



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NYERI

INDUSTRIAL CAUSE NO. 11 OF 2013

**KENYA UNION OF DOMESTIC HOTELS,
EDUCATIONAL, INSTITUTIONS, HOSPITALS AND
ALLIED WORKERS (KUDHEIHA WORKERS).....CLAIMANTS**

VERSUS

THE BOG OF KAMAHUHA GIRLS HIGH SCHOOL.....RESPONDENTS

JUDGMENT

1. The grievants in this cause were employees of the respondents working as night guards. Samuel was employed on 11th September, 1989 while Joseph was employed on 5th November, 1996. Their services were terminated on 29th October, 2009 due to a theft incident at work in which the respondent felt they were blameworthy.
2. According to them, they had no role at all in the theft nor culpable. They therefore brought this action through their union claiming their termination was wrongful and unfair. They thus seek an order of this court that they be compensated for wrongful and unfair termination of employment.
3. The respondents on their part have refuted the claimant's claim on the basis that they were collusive in the theft hence their dismissal was warranted.
4. At the trial, Samuel testified that on the material day he was working from the gate and the office area when at around 1 a.m thieves found him between the office and the monument. They caught and tied him up then took the things he had carried including his weapon, phone and the keys. The thieves then broke the office, took him in and locked him in there and warned him not to scream. They then left him there. After sometime he knocked on some metal cabinet and called for help. Joseph who was meant to relieve him heard and came to his rescue. He testified that he asked Joseph to call the Principal who came with the deputy but did not enter the office but instead called the police who conducted investigations and arrested him but later released him with no charges preferred against him. It was his evidence that he was later suspended and thereafter called before the Board where he was asked to show cause why he should not be dismissed. He wrote a statement giving his side of the story but was later dismissed summarily. He was however paid 14,000 which according to him was leave dues.
5. Joseph on his part testified that he learned of the theft at the workplace when he went to relieve Samuel at the gate and never found him there. He found Samuel locked in the office and the latter asked him to call the Principal. He was later asked to go to the police station which he did and recorded a statement.

Upon his return to school he found the Principal in a meeting with other watchmen and when he tried to join in he was told by the Principal to go home and wait for a report. He was later called by the BOG and given a show cause letter. He wrote his account of the incident but was summarily dismissed as well.

6. The respondents called the Principal Ms Anne Mwangi who gave account of the events that led to the dismissal of the claimants. It was her testimony that the events took place before she became the respondent's principal and that she was relying on records.

7. In their written submissions, the claimants' representative reiterated the factual basis of their claim and submitted in essence that the dismissal was wrongful both in facts and in the process. Concerning the facts, it was submitted that there was no evidence linking the claimants to the theft hence their dismissal on that basis was wrongful and unfair. Concerning the process, it was submitted that they were never given any notice and that prior to terminating them, the Union was not involved as required by section 41 of the Employment Act.

8. The respondents on their part submitted that the dismissals were justified as the claimants either colluded with the thieves or were negligent on duty when the theft occurred.

9. In claims concerning wrongful or unfair dismissal section 43(1) of the Employment Act places the onus of proof of reasons for termination on the employer and where an employer fails to do so, the termination shall be deemed to be unfair within the meaning of section 45 of the Act. Further where the court comes to the conclusion that an employee has been unfairly terminated, the court has power in appropriate cases to award up to a maximum of 12 months wages as compensation.

10. The claimants in this suit have averred that they were terminated for alleged involvement in theft that took place in respondent's premises. They further averred that they were dismissed summarily. These averments have not been denied by the respondent. They have instead been affirmed and justified by the respondent through its pleadings and evidence. The quality of evidence offered by the respondent in justifying its actions was however below the minimum threshold required in such cases. To begin, the only witness who testified on behalf of the respondent was not an eye witness to the events that she was talking about. She said that she relied on records for what she stated in court. As much as this court may in appropriate cases dispense with strict rules of evidence, the allegations that led to the dismissal of the claimants were serious in nature and could have landed them to criminal prosecution. It was therefore necessary to lead some reasonable evidence to show on a balance of probability that the claimants were blameworthy and that the respondent actually lost the money alleged to have been lost.

11. On the other hand, the respondent could not be expected to keep employees whose confidence and trust they had lost. But where such a situation arises, the law as written in the contract of employment or in the Employment Act must be followed in bringing to an end the relationship. This did not happen in this case with the consequence that the court awards the claimants as follows:-

(a) Samuel Kibandi

(i) Three months' salary in lieu of notice	Kshs. 15,249
(ii) Salary for the month of November plus	
house allowance.....	6,143
(iii) 6 months' salary as compensation for	
unfair termination	30,498
(iv) Service pay at rate 1/12 of each completed	
month of service.....	<u>101,660</u>

153,550

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(b) Joseph Kamande Muiruri

(i)	Three month's salary in lieu of notice	Kshs. 14,250
(ii)	Salary for November, 2009.....	4,750
(iii)	6 months' salary as compensation for unfair termination.....	28,500
(iv)	Service pay at 1/12 of each month of completed service.....	<u>57,000</u>

104,500

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These awards will be subject to any payment already made to the claimants and less any statutory deductions.

The claimants will have the costs of the suit.

It is so ordered.

Dated at Nyeri this 18th day of July, 2014.

ABUODHA N. J

JUDGE

Delivered in open Court in the presence of Gatene Advocate for the Claimants and in the absence of the Respondent Advocate for the Respondent.

ABUODHA N. J

JUDGE