



REPUBLIC OF KENYA



KENYA LAW
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**Odhiambo v Board of Management, Khalsa School (Cause 616 of 2019)
[2023] KEELRC 2623 (KLR) (27 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2623 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 616 OF 2019
NJ ABUODHA, J
OCTOBER 27, 2023**

BETWEEN

ODOYO ARGWINGS ODHIAMBO CLAIMANT

AND

THE BOARD OF MANAGEMENT, KHALSA SCHOOL RESPONDENT

JUDGMENT

1. In the Amended Statement of Claim dated 3rd September 2021, the Claimant pleaded unfair termination of his services and failure to pay his terminal benefits by the Respondent and pleaded that the Respondent employed him as an unregistered Form Tutor and acting Deputy Head of the School compound located at South C, Muhoho Avenue, Opposite Capital Centre along Mombasa Road. He was employed on or about 1st September 2014 earning a gross salary of Kshs. 100,000/= per month.
2. The Claimant averred that he served the Respondent with loyalty and diligence until August 2019 when his employment was wrongfully and unfairly terminated without due process and the respondent failed to pay his terminal dues including notice pay, salary arrears and compensation for unfair termination.
3. The Claimant further averred that on 21st June, 2019 through a letter, the Respondent's Principal Mr. Sabastian Chacko informed the Claimant that he should submit his TSC registration certificate on or before 15th July, 2019 failure to which his employment would be terminated. The Claimant averred that the Respondent did not mention this requirement at the time of recruitment and that the Respondent knew he was not eligible for registration with TSC, not a trained teacher but a Bachelor of Commerce graduate.
4. It was the Claimant's position that on 5th August, 2019 the Respondent sent him a letter which had the net effect of terminating his employment for the reason that he lacked TSC certificate. This action he considered was unilateral and an arbitrary change of the terms of his employment.



5. He claimed and prayed for Judgment against the Respondent for a declaration that the Respondent's action was unprocedural amounting to unfair termination; he further claimed unpaid salary, one month's salary in lieu of notice and compensation for unfair termination all amounting to Kshs 1,600,000/=
6. In its amended statement of Response, the Respondent agreed to having employed the Claimant but denied that the Claimant served it with loyalty and diligence. The respondent further denied that the letter of 5th August, 2019 had a net effect of terminating the Claimant's employment. The respondent further averred that on 25th July, 2018 a staff meeting was held at Khalsa School where all teachers including the Claimant were informed that it had become mandatory for teachers in private and public schools in Kenya to have TSC number.
7. It was the Respondent's case that it requested all teachers to obtain and submit their TSC numbers on or before 30th November, 2018 and come that time the Claimant had not obtained or submitted the TSC number as requested.
8. The Respondent averred that it received several circulars from TSC prohibiting the employment of unregistered teachers and the Claimant was at all times aware of this directive but refused to apply for a TSC number. The respondent denied changing the terms of employment without consulting the Claimant and further that he resigned after he was unable to produce his TSC number. It was the respondent's case therefore that the claimant was not entitled to the prayers sought.
9. At the hearing, the Claimant adopted the documents filed in court as his evidence in chief and he stated in cross-examination that he was in attendance of staff meeting of 25/7/2018 and was informed he needed to submit TSC certificate by 30/11/2018. He did not do so but asked for more time as it was not available because he was not a trained teacher by then.
10. He testified that he received a reminder on 21/6/2019 but still did not submit the TSC Certificate and further that he neither explained nor informed the school of his difficulty. He further stated that he verbally retired from teaching and that he had by the time this suit came to trial not received the certificate yet.
11. On the letter dated 5/8/2019 he confirmed it was about submission of TSC registration certificate and not a termination letter. The letter was however conditioned that if he did not submit the certificate he would be terminated. He further stated that he was aware that schools received circulars from TSC on registration and that he was not a trained teacher but a B.com graduate.
12. It was the Claimant's testimony that the school employed him knowing he was not registered by TSC and teachers were given leeway to go for retraining and most went but he was not given the opportunity since the intention was to dismiss him.
13. The Claimant testified he was claiming three months' notice pay although the contract provided for one month's notice. He further stated that the August salary was paid by instalment and on re-examination he clarified that the contract provided for one term notice and that a term was three months and that no notice of disciplinary hearing was given and none was conducted. It was further his evidence that since the letter dated 5/8/2019 provided that if he did not submit the certificate by 8/8/2019 he would be deemed not part of teaching staff, he considered himself terminated on 8/8/2019.
14. The Respondent's witness, RW1, adopted documents filed in court as evidence in chief and in cross-examination RW1 testified that the letter dated 5/8/2019 required TSC certificate by 8/8/2019 and the Claimant ceased to be a member of teaching staff when he failed to present the TSC registration



certificate. According to him, there was no need for the claimant to be taken through disciplinary hearing as this was a condition set by TSC and since the Claimant did not submit the certificate and he stopped coming to school on 8/8/2019 he dismissed himself.

15. In submission, the Claimant on the issue of whether he was unfairly terminated, submitted on article 41(1) and 47(1) of the *Constitution* and section 41, 43 and 45 of the *Employment Act* and relied on the cases of *Walter Ogal Anuro v Teachers Service Commission* (2013) eKLR, *Pamela Nelima Lutta v Mumias Sugar Co. Ltd* (2017) eKLR among others to submit that the Respondent did not follow procedure while terminating his service. According to him there was no valid reason to terminate his service. He had worked for 5 years without the TSC certificate. The respondent ought to have given him an opportunity to train as a teacher to get the TSC certificate.
16. On the issue of whether the Claimant was entitled to reliefs sought he submitted that the court finds he was unfairly terminated and that he was entitled to three month notice pay, certificate of service, compensation for unfair termination and costs and interests.
17. The Respondent on the other hand filed its submissions and submitted on the issue of whether the Claimant was unfairly terminated, it stated that the letter dated 5/8/2019 was just a reminder of the subject to the meeting of 25/7/2018 cautioning the claimant of the sanctions if he did not submit the TSC certificate. This was a normal work related warning or caution employers use to communicate with employees on important matters and in that regard the Respondent relied on the case of *Jaswinder Kaur Ghataaura vs Naredrasing r. Mahida & Another* (2013) eKLR.
18. It was the Respondent's submission that the Claimant on mistaken belief that it intended to terminate him resigned when what was required of him was compliance with the requirement to produce TSC number. The Claimant admitted understanding the contents of the letter and in any case if he did not understand it he ought to have sought clarification from the Respondent.
19. It was the Respondent's Submission that the Claimant was given enough time as early as July 2018 to regularise his position to get TSC registration but he declined which amounted to misconduct as per section 44(4) (e) of the *Employment Act*.
20. The Respondent further submitted that refusal to obtain and submit his TSC number after several requests both orally and in writing entitled the Respondent to summarily dismiss the Claimant which it did not as he resigned.
21. On the reliefs sought by the Claimant the Respondent submitted that the contract did not provide for payment of one term notice but each party was to give such a notice to terminate hence this prayer should fail; on compensation for unfair termination the Respondent submitted that the Claimant was not entitled to the same having voluntarily resigned after failing to obtain and submit TSC number.

Determination

22. The Court has reviewed and considered the pleadings, evidence and submissions by Counsel in the matter and is of the view that the only issues for determination are whether the claimant was unfairly terminated and whether the Claimant is entitled to the reliefs sought.
23. On the issue of whether the Claimant was unfairly terminated it was not disputed that the Claimant was employed on 1st September, 2014 as a form four tutor and deputy head of school and he worked for 5 years since August 2019 when he did not report to work on 8/8/2019 as per the Respondent's letter dated 5/8/2019 which required him to obtain and submit the TSC registration certificate failure to which his services would be terminated.



24. The Claimant's assertion that this letter amounted to termination does not hold water bearing in mind that if at all he submitted the said certificate then he would have complied with TSC requirement and continued working for the Respondent. *In Jaswinder Kaur Ghataaura V Naredrasing R. Mahida & Another*[2013]eKLR it was held as follows:-

"I find the letter issued to the claimant dated 5th July 2010 was not a termination notice. It was however a caution to the claimant based on the reasons indicated therein. This is a normal work related warning or caution where employers for good reasons find it necessary to communicate to the employees on matters they find of importance based on the circumstances of each case. It is an administrative action that ensures employees are well supervised and where there is a mistake, in law a warning can be issued and in most cases such warnings give the possible sanctions that may be taken if the warning is not heeded by the employee. I find this a good practice for an employer to communicate to their employee on good reason as unlike a case of summary dismissal even on a matter where an employee should have been cautioned and proceed to undertake their duties. In any event, such a warning and caution can only last for a fixed period if not repeated. Therefore the caution here was only valid for one year and the claimant had that opportunity to continue serving and the warning and caution would have automatically lapsed after one year."

25. The Claimant's employment was terminated on the ground of failure to obtain the TSC certificate and I note that this was discussed on the staff meeting of 25th July, 2018 where the same was to be submitted by 30th November, 2018. The Claimant did not submit the same.
26. During hearing the Claimant admitted that he attended the staff meeting of 25th July, 2018. He knew the TSC had issued circulars on registration of teachers. The Respondent issued him with the compliance letter in August 2019 after the staff meeting on July 2018. The claimant did not take any steps to get the registration despite knowing that he was not a trained teacher but a B.com graduate.
27. It was not in dispute that at the start of the engagement of the parties the requirement for TSC registration was not brought to the attention of the Claimant even though the advert specifically needed a candidate with TSC number; this means then from the onset the Claimant knew of this requirement hence cannot blame the Respondent who has even employed him without such a crucial requirement. Even though this issue was assumed by parties at the onset, with TSC circulars more specifically the circular of 2nd May, 2019 which was sent to TSC regional directors it became mandatory and there was no way the Respondent could continue engaging the services of the Claimant unless he complied with the registration requirements. The performance of the contract became illegitimate thereafter since the claimant could not continue teaching without TSC registration.
28. The Claimant was reminded severally but did not provide the certificate. Failure to obey the Respondent in this regard leads to gross misconduct under section 44(4)(e) of the *Employment Act* which justifies summary dismissal but in this case the Respondent did not terminate the Claimant. It was the claimant who resigned by failing to report to work on the date given on the warning letter when he was to obtain and submit the TSC certificate.
29. I find the reason for the claimant's termination was a fair under section 43 of the *Employment Act* since the Respondent did not have control over the requirement by TSC for teachers. The Claimant was at all times aware of this requirement hence the performance of the contract could not be undertaken while it became totally illegal.
30. In conclusion the Court hereby dismisses the Claimant's claim with costs.



31. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER, 2023

ABUODHA JORUM NELSON

JUDGE

