



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.21 OF 2014

(Before D. K. N. Marete)

GEORGE KIPROTICH KORIR.....CLAIMANT

VERSUS

THE BOARD OF GOVERNOR, TENWEK HIGH SCHOOL.....RESPONDENT

JUDGMENT

This matter was brought to court by way of an Ammended Memorandum of Claim dated 3rd March, 2014. The issues in dispute are therein cited as;

- a) *Unfair termination*
- b) *Failure to serve termination notice*
- c) *Reinstatement and payment of damages*
- d) *Non-payment of terminal dues*
- e) *Underpayment of salary and allowances in issues in dispute*

The respondent in a Respondent's Memorandum of Response dated 10th December, 2013 and Supplementary Memorandum of Response to the Ammended Memorandum of Claim amended on 7th April, 2014 refutes the claim and prays that the same be dismissed with costs.

The claimant's case is that on 15th December, 2000 he was appointed as a security officer by the respondent. On 21st March, 2012, the respondent issued the claimant with a letter of interdiction on allegations of constant indiscipline and claims that he had stolen 50 Kilos of rice from the Kitchen Store. The interdiction letter also referred to an earlier one dated 12th January, 2011 where he had been given a last warning. He made a response to these allegations vide a letter dated 23rd July, 2012.

The claimant's further case is he later received letters dated 25th July, 2012 and 15th

August, 2012 requiring him to appear before the Board of Management where he was not afforded a fair hearing. He was not given an opportunity to defend himself and neither was he informed of his right to have a colleague or representative of the union during the hearing.

His further case is that he sufficiently answered the allegations leveled against him and that the previous warnings, which were used against him were no longer applicable. A period of more than 1 year having lapsed since the date of the last warning. At any rate those issues had been fully addressed - see GKK 5 being copies of previous warnings. Further, the claimant states that the alleged theft was reported to the police but on hearing his version of the story declined to charge him. He also denied theft and backed this on the fact that he did not have access to the kitchen and again, he had recovered the stolen rice and secured the same as an exhibit in any future investigations.

The claimant avers that in November, 2012 or thereabouts, his service was unfairly terminated and his appeal in a letter dated 23rd November, 2013 was rejected.

The claimant's other case is that the termination subjected him to damages as he is now unable to service his loan of Kshs.150,000.00 and has also lost his earnings.

15. a) The claimant claims that sometimes in 2001 a circular was issued and employees salaries increased. His salary as "Group D" category employee was increased to Kshs.8,163/= from Kshs.6,185/=, house allowance was increased to Kshs.1,900/= from Kshs.1,800/=, leave allowance was retained at Kshs.1,000 and medical allowance increased to Kshs.550/= from Kshs.375/=

16. The claimant however further claims this salary increment to him that was not effected since the year August, 2001, and more specifically he was never given leave allowance at the rate of Kshs.1,000/= per month for the 11 months, years worked. (see bundle GKK 8).

16. a) The claimant states that he has been receiving salary under the category of group C workers and not group D which he belongs and as such has been getting underpaid since the year 2001 to the date of his termination (refer to bundle GKK 8).

17. The claimant raised the issue of his termination with the union and it computed his severance pay at Kshs. 127,226/= but the respondent has to date failed to settle. (see GKK 9)

18. During his interdiction the claimant was not paid half his salary as per the relevant CBA. The provision of the said CBA as regards warning was totally breached as well as other provisions thereof. (see GKK 10).

He claims;

- a) A declaration that his termination was unfair;*
- b) Reinstatement to his previous employment; or;*
- c) In the alternative to (b) above compensation for unfair termination;*
- d) Payment of all his terminal benefits.*
- e) Payment of all sums calculated as underpayment in salary and other allowances.*
- f) Costs of this claim.*

The respondent's case is that she hired the claimant as a security guard in 2001 but denies all the other allegations of the claim and ammended claim.

It is the respondent's further case that she acted within the law and fairness in terminating the services of the claimant. It was indeed the claimant who acted contrary to his duties, terms and obligations as employee.

5. *The respondent states that the claimant has continuously over the years been involved in cases of indiscipline and non-performance of his duties. Of particular are the following incidences:-*

a) *From the 27th October to 5th November 2008 the claimant failed to show up for duty.*

b) *Absconded duty from 4th, to 11th of January 2011.*

c) *On the 14th of November, 2008, the claimant was asked to explain his absence from duty.*

d) *The claimant could not offer a valid reason or at all.*

e) *The claimant has other disciplinary issues including theft.*

f) *Stole on the 19th March, 2012 50kgs of rice from the respondent. The claimant admitted the offence in writing.*

The respondent's further case is that the claimant was afforded an opportunity to be heard in the presence of a union representative and this meeting was followed up with another on the unions request and an amicable solution was reached. In this, the claimant was paid an amount of Kshs.51,385.00 through the County Labour Officer, Bomet and this included his half salary. The claimant received and acknowledged the same. This was his terminal benefits. She further denies the claim as follows;

6. *The respondent denies that there was any circular issued sometimes in 2001 or at any other time directing any salary increment. The alleged increment referred to in paragraph 15 (a) of the amended memorandum of claim is unknown to the respondent.*

7. *The respondent further states that the claimant earned his salaries according to the contract of employment and the respondent's policy and any change thereto from time to time and he had had salary increment accordingly. He had not been underpaid since the year 2001 as alleged. No sum is due therefore as underpayment of salaries or leave allowances denied or at all.*

The matter came to court variously until the 15th July, 2016 when it heard with the claimant restating his case as pleaded. The respondent did not appear and there was no *viva voce* extrapolation of her case.

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. The parties are diametrically opposed on the versions of this. The claimant in his pleadings and evidence reiterates his case of unlawful termination of employment. The respondent denies this and submits a case of massive indiscipline culminating in the dismissal of the claimant. This was after numerous warnings on the part of the claimant and the penultimate case of theft of fifty (50) kilograms of rice from the kitchen store involving the claimant. It is the respondent's further case that the termination of the employment of the claimant was procedural and lawful in that he was invited for disciplinary proceedings before the respondent's board of management where issues relating to the claimant conduct were thrashed out in the presence of himself and union representatives and an amicable solution reached. The claimant was paid an amount of Kshs.51,385.00 through the County Labour Officer, Bomet and this included his half salary. The claim of unprocedural and unfair termination of employment is therefore unfounded.

It would appear that on a balance of probability and preponderance of evidence, this matter tilts in favour of the respondent. The evidence adduced by the respondent is the more probable of the two versions of the parties' evidence. The claimant seems to be involved in mischief and profiteer litigation and this should be nibbed at the bud. I therefore find a case of lawful termination of employment of the claimant by the respondent.

On a finding of lawful termination of employment, the claimant loses his bid on relief. He becomes disentitled to the relief sought.

I am therefore inclined to dismiss this claim with an order 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. Kahuria holding brief for Njoroge and instructed by Kiplenge & Kurgat Advocates for the Claimant.
2. No appearance for the Respondent.