



**Cosmas Obiero v Teachers Service Commission & another (Cause 294 of 2018) [2022] KEELRC 4120 (KLR) (28 September 2022) (Judgment)**

Neutral citation: [2022] KEELRC 4120 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE 294 OF 2018  
S RADIDO, J  
SEPTEMBER 28, 2022**

**BETWEEN**

**PETER COSMAS OBIERO ..... CLAIMANT**

**AND**

**TEACHERS SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**DIRECTOR OF PENSIONS ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. Peter Cosmas Obiero (the claimant) was employed as a teacher on May 1, 1982 by the Teachers Service Commission (the commission).
2. On or around April 28, 2015, the commission informed the claimant that he would attain the retirement age on July 1, 2016.
3. However, on July 16, 2015, the County Director of Education issued an interdiction letter to the claimant, and the allegation was immoral behaviour, said to have occurred on July 2, 2015.
4. The interdiction letter requested the claimant to respond to the allegation within 21 days, and that he would, later on, be invited to an oral hearing.
5. The claimant responded on July 27, 2015.
6. On August 17, 2015, the County Director of Education issued another interdiction letter to the claimant. The allegation remained the same, but the incident was reported to have happened on July 27, 2015.
7. The claimant responded to the amended interdiction letter on October 22, 2015, and through a letter dated April 1, 2016, the commission invited him to attend a disciplinary hearing on April 26, 2016 at 8.30 am.



8. The claimant attended the hearing.
9. The commission then notified the claimant of dismissal through a letter dated June 16, 2016. The dismissal letter indicated that the claimant had been found culpable of the allegations in the first interdiction letter.
10. The claimant wrote to the commission on October 21, 2016, seeking to know the outcome of the disciplinary hearing (the claimant asserted that he did not receive the dismissal letter).
11. On June 15, 2017, the claimant appealed against the dismissal. He sent a reminder on June 19, 2017.
12. The commission acknowledged receipt of the appeal on June 20, 2017 and advised the claimant that it was looking into the appeal. The commission requested the claimant on August 29, 2017 to make payment to enable it to process the appeal, and he made the payment on September 14, 2017.
13. The commission did not inform the claimant of the outcome of appeal, and he lodged these proceedings in court on September 14, 2018.
14. The remedies sought by the claimant were:
  - (a) A declaration that the dismissal of the claimant's employment by the 1<sup>st</sup> respondent by a letter Ref: TSC No 14718/173 dated June 16, 2016 and all processes flowing from that letter were wrongful, unlawful, unprocedural, illegal, unfair, null and void, in violation of the [Constitution, 2010](#), the [Employment Act, 2007](#), the [Teachers Service Commission Act, 2012](#) and the [Teachers Service Code of Regulations for Teachers, 2015](#).
  - (b) A declaration that the claimant is entitled to all pension benefits upon retirement effective from July 1, 2016 and as such the claimant to be immediately paid the pensions benefits under the [Pensions Act](#), chapter 189 of the Laws of Kenya.
  - (c) An order compelling the 2<sup>nd</sup> respondent to immediately liaise with the Registrar and/or Deputy Registrar of the court to compute, declare and produce in court an account of the claimant's legal retirement benefits and schedule thereof payment of the claimant's legal retirement benefits and monthly pension duly computed under the [Pensions Act](#), Chapter 189 of the Laws of Kenya consequential to order (b) above and to file the same in court for further directions on a convenient mention date.
  - (d) An order that the 1<sup>st</sup> respondent should immediately compute and accordingly pay the claimant for loss of income in account of all withheld salaries, accrued leave and allowances due to the claimant from July 1, 2015 up to retirement date of June 30, 2016 as pleaded in paragraph 5 above, with interest thereon payable at court rates from July 1, 2015 till payment is made in full.
  - (e) Compensatory damages equivalent to the claimant's 12 months gross salary pursuant to section 49(1)(c) of the [Employment Act, 2007](#) for unlawful and wrongful termination of employment.
  - (f) An order that the claimant and the 1<sup>st</sup> respondent to immediately liaise with the Registrar and/or Deputy Registrar of the court for computation of the actual figures for orders made in (d) and (e) and the same be scheduled for mention in court for further directions on a convenient mention date.
  - (g) Special damages for Kshs 302,000.00 as pleaded in paragraph 10 above.



- (h) Exemplary, punitive and/or aggravated damages as pleaded in paragraph 18 above.  
General damages occasioned by violation of the claimant's right to fair administrative action under article 47 of the *Constitution of Kenya, 2010*, as pleaded in paragraph 19 above.
  - (j) An order to the 1<sup>st</sup> respondent to forthwith issue a certificate of service to the claimant in line with section 51 of the *Employment Act* within 14 days of the order of the court.
  - (k) Interest on (d), (e), (h) and (i) above (all inclusive) at court rates until payment in full.
  - (l) Costs of the suit.
  - (m) Any other relief that the honourable court may deem fit to grant and just to award under the circumstances.
15. The commission filed a response on October 2, 2018, prompting the claimant to file a reply on October 25, 2018.
  16. The cause was heard on March 29, 2022 and May 19, 2022. The claimant and a Deputy Director with the commission testified.
  17. The claimant filed his submissions on July 22, 2022 (should have been filed and served before July 21, 2022) and the commission on August 30, 2022.
  18. The court has considered the pleadings, evidence, and submissions.

### **Unfair termination of employment**

#### **Procedural fairness**

19. The claimant challenged the procedural fairness of his dismissal on several grounds, including inconsistency on the dates when the alleged incident occurred and failure to determine his appeal expeditiously or within a reasonable time.
20. Section 35(1)(c) of the *Employment Act, 2007*, expects the employer to give written notification of termination of employment. In some ways, the interdiction letter issued to the claimant served that purpose.
21. The first interdiction letter gave the date of the alleged incident as July 2, 2015. The investigations report signed on July 21, 2015 indicated that the incident was on July 2, 2015.
22. The date was altered to July 27, 2015 through the second interdiction letter dated August 17, 2015.
23. When the claimant appeared before the Disciplinary Committee on April 26, 2016, the minutes show that the hearing was in respect to the incident on July 2, 2015.
24. It is apparent that the commission was not certain of the particulars of the allegations against the claimant, especially the date. It altered the dates but still proceeded to hear the case based on a date it had changed and thereafter moved to dismiss the claimant.
25. In the court's view, the inconsistency in the dates of the alleged incident tainted the procedural propriety of the disciplinary process. The commission should have stuck with a particular date to enable the claimant to defend himself effectively.
26. The code of regulations guiding the contractual relationship between the claimant and the commission provided for an appeal.



27. The claimant exercised the right and was even requested to make a deposit to enable the appeal to be heard.
28. The appeal had not been determined by the time the claimant moved the court, over a year after the appeal.
29. Where the internal procedures of an employer have provided for an appeal, it is one of the elements the court will consider in determining if there was fairness see *Gwynedd council v Barrat & Ar* (2021) EWCA Civ 1322).
30. In the case at hand, the commission failed to meet the standards set by itself and this, in the court's view, negatively affected the overall fairness of the disciplinary hearing.

### **Substantive fairness**

31. Sections 43 and 45 of the *Employment Act, 2007* have placed a burden on an employer to prove as valid and fair the reasons for dismissing an employee.
32. To discharge the burden, the commission called one witness. The witness produced documents.
33. The interdiction letters produced in court had inconsistent dates as to when the incident happened, but the variance in dates was not satisfactorily explained.
34. The author of the letters with inconsistent dates was not called to testify and explain the same. No investigations report was placed before the court to explain the alteration of the dates.
35. The court also takes judicial notice that the High Court in Siaya Criminal Appeal No 188 of 2016, *Peter Onyango Obiero v R*, made a finding that there was no evidence that the claimant was at the scene of the alleged incident.
36. The court concludes that the commission did not discharge the burden placed on it.

### **Special damages**

#### **Legal expenses incurred in the criminal trial**

37. The claimant sought Kshs 300,000/- said to be legal costs of defending himself in the criminal charges/ appeal he faced.
38. In this court's view, it has no jurisdiction to make or award such damages.

### **Appeal deposit**

39. The claimant deposited Kshs 2,000/- with the commission to facilitate the processing of his appeal.
40. The appeal was not determined within a reasonable time, and the court orders a refund of the deposit.
41. Before concluding, the court notes that the claimant did not make a case for the grant of any constitutional remedies or award of general, exemplary or punitive damages.

### **Conclusion and Orders**

42. From the above, the court orders:
  - i. A declaration is hereby issued that the dismissal of the claimant by the 1<sup>st</sup> respondent through a letter Ref: TSC No 14718/173 dated June 16, 2016 was unfair.



- ii. A declaration that the claimant is entitled to all pension benefits upon retirement effective from July 1, 2016, and as such the claimant to be immediately paid the pensions benefits under the *Pensions Act*, chapter 189 of the Laws of Kenya.
  - iii. The respondent to pay compensation equivalent to claimant's salary from April 26, 2016 to June 30, 2016.
  - iv. Refund of Kshs 2,000/-.
  - v. The respondent to issue a certificate of service to be issued within 21 days.
43. The decretal sums attract interest at court rates from the date of judgment.
44. The claimant to have costs.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 28<sup>TH</sup> DAY OF SEPTEMBER 2022.**

**RADIDO STEPHEN, MCI Arb**

**JUDGE**

Appearances

For Claimant Arika & Co. Advocates

For 1<sup>st</sup> Respondent Edwiq Musundi Advocate

For 2<sup>nd</sup> Respondent did not participate

Court Assistant Chrispo Aura

