



IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

CAUSE NO. 1458 OF 2010

JOSEPH MUNYITHYA MUTISYA
.....CLAIMANT

-VERSUS-

THE CHAIRMAN BOARD OF GOVERNORS MIVUKONI SECONDARY SCHOOL
....RESPONDENT

Miriam Wanjiku Mwaura for the
Claimant.

Mr. B.M. Musyoki for the Respondent

JUDGMENT

Joseph Munyithya Mutisya brought this suit by way of a Memorandum of Claim dated 18th November, 2010 against the Respondent, the Chairman, Board of Governors, Mivukoni Secondary School.

The facts leading to the claim are that, the Claimant was an employee of the Respondent in the position of a Head Cook.

At the time he stopped working for the Respondent he earned a basic salary of Kshs.6,000/= a month, house allowance of Kshs.1,100/= and medical allowance of Kshs.465/=.

The termination of employment followed a suspension by the Principal of the Respondent by a letter dated 24th July, 2009.

That while he was under suspension he was replaced in March, 2010 without having the issue of suspension addressed.

On 17th July, 2010, he was summoned before the Board of Governors where it was decided that he was to be terminated and paid three months salary despite having been on suspension for twelve months.

On 15th July, 2010, the Respondent through the Principal issued a letter terminating the services of the Claimant without assigning any fault on the Claimant.

The Claimant in his sworn testimony told the court that both the suspension and eventual termination was wrongful, unlawful and unfair and seeks damages for the unjustified loss of employment.

The particulars of unlawfulness were enumerated as;

- a. *failure to follow laid down procedures under the Employment Act;*
- b. *failure to assign any justification to the suspension and termination;*
- c. *keeping the Claimant on suspension for a period of 12 months without pay; and*
- d. *failing to pay wages to the Claimant for the period of suspension.*

The Claimant sent a demand and notice of intention to sue but same was not heeded by the Respondent.

The Claimant seeks the following reliefs;

- a. *Payment of monthly salary for the period 24th July, 2009 to 18th July, 2010 at the rate of Kshs.6000/= per month.*
- b. *Compensation for the unlawful and unfair termination for a maximum period of 12 months at the rate of Kshs.6000/= per month plus house allowance of Kshs.1,100/= and medical allowance of Kshs.465/= per month making a total of Kshs.7,565/= per month.*

The court notes that the gross monthly payment of the Claimant from the sworn testimony and the amended Statement of claim filed on 18th July, 2011 is Kshs.7,565/=.

The letter of suspension dated 24th July, 2009, letter of termination dated 18th July, 2010 and the letter of demand were produced as exhibits in this matter by the Claimant.

The Respondent filed a Memorandum of reply to the claim dated 20th May, 2011 wherein it avers that the Claimant was suspended due to continuous and persistent complaints by students.

That the Claimant was given a warning on 9th March, 2009 and further verbal warnings prior to the suspension.

A letter of warning dated 5th March, 2009 is annexed to the statement of Response and marked AK2. It is alleged that, on that date, breakfast was not prepared on time hence the students had their breakfast at 7.00 a.m. instead of 6.00 a.m.

The Claimant told the court that he was not the cook on duty on the material day, but his counterpart, one **Tom Mutisya** was on duty and had failed to report without notifying him. He told the court that this is the incident which led to his suspension yet he was not to blame for the delay and was not given opportunity to explain the matter to the Board of Governors for a period of 12 months.

The Respondent further avers that it paid the Claimant Kshs.18,000/= upon termination which was half salary for the six months period he was on suspension.

Analysis

The Respondent failed to appear for the hearing of the matter inspite of the fact that the date was taken in court by consent of both parties on 21st June, 2013.

On that day, the matter was adjourned at the instance of the Respondent and the court awarded wasted costs to the Claimant, in the sum of Kshs.2,000/=, same to be paid before 2nd October, 2010.

On 2nd October, 2012, the Respondent's advocate Mr. Mbaluka did not appear and sought another adjournment of the matter. The court was informed that the advocate had attended another hearing before a magistrate court in Kitui County. The advocate had in the morning sent Mr. Mapesa Advocate to apply for the adjournment. The court refused to grant the same and directed that the matter would proceed at 12 noon.

The advocate was absent at 12.15 when the matter commenced but a court clerk from his office informed the court that, he was at Mwingi attending a Hearing No. 17/2011 before the Chief Magistrate court.

She further told the court that he had made specific instructions that the costs awarded to the Claimant should not be paid.

The court noted that the matter would proceed as scheduled because no good reason was given for failure of the advocate to attend since the date had been set by consent of the parties in court. The Claimant had opposed the adjournment stating that he was now impoverished and whenever he travelled to Nairobi to have the matter heard, he slept in the streets with security guards as he would not afford accommodation.

The court in the circumstances notes the case put forward by the Claimant is largely uncontroverted.

That the letter of termination did not provide any reason for the decision.

The court also agreed with the evidence by the Claimant that he was suspended for no good reason at all because he was not on duty on the day the making of breakfast was delayed.

That it was wrong to attribute failure of his co-cook to report to work on time to make breakfast to him just because he was the head cook.

That he was kept at home on suspension and without pay for an inordinately long period and this conduct by the Respondent was not only unprocedural, but was a violation of his right to work and the same was a violation of his human dignity as was meant to keep him impoverished and humiliated without any financial support to himself and his family.

The court notes that the Claimant was not provided with a Certificate of service and remained unemployed up to the time of the conclusion of this case.

He has indeed suffered sleeping at Machakos, Country Bus stop while attending this case due to lack of funds.

The Claimant has established on a balance of probability that he was not paid any salary for the entire period he was on suspension which comprises 12 months in aggregate and finds that he is entitled to payment of not only the Kshs.6,000/= basic salary for the period but also the housing allowance in the sum of Kshs.1,100 for the entire period.

Furthermore, it is without hesitation that the court finds that the Respondent has failed to assign any justifiable reason to the termination of the employment of the Claimant and that the procedure followed before the termination was highly irregular and was meant to humiliate the Claimant.

Accordingly, the termination of the employment of the Claimant was both substantively unlawful and procedurally unfair within the meaning of **Section 45** of the Employment Act.

Remedies

The court awards the claimant;

- a. sum of Kshs.85,200/= comprising of 12 months basic salary and house allowance of the entire period he was on suspension unlawfully, less Kshs.18,000/= already paid to him;
- b. maximum compensation of twelve (12) months gross salary in terms of Section 49 (1) c of the Employment Act in the sum of Kshs.90,780/=.

Total award 175,980/=.

- c. The Respondent is to pay the interest at court rates on the total award with effect from the date of filing this suit;
- d. Respondent is to pay costs of the suit.

Dated and delivered at Nairobi this 25th day of October, 2013.

MATHEWS N. NDUMA

PRINCIPAL JUDGE