



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 1329 OF 2011

KENNETH GICHURU CLAIMANT

VERSUS

BOARD OF GOVERNORS ST. TERESA GIRLS

SECONDARY SCHOOL RESPONDENT

JUDGEMENT

1. The issue in dispute is the unfair termination of the Claimant and the non-payment of his terminal dues.
2. The claim filed by the Claimant is against the respondent, an educational institution under the Ministry of Education and represented by the office of the Attorney General as the government legal advisor. The Claimant testified in support of his claim while the Respondent called Kennedy Kilonzo as their sole witness and in support of the respondent's case.

The claim

3. The Claimant was employed by the Respondent on 1st October 1990 as a Bursar at the Respondent school. The claimant's salary was increased over the years and his last salary was Kshs.21, 136.00 per month. He was unionized and his employment was then governed by the Collective Bargaining Agreement between the Ministry of Education and Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers. Before joining the respondent, the Claimant was working with the Ministry of Education, Audit office.
4. The Claimant also states that he served diligently until 6th June 2008 when the Respondent asked him to proceed on annual leave for 30 days and was to end on 11th June 2008. The letter sending him on leave noted that he had not been taking his leave for a long time. On 19th June 2008 the Respondent wrote to the Claimant accusing him of failing to do a hand over. On 5th August 2008 the Claimant received letter dated 1st August 2008 accusing him of failing to hand over accounting documents and that he had been suspended from duty until his case was discussed by the Board. The Claimant replied to the letter expressing shock and noting that he had handed over when he was sent on leave. He was never summoned by the Board and was summarily dismissed on 11th December 2008 without being given a hearing. Only part of gratuity was paid but 228 leave days due were not paid for, there was no notice pay, salary underpayments or compensation for the loss of employment.
5. The Claimant also stated that due process was not followed before his dismissal. The same was thus unfair and is seeking the payment of;

3 months' salary in lieu of notice at kshs.63, 408.00

Annual leave of 228 days at Kshs.185, 341.20

Balance of gratuity at kshs.91, 856.00

Salary arrears for 2007 at Kshs.28, 668.00

For 2008 at Kshs.16,284.00

Compensation at Kshs.253,632.00

6. The Claimant also testified in support of his case and stated that upon his employment by the Respondent his duties were to write accounts, was in-charge of subordinate staff, and was answerable to the Principal of the Respondent school. His terms of employment were subject to the CBA in place at the time. On 6th June 2008 he was issued with a letter by the school principal directing him to proceed on leave as he had not taken such leave in a long time. He did not resume duty as when the leave was complete he was suspended. On 11th December 2008 he was summarily dismissed without warning or being given a hearing. The reasons for the dismissal was that he lacked the professional qualifications for the position he had held for 18 years but had never been called and asked to submit his academic qualifications. He was asked to hand over but the Principal of the school as the accounting officer was the one to receive the hand over report and not the secretary as directed and thus he decided to wait until the principal was ready to do the hand over. The second charge against the Claimant was that he had not updated his work but he noted that the principal then was only 8 months old in the school and the practice was update all accounts at end month or when required by the principal. In this case he was asked to go on leave as he had not done so in a long time and had accumulated 228 days of leave. The principal then asked him to hand over all cheques, vouchers and daily records. The Claimant also had his personal papers in his desk that were kept locked but while he was on leave, the principal called the Ministry and his desk was broken into to access his personal documents.

7. Upon suspension, the Claimant was asked to wait for the Board meeting that was yet to be inaugurated but instead of getting an invitation for a hearing, he received a letter of summary dismissal. The dismissal was not justified as there were no valid reasons for the same. It was an unfair dismissal.

8. Upon termination the Claimant was entitled to his gratuity but was only given Kshs.200,792.00 based on half gross pay for the 18 years served. His due leave days were not paid for or notice noting the dismissal was not procedural and was contrary to the CBA in force at the time.

Defence

9. In defence the Respondent stated that faults were noted in the claimant's work hence the letter issued to him on 7th July 2008 from Provincial Director of Education noting that most of his draft accompanying the books submitted for audit had clerical errors. When the Claimant went on leave he failed to hand over all records and on 9th July he was asked to attend a Board meeting to hand over financial records but failed to attend without any reasonable cause. The Claimant also failed to submit his academic certificates by 13th June 2008 as required as this was an issue raised on the Respondent books of accounts and audit. The competence of the Claimant was an issue that the Respondent was required to address by the auditors since 2006. In an agreement between the Claimant and his union, it was agreed that a sum of kshs.73,348.00 be paid in service gratuity and there is nothing owing unpaid. The Claimant should therefore be dismissed.

10. In evidence, Kennedy Kilonzo, the current Bursar of the Respondent testified that he joined the Respondent in January 2009 and did not work with the claimant. He was told that the previous bursar [the claimant] had not been updating account records and was given the task. Some records were missing and the records of accounts were not tallying. He had to re-do all the records and regularizes the books. He

was also told that the previous bursar did not have the qualifications for the job which required accounting certificate and computer literacy.

11. From the records, the Claimant was paid all his terminal dues, 200,000.00 was paid immediately upon dismissal and later the union agreed to the payment of Kshs.73,000.00 in service gratuity. The Claimant took all his leave days due and there is no record for the 228 now claimed. This was not a case of unfair dismissal as there are valid reasons and he did not meet the basic qualifications for the position held. From February 2008 there were no proper accounts kept and some documents were missing.

12. In cross examination the witness confirmed that all the financial records and accounts of the Respondent prior to 2008 were in good order, the only problem related to the ones for 2008 that had not been updated and some records were missing. There are no Board minutes for any meeting held to discuss the claimant. A sum of kshs.273,000.00 was paid to the Claimant as terminal dues.

Submissions

13. Only the Claimant filed his written submission. These are dated 5th June 2015.

14. The Claimant submitted his dismissal was done in disregard to the provisions of section 41 of the Employment Act as there was no show cause, notice or hearing and the reasons given for the same were not valid. This was therefore an unfair practice and he is entitled to compensation. The claim that there were no proper accounts records kept is not supported by any documentary evidence.

Determination

15. Summary dismissal is a matter governed under section 44 of the Employment Act. Such action should be taken in the rarest of cases where it is apparent that an employee has grossly miscounted himself by committing some of the actions outlined. An employer is also allowed to add to the list of action where committed may result in summary dismissal. Where an employee is unionized such as the Claimant was, a CBA or work place policy can add to the list of what can constitute gross misconduct and warrant summary dismissal. However even in such a case, section 41(2) of the Employment Act apply thus;

(2) 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, and the person, if any, chosen by the employee within subsection (1) make.

16. Before the summary dismissal, an employee must be given a hearing and an opportunity to defend himself. A chance to state his case. Where an employee is unionized, such union should be notified as this is the body that acts for the employee and the purpose of joining such union is to ensure representation in matter such as how to address a threat to termination of employment. Where an employee is not unionized, the same right is present as such an employee should be allowed to have a fellow employee of his choice present. This is to safeguard the interests of the employee who at this point is faced with a possible loss of his employment. It is also a fundamental requirement that finds support in article 41 and 47 of the constitution as regard fair labour practices and fair administrative action.

17. It was the evidence of the Claimant that on 11th December 2008, he was issued with a letter of summary dismissal. This was after being sent on compulsory leave, being suspended and upon advice that he would be called for hearing once the Board of the Respondent was inaugurated. The summary dismissal letter was therefore a shock to him as he had not been heard or notified before it was issued. That in any case the reasons for the dismissal were not valid.

18. In the dismissal letter the Respondent outlines a chronology of reasons that led to the summary dismissal;

a) That the Claimant lacked the professional qualifications to hold office per revised Scheme of

Service for accounting personnel;

b) He was unable to write financial records properly;

c) Cash books and ledgers had not been updated;

d) Had not prepared trial balance by the time he went on leave;

e) Improper records on cash;

f) Indication that the former principal Sophie had cash on hand of Kshs.1.09 million in the takeover report and upon a qualified accountant's report it was discovered that it was Kshs.4.00;

g) Had tampered with files

h) Failed to process accounting data and transactions to ensure proper maintenance of efficient filing system and safe keeping of invoices, receipts and other accounts records; and

i) Accumulated leave without authority.

19. Such a long litany of serious allegations. However, in the pleadings and evidence called, nothing outlined above was proved. Where the Claimant failed to keep proper books of accounts that necessitated that he should go on compulsory leave, be suspended and eventually be dismissed can only be confirmed through an audit report or a record properly so kept by the new Bursar now employed in place and instead of the claimant. The Respondent being a corporate and educational institution under the Ministry of Education has the assistance and services of public officers to ensure proper books of accounts are kept, annual audits are a requirement and where indeed all books of accounts were properly kept save for the year 2008 when the Claimant was dismissed, then such records or audit report would have been a necessary document availed to the Court in the arbitration of the matter. To fail to prove that indeed the Claimant had failed in his duties, fail to subject him to due process of a hearing or an opportunity to be heard is tantamount to undertaking an unfair labour practice and thus unfair under the provisions of section 45 of the Employment Act. The basic minimum standards required of an employer, before the termination of an employee, where the same is due to factors as under section 43 or 44 of the Employment Act, such an employee must be subjected to the procedures outlined under section 41(1) and (2) respectively. A hearing of the subject employee is imperative in both scenarios. Such a hearing is meant to accord an employee who is alleged to have misconducted self or grossly misconducted self an opportunity to state their case before any summary action is taken or termination notice is issued. This applies even where an employer intends to pay in lieu of notice. The aspect of hearing before taking any action against an employee is mandatory. This is the essence of section 41 of the Employment Act.

20. The Claimant had served for a record 18 years. Where his qualifications were wanting and required to be upgraded to the level set out under the Revised Scheme of Service for accounting personnel dated 24th December 2002, the duty was upon the employer to ensure that such training and provision of the necessary tools of trade were perfected for the Claimant to continue in their employment. To issue summary dismissal on the basis that the Claimant was not qualified in his position yet he had been in service for 18 years as no effort was put in place to have him take time for further training, such circumstances addressing challenges with regard to the performance of an employee call to the employer to systematically address the same by putting in place a performance improvement plan with set targets and timelines. Where an employee is assessed and found not to comply with such a plan, then the question of performance being wanting can form a firm basis for notice for termination. To thus use a ground of poor performance to dismissal an employee without any prior support to help improve such poor performance is an unfair labour practice. Equally, the reason that the Claimant was unable to write financial records properly is a very subjective assessment of his work. The periods of such allegations and the tools provided for him to be able to undertake his duties effectively are not stated. The files the Claimant is alleged to have tampered with are not stated. Where the Respondent failed to give the Claimant a hearing to defend himself, with it was lost the chance to have him improve on his duties or a

chance for proper directions noting that for the 18 years of service there is no waring, misconduct or a disciplinary action taken against him. The Respondent witness was clear in this regard that the only fault that he found was the account records for 2008 were not properly updated. Even where this was to be taken as the truth, such is a ground does not warrant the harsh sanction that warrant summary dismissal. Section 44(4) of the Employment Act give a glimpse what may constitute good grounds for summary action. Failure to update account records is one such ground.

21. I find the action of the Respondent to summarily dismiss the Claimant was fraud with procedural inconsistencies; there are no substantive reasons to justify the same and the sanction given too harsh in the circumstances of the case. The dismissal was therefore unfair under the meaning of section 45 of the Employment Act.

Remedies

22. The Claimant is seeking notice pay of 3 months. The CBA subject of the claim is not attached. This shall be awarded at kshs.21,136.00 being one month's salary in lieu of notice due in a case of unfair dismissal.

23. There are 228 leave days due. The contest was that these leave days were not approved to be carried forward. However had it not been for the unfair summary dismissal, the Claimant had commenced the process of taking his annual leave. He was not given a chance to so serve. The payment in lieu of taking such leave shall be awarded at kshs.185,341.20.

24. Service gratuity is due to the employee and not to his union. The agreement between the union and the Respondent notwithstanding should not be used to negate rights that are legally due to an employee. I find no justification even where there is a written agreement with the union to take away a benefit and right that became due to the Claimant in a case of unfair summary dismissal. Gratuity not paid is awarded at kshs.91,856.00.

25. Salary arrears were not contested at all. There was nothing submitted by the Respondent to challenge the underpayments outlined by the claimant. This is awarded at kshs.45,300.00.

26. On the finding that this was a case of unfair summary dismissal, compensation is due. The Claimant shall be awarded 12 months' salary in compensation kshs. 253,632.00.

Conclusion

Judgement is entered for the Claimant against the Respondent in the following terms;

- a) A declaration that the Claimant was unfairly summarily dismissed form his employment;**
- b) Compensation awarded at Kshs.253,632.00;**
- c) Notice pay at kshs.63,408.00;**
- d) 228 leave days' pay at Kshs.185,341.00;**
- e) Balance of gratuity due at Kshs.91,856.00;**
- f) Underpayment for 2007 and 2008 all at Kshs.45,300.00; and**
- g) Costs of the suit.**

Delivered, dated and signed in open Court at Nairobi this 9th July 2015.

M. Mbaru

JUDGE

In the presence of:

Lilian Njenga: Court Assistant

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