



**REPUBLIC OF KENYA**

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

**CAUSE NO. 122 OF 2014**

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL**

**INSTITUTIONS HOSPITALS AND ALLIED WORKERS.....  
CLAIMANT**

**VERSUS**

**BOARD OF MANAGEMENT,**

**CHUGU BOYS SECONDARY  
SCHOOL.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 29<sup>th</sup> May, 2015)

**JUDGMENT**

The claimant filed the memorandum of claim on 19.09.2014 on behalf of its member Andrew Muriiki, the grievant. The claimant prayed for judgment against the respondent for:

- a) Payment of service gratuity Kshs.7,518 x 15 making Kshs. 112,770.00.
- b) Pay in lieu of notice Kshs.7,518 x 3 making Kshs.22,545.00.
- c) The respondent to meet the cost of the cause.

The respondent filed the memorandum of response on 06.11.2014 through the learned litigation counsel F.O. Makori for the Attorney General. The respondent prayed that the claimant's memorandum of claim be dismissed with costs.

The respondent employed the grievant on 1.04.1996 as a night watchman on probationary service and subsequently confirmed him in appointment on 15.04.1996. The grievant testified that he was born in 1961 and further that on 16.11.2011 he was summoned to the respondent's meeting. The meeting followed a warning letter which had leveled misconducts against the grievant. The misconducts as set out in the correspondence were as follows:

- a) On numerous occasions the claimant had performed duties while intoxicated.
- b) On 29.10.2011 the claimant reported for duty at 11.00 pm while drunk after he had been recalled by the respondent's principal to work and the claimant had that night left work again.

- c) The claimant deserted duties from 30.10.2011 to 10.11.2011 without permission.
- d) The letter further referred to the last warning letter dated 27.07.2011 about the claimant's misconduct.

The grievant testified that at the respondent's disciplinary hearing he was told by the respondent that his misconduct was essentially reporting on duty while drunk and lateness. The grievant did not testify about his defence to the misconduct as leveled against him. Throughout the hearing before the court, the claimant never suggested that he had a defence to exculpate himself from the allegations of poor performance and misconduct as leveled against him before and at the respondent's disciplinary hearing. The board decided to dismiss the grievant by the letter dated 7.11.2011.

The respondent's secretary testified that the claimant had received numerous warnings about his poor performance and misconduct culminating in the dismissal.

The parties undertook conciliation proceedings that did not yield an amicable solution; thus the filing of this suit.

The court has carefully considered the pleadings, the evidence and the submissions. Throughout the disciplinary hearing before the respondent and before this court, the grievant has not denied any of the misconduct and poor performance leading to his dismissal.

The court finds that the respondent had a valid reason to terminate the grievant's employment as envisaged in section 43 of the Employment Act, 2007. The grievant was accorded due notice and hearing by the respondent as envisaged in section 41 of the Act. Accordingly, the court finds that the grievant's dismissal was not unfair. While making that finding, taking all the circumstances of the case into account, the court considers that the failure by the claimant to appear at the respondent's disciplinary hearing with a union representative has not been shown to have occasioned miscarriage of justice and the error is excusable as the reason for dismissal has been well established. The court holds that such procedural error, that did not lead to injustice and in view of the established reason for the termination, would be excusable on the respondent's part.

The court further finds that the claimant has failed to establish the justification for the prayers made and the same shall fail.

In conclusion the claimant's suit is dismissed with costs.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 29<sup>th</sup> May, 2015.**

**BYRAM ONGAYA**

**JUDGE**