



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 90/2013

(formerly Nrb 1975/2012)

(Before Hon. Justice Hellen Wasilwa on 30th September, 2013)

K.U.D.H.E.I.H.A CLAIMANT

-VERSUS-

B.O.G CHAVAVO SEC SCHOOL RESPONDENT

JUDGMENT

The claimants herein Kenya Union of Domestic, Hotels and Educational Institutions, Hospitals and Allied Workers, (KUDHEIHA) filed their memorandum of claim before this court on 3.10.2012. The issue in contention is the unlawful termination of services of Gladys K. Samoya their member. The claimant's case is that the grievant was an employee of the respondent.

Under mandate from the Ministry of Education, the respondent can employ staff to aid in the running of the school. The grievant was employed by the respondent in January 1986 as a copy typist. She was issued with a letter of appointment accordingly. She subsequently worked for the respondents with dedication for 25 years. On 27.7.2011 the grievant claims that she and 8 other employees joined the claimant union to exercise their democratic right under the Constitution.

It appears, the decision made by the grievant did not go well with the respondents and on 5th August, 2011, the respondents sent the grievant on leave for the years 2010 and 2011 as per Appendix 5. Thereafter on 15th September 2011, the respondent terminated her services through Minute No. 09/7/2011 of the full board meeting that had met on 29th July 2011. She claims that she was not invited to defend herself for the offences she had committed as contained in the claimants CBA with the respondent under clause 6(c) – Appendix 6.

In cross examination the grievant told court that she was on leave when the accountant called her to school and gave her her termination letter. She denies disobeying school rules nor threatening to fight the Principal or getting money unlawfully from any sponsors for students. She claims she was also being underpaid by the respondents and seeks to be paid as per government regulations.

The respondents filed their response on 19.11.2012 through the office of the Attorney General. They also called 4 witnesses. The respondents evidence is that they have no recognition agreement with the

claimants and that the workers the claimant allege had joined the union e.g Aggrey Midenyo, Ruth Adenyi and Judith Ombodo were not in school at the time it is alleged they joined the union and the said Ruth Adenyi gave evidence denying that she was even a member of the claimant union nor even signed their check off system as alleged by the claimants.

First in relation to the case on dismissal of the grievant, it is the respondent's case that she was terminated on 29.7.2011 following a resolution of the Board of Governors of the School. She had been issued with a warning letter on 13.7.2011 addressing issues of lateness, leaking of school secrets, idling around, unnecessarily on the phone, lacking respect for her seniors, neglecting office work and poor typing. The issue of her taking money from sponsors of students was also addressed. She was given time to respond and she refused. The members of the board observed that she was defiant, not remorseful, lacked respect and was rude. The board therefore made a decision to terminate her services for gross misconduct. The 2nd respondent the Principal, told court that the grievant was paid her terminal dues before she was dismissed. She also told court that the disciplinary issues were on even before Gladys joined the union. On underpayment, the witness told court that the school had few students and 10 workers and most of them were not being paid well as the school was not in a position to pay them. In cross - examination the witness told court that she advertised for jobs of workers who were in school as they had never been interviewed by the board. She agrees that a letter of appointment had been given to Gladys but her work was poor. She also said that Gladys was called to appear before the board but she was on leave between 23rd August 2011 to 20th September 2011 and was terminated on 15th September 2011 when she was on leave. She denies sacking workers who had joined the union.

Having heard the evidence from both parties, the issues for determination are as follows:-

1. Whether the decision to terminate the services of the grievant were fair and justice.
2. Whether the grievant is entitled to the remedies she seeks before court.

The grievant has exhibited before this court her appointment letter Appendix 2 showing that she was appointed by the 1st respondent with effect from January 1986. She served the respondent as a copy typist and there is no indication of any indiscipline until 13.7.2011 when she is served with a warning letter about neglecting her duty including reporting late on duty frequently, leaking school secrets to outsiders etc as per her Appendix 3. It however appears that the claimant had joined the claimant union and on 15.8.2011, the union did write to the 1st respondent informing them that she was one of the workers who had joined the union and that her union dues were to be deducted by the school and remitted to the claimants. Things moved so fast thereafter with the grievant being forced to proceed on her leave for year 2010 and 2011, being summoned before the board and being dismissed the same month.

It is grievant's contention that she was dismissed after she decided to join the union in August 2011. In September 2011 while on leave, she received her termination letter. I have looked at the termination letter served on the grievant Appendix 6. The letter does not give reasons for the termination under Section 41 of the Employment Act 2007:-

“(1) Subject to Section 42(1) an employer shall before terminating te employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understand, the reasons 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.

(2) Notwithstanding any other provision of this part, the 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 have on the grounds of misconduct or poor performance, and the person if any chosen by the employee within sub – section (1) make.”

The operative requirement here being given a hearing. The respondent contend that they gave claimant a hearing which the claimant denies. The minutes displayed before court has a list of people present during the hearing and the name of Gladys is missing. The minutes indicate that she was called on

to respond to charges against her and she declined. The respondents have not displayed any letter inviting her to any disciplinary meeting whatsoever. It appears, on the face of the record that no hearing was accorded to Gladys before she was dismissed. Her right to be heard was flouted. This contravenes the above Provisions and Article 50(1) of the Constitution of Kenya which states that:-

“Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal and body.”

ILO Convention 158 Termination of Employment Convention. Article 7 provides that:-

“The employment of a worker shall not be terminated for reasons related to the worker's conduct or performance before he is provided with an opportunity to defend himself against the allegations made, unless the employer cannot reasonably be expected to provide this opportunity.”

Another issue to consider is whether the respondent had valid reasons to terminate the claimant's services.

Section 43(1) of the Employment Act 2007 provides that:-

“(1) In any claim coming out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.”

Under Section 45:-

“(2) A termination of employment by an employer is unfair if the employer fails to prove;

- (a) that the reason for the termination is valid.**
- (b) that the reason for the termination is a fair reason,**
 - (i) related to the employees conduct, capacity or compatibility**
 - (ii) based on the operational requirements of the employer**
- (c) that the employment was terminated in accordance with fair procedure.”**

Given that the grievant was not given any reasons in a fair hearing for his dismissal, the termination is unfair under S. 45 of Employment Act .

ILO Convention 158 – Article 4 also provide the requirement of providing a valid reason as follows:-

“The employment of a worker shall not be terminated unless there is a valid reason for such termination connected with the capacity or conduct of the worker and based on the operational requirements of the undertaking, establishment and service.”

Given that in grievant's case no valid reasons were given and neither was she accorded a hearing, I find that the termination of the grievant by respondent was unfair and unjustified and I declare it so.

What remedies then is grievant entitled to? To start off, the claimant told court that the grievant was underpaid and was earning Ksh 6000/= at the time of dismissal in 2011. In 2011, the minimum wage for a copy typist was Ksh 13,753 - According to Legal Notice No. 262 of 3.9.1993.

Article 4 - **“persons belonging to a professional cadre and employed by the Board, shall be**

employed on such terms and conditions of service similar to those recommended for equivalent posts in the Civil Service and as per the applicable scheme of service.”

It follows therefore the grievant was to serve under terms applicable in Public Service. The grievant did not lay before court however her salary progression from the time of employment to the time of dismissal. This court will be going on a wild goose chase to find out how much she earned progressively. In 2011, she puts evidence in court that she was earning Ksh 6000/= and weighed against this evidence which was unchallenged I find that she was actually in 2011 by Ksh 7,753/= which translates to:-

$$7753 \times 8 = \text{Ksh } 62,024.$$

In the same period the claimant was not given a house allowance which she is entitled to at 15% of salary;

$$15/100 \times 13753 \times 8 \text{ months} = \text{Ksh } 16,503.60$$

I also award the grievant 12 months salary for wrongful termination;

$$= 12 \times 13753 = \text{Ksh } 165,036$$

I award claimant her service pay calculated at 15 days for each year worked. This translates to;

$$0.5 \times 13,753 \times 27 = \text{Ksh } 185,665.50$$

I also award Ksh 6,875.50 salary for days worked in November 2011.

TOTAL = KSH 374,081

The respondents will also pay costs of this suit.

HELLEN WASILWA

JUDGE

30.9.2013

Appearance

Joseph Okwach for claimant present

BOG Chair Chavavo present

CC. Sammy