



**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**

**CAUSE NO. 7/2013**

(Before Hon. Justice Hellen Wasilwa on 12<sup>th</sup> February, 2014)

BUMALI MUSANA ..... CLAIMANT

**-VERSUS-**

BHAYANI NURSERY &

PRIMARY SCHOOL ..... RESPONDENTS

**JUDGMENT**

The claimant herein Bumali Musana filed his memorandum of claim on 23.7.2013. His claim is that he was unlawfully terminated by the respondents and therefore seeks compensation. The claimant's case is that in January 1990, he was employed by the respondents earning a monthly salary of Ksh 1,350/= and house allowance of Ksh 200/=. He worked for the respondents continually for 23 years until 20<sup>th</sup> October, 2012 when his services were terminated. He annexed his letter of appointment as annexure A1. The claimant contends that he worked for respondents well for the 23 years and was even given a certificate of appreciation annexed and marked A2.

He further avers that at the end of year examinations in 2012, he condemned cheating in exams which led to other skills such as handwriting, spelling, comprehension and composition not being tested. It is then that his services were terminated without due process of law. He avers that he was not given any hearing nor given any notice before the termination was effected.

He prays that the honourable court declares the termination unlawful and order the respondents to reinstate him back to work with all his benefits. He also seeks to be paid salary and allowances, underpayments as required by the statutory minimum wages. He also prays he be paid damages plus costs and also be issued with a certificate of service.

The respondents on the other hand contend that the claimant was dismissed for misbehaviour. That he had been given a warning letter and he refused to sign it. It was then that the RW1 informed his director of what claimant had done. The director called the claimant and urged him to sign the warning letter on 29.10.2012. The claimant refused to sign and even said that he had already surrendered all school properties. It is then that the respondents decided to terminate his services on 30.10.2012 and also gave him a cheque for his dues. They told court that claimant was not issued with a certificate of service nor a recommendation letter.

The parties filed their written submissions. Upon considering the evidence and submissions, the issues for determination are:-

1. **Whether respondents action in terminating claimant was justified.**
2. **Whether claimant is entitled to the remedies he has sought.**

On issue no. 1, the claimant's termination letter shows that he was terminated by the respondents for a raft of reasons ranging from:-

1. **Talking against the management in a manner likely to instigate the other staff against the management,**
2. **Always going against the changes brought by the management for the benefit of the school,**
3. **Refusing to sign a warning letter issued,**
4. **Talking rudely with the management.**

The claimant was informed of his misdeeds as envisaged under Section 43 of the Employment Act. It is however important that such reasons be put to the test and proved. This test is what is envisaged under Section 41(1) and (2) of Employment Act which states that:-

**“(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reasons for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

**(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 have on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within sub – section (1) make.”**

In the current case the claimant was not accorded an opportunity to be heard. The rights of the claimant to be heard were therefore flouted. This also contravened Article 50(1) of the Constitution which states:-

**“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal and body.”**

By reason of the above analysis, I make a finding that the respondents were not justified in dismissing the claimant and therefore the termination was unfair by virtue of Section 45 (1) of the Employment Act.

On the 2nd issue, the claimant has made a claim of several issues. He seeks to be paid 1 month salary in lieu of notice. However from his termination letter, he was paid 1 month salary which was paid in his bank in lieu of notice. The claimant did not disapprove this payment and therefore he is not entitled to that prayer.

He also sought to be paid severance pay for the 23 years he worked. This is not payable however as Section 35 (6) of Employment Act 2007 categorically states that:-

**“This section shall not apply where an employee is a member of:-**

- (a) a registered pension or provident fund scheme under the Retirement Benefits Act,**
- (b) a gratuity or service pay scheme established under a collective agreement,**
- (c) any other scheme established and operated by an employer whose terms are more favourable than those of the service pay scheme established under this section;  
and**
- (d) the National Social Security Fund.”**

It is noted that the claimant was a contributor to National Social Security Fund and cannot therefore be paid severance pay. The claimant also sought to be paid salary underpayments and house allowance underpayments. He did not prove this limb of his claim and therefore the prayer is declined.

I however find his prayer to be issued with a certificate of service is justifiable and is allowed. Due to the unfair manner of his termination. I also order that he be paid 12 months salary for the unfair termination which is;

= 12 X 17276

= 207,312

The claimant will also be paid interest on the above amount plus costs.

**HELLEN WASILWA**

**JUDGE**

**12/2/2014**

**Appearances:-**

Claimant present in person

Indimuli for respondents

CC. Wamache