Teachers Service Commission v Gitahi (Employment and Labour Relations Appeal E017 of 2022) [2023] KEELRC 2267 (KLR) (29 September 2023) (Judgment)

Neutral citation: [2023] KEELRC 2267 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI

EMPLOYMENT AND LABOUR RELATIONS APPEAL E017 OF 2022

ON MAKAU, J

SEPTEMBER 29, 2023

BETWEEN

TEACHERS SERVICE COMMISSION ..... APPELLANT

AND

STEPHEN MAINA GITAHI ..... RESPONDENT

(Being an Appeal against the Judgment and consequent orders of Honorable P.N Maina (CM) in Murang'a CMELR Cause No.09 of 2019 delivered on 15th September, 2022)

JUDGMENT

1. The respondent was employed by the Appellant as a teacher from 30th October, 2008 until 17th July, 2018 when he was interdicted and subsequently dismissed on 9th May 2019. The reason cited was that he had sexual intercourse with his student, CWH, in his office on diverse dates between February and March 2019. He appealed against the said decision but the appeal was dismissed. He then filed suit in the lower court.

Before the trial court

2. The respondent (claimant in the lower court) testified as CW1 and called CWH as CW2. He adopted his written statement as his evidence in chief and produced 14 exhibits to support his case. His case in brief was that he was employed as a teacher on 30th October, 2008 and his last station at [Particulars withheld] Secondary School.

3. On 17th July 2018, he was summoned by the school BOM to defend himself on allegation made by CWH that he had sexual intercourse with her and impregnated her. He denied the allegation and CWH who also attended the hearing recanted the allegations. He was, however, not allowed to cross examine her. Despite the foregoing facts, the school BOM found him with a case to answer and

escalated the matter to the Appellant. Further, the respondent was interdicted pending decision by the appellant.

4. On 14th February he was summoned for disciplinary hearing at Murang'a County Education Office but the hearing was adjourned to 27th March 2019 due to absence of CWH. On the said date CWH also never attended the hearing and the matter proceeded in her absence. He was therefore not able to cross examine the complainant. He maintained that, there was no evidence to prove the offence against him since the complainant had recanted her statement and even wrote a letter to her area chief confirming that allegation against the respondent were false.

5. The respondent believed that his academic advancement from Diploma teacher to PHD student at Kenyatta University, had made the Principal [Particulars withheld] Secondary School jealous and uncomfortable. He maintained that there was no proof of sexual intercourse between CWH and that his dismissal was done without according him a fair hearing.

6. On cross examination he admitted that CWH made accusation against him but later recanted the same. He further admitted that he attended hearing before the BOM and the appellant but maintained that he was not allowed to cross examine CWH. He also admitted that he sent money to M, brother to CWH through a phone registered in their father's name. He contended that the said money was refund of transport money which he forgot to give CWH on school closing day.

7. CWH (CW2) adopted her written statement dated 4th September 2019 as her evidence in chief. In brief, her evidence was that she wrote a false letter dated 4th July, 2018 against the respondent. She further explained that on 17th July 2018, she appeared before the BOM and recanted the allegations against the respondent. She contended that she had liked and admired the respondent for a long time but he did not know. She contended that she had lied to her close friends including Carol Mwangi that she had a relationship with the respondent and she told other classmates and the respondent.

8. She went on to state that the respondent sent for her and cautioned her about the rumors. Thereafter, she noted that she was pregnant and reported the matter to the matron stating that the respondent was responsible for the pregnancy. The matter was escalated to the principal and then to the BOM.

9. She maintained that the allegation against the respondent was false and she had no sex with him. That she lied because she wanted a special diet and also to be sent home. She denied ever being in the office with the respondent alone. She also denied that he called her sent a text message to her. She reiterated that she lied to her classmates Carol and Naomi that she had a love affair with the respondent. She contended that when she went home on 5th July 2018, she told her mother that she was impregnated by her boyfriend John Njoroge.

10. She regretted having accused her teacher falsely and stated that on 25th July 2018, she wrote a letter to the TSC to put the record straight but the letter was ignored just as her verbal explanation to the BOM was ignored.

11. On cross examination, she stated that she first told the principal about her pregnancy and thereafter told the matron. Thereafter she wrote a letter that the respondent had impregnated her. She confirmed that she left school after discovering that she was pregnant but still did her KCSE exams in 2018.

12. The appellant called two witnesses also. David Ngunyi Thiongo, the retired Principal of Mwarano Secondary School who testified as DW1. He also adopted his written statement as his evidence in chief. In brief his evidence was that he was at the material time the Principal Mwarano Secondary School until 31st December 2021 when he retired. He further stated that he received information that the respondent had carnal knowledge of CWH, a Form 4 student in the school.

13. He stated that his office was informed that the respondent had carnal knowledge with the student between January and March 2018 and that on 29th April 2018, he sent Kshs 227/- to the victim father's mobile number 0795 61XXXX to facilitate her transport to their date. As a result of the said information investigations were done in which CWH and two other students, Naomi Maina and Carol Mwangi recorded statements. The school matron, Agnes Muthoni and Deputy Principal Alice Wachira also recorded statements.

14. During the investigating hearing, the BOM confirmed that CWH had approached the school Matron and confided to her that she had been impregnated by the respondent. The BOM considered the evidence given by the said witnesses and their written statements. It also considered the evidence by the respondent and allowed him to cross examine the witnesses. Although CWH recanted her written statement during the hearing before the BOM, it was found that there was sufficient proof that the respondent had committed the offence charged.

15. The said evidence included sending money, the voluntary confession by the victim to the school matron, and the fact that CWH's classmates Naomi and Carol knew about the love relationship. As a result of the foregoing the BOM resolved that the respondent had a case to answer and interdicted him for immoral behavior. DW1 maintained that the process followed during investigations by the BOM and the disciplinary process before the appellant was fair. Therefore, he prayed for the suit to be dismissed.

16. On cross examination, he admitted that CWH recanted before the BOM, her allegation that she had an affair with the respondent. He contended that the girl wrote a note indicating that she had an immoral activity with the teacher and that is why the BOM met. He maintained that the girl reported the matter to the school matron first and she was brought to his office by the matron and the Deputy Principal. He denied that he forced the girl to write a letter to the appellant.

17. He further stated that CWH wrote the letter to recant her allegations after the teacher was interdicted. He suspected that the CWH was coached to recant the accusation. He reiterated that CWH mentioned two classmates who were aware of her relationship with the respondent and they recorded statements on 4th July 2018.

18. DW2, was Mr.Lawrence Kigen, from appellants Headquarters. He also adopted a written statement as his evidence in chief. He also produced 10 exhibits to support the defence case. In brief his evidence was that after the interdiction of the respondent, the appellant received the statements of the witnesses, minutes of the BOM and investigations Report from the Principal Mwarano Secondary school.

19. He testified that a disciplinary hearing was conducted on 27th March 2019 at the respondent's office at Murang'a and a total of 5 witnesses in support of the accusation and they were cross examined by the respondent. In the end the respondent was found guilty and eventually dismissed. DW2 maintained that the procedure followed was fair as rules of natural justice were adhered to.

20. After considering the evidence, the trial court (RN Maina PM) reached a finding that the reason for the dismissal was valid but the procedure followed was unfair. As a result, he declared the dismissal unfair and awarded the respondent compensations damages.

In this appeal

21. The appellant was aggrieved and brought this appeal seeking to dislodge the said judgment on seven grounds. However, during the hearing, the said grounds were condensed into the following two grounds:-

a. The learned Trial Magistrate erred in law and fact in finding that the termination of the respondent's employment was unjustified, unlawful and unprocedural.

b. The learned Trial Magistrate erred in law by awarding reliefs to the respondent that were not tenable in law.

22. The appellant submitted that the trial court erred in finding that the dismissal was unfair and unlawful contrary to section 45 of the *Employment Act*, yet page 10 of the impugned judgment the court had made a finding that there existed a valid and reasonable ground for termination of the respondent's employment. Consequently, the appellant submitted that the trial court contradicted itself in making the conclusion that the termination was unlawful.

23. Reliance was placed on the Court of Appeal decision in *Lake Victoria North Water Service Board & another v Alfred Onyango Amombo* (2018) eKLR where it was held that the court cannot usurp the function of the decision maker by imposing its own abstract decision on what should have been a reasonable decision.

24. Further reliance was placed on the case of *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* (2017) eKLR where the Court of Appeal held that all what the employer is required to prove are the reasons he genuinely believed to exist and which caused him to terminate the employee's services.

25. As regards the second grounds, it was submitted that the trial court erred in awarding the respondent salary in lieu of notice and compensatory damages as the termination was lawfully done. Besides the award of the maximum 12 months' compensatory damages was made without considering the relevant factors set out under section 49 (4) of the *ELRC Act*. For emphasis, reliance was placed on the Court of Appeal decision in *Kiambaa Dairy Farmers Co-operative Society Limited v Rhoda Njeri & 3 others* (2018) eKLR that the 12 months' statutory maximum compensation ought to be left for the most egregious cases of abuse where there is blatant and contumelious disregard of the rights and dignity of an employee while being dismissed.

26. On the other hand, it was submitted for the respondent that the termination of his employment was substantively and procedurally unfair, and that he was entitled to the reliefs sought. It was contended that fair termination entails both fair procedure and valid reason for the termination. It was submitted that the procedure for removal of a teacher from the Register of Teachers, and disciplinary process is provided under Regulation 66 (2) (3) (4) of the Code of Regulation of 2005 but the same was not followed.

27. It was submitted that CWH had stated under oath that the respondent was innocent and therefore the termination of his employment was substantively unfair. Further, the termination was procedurally unfair since the procedure set out under the aforesaid Regulations was not complied with. For emphasis, reliance was placed on *Kennedy Ondigo Olero v Teachers Service Commission* (2019) eKLR where a teacher was reinstated to his employment.

Analysis and determination

28. As the first appellate court, my duty is to reconsider the evidence adduced before the trial court and re-evaluate it so as to draw my own independent conclusions, and ensure that the conclusions reached by the trial court are consistent with the evidence. (See *Sanitam (EA) Ltd v Rentokil* [2006] 2 KLR 70).

29. In this case, I have carefully considered the judgment of the trial court, the record of appeal, the submissions by counsel as well as the law and cited authorities. The issues for determination are:-

a. Whether the dismissal of the respondent was unfair and unlawful.

b. Whether the respondent was entitled to the damages awarded by the trial court.

Unfair dismissal

30. As correctly submitted by the respondent, fair termination entail fair procedure and valid reason. Section 45 (2) of the *Employment Act* provides that:-

> "(2) A termination of employment by an employer is unfair if the employer fails to prove –
>
> a. That the reason for the termination is valid;
>
> b. That the reason for the termination is a fair reason -
>
> i. Related to the employee's conduct, capacity or compatibility, or
>
> ii. Based on the operational requirements of the employer; and
>
> c. That the employment was terminated in accordance with fair procedure."

31. In this case the trial court reached conclusion that there was a valid reason for dismissing the respondent from service. The said finding has not been challenged by appeal and therefore it is a non-issue on this appeal. Even if there was a cross appeal, the court would still find that there is evidence to prove that the respondent had an immoral behavior towards his student (CWH).

32. The student voluntarily reported the matter to the school management and her two classmates corroborated the allegations in writing, before the BOM and before the Appellant during the disciplinary hearing. The Mpesa transaction from the respondent to a phone belonging to the father of CWH was not shaken. Such evidence was evaluated by the employer and in its honest belief formed the opinion that the respondent was unfit to continue serving as a teacher.

33. The respondent has not shown that the said decision by the Appellant was unreasonable and that no reasonable employer in similar circumstances would have dismissed the employee. In my view an employer receiving a report from a student that she has been impregnated by her teacher and corroborating evidence is availed, would be entitled to treat with suspicion the withdrawal of the said allegation by the student.

34. Turning to the issue of procedure, section 41 of the *Employment Act* provides that:-

> "(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 reason 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 subsection (1), make."

35. There is no denial that the respondent was accorded a hearing by the BOM before interdiction. There is further no denial that the respondent was accorded a hearing by the Appellant before the dismissal from service. All what he states is that the mandatory provisions of section 41, 43 and 45 of the *Employment Act* were not adhered to and therefore the termination was unfair.

36. The appellant maintained that the appellant was accorded fair hearing by the appellant's disciplinary panel and he was able to cross examine the witnesses. It was argued that the failure by CWH to attend the hearing did not negate the procedure followed or weaken the evidence available. It was further submitted that the recanted evidence by the CWH was corroborated by the evidence from her classmates and the Mpesa transaction by the respondent to the phone of CWH's father.

37. I have considered the evidence adduced during the trial and it is clear that the respondent was made aware of the allegations against him by CWH. It is further clear that he was invited to attend a hearing before the BOM to respond to the allegations by CWH and other witnesses. It is a fact that he attended the hearing and he made his representations.

38. There is nothing on record to show that he objected to the procedure adopted by the BOM or the Appellant's disciplinary panel. There is also nothing to show that he requested to be present when the witnesses were being interviewed by the BOM, or to be allowed to cross examine them. He also never raised that matter before the trial court. However, the court went ahead and made a finding that since the respondent was not present when the witnesses were interviewed by the investigators, the subsequent dismissal by the Disciplinary committee was procedurally unfair.

39. Respectively, I am of a contrary view, as far as the foregoing finding by the trial court is concerned. First the said finding was not based on any evidence or submissions before it. Secondly, the investigation before the BOM and a charge before the disciplinary committee are separate and distinct. The investigation process ends with a finding of a case to answer, and the disciplinary process starts with the invitation of the claimant employee to defend himself before disciplinary action is taken against him.

40. In view of the foregoing observation, I find that there is on record, sufficient evidence to show that the respondent was accorded a fair hearing before his dismissal as required by section 41 of the *Employment Act* and Regulation 66 of the Code of Regulations for Teachers (CORT). He was made aware of the charges against him and he was given a fair opportunity to make his representations in defence, which were then considered before a decision to dismiss him was reached. Consequently, I hold that the trial court erred in concluding that the dismissal was unfair because it was not done in accordance with a fair procedure.

Reliefs sought

41. Having found that the trial court fell into error by holding that the dismissal was procedurally unfair, I further find and hold that the court erred in awarding compensatory damages to the respondent for unfair termination. The said award was not supported by evidence and the law. Even if the dismissal was procedurally unfair, which is not the case, awarding of the maximum compensation of 12 months' salary would not be justified. Section 49 (4) of the *Employment Act* provides for factors to consider when deciding what relief to award for unfair termination of employment. One of the factors for consideration is whether the employee has contributed to the termination through misconduct.

42. In this case the trial court had made a finding that there was a valid reason for dismissing the respondent from service. That factor was not considered and therefore the trial court fell into error by not taking

into account a relevant factor. I seek support from *Kiambaa Dairy Farmers Co-operative Society Limited v Rhoda Njeri & 3 others* (2018) eKLR where the Court of Appeal held that:-

> "...the less the violation of an employee's rights that accompany his dismissal, the fewer the monthly wages will be awarded. Twelve months, the statutory maximum ought in all logic to be reserved for the most egregious cases of abuse where there is blatant and contumelious disregard for the rights and dignity of an employee who is being dismissed. Award of the full twelve months ought therefore to be the exception, all fully explained and justified, as opposed to a default or knee jerk award for every and any case of unfair dismissal."

Conclusion

43. I have found that the evidence on record demonstrates that the dismissal of the respondent from service was grounded on valid reason and fair procedure was followed. Accordingly, I have reached the conclusion that the dismissal was fair both substantively and procedurally. I have further found that the trial court erred in law and fact by declaring the dismissal of the respondent unfair and awarding him maximum compensation. In the end I allow the appeal, set aside the impugned judgment entirely, and in its place enter judgement for the appellant dismissing the lower court with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 29TH DAY OF SEPTEMBER, 2023.

ONESMUS N MAKAU

JUDGE

Order

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE