



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 91 of 2011**

**Julius Irungu Kanyoko**

**Claimant**

**Board of Governors, Rwathia Girls School**

**1<sup>st</sup> Respondent**

**The Principal, Rwathia Girls School**

**2<sup>nd</sup> Respondent**

**AWARD**

**Background**

1. Julius Irungu Kanyoko (the Claimant) filed a Statement of Claim against the 2 Respondents on 28 January 2011. The issues in dispute were stated as:
  1. *One month's salary in lieu of Notice*
  2. *Salary arrears*
  3. *Pay for unfair termination*
  4. *One month salary in lieu of Notice*
  5. *Accrued leave days*
  6. *Certificate of service.*
2. The Respondents' were served and they filed a Memorandum of Defence on 5 May 2011 through C.O. Wairoma, Litigation Counsel from the office of the Attorney General.
3. On 10 April 2012 Mr. Kangata for the Claimant and Mr. Khairo for the Respondents appeared before Justice Madzayo (he has since ceased being a judge of the Industrial Court) and agreed by consent that the Cause would be determined on the pleadings. Hearing was fixed for 11 October 2012.
4. On 11 October 2012, Mr. Kangata appeared for the Claimant while there was no representation for the Respondents. And having satisfied myself that the hearing date was taken by both Counsels I allowed the hearing to proceed. The hearing thereafter commenced at 12.15 pm with Mr. Kangata making oral submissions.
5. I have considered both the pleadings of the Claimant and Respondent and also the submissions of the Claimant in reaching my decision.

## **Claimant's case**

6. The Claimant pleaded he was employed by the Respondent on 19 October 2000 as a watchman. The employment letter was exhibited.
7. On or about 17 September 2009, the Claimant was charged with neglect to prevent a felony contrary to section 392 of the Penal Code before the Kangema Senior Resident Magistrate in *Criminal Case No. 304 of 2009, R v Dominic Mwangi & Another*. A copy of the proceedings and judgment were exhibited. Both the Claimant and other accused were acquitted under section 215 of the Criminal Procedure Code on 6 April 2010. He submitted that the Criminal Court found that there was no theft and if there was any theft, it was an internal theft.
8. According to the Claimant, about a month before the judgment of the Criminal Court, specifically on 4 March 2010, he was summarily dismissed on the grounds of *negligence of duty and insubordination* with immediate effect. And this after about 10 years of service. He was earning a gross salary of Kshs 10,507/-.
9. It was the contention of the Claimant that the dismissal was actuated by malice and illegalities in that the allegations of negligence of duty and insubordination were untrue and that the only time the Claimant was not on duty was when he was in lawful custody on or about 16 September 2008 and the Respondents were aware of this.
10. The Claimant further contended that the report made to the Police was false and meant to have him dismissed from employment. The dismissal, according to the Claimant was unfair in that insufficient notice was given, fair procedures were not followed and in any case valid reasons were not given.
11. The Claimant urged that the summary dismissal was unfair and that sections 42 – 46 of the Employment Act, 2007 were applicable. He further urged that the Respondent being a public body did not comply with Article 47 of the Constitution on fair administrative action.
12. The Claimant therefore seeks one month salary in lieu of notice in the sum of Kshs 10,507/-, maximum 12 months compensation for unfair termination of Kshs 126,084/-, leave allowance and overtime of Kshs 65,594.1/-, salary arrears of Kshs 20,000/- and a certificate of service.

## **Respondents' case**

13. According to the Respondents, the suit offended the provisions of section 10 of the Education Act and that they were non-suited.
14. The Respondents also denied knowledge of the arraignment and acquittal of the Claimant in Kangema Senior Resident Magistrates Court Criminal Case No. 304 of 2009 and all the claims asserted by the Claimant.
15. In the alternative, the Respondents pleaded that the Claimant was arrested and charged after police investigations involving theft of Kshs 27,000/-, a camera and destruction of the Respondents property on the night of 15<sup>th</sup>/16<sup>th</sup> September 2009.
16. The Respondents further pleaded that the Claimant was guilty of gross misconduct and negligence for failing to report on duty on 15<sup>th</sup>/16<sup>th</sup> September 2009, sleeping while on duty, failing to carry out patrols in the school, failing to raise an alarm when burglars struck, failing to inform them of the break-in and or assisting the thieves who broke into the school.
17. The Respondents also pleaded that the Claimant was given a hearing before he was dismissed and that he refused to collect his salary for October 2009.
18. The Respondents exhibited several documents and I will refer to them as appropriate while examining

the different heads of Claim.

### **Issues for determination**

19.From the brief overview given above there are two issues which emerge for determination and these are:

- (i) Whether the termination of the Claimant was unfair
- (ii) If the answer is in the positive, what are the appropriate remedies?
- (iii) Whether the suit offends section 10 of the Education Act

### ***Whether the termination of the Claimant was unfair***

20.It was the case of the Claimant that the summary dismissal was unfair because the two reasons given, namely negligence of duty and insubordination were false. By false, I understand the Claimant to stating that these reasons were not valid or fair.The Claimant in his submissions invoked the provisions of sections 42 to 46 of the Employment Act, 2007.

21.Section 43 of the Employment Act, 2007 requires an employer to prove the reasons for the termination and where an employer fails to prove the reasons, the termination shall be deemed to be unfair within the meaning of section 45.

22.The first reason given for the dismissal was negligence of duty. The question therefore that I need to address is whether the Respondent has proved that the Claimant was negligent. The Claimant sought to rely on the proceedings and judgment in *Criminal Case No. 304 of 2009, R v Dominic Mwangi Githaiga & Another*, where after the criminal trial was completed, the learned Magistrate acquitted them of the charge of neglect to prevent a felony.

23.I have gone through the proceedings and judgment in the criminal case. The learned Magistrate towards the end of his judgment observed that the accused persons, who included the Claimant were still in the employ of the Respondent at the time of judgment.

24.The judgment was delivered on 6 April 2010.The Claimant had been dismissed about one month earlier, to be specific on 4 March 2010.The learned Magistrate made a finding of fact that the Claimant and the co- accused were not guilty of neglect to prevent a felony. This was after listening to witnesses who included the 2<sup>nd</sup> Respondent.

25.Under these circumstances I am unable to reach a decision that the Respondents have proved the validity or fairness of negligence of duty as a ground to dismiss the Claimant.

26.The second reason given by the Respondents to dismiss the Claimant was insubordination. Insubordination has been defined in Black's Law Dictionary, ninth edition as, '***a wilful disregard of an employer's instructions, esp. behaviour that gives the employer cause to terminate a worker's employment....An act of disobedience to proper authority; esp. a refusal to obey an order that a superior is authorised to give***'. I will adopt this definition for the purposes of this determination.

27.I therefore turn to the reasons given by the Respondent to support the contention of insubordination. The first reference to this reason is in the Respondents' letter to the Claimant dated 27 October 2009.This is about one month after the Claimant had been arraigned in Court on 17 September 2009. The letter accused the Claimant of insubordination because he had absented himself from work from 15<sup>th</sup> to 23<sup>rd</sup> September 2009 without explanation. The letter also states that the Claimant's Supervisor had sought an explanation for the absenteeism on 1 October 2009 but none had been forthcoming four weeks later.

28.It is apparent that the Respondents case on insubordination in this case was predicated on the failure

by the Claimant to comply with the request by the Supervisor to give an explanation for the absenteeism. According to the Claimant he was in lawful custody during the period commencing 16 September 2009 and the Respondents were aware of this fact. This fact is corroborated by the proceedings in the Criminal Court which indicate that the Claimant was arraigned in Court on 17 September 2009 and released on bond around 19 September 2009.

29. The Respondents as the complainants in the Criminal Case must have been aware that the Claimant had been arrested and arraigned in Court. From the proceedings it appears the Claimant was released from custody on 19 September 2009 and this leaves unexplained the absence from duty from 20 September to 23 September 2009.

30. The letter dated 27 October 2009 required the Claimant to appear before the 1<sup>st</sup> Respondent's Executive Board on 29 October 2009. Minutes of the Executive Board for 29 October 2009 were exhibited and they show the Executive Board decided that there was no need for the Claimant to appear before the full Board. The Executive Board recommended the suspension and summary dismissal of the Claimant.

31. The Respondents exhibited to the Memorandum of Defence a letter 9 February 2010 indicating the Claimant was required to appear before the 1<sup>st</sup> Respondent on 11 February 2010. Minutes of the full Board meeting were exhibited and they indicate that the Board gave the Claimant an opportunity to give his side of the story on the absenteeism.

32. According to the minutes, and I need to quote the relevant portion in *extenso*, the Claimant informed the Board that he did not give an explanation **'because, he thought he was being trapped. When he was told of his suspension, and instructed to clear and collect letter from the Secretary he disappeared because again he didn't understand the Principal's instructions. He concluded he was being trapped. The board asked him to defend himself over the given allegations but he was neither remorseful nor apologetic. When asked whether he would resume duty immediately if instructed, he said he will not'**.

33. It is after this interaction with the full Board that a decision to summarily dismiss the Claimant was taken.

34. It is with the above in mind that I must now turn to the question of whether the Claimant was guilty of insubordination. It is not in doubt that the Claimant was at least in lawful custody from 16 September 2009 to 19 September 2009. The Respondents must have been aware of this. After his release from lawful custody he should have gone back to his employer and or reported to his place of work. He did not.

35. It was therefore in order for the Respondents to seek an explanation from him on why he had absented himself from his place of work. He failed to give an explanation. The Claimant was therefore absent without leave or other lawful cause from his appointed place of work from 20 September 2009 to 23 September 2009.

36. But this being a court of justice, it must not lose sight of the fact that the Claimant had just come from custody. Being in custody itself, apart from loss of liberty is not a very nice experience. In the circumstances of this case I don't think that the Claimant fundamentally breached the obligations of his contract with the Respondent and thus that summary dismissal was justifiable as required by section 44(4) of the Employment Act, 2007.

37. I therefore do hold that the summary dismissal of the Claimant was not justifiable and should have been termination on notice and convert it into termination with notice under section 35(1)(c) of the Employment Act. I now turn to the heads of relief sought by the Claimant.

### ***One month salary in lieu of Notice***

38. I have reached the conclusion that the summary dismissal of the Claimant was unjustifiable and therefore award him one month's salary in lieu of Notice in the sum of Kshs 10,507/-.

### ***12 months' pay for unfair termination***

39. Considering the circumstances of this case, it is my view that the Claimant has not met the case for the award of any compensation for unfair termination. His conduct during the meeting with the full Board as gleaned from the minutes disentitles him to any award under this head. He was not even ready to indicate whether he was ready to resume duty. I therefore decline to grant this prayer.

### ***Leave Allowance***

40. The Claimant sought what he referred to in the prayers as leave allowance and in the body of his pleadings as leave days and overtime. In submissions it was submitted that Claimant never went on leave during the 10 years or so he served with the Respondent. However, I am unable and cannot agree with the Claimant that he never went on leave. This submission was made in spite of and despite the fact that the Respondent had annexed to the Memorandum of Defence annexure marked 'G' which were the records of the leave applications by the applicant and approvals by the Respondent allowing the Claimant to proceed on leave from the year 2001 to 2009. The last leave application form and approval for 2009 indicate that the Claimant had a balance of only 14 days.

41. I therefore award the Claimant payment in lieu of Notice for 14 days outstanding as at 2009 calculated by multiplying the 14 days by the monthly salary of Kshs 10,507/- and dividing the total by 21 days of annual leave entitlement, in the sum of Kshs 7004/-.

42. No basis was laid by the Claimant for overtime payment and therefore I decline to grant the prayer for overtime.

### ***Salary arrears***

43. The Claimant also claimed salary arrears in the sum of Kshs 20,000/-. It was not clear from the pleadings or submissions which period or month the salary arrears related to. A claim for salary arrears should be capable of precise mathematical calculation. The Claimant failed to prove this aspect.

44. However in the Memorandum of Defence, the Respondents admitted that the Claimant had not collected his salary arrears for October 2009 and 3 days in November 2009 totalling Kshs 7,242/- and therefore I do award this admitted sum.

45. Before concluding I need to note that the letter of employment of the Claimant was made subject to the terms of agreement between the Ministry of Education and the Kenya Domestic and Hotel Workers Union (KUDHEIHA), but such agreement was not brought or produced in Court and therefore the Court is not able to determine what benefits accrued to the Claimant therefrom. I also note there was no prayer for service pay as contemplated under section 35 (5) of the Employment Act, 2007.

### ***Whether the suit offends section 10 of the Education Act***

46. The Respondents in their pleadings had pleaded that the Claim should be struck out because it offends the provisions of section 10 of the Education Act. The section makes provision for the Minister for Education to establish Boards of Governors as a body corporate capable of suing and being sued. In effect I find no merit in the argument that this suit offends the cited provision of the Education Act. Even the letter of appointment of the Claimant was signed on behalf and at the behest of the Board of Governors who are cited as the 1<sup>st</sup> Respondent herein.

47. I don't think it is necessary to pronounce myself on the joinder of the 2<sup>nd</sup> Respondent as it does not affect the decision I have reached.

### ***Conclusion and Orders***

48. In conclusion, I do find that the summary dismissal of the Claimant was unjustifiable and convert it

into termination with notice. The Relief/prayers (b) and (d) of the Statement of Claim are declined.

49. An award is made in favour of the Claimant as follows:

- (i) One month salary in lieu of Notice in the sum of Kshs 10,507/-
- (ii) Outstanding leave balance of 14 days in the sum of Kshs 7004/-
- (iii) Salary arrears for October/November 2009 Kshs 7,242/-

TOTAL **Kshs 24,753/-**

50. I make no order as to costs.

***Dated and delivered in open Court in Nairobi on this 16<sup>th</sup> day of November 2012.***

**Justice Radido Stephen**  
**Judge**  
**Appearances**

Mr Kangata instructed by Muchoki Kangata & Co

Advocates

For Claimant

Mr. C.O. Wairoma, Litigation Counsel

instructed by Hon Attorney General

on record for Respondent