



REPUBLIC OF KENYA
EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT KERICHO

CAUSE NO.219 OF 2015

(Before D. K. N. Marete)

KENYA UNION OF EMPLOYEES OF POLYTECHNICS,
COLLEGES AND ALLIED INSTITUTIONS (KUEPCAI).....CLAIMANT

VERSUS

THE BOARD OF MANAGEMENT

ILMOTIOOK SECONDARY SCHOOL.....RESPONDENT

JUDGMENT

This matter was brought to court vide an application by way of Notice of Motion dated the 28th July, 2015 and filed on 30th instant. It seeks the following orders of court;

1. *THAT, this Honourable Court do certify this Application as urgent and be dispensed with ex-parte in the first instance.*
2. *THAT, Mr. Mathews Ngetich be reinstated in his work position prior to the unlawful compulsory leave pending the hearing and determination of this application and suit.*
3. *THAT, the Respondent herein be stopped forthwith from harassing and intimidating Mr. Mathew Ngetich (Grievant) pending hearing and determination of this application and suit.*
4. *THAT, the Respondent to continue to paying the salaries and allowances to the Grievant with effect from May, 2014 pending the hearing and determination of this application and suit.*
5. *Any other relief the Honourable Court may deem fit to grant be granted.*

The application is also accompanied by a Statement of Claim of the same date.

When the matter came for hearing on 30th July, 2015 the court made the following orders;

- i. *That this application be and is hereby certified as urgent and be heard ex-part in the first instance.*

ii. That the Grievant be placed on pay and terms accorded to workers on suspension by the Respondent.

iii. That this application and orders of court be served onto the Respondent forthwith but not later than the close of the day on 3rd August, 2015.

iv. That the Respondent be and is hereby ordered to file and serve responses to the application and claim within seven days of service.

v. That this application be heard on 12th August, 2015 before the duty Judge.

The respondent did not, despite service appear in court to defend the suit. However, one finds an answer to the application by way of a Replying Affidavit sworn on 18th August, 2015 and also a Supporting Affidavit sworn on even date. These are further accompanied by a Statement of General Defence dated 25th August, 2015 and filed on the following day.

Like is stated herein-above, there was no oral defence or even appearance at the various hearings. When the matter came for hearing on 27th August, 2015. Mr. Agura for the claimant/grievant proceed by way of an oral submission reiterating the application and claim. Earlier, the court had made a proposal for a determination of the issue in dispute by way of hearing the main suit but this was not substantially thrashed due to the absence of the respondent.

The claimant's case is that the grievant was engaged by the respondent on 1st August, 2008 as a Store Keeper at a monthly salary of Kshs.12,440.00 and without any element of house allowance. He was confirmed into permanent employment on 1st October, 2008 after completion of a three (3) months probation period. By a letter dated 15th February, 2012 he was transferred from the main store to the Kitchen Store and a successful handing over ensued. This was followed by a salary reduction in 2008 which was not explained by the respondent despite numerous enquiry on the same. On 9th May, 2014 the grievant was served with a letter of compulsory leave bearing unfounded allegations ranging from abuse of procurement procedures to unbecoming conduct. This was extended vide a letter dated 23rd June, 2014 by the respondent indicating that a communication of its findings and recommendations would be made after internal investigations.

The grievant was invited to appear and defend himself before the Board of Management meeting of 27th September, 2015 but this did not bear tangible outcome owing to lack of good spirit by the respondent. He was indeed out of the meeting and told to go and await a verdict from the respondent. The respondent has remained evasive, irresponsible and uncooperative in settling this matter and at earlier attempts by the claimant at conciliation. She prays for;

1. Unpaid Salaries & Allowances

For; July, September, November 2014,

January-March, 2015 (Total 7 Months)

(16,080+2,300)x 7 months.....Kshs, 128,660.00

2. Underpayments of Salary/Wage: 6 Years of Service

Based on DPM circular of 2013, Job Group- "F"

16,080.00-12,260)x 72 months.....Kshs,275,040.00

3. Unpaid House Allowance:

Based on DPM circular of Ref. No.

DPM.SAL.COM 16/1/4A/VOL 11/53

of 1st July, 2001 for 80 months

(2,300x80 months).....Kshs,184,000.00

4. Unpaid Medical Allowance:

Based on the DPM Circular of Authority No.

16/1/41/VOL.11/53 of 1st September, 1995.

495.00x80 months.....Kshs,39,600.00

5. Accumulated Annual Leave:

For the last 6 years from the date of entry

@ the rate of 21 working days for each year in service:

(16,080.00+2,300)x2 months.....Kshs,77,196.00

6. Terminal Notice @ Two Months:

2 months gross salary in lieu of Notice

(16,080+23,000)x2 months.....Kshs,36,760.00

7. Service Gratuity

Calculated at 30 days rate based on the last Gross Salary

(16,080.00+2,300) x 6 years.....Kshs,110,280.00

8. Compensation for Unfair Termination

12 months Gross Wage within the meaning of section

49 (1) (c) of the Employment Act, 2007, Laws of Kenya.

(16,080.00+2,300)x 12 months.....Kshs,220,560.00

TOTAL AMOUNT

Kshs,1,072,096.00

9. General Damages Emoluments/Contingencies

at the discount of 15% of Total Amount

1,072,096.00x0.85%.....Kshs,911,281.60

TOTAL AMOUNT DUES PAYABLE.....Kshs, 1,983,377.60

In her oral submissions, the claimant objects to the filing of a document named, *Statement of General Defence* on ground that no leave of court was sought in accordance with Rule 13 (4) of the Industrial Court (Procedure) Rules, 2010. She prayed that the same be expunged from the record of court and also

be totally disregarded. She also urged the court to consider issue of relief as sought in the application dated 28th July, 2015 bearing in mind that the respondent has neglected and refused to prosecute a defence despite numerous service. This is as follows;

4. RELIEF SOUGHT

The Claimant herein prays for a declaration of a judgment against the Respondent for “ORDERS:”

*4.1 **THAT**, the Compulsory Leave slapped upon the Grievant by the Respondent was unlawful, illegal and unfair thus, **NULL** and **VOID**.*

*4.2 **THAT**, the Grievant be “**REINSTATED**” to his position held before in the employment of the Respondent, without loss of seniority, continuity, benefits and privileges, forthwith.*

*4.3 **THAT**, the Grievant herein be paid his back-salaries and allowances from the month of May, 2014, forthwith.*

“ALTERNATIVELY ORDERS”

*4.4 **THAT**, the Respondent owes the Grievant Kshs 1,983,377.60/= as tabulated at paragraph 2.15 hereinabove and the same be paid forthwith.*

*4.5 **THAT**, the Respondent pay interest on the total amount at Court rates.*

*4.6 **THAT**, the Respondent pay a twenty percent (20%) interest on the Award every month until settlement is cleared.*

*4.7 **THAT**, the Responent issue the Grievant with his “**CERTIFICATE OF SERVICE**” within the meaning of Section 51 of the Employment Act, NO.11 of 2007, Laws of Kenya.*

*4.8 **THAT**, cost of the suit be provided for by the Respondent.*

4.9 Any further and better relief the Honourable Court may deem fit to grant be granted.

The claimant chose to rest his case by submitting that she had responded to the respondents defence served on 19th August, 2015 by a Further Affidavit in response to the Respondents Replying and Supporting Affidavit. It was not therefore necessary to call witnesses or adduce any further evidence, the same having been proffered in the claimant's pleadings. I agree.

The issues for determination therefore are;

1. Is the Court agreeable that the respondent's defence should be struck out and expunged from the record of court?
2. Was the termination of the employment of the claimant wrongful, unfair and unlawful?
3. Is the claimant entitled to the relief sought?
4. Who bears the costs of this cause?

The 1st issue for determination is whether the Statement of General Defence as filed by the respondent on 26th August, 2015 should be struck out and expunged from the record of court. The record of court indicates that the application before court was slated for hearing on 12th August, 2015. The orders of court had thereby awarded the respondent seven days to make necessary responses to the application and set herself for hearing. She indeed filed a Replying Affidavit on 19th August, 2015 out of the court

directed timeline but did not attend court at all at the hearing dates on 12th August 2015, 19th August 2015 and 27th August, 2015 despite service. There is no application for extension of time to file the defence or other pleadings by the respondent.

The respondent through out these proceedings displays a very casual approach to the process of court, due process and issues for determination. This is careless or at the worst, a display of ignorance or arrogance. I therefore strike out the defence of the respondent for want of appropriate leave to file the same.

On the 2nd issue for determination, I find that the termination of the employment of the grievant was wrongful, unfair and unlawful. Why? The grievant was issued with a letter of compulsory leave dated 9th May, 2014 which letter cited a litany of misconduct and sins on his part. This leave was extended vide a letter of 23rd June, 2014. This matter was deliberated at a meeting of the Board of Management on 27th September, 2014 where the grievant was not afforded a chance to defend his case. All these are ingredients of unfair termination and run contrary to Sections 43 and 45 of the Employment Act, 2007 as follows;

43. (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reasons for termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

45.(1) No employer shall terminate the employment of an employee unfairly.

(2) A termination of employment by an employer is unfair if the employer fails to prove-

(a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason-

(i) related to the employees conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair procedure.

(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.

(4) A termination of employment shall be unfair for the purposes of this Part where-

(a) the termination is for one of the reasons specified in section 46; or

(b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.

*(5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour Officer, or the **Industrial** Court shall consider-*

(a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision;

(b) the conduct and capability of the employee up to the date of termination;

(c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;

(d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and

(e) the existence of any previous warning letters issued to the employee.

It is not comprehensible that a respondent who so clearly articulated a case for misconduct in the letter of compulsory leave of the grievant choose not to mount a defence in court.

I also note that throughout the pleadings and even proceedings, there was no evidence of a formal termination of employment of the grievant by the respondent. No letter of termination was annexed to the claim or referred to in the submissions by the claimant. This can only be treated as a case of constructive termination and I deem it as such. I therefore find a case of wrongful, unfair and unlawful termination of employment in the circumstances.

The 3rd issue for determination is whether the claimant/grievant is entitled to the relief sought. He is. The finding of a case for unlawful termination places him at the centre of relief as the appropriate remedy.

The side issue on this is whether the claimant/grievant is entitled to reinstatement as a relief for unfair termination. The law at Section 49 (4) of the Employment Act, 2007 stipulates the circumstances for grant of reinstatement and other remedies as follows;

(4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following-

(a) the wishes of the employee;

(b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and

(c) the practicability of recommending reinstating or re-engagement.

(d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;

(e) the employee's length of service with the employer;

(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;

(g) the opportunities available to the employee for securing comparable or suitable employment with another employer;

(h) the value of any severance payable by law;

(I) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;

(j) any expenses reasonable incurred by the employee as a consequence of the termination;

(k) any conduct of the employee which to any extent caused or contributed to the

termination;

(l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and

(m) any compensation, including ex-gratia payment, in respect of termination of employment paid by the employer and received by the employee.

Section 50 of the Employment Act empowers this court to employ the provisions of Section 49 in a determination of issues of unfair termination of employment.

In this situation, the claimant has made reinstatement as a primary prayer in her claim. In the absence of a viable defence and bearing in mind the conduct of the respondent at conciliation is a pointer that it is the respondent who is at default in the circumstances. The termination also occurred in 2014 and therefore falls in place with the three year provision for a consideration of a case of reinstatement.

The circumstances and evidence adduced also prefer a case of practicability of reinstatement in that this was a low caliber employment and there was no evidence of replacement. In any event, this (reinstatement) was not countered by the respondent despite the ample opportunity granted to do her case.

I, in the circumstances order relief and under as follows;

- i. That a declaration do hereby issue that the compulsory leave made to the grievant by the respondent was unfair and unlawful.
- ii. That the grievant be and is hereby reinstated to the employment of the respondent with effect from the date of this judgment of court without loss of seniority, continuity, benefits and privileges.
- iii. That the grievant be and is hereby ordered to report back to work on 12th November, 2015 at 800 hours.
- iv. That the respondent be and is hereby ordered to pay the grievant all his unpaid salaries and allowances from the time of compulsory leave in May, 2014 to date; that is Ksh 12,260.00 x 18 months = Kshs.220,680.00
- v. That the costs of this suit shall be borne by the respondent.

Delivered, dated and signed this 11th day of November 2015.

D.K.Njagi Marete

JUDGE

Appearances

1. Japheth Anyira Agura for the Claimant Union.
2. E.K.Chirchir on record for the Respondent.