REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NYERI

CAUSE NO. 24 OF 2012

(Nairobi Cause No. 1388 of 2011)

KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTION,

HOSPITALS AND ALLIED WORKERS …..... CLAIMANT

VERSUS

ALMANO SPECIAL SCHOOL …..... RESPONDENT

J U D G M E N T

The claimant Mr. Joseph Maru, in this suit seeks judgment against the respondent for what is detailed as:-

1. Notice;
2. Service gratuity 10 years;
3. Salary for 9 days worked in 2006;
4. Leave not taken;
5. Public Holidays worked;
6. House allowance;
7. Underpayment of wages;
8. Twelve months compensation for loss of employment.

The claimant alleges that he was an employee of the respondent having been employed on 11th August, 1996 as a groundsman at a salary of Kshs.1,200. According to him he served the respondent without any problems until 1st December, 2005 when he was informed by a letter of that date that his services were no longer needed.

The claimant through his Union which brought the claim on his behalf avers that the Union made effort but without success to settle this matter prompting the same to be referred to this court for resolution.

The respondent for its part while not denying the claimant was its employee, avers that it terminated the claimant's services due to gross misconduct after several warnings. The respondent further averred that the claimant was not a member of the Union hence the latter lacked capacity to bring the claim on the claimant's behalf. The respondent further averred that it had no collective bargain agreement with the Union.

At the hearing, the claimant reiterated the averments in his statement of claim stating that he was employed in 1996 and terminated in 2006 without being given any reason at all.

When he was terminated he reported the matter to the Union to attempt the resolution of the dispute. It was his evidence in chief that during the time he was employed he only received one verbal warning. According to him the warnings were on Union issues and nothing to do with his work.

On the part of the respondent, Sister Jane Ngacha testified. She produced the claimant's letter of appointment and stated that he was terminated for misconduct.

On termination the claimant was paid his salary for December, 2005. She produced an extract from Muster Roll to show this (D-ex.3). It was Sister Jane's testimony that the claimant used to harass and beat the children at the school and that he had an intimate relationship with one of the girls. According to her she served the claimant more than once with warning letters over his misconduct and he promised to change. She produced two warning letters as D-ex.4.

Upon termination the claimant was paid his dues less NHIF and NSSF (D-ex 4).

Regarding holidays, it was her evidence that the school was a boarding school so the claimant would be on leave during school holidays. She denied receiving any invitation from the conciliator and further stated that the school did not have any recognition agreement or CBA with the Union.

The court has reviewed the pleadings in this case together with supporting documents. Further, I have heard the benefit of hearing the testimony of both the claimant and the respondent. Whereas the respondent has endavoured to produce evidence before the court in a bid to justify its actions against the claimant, the latter has produced nothing nor called any additional evidence to vouch for the claim as pleaded in the statement of claim or oral testimony. The claimant's claim in the circumstances is wanting in detail and material evidence. It is almost a bare allegation. The respondent for its part has produced the warning letters which it claimed was a precursor to the dismissal of the claimant. It has further produced documents to show the claimant was paid his salary for December, proceeded on leave and that he was a contributor to NSSF and NHIF.

As this court has said before and as recently as in the case of **Patrick Nguthiru Gichuki -vs- David Denny Cause No. 22 of 2012 – Nyeri**, it is a settled rule of evidence that a person who seeks from any court or tribunal a determination in his or her favour must provide that court with sufficient evidence to persuade such court or tribunal that whatever is being claimed more probably took place than not. It does not have to be proof beyond reasonable doubt as in criminal cases but it ought to be such proof that any reasonable person listening to the testimony or reviewing the evidence will be more inclined to reach the conclusion that the event being alleged more probably took place than not.

Besides section 47(5) of the Employment Act provides that:

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

From the foregoing the court is of the opinion that the claimant has failed to discharge that burden.

What about the respondent? Has it fully justified the grounds for termination of the claimant's employment? While this may be so, one question that was not adequately answered whether by pleadings, evidence or oral testimony, is whether in terminating the services of the claimant, the respondent followed the proper procedure laid down in the Employment Act.

The respondent alleged and has reasonably shown that it terminated the services of the claimant on grounds of misconduct and after failing to change as per his undertaking when he was warned. However nothing turned out either in the pleadings or evidence in court that in terminating the claimant's employment the respondent complied with the provisions of section 41(1) of the Employment Act which provides:

"... 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 this explanation".

In the absence of such evidence the court is of the finding that the termination of the claimant's employment even if deserved was contrary to procedure laid down in the Act hence unlawful.

The claimant was engaged through a written contract of employment

(D-ex. 1). On termination, the contract provides that for grave reason rather than gross misconduct, the contract may be terminated by either party giving at least one month's notice or by payment of one month's salary in lieu of notice to the affected party. The claimant was given one month's notice of termination however this court having found that the notice was issued contrary to the provisions of section 41(1) hereby annuls the said notice and awards the claimant one month's salary in lieu thereof.

In conclusion, the claimant's case stand dismissed except to the extent that the respondent will be liable to pay the claimant one month's salary in lieu of notice for reasons stated above. It is so ordered.

Dated at Nyeri this 23rd day of July, 2013.

Abuodha J. N

Judge

Delivered in open Court in the presence of Gatere Advocate for the Claimant and in the presence of Muthoni Advocate for the Respondent.

Abuodha J. N

Judge