REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUNGOMA

Civil Appeal 150 of 2010

PETER MWANGI THUMBI.....APPELLANT

~VRS~

TEACHERS SERVICE COMMISSION.....RESPONDENT

(Appeal from Judgment of Chief Magistrate Hon. R. Nyakundi at Bungoma in civil case no.270 of 2008)

JUDGMENT

On 4/3/2010 the Chief Magistrate dismissed with costs the Appellant's suit against the Respondent. The suit followed the dismissal of the Appellant from the teaching service by the Respondent on 11/3/2004. The Appellant sought a declaration that his dismissal was irregular, unprocedural and unlawful. He sought an order directing the Respondent to reinstate the employment, or, in the alternative, to pay his terminal benefits. This is the claim that was dismissed by the trial court following trial. The Appellant was aggrieved and filed this appeal.

This is the first appellate court. Its responsibility is to subject to fresh and exhaustive scrutiny all the evidence that was tendered before the trial court, while appreciating the advantage that was enjoyed by the court of seeing and hearing the witnesses **(Hann. V. Singh KLR 716).** Where there is conflict of primary facts between parties and where the credibility of witnesses is crucial, this court will hardly interfere with a conclusion made by the trial court after weighing the credibility of the witnesses.

It was not in dispute that the Appellant was a teacher at Malaha Secondary School in Bungoma having been employed by the Respondent on 7/5/1990. In the school, he was answerable to Mrs. Sisungo Ann (DW1). The school had a Board of Governors which on 30/5/2003 interdicted him for not being of good moral character because of having impregnated Everlyne Sikuku (PW2) who was a form four girl in the school and for being guilty of infamous conduct by privately talking to the girl in and out of school on matters not related to teaching. The Board recommended the decision to interdict to the Respondent. The Respondent conducted a hearing following which it dismissed the Appellant. That was when the Appellant filed this suit claiming that he had been irregularly, unprocedurally and unlawfully dismissed.

There was no dispute that if DW1 received a report that a teacher had made a student pregnant she was required to conduct a preliminary hearing before referring the matter to the Board to hear and make a determination whether or not to interdict the teacher. If the Board decided to interdict, the interdiction would be effected and communicated to the Respondent. The Respondent would summon the teacher and receive all the evidence in the case and make a determination. It had the power to discipline the

teacher, including dismissing him.

What happened in this case was that PW2 joined the school in form 1 in 2000. In 2003 she was in form four. The Appellant was her Biology teacher. Sometimes in 2003 DW1 noticed that PW2 had become sickly and would attend outpatient treatment. She complained of chest problem. She called her father to take her for treatment. It was, upon examination, found out that she was pregnant. DW1 asked her to find out who was responsible. She answered that it was some boy in Eldoret. The next day the father of the girl came to report that it was the Appellant who had made the girl pregnant. DW1 asked the Appellant about the allegation that he had made the girl pregnant. The Appellant said he was going to talk to the girl. The girl's father came with the PTA Chairman. DW1 reported the case to the Assistant Education Officer who advised that a Board of Governor's meeting be convened. The meeting was convened on 29/5/2003. By this time the father of the girl was no longer pursuing the matter. He did not attend the board meeting. Neither did the girl (PW2). The Board discussed the case and interdicted the Appellant. There was a letter dated 31/3/2003 written by PW2 to say that the Appellant was responsible for the pregnancy. On 14/6/2003 she wrote another letter to the Respondent to say that she had a boyfriend in Eldoret who was the father of the child and that is was not true that the Appellant had made her pregnant. When asked during cross-examination why there was this change of heart, she explained that she had been forced by her father to write the first letter and to implicate the Appellant. The evidence of the Appellant was that he had neither slept with the girl nor made her pregnant.

PW2 gave evidence before the Respondent and repeated that she wrote the first letter to implicate the Appellant because her father wanted her to do so. Otherwise, the Appellant was not responsible for the pregnancy.

It is material that when PW2 was asked by DW1 about her pregnancy she blamed it on her boyfriend. It was her father who came to blame it on the Appellant. The Appellant denied. PW2 then wrote a letter to implicate him. She wrote another one to exonerate the Appellant. Both PW2 and her father did not attend the Board meeting. The Appellant was entitled to confront them now that they were accusing him. If PW2 was blaming her boyfriend and also blaming the Appellant, she could not be relied upon as a witness. Her father who had allegedly coerced her to blame the Appellant did not attend the hearing to deny the allegation.

When PW2 appeared before the Respondent she exonerated the Appellant. Her father did not come to give evidence. There are two pieces of evidence that led the Board, the Respondent and the trial court to conclude that the Appellant had made the girl pregnant. One incident was that following the allegation, the Appellant talked to PW2 outside the gate of the school on 27/3/2003. This incident formed the basis of the second reason for the interdiction and dismissal. The Appellant explained that he was concerned by the allegation that he had made the girl pregnant and that was why when he found her outside the compound he had to ask her. It should be recalled that when DW1 first confronted the Appellant with the allegation that he had impregnated the girl, he said he was going to talk to her. DW1 did not find that offensive and did not stop him. It should follow that the conduct of the Appellant to talk to the girl and ask her about the claim that he had made her pregnant could not, in the circumstances, be said to be either unprofessional or infamous.

The other incident related to the Appellant having gone to the home of the girl's father. The Board, the Respondent and the trial court read this to be an attempt to get the girl to change her story and that that led to the letter exonerating him. The Appellant was not quite convincing as to the reasons why he went to the home, but he eventually talked to the father of the girl. It should be recalled that the allegation that he had made the girl pregnant came from the father, and not the girl. For the Appellant to go to him to find out on what basis he was blaming him cannot be said to have been wrong. It was a natural reaction.

In conclusion, the trial court was wrong in finding that there was basis for the Respondent to dismiss the Appellant from service. I allow the appeal, set aside the decision of the trial court to dismiss the suit with costs and in its place there shall be judgment for the Appellant against the Respondent declaring that the dismissal was unlawful. The Appellant sought reinstatement or the payment of his

terminal benefits. So that the Appellant is not imposed on the Respondent, I ask that he be paid his terminal benefits and interest at court rates. Costs of the suit and the appeal shall be borne by the Respondent.

Dated, signed and delivered at Bungoma this 17th day of September , 2012.

A. O. MUCHELULE
JUDGE