



REPUBLIC OF KENYA

IN THE EMPLOYMENT LABOUR AND RELATIONS COURT AT MOMBASA

CAUSE NO. 328 OF 2013

KENYA UNION OF DOMESTIC, HOTEL EDUCATIONAL

INSTITUTIONS & ALLIED WORKERSCLAIMANT

VERSUS

B.O.G MOI HIGH SHOOOL KASIGAU.....RESPONDENT

J U D G M E N T

1. The claimant brought this suit on 3.10.2013 on behalf of her members Mr. Alphonse Mwangombe and Zarkani Kiangi (grievants). The suit seeks to recover employment benefits and compensation for unfair and unlawful termination of employment by the respondent. The respondent filed her defence on 25.10.2013 denying liability for unfair termination and averred that the termination was lawful and justified because the grievants were guilty of negligent performance of duty which led to theft of the schools property.

2. From 25.11.2013 when the suit was mentioned for the first time, the court encouraged that parties to negotiate amicable settlement. After several mentions and even preliminary objection (P.O), the parties recorded partial settlement on 8.5.2015. The consent recorded was for 3 months' salary in lieu of notice, 12 months' salary as compensation for unfair termination and annual leave. In that consent Mr. Alphonse Mwangombe was given Ksh 312,480 while Zakaria Kiangi got Ksh 171,908. The parties disagreed on the issue of salary arrears during suspension and service gratuity. They therefore agreed to dispose the disputed issues by way of written submission.

Analysis and Determination.

3. There is no dispute that the grievants were employed by the respondent and worked continuously until 26.5.2006 when they were suspended for alleged misconduct. Thereafter they were arrested and charged in court but later they were acquitted on 10.6.2008. They were however not allowed back to work by the respondent as a result of which their union (claimant) lodged a dispute with the minister for Labour for conciliation but that mechanism bore no fruit hence this suit. In view of the consent order aforesaid, there is no dispute that the respondent has admitted liability for unfair and unlawful termination of the grievants employment. The issues for determination are:

- a) what date did the termination of the claimants employment take effect.
- b) whether the grievants are entitled to salary for the whole period between 26.5.2006 and the effective date of their termination.
- c) whether the grievants are entitled to service gratuities.

Termination date

4. According to the respondent, the grievants were terminated on 26.5.2006. On the other hand the claimant contends that the grievants were suspended from work by letters dated 26.5.2006 pending investigation on the theft that occurred at the school on 11.5.2006. That the grievants were subsequently charged with criminal case in Voi law courts but they were acquitted on 10.6.2008 and reported back to work. That the employer did not receive them back and no formal communication was ever given to them notifying them of their termination until they received the letter dated 27.1.2014 admitting liability and proposing a compensation plan. The letter stated in part as follows:

1. On 4.1.2004 the BOM gave out a compensation plan after it realized that it will not reinstate you but terminate your services as it was done by the principal during the year the robbery took place that time. A letter written to you by the school principal Ref: MHSK/BOG/19 dated 26.5.2006 and the memorandum of agreement written on 8.12.2009 Ref: ML/1R/3/224/2009 from the ministry of Labour.”

5. The court has carefully considered the contentions by the two sides. It is clear that the termination of the claimant was never communicated in writing. The letter dated 26.5.2006 was not termination but for suspension pending police investigation. Likewise the termination was done by the letter dated 27.1.2014. As held in the Ruling on the preliminary objection delivered on 13.2.2015, the letter dated 27.1.2014 mainly served the purpose of reviving the cause of action herein. The termination of the grievants in the opinion of this court occurred when the grievants reported back to work after acquittal from the criminal case on or about 10.6.2008 and were not allowed back. The termination was done verbally and unfairly and that is why the respondent admitted liability to pay compensation and salary in lieu of notice to the grievants vide letter dated 27.1.2014.

Salary during Suspension.

6. In view of the foregoing finding that the termination of the grievants employment occurred in mid June 2008, the court awards them salary for period between May 2006 and June 2008 which is approximately 24 months Mr Alphonse Mwangombe (1st grievant) was earning a gross salary of Ksh 14,210 per month according to the BOM, minutes and filed by the respondent, dated 1.5.2015 and the consent judgment recorded on 8.5.2015. The salary for 24 months between May 2006 and June 2008 is Ksh 341,040. On the other hand Mr Zakaria Kiangi's gross monthly salary was Ksh 8,604 and as such is accorded Ksh 206,496 being the salary arrears for the 24 months between May 2006 and June 2008.

Service Gratuity.

7. According to the respondent, the grievants were contributors to the NSSF and as such under section 35 (5) & (6) of the employment Act (E.A) they are disqualified from claiming service gratuity. The claimant however contends that, under the Collective Bargaining Agreement (CBA) signed between the claimant union and the ministry of Education, science and technology the grievants were entitled to service gratuities. That their appointment letters provided that their terms and conditions of service were governed by the said CBA. The CBA was produced as appendix 13 by the claimant.

8. After considering the agreements by the two parties, the court agrees that the grievants terms of employment were governed by the CBA produced in court by the claimant. Clause 31 of the CBA provided for service gratuity only on retirement. It did not provide for gratuity for any other form of termination before retirement. The grounds upon which an employee qualified for service gratuity under clause 31 of the CBA were:

“a) minimum of :-

(i) Ten years of continuous service.

(ii) Attainment of 50 years of age or compulsory retirement age of 55 years.

b) ill health.

c) Public interest.”

9. In addition to the foregoing, the court agrees with the submissions by the respondent that the grievants are barred from claiming service pay under section 35 (6) of the E.A. The grievants were allegedly members of the NSSF and the employer contributed to their social security every month. That allegation was not rebutted by the claimant using any NSSF statement. The court therefore declines to award the prayer for service gratuity to the grievants.

Disposition.

10. For the reasons stated above judgment is entered for the claimant on behalf of the grievants in the following terms:

Alphonse Mwangombe.

| | |
|--------------------------|-----------------------|
| Partial consent judgment | 312,480 |
| Salary during suspension | <u>341,040</u> |
| | <u>653,520</u> |

Zakaria Kiangi

| | |
|--------------------------|-----------------------|
| Partial consent judgment | 171,908 |
| Salary during suspension | <u>206,496</u> |
| | <u>378,404</u> |

They will also have costs and interest.

Signed, Dated and Delivered at Mombasa this 23rd day of October 2015.

ONESMUS MAKAU

JUDGE

23.10.2015

Coram

Before Justice Onesmus Makau

C/Assistant -

For the Claimant:

For the Respondent:

Court

Judgment delivered in their presence/absence in open court.

ONESMUS MAKAU

JUDGE