



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**  
**COURT OF KENYA AT NAIROBI**  
**CAUSE NO. 171 OF 2008**  
**KENYA UNION OF EMPLOYEES OF VOLUNTARY**  
**AND CHARITABLE ORGANISATION(KUEVACO).....CLAIMANT**  
**VERSUS**  
**TAILORS AND TEXTILES WORKERS UNION.....RESPONDENT**

Mr. Janitor Otieno for the Claimant

M/s Guserwa for the Respondent

**JUDGMENT**

1. The grievant, Cosmas Okongo Orowe, was verbally employed by the Respondent on 3<sup>rd</sup> February, 2003 as an Industrial Relations Officer. The grievant worked continuously until 17<sup>th</sup> March, 2005, when he was issued a letter of termination of employment for failure to carry out his work effectively and for being rude to his supervisor.
2. The grievant was subsequently paid terminal dues as follows;
  - a. one month salary in lieu of notice in the sum of Ksh.16,000.00
  - b. payment in lieu of two months leave days in the sum of Ksh.32,000.00
  - c. arrears salary for days worked in the sum of Ksh.44,000.00 + Ksh.10,460.00

**Total is Ksh.102,460.00**

3. The Claimant seeks on behalf of the grievant, payment, less any substantive payments already made, as termination benefits set out in paragraph 9:02 of the Amended Memorandum of Claim dated 29<sup>th</sup> May, 2012 as follows;
  - a. 17 days salary in March, 2005 – Ksh.9,066.65
  - b. underpayment for 15 months in the sum of Ksh.60,000.00
  - c. 12 months' pay in lieu of a reasonable notice in the sum of Ksh.576,000.00
  - d. 81.25 days accrued and pro rata leave earned at Ksh.43,333.00
  - e. arrear leave travelling allowance for twelve (12) annual (leave taken) Ksh.24,000.00
  - f. four (4) months service gratuity in the sum of Ksh.776,399.95

4. The Claimant Union has attached the Recognition Agreement in place between the Union and the Respondent marked 'A'.
5. The letter of termination dated 16<sup>th</sup> March, 2005 in which is cited failure by the grievant to follow instructions of the Employer on matters pending at the Industrial Court is also attached and marked 'C'. He was sacked by Mr. William Muge Aketch, the Secretary General of the Respondent (the Employer).
6. The grievant wrote a letter dated 18<sup>th</sup> March, 2005 protesting the decision to terminate his employment while explaining the various issues raised in the letter of termination.
7. In short, the Claimant alleges that he was terminated without any lawful cause, was not given a show cause letter and was not given a hearing prior to the termination. The Claimant states that the termination was an arbitrary action of the Respondent's Secretary General without approval of the Board.

### **Response**

8. The Respondent filed its Response to the Claim vide the Memorandum of Response dated 24<sup>th</sup> June, 2013 and filed on the 26<sup>th</sup> August, 2013.
9. The Respondent states that the claim as filed is misconceived, baseless and frivolous.
10. The Respondent states that it had valid reasons to terminate the employment of the grievant in that he failed to follow work instructions and was rude to the Secretary General when called upon to explain his omission.
11. That the grievant threatened to quit his job rather than explain his shortcomings and the Respondent Union lawfully and fairly issued him a termination letter dated 17<sup>th</sup> March, 2005.
12. That the Union followed its constitution in disciplining the grievant and he was given a hearing before his employment was terminated.
13. That he was paid his lawful dues and the claim ought to be dismissed with costs.
14. The Respondent further stated that the grievant accepted to work for the Respondent on verbal terms and should not fault the employer for not giving him a written contract of employment.
15. The Respondent avers that the Claimant cannot be reinstated to his employment ten (10) years down the line.
16. The Claimant is also not entitled to the claim for Ksh.776,399.55 as the Claimant was fully paid his terminal dues.
17. The Claimant is also not entitled to payment of compensation since his employment was terminated for lawful reason and the termination was in terms of a fair procedure.
18. **Issues for determination**
  - i. Was the employment of the grievant terminated for a valid reason and in terms of a fair procedure?
  - ii. What remedy, if at all is available to the grievant?

### **Issue I**

19. The repealed Employment Act, Cap. 226, protects the employment of an employee from unlawful and unfair termination.

20. This Act, is applicable to this matter since the termination took place in 2005, prior to the enactment of the present Employment Act, 2007.

21. The onus is on the employee to *prima facie* demonstrate that a termination of employment took place without a good reason and that the termination was done without following a fair procedure.

22. Once that is done, the burden shifts to the employer to justify the reason for the termination and rebut the evidence by the Claimant that the termination did not follow a fair procedure.

23. In this case, the parties, by consent, chose to rely on the pleadings, documents and submissions filed. Oral testimony was dispensed with.

### **Determination**

24. Having considered the pleadings, documents and written submissions by the parties, the court has arrived at the following conclusion of facts;

- i. the accusations in the letter of termination dated 16<sup>th</sup> March, 2005, by the Respondent against the grievant are not documented elsewhere earlier.

It is therefore safe to conclude that the same were first raised against the grievant in the letter of termination itself.

There is no letter to show cause or charges levelled against the grievant to answer,

- ii. secondly, the court has arrived at the conclusion that no formal hearing was convened to give opportunity to the Claimant to explain why his employment should not be terminated.

No minutes of such a meeting were produced by the Respondent nor are there averments that a formal hearing actually took place other than a confrontation between the grievant and the Secretary General in which the grievant was alleged to have spoken rudely to the Secretary General.

- iii. from the foregoing, the court is not satisfied that the grievant's employment was terminated for a valid reason. Furthermore, the court is equally not satisfied that the employment of the grievant was terminated in terms of a fair procedure.

### **Remedy**

25. The grievant's employment was terminated in 2005 about ten(10) years ago. The remedy of reinstatement is not available to the Claimant therefore.

26. The Claimant was paid terminal benefits set out in paragraph 10 of the Respondent's written submissions in the sum of Ksh.102,460.00. The Claimant has not proved on a balance of probability that the grievant was owed any further benefits as enumerated in the Amended Memorandum of Claim.

27. The court therefore dismisses the entire claim for terminal benefits set out therein.

### **Compensation**

28. The grievant had served the Respondent Union as an Industrial Relations Officer for a

period of over two(2) years. He was treated unlawfully and unfairly by the Respondent, culminating in the termination on 17<sup>th</sup> March, 2005.

29. In terms of Trade Disputes Act, Cap. 234 (now repealed), applicable to the Dispute, which provided for a maximum of 12 months' salary compensation for unlawful and unfair termination, the court awards the grievant eight(8) months' salary as compensation in the sum of Ksh. (16,000.00 x 8) 128,000.00.

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

31. The Respondent is also to pay the costs of the suit.

**Dated at Nairobi this 23<sup>rd</sup> day of April, 2015.**

**MATHEWS N. NDUMA**

**PRINCIPAL JUDGE**

**Delivered by Hon. Hellen Wasilwa on 24<sup>th</sup> day of April, 2015.**

**In the presence of**