



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 156 OF 2013

(formerly NAI No. 980/11)

(Before Hon. Justice Hellen S. Wasilwa on 18th September, 2014)

KUDHEIHA WORKERS CLAIMANT

-VERSUS-

SINAGA GIRLS SECONDARY SCHOOL RESPONDENT

JUDGMENT

The claimant union filed their memo of claim on 20.6.2011 on behalf of their members, the issue being the grievants alleged unfair dismissal. The 1st grievant Beatrice Nelima Wanjala gave her evidence in court and told that she initially worked for respondent as an Accounts clerk as per her appointment letter **App 6** on 27.8.1992. On 5th January 1998, she was promoted to the position of Bursar as per the letter **App. 7**. She handled all the school accounts work as enumerated in **App 6(b)**. She did her work exceptionally well and the outgoing Principal Merab wrote her a recommendation letter **App 7(b)** as she handed her to the incoming Principal in 2009.

However trouble began with the incoming Principal who the grievant Beatrice states that had warned her of staff retrenchment. The new Principal now went on to serve the 1st grievant with a letter ordering her to do the work that the accounts clerk was doing (**Annex 1 – respondents documents**). This letter was dated 17.6.2009. The letter informed 1st grievant that the Board of Governors was implementing the Ministry of Education's directive to reduce non – teaching and support staff to meet the guidelines issued by the same office. The 1st grievant was to remain the school bursar and do duties which included writing all receipts, payment vouchers etc, accounting for all revenues and expenditure, plans, transactions, books of accounts and records and all other duties that encompasses the office of accounts and any other duties that may be assigned by the school Principal.

The respondents further sent the 1st grievant another letter as a reminder to the 1st one on 6.7.2009 to take up her new duties. The 1st grievant replied to the 1st letter vide her letter dated 18.6.2009 indicating that she could not take up the new duties immediately because she had issues to put before the Board of Governors in person.

On 20.7.2009 the 1st grievant appeared before the board and stated her case. On the same day she was served with a letter of suspension. She was asked to hand over all the accounting documents in person to the Principal the same day. On 23.7.2009 she was served with a show cause letter informing her to show cause why disciplinary action should not be taken against her for gross misconduct (**App 10**).

She replied to this letter vide her letter dated 23.7.2009 stating that the work load in the school with three streams was heavy and she needed someone to assist her in revenue collection, posting the fees registers etc. She further indicated that the stores need supervision which could not be done in the same office as other duties go on. She was thereafter asked to appear before the Board of Governors on 2.10.2009 at 10 am for gross misconduct. She was subsequently dismissed on 7.10.2009 for disobeying instructions from the Board of Governors by refusing duties assigned to her.

It is 1st grievant's contention that the terms and conditions of her union were to apply to her in case of suspension and even at board meetings but this was flouted. She wants court to order her to be paid 3 months salary in lieu of notice, gratuity, leave and damages for unlawful termination. At the time of termination, her salary was Kshs 15,018/= gross.

In cross-examination she told court that she informed her union that she had been summoned by the board. A representative came but the Principal refused to allow him before the board.

CW2 – the 2nd grievant's case is that he had been employed by the respondent in February 1996 subject to terms of service between the union and the Ministry of Education. He was employed as a clerical officer on 19.2.1996 he was given a letter stating his duties (**App 14**) and he performed those duties in the school. Even on 24.11.99 (**App 15**) he was given a good recommendation letter by the Deputy Headmaster. On 20.7.2009, he was suspended from duty but reasons for the suspension were not stated vide his **App 9 (respondent documents)**. On 17.6.2009, he responded to this letter of suspension. He had been previously deployed to the school stores and to perform any other duties that may be assigned to him by the school Principal. He requested to appear before the board and state his case. He was summoned before the executive Board on 22.9.2009 (**App 17**) to appear on 2.10.2009. He attended the board meeting on 2.10.2009. At the meeting, he stated that he was not given time to defend himself but was just told off and told to go out. On 23.7.2009 he was given a letter indicating that he had committed an offence of gross misconduct without stating the particulars. On 7.10.2009 he was dismissed from service. He contacted his union who took up the matter. He stated that his union never attended any of the meetings. He now seeks to be paid 3 months salary in lieu of notice, 1 months salary for each year worked, salary for July 2009, annual leave and 12 months salary as compensation for wrongful termination. At the time of termination, he was earning Ksh 10,470/=. He denies disobeying rightful instructions.

The respondent filed their response on 29.2.2012 through the firm of Kulecho, Musomba & Co. Advocates. They also called one witness RW1 who is a member of the Board of Governors of the respondent. It is the respondent's case that the grievants were asked to take up new duties and appear before the Board. They refused to take up the duties. They were invited before the board to defend themselves. After the hearing by the board, the board decided to dismiss them for insubordination. In cross-examination the respondent's witness admitted that the union was not informed of the need to appear before the board as stipulated under Clause 8(f) of the Collective Bargaining Agreement.

Having heard both parties, the issues for determination are as follows:-

- 1. Whether due process was followed before the grievants were dismissed.**
- 2. Whether the grievants are entitled to the prayers sought.**

There is evidence adduced to show that the 2 grievants were employed by the respondent as bursar and account's clerk respectively. In 2009, however, the Principal of the respondent purported to redeploy them to other duties. They resisted the move. This was considered insubordination and led to their dismissal.

The grievants were members of the claimant union. The union had a Collective Bargaining Agreement with respondent. Attached as App 20. Under Clause 6(c) of the Collective Bargaining Agreement:-

“Before the decision of terminating or dismissing the services of an employee is arrived at, the

employee shall be given a hearing at the Board meeting and at the same time, an employee shall be represented by the Union Branch Secretary or Secretary General at the Board meeting.”

It is clear that the union was expected to attend the Board meeting that decided to terminate the services of the grievants and this was not done. The Board meeting also flouted the provisions of S. 41 of Employment Act, 2007 which provides 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, chosen by the employee within sub – section (1) make.”

In this case the grievants were entitled to have another employee or a shop floor union representative of their choice present during the hearing. The 1st grievant told court that she even invited her union representative to attend the meeting but the Principal denied him access.

It therefore follows that due process was not adhered to before the grievants were dismissed.

Are the grievants entitled to prayers they have sought? It is the decision of this court that any action taken against the grievants without following due process was null and void. I therefore convert the dismissal into a normal termination and award the grievants as follows:-

1st Grievant:-

1. **3 months pay in lieu of notice as provided for under Clause 6(ii) of the Collective Bargaining Agreement = 3 X 15,015 = Kshs 45,045/=**
2. **1 month pay as gratuity for each completed year of service as per Clause 31 of the Collective Bargaining Agreement = 15,015 X 17 = Kshs 255,255/=**
3. **Unpaid June 2009 salary = Kshs 15,015/=**
4. **Annual leave for 2008 = Kshs 15,015/=**
5. **12 months salary as compensation for wrongful termination = 15,015 X 12 = Kshs 180,180/=**

KSHS 510,510/=

TOTALS =

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2nd Grievant:-

1. **3 months salary in lieu of notice as provided for under Clause 6(ii) of the Collective Bargaining Agreement = 3 X 10,470 = Kshs 31,410/=**
2. **1 month pay as gratuity for each year worked =**

13 X 10,470 = Kshs 136,110/=

3. Unpaid June 2009 salary = Kshs 10,470/=
4. Annual leave for 2008 = Kshs 10,470/=
5. 12 months salary as compensation for wrongful termination = 10,470 X 12 = Kshs 125,640/=

TOTALS =

KSHS 314,100/=

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

HELLEN S. WASILWA

JUDGE

18/9/2014

Appearances:-

Claimants present in person

Angu h/b Oyombe for respondent present

CC. Wamache