



REPUBLIC OF KENYA



KENYA LAW

THE NATIONAL COUNCIL FOR LAW REPORTING

Where Legal Information is Public Knowledge

**Makutwa v Godrick & 2 others (Cause 158 of 2013)
[2023] KEELRC 603 (KLR) (15 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 603 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 158 OF 2013
S RADIDO, J
MARCH 15, 2023**

BETWEEN

NEWTON MAKUTWA CLAIMANT

AND

MAKOKHA ODENDE GODRICK 1ST RESPONDENT

WILFRED BOSRIRE 2ND RESPONDENT

TEACHERS SERVICE COMMISSION 3RD RESPONDENT

JUDGMENT

1. Newton Makutwa (the Claimant) sued some 6 Respondents on 13 June 2013, alleging unfair termination of employment (action against 3 of the Respondents was withdrawn on 19 July 2019).
2. The current Respondents filed a joint Response on 27 February 2014, and the Claimant filed a Reply to the Response on 30 July 2014.
3. On 6 June 2018, the Court dismissed the Cause for want of prosecution, but upon the application of the Claimant, the Cause was reinstated on 8 July 2019.
4. The hearing then commenced on 22 July 2019 and was adjourned to 29 January 2020. The hearing did not proceed as the Respondents' advocate was reported indisposed.
5. None of the parties moved the Court until 19 October 2022, when the Cause was listed for directions on 1 December 2022. None of the parties attended the session and the Court issued a Notice to Show Cause for 15 December 2022, when the Court directed that the hearing resumes on 9 February 2023.
6. On the said date, the Claimant's second and Respondents' witness testified.
7. The Claimant filed his submissions on 24 February 2023, and the Respondents on 8 March 2023.



8. The Court has considered the pleadings, evidence and submissions.

Unfair termination of employment

Procedural fairness

9. The Claimant's case on procedural fairness was that the Teachers Service Commission (the Commission) did not allow him an opportunity to defend himself by failing to serve him with summons to attend the disciplinary hearing, failing to record witness statements from impartial witnesses, failing to serve him properly with the interdiction letter and that his appeal to the Teachers Service Appeal Tribunal was not considered.
10. On or around 5 October 2009, the Commission received a complaint alleging that the Claimant had sexually assaulted a pupil and an investigative hearing was held on 30 October 2009.
11. The Claimant was present during the hearing. Before the hearing, the Claimant had recorded a 14-page statement on 16 October 2009, which he requested the panel to consider.
12. After the preliminary investigations, the panel recommended to the Commission to consider disciplinary action against the Claimant.
13. Consequently, the Commission interdicted the Claimant through a letter dated 10 November 2009, and the Claimant was requested to make a written response within 21-days.
14. The Claimant responded to the interdiction letter on 27 November 2009, and on 11 May 2010, the Commission invited him to attend a disciplinary hearing on 14 June 2010.
15. The Claimant did not attend the hearing but the minutes show that witnesses were present.
16. The Claimant contended that he did not receive the invitation letter. The minutes indicate that the Claimant had received the invitation and that the District Education Officer had also called him on the morning of the hearing and also called his sister who confirmed that he was at home and had received the invitation.
17. The Commission's witness stated in her witness statement that the invitation letter had been served upon the Claimant by the District Human Resource Officer through his last known address, and that a call had been placed to him as well by the District Education Officer and was received by the sister.
18. The witness also testified that the interdiction letter had been sent to the Claimant's last known postal address (the address he gave while recording a statement during investigations).
19. The Commission requested the Claimant to make a written response to the allegations and he did make a written response. The Commission then sent an invitation to the Claimant to attend an oral hearing.
20. The invitation was sent through the postal address of the school the Claimant was serving at the material time. The same postal address had been used to serve the Claimant and he received the letters.
21. Service of such letters and notices through post is widely accepted in this jurisdiction, and the Court has no hesitation in finding that the Claimant was served through his last known postal address and that he must have received a copy of the invitation in due course.
22. The Claimant appealed and the Commission notified him of the outcome of the appeal on 1 February 2011.



23. Although alleging that he further appealed to the Teachers Service Commission Appeal Tribunal, the Claimant did not demonstrate that he made a formal appeal to the Tribunal.
24. This Court is satisfied that the Commission was in substantial compliance with the requirements of procedural fairness as set out in sections 35(1) and 41 of the [Employment Act, 2007](#), the [Code of Regulations for Teachers](#) and the rules of natural justice.

Substantive fairness

25. Sections 43 and 45 of the [Employment Act, 2007](#) places a burden on the employer to prove the validity and fairness of the reasons leading to a dismissal or terminating of employment.
26. The Court has keenly looked at the Claimant's statement recorded on 16 October 2009.
27. The Claimant made admissions therein that he had been having a sexual relationship with the pupil, and that he had asked the pupil to stay with him and that they had agreed to marry. The Claimant also stated in the statement that they agreed he would approach the pupil's parents for their blessings but the mother had objected.
28. Despite contending during oral testimony that he was coerced to record the statement, the Claimant did not make any such indication in the witness statement.
29. In fact, the Claimant had indicated in the statement:

I wrote this statement willingly but stressed. I've been disturbed by statement that I rung the Head teacher telling him I can't go to school as the DEO instructed me to avoid it and that officer who came is junior. I did not utter that. I was told to keep off school completely but only to report to the DEOs office..

30. From the Claimant's own admissions, the Court is satisfied that he was in breach of the [Code of Regulation for Teachers](#) and that the Commission has proved valid and fair reasons for the dismissal.

Lost income

31. The Claimant prayed for the remuneration he would have earned had he served until normal retirement age (lost income) of Kshs 5,093,760/-.
32. In addressing this head of the claim, the Court can do no better than endorse of the decision of the Supreme Court of Uganda in [Bank of Uganda v Tinkamanyire](#) (2008) (2008) UGSC, that:

the contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law. Similarly, claims of holidays, leave, lunch allowances and the like which the unlawfully dismissed employee would have enjoyed had the dismissal not occurred are merely speculative and cannot be justified in law.

Conclusion and Orders

33. The Court finds and declares that the dismissal of the Claimant was fair.
34. The Cause is dismissed with no order on costs considering that the claimant had not secured alternative employment by the time of hearing.

DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 15TH DAY OF MARCH 2023.



RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant Wanyama & Co. Advocates

For Respondents Mary Njau Advocate, Teachers Service Commission

Court Assistant Chrispo Aura

