



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 137 of 2013

(Before Hon. Justice Hellen Wasilwa on 14th March, 2014)

KUDHEIHA WORKERS CLAIMANTS

-VERSUS-

BOG, MADIRA GIRLS

SEC. SCHOOL RESPONDENTS

JUDGMENT

The claimants herein Kudheiha Workers filed their memo of claim on 14.5.2012 on behalf of the grievants;

- **Susan Makungu,**
- **Rachel M'bulika**
- **Christopher Mwangi**

The issue in dispute is the unfair dismissal of the 3 grievants.

The respondents were served with the memo of claim and summons to enter appearance but they never entered any appearance. They also failed to file any defence. The case was subsequently set down for hearing. The respondents were also served with a hearing notice for 26.2.2014 and they failed to attend court. This court then ordered hearing to proceed in their absence.

The grievants have told court that they were employees of the respondent having been employed on 22.6.1998, 1.8.2000 and 28.7.2000 respectively. The 1st grievant was employed as a school cateress and the 2nd as a groundsman and the 3rd as an accounts clerk. Their salaries at employment were Ksh 2,500/=, 1500/=, and 2500/= respectively. They exhibited their appointment letters accordingly.

The 1st grievant was employed as a cateress but she told court that on 5.5.2012 she received a letter from the respondent, deploying her as a farm manager with effect from 1.3.2012, a job she had not previously been employed for and for which she had no qualifications and she didn't take it up. On 19.5.2012, she received a suspension letter indicating that she and others had authored a letter to DEO and copied it to the PS Ministry of Education, PDE Western Province, the Principal of respondent, DC, Area councilor and BOG Chairman and Kudheiha. The letter further stated that the letter authored by the grievant and others was of a defamatory nature and untrue and this amounted to gross misconduct. There were other accusations leveled upon her in the letter including insubordination and holding of an illegal meeting. She was requested to write her response to that letter within 14 days and she stood suspended immediately. The period of suspension was not indicated. She responded to the letter and allegations

levelled against her on 31.5.2012. On 25.6.2012 she received a letter summarily dismissing her.

It appears that the three grievants authored the alleged letter together and they were all treated in like manner and were all dismissed from the employment of the respondent on 25.6.2012.

The letter written by the grievants which is being considered as rude was exhibited in court and it related to the grievants complaint about their salaries, job description and deployment to areas for which they had not previously been employed and their being harassed.

The trade union took up this case and reported a trade dispute to the Minister. A conciliator was appointed to resolve the dispute but it appears no agreement was reached.

The claimants then filed this case where they want this court to order that they be reinstated or in the alternative be paid their terminal dues and damages for unlawful termination.

Having heard the grievants herein, the issues for determination are as follows:-

1. **Whether the decision to terminate the grievants was justified.**
2. **Whether the grievants are entitled to orders sought.**

On the issue of termination, it is apparent that the grievants were terminated for raising a complaint in relation to their conditions of service. Under Section 46(h) of the Employment Act 2007;

“The following do not constitute fair reason for dismissal or for the imposition of a disciplinary penalty:-

- **an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation.”**

The grievants complained to the authorities about the manner the respondents had treated them by deploying them to duties they didn't previously hold and for which they had not been employed. This was their right and it could not be used as a basis of terminating them. It is apparent also that none of the grievants was accorded any hearing before the dismissal but their action was unfairly treated as gross misconduct. The respondents therefore flouted the rights of the grievants as envisaged under Section 41 of Employment Act 2007 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 on the grounds of misconduct or poor performance, and the person, if any, chose by the employee within sub – section (1) make.”

I therefore find that the dismissal of the grievants by the respondents was unfair and unjustified and amounts to unfair dismissal.

On 2nd issue, the grievants have sought order for reinstatement and/or payment of their terminal dues including payments for underpayments as per various legal notices. They also sought to be paid service gratuity, notice pay and compensation for loss of service.

At the time of dismissal, the grievants were earning Kshs 7,230/=, Ksh 4,611/= and Ksh 15,498/=

respectively. They however never displayed their pay slips for confirmation of the said amounts. They have sought to be paid underpayment of salaries which they have not established because they have not demonstrated to court how much they earned as against the statutory minimum. The prayer on underpayments is therefore not proved and is not awarded.

I will however find that they were not given any notice before they were dismissed and order they be paid as follows:-

1st grievant - Susan Makungu:-

1. 1 month salary in lieu of notice = Ksh 7,230/=
2. Service gratuity for 14 years $X \frac{1}{2} X 7,230$
= Ksh 50,610/=

3. 12 months compensation for unlawful

$$\text{dismissal} = 7,230 X 12 = \text{Ksh } 86,760/=$$

TOTAL = KSH 144,600

=====

2nd grievant – Christopher Mwangi:-

1. 1 month salary in lieu of notice = Ksh 4,611
1. Service pay for 12 years = $12 X \frac{1}{2} X 4,611$
= Ksh 27,666

3. 12 months salary as compensation for unlawful termination = $12 X 4,611 = \text{Ksh } 55,332$

TOTAL = KSH 87,609

=====

3rd grievant - Rachel M'bulika Okuso:-

1. 1 month salary in lieu of notice = Ksh 15,495/=
2. Service gratuity since 1994 to 2012 = 18 years
 $18 X \frac{1}{2} X 15,495 = \text{Ksh } 139,455/=$

3. 12 months compensation for unlawful

$$\text{dismissal} = 15,495 X 12 = \text{Ksh } 185,940/=$$

TOTAL = KSH 340,890

=====

Each grievant will also be issued with a certificate of service. The respondents will pay costs of this suit.

HELLEN WASILWA

JUDGE

14/3/2014

Appearances:-

Okwach for claimants

N/A for respondents

CC. Wamache