



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 306 OF 2013

DANIEL RAITI OGETO.....CLAIMANT

-VERSUS-

**THE COLLEGE MANAGEMENT BOARD ACTING FOR
ELGON VIEW COLLEGE BOARD.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 19th September, 2014)

JUDGMENT

The claimant filed the statement of claim on 13.09.2013 in person. He prayed for judgment against the respondent for:

1. Orders that the respondent do reinstate the claimant without loss of benefits and position forthwith.
2. In alternative to reinstatement, the respondent to pay the claimant a sum of Kshs.1,166,475.05 under the claims for days worked in May, 2013; accrued house allowance at 15% salary for the 14 months worked; pay for accrued annual leave; leave travel allowance; severance pay for period worked from July 2012 to May 2013; 3 months pay in lieu of notice; 12 months maximum compensation for unfair termination; and general damages as set out in the statement of claim.
3. The respondent to pay the claimant Kshs.32,200.00 per month from 14th May, 2013 the effective date of constructive unfair termination or wrongful termination to the date of the judgment.
4. The respondent to issue the claimant's certificate of service.
5. The respondent to pay the costs.
6. The court to make any other relief as may deem fit to grant.

The respondent filed the statement of defence on 09.10.2013 through Ngigi Mbugua & Company Advocates. The respondent prayed that the claimant's prayers be dismissed with costs.

The amended statement of claim was filed on 18.06.2014 amending the sum of money in prayer 2 as set out in this judgment to Kshs.1,153,895.04.

It is not disputed between the parties that the respondent employed the claimant to the position of lecturer from July 2012 to May 2013. The claimant was absent from duty without leave sometimes in January, February, March and April 2013. The parties were unclear on the exact number of days the claimant was absent without permission but the submissions and evidence on record show that the claimant was indeed absent for one or more days in each of the cited months. Accordingly, the court finds that the claimant was notoriously absent without the respondent's permission or reasonable cause in the cited months.

Oluoch Titus Okwoyo, the respondent's witness No. 2 (**RW2**) testified that on 10.05.2013, the claimant was absent as he never checked out from work as expected and was not available during the working hours for a meeting to discuss students' complaints as required on that day. RW2 testified that the claimant did not check in on 13.05.2013. On 14.05.2014, the respondent convened a meeting in the claimant's absence and the respondent decided to terminate the claimant's services as per the letter dated 14.05.2013. The claimant was terminated for absconding duty from 10.05.2013 to 14.05.2013 and in view of a service record that showed a tendency for absenteeism. The termination was effective 10.05.2013. The claimant testified that he was present at work on 10.5.2014 and further testified that on 14.05.2014 he was substantially absent because he reported at work at about 4.00 pm. The claimant further testified that on 15.05.2013, he had a lengthy discussion with the respondent's chairman on the issue of the absence and the respondent delivered to the claimant the termination letter of 14.05.2014.

The court has considered the evidence. The issue for determination is whether the termination was unfair. The evidence shows that at termination, the claimant had notoriously been absent from work without permission. The court finds that the claimant was indeed absent from work without permission on 14.05.2014. Accordingly, the court finds that at the time of termination, the respondent had a valid reason for termination as envisaged in section 43 of the Employment Act, 2007. There is no doubt that the claimant was served with the termination letter and the show cause letter at the same time on 15.05.2014 as testified by RW2. There is also no doubt that the claimant was given a lengthy hearing about the dismissal and the reason for the dismissal at the meeting of 15.05.2013 between the claimant and the respondent's chairman resulting in the upholding of the dismissal. The court finds that the lengthy hearing and discussion served to cure any procedural defects that would have occurred if the termination had taken place without a hearing. It is the opinion of the court that the hearing that took place served the requirements of section 41 of the Act that prescribes a hearing before termination. Accordingly, the court finds that the termination was not unfair.

The next issue for determination is whether the claimant is entitled to the remedies as prayed for. The court finds as follows:

1. As the termination has been found to have not been unfair, the claimant is not entitled to reinstatement or compensation for unfair termination as prayed for.
2. As the claimant has admitted that he had served for less than 12 months, he is not entitled to the leave and leave pay as prayed for because leave did not accrue as envisaged in section 28(1) of the Act.
3. The evidence showed that the parties agreed upon a consolidated monthly pay inclusive of reasonable provision for rent. There were no disputes on that issue throughout the employment relationship. The court finds that the prayer for house allowance will fail.
4. The claimant is entitled to the certificate of service under section 51 of the Act.
5. The claimant has not established justification for all the other prayers made in the statement of claim and the same shall fail.

In conclusion, judgment is entered for the respondent to deliver to the claimant the certificate of service within 7 days and for each party to bear own costs of the suit.

Signed, dated and delivered in court at Nakuru this Friday, 19th September, 2014.

BYRAM ONGAYA

JUDGE