



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 1086 of 2010

JACKSON KAINDI MUSAU.....CLAIMANT

VS

THE CHAIRMAN OF BOG OF KITHEINI SEC SCH.....1ST RESPONDENT

THE SECRETARY OF BOG OF KITHEINI SEC SCH.....2ND RESPONDENT

THE TREASURER OF BOG OF KITHEINI SEC SCH.....3RD RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 14th September 2010 and filed in Court on 17th September 2010, the Claimant sued the Respondent for unfair and unlawful dismissal from employment. The Respondent filed a Memorandum of Reply on 13th March 2012.
1. At the hearing Ms Gichuki instructed by B.M. Mung'ata & Co Advocates appeared for the Claimant while Mr. Fedha instructed by the Attorney General appeared for the Respondents. The Claimant and the Respondent's witness Alphonce Mutinda Kateti (RW1) gave sworn evidence and the parties' respective Advocates filed written submissions.

The Claimant's Case

1. The Claimant was employed by Kitheini Secondary School in the position of Accounts Clerk II effective 1st January 1988 at an initial salary of Kshs. 1,290. (letter of appointment is marked "JMD1" in the Claimant's documents).The Claimant testified that at the time of leaving employment his salary was Kshs. 11,750.
4. On 10th February 2010, the Claimant was sent on normal leave (letter marked "JM2" in the Claimant's documents).
5. On 30th March 2010, the Respondent wrote to the Claimant terminating his employment on grounds of gross misconduct (letter marked "JM3" in the

Claimant's documents).

6. The Claimant told the Court that he was not given notice and was not paid his terminal benefits. He further stated that prior to termination of his employment he was not heard.

7. The Claimant therefore claimed the following:

- a) 4 month's salary in lieu of notice.....11,750X4=47,000
- b) Terminal benefits @ 1/2 salary for every year of service.....5,875X22=129,250
- c) Unpaid house allowance @ 1/3 of monthly salary
- d) Damages for unlawful dismissal.....987,000
- e) Costs and interest
- f) Any other relief the Court may deem just to grant

The Respondent's Case

8. The Respondent, in its Memorandum of Reply denied the Claimant's claim for unfair and unlawful dismissal, submitting that the Claimant's employment record had been negative for a long time as evidenced in the following particulars:

- a) On 1st July 1997, the Claimant was issued with a warning letter for desertion of duty and refusal to hand over office keys to the Headmaster (letter marked Exhibit A in the Respondent's documents).
- b) In October 2004, the Claimant was suspended for going to the Principal's house while drunk (letter marked Exhibit B in the Respondent's documents).
- c) The Claimant's conduct was discussed at a meeting of the Board of Governors held on 29th January 2007 (minutes marked Exhibit C in the Respondent's documents).
- d) On 8th October 2007 the Claimant was summoned by the Board and warned specifically against getting drunk while on duty. (minutes marked Exhibit D in the Respondent's documents).
- e) On 5th October 2007 the Claimant's conduct was discussed again by the full Board of Governors and it was resolved that the Claimant proceeds on a one month's leave.

9. In view of the foregoing, the Respondent terminated the Claimant's employment effective 1st April 2010 (letter marked Exhibit E in the Respondent's documents).

Determination and Findings

10. The first issue for determination in this case has to do with the Claimant's salary as at the time he left employment. The Claimant testified that his salary was Kshs. 11,750. The Respondents' witness, Alphonse Mutinda Kateti admitted in cross examination that he did not know what the Claimant's salary was as at the time he left employment. Section 20 of the Employment Act, 2007 requires employers to provide an itemised pay statement for employees in regular employment while Section 10 of the Act places the responsibility of keeping employee records on the employer. In the absence of such records, the Court has adopted the Claimant's figure of Kshs. 11,750 as his monthly salary as at the time he left employment.

11. The second issue for determination is whether or not the Claimant's termination of employment by the Respondents was justifiable and lawful. Both the Claimant's and the Respondent's pleadings and attachments thereto used conflicting terms of termination such as retirement, dismissal and summary dismissal.

12. However, a proper consideration of the circumstances surrounding the termination of the Claimant's employment reveal that the Claimant was dismissed summarily as envisaged in Section 44 of the Employment Act. Section 44 (3) of the Act provides as follows:

(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

13. Section 41 of the Act sets out the procedure for doing so as follows:

(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 reason 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 the 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 subsection (1) make

14. Documents produced by the Respondents indicate that the Claimant's conduct and performance had been a source of concern within the School and the subject of discussion on several occasions over a long period of time.

15. Although there was no evidence that the Claimant received any of the warning letters produced by the Respondents, the Claimant did not rebut any of the accusations leveled against him in the letters and minutes produced by the Respondent. The Court has therefore reached the conclusion that the Claimant was aware that his conduct and performance had been the subject of discussion at the School.

16. The only question therefore is whether the Claimant was given adequate opportunity to respond to these accusations. According to the minutes of the meeting of the Board of Governors held on 29th January 2010, the Claimant was required to offer a written apology for reporting on duty while drunk. He was also to appear before the full Board or its Executive Committee. The minutes of the Board meeting held on 8th October 2007 also indicated that the Claimant was present when his conduct was discussed. The Claimant did not respond to the Respondents' evidence in this respect neither did he deny that he had been suspended on the same account.

1. Section Section 47(5) of the Employment Act that :

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.

1. I find that the Respondents in this case had a justifiable ground for terminating the employment of the Claimant but failed to follow the correct procedure in effecting the termination.

1. I therefore convert the summary dismissal into a normal termination and award the Claimant 1 month's salary in lieu of notice. I also award him service pay at the rate of 15 days pay for each completed year of service. In view of the Claimant's employment record, I decline to award him

compensation for unfair termination. The claim for house allowance has not been proved and is hereby dismissed.

1. Each party will bear their own costs.

DELIVERED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF JANUARY 2013

**LINNET NDOLO
JUDGE**

In the Presence of:

.....**Claimant**

.....**Respondent**