



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NYERI
CAUSE NO. 31 OF 2012
(Nairobi Cause No. 164 of 2012)

**KENYA UNION OF DOMESTIC HOTELS EDUCATIONAL
INSTITUTIONS HOSPITALS AND ALLIED WORKERS.....CLAIMANT**
VERSUS
MARY IMMACULATE PRIMARY SCHOOL.....RESPONDENT

JUDGMENT

1. The claim initially concerned four claimants but at the trial stage only three claimants prosecuted their case. The claimant's representative withdrew the claim by Jane Wanjiku Gachau since the claimant had not been attending court to advance it.
2. The claimant's claims were that they served the respondent in various capacities but were unlawfully and unfairly terminated from employment. According to the respondent however, the reasons for termination were valid and justified.
3. The claims by the three were as follows:-
 - A. Jane Wathoko Migwi**
 - i. She was employed by the respondent in May, 2007 as a house mother at a starting salary of Kshs.3,500 per month with accommodation but was never issued with a termination letter.
 - ii. She was verbally terminated on 23/4/2008 because she became a member of the Union.
 - B. Michael Mwangi Ndungu**
 - i. He was initially employed in 2001 as a cook earning a salary of Kshs.2,300 per month and accommodated. He like his colleague was never issued with a letter of appointment.
 - ii. He was verbally terminated in July, 2008 because he was a member of the Union.
 - (iii) At the time of termination he was earning a salary of Kshs.3,400 per month.

C. John Karuga Kamau

- i. He was employed in June, 2007 as a cook at a salary of Kshs.3,500 per month. He was also not given a letter of appointment.
- ii. He too was verbally dismissed on 2nd September, 2008 because he became a member of the Union.
- (iii) By the time he was leaving he was earning Kshs.4,500 per month.

4. The respondent for its part in a detailed memorandum of defence refuted the claimant's claims. The respondent states that contrary to the allegations by the claimants, they were issued with appointment letters and that their terminations were not verbal as they were all summarily dismissed for various reasons assigned to each in the statement of defence. The respondent further pleads that upon termination, the claimants were paid their respective dues and that they were not entitled to pay in lieu of notice as they were summarily dismissed for gross misconduct. The respondent further argued that the claimant's termination of employment was done according to law and not because they were members of a Union.

5. The first question the court requires to decide on is the reasons for termination of the claimants employment and in order to see if they met the requirements set by the law.

A. Jane Wathoko Migwi

- By a letter dated 23rd April, 2008 she was summarily dismissed for boycotting work contrary to her contract. The nature of the boycott was that on the night of 22nd April, 2008 she neglected work assigned to her.
- In her response to the accusations, she testified that on the material day she went home overnight and upon her return she was called to the office by a sister Wanjiru and told her job was over.
- In cross-examination she admitted that she did not ask for permission to go on off but left her colleague Rosemary to stand in for her.

B. Michael Mwangi Nderitu

- By letter dated 2nd August, 2008 he was summarily dismissed after being sent on compulsory leave to enable investigation into theft of the respondent's property. According to the respondent, investigations established that he was involved in the theft. The respondent noted that the claimant had been issued with previous warnings on his behaviour and had promised to reform.
- In his response to the dismissal, the claimant testified during the trial that he had been seeking to go on leave but was never allowed to for some time. After persisting he was given one month's off but was not given transport money. According to him he reported the issue to the Union and when he reported back in December, 2008 he was dismissed on the accusation of trying to negatively influence the others with his Union activities.
- Although in his evidence in chief he neither commented nor alluded to the allegations of theft against him, in cross-examination he admitted he had at some point in his employment been disciplined, he denied ever receiving any warning letter. He further denied ever writing any apology (annex 8 and 9).

C. John Karuga Kamau

- By a letter dated 3rd September, 2008 the claimant was dismissed from employment on the allegation that he was abusive and aggressive to the sister with whom they were working. Because of this, he was separated and transferred to work in security department as a gate-keeper.

While as a gate-keeper he neglected the duties thus calling for his termination.

6. To buttress its case the respondent called on witness Sister Anne Marie Oduya who said she was a head teacher. According to her Michael was not terminated unfairly since he had been stealing from the school and had been warned severally. According to her, since the dismissal was summary payment in lieu of notice was not possible. According to her the claimant was a member of NSSF and that since he was not on duty when the schools closed, he was not entitled to claim leave.

7. Regarding Jane, she testified that she was employed as a house mother staying with the girls in the dormitory. She stated that Jane was not unfairly terminated since she neglected her duties in that she was away late in the night forcing the school to get someone else to stand in for her. The witness also refuted her claim for leave since she was always on leave when the school was closed.

8. Concerning John, she testified that he was abusive and aggressive to co-workers and was moved to security departments. He neglected duty and did not report where she was required hence was summarily dismissed. Upon dismissal his dues were paid to him.

9. It was her evidence that all the claimants were housed at the school and that all leave and off days were covered in the school holidays.

10. The burden of proof in employment cases is set out in section 47(5) of the employment Act that for any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment 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.

11. The claimants in this suit denied ever being issued with letters of employment, and being issued with letters terminating employment. In fact John even denied ever applying for a job yet was making a claim for unfair and wrongful termination of employment.

12. Whereas an employment contract can be oral the court failed to understand the purpose and effect of the claimant's denial that they were not issued with letters of employment. Section 8 of the Employment Act provides that it shall apply to oral and written contracts. Which means there can intentionally be an oral employment contract or a contract of employment by presumption of law where no written contract is available. It is of course a requirement under Section 9 that a contract of service for a period exceeding three months shall be in writing but the absence of such written contract does not negate the presumption of existence of a contract in appropriate cases.

13. The claimant have merely alleged they were verbally terminated yet the respondent exhibited their termination letters (annextures 5, 11, 13 of amended memo of response). For John there was even a detailed letter dated 2nd August, 2008 stating reason for his dismissal as theft of employers property. The claimants never made any effort either by way of supplementary documents or evidence to sufficiently refute the allegations against them.

14. Their case was simply that they were verbally dismissed so they should be paid. To this extent the court is not persuaded that the claimants have sufficiently discharged the burden of proof imposed on them by section 47(5) of the Employment Act.

15. The respondent on the other hand reasonably demonstrated that it had lawful reasons to summarily dismiss the claimants.

16. The claim therefore fails and is hereby dismissed with costs.

17. It is so ordered.

Dated at Nyeri this 26th day of November, 2013.

NELSON ABUODHA J.

JUDGE

Delivered in open Court in the presence of Ngirigacha for the Claimant and in the presence of Ms. Nderitu for the Respondent.

NELSON ABUODHA J.

JUDGE