



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA**

**AT MOMBASA**

**CAUSE NO. 289 OF 2013**

**SIMON MWAURA KARANJA ..... CLAIMANT**

**VERSUS**

**THE BOARD OF GOVERNORS**

**ST. CHARLES LWANGA SECONDARY SCHOOL ..... RESPONDENT**

**J U D G M E N T**

**Introduction**

1. The Claimant has brought this suit claiming Kshs.208,245 being employment benefits plus compensation for unfair termination of his employment by the Respondent on 8.1.2013. The basis of the suit is that the termination of the Claimant's employment was substantively and procedurally unfair.
2. The Respondent has denied liability to pay the damages sought and averred that the termination of the Claimant's employment was due to gross misconduct and was reached after due process.
3. The suit was heard on 15.7.2014, 9.10.2014 and 14.10.2014. When the Claimant testified as CW1 and the Respondent called Fridah Vulemi Kiliru and Peter Omolo Muga as RW1 and RW2 respectively. Thereafter both parties filed written submissions through their counsel.

**Claimant's Case**

4. CW1 was employed by the Respondent as a driver in 2009 by letter dated 12.9.2009 (Exh.1). He worked until January 2013 and his gross salary was Kshs.12654. He produced payslip to prove the said salary and also to show that he used to be deducted NSSF contribution of Kshs.400 per month instead of the usual Kshs.200. He contended that the employer never contributed his share of the NSSF contribution as required by the law.
5. On 9.1.2013, CW1 received a termination letter dated 8.1.2013 (Exh.3). The letter never stated the reason for the termination and it was effective from the said 9.1.2013. The letter also did not offer to pay any separation dues. CW1 wrote a protest letter to the Respondent and also reported the matter to the Labour Officer which prompted the Respondent to call CW1 for some money. CW1 was not satisfied with the dues offered because it was less Kshs.7000 deducted for settling a disputed debt regarding a stolen bus radio. According to CW1, the school bus was vandalised between 14th and 17th September 2012 (which was a weekend) and a radio stolen therefrom. When CW1 discovered the vandalism on Monday (17.9.2012) morning, he reported to the Accounts Clerk who reported to the RW1 who in turn

referred the matter to the RW2. CW1 accompanied RW1 and the school bursar to the police station to make a report of the theft. The police later went to inspect the bus and then arrested CW1 but released him on a bond of Kshs.5000. CW1 was forced to report to the police station daily until 8.1.2013 when he was dismissed from work. Before the dismissal, CW1 was summoned to appear before the executive committee of the Board of Governors (BOG) on 20.11.2012 and forced to admit to pay for the lost bus radio. According to CW1, he was told to pay or lose his job. In the circumstances, CW1 wrote a letter on 20.11.2012 undertaking to pay after Father Paul, a member of the B.O.G, persuaded him to write in order to save his job.

6. On 26.11.2012, CW1 received a letter dated 26.11.2012 (Exh. 8) telling him to wait for the decision on the bus radio from the full B.O.G. He was never called before the full B.O.G until he received the dismissal letter on 9.1.2013. He contended that the termination was unlawful and prayed for one month salary in lieu of notice, 12 months salary as compensation for unlawful termination and salary for 5 days worked in December 2012 when he was recalled from leave plus 7 days worked in January 2013. He prayed for refund of Kshs.10,000 deducted from his salary to pay for accident victim. He also prayed for accrued salary increments for 2010 and 2011 at 5% plus Certificate of Service.

7. On cross examination CW1 denied ever being served with a Certificate of Service after his dismissal from work. He admitted that he attended a meeting with Board Members on 20.11.2012 when he was forced to sign a letter admitting to pay for the radio in order to save his job. He also admitted that he was served with a warning letter dated 7.7.2011. He blamed the watchmen and other people in the school for the stolen bus radio.

### **Defence case**

8. RW1 is a teacher and the Principal of the Respondent. She admitted that CW1 was employed by the Respondent as a driver for the school bus. According to RW1, CW1 had caused many accidents which occasioned a lot of losses. Despite being talked to by the B.O.G and being warned, CW1 did not improve and was consequently dismissed on 8.1.2013. According to RW1, CW1's services were terminable by one month notice under his appointment letter. After his termination CW1 was offered his terminal dues being Kshs.34992 but he declined to collect the payment cheque. The dues payable according to RW1 was salary for 9 days worked in January (Kshs.2778), one month notice in lieu of notice (Ksh.9259) plus Gratuity for 3.3 months being (Ksh.30.555) totalling to a gross of Kshs.42592 less Kshs.7600 for the lost bus radio.

9. RW1 maintained that CW1 took away copy of Certificate of Service dated 19.2.2013. She produced minutes to show that the BOG heard the Claimant before dismissing him. RW1 explained that the Labour Officer wrote to her after the dismissal of the CW1 requesting her to deposit CW1's dues with the Labour Officer but she did not comply. According to her on the day the bus radio was stolen she was away and the matter was handled by the RW2.

10. On cross-examination by the Claimant's counsel, RW1 explained that CW1 was dismissed for reckless driving which led to accidents, loss of the bus radio and insubordination of the principal and other workers. According to her CW1 caused several accidents including one where a student fell from a stationary bus in a jam but the police did not charge CW1 with any offence. Instead the school compensated the victim and never recovered the money from CW1's salary. She confirmed that the bus radio was stolen over the weekend while the bus was parked at its open shed at the school compound. The bus key was kept in the office and the watchmen never reported any theft of bus radio until CW1 who reported the stolen radio in the morning after reporting to work. According to RW1, CW1 was investigated by the police and charged but the school withdrew the case by a letter. RW1 admitted that on 20.11.2012 CW1 was invited by BOG for discussion on his performance which ended up with a warning to him but later he was dismissed on 8.1.2013 for insubordination. RW1 admitted that CW1 was never called to any other BOG meeting to defend himself.

11. RW2 was the PTA Chairman between 2001 and 2012. On the day when the radio was stolen, he was called by RW1 to attend to the matter. He went to the school and found CW1 inside the bus and

proceeded to report to the police who did investigations and arrested CW1 after 2 days. RW2 confirmed that CW1 was then a parent to the same school and as such the case never went to court after CW1 was discussed by the BOG and wrote a letter on 19.2.2012 undertaking to pay for the radio. RW1 then withdrew the case from the police by letter dated 9.1.2013.

12. On cross examination by the Claimant's counsel, RW2 admitted that there was no problem with the CW1 being in the bus when RW1 went to check the stolen radio. RW1 admitted that he did not know who stole the bus radio. RW2 further admitted that CW1 wrote a letter undertaking to pay for the lost radio after the arrest by the police.

### **Analysis and Determination**

13. There is no dispute that CW1 was employed as a driver by the Respondent between 12.9.2009. and 8.1.2013 when his services were terminated. There is also no dispute that CW1 was involved in many issues of misconduct which did not go down well with the Respondent. There is further no dispute that CW1 was summoned to appear before the executive committees of the BOG in November 2012 to explain a theft of bus radio between 14.9.2012 and 17.9.2012. There is no dispute that in the said meeting CW1 wrote a letter undertaking to pay for the lost bus radio and the matter was forwarded to the BOG for ratification. It is also a fact that the BOG met on 8.12.2012 and received the findings by the Executive Board concerning CW1 and resolving to terminate CW1's contract effective 7.1.2013 on account of misconduct. That the BOG also resolved that CW1 will be paid salary in lieu of notice plus his other benefits less the value of the lost bus radio.

The issues for determination are whether the termination of the Claimant's employment on 8.1.2013 was unfair and whether the reliefs sought ought to issue.

### **Unfair termination**

14. The letter terminating CW1's services stated as follows:

**“Re: TERMINATION OF SERVICES**

**SIMON MWAURA KARANJA ID NO 9810784**

***During our full Board of Governors meeting held on 8/12/2013 – (Min 2/12/12) it was decided that you be relieved of your duties as a school bus driver of St. Charles Lwanga Secondary School with effect from 9.1.2013.***

***We thank you for the services you rendered to the school.***

***Yours faithfully,***

***Fridah V. Kilivu***

***Principal ...”***

The said letter never cited any reason for the dismissal. It also never offered to pay any dues. In this court's view the said termination was wrongful because it was in breach of the contract because CW1 was not served with one month prior notice in writing as provided under the letter of appointment (Exh.1). The termination was therefore not unfair within the meaning of Section 45 of the Employment Act because it was not based on any reason which warranted proof of substantive and procedural fairness. In this court's view, both the employer and the employee enjoys freedom of contract which is protected under Section 36 of the said Act. Consequently any of the parties to the contract can terminate the contract at will upon certain terms provided that the termination is not on ground of misconduct, incapacity, poor performance or redundancy which subjects the said freedom of contract to substantive and procedural fairness.

## **Reliefs**

15. Under Section 36 of the Employment Act, a wrongfully discharged employee is entitled to salary in lieu of notice. The CW1's letter of appointment (Exh.1) provided for one month salary in lieu of notice and as such he is awarded Kshs.12654 as per his last payslip (SM-2). CW1 is awarded Kshs.2109 being salary 5 days worked in December 2012 when he was recalled from leave. He will also get Kshs.6481.30 being pay for 21 days annual leave for 2010 not taken. RW1 will also get Kshs.2778 being salary for 9 days worked in January 2013. The prayer for refund of Kshs.10000 is dismissed for lack of evidence. The prayer for salary increment was not denied in evidence. The court however awards only Kshs.8040 from the same based on the formula in the appointment letter. The pay for compensation for unfair termination is dismissed in view of the finding that the termination was not unfair. The court however deems just to award gratuity in terms of the calculations contained in the Respondent's letter dated 19.2.2013 being Kshs.30555. In total CW1 is awarded Kshs.70617.30 The court will not set off the said award against the alleged Kshs.7600 value of the bus radio. The reasons for the foregoing is that there is no counter claim filed with the defence. In addition there is no basis for such valuation of the bus radio. Lastly the undertaking by the CW1 was under undue influence and therefore not unequivocal.

## **Disposition**

16. For the reasons above judgment is entered for the Claimant in the sum of Kshs.70617.30 plus costs and interest.

**Dated, signed and delivered this 19<sup>th</sup> December 2014**

**O.N. Makau**

**Judge**