his duties and his unsatisfactory answer to notices to show cause. This is as follows;

“The claimant was an employee of the Respondent serving as a School Clerk/Accounts Clerk. Sometime in the year 2015 the Board of Management of the school received information of improprieties and suspicious transactions perpetrated by the claimant in the course of duty or purported course of duty. The respondent Board of Management then in office convened a Board of Management session in which the claimant was invited to explain; indeed show cause to a raft of allegations pertaining to his conduct on the claimant's part in discharge of official functions. The notice to show cause served on the claimant contained allegations of grave intensity and extreme and callous conduct on the part of the claimant.

The allegations numbered 21 and were forwarded to the claimant vide letter dated 7th July, 2015 constituting the Respondent's exhibit Number 4 in the list of documents filed by the respondent.

It is therefore her submission that the claimant's dismissal from employment was fair and legal and in accordance with the law. She puts it thus;

“The Respondent avers that the dismissal from employment was fair and legal; and in line with the provisions of the Employment Act and the claimant's right to fair hearing.

The respondent further submits compliance with the process of substantive and procedural justice as enunciated in S.41 (1), 42 and 43 of the Employment Act, 2007 as follows;

Section 41 (1) of the Employment Act provides that an employer shall, before terminating the employment of the employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reasons 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 explanation. 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.....

.... we submit the claimant was availed the said rights and that his dismissal was fair and lawful. He was accorded the right to be heard as provided in Section 41 hereinabove quoted.

The issues for determination therefore are;

1. Whether the termination of the employment of the Claimant by the Respondent was wrongful, unfair and unlawfully.
2. Whether the Claimant is entitled to the relief sought.
3. Who should pay costs of the suit.

The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawfully. It is the claimant's case that this was for the respondent and denies the same.

The claimant in his written submissions reiterates a case of unlawful termination of employment as pleaded but this is rebutted through the respondent's case and submissions. It is the respondent's case that the claimant was served with a show cause letter enlisting twenty-one (21) allegations of misconduct. He was invited to answer the charges and acknowledged service but altogether refused to respond to the same. The decision on dismissal was therefore apt in the circumstances and coated with lots of legality. I therefore find a case of lawful termination of employment and hold as such. This answers the 1st issue for determination.

On a finding of lawful termination of employment, the claimant becomes disentitled to the relief sought. This clears the matter *in toto*.

I am therefore inclined to dismiss this claim with orders that each party bears their own costs of the claim.

Delivered, dated and signed this 14th day of November 2016.

D.K.Njagi Marete

JUDGE

Appearances

1. Mr. Makori instructed by Makori Nyang'au & Company Advocates for the Claimant.
2. Mr. Nyambega instructed by Mose Nyambega & Company Advocates for the Respondent.