



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

CAUSE NO. 1237 OF 2012

JOHN OKUMU DINDICLAIMANT

VERSUS

THE BOARD OF GOVERNORS JAMHURI HIGH SCHOOL.....1ST RESPONDENT

DAVID KILONZI2ND RESPONDENT

RICHARD MAINA WAMBUGU3RD RESPONDENT

SAMUEL G. KINYUA4TH RESPONDENT

Mr. Ashiruma for the Claimant

Mr. Wabal for the Respondent

JUDGMENT

1. The Claimant filed a Statement of Claim on 19th July, 2012 praying for various terminal benefits and compensation for unlawful and unfair termination as follows;

- i. gratuity at the rate of 30 days pay per completed year of service in the sum of Ksh.171,120.00,
- ii. payment in lieu of one month leave in the sum of Ksh.17,112.00,
- iii. payment in lieu of thirty (30) months' notice in the sum of Ksh.51,336.00,
- iv. reasonable compensation for the unlawful and unfair termination,
- v. provision of certificate of service,
- vi. Costs and interest.

2. **Particulars of Claim**

The Claimant was employed by the 1st Respondent vide letters dated 24th January, 2001 and 22nd January, 2001 in the position of Laboratory Technician.

3. The Claimant served in that position continuously for 10 years until when the Respondent served the Claimant's Advocates with a letter of dismissal dated 1st September, 2011 on 5th September, 2011.

4. Prior, the Respondent had placed the Claimant on suspension vide a letter dated 10th August, 2011.
5. The Claimant states that the suspension and subsequent dismissal were unlawful and unfair for the following reasons;
 - i. the Claimant was accused of false, and unsubstantiated allegations of gross misconduct contained in a letter of suspension dated 10th August, 2011 to wit,
 - a. some potassium iodate was missing in the laboratory,
 - b. that 60 kg gas got finished in the middle of a Chemistry Mock Examination
 - c. insubordinating the Principal and the Board of Governors
 - d. illegal occupation of a school servant quarters without the authority of the Principal and Secretary, Board of Governors
 - e. missing laboratory apparatus and chemicals valued at Ksh.1,164,860.00
6. He was requested to appear before the Board on Tuesday 30th August, 2011, without stating the reason for the appearance and was to hand over immediately and leave the school.

7. Testimony

The Claimant testified that he had been assigned duties of collecting laboratory supplies, filing inventories and ledger, preparation of chemical solutions for practicals amongst other duties by the 1st Respondent which he performed for many years with honesty and diligence until the 3rd and 4th Respondents stated interfering with the Claimant's duties and harassing and intimidating him without any justifiable cause.

8. That on various dates in March and April, 2011, the 4th Respondent forcefully and without any justification took away the Chemistry Ledgers and Inventory from the Claimant's custody and unlawfully forced the Claimant to wash two (2) laboratory floors, to clean windows, cupboards and all benches which the 4th Respondent knew was not part of the duties of a Senior Laboratory staff member, the Claimant.
9. The Claimant wrote letters of complaint on the matter dated 26th April, 2010 and 23rd June, 2011.
10. The 3rd Respondent wrote various letters to the Claimant aimed at harassing, intimidating and frustrating the Claimant in performance of his duties as a Laboratory Technician.
11. The 4th Respondent falsely accused the Claimant for being a thief and for having stolen chemicals and gas from the laboratory without any evidence.
12. On 25th July, 2011, the Claimant wrote to the Chairman of the Board to seek protection from the actions by the 3rd and 4th Respondents.
13. The Claimant told the court that the 3rd and 4th Respondents were fairly new in the school and had allowed private candidates from outside the school to sit practical examinations at the 1st Respondent's school's laboratories without causing them to pay for the consumables used in the process of the said examinations. That moneys paid for the purpose (if) any were not remitted to the school, and this caused the shortages of laboratory chemicals and apparatus, which the 3rd and 4th Respondents falsely accused the Claimant for stealing.
14. The Claimant further told the court that the matter of misuse of the school facilities by the 3rd and 4th Respondents was leaked to the press leading to investigations and arrest of the 3rd Respondent.

15. That the 3rd and 4th Respondents blamed the Claimant for the leakage of the information to the press hence the start of the concerted campaign to remove the Claimant from the school using falsehoods, intimidation and abuse of office.

16. The Claimant urged the court to find that the accusations made against him were baseless and malicious and award him as prayed in the Statement of Claim.

17. The Claimant was closely cross-examined by Counsel for the Respondent and withstood the test well. He came across an honest, candid witness and his testimony was largely consistent with his pleadings, documentary evidence and submissions presented before court.

18. Defence

The Respondents filed a Memorandum of Reply on 23rd October, 2012 in which they denied;

- i. that the Claimant served the 1st Respondent with honesty and dedication,
- ii. stated that the suspension and termination of the Claimant's employment was lawful and fair
- iii. denied ever intimidating, harassing or frustrating the Claimant in the course of his work
- iv. stated that the Claimant exhibited remarkable trend of poor performance in effectiveness, insubordination and incompetence in his work at Jamhuri High School, in that,
 - a. it was usual to find extremely dirty glassware, burette, pipette and cupboards in the Chemistry Laboratory which were served by the Claimant
 - b. that the Claimant was not committed and caused gas shortage during mock examinations
 - c. the Claimant failed to take stock upon request which was his duty to do regularly. This in itself was contrary to the school policy and amounted to insubordination.

19. The Respondent states that the allegation of misuse of the school facilities made by the Claimant were false and pray that the name of the 2nd, 3rd and 4th Respondents be struck off the claim since they acted on behalf of their employer, the 1st Respondent and did not act maliciously in any way towards the Claimant.

20. Testimony

RW1 was the 4th Respondent, Samuel Gitonga Kinyua. He told the court that he was the Head Teacher of Science and taught Physics and Maths. As the head of Science he was in charge of the laboratories. Mrs. Mugambi was head of Chemistry and was immediate Supervisor of the Claimant.

21. RW1 joined Jamhuri School in 2009. He stated that the Claimant performed his work poorly and did not obey instructions from his supervisor.

22. Teachers complained that the Claimant;

- i. did not mix solutions
- ii. was not available when required
- iii. did not clean the laboratories; and
- iv. did not update the records.

23. That the Claimant had the terms of reference in a letter dated 8th August, 2002 which he ought to have followed to the letter. The attempts by RW1 to introduce the letter at this late stage was refused by the court.

24. RW1 became head of Science in 2010. That there were three (3) lab technicians who manned six (6) laboratories. The Claimant was in charge of the junior and senior chemistry labs and his work included

collecting lab supplies, filling ledgers and inventory preparations of chemical solutions and preparing and availing equipment.

25. RW1 told the court that when he took over in 2010, he found the ledgers not well filled and generally all records were not properly maintained.

26. This led to the stock take on 19th January, 2011 by ten (10) teachers and three (3) Lab Technicians which showed a big deficit between the records and the stock in hand.

27. On 22nd June, 2011, RW1, received a complaint that potassium iodate to be used in the mock exams was missing. 1000 grams had been ordered on 19th January, 2011.

28. On 23rd June, 2011, the gas got finished in the course of mock exams though the Claimant had confirmed that gas was adequate. Four (4) gas cylinders had been filled on 6th June, 2011 amounting to 60 kg.

29. RW1 reported about the missing gas and chemicals and went on midterm.

30. RW1 then received a letter from an advocate of the Claimant demanding that he stops harassing the Claimant. This is when a thorough stock take of chemical stock was done. The Claimant had taken stock on 17th July, 2011 and on 20th July, 2011, a joint stock take was undertaken and a report was submitted to the Principal.

31. The witness was cross-examined blissfully especially on the reason why the Claimant who had a good and clean record of work for 10 years had suddenly become so bad upon RW1's take-over as the head of Sciences and coming in of a new Principal RW4.

32. He was also cross-examined thoroughly on the use of the school chemical stocks, equipment and labs by outside students without accountability.

33. He was also questioned on his instructions to get the Claimant, a Senior Technician to mob the laboratory floors and clean the tables and the room at large.

34. Furthermore he was questioned on the alleged misuse of potassium iodate which RW1 had received on 28th January, 2011 personally on behalf of the school.

35. The answers by RW1 on these matters were not satisfactory. He did not come across as a witness telling the truth. The records contradicted his answers on various issues especially regarding the alleged missing stock.

36. RW1 was particularly evasive on the allegations of persistent harassment of the Claimant including attempts to remove him from a school servant quarter which he had occupied for a long time.

37. RW2 was Mr. Richard Maina Wambugu, the 3rd Respondent. He was the Principal of St. Teresa's Boys School in Eastleigh. He was the Principal of the 1st Respondent from 2009. He did not remember when the Claimant joined the school.

38. RW1 told the court that he received a complaint regarding poor performance by the Claimant.

39. RW1 wrote a letter to the Claimant in 2011 asking him to wash glassware at the lab and cupboards. The Claimant did the work pursuant to the letter.

40. RW1 wrote a 2nd letter to the Claimant regarding stocktake. He told the court that the Claimant had not done stock taking for a while and it was not the first time he had asked the Claimant to take stock. He

requested the Claimant to take stock on 4th May, 2011, but it was not done. RW2 wrote again on 5th July, 2011 re-emphasizing the need to take stock. The claimant did not do the stocktake but instead wrote a response to the request. RW2 wrote another letter on 13th July, 2011, demanding that the Claimant conduct a physical stock take to establish the truth about the missing potassium iodate but the Claimant did not take the stock and RW2 organised all Sciences teachers to take the stock with three (3) lab technicians.

41. On 10th August, 2011, RW1 suspended the Claimant from work for the missing stocks and the Board was to sit on 30th August, 2011 on the matter.

42. The Claimant appeared before the Board with a Union Representative. The claimant had requested the Deputy Head Teachers, Mr. Karanja, and the School Bursar, Mr. Bernard Kimaile to appear as his witness. The Board heard the matter for four (4) hours and 34 minutes.

43. The Claimant was given enough time to defend himself. He also put in written submissions.

44. The Board did not find him guilty of all the charges. He was acquitted with respect to charges 1 and 2 on missing gas and potassium iodite but was found guilty of the rest and was summarily dismissed with effect from 30th August, 2011.

45. The Claimant did not come back to hand over. He has however recently collected his cheque for terminal dues in the sum of Ksh.35,451.00.

46. The witness was closely cross-examined. RW2 accepted that the Claimant had worked from 22nd January, 2001 for a continuous period and had no previous warnings and or complaint regarding his work performance.

47. He was at pains to explain why the Claimant all of a sudden became so bad after RW1 and RW2 came to the school and became his immediate supervisor.

48. He was also at pains to explain how the consumables used by external candidates who sat their examinations at the school were accounted for and how this affected the stocks at various laboratories.

49. The witness did not explain satisfactorily the allegation that he started fighting the Claimant when he queried this matter since it directly impacted on his performance and stock taking.

50. The witness did not explain to the satisfaction of the court the allegations of persistent harassment of the Claimant including attempts to get him out of his residence at the school which he had occupied for a long time. The witness as a whole did not come across as one telling the truth to the court.

51. **Determination**

A careful evaluation of the pleadings, the evidence before court and the submissions by the parties has led the court to reach a conclusion of fact that, the Claimant was a good employee who had diligently served the 1st Respondent for a period of 10 years.

52. That his problems began upon RW1 and RW2 assuming office as his immediate supervisors.

53. That the two embarked on a campaign of harassing and frustrating the Claimant for asking questions regarding certain matters concerning his work set out in the Judgment.

54. It is the court's considered view that RW1 and RW2 deliberately targeted the Claimant for harassment and eventual dismissal in order for them to continue with malpractices concerning external candidates who sat examinations at the school without proper payments and accounting to the school.

55.The Claimant has established that his dismissal was not for a valid reason but was deliberately hounded out of his employment.

56.The Respondents have failed to discharge their onus of justifying the summary dismissal of the Claimant who hitherto was a very good employee.

57. The Claimant has suffered loss and damage as a result of the unlawful and unfair dismissal from his employment.

58.He was paid reduced terminal benefits very late when the matter was before court.

59. **Remedy**

Gratuity

This claim is based on the terms of agreement between the Ministry of Education, Science and Technology on the terms and conditions of service of persons employed by the Board of Governors according to the Claimant. Claimant admitted he was registered with and contributions were made to NSSF.The claim has not been sufficiently proved and same is dismissed.

60. **Leave**

The Claimant made a claim for payment of one month's salary in lieu of leave days not taken in his final year at work. The Respondent did not by documentary evidence rebut the claim. The employer is the legal custodian of employment records and where no documentary evidence is led to rebut a claim based on the terms and conditions of service, the court deems the claim to be proven on a balance of probabilities. The award of Ksh.17,112.00 in lieu of leave is awarded.

61. **Notice**

The Claimant seeks payment equivalent to 3 months' salary in lieu of notice. The statutory minimum notice in terms of the **Employment Act, 2007**, is one month's notice or payment in lieu. No documentary evidence is relied upon for the claim of three months. The court awards the claimant one month's salary in lieu of notice in the sum of Ksh.17,112.00.

62.**Compensation**

The Claimant had served the Respondent diligently for a period of 10 years. He was harassed, frustrated and eventually summarily dismissed from work unlawfully and unfairly contrary to the provisions of **Section 45(1)** as read with **Sections 45(2)(a) and (c) of the Employment Act, 2007**.

63. He was labelled a thief without any basis and kicked out of his residence at the school.

64. The Claimant lost his job in an environment which is not easy to get another job in Kenya today especially where as in his case, the employer dismissed him without a certificate of service.

65.The Claimant has not gotten alternative employment to date.

66. The court awards him 12 months' salary as compensation for the unlawful and unfair dismissal in the sum of Ksh.205,336.00.

67.**Certificate of Service**

The 1st Respondent is to provide the Claimant with a certificate of service within 30 days from to date.

68. Total Award

The total award to the Claimant is Ksh.239,568.00.

69. Costs and Interest

The award is payable with interest at court rates from date of the Judgment till payment in full.

70. For the avoidance of doubt, the Judgment is made against the 1st, 3rd and 4th Respondents jointly and severally since the Claimant has proved malice on the part of the 3rd and 4th Respondents.

Dated and Delivered at Nairobi this 6th day of March, 2015.

MATHEWS N. NDUMA

PRINCIPAL JUDGE