



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 1327 of 2010**

JAMES NYAGA

SAMWEL.....  
.....CLAIMANT

**VERSUS**

BOARD OF GOVERNORS,

KAMUTHATHA PRIMARY

SCHOOL.....RESPONDENT

*Rika J*  
*CC. Elizabeth Anyango*

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*Mr. Mugambi instructed by Mugambi Njeru and Company Advocates for the Claimant*

*Mr. Gitonga D.N. Chairman of the Board of Governors Kamuthatha Primary School for the Respondent*

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ISSUE IN DISPUTE: UNFAIR AND UNLAWFUL TERMINATION

AWARD

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1. The Claimant filed his Statement of Claim on 28<sup>th</sup> October 2010. The Respondent filed its Statement of Reply on 10<sup>th</sup> October 2011. The Claimant gave evidence and closed his case on 16<sup>th</sup> December 2011. Jane Karira, the Head Teacher of the Respondent Primary School, testified on 18<sup>th</sup> September 2012. Her Deputy Nephth Gathungu Namu gave evidence on 5<sup>th</sup> October 2012, when the Respondent closed its case. The matter was last mentioned on 26<sup>th</sup> November 2012 when parties were advised the Award would be delivered on notice.
2. Samwel testified he was employed by the Respondent as a Night Guard, on 1<sup>st</sup> April 1992. He was confirmed on 24<sup>th</sup> March 1993. He was respectively issued with letters of appointment and confirmation.

His first salary was Kshs. 805 per month. On 14<sup>th</sup> April 2010, the Respondent issued the Claimant with a letter terminating his contract of employment. The letter reads:

*“I wish to inform you that during the School Management Committee held in the school on 14<sup>th</sup> April 2010 and where you presented yourself to show cause why you should not summarily dismissed and where you confessed that you knew nothing about the alleged theft in the school. Taking note of other records held in this office concerning your discipline and conduct. This Committee has decided to summarily dismiss you from service with effect from 14<sup>th</sup> April 2010.”*

At the date of termination, the Claimant earned a monthly salary of Kshs. 5,097.

3. The Claimant testified that he did not have any previous theft record as alleged by the Respondent. He was investigated and cleared by the Police. He did not steal anything from the Pupils. Two fellow Guards, Daniel Mwaniki and Joseph Njeru, were arrested and charged at the Embu Magistrates’ Court over the incident. On 15<sup>th</sup> March 2010, the Respondent interdicted the Claimant and placed him on half salary. He was not heard sufficiently before the decision against him was made. His testimony was disregarded. The termination was malicious and a witch-hunt, aimed at denying the Claimant retirement benefits, after he had served for 19 years. He worked overtime of 4 hours every day. This was not compensated. The Claimant seeks the Court to grant him overtime pay of 19 years which he has calculated at Kshs. 185,820. He was not availed reasonable housing accommodation or housing rent for the 19 years. He prays for:-

- a) A declaration that the Respondent acted illegally and in bad faith when it dismissed the Claimant;
- b) Unconditional reinstatement without loss of benefits and payment of all his salaries and dues from the date of dismissal to-date;
- c) Kshs. 185,820 in overtime pay;
- d) In the alternative to reinstatement, 12 months’ salary in compensation at Kshs. 61,164 and 1 month salary of Kshs. 5,097 in notice pay;
- e) House rent allowance of 19 years;
- f) Costs of the Claim;
- g) Interest on [c] and [e] above; and
- h) Any other suitable relief as the Court may deem just.

4. Samwel testified that he worked from 6.00 p.m. to 6.00 a.m. He was not at all involved in the theft of the School Children’s personal effects. Items such as soaps and oils were stolen from the dormitories. The Claimant did not have any recorded disciplinary issues. Each Guard had a specific area to patrol within the large school compound. After the incident, Police searched the Guards’ houses. They did not recover anything from the Claimant. They recovered soaps, shoe polish, bedcovers and torches from the houses of the other two Guards. All the Guards were held in custody by the Police for three nights. The Claimant was released while the other two were arraigned in Court for theft. Samwel testified that he could not prevent his colleagues from stealing. He was set to retire in December 2010. Termination was on 14<sup>th</sup> April 2010. The Head Teacher called the Claimant after he had filed the dispute, and promised to settle out of Court. There was no settlement.

5. On cross-examination, the Claimant testified that he was 60 years old at the time of giving evidence. He lived at a place called Kithimu in Embu County. It was about three Kilometres from the School; it was a walking distance. He was employed in 1992. The school had about 450 children. It is a Public Boarding School and top performer. Parents from around the country take their children to this school. At the time he was employed in 1992, there were two Guards. The Respondent employed an additional Guard to bring the total to three, the total number at the time the Claimant left employment. All were night Guards. There were no day Guards. The Claimant was not aware if there was a Gate Keeper. He never manned the

gate. He served in the dormitory, office and dining hall areas. The compound was fenced. Theft took place in March 2010. Samwel was guarding the boys' dormitory area; Daniel Mwaniki the girls' dormitory area; and Joseph Njeru the Administration Building. The items were stolen from both dormitories. Children went to their classes for evening prep around 7.00 p.m. and came back to the dormitories at 8.00 p.m. The items were stolen when they were doing their prep. Police visited the Claimant's house after two days. All the Guards were arrested. The Claimant was released while the other Guards were charged. He was released on 15<sup>th</sup> March 2010, the same date he was interdicted. He appeared before the Board and explained how the incident happened. He was dismissed after this. He did not sign the attendance register. He did not have any document to support the claim for overtime pay. He did not sign off after duty. He did not make a complaint with the Labour Office upon termination. He was subscribed to the National Social Security Fund. He never went on leave. He applied for leave at one time. He refused to see the Head Teacher when she called him because the case is in Court. Redirected, Samwel testified that the Respondent alleged he was negligent. He was told he failed to prevent theft. The interdiction letter alleged he stole. This was untrue. Theft took place from both the boys' and the girls' dormitories. A lot of items were stolen. The Claimant explained what happened to the Disciplinary Committee. He worked from 6.00 a.m. to 6.00 p.m. every day. He used to demand for house rent allowance. He went on leave of sixteen days in 1997 when his father fell ill. The Claimant prays the Court to uphold the Claim.

6. The Respondent answers that it acted within its mandate, and exercised its right to terminate, after the Claimant failed to prevent a felony at the workplace. He failed to prevent theft that took place at the school. He had previous disciplinary issues. He admitted negligence before the Respondent and asked for forgiveness. He was given an opportunity to present his case. He was called by the Head Teacher to negotiate settlement, but declined the invitation. He did not have any documents to support the claim that he worked for 12 hours a day. He was paid all allowances as agreed. He was not housed by the school as he was a night guard.

7. The Head Teacher testified that she has worked with the Claimant from 1994. She had a good working relationship with the Claimant. There was a breakage at the school. The Guards were interrogated and said they knew nothing about the incident. The pupils had complained severally about missing items. The Head Teacher had discussed the problem with other teachers. The Claimant was in charge of the particular place where the theft occurred. A girl had raised alarm saying she noticed someone was bending over the dormitory window. The Claimant said everything was okay; he was in control. When the pupils came back to the dormitories, they found about 70 pairs of their shoes missing. They started screaming and had to be calmed down by the Duty Teacher. The Deputy Head Teacher summoned the Guards. The Guards alleged that the pupils were stealing from each other. The Claimant informed the Head Teacher the following day that he was in charge. A few days later, some items were brought by a member of the public, having been dropped outside the school. It was only then that the Claimant admitted there was a theft at the school. A search was carried out in the houses of the three Guards. Items were recovered from two of the Guards. There were no items recovered from the Claimant. Mwaniki and Njeru were charged, while the Claimant was arrested, locked up, but released without charges. Mwaniki died in the process and the case continued against Njeru. The Claimant was called before the Management Committee. He said he did not have anything to do with the incident. The theft left the pupils traumatized. They lost trust in the Administration and the Guards. The Parents were disgusted that such theft could take place in the early hours of the night. The Committee concluded there was gross negligence of duty and terminated the Claimant's contract of employment.

8. On cross-examination, the Head Teacher testified she employed the Claimant. He did not have any cases of misconduct for the 19 years worked. He is not a pastor, but just an ordinary Christian. His salary was Kshs. 5,000 per month. He did not work overtime. The Guards served from 6.00 p.m. to 6.00 a.m. There was nothing in the contract of employment stating overtime would not be compensated. He was entitled to 21 days of annual leave and two weeks to compensate for public holidays. The Guards did not go for public holidays because of the nature of their work. There were 4 guards at the beginning. 1 retired. If the security was bad, the school would consider raising the number of the Guards. Samwel took leave. It would be an oversight if the Respondent failed to point this out in its Statement of Reply. The Guards were provided with houses but said they would work from their homes. Their salaries were consolidated. Nothing was recovered from the Claimant's house. The recovered items were not what were stolen on the specific date, 6<sup>th</sup> March 2010. The Claimant was arrested because he was in charge of the area where the offence took place. A person was seen bending over the windows by one of the girls. There were no grills

on the windows, schools having been directed by the government not to have such grills, after the Kizito School fire tragedy. Samwel failed to prevent the theft. Police did not charge the Claimant. Class 5 children were the most affected. Their shoes were stolen between 7.00 p.m. and 8.00 p.m. They were stolen from 3 dormitories. The Guards make their own arrangement on their respective areas of responsibility. The Guarded area is about 2 acres. The Claimant told the Head Teacher he was in charge of the area where the offence took place. When he appeared before the Committee, he stated he knew nothing about the theft. He proposed to the Head Teacher that he is paid something on termination. The Respondent then received the demand from the Claimant's Advocates. There was a response made through the Law Firm of D. Gitonga. There was no proposal for settlement in this response. The Head Teacher called the Claimant when this dispute was already filed in Court. She was being humane. Samwel was to retire at the end of 2010. He had five months left. He was not issued with the certificate of service.

9. Nephy Gathungu Namu was on duty on 6<sup>th</sup> March 2010. After prep, children were released to go and sleep. There was screaming from the boys' dormitory. They were becoming violent, complaining that their shoes had been stolen. The Deputy Head Teacher together with the Teacher on duty calmed the children. He then instructed the Guards to look for the stolen items; they found nothing. At 6.00 p.m. the following day, the Respondent received a report that some of the items had been found scattered about 500 metres from the school. Namu and the late Mwaniki went to the scene. Mwaniki was asked to collect the items. He said he was sorry to Namu. The Police took over investigations. They recovered more items in the houses of Mwaniki and Njeru. They did not recover any from the Claimant's. The pupils were not comfortable with the three Guards. The Management Committee summoned the Guards to appear before it, on 14<sup>th</sup> April 2010. A decision was made to terminate the Guards' respective contracts of employment. The Respondent found the Guards to have been guilty of gross negligence and stealing. There were other miscellaneous complaints in their files. Answering questions from the Advocate for the Claimant, Namu testified that he had served as Deputy Head from November 2005. Generally the Claimant worked well. The witness did not have a specific complaint against the Claimant. The letter of interdiction stated the Claimant was interdicted for stealing personal effects while on duty. Nothing was recovered from the Claimant's house. There was no justification in the charge that the Claimant had stolen. The letter did not mention negligence. There was no understaffing in the security area. There were two dormitories, for girls and boys in separate areas of the same compound. Reports of theft were specifically about stolen shoes. The items stolen on the material night were not recovered. It was possible one Guard could be involved in stealing, while others were unaware. The Claimant admitted theft occurred where he was guarding. He was given a chance to defend himself. The Guards were granted annual leave. The Claimant worked from 6.00 p.m. to 6.00 a.m. for 19 years. He was not provided with housing accommodation. His gross negligence denied him any terminal benefits. The Respondent urges the Court to dismiss the Claim.

#### *The Court Finds and Awards:-*

10. There is no dispute that the Claimant was employed by the Respondent as a Night Guard. He worked for 19 years. His last salary was Kshs. 5,097. It is agreed that there was a theft incident on 6<sup>th</sup> March 2010 at the Respondent Boarding Primary School. Shoes and other assorted items belonging to the pupils were stolen from their dormitories between 7.00 p.m. and 8.00 p.m., while the pupils were in their classes doing their evening prep. The children were distraught on learning about their stolen personal effect. The Deputy Head Teacher and the Teacher on duty calmed them down, and commenced investigations.

11. The Claimant and two other Guards, the late Daniel Mwaniki and Joseph Njeru, were on duty. Policemen were called in and searched the houses of the three Guards. The search yielded stolen items from the houses of Mwaniki and Njeru. Nothing was recovered from the Claimant's house. Notably, the items recovered from the two Guards were not the items stolen on the material night. The three Guards were placed in Police Custody. The Claimant was however released without charge, while his two colleagues were arraigned before the Magistrates' Court at Embu. Mwaniki died in the process. Njeru was found guilty and convicted for the offence by the Criminal Court.

12. The Claimant was interdicted by the Respondent on 15<sup>th</sup> March 2010. This was after he had been asked to appear before the School Management Committee for a hearing the previous day 14<sup>th</sup> March 2010. The letter of interdiction suggested that the Claimant was involved in stealing of pupils' personal

effects. A month later, on 14<sup>th</sup> April 2010, the Respondent issued the Claimant with the termination letter. The Respondent told Samwel that, *‘you confessed that you knew nothing about the alleged theft in the school.....taking note of other records held in this office concerning your discipline and conduct.’*

13. The question raised by the decision is whether termination conformed to the statutory minimum disciplinary procedure and whether the Respondent gave valid reason or reasons, to justify termination, as contemplated under Sections 41, 43 and 45 of the Employment Act 2007.

14. The Claimant was on duty when the theft occurred. He admitted the incident occurred within his area of duty. It is true that he was not charged with the offence of stealing, or any other related offence in the Criminal Court. It is true nothing was recovered from him by the Officers of the Law who undertook the criminal investigations. There was nothing to incriminate the Claimant in the offence of stealing. The Respondent however, was not barred from initiating disciplinary proceedings against the Claimant for negligent performance of duty. It may even have had reasonable suspicion that the Claimant was involved in the offence committed by his two colleagues. The employment disciplinary process did not rest on the process and findings in the criminal trial. Under Section 44 [4] of the Employment Act 2007, an employer is justified in moving against an employee who is suspected of committing any of the employment offences under the Section. These offences include careless and improper performance of duty, and being reasonably suspected of having acted in a manner to the substantial detriment of the person or property of the employer. The Court is persuaded that the School had valid ground to terminate the contract of employment of the Claimant. The incident traumatized the children. They could no longer trust their Guards and the School Administration. The parents were irate. The Claimant testified that items recovered from his colleagues were not the items stolen on the material night. This would suggest the crime was of a recurrent nature. It would not have been possible to retain the Claimant after this collective lapse of security at the School. The pupils would not learn in this insecure environment. There was valid ground in justifying termination. The Respondent may have mis-described the various offences in the letters of interdiction and termination. The law calls for clearly drawn charges. The Respondent's letters appear poorly worded. The lack of clarity on the part of the Respondent with regard to the specific charges did not prejudice the Claimant. He knew what was being investigated, understood well that he was being questioned for involvement in the actual theft or in failing to prevent the theft. Overall, as the Guard who was in charge of the dormitory the epicenter of the invasion of 6<sup>th</sup> March 2010, he was correctly apportioned liability for careless and improper performance of duty. The Respondent had substantive justification in terminating the Claimant's contract of employment.

15. Procedural fairness was not observed in full. The lack of clearly drawn charges in the letter of interdiction was part of the defects in procedure. Section 41 of the Employment Act calls on the employer to explain to the employee, in a language understood by the employee, the charges faced by the employee. There is a requirement to ensure the employee is allowed the company of a workmate or that of a representative from his trade union, if unionized. These procedural standards were not observed by the Management Committee of the Respondent when it heard the Claimant on 14<sup>th</sup> March 2010. These defects make the termination unfair for which minimal compensation is awardable.

16. The Claimant was five years to his retirement day when his contract of employment was terminated. He had served for 19 years. Namu testified that because the Claimant was found to have been involved in gross negligence, he was disentitled of his terminal benefits. This was not a reasonable conclusion on the part of the school. There is no law which disentitles an employee what has accrued to him by dint of his years of hard work. The Respondent acknowledged Samwel had worked well for these 19 years. There were no other disciplinary issues shown to exist in his record, at the date of termination. The Court has made a view that the school was justified in terminating the contract of employment after the theft incident. In making the decision, the school ought to have considered: the long years served by the Claimant without disciplinary issues; the fact that he was only five years to retirement; and the fact that he was not directly involved in the crime at the school. These factors ought to have been weighed carefully before the decision to terminate was made. To send him away empty handed after 19 years of service, does not even to the untutored eye, appear right.

17. The Respondent ought also to have considered that it was not paying the Claimant all his statutory entitlements for the period he served. Successive laws governing terms and conditions of employment impose an obligation on the employer to provide the employee, at the employer's own expense, with reasonable housing accommodation at or near the place of work. In the alternative, the employer should pay the employee reasonable house rent allowance. This was the case under Section 8 of the repealed Employment Act Cap 226 the Laws of Kenya, and is the case under Section 31 of the current

Employment Act 2007. The Regulation of Wages [General] Order, fixes the house rent allowance at 15% of the employee's basic minimum wage. The Respondent, quite clearly from the evidence on record, did not at any one time comply with this requirement. There was nothing in the pay slip showing house rent allowance was included in the Kshs. 5,097 paid to the Claimant. It was similarly conceded by the Respondent that the Claimant worked 12 hours every single day of the week, amounting to 84 hours in a week, against the maximum 60 hours a week allowable under the Regulation of Wages [General] Order. There was no rest day. It was shocking to hear the Head Teacher say that this arrangement was agreed between the parties on a 'take it, or leave it' basis. The Employment Law sets down certain minimum employment standards, which no employer or employee should contract below. The Court feels that the Respondent ought to have taken into account these factors, to reach a reasonable settlement with the Claimant. The remedy of reinstatement to an employee who was five months to retirement, does not seem to the Court reasonable. Secondly, the Claimant left employment in circumstances that destroyed trust and confidence between the employee and the employer. It is unlikely that these values can be rebuilt in a fresh employment relationship, more so considering the effect the theft incident had on the pupils and their parents. Reinstatement is declined.

18. The Claimant however has slept too long on other statutory rights, that he cannot recover the entire amounts claimed for 19 years. This Court does not enforce rights that are statutory barred under the current employment law regime. The temporal jurisdiction of the Court is not open ended. It may be asked of the Claimant why for 19 years, he never raised the issue of unpaid overtime work and house rent allowance. It is not right that these claims are only triggered by the controversial termination of employment of 14<sup>th</sup> April 2010. The Claimant was a member of the National Social Security Fund, entitled to his pension and does not seek service pay. The Regulation of Wages [General] Order stipulates that:-

§ The normal working week shall consist of not more than fifty-two hours of work, spread over six days of the week.

§ Notwithstanding this, the normal week of a person employed on night work shall consist of not more than sixty hours of work per week.

§ Every employee shall be entitled to one whole rest day in each week.

§ Overtime shall be paid for time worked in excess of the normal number of hours per week, at one and one-half times the normal hourly rate.

§ For time worked on the employee's normal rest day or public holiday, at twice the normal hourly rate.

§ For purposes of calculating payments for overtime, the basic hourly rate shall, where the employees are not employed by the hour, be deemed not less than one two-hundred-and-twenty-fifth of the employee's basic minimum monthly wage.

The Court shall grant him reliefs based on the date the Employment Act 2007, and the Labour Institutions Act 2007 under which the summons issued, came into force, the 2<sup>nd</sup> June 2008 up to the date of termination, 14<sup>th</sup> April 2010. Claims relating to other years before this date are too remote in time and are indeed time barred under the Employment Act 2007. He is granted arrears of house rent allowance of 21 months. He is granted overtime pay at one and one-half times the normal hourly rate for 24 hours a week, which in 21 months amounts to Kshs. 45,669.

He is allowed the claim for notice pay. The Court Awards:-

**[a] Termination was on account of procedure unfair;**

**[b] The Respondent shall pay to the Claimant 6 months' salary in compensation calculated at Kshs. 30,582;**

**[c] House rent allowance is granted to the Claimant from 2<sup>nd</sup> June 2008 to 14<sup>th</sup> April 2010, a period of**

**21 ½ months, at 15% of Kshs. 5,097, totaling Kshs. 16,437.80;**

**[d] Notice pay of 1 month granted at Kshs.5,097;**

**[e] Overtime granted at Kshs. 45,669; and,**

**[f] The total amount of Kshs. 97,785 shall be paid to the Claimant by the Respondent within 30 days of the reading of this Award.**

Dated and delivered at Nairobi this 9<sup>th</sup> day of May 2013

James Rika  
Judge