



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

ELRCA NOS. E026 AS CONSOLIDATED WITH ELRCA NO. E035 OF 2021.

TEACHERS SERVICE COMMISSION.....APPELLANT

VERSUS

TIMOTHY ONYANGO OLALE.....RESPONDENT

(Being an Appeal Against the Judgment and Orders of Hon. R. K. Ondieki in Kisumu CMELRC No. 88 of 2019 Delivered on 8th June, 2021.)

Between

TIMOTHY ONYANGO OLALE.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

JUDGMENT

1. Timothy Onyango Olale lodged Cause Number 88 of 2019 at the Kisumu Chief Magistrates Court against Teachers Service Commission. He sought a declaration that his dismissal was unfair and unlawful, reinstatement to the service of the Appellant, and payment of salary arrears.

2. The case was heard and Judgment rendered on the 8th June, 2021, whereupon the learned Magistrate entered judgment in favour of the Claimant against the Respondent in the following terms:

“i. The dismissal from employment of the Respondent was unfair and unlawful

ii. Reinstatement is declined

iii. Payment of salary arrears from September, 2017 until 7th June, 2021, at the rate of Kshs. 62,527 subject to taxes

iv. General Damages of twelve months’ salary.”

3. The Teachers Service Commission was dissatisfied with the decision of the court and filed a Memorandum of Appeal on the 8th July, 2021, premised on the following grounds THAT:

a. The learned Magistrate erred in law and fact in finding that the Respondent’s termination from employment was unjustified, unlawful and unprocedural.

b. The learned Magistrate erred in law and fact by awarding the Respondent salary arrears from September, 2017 to 7th June, 2021 when the employer-employee relationship had terminated and no service had been rendered by the Respondent during the said period contrary to the provisions of the Employment Act, 2007.

c. The learned Magistrate erred in law and fact by awarding the Respondent twelve (12) months salary as general damages without giving any legal or reasoned justification thus going against the principle of granting an award of compensation as set out under

Section 49 and 50 of the Employment Act.

4. Submissions on the appeal were filed for both parties.

The Appellant's Submissions

5. The Appellant submitted that it has the overall mandate to exercise disciplinary control over its teachers and it was in the exercise of this mandate that a decision was made to re-evaluate the material before it and proceeded to interdict the Respondent despite having been exonerated by the Board of Management. The Appellant submitted that

6. The Appellant submitted that at the time of dismissal, there was sufficient evidence to prove on a balance of probability that the Respondent was culpable of immoral behavior. The Appellant cited *Nairobi Civil Appeal No. 66A of 2017 Kenya Revenue Authority v Reuvel Waithaka Gitahi & 2 Others* and *Nyeri Civil Appeal No. 29 of 2016 Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike (2017) eKLR* where the Court of Appeal held that while the burden is on the employer to prove the reasons for termination, the test is subjective in that all the employer is required to prove are the reasons he genuinely believed caused him to terminate the employee's services.

7. It is further submitted that the Appellant considered the actions of the Respondent in their entirety. It is submitted that the Respondent invited the learner to an adult entertainment resort, bought her soda, took her to a room in the resort, undressed her and touched her inappropriately, which violated the canons of the teaching service.

8. The Appellant further submitted that the Respondent was accorded a fair hearing and an opportunity to be heard in compliance with Sections 41 and 45 of the Employment Act, the Code of Conduct for Teachers, 2015 and the Rules of Natural Justice.

9. The Appellant submitted that the Trial Court awarded the Respondent Salary arrears without basis as the prayer for reinstatement to which salary arrears is an attendant relief, was declined.

10. It is the Appellant's submission that the Respondent was dismissed effective 10th July, 2018, thus no salary could have accrued to him between that time and 7th June, 2021. It is the Appellant's Submission that the Trial Court erred in awarding salary arrears for a period when no employer-employee relationship existed and no service had been rendered.

11. It is the Appellant's submission that Regulation 148(h) excludes teachers interdicted on the ground of immoral behavior from payment of half salary during interdiction, hence the Respondent was not entitled to salary arrears for the period of interdiction (**12/9/2017-10/7/2018**). It is the Appellant's position that the Respondent would only be entitled to the remedies prescribed under Section 49 of the Employment Act, 2007.

12. The Appellant further submitted that the Trial Court did not consider the relevant factors as outlined in Section 49(4) of the Employment Act when awarding compensation. The Appellant relied on *Msa Civil Appeal No. 27 of 2019 Kridha Limited v Peter Salai Kituri (2020) eKLR*, where the court held that judicial officers bear the burden of accounting for their decisions and must explain the basis of their decisions.

13. The Appellant urged that the court allows her appeal with costs.

The Respondents' Submissions

14. The Respondent submitted that he is entitled to compensation for the unfair dismissal and the award by the Trial Court is justified in this respect.

The Cross-Appeal

15. The Claimant, also being dissatisfied with the Judgment of the court, filed a cross- Appeal dated 27th September, 2021 and filed on even date. The Claimant's appeal was premised on two grounds namely:

a. That the Trial Magistrate erred in law and fact in failing to reinstate him even after declaring that his dismissal was both unfair and unlawful

b. That the Trial Magistrate erred in law and fact in failing to reinstate the Claimant even after reaching a finding that the disciplinary process was a sanitization of the flawed exercise, to appear that a process was adhered to.

The Respondent's Submissions in support of the cross-Appeal

16. The Respondent, now Appellant in the cross-appeal, submitted that he was entitled to be reinstated to the service of the Respondent premised on the fact that the Trial court had found his dismissal unfair and unlawful.

17. The Respondent further submitted that denial of reinstatement on the basis of timelines does not serve the interest of justice.

The Appellant's Submissions on the Cross-Appeal

18. It is the Appellant's submission that the Trial Court did not err in declining the prayer for reinstatement. It is the Appellant's submission that the Trial Court properly applied the holding in *Lawrence Onyango Oduori v Kenya Commercial Bank Ltd (2014) eKLR* and *Kenya Chemical Allied Workers Union v National Cement Company Limited (2014) eKLR* where the court held that due to the breach of trust and passage of time (3 years) since the Respondent had left employment, reinstatement was not a reasonable or practical remedy.

19. The Appellant further submitted that Section 12(3)(vii) of the Employment and Labour Relations Court Act, 2011, imposes a time limitation on the remedy for reinstatement after the lapse of three years. She cited the holding in *Nyeri Civil Appeal No. 23 of 2017 Sotik Highlands Tea Estates Limited v Kenya Plantations and Agricultural Workers Union (2017) eKLR* for the holding by the Court of Appeal, that in ordering for the Claimant's reinstatement after a three years period had lapsed, the trial court acted without jurisdiction.

20. The court consolidated the two appeals.

Determination

21. I have considered the appeal, the cross-appeal and the parties' submissions in support and opposition of both the appeal and the cross-appeal. The issue for determination emanating from the grounds of appeal in both appeals are:

- i. Whether the trial court erred in awarding salary arrears and 12 months' salary in damages for unfair termination.
- ii. Whether the trial court erred in declining to reinstate the Respondent/Claimant

22. The Court of Appeal in *Musera vs. Mwechelesi & Another (2007) KLR 159*: stated as follows in regards to appeals:

“We must at this stage remind ourselves that though this is a first appeal to us and while we are perfectly entitled to make our own findings on the evidence, the trial Judge has in fact made clear and unequivocal findings and as an appellate court we must indeed be very slow to interfere with the trial Judge's findings unless we are satisfied that either there was absolutely no evidence to support the findings or that the trial Judge must have misunderstood the weight and bearing of the evidence before him and thus arrived at an unsupportable conclusion.”

23. Following the holding in the case cited herein, my role in this appeal, which is a first appeal, is to re-assess and re-evaluate the entire evidence tendered before the trial court and arrive at my own conclusions, while taking into consideration the lower court's exercise of discretion on findings of fact and law.

Whether the trial court erred in awarding salary arrears and 12 months' salary in damages for unfair termination.

Award of Salary arrears

24. The Appellant's position is that the court having declined to reinstate the Respondent/Claimant, renders the award of salary arrears improper as the salary arrears is an attendant relief to reinstatement.

25. Where a court makes an order for reinstatement of a dismissed employee, the employer is required to treat the employee in all respects as if the employee's employment had not been dismissed. In the South African case of *Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration & Others (2008)12 B.L.L.R 1129 (CC)* it was held that the remedy of reinstatement has the effect of safeguarding an employee's employment by restoring it and making the employee resume employment on the same terms and conditions that prevailed at the time of dismissal.

26. The circumstances under which the Respondent/Claimant was interdicted, were justified in view of the serious charges that were leveled against him. Moreover, the trial court did not justify the reasons upon which it awarded salary arrears, the period in issue being time when the Respondent/Claimant did not render service. In the case of *Abraham Gumba v Kenya Medical Supplies Authority (2014) eKLR*, the court held that a grant of 10 months' compensation for a period the Claimant did not work would amount to unjust enrichment. (*See Msa Civil Appeal No. 27 of 2019 Kridha Limited v Peter Salai Kituri (2020) eKLR*)

27. The Respondent/Claimant would only have benefited from salary arears if he were reinstated, as reinstatement restores an employee to the position he would have been had the dismissal not happened, and which includes payment of withheld salaries and benefits. That the trial court declined to reinstate, renders the award of salary arrears untenable.

28. In light of the foregoing, I find and hold that the award of salary arrears for a period when services were not rendered, is unjustified and the award is hereby set aside in its totality.

Award of Damages

29. The trial court awarded the Respondent/Claimant, 12 months' salary in damages. An award of damages/compensation is regulated under Sections 49 and 50 of the Employment Act. Although the court based the award on the declaration of unfair and unlawful dismissal, it did not consider the 13-factors spelt out in Section 49 of the Employment Act to justify an award of maximum compensation.

30. I agree with the trial court that the reasons for the dismissal were not entirely proved by the employer herein as is required under Sections 43 45 and 47 of the Employment Act. The investigative bodies of the Appellant could not agree on whether or not the Respondent was guilty of the charges. This leads this court to agree with the trial court that there could have been an element of unfairness in the

dismissal. This however, did not in my view justify maximum compensation.

31. The Respondent/Claimant admitted having been at a resort and having a drink with his learner. Notwithstanding that the charge of immoral acts was not proved, I hold that the Respondent/Claimant largely contributed to his dismissal and the maximum awarded rendered by the trial court is unjustified.

32. Consequently, the award of 12 months' salary in damages is set aside and substituted with 6 months' salary for unfair dismissal.

Whether the trial court erred in declining to reinstate the Respondent/Claimant

33. The sole ground for the cross-appeal, was premised on the failure of the trial court to order reinstatement of the Respondent/Claimant back to the service of the Appellant. The trial court based its decision not to reinstate despite finding the dismissal unfair and unlawful, on time lapses and the eroded trust between the employer and the employee.

34. The Respondent/Claimant; a teacher, was dismissed on allegations of having engaged in immoral acts with a learner. The Trial Court in declining to allow reinstatement of the Respondent/Claimant, had reliance on the holding of Rika J in **Lawrence Onyango Oduori v Kenya Commercial Bank Ltd (2014) eKLR**, where the Learned Judge held that an employment relationship is dynamic and based on mutuality of trust and confidence. He further opined that long passage of time works against the possibility that such trust and confidence can be rebuilt.

35. The Respondent/Claimant was dismissed effective 10th July, 2018 and the judgment delivered on 8th June, 2021. This was one month short of 3 years from the date of dismissal.

36. Reinstatement is not an automatic right of an employee. It is a discretionary remedy and which largely involves the balancing of the interests of the parties with each case being considered on its own merits. (See **George Ogembo, Employment law guide for employers pg.34**).

37. Section 12(3)(vii) of the Employment and Labour Relations Court Act, provides as follows in regards to reinstatement:

“In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders:

(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law.”

38. The reasons the trial court listed for declining to reinstate the Appellant are justified reasons and this court finds no reason(s) to interfere with the decision of the lower court in this respect.

39. The Respondent/Claimant's cross appeal seeking to set aside the Trial Court's decision declining his reinstatement is dismissed.

40. In whole, the court makes orders as follows in respect of both the appeal and the cross-appeal:

- a. That the Trial Court's award of salary arrears from September, 2017 to 7th June, 2021, is set aside in its entirety.
- b. That the Trial Court's award of 12 months' salary in damages is set aside and substituted with a 6 months' salary in compensation for unfair dismissal at Kshs. 62,527/- per month.
- c. The Trial Court's decision declining reinstatement of the Respondent/Claimant is upheld.
- d. Each party shall bear their own costs of the appeals.

41. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 4TH DAY OF APRIL, 2022

CHRISTINE N. BAARI

JUDGE

Appearance:

Ms. Manyasa present for the Appellant

Mr. Timothy Olale Respondent present in person.

MS. Christine Omollo - Court Assistant.