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| Case Number:   | Cause 160 of 2013  |
| Date Delivered:  | 11 Dec 2014  |
| Case Class:  | Civil  |
| Court:   | Employment and Labour Relations Court at Nakuru  |
| Case Action:   | Judgment   |
| Judge:   | Radido Stephen Okiyo   |
| Citation:  | Kenya Union Of Domestic, Hotels, Educational Institutions, Hospitals And Allied Workers v Comboni Polytechnic [2014] eKLR          |
| Advocates:   | For Grievant Mr. Onwonga, Industrial Relations Officer, KUDHEIHA For Respondent Mr. Orege instructed by Rodi Orege & Co. Advocates |
| Case Summary:  | -  |
| Court Division:  | Industrial Court   |
| History Magistrates:   | -  |
| County:  | Nakuru   |
| Docket Number:   | -  |
| History Docket Number:   | -  |
| Case Outcome:  | Dismissed  |
| History County:  | -  |
| Representation By Advocates:   | Both Parties Represented   |
| Advocates For:   | -  |
| Advocates Against:   | -  |
| Sum Awarded:   | -  |
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**REPUBLIC OF KENYA**

**IN THE INDUSTRIAL COURT OF KENYA AT NAKURU**

**CAUSE NO.160 OF 2013**

**(ORIGINALLY NAIROBI CAUSE NO. 1001 OF 2010)**

**KENYA UNION OF DOMESTIC, HOTELS,**

**EDUCATIONAL INSTITUTIONS, HOSPITALS**

**AND ALLIED WORKERS**

**CLAIMANT**

**V**

**COMBONI POLYTECHNIC**

**RESPONDENT**

**JUDGMENT**

1. The issues for determination in this judgment are, whether the Respondent has the legal capacity to be sued, whether Diocese of Nakuru was party to a Collective Bargaining Agreement with the Union, whether the dismissal of Grievant was unfair, whether Respondent is liable for Grievant's dismissal, and appropriate orders.

2. The Union instituted legal proceedings against Comboni Polytechnic on 3 September 2010 and the issue in dispute was stated as unfair dismissal of Alfred Dimo Opiyo (Grievant).

3. The Respondent filed a Response on 29 September 2010 and an Amended Response on 29 August 2011 in which it counterclaimed against the Grievant for refund of Kshs 8,500/-.

4. The Cause was heard on 21 October 2014 and 6 November 2014. The Union filed its submissions on 14 November 2014 while the Respondent filed its submissions on 26 November 2014. The Court has considered the submissions.

**Whether the Respondent has the legal capacity to be sued**

5. Although the Respondent pleaded that it lacked the legal capacity to be sued, and that it was owned by the Catholic Diocese of Nakuru Trustees Registered, the real issue is who the Grievant's employer was.

6. The Grievant was issued with an employment contract titled service agreement and which contract was signed by the Grievant on 12 July 2007 and the *employer* on 31 October 2007.

7. The agreement was on the letter head of an entity which described itself as *Comboni Polytechnic Catholic Diocese of Nakuru*. The agreement further described the Catholic Diocese of Nakuru as the owner of Comboni Polytechnic.

8. At the time the service agreement was entered into, the Employment Act, 2007 was not in place. The Act came into operation on 2 June 2008.

9. Pursuant to sections 9 and 10(2) of the Act, an employer is under a statutory obligation to issue an employee with a written contract setting out the name of the employer.

10. The Grievant's employer was therefore under a duty on the commencement of the Act to issue the Grievant with a contract which conformed to the requirements of the Act.

11. The contract issued to the Grievant did not clearly state who the name of the employer was. It was on the letter head of *Comboni Polytechnic, Catholic Diocese of Nakuru* and made reference to the Catholic Diocese of Nakuru being the owner of the Respondent.

12. The pay slips issued to the Grievant were in the name of the Respondent

13. Under these circumstances, the Court is unable to agree with the contention in paragraph 2 of the Amended Response that the Catholic Diocese of Nakuru Trustees Registered was the only proper and correct party to sue.

14. The Union sued the party which presented itself as the employer and the Cause cannot therefore fail because of joinder or legal capacity.

15. In employment disputes, employers who do not properly and correctly identify or describe themselves should not be heard to raise issues of capacity or proper and correct party to sue.

16. This is not the first time the Respondent has raised this issue. Marete DKN J attempted to address the issue of the relationship between the Respondent herein and the Catholic Diocese of Nakuru in Nairobi Cause No. 24 of 2011, *KUDHEIHA v Comboni Polytechnic*, and although I would agree with him generally, I have reached same conclusion based on slightly different grounds, as discussed in the preceding paragraphs.

### **Whether Diocese of Nakuru/Respondent were parties to a Collective Bargaining Agreement with the Union,**

17. This issue was raised in the case dealt with by Marete J in the preceding paragraphs. The Respondent in paragraphs 9 and 10 of the Amended Response raised the issue again.

18. I entirely agree with the Honourable Judge on this issue that the Collective Bargaining Agreement is binding upon the Respondent.

### **Whether the dismissal of Grievant was unfair**

#### ***Procedural fairness***

19. The Grievant was dismissed through a letter dated 17 September 2009. The grounds set out in the letter all belong to the class of misconduct.

20. By the time of dismissal, the Employment Act, 2007 was in operation and therefore section 41 of the Act is implicated.

21. In his testimony, the Grievant stated that prior to dismissal, he was not given a warning letter or called to a hearing before any Board and that he did not attend a hearing on 3 September 2009.

22. He further stated that a meeting was held in the Training Manager's office regarding the assault allegations and agreement was reached in the meeting.

23. In my view, this meeting held in the Training Manager's office was not the type of disciplinary process contemplated by section 41 of the Employment Act, 2007. It was not suggested that the Training Manager was a person who had or could exercise disciplinary control over the Grievant. The Respondent cannot rely on this meeting to show it complied with procedural fairness.

24. But there was another meeting. According to the Respondent's witness, the Grievant was called in the course of the Board meeting held on 3 September 2009, although he is not minuted as present and that he was afforded a hearing. The witness stated and the minutes bear out that the Board was not satisfied with the Grievant's explanations.

25. The Grievant stated he did not attend the meeting with the Board. The Respondent's witness stated the meeting started without the Grievant but he was called in the course of the meeting.

26. The testimony of what transpired on 3 September 2009 was conflicting. However, based on the minutes of the Board meeting, the Court is satisfied that the minutes are genuine and reflect what happened on 3 September 2009 and finds that the Grievant was summoned to a meeting of the Respondent's Executive Board of Governors to discuss his conduct.

27. The Court is satisfied that the Grievant was informed of and knew of the allegations against him and that he was afforded an opportunity to make representations before the decision to dismiss him was taken.

### ***Substantive fairness***

28. In a complaint of unfair termination, an employer is under a statutory obligation to prove the reasons for termination. And the employer is expected to go further and prove that the reasons are valid and fair pursuant to section 45 of the Act.

29. The reasons given for the summary dismissal of the Grievant were

*a. That on 26<sup>th</sup> July 2009, you physically assaulted two trainees without valid reasons nor prior authorization by the management to do so i.e Simon Kariuki Ndekei and Janet Wangechi Migwi.*

*b. You have also been showing disrespect, use of abusive and insulting language to the management especially when called upon to come and solve disputes between you and the trainees. c. You have also put the institution into disrepute due to your unbecoming behaviour and language even putting bad allegations about the institution.*

30. These are the reasons the Respondent had to prove and prove as valid and fair reasons to summarily dismiss the Grievant.

31. The Respondent's witness testified that the Grievant assaulted two trainees on the evening of 26 July 2009 and that an assault report was made to the Police under OB No. 31/26/07/09 and No. 30/26/07/09. He further stated that the trainees sought medical treatment and were issued with medical cards.

32. The witness also stated that the next day, a meeting was held and the Grievant, the trainees, their parents and the Training Manager were present and it was agreed the assault case should not proceed.

33. From the material placed before Court, the Court is satisfied that the Grievant assaulted the two named trainees on 26 July 2009 and a report was made to the Police but the parties agreed not to proceed with the police case.

34. The Court further finds that for the Grievant, a trainer to assault his trainees was a valid and fair reason to summarily dismiss him. The law cannot countenance a teacher assaulting his charges and neither can employer be faulted for taking disciplinary action against such employee.

35. The Respondent has proved that the summary dismissal was substantively fair.

### **Appropriate remedies**

36. The Court has keenly considered the Statement of Claim filed in Court on 3 September 2010. The reliefs sought were not succinctly set out but the Court identifies the following from the body of the Claim as being sought.

### **Reinstatement**

37. The Grievant testified that he was not seeking reinstatement.

### **Terminal benefits**

38. The Grievant was paid Kshs 8,500/- as notice pay, Kshs 16,128/- as service pay, Kshs 21,000/- as gratuity and Kshs 3,200/- as leave travelling allowance all totalling Kshs 48,868/-. The Respondent produced its bank statement to show its account was debited by a similar amount. The Court is satisfied

the Grievant received this amount.

39. The Court declines to order any further terminal dues.

### **Counterclaim**

40. The Respondent counterclaimed against the Grievant for Kshs 8,500/- on account of money paid and received by the Grievant over and above what he was entitled.

41. The Court was told the sum was paid through mistake. The Court was not informed whether this was a mistake of law or fact.

42. The Court declines to find for the Respondent as counterclaimed.

### **Conclusion and Orders**

43. The Court finds and holds that the summary dismissal of the Grievant was fair and dismisses the Statement of Claim filed on 3 September 2010 with no order as to costs.

44. The Court also dismisses the Counterclaim with no order as to costs.

**Delivered, dated and signed in Nakuru on this 11<sup>th</sup> day of December 2014.**

**Radido Stephen**

**Judge**

### **Appearances**

For Grievant            Mr. Onwonga, Industrial Relations Officer, KUDHEIHA

For Respondent        Mr. Orege instructed by Rodi Orege & Co. Advocates



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