



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 31 OF 2012

(Formerly Nairobi Cause No. 412 of 2011)

KEPHA THUO MAGUA.....CLAIMANT

-VERSUS-

**BOARD OF GOVERNORS SATIMA SECONDARY
SCHOOL.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 26th July, 2013)

JUDGMENT

The claimant Kepha Thuo Magua filed the memorandum of claim through B.I. Otieno & Company Advocate on 15.03.2011. In the Amended Memorandum of Claim filed on 16.10.2012, the claimant prayed for a declaration that the termination of the claimant's employment was unfair and unlawful; and the respondent to pay the claimant terminal dues including:

- a. **service gratuity for 6 years at Kshs.16,995/= being Kshs.101,970.00;**
- b. **unpaid house allowance being Kshs.2,000/= for 12 months for six years served making Kshs.120,000.00;**
- c. **medical allowance at Kshs.2,000/= per month for six years being Kshs.120,000.00;**
- d. **unpaid annual leave for six years at Kshs.16,995/= being Kshs.101,970.00;**
- e. **three months pay in lieu of termination notice being Kshs.494,925.00**
- f. **total claim of Kshs.494,925.00.**

The claimant also prayed for a certificate of service and costs of the suit. The respondent filed the memorandum of defence on 28.06.2011 through the Honourable Attorney General. The respondent prayed that the suit be dismissed with costs.

The case was heard on 6.6.2013 when the claimant testified to support his case. The respondent's case was heard on 4.7.2013 and the respondent's witness was its Principal and secretary Zacharia Kimani Njenga.

The claimant was employed by the respondent from 17.02.2005 to 19.07.2010 in the capacity of an accounts clerk. By a letter dated 1.05.2010, the respondent reduced the claimant's salary from Kshs.16,999.00 to Kshs.12,000/= effective the date of the letter. The respondent stated in the letter that the reduction was due to the claimant's low ACNC accounts qualifications; there was no respondent's minute setting the claimant's such high salary; and the student population was too low.

By an undated letter being appendix 4B on the claim, the respondent conveyed to the claimant the decision of the meeting of 30.04.2010 that he would be employed on contract for three months to be renewed based on performance; he would be put on probationary service before being employed on permanent terms; and he would retain his designation of accounts clerk. The claimant raised complaints about the unfair labour practices and unfairness as advanced by the respondent. He was served a warning letter being appendix 6 on the memorandum of claim. He was warned that on 28.01.2010 he had been rude to the Principal by alleging that it was his duty to fight for the rights of the workers; that on 7.03.2010, he was reported as having incited workers; that he exaggerated the days casual workers had been on duty with the aim of defrauding the school; and on 24.04.2010, the Principal called him to come to school to do budget for second term but he refused to show up as he had alleged to be far away in Eldoret where as he had been spotted within reach at a petrol station at Ol-Kalou town and escaping by driving away at a dangerous speed upon seeing the approaching Principal.

By the letter dated 19.07.2010, the respondent dismissed the claimant with effect from 8.7.2010 on account of gross insubordination to the school administration, the respondent and for participating in the student strike that took place on 24.05.2010. Prior to the dismissal, the claimant had been invited to attend the respondent's meeting on 8.07.2010 but refused to participate in the proceedings without the attendance of his union official. The respondent's case was that the dismissal was fair because the claimant had been given the notice of the misconducts and a chance to be heard in self exculpation. Further, the Government circular following gazette notice No. 262 of 1993 had empowered the respondent to determine the salaries for its staff and the claimant's salary had been reduced in view of his stumpy qualifications. The respondent further submitted that the claimant had failed to transform in view of the changes introduced by the new Principal relating to streamlined procurement process that abolished single sourcing in purchasing school supplies.

The claimant reported his predicament to his union, the Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers which exchanged correspondence with the respondent in that regard. In absence of any amicable settlement and after a notice to sue by the claimant's Advocates, the claimant filed the suit.

The first issue for determination is whether the termination of the claimant's employment was unfair. The claimant has submitted that the respondent has failed to establish the reason for termination as provided for in sections 43 and 47 (5) of the Employment Act, 2007.

The court finds that the respondent has failed to establish the reasons for termination as stated in the termination letter as having existed at the time of termination. There was no evidence linking to claimant to or participating in the student strike. The evidence on record shows that the claimant raised genuine grievances about the unilateral and adverse changes in his terms of service. The court holds that such genuine complaints were valid and could not constitute a valid reason for termination as provided in section 46 (h) of the Act. The section entitled the claimant to initiate the complaints about his terms that were changed to his disadvantage and without any agreement between the parties. The court holds that the Government circular entitling the respondent to determine the salaries of its staff did not thereby entitle the respondent to contravene section 10(5) of the Act which provides that changes in the terms and conditions of service be effected in a consultative process between the parties to a contract of employment. The court finds that section 41 of the Act entitled the claimant to a hearing in presence of a person of his choice including a union representative and the denial of that opportunity by the respondent rendered the procedure defective. Accordingly, the court finds that the termination was unfair and the claimant is entitled to twelve months salaries being **Kshs.203,940.00** at the legitimate last monthly gross pay of Kshs.16,995/=.

The court makes the following findings on the other prayers made for the claimant:

- a. The claimant was a member of the National Social Security Fund and is not entitled to the service pay or gratuity as per section 35(6) of the Act.
- b. The claimant did not justify the pay for three months in lieu of the termination notice and the court finds that the claimant is entitled to one month pay being **Kshs.16,995.00** as the statutory

- provision in section 35(1) (c) of the Act.
- c. The respondent's evidence was that the claimant rested during school vacations in April, August and December. The court finds that the evidence was credible and finds that the claimant is not entitled to pay in lieu of leave as prayed for.
 - d. The claimant has not established the basis for the prayer for unpaid medical allowance and the court finds that the concerns and evidence by the respondent that during the service he never complained about the Kshs.1,000.00 paid for medical allowance is valid and the claim shall fail as a mere unfounded afterthought.
 - e. The claimant did not provide evidence and justification for the unpaid house allowance as prayed for and the claim shall fail.
 - f. The court finds that the claimant is entitled to costs of the suit and the certificate of service.

In conclusion, judgment is entered for the claimant against the respondent for:

1. A declaration that the dismissal of the claimant by the respondent was unfair.
2. The respondent to pay the claimant **Kshs.220,935.00** by 1.10.2013 and failing interest to be payable the date of the judgment till full payment.
3. The respondent to deliver to the claimant the certificate of service by 1.08.2013.
4. The respondent to pay costs of the case.

Signed, dated and delivered in court at Nakuru this Friday, 26th July, 2013.

BYRAM ONGAYA

JUDGE