



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 107 OF 2003

MOSES KIPNGETICH

CHERUIYOT.....PLAINTIFF

VERSUS

TEACHERS SERVICE

COMMISSION.....DEFENDANT

JUDGMENT

1. THE PLEADINGS

By an Amended Plaint dated 7th March 2005, the Plaintiff (*Moses Kipngetich Cheruiyot*) sued the Defendant (*the Teachers Service Commission*) for-

- (a) a declaration that the Plaintiff's interdiction on 28th December 2001 and/or his dismissal on 3rd July 2002 was illegal, unlawful and wrongful,*
- (b) restitution of terminal benefits lost by the Plaintiff upon his dismissal,*
- (c) payment by the Defendant of the Plaintiff's salary from 1st February 2002 to 30th September 2005 when the Plaintiff was due for retirement,*
- (d) special damages by way of one month's notice as pleaded in paragraph 8 of the Amended Plaint (i.e. Shs 18,085/=),*
- (e) damages for wrongful dismissal,*
- (f) costs of the suit,*
- (g) interest on (b), (c), (d), (e) and (f).*

The Hon. the Attorney-General entered a Memorandum of Appearance on behalf of the Defendant on 27th May 2005, but failed to file a Defence. However by an order made on 30th June 2009, the Defendant were granted leave to file a Defence within 7 days. The Defendant failed to do, and filed its defence a day later. The defence was on the application of the Plaintiff's Counsel struck out having been filed outside the time allowed by the order of court, and in the event without leave of court.

In any event, judgment had earlier been entered except for the prayer for costs which was included in the Amended Plaint. So when this matter proceeded to hearing, the Defendant had been legally locked out because it did not bother to appeal against the order striking out its defence. So it was the Plaintiff's case which was heard before me on 6th September, 2010. The facts are therefore not in dispute.

THE EVIDENCE

Moses Kipngetich Cheruiyot, the Plaintiff was a trained Primary School Teacher at Kamagambo Teachers Training College, P. O. Box 591, Kisii, and was registered as such under certificate of Registration Number TSC/75389 dated 31st December 1974.

The Plaintiff was issued a Letter of Permanent Appointment dated 25th October 1991 the terms of which he accepted on the same day (25/10/1991). By this time the Plaintiff had been in the service of the Defendant for a period of not less than sixteen years (*from January 1975*). Clause 4 of the Letter of Appointment reiterated Regulation 22(2) of the Teachers Service Commission Regulations which says -

"A teacher who has been confirmed on permanent and pensionable appointment may have his appointment terminated by either the commission or the teacher, giving to the other three months' notice in writing, or by paying to the other one month's gross salary in lieu of notice."

In addition to the above Regulations there is also Section 9(1) & (2)(a) of the Teachers Service Commission Act, (Cap. 212, Laws of Kenya) and Regulation 70(3) (c) which the Plaintiff claims the Defendant breached.

Section 9(1) and 9(2)(a) of the Act provides as follows -

"9(1) The Commission shall investigate, consider and determine any case where it is alleged that a registered teacher should have his name removed from the register or that, if he were not registered, the commission would refuse to register him."

2(a) In any proceedings under this section, "the commission shall inform the person the nature of the allegations made against him, shall afford that person adequate time for the preparation and presentation of his defence and shall afford him an opportunity of being heard in person."

And Regulation 70(3)(c) aforesaid provides -

"70 (1)

(2)

(3) (a - b)

(c) In any proceedings under this section, the commission shall-

(i) shall inform the person concerned of the nature of the allegations made against him, shall afford that person adequate time for the preparation and presentation of his defence and shall afford him the opportunity of being heard in person;

The Plaintiff claims that the Defendant failed to act in accordance with its own regulations governing its relationship with its workers, the teachers. Instead the Defendant instigated a series of actions against the Plaintiff -

(1) Through the School Committee, it instituted Kericho CMCC 91 of 1995 (The Committee of Sondu Primary School vs. Moses Kipngetich Cheruiyot) which was dismissed by the court against the School Committee.

(2) Kericho P.M.C.Cr. No. 1389 of 1996 where the Plaintiff was charged with the offence of stealing contrary to Section 275 of the Penal Code (Cap. 63 Laws of Kenya) and again the Plaintiff (as

accused) was acquitted for lack of evidence.

These efforts having failed, the Defendant went for the ultimate weapon, dismissal of the Plaintiff from his teaching job. The first issue therefore is whether the dismissal was lawful, and secondly the consequences of that dismissal.

The law of master and servant, or employer and employee as I understand it is that the master, or the employer has the right to hire and fire his employee or servant. That right may however be curtailed by either the terms of contract or statutory provisions which govern their relations of master and servant or employer and employee.

In this case the relationship between the Plaintiff as a Teacher and the Defendant as employer was governed by the Letter of Appointment to which I have already referred to in the earlier passages of this judgment, and of course the Defendants Statute and Code of Regulations.

Firstly the Letter of Appointment gave the Defendant the right to terminate the Plaintiff's employment upon giving him three months notice in writing; or payment of one month's salary in lieu of notice. The Defendant breached that term of contract. It neither gave the Plaintiff such notice nor paid the Plaintiff one month's salary in lieu of notice. The Plaintiff was entitled to that one month's salary, I so find and hold.

Secondly the Plaintiff's terms of service were also statutorily under pinned. Both Regulations 9(1) (removal of a teacher from the Register), and Regulation 70(3)(c) (proceedings for removal of a teacher from office), require that the Defendant not only notify the person concerned of the nature of the allegations made against him, but obligated the Defendant to-

"afford that person adequate time for the preparation and presentation of his defences and shall afford him the opportunity of being heard in person."

This provision incorporates what is known in the common law as the cardinal rules of natural justice. This rule has two limbs ***(i) hear the other party*** and ***(ii) and no person may be condemned unheard.***

Having reinstated the Plaintiff, and having paid him his arrears of salary for the period of 1994 to 1999, the Defendant could not dismiss the Plaintiff for whatever reason without first giving notice and an opportunity to answer to the accusations of absenteeism. That was a breach of both the Defendant's own Statute and Regulations, and the rules of natural justice.

The Plaintiff's case is that if he had not been unlawfully dismissed from his employment as a teacher, he would have attained the retirement age of 55 years in the year 2005, and would have been entitled to a pension until he dies. Since he was retired in February 2002, the Plaintiff claims salary for the period February 2002 to September 2005. The Plaintiff also claims a lump sum in lieu of pension, costs, costs of the suit and interest. I will consider each of these claims in turn -

(i) Unpaid Salary

The Plaintiff was unlawfully dismissed in February 2002. If it were not for the unlawful dismissal he would have worked from February 2007 to September 2005 a period of 44 months. The Plaintiff's salary was Kshs 18,085 x 44 = 795,740/=.

(ii) RESTITUTION OF TERMINAL BENEFITS (Lump sum Payment of Pension)

This comprises the basic annual salary, multiplicand by the length of service in months and works out @ 271,020 x 365 x 20 = 825,128.12 480 X 4

(iii) Costs as per the receipts produced Shs 65,870.00

(iv) Notice period 18,085.00

Sub-Total 1,704,823.125

I would award the Plaintiff the said total sum of Ksh 1,704,823.10 and interest @ court rates.

The Plaintiff also prayed for restitution of terminal benefits. This includes his pension rights. I would also direct the Defendant to calculate at the appropriate rates as of the time of his retirement at age 55 years and to pay the Plaintiff his pension from October, 2005 till he dies, and thereafter his family to draw monthly pension at the appropriate rate in accordance with the pension regulations, and subject to review, if any, of pension in accordance with the Teachers Service Commission Regulations. The Court of Appeal in similar circumstances, made a similar order in the case of **KENYA AIRPORTS AUTHORITY vs. EDWARD OTIENO** (*Civil Appeal No. 120 of 1997 at Mombasa*).

The Plaintiff shall also have the costs of this suit.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 26th day of November 2010

M. J. ANYARA EMUKULE

JUDGE