



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 42 OF 2013

(Formerly Nairobi Cause No. 1859 of 2011)

REUBEN NGANGA MUTURI.....CLAIMANT

-VERSUS-

**THE TRUSTEES CATHOLIC DIOCESE OF
NAKURU.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday 5th July, 2013)

JUDGMENT

The claimant **Reuben Nganga Muturi** filed the memorandum of claim on 3.11.2011 through Njeri Njagua & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. **Kshs.135,889/=.**
- b. **General damages for unfair dismissal.**
- c. **Costs of the claim.**

The respondent filed the memorandum of response on 06.12.2011 through Rodi Orege & Company Advocates and prayed for the dismissal of the claim with costs.

The case was heard on 28.05.2013 and on 10.06.2013. The claimant gave evidence to support his case and the respondent called three witnesses namely James Wanjohi (RW1) the respondent's night guard at the school's main gate, Sister Teresa Martinez (RW2) the School Nurse, and Jesse Ngwiri, the Chairperson of the school Board of Governors at the material time.

The claimant was employed by the respondent as a watchman at the respondent's Arutani Secondary School with effect from 2.01.2011 for a renewable three year contract. The claimant was deployed to serve as a night guard at the Sister's convent situated within the school compound.

On the evening of 13.06.2011, at about 8.30 pm was a rainy season at the convent. The convent comprised a house the Sisters used as a residence. At the material time, Sister Mercyline Ogema, the supervisor at the kitchen, the dormitory and the patron of the young Christian students, Sister Teresa Martinez (RW2), and Sister Elena, the school Principal were in the house at the table taking supper.

The claimant had reported at work at around 6.30 pm that evening. He was in the enclosed space at the convent in the process of making soup for the dogs. There was heavy rain then the electrical power supply went off. At about 8.00 pm, he saw a flush of a person passing towards the Sisters' house. He imagined it was his workmate, the night guard deployed at main gate. In a succession, he saw a second person pass. He sensed danger and he called Sister Teresa on her cell phone. The phone rang but it was not picked. The claimant did not have any other useful phone number other than Sister Teresa's. He tried to call the second time but there was no response. He saw three other persons going towards the Sisters' residence. He sensed the persons were evil people. He tried to call the watchman at the gate (RW1) but the call failed to go through.

He was afraid and not sure what to do. He escaped through a door which was set aside for the car. He ran for about 50 metres and called Father Cafana and asked him to put on the alarm because the convent had been attacked. His alarm used electricity and since there was an electrical blackout, it could not function. The claimant ran and shouted for help and teachers at the staffroom came out. One of the teachers called Njoroge telephoned the Chief and requested that the Administration Police officers be dispatched to the school. Three night guards, deployed one at the main gate and two at the dormitories, joined the claimant. They met at the main gate and resolved to go to the convent to face the thieves. They patrolled the convent compound but the thugs had already attacked the Sisters, robbed, injured Sister Teresa and left. It was about 9.00 pm. Subsequently, the police arrived. They investigated and asked the Sisters to retire and sleep. The claimant remained on duty till 6.00 am. The claimant identified two suspects and informed the Principal and the Chief reported their details to the police. The claimant continued to serve as a night guard at the convent until 29.06.2011 when he was redeployed to a day guard.

On 8.08.2011, the claimant was working at the school main gate and noticed that the Board members were reporting at the school for a meeting. The Principal called the claimant to the Boardroom and the Board asked him to explain the events of 18.06.2011 when the convent had been attacked. The Board visited the convent and the details of the attack were narrated by the claimant. Back at the Boardroom, the claimant wrote a statement on the event of 18.06.2011 as per exhibit 2 on the memorandum of response. He was later given a dismissal letter after meeting the Board. The dismissal letter dated 8.08.2011 attached on the memorandum of claim was addressed to the claimant and stated as follows:

“RE: SUMMARY DISMISSAL

We refer to your employment with us as a watchman in Arutani Secondary School.

Following a series of discussion you have had with the School Management Board, the Board has decided to Summarily Dismiss you from the employment due to the following reasons;

That on 13.06.2011, at around 8.00 pm, the Sisters were attacked by thugs at place you were assigned.

After careful scrutiny it has been realized that you neglected your duty as a watchman since you failed to inform the Principal on time. This is even after declaring that you actually found them coming into the convent. You were expected to inform the Principal what was happening but you failed to do so.

Due to this, it led to Sisters being hurt, breakages in the house and loss of money and other personal belongings.

This is gross misconduct which amounts to neglect of duty. It is a violation of your employment contract and Employment Act, Issue No. 11 of 2007, section 44 (4) (c). Consequently, the management has no option other than Summarily Dismiss your services with immediate effect from 8th August 2011. Please make the necessary arrangements with the School Bursar to handover the school property you may be in possession for computation of your final dues.

Yours faithfully,

Signed

Sr. Erlena Vacil Hinojosa

Board Secretary

At the hearing, the evidence on record shows that:

- a. **the claimant had his private cell phone and was not provided any airtime;**
- b. **the claimant did not have the Principal's cell phone number saved on the claimant's cell phone directory;**
- c. **it was not evident that the respondent had trained the claimant on emergency situations;**
- d. **the thieves that attacked that early night were between three and six and the court finds they could easily overpower the claimant had the claimant tried to confront them especially in circumstances where the respondent had not provided the claimant with any serious weapon for such purpose;**
- e. **there was darkness and heavy rains at the time the thieves attacked and screams for help as testified by the claimant must have been made but the response appears to have been naturally slow than expected including that the claimant's information that the alarm be switched on by Father Cafana did not yield any positive response in view of the electrical blackout; and**
- f. **the dogs were not trained and barked only once.**

The respondent's written submissions were filed on 21.06.2013. The claimant failed to file the written submissions as directed by the court. The issues for determination are whether the termination was fair and whether the claimant is entitled to the remedies as prayed for.

There is no doubt that the claimant was given a hearing by the respondent's Board and there is no doubt that the claimant knew the allegations leveled against him. The court finds that the claimant was accorded procedural fairness. The next consideration is whether the reason for termination was genuine and valid as envisaged in section 43 of the Employment Act, 2007. The reason given is that the claimant failed to inform the Principal about the thieves on time. The events of the evening as per the facts reproduced in this case were consistent with the record of the minutes of the Board attached to RW3's witness statement filed on 28.05.2011. It is obvious that the Principal was one of the Sisters under attack. The claimant's evidence that he unsuccessfully called RW2 cannot be doubted. The Board minutes show mobile phones were stolen and there is no reason to doubt that the claimant had not saved in his phone's directory the Principal's cell phone number. It is not shown by the respondent that the claimant failed to comply with any operational policies or prescription applicable to the kind of attacks that occurred on the evening of 13.06.2011. In particular, there were no clear instructions to inform the Principal, there were no prescribed timelines from which to compute and determine if the claimant acted late or not and there was no policy by the respondent to guide the claimant in the circumstance of the case. The court finds that in the circumstances of the case, the claimant acted prudently and to the best of his capacity in absence of clear and communicated operational policies and systems by the respondent.

The court upholds its opinion in Grace Gacheri Muriithi –Versus- Kenya Literature Bureau, Industrial Cause No. 44 of 2011 at page 34 of the Judgment, where it was stated:

“To ensure stable working relationships between the employers and employees, the court finds that it is unfair labour practice for the employer to fail to act on reported deficiencies in the employer's operational policies and systems. It is also unfair labour practice for the employer to visit upon the employee adverse consequences for losses or injury to the employer attributable to the deficiency in the employer's operational policies and systems. The court further finds that it would be unfair labour practice for the employer to fail to avail the employee a

genuine grievance management procedure. The employee is entitled to a fair grievance management procedure with respect to complaints relating to both welfare and employer's operational policies and systems. The court holds that such unfair labour practices are in contravention of Sub Article 41(1) of the Constitution that provides for the right of every person to fair labour practices. Further, the court holds that where such unfair labour practices constitute the ground for termination or dismissal, the termination or dismissal would invariably be unfair and therefore unjust."

In this case, the school fence was not well maintained, there was no electricity backup system, there was no clear claimant's job description, there was no operational instructions on reporting attacks like the one that occurred and it is the court's opinion that the respondent's operational deficiencies are no grounds to punish the claimant in circumstances whereby the claimant did the best possible. The court finds that the reason for termination was not valid.

The court has considered the claimant's honest and clean record, the seriousness the respondent's Board treated the case by hearing the claimant and the balance of justice in the matter and finds that **Kshs.62,718/=** being six months salaries at Kshs.10,453/= per month for the unfair dismissal will serve the ends of justice. As the termination was without the due notice, the court finds that the claimant is entitled to **Kshs.10,453/=** for pay in lieu of the termination notice. The claimant was a member of the National Social Security Fund and in view of the provisions of section 35(6) of the Employment Act, 2007, the court finds that he is not entitled to the claim for gratuity or service pay.

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

- a. a declaration that the termination of the claimant's employment by the respondent was unfair;
- b. the respondent to pay the claimant a sum of **Kshs.73,171/=** by 1.09.2013 failing which interest at court rates to be payable from the date of this judgment till full payment; and
- c. the respondent to pay costs of the case.

Signed, dated and delivered in court at **Nakuru** this **Friday, 5th July, 2013.**

BYRAM ONGAYA

JUDGE