



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU
CAUSE NO.103 OF 2013
(Originally Nairobi Cause No. 2295 of 2012)

JAMES SIMIYU

CLAIMANT

v

BOARD OF GOVERNORS,

MOI FORCES ACADEMY LANET

RESPONDENT

JUDGMENT

1. James Simiyu (Claimant) was employed by the Board of Governors, Moi Forces Academy, Lanet (Respondent) with effect from 1 September 1986 as Accounts Clerk subject to terms of agreement between Ministry of Education and the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers (KUDHEIHA).
2. In 1992, the Claimant was promoted to the position of bursar of the School. On or around 17 July 2006, the Respondent interdicted the Claimant through a letter of even date. The interdiction letter gave some 11 reasons for the interdiction.
3. The interdiction letter requested the Claimant to respond to the allegations leading to the interdiction and further asked the Claimant to prepare to appear before the Respondent on 19 July 2006. In the meantime, he was directed to hand over office.
4. The Claimant responded as requested through a letter dated 19 July 2006 (Claimant's exhibit 4) and according to the Respondent's minutes of 11 November 2006 he had a lengthy session with the Respondent after which the Respondent resolved to terminate his services for gross misconduct.
5. On 20 November 2006, the Respondent's Secretary wrote to the Claimant informing him of the decision to terminate his services with effect from 11 November 2006 for misconduct.
6. The Claimant was not content with the termination of services and he consulted KUDHEIHA which wrote several letters to the Respondent but no resolution of the dispute was reached.
7. He subsequently sought legal advice and his Advocate wrote demand letters on 10 November 2010 and 11 November 2011 to the Respondent seeking payment of his terminal benefits, but without success. Other letters were also written but the dispute remained unresolved leading to the institution of legal proceedings around 10 May 2012.

Claimant's case

8. The Claimant's pleaded case is that the termination of his services was unlawful, unfair, discriminative and unjust and coloured with malice and bad faith. He further pleads he was not given notice or paid terminal benefits and other contractual dues contrary to the Employment Act, 2007.

9. The Claimant testified. He stated that he was appointed as an Accounts Clerk and was promoted to School Bursar when the then bursar left. His duties as bursar included taking charge of the non teaching staff and school accounts and that he performed the duties satisfactorily.

10. In regard to the events leading to the separation, the Claimant stated that on 17 July 2006 he was summoned by the School Principal and given an interdiction letter (Claimant's exh 3). He stated that he responded to the interdiction letter through a letter dated 19 July 2006 (Claimant's exh 4).

11. On the process followed, the Claimant stated that he appeared before the Respondent on 19 July 2006 but because the Respondent had not received his written response, the session was adjourned and held on 11 November 2006 but on this day he was not asked any questions. Later in the course of examination in chief he admitted giving explanations to the Respondent.

12. Subsequently, the Claimant stated that he received the termination letter dated 20 November 2006 on 23 February 2007 (Claimant's exh 5) and he acknowledged receipt in a delivery book (Claimant's exh 6).

13. In cross examination, the Claimant admitted that during the interdiction period he was being paid half salary until October 2006. He also confirmed receiving warning letters in the course of employment.

14. The Claimant further stated that he worked for 6 years without going on leave (2001-2006), though he admitted Respondent's appendix 16 were his leave records.

15. Because of reasons which will become clear shortly, the Court deems it unnecessary to relate what the Claimant stated in reference to the reasons for termination save to say he denied the allegations and also stated that some of the challenged actions were carried out with approval or directions of the Respondent.

Respondent's case

16. The Respondent called Ms. Elizabeth Njoroge, the Principal to testify. Again for reasons which will become clear, I will only recite that part of her testimony relating to the process followed before the decision to terminate the services of the Claimant was taken.

17. The witness stated that when she joined the School, she asked the Claimant to give her trial balances but the Claimant never brought the balances. In the course of settling down, she discovered several frauds relating to purchases and payments. She put these allegations in writing in the interdiction letter, and asked the Claimant to respond and that the Claimant ultimately appeared before the Respondent on 11 November 2006.

18. On contractual entitlements, the witness stated that the Claimant was entitled to 21 annual leave days and these were taken during the school holidays. She further stated that on termination, an employee was entitled to gratuity, but not employees who were summarily dismissed like the Claimant.

19. She further stated the termination of the services of the Claimant was in accord with the Education (Board of Governors) (Non- Teaching Staff) Regulations, 1993.

20. The Claimant filed his submissions on 27 October 2014 while the Respondent filed its submissions on 10 November 2014.

21. The Court has considered the submissions and the authorities cited.

Evaluation

22. The Claimant was terminated before the advent of the Employment Act, 2007. Therefore in so far as his cause of action and some reliefs sought are anchored on the said Act, they are misplaced.

23. The jurisprudence in 2006 was that an employer did not need to give any reasons for dismissing or terminating the services of an employee provided notice or pay in lieu of notice in terms of the contract between the parties was given or paid. The right to a hearing was equally an alien concept. It was employment at will, unless a contract or applicable statute specifically provided for a hearing

24. Under that framework, an employer was free to dismiss for a bad reason, a good reason or no reason at all provided notice or damages equivalent to the notice period was given or paid. In the language of the learned or the esoteric, an employer could dismiss without cause but on requisite payment. There was no requirement like now under section 43 of the Employment Act, 2007 for an employer to prove the reasons for dismissal or under section 45 of the same Act that the reasons are valid and fair. Employees were at the mercy of the employers.

25. That was generally the legal position unless the contract between the parties provided for a hearing. I have looked at the Education (Board of Governors) (Non-Teaching staff) Regulations, 1993 and indeed regulation 8 provided for a hearing before taking the decision to dismiss.

26. Further, the Claimant's letter of appointment provided that the contract would be subject to the terms of an agreement with KUDHEIHA. Clause 6 of the relevant Collective Bargaining Agreement provided for a hearing before termination and clause 8 provided for interdiction.

27. The Claimant contested the interdiction on the ground that the School Principal interdicted her without reference to the Respondent. Clause 8 of the Collective Bargaining Agreement provided for interdiction. The interdiction letter was written by the Principal as the Secretary of the Board of Governors. The interdiction letter specified the allegations against the Claimant and called upon him to respond in writing. The letter further informed him that he would appear before the Respondent.

28. In my view, the Claimant cannot fault the process on the ground that the Secretary acted without reference to the Respondent. She was in charge of day to day operations of the School and was answerable to the Respondent. Her decision was of a temporal nature and the Claimant had opportunity to appear before the Respondent.

29. However, the clause also provided that the notice of interdiction should be copied to KUDHEIHA's Union Branch Secretary and Secretary General, the Provincial Education Officer and Permanent Secretary, Ministry of Education.

30. The interdiction letter on the face of it does not show that these persons were copied. It was only copied to the Respondent's Chairman. No evidence was led as to whether the letters were actually brought to the attention of these persons.

31. And in my view, the failure to copy the interdiction letter to the Union caused prejudice to the Claimant. I say so because clause 8(f) of the Collective Bargaining Agreement made the presence of the either of the Union officials mandatory during the hearing before the Respondent. The union officials are ordinarily more conversant with industrial relations.

32. On this ground, I would find and hold that the termination of the services of the Claimant was unlawful and convert it into normal termination with benefits as may be appropriate.

Appropriate relief

Pay in lieu of Notice

33. The Claimant sought Kshs 59,190/- being the equivalent of three months pay in lieu of notice. The Claimant had served the Respondent for about 20 years. In accordance with clause 6(a)(ii) of the Collective Bargaining Agreement, the Claimant should have been given two months notice or pay in lieu of notice.

34. The Court would award him two months pay in lieu of notice assessed at Kshs 39,460/-.

Unpaid leave for 6 years

35. Under this head, the Claimant sought Kshs 118,380/-. According to the records produced by the Respondent, the Claimant took 11 leave days in 2003, 16 leave days in 2004 and 1 day in 2005. As bursar, the Claimant was on job grade 'E' and was entitled to 21 annual leave days every year. With the records placed before Court it is apparent he went on leave for 28 days, which is equivalent to about one annual leave.

36. The Court would therefore award him the equivalent of 5 months accrued leave in respect of the 5 years leave assessed at Kshs 98,650/-.

Gratuity

37. Under this head, the Claimant sought Kshs 394,600/- being one month pay for each of the 20 years served.

38. Clause 31 of the Collective Bargaining Agreement provided service gratuity for those employees who **retire** or **are retired**. The Court has converted the dismissal into normal termination and therefore service gratuity based on contractual agreement does not apply.

39. The Claimant did not lay any statutory or other foundation for service gratuity and the Court would decline this relief.

Unpaid salaries for 3 months and 23 days

40. The Claimant also sought Kshs 74,316/- being unpaid wages. The evidence produced is that the Claimant was on half pay during the interdiction period. This was admitted in paragraph 4 of the Defence.

41. The Respondent later on in the Defence denied owing the Claimant unpaid salaries at paragraph 17 of the Defence.

42. Having found the termination of services unlawful, the Claimant is entitled to the balance of salaries withheld from time of interdiction to time of dismissal.

43. Because the Respondent did not provide evidence to dispute the figures as pleaded by the Claimant, the Court would award him the sum of Kshs 74,316/- as remaining half of salaries during interdiction.

General damages

44. No contractual or statutory basis was laid for an award of general damages.

Conclusion and Orders

45. The Court finds and holds that the termination of the services of the Claimant was unlawful and awards him and orders the Respondent to pay him

(a) Two months wages in lieu of notice

Kshs 39,460/-.

(b) 5 months equivalent pay in lieu of leave	Kshs 98,650/-.
(c) Withheld/unpaid salaries	Kshs 74,316/-
TOTAL	Kshs 212,426/-.

46. The head of claim for gratuity is dismissed.

47. Claimant to have costs assessed at Kshs 35,000/-.

Delivered, dated and signed in open Court in Nakuru on this 14th day of November 2014.

Radido Stephen

Judge

Appearances

For Claimant Ms. Angima instructed by Nyagaka S.M. & Co. Advocates

For Respondent Ms. Muthoni instructed by Karanja Mbugua & Co. Advocates