Onyango v Teachers Service Commission (Cause 1714 of 2014)
[2024] KEELRC 13628 (KLR) (25 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 13628 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1714 OF 2014

MA ONYANGO, J

APRIL 25, 2024

BETWEEN

ONYANGO ..... CLAIMANT

AND

TEACHERS SERVICE COMMISSION ..... RESPONDENT

JUDGMENT

1. Vide his Memorandum of Claim dated 1st October 2014 and filed in Court on 2nd October 2014, the Claimant avers that his employment was unlawfully terminated by the Respondent and that he was not paid his terminal benefits.

2. The Claimant states that he was employed by the Respondent as a teacher in the year 1996 and at the point of his dismissal, he was working for the Respondent as a tutor at [particulars withheld] Teachers College, earning a monthly gross salary of Kshs.53,000.

3. It is the Claimant's case that he served the Respondent until 1st 0ctober 2010 when the Respondent wrongfully and unlawfully terminated his employment and refused to pay his terminal dues.

4. According to the Claimant, the Respondent did not give him any or adequate hearing before reaching the decision to terminate his employment.

5. The Claimant avers that the reason given by the Respondent for his dismissal was that the Claimant had carnal knowledge of his student one EC on the 4th May 2010 at Chavakali Hams Hotel and on 12th, 13th and 14th June 2010 at Paradise Hotel, Serem.

6. It is the Claimant's case that the Respondent, through its agent the Principal [particulars withheld] College first made these accusations against the Claimant vide a letter dated 19th July 2010 which the Claimant responded to requesting for a copy of the written complaint.

7. The Claimant states that the Principal did not furnish him with the alleged evidence which gravely prejudiced the Claimant as he did not know what he was defending himself against.

8. The Claimant avers that based on the allegations levelled against him, he was issued with a letter dated 27th July 2010 summoning him for a disciplinary hearing before the Board of Management of the Teachers Training College on 31st July 2010.

9. According to the Claimant, on the said 27th July 2010, the Deputy Principal being aware that the Claimant was a Civic Education Coordinator for [particulars withheld] District appointed by the Committee of Experts on Constitutional Review on the proposed Constitution, had given him two days compassionate leave to attend a referendum training for presiding officers in Funyula constituency over 100km away from the college.

10. The Claimant contends that he was notified of the scheduled disciplinary hearing of 31st July 2010 on the night of 30th July 2010. He avers that he could not have presented any witnesses or exhibits as he had not known the specifics of the charges against him. He states that he was also denied the opportunity to question the student and her husband when they appeared before the board members.

11. The Claimant contends that pursuant to the irregular disciplinary proceedings, the Respondent's agent, the principal, hurriedly wrote a letter interdicting the Claimant on the same date, that is 31st July 2010. The Claimant states that the principal realized defects in the letter and tried to rectify it by another interdiction letter dated 19th August 2010.

12. It is the Claimant's averment that in the said letters of interdiction the Respondent invited the Claimant to make a statement to the Commission in writing. That by letter dated 24th August 2008, the Claimant submitted his response to the Respondent petitioning the Respondent to address itself to the documents he had annexed to the said response. The Claimant avers that had the Respondnet perused the documents he annexed to his response, he would have been exonerated from the false allegations made against him.

13. The Claimant avers that vide a letter dated 3rd September 2010, he was invited for a TSC disciplinary meeting on 2nd October 2010 at Sabatia DEOs office in Vihiga.

14. The Claimant avers that the TSC disciplinary proceedings at Sabatia which were rescheduled to 1st October, 2010, started past 6pm and ended at 9pm. According to the Claimant this was cruel, oppressive and unconscionable as the proceedings were done in a rush, abusive and hostile manner.

15. The Claimant avers that on 1st October 2010, he was dismissed by the Respondent from the teaching service.

16. The Claimant stated that he appealed against the decision to dismiss him but the dismissal was upheld

17. The Claimant states that he filed a defamation case, Kakamega CMCC No. 443 of 2010 against the student and her husband and the court in its judgment found that the allegations they had made were malicious, reckless and false.

18. It is the Claimant's case that by a letter dated 5th May 2014, he submitted the judgment in the defamation case to the Respondent asking it to review the verdict in his disciplinary case but the Respondent vide a letter dated 30th July 2014 informed him that the judgment did not add any value to his case.

19. The Claimant avers that the position taken by the Respondent was wrongful and malicious.

20. In his memorandum of Claim the Claimant prays for the following reliefs:

    i. An order that the Respondent reinstate the Claimant into his said employment;

    ii. An order that the Respondnet do pay the Claimant all his outstanding monthly salaries from 1st October 2010 to the date of the said reinstatement;

    iii. Substantial compensation and wrongful dismissal as this Honourable court shall deem fit and just;

    iv. Costs of this suit.

21. The Respondent filed a Defence to the Memorandum of Claim and a Counter claim on 2nd December 2014. According to the Respondent, the Claimant's contract of employment was governed by the provisions of the Education Act, *Teachers Service Commission Act* and the Code of Regulations compiled and published by the Respondent and other Administrative circulars issued from time to time by the Respondent and or its authorized agents.

22. The Respondent states that it received a letter dated 7th July 2010 from Mr OB alleging that the Claimant had carnal knowledge of a student at [particulars withheld] Teachers Training College, EC whom the Claimant taught as a lecturer.

23. According to the Respondent, the alleged act was in blatant breach of Regulation 66 of the Code of Regulations and Clause 9 of the Teachers Service Commission Code of Conduct and Ethics as read together with the *Teachers Service Commission Act*.

24. The Respondent states that through its agent, the Principal [particulars withheld] Teachers College, it wrote to the Claimant a letter dated 19th July 2010 informing him of the allegations levelled against him by OB and the Claimant was given an opportunity to write a statement which he did, denying the allegations.

25. It is the Respondent's case that the Claimant was interdicted after the Principal carried out preliminary investigations which disclosed that the Claimant was culpable and interdicted the Claimant, giving him an opportunity to prepare and submit his defense to the Commission in writing within 21 days. That the Claimant responded vide a letter dated 13th August 2010 denying the allegations made against him.

26. The Respondent states that it convened its disciplinary panel and invited the Claimant for a disciplinary hearing during which all witnesses were interrogated. That it evaluated both written and oral statements presented before it, considered the statement of the Claimant and all facts adduced during the hearing and arrived at a conclusion that the Claimant was guilty of breach of the Code of Regulations and recommended that the Claimant be dismissed from service.

27. It is contended that while hearing and determining the Claimant's case, the Respondent's disciplinary panel acted impartially, independently and with utmost professionalism and arrived at a fair, just and appropriate decision based on the merits of the case and evidence adduced before it.

28. In its Counter-claim, the Respondent claimed for Kshs. 138,012.75 from the Claimant being salary and allowances that the Claimant is alleged to have earned between 31st July 2010 and 20th October 2010 when he was dismissed.

29. The court was urged to allow the Respondent's Counter-claim and dismiss the Claimant's suit with costs.

The Evidence

30. The Claimant testified on 27th July 2021 as CW1. He stated that he was dismissed by the Respondnet from service on allegations of immoral conduct.

31. He stated that he was not satisfied with the dismissal for reasons that the process followed was a sham; that there was no evidence tendered to justify his dismissal and that even after being absolved by the Kakamega Court of the allegations made against him, the dismissal was not reversed. The Claimant adopted his witness statement dated 16th February 2021 and relied on the documents he filed in support of his case.

32. On being cross examined by Mr. Anyuor, counsel for the Respondent, the Claimant stated that he was dismissed after one Mr. O complained to the Principal of [particulars withheld] Teachers College that the Claimant had an illicit affair with one of his students. He stated that the letter from the Principal required that he makes a detailed statement which he did vide a letter dated 22nd July 2010 denying the allegations. CW1 testified that he was later invited to the Board of Management meeting on 31st July 2010 where he was heard and issued with an interdiction letter the next day.

33. The Claimant testified that the charges according to the interdiction letter were breach of section 7(3)(b) of the *Teachers Service Commission Act* and Regulation 66(a) of the Code of Regulations.

34. Amimo Rhoda Mbalu testified as CW2 and introduced herself as a former teacher at [particulars withheld] Teachers College. She adopted her witness statement dated 14th April 2021 as her evidence in chief. According to CW2, the Claimant's dismissal was done out of malice. She narrated how the student who was alleged to have had an affair with the Claimant absented herself from school on the excuse that her child was sick but rumors started circulating that she was with the Claimant during the said period.

35. On cross examination, CW2 stated he was aware that the Claimant appeared before a disciplinary committee and was interdicted.

36. Cecilia Mwihaki Kariba, the Claimant's spouse testified as CW3. She adopted her witness statement dated 16th February 2021 as her evidence in chief.

37. On cross examination, she confirmed that the Claimant was summoned before the disciplinary committee and that he appeared before the Respondent's disciplinary panel to defend himself on the allegations of having an illicit affair with his student.

38. The Respondent on its part called two witnesses in furtherance of its case. Mr Nicholas Simani testified as RW1 and introduced himself as the former chairman of the board of [particulars withheld] Teachers College. He stated that his duties as a chairman entailed chairing all meetings of the Board and teachers' discipline. He testified that he chaired the Claimant's disciplinary hearing held on 31st July 2010 and signed the minutes thereof. RW1 adopted the minutes of the disciplinary hearing of 31st July 2010 as his evidence in chief.

39. On cross examination, he explained that a teacher appears before a disciplinary committee then before the board. He stated that the disciplinary hearing of the Claimant held on 31st July 2010 was before the board. He stated that the verdict was given the same day that the Claimant had a case to answer.

40. RW2 Cicily Muthoni Musyoki introduced herself as the Discipline Officer of the Respondent. She adopted her witness statement dated 6th July 2021 as her evidence in chief.

41. On cross examination, RW2 stated that the basis for the Claimant's interdiction was the letter by OB who reported that there were phone messages to prove that the Claimant had an affair with his student. That the author of the letter stated that the student confessed to having carnal knowledge with the Claimant. She testified that she did not see the confession made by the student.

42. She stated that when a teacher is summoned for a disciplinary hearing, the teacher ought to be given sufficient time. She testified that the repealed code applicable at the time of the Claimant's disciplinary case did not specify the length of notice to be given to a teacher but the current code provides for 7 days' notice.

43. RW2 denied the allegations made by the Claimant that he was taken through the disciplinary hearing late, between 6pm to 9pm.

44. At the close of the hearing of the case, the court directed parties to file submissions. The said submissions were highlighted on 21st July 2022.

Determination

45. I have considered the evidence and the submissions by both parties. I have also considered the authorities cited by the parties. The issues arising for determination are the following: -

    i. Whether there was valid reason for dismissal of the Claimant.

    ii. Whether due process was followed in the termination of the Claimant's employment.

    iii. What reliefs should issue.

Whether there was valid reason for dismissal of the Claimant

46. In its pleadings and evidence tendered in court, the Respondent maintained that the Claimant was dismissed from service on allegation that he had carnal knowledge with his student contrary to section 66 of the Code of Regulations for Teachers. According to the Respondent, the Claimant had carnal knowledge of his student one EC on the 4th May 2010 at Chavakali Hams Hotel and on 12th, 13th and 14th June 2010 at Paradise Hotel Serem.

47. These allegations were brought to the attention of the Respondent by the said student's husband, Mr OB vide a letter dated 7th July 2010 addressed to Respondent herein.

48. Based on the above letter, the Respondent's agent, the Principal of [particulars withheld] TTC wrote a letter dated 19th July 2010 to the Claimant requesting for a detailed explanation on the allegations raised in the letter by Mr. O. The Claimant responded vide a letter dated 22nd July 2010. The Claimant was thereafter invited for a disciplinary hearing on 31st July 2010 before the BOM following which he was interdicted. The Claimant was later invited for a disciplinary hearing before the Respondent's Discipline Committee on 1st October 2010 and subsequently dismissed from employment by letter of the same date.

49. The Claimant maintained that the allegations made against him were not only false but malicious. He testified that the allegations by his student were never proved. That during the period he is alleged to have committed the offence he was not in the college. The Claimant produced the proceedings of Kakamega CMCC No. 443 of 2010, a defamation suit he filed against the student, EC and her husband OB that led to his dismissal from employment.

50. I have looked at the proceedings of the defamation case. Although the judgment attached to the Claimant's documents is incomplete, I have noted that the court at page 55 stated that the defence did not tender any evidence. The court concluded that there was an element of malice by the student.

51. It is noteworthy that the Claimant was dismissed on 1st October, 2010 and the decision in the defamation case was delivered on 16th December, 2013. It is further evident that the defendants did not testify in the said suit. The Judgment clearly states at page 77 of the Claimant's bundle that the Respondents in the defamation case did not testify. The record shows that the defence case was closed on 27th August 2012 when the defendants and their counsel did not appear in court for hearing of defence case.

52. The decision in the defamation case cannot be used to contest the dismissal which took place 3 years earlier. According to section 43 of the *Employment Act* the reasons for termination are those which the employer believed at the time of making the decision to terminate, not evidence that became available long after the decision.

53. The proceedings of the disciplinary Committee of the Respondent show that the Claimant was called for a disciplinary hearing on 1st October, 2010, the charges were read to him which he denied. He was then questioned by the Committee and both the questions and his answers were recorded.

54. Witnesses were called and gave evidence in his presence and he was allowed to cross examine them. The witnesses who testified were the student, her husband, the then Principal of [particulars withheld] TTC and the Board Chairman. The Claimant cross examined all of them.

55. It emerged that the Claimant had met with the husband to the student and offered him money to drop the case but he declined. The student was also offered money to drop the case but declined.

56. From the evidence adduced before the disciplinary committee I am persuaded that the verdict reached by the disciplinary Committee was supported by the evidence adduced before it.

Whether due process was followed by the Respondent before the termination of the Claimant's employment.

57. The procedure for discipline of teachers in Kenya is contained in the Code of Regulations for Teachers (CORT). Regulation 66(4) of the Code of Regulation provides as follows: -

> " The Commission shall:
>
> (a) Inform the teacher concerned on/about the nature of the allegations made against him/her afford that teacher adequate time for the preparation and presentation of his/her defence and the opportunity of being heard in person.
>
> (b) Act on general evidence or statements relating to the character or conduct of the teacher concerned and shall not be bound to receive and consider only evidence admissible in a court of law and
>
> (c) Administer oath and may for the purpose of dealing with any matter before it, summon any person to attend and give evidence and to produce any relevant documents
>
> (d) Consider only those allegations that the teacher has been informed and charged with."

58. Section 41 of the *Employment Act* 2007 which provides for the procedure for disciplinary hearing states: -

> "(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reasons for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
>
> (2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within sub – section (1) make."

59. In the instant case the Claimant was given an opportunity to respond to the charges against him during investigations by the Principle. He was thereafter invited for a disciplinary hearing before the Board of the college which after hearing the evidence against him from the student and her husband as well as the response of the Claimant, were convinced that he had a case to answer and interdicted him. The Claimant was thereafter invited to appear before the Respondent's disciplinary Committee which heard the case, found the Claimant guilty of the charges against him and decided to dismiss the Claimant.

60. The Respondent thus complied with the procedure under both the *Employment Act* and the Respondents Code of Regulations for Teachers.

61. On its counter claim the Respondent did not adduce any evidence. The counter claim seeks refund of money paid to the Claimant during interdiction. Even if the Respondent had adduced evidence in respect of the same, it is unlikely that it would have succeeded as the regulations provide for payment of half salary during interdiction and the said salary was properly paid to the Claimant during the period he was on interdiction. He was therefore entitled to be paid the salary. The counter claim having not been proved is dismissed.

62. Having found that both the Claim and counter claim were not proved, the entire suit and counter claim are dismissed. Each party shall bear its costs.

DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 25TH DAY OF APRIL, 2024

MAUREEN ONYANGO

JUDGE