



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 395 OF 2013

EDWARD NJUGUNA MWANGICLAIMANT

VERSUS

THIKA HIGH SCHOOL

THR' BOG OF GOVERNORS..... RESPONDENT

JUDGMENT

By a Memorandum of claim dated 22nd March 2013 and filed in court on 25th March 2013 the Claimant EDWARD NJUGUNA MWANGI alleges that he was wrongfully and unfairly terminated by the Respondent THIKA HIGH SCHOOL. He seeks the following orders;

- a. **A declaration that the Claimant's dismissal from the Respondent's employment was unprocedural, unfair and unlawful and unconstitutional.**
- b. **An order for compensation for violation of the Claimant's Constitutional rights.**
- c. **Unpaid salary for failure to increase salary every year.**
- d. **Unpaid salary for the month of October 2011 Kshs.789.30**
- e. **Three (3) month's salary in lieu of notice of termination of employment Kshs.23,679/=**
- f. **Punitive and aggravated damages.**
- g. **Compensation equivalent to twelve months wages.**
- h. **Interests on (b), and (d) above.**
- i. **Costs of this suit.**
- j. **Any other relief that the court may deem appropriate to grant.**

The Respondent filed its Defence dated 24th April 2013 on 3rd May 2013. Respondent denies terminating the employment of the Claimant and avers that the Claimant deserted duty under the pretext that he and his colleagues had been called thieves. It prays that the claim be dismissed with costs.

The case was heard on 9th October 2013. The Claimant testified on his behalf and was represented by Mr. Kamotho while WILLIAM MACHARIA MWANGI the Principal of Thika High "School testified for the Respondent. The Respondent was represented by Mr. Muhoro.

The Claimant testified that he was employed by the Respondent on 21st January 2005 as a cook at a salary of shs.5,600. His employment was terminated on 3rd October 2011. His last salary was shs.11,900. On that day he went to work as usual with his colleagues at 1.30am and prepared breakfast for students and teachers. The students took breakfast at 4am while the teachers took their breakfast at 6.00 am. After morning assembly Mrs. Kang'ethe a teacher, went to the kitchen and told the cooks that they had been called thieves at the assembly by the head teacher. The students also called them thieves. The cooks sent

the Head cook Mr. David Ndungu to ask the headteacher why he had called them thieves but the secretary did not allow him to see the headteacher. Later the foreman Isaac Njoroge told the cooks that they had been sacked. When they went to their houses within the school compound they found the houses locked with padlocks. The foreman then took casuals working in the grounds to the kitchen to take over the duties of the cooks. The cooks then left the compound to look for someone to talk to the headteacher on their behalf. They met a reporter for Inooro FM who called the headteacher and he told the reporter that the cooks had been sacked for refusing to work. When the cooks went back to the school compound they found notices at the gate advertising for their jobs. Since their houses were still locked they asked the head cook to go to Thika Police Station to report that they had been locked out. The police called the headteacher to open the houses but he did not. The Claimant slept out with his wife and 3 children that night. The following morning on 4th October 2011 the headteacher told them to remove their things and leave in 20 minutes or he would call students to evict them. They removed their property and left.

The Claimant denied that he was a thief. He testified that he was never given an opportunity to defend himself. He denied that he absconded duty. He further denied receiving a letter to go to the board for hearing of his disciplinary case.

He urged the court to order payment of his salary for days worked and notice.

RW1 WILLIAM MACHARIA MWANGI testified that he is the Principal of Thika High School the Respondent. On 3rd October 2011 while at assembly the students complained of insufficient food and he promised to investigate. Before that date the cateress had reported that she found some food hidden in the store. Investigations by the cateress and the bursar who was overall in charge of the workers identified the person who had stolen the food who admitted when questioned. In his address to the students on 3rd October 2011 he told them that he had identified how food disappeared from the kitchen and promised to take action. At around 8.30am he was informed that the cooks who worked in the morning shift had left the kitchen protesting that they had been called thieves from information from a teacher. Since the protest exposed the school to strike by the students due to lack of lunch, he asked the Bursar to mobilize casual workers within the school compound to make 10.30 tea and lunch under the supervision of the cateress and one cook who had not joined his protesting colleagues. He later received a call from a reporter from Inooro FM to whom he explained what had happened. The reporter reported the incident at 4pm news leading to many inquiries by parents whom he assured all was well. He later decided to engage cooks immediately after a meeting with the bursar, the cateress and the deputy principal. One of the cooks Bernard Kamau went back on 4th October 2011, explained what had happened, and was allowed to go back to work. The other workers including the Claimant never reported back and were deemed to have deserted duty. He denied receiving a call from the police about the cooks or sending the foreman to sack the cooks. The issue of the cooks was discussed at a Board of Governors meeting on 6th October 2011 and it was resolved to take disciplinary action against the cooks when they reported back. However none of them reported back. He was informed that the cooks had brought a lorry and carried away their property on 4th October 2011 voluntarily upon realizing that casuals were working in the kitchen.

Under cross examination RW1 denied calling the cooks thieves at the assembly or that the head cook went to see him. He however admitted that he told the students at the assembly that the cooks were responsible for the disappearance of the food. He also admitted he was aware that a teacher informed the cooks that they had been called thieves. He admitted not writing a letter to the Claimant to attend a disciplinary meeting. He admitted that the staff houses were locked by the foreman on his instructions. He stated he instructed the bursar that the cooks would be paid after their disciplinary meeting.

I have considered the pleadings, the documents attached thereto and the Claimant's written submissions. The Respondent did not file written submissions.

There is no disagreement that the Claimant was employed in 2005 and left employment on 3rd August 2011 after protesting against being called a thief together with his fellow cooks. There is also no disagreement that the Claimant's position as a cook was taken over the same day by casuals and that the

Claimant's job was advertised as per Claimants appendix 5. There is also no disagreement that the Claimant was not paid his last salary.

The issues for determination in my opinion are therefore;

- i. If the Claimant was unfairly dismissed.
- ii. Whether the Claimant is entitled to the terminal dues as prayed.

i. **Was the Claimant dismissed unfairly**

The Claimant alleges that he was told by the foreman that he had been dismissed. His house was locked and casual employees working on the grounds taken to the kitchen to take over his job.

The Respondent on the other hand alleges that the Claimant deserted duty. RW1 however admitted to asking the Bursar to mobilize casual workers to take over the work of the cooks and to advertising the jobs of the Claimants and his fellow cooks.

RW1 admitted not inviting the Claimant for a disciplinary hearing.

I find that the failure of RW1 to discuss with the Claimant and his colleagues about their complaint of having been referred to as thieves, even after RW1 became aware that the Claimant and the other cooks had been informed of the incident by a teacher who attended the morning parade, the locking up of their houses, the recruitment of casuals to take over their jobs and the failure to call them for a disciplinary hearing all amount to a constructive dismissal.

The Claimant was never given a hearing in terms of the provisions of section 41 of the Employment Act. His dismissal was therefore unfair.

ii. **Whether the Claimant is entitled to the prayers sought**

The Claimant referred this court to the following cases in support of his claim;

1. Industrial Court Cause No. 644 of 2010 LIBERATA NJAU NJIIOKA V MAGADI SODA COMPANY LIMITED.

A copy of the case was however not availed to the court and therefore I will ignore the authority.

2. FRANCIS N. GACHURI V ENERGY REGULATORY COMMISSION (2013) eKLR.

I find this authority not relevant to the Claimants case as the circumstances of termination in the 2 cases were different.

3. COSMAS KAWELU V KABUITO CONTRACTORS INDUSTRIAL COURT CASE NO. 1991 OF 2011

I find the circumstances of this case too to be different from the Claimants case and therefore not relevant.

The Claimant has prayed for the following;

- a. **A declaration that the Claimant's dismissal was procedural, unfair and unlawful and unconstitutional.**

As I have already found above the termination of the Claimant's employment was unfair. I therefore declare the termination unprocedural and therefore unfair.

- b. **An order for compensation for violation of the Claimant's constitutional rights.**

The Claimant has not specified the nature of his constitutional rights that were violated, the legal basis of compensation and the amount of compensation sought under this head. I therefore dismiss the claim for want of proof.

c. **Unpaid salary for failure to increase salary every year.**

This is a prayer for special damages that must be specifically pleaded and proved as it is not a right provided for by law. The Claimant has not specified the years for which no salary increment was given and the amount sought.

I dismiss the claim for want of proof.

d. **Unpaid salary for the month of October 2011**

RW1 admitted not paying the Claimant the salary for October 2011. The Claimant worked up to 3rd October 2011 and is entitled to payment of the same. He is entitled to shs.1076.80 based on a gross monthly salary of 10,768 as per Claimant's Appendix 2.

I therefore award the Claimant the sum of Shs.1076.80.

e. **3 months' salary in lieu of notice**

The Claimant's letter of appointment provided for giving of 3 months' notice or payment of 1 month's salary in lieu of notice.

I therefore award him shs.10,768/= being one month's salary in lieu of notice.

f. **Punitive and Aggravated damages**

This being a contract the Claimant is not entitled to punitive and aggravated damages. Such damages are not payable for breach of contractual obligations. The employment contract provides for the mode of termination and compensation payable in the event of breach.

g. **Compensation equivalent to 12 months compensation**

The Claimant worked for a total of just over 6 years. Taking into account the length of service, the manner in which he was terminated and the other factors in section 49(4) of the Employment Act, further taking into account that the respondent did not file submissions to give reasons why the Claimant should not be paid full compensation, it is my opinion that this is a proper case for full compensation. I therefore award the Claimant the sum of shs.129,216 being 12 months gross pay as compensation.

h. **Costs**

The Respondents shall pay the Claimants cost of this suit.

i. **Interest**

Interest shall be payable from date of Judgment.

Orders accordingly.

Delivered and signed in open court on 3rd day of February 2014

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

In the presence of:

Claimant in person

for Respondent