



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT AT NAIROBI
CAUSE NO. 643 OF 2012

**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS,
HOSPITALS AND ALLIED WORKERS (KUDHEIHA WORKERS)CLAIMANT**
-VERSUS-
MUTHETHENI GIRLS SECONDARY SCHOOL RESPONDENT

JUDGMENT

The claimant Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA WORKERS) is a trade union registered to represent workers in the sectors covered under its constitution, among them educational institutions. The claimant filed this case on 18th April 2012 on behalf of its member Mr. Charles Kitonga Mbui (the grievant) who was an employee of the respondent, Muthetheni Girls Secondary School through a Memorandum of Claim dated 13th April 2012. The claimant alleges that the grievant was unlawfully summarily dismissed by the respondent. It states in the Memorandum of Claim that the grievant was employed by the respondent as a driver on 16th June 2003 at a monthly salary of Kshs 6545 inclusive of house and medical allowance. He worked diligently with a clean record until May 2009 when he started feeling unwell. On 19th May 2009 the grievant went for treatment at Machakos District Hospital and the Hospital put him on light duties for one month. On 27th November 2009 he was assigned work of shifting the school fence from a road reserve with other employees. Since he was unwell he could not do the heavy work. On 11th and 12th January 2010 the grievant was allocated work of trimming flowers around the School Administration Block but was unable to do it as he was unwell and the sun was hot.

On 19th January 2010 the claimant was interdicted for insubordination and on 8th February 2010 he was invited to appear before the full Board of Governors (BOG) meeting which was deferred to 22nd February 2010. The claimant's Branch Secretary Machakos was invited to the meeting but was not allowed to enter into the meeting venue. After the meeting which started at 9.30 am and ended 3.30 pm the Branch Secretary and the grievant were informed by the BOG chairman that the case against the grievant was not serious and did not require the attention of the Board.

On 8th March 2010 the grievant was summarily dismissed. At the time of dismissal the grievant's basic salary was Kshs 8,016 with a house allowance of Kshs 2,100 and medical allowance of Kshs 375 per month.

The claimant reported a dispute to the Minister for Labour and Mr. Kimeu of Machakos Labour

Office was appointed conciliator. The conciliator called a meeting which only the claimant attended. The conciliator issued a certificate referring the dispute to this court.

The claimant submitted that the summary dismissal of the grievant was in breach of Clause No. 8(f) of the parties collective bargaining agreement which provides that the union Branch Secretary or Secretary General together with the complainant shall attend the BOG meeting for the hearing of the case of the interdicted employee. The claimant further submitted that the respondent ignored the Doctor's instructions directing the grievant to be put on light duties. The claimant prayed for the following remedies:-

1. Three months pay in lieu of notice as per Clause 6(a)(ii) of CBA. Kshs 10,260 X 3 months = Kshs 30,780/=
2. 12 months pay as maximum compensation for unlawful dismissal, = Kshs 10,260 X 12 = Kshs 123,120/= **TOTAL = KSHS 153,900/=**
3. Plus costs of the suit.

The respondent filed its response on 29th June 2012 admitting that it employed the claimant as a driver on 16th June 2003 and dismissed him on 8th March 2010. The respondent stated that although he was employed as a driver the grievant's letter of appointment stated that he would also do any other work assigned to him. This was because the school bus was driven only occasionally and the driver would be idle when the bus was not in use. It denied that the dismissal was unfair. It also denied that the claimant worked diligently for the respondent.

According to the respondent the claimant was issued warning letters for misconduct on 6th December 2005, 1st February 2007 and 4th February 2008. The grievant frequently excused himself from performing duties assigned to him on grounds of headache or stomach ache. The persistent complaints of sickness prompted the respondent to ask him to submit a medical report on 27th November 2009. This was after he refused to work with other workers to shift the school fence from the road reserve complaining of stomach ache.

On 28th November 2009 the grievant submitted a medical report recommending rest and off duty for 2 weeks. The medical report also recommended that the grievant be reviewed weekly.

On 11th January 2010 the grievant refused to carry out work of trimming flowers around the school administration block assigned to him by the school Principal. The Principal asked him to read his appointment letter and see her the following day. On 12th January 2010 the Principal again asked the grievant to trim the fence in the presence of the shop steward, the accounts clerk and the Deputy Head-Teacher but he refused and stated "sitafanya hio kazi" (translated "I will not do that work"). Later the same morning the grievant returned the keys to the school bus to the Principal without being asked to do so. On 19th January 2010 the grievant was interdicted. On 18th January 2010 the grievant was invited for a meeting with the BOG Chairman where Board chairman talked to him at length and he admitted insubordination. When asked to apologize he refused.

He was invited for a meeting of the BOG to discuss his disciplinary case on 8th February 2010 but the meeting was adjourned to 22nd February 2010 as the Principal was involved in an accident.

On 22nd February 2010 the grievant attended the meeting. The Branch Secretary arrived at the school and signed the visitor's book then disappeared and could not be found when the grievant's case was to be heard so the case went on without him.

At the hearing the grievant was found guilty of misconduct and was summarily dismissed. He collected his terminal dues on 18th April 2010.

The respondent prayed that the case be dismissed.

The case was fixed for hearing on 3rd March 2014 but could not be reached and was deferred to 26th May 2014. The case was adjourned again on 26th May 2014 at the request of the respondent. When the case came up for hearing on 29th September 2014 the parties opted to proceed by way of written submissions. They subsequently filed and exchanged submissions.

The issues for determination are whether the grievant was unfairly dismissed and if he is entitled to the prayers sought.

The claimant alleged that the summary dismissal was unfair as the Branch Secretary was not allowed to enter into the meeting venue and also because the respondent failed to comply with doctor's instructions that grievant be given light duty only.

The respondent however stated that the grievant was a malingerer who always feigned illness to avoid doing any other work apart from driving. The respondent granted him numerous sick offs, copies of which were attached to the Memorandum of Defence. It is the respondent who demanded a medical report when the grievant's sick offs became too many. The sick recommendation for light duty was for November 2009 while the incident leading to the dismissal of the grievant was in January 2010 after the grievant had long reported back from sick off.

On the issue that the Branch Secretary was not allowed into the meeting, the respondent produced a copy of the visitors book signed by the Branch Secretary which shows the Branch Secretary came to school on that day. The respondent also produced minutes which stated that when the grievant was called into the meeting for his case together with the Branch Secretary, the Branch Secretary had disappeared and could not be traced. After the hearing the grievant was asked to write a letter of apology and when he was called back about an hour later to submit the apology letter he stated he would not apologize as he had been advised by the Branch Secretary not to do so. This means that the Branch Secretary was within the school compound but deliberately avoided to attend the grievant's disciplinary hearing.

There is no evidence that the grievant protested the absence of the Branch Secretary at the disciplinary hearing.

The grievant went ahead with the hearing of his case and admitted the charges against him.

I note from the evidence on record that respondent gave the grievant a chance to apologize twice, the first time on 18th January 2010 before the interdiction and the second time after the hearing of his case on 22nd February 2010. It means the respondent was ready to give him a chance to continue working if he was willing to write the letter of apology. On both occasions he refused to apologize on the advise of the Branch Secretary.

I find that the respondent was overly lenient to the grievant who had admitted the charges preferred against him. The respondent complied with the procedure set out in the Employment Act and the parties collective bargaining agreement. There was therefore valid reason and the procedure adopted was fair.

The claimant's allegation of unlawful dismissal therefore fails and is dismissed.

The claimant prayed for pay in lieu of notice, maximum compensation and costs. Having failed to establish that the dismissal was unlawful or unfair, the grievant is not entitled to either notice or compensation.

The result is that the entire claim is dismissed.

Each party shall bear its costs.

Dated and signed at Kisumu this 16th day of June, 2015

MAUREEN ONYANGO

JUDGE

Delivered in Nairobi this 7th day of July, 2015

HELLEN WASILWA

JUDGE

In the presence of:

Samson Kioko for claimant

Martin Munene, Litigation Counsel - AG's Office for respondent