



Mugo v Teachers Service Commission (Employment and Labour Relations Cause E028 of 2021) [2022] KEELRC 13180 (KLR) (31 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 13180 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MERU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E028 OF 2021
DKN MARETE, J
OCTOBER 31, 2022**

BETWEEN

PETER KINYUA MUGO CLAIMANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

JUDGMENT

1. This matter was originated by way of a memorandum of claim dated August 11, 2021. It does not disclose an issue in dispute on its face.
2. The respondent in a respondent's memorandum of defence dated October 27, 2021 denies the claim and prays that the same be dismissed with costs.
3. The claimant also does a reply to the respondent's memorandum of defence and also a claimant's defence to a counter claim.
4. The claimant's case is that at all material times from September 14, 2001, he has been an employee of the respondent and was awarded several promotions over time due to his dedication to service.
6. His further case is as follows; He was employed as a P1 teacher and posted to Nthambiro Primary School and subsequently promoted to headteacher Ntue Primary school and Karama Antuamuo Primary school. On October 29, 2018 during the KCPE, 2018 he was examination centre manager and chaired the rehearsal proceedings thereof. On October 30, 2018 the first day of the examinations the claimant was expected to drive to Igembe Central Sub-county Headquarters at Kangeta Township to collect examination papers for his school but got there late. He was told that the examination papers for his school had been taken by the DCC and a team of education and security officers. He arrived at school at 7.40am upon which he was ordered out. He was further instructed to report at the DCC's headquarters where he stayed until evening when he was ordered to go home and await communication from the respondent. On return home, his healthy situation worsened and was



admitted to Nyambene Clinical services and Nursing Home where he was treated and discharged on November 3, 2018. He had cerebral malaria. On discharge, he was served with a show cause letter dated November 6, 2018 asking him to show cause as to why disciplinary action should not be taken against him for failing to pick examination papers on October 30, 2018. He did reply to this on November 15, 2018 explaining his health challenges occasioning lateness on the material day. The respondent Meru County Investigation panel summoned him to appear before it on November 27, 2018 and after deliberations he was served with an interdiction letter dated August 26, 2019. In a letter dated May 2, 2019 he was summoned to a hearing of his case on June 3, 2019 at the national headquarters of the respondent. He was dismissed following the hearing by the letter dated June 20, 2019. The claimant claims a blemish free service prior to this incidence.

7. It is his further case that this dismissal from unemployment was unlawful, unfair, unmerited, unprocedural and unreasonable on the following grounds.
 - i. Failing to take cognizance of the claimant's state of health at the material time.
 - ii. Failing to take cognizance of the medical records presented by the claimant to the respondent in support of his allegations of ill health.
 - iii. Refusing and/or failing to confirm the claimant's state of health at the material time.
 - iv. Illegally and wrongly holding that the claimant appeared in school at 8.30am instead of 7.45am on the material day.
 - v. Failing to consider the claimants otherwise sterling disciplinary record and enviable performance track record.
 - vi. Terminating the claimant's employment without any reason or justifiable reason whatsoever.
 - vii. Failing to use other disciplinary mechanism to punish the claimant for any alleged indiscipline.
 - viii. Summarily dismissing the claimant, which is an extremely harsh penalty for the alleged indiscipline.
8. The claimant's other case is that at the time of his dismissal, the claimant earned a monthly remuneration package as follows;
Basic salary Kshs 55,644
Rental allowance Kshs 13,000
Hardship allowance Kshs 14,650
Commuter allowance Kshs 8,000
Leave travel allowance Kshs 6,000
Total earnings Kshs 97,294 per month
9. He again stipulates the following as particulars of loss and damage;
 - a. Being unable to service his debts hence serious financial embarrassments leading the claimant being enlisted in the CRB by Kenya Commercial Bank.
 - b. Loosing his only source of income.
 - c. Loosing benefits earned for 18 years of diligent service
 - d. Psychological and mental anguish for unlawful summary dismissal.



- e. Being unable to enrol his daughter to a college despite having done her KCSE in 2019.
 - f. Hospital bills due to terminated insurance.
10. He prays as follows;
- a. A declaration that the claimant's dismissal/termination from employment by the respondent was unlawful, wrongful, unfair, unjustifiable, inequitable and bad in law.
 - b. An order directing the respondent to reinstate the claimant to his former capacity and rank on the same progressive terms of remuneration and merit.
 - c. An order for payment for all unpaid salaries and benefits to the claimant from June 3, 2019 to date.
 - d. In the alternative, Kshs 1,167,528.00 being 12 months salary compensation for unfair termination.
 - e. General damages for unfair administrative action and wrongful/unfair termination/dismissal.
 - f. Costs and interests at court rates.
11. The respondent's case is that whereas the claimant was its employee, this relationship was governed by the Teachers Service Commission Act, Education Act and the Code of Regulations for Teachers, 2015 including the respondents code of conduct and ethics and other legal instruments and including administrative circular issued by herself from time to time.
12. The respondent's further case is that in October, 2017, the claimant, being Head teacher of Karama Antuamuo Primary School, Meru County and therefore Examination Centre Manager neglected his duties as such. This was reported by the County Commission and an investigation panel set up by the respondent.
13. The respondent's other case is that the panel found him culpable and set the matter for further hearing as he had a case to answer. He was invited for disciplinary hearing and also informed of his right to bring witnesses.
14. The respondent's further avers that at the hearing, the claimant admitted the charges and specifically as follows;
- a. That he was aware what was expected of him during the KCPE 2018 exams;
 - b. That he was aware what time he was required to have picked the exam papers; and
 - c. That he ever communicated to his supervisor that he was unwell.
15. The respondent's other case is that the claimant was dismissed and an appeal against dismissal was further dismissed for being out of the ninety (90) day time limit available under the Teachers Service Commission Code of Regulations for Teachers.
16. The respondent's further case is a condemnation of the claimant's conduct as being reckless and a violation of the code of regulation for teachers as follows;
- "14. Regulation 112(1) COURT: "A head of institution who on account of illness is required to attend to duties assigned by the Commission as required shall apply for sick leave to the commission through the Sub County Director..."



“(2) An application for sick leave by head of institution shall be forwarded to the Commission not later than forty-eight hours where the head of institution attended hospital as an out-patient and not later than seven days where the head of institution is an in-patient.”

16. A responsible head teacher and Center Manager he would have alerted the Sub County of his current condition noting that the national examinations were being conducted under strict timelines."
17. His action was inordinate in view of the circumstances pertaining to national examinations.
18. The respondent further pleads a counter-claim on grounds that the claimant was paid half salary and house allowance following his dismissal on June 3, 2019. She therefore claims an amount of Kshs 102,078.30 due and owing from the claimant as at August 31, 2019 when he was removed from the payroll.
19. The issues for determination therefore are;
 1. Whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful
 2. Whether the respondent is entitled to the counter claim
 3. Whether the claimant is entitled to the relief sought
 4. Who bears the costs of the case
20. The 1st issue for determination is whether the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful. The claimant in his written submissions dated May 26, 2022 submits a case of unlawful termination of employment.
21. The claimant in buttressing his case sought to rely on the authority of Justice Stella Ruto in *Bakery Confectionery Food Manufacturing & Allied Workers Union v Wrigley Company (EA) Limited* (2022) eKLR held as follows;

“Section 41 (1) addresses the manner in which the fair procedure is to be achieved. It makes specific requirements in regards to the process to be complied with by an employer and this entail notifying the employee of the allegations levelled against him or her and granting him or her the opportunity to make representations in response to the said allegations in the presence of a fellow employee or a shop floor union representative of own choice.

...The fairness of a disciplinary process cannot be over emphasized. A disciplinary process which has the likelihood of depriving the employee of his livelihood must by all means be seen to be fair.”
22. The claimant further seeks to buttress his case by relying on the holding of Justice Dr Jacob Gakeri in *Oponyo Etenyi John v Saman Limited/Mansur Asria* (2022) eKLR, he held thus;

“Section 41 is the bedrock of procedural fairness in termination of contracts of employment.”
23. Again, in the authority of *Loice Otieno v Kenya Commercial Bank* (2013) eKLR Radido J expressed himself as follows: “in my view, an employer must demonstrate as a matter of fact that it



- i. Explained to the employee in a language the employee understood the reasons why it was considering the termination.
 - ii. Allowed a representative of the employee, being either a fellow employee or a shop floor representative to be present during the information/explanation of the reasons.
 - iii. Heard and considered any explanations by employee or his representative.”
24. The respondent fomented and answers the following as issues for determination;
 - a. Whether the action by the claimant contravened TSC Act, CORT, and amounts to his dismissal on reasonable/sufficient grounds;
 - b. Whether or not due process of termination was followed; and
 - c. Whether or not the claimant is entitled to the prayers sought.
 25. She answers all these in the affirmative and concludes that the claim is unsubstantiated and unviable and does not lie.
 26. A scrutiny of the respective cases of the parties leaves this court in the middle of nowhere. Firstly, the claimant’s case is that he was employed by the respondent in 2001 and has had a blemish free stint of service until the October 30, 2018 when he was implicated in the failure to promptly attend to his duty as an examination centre manager. This was followed by various disciplinary processes at local and national level in which he was implicated and found culpable. A determination of his dismissal from employment ensued.
 27. One of the determinant case and submission of the respondent is that at the two tier disciplinary proceedings on this issue, the claimant admitted the charges against him and in toto accepted his wrong doing.
 28. The respondent’s case and submission is that the claimant violated the Code of Regulations for Teachers as read with various other codes, statutes and international instruments relating to teaching, teachers and the teaching profession and her disciplinary etiquettes and modules.
 29. It is not in dispute that the claimant was taken through very elaborate disciplinary processes at two stages in this matter. What is indeed in issue is the eventual outcome of the process. The determination or sentence of dismissal on the charges preferred to the claimant. Was this a fair determination in the circumstances?
 31. The claimant’s case and submission is that he had employed on September 14, 2001 and this eventuality occurred on October 30, 2018. This is a seventeen (17) plus years blemish free stint of service. Was this factor taken into account in preferring a determination of dismissal? Was the determination fair in the circumstances.
 32. Whereas this court appreciates and takes judicial notice of our history and culture on examination and the distance we have so far made in curing our examination culture, we are of the view that this must be taken in countenance. It must take into account the other paradigms of everyday life even as it is executed and implemented.
 33. The respondent’s case and submission is one of admission of liability on the part of the claimant during the disciplinary proceedings. The big question is, is this claim an afterthought on his part? I do not think so. This is because from the onset the claimant paraded a case of disability to be on time at the examination collection centre due to bad health. He produced documentary evidence on this and



- placed the same on the table of the respondent. One wonders whether this was taken into account in the determination of the disciplinary panel.
34. What is evident is that the determination of the disciplinary panel was based on this one off omission by the claimant. The claimant's entire career and employment stint which was blemish free was not considered or at all. If this is not unfairness and injustice, we must revisit the English dictionary for a definition of terms.
35. Justice incorporates fair play at all levels of decision making and also in everyday life. There must have been alternative modes of punishment or disciplinary measures available to the claimant even in the events of being found or admitting culpability for the offences raised against him. These were not addressed or applied in the circumstances.
36. In our estimation, not even an unfettered admission of the charges by the claimant would have warranted the outcome and determination of the respondent. This was excessive, harsh and inconsiderate in the circumstances. At this rate, the respondent would be a massive departure station for her employees, the teachers of Kenya. It would also be a failure for appropriate industrial relations and practices at the shop floor.
37. Whatever the outcome of the disciplinary proceedings, I find the determination or sentence wrongful, unfair and unlawful. This is based on the history of the employment relationship inter partes and the circumstances of the case. There were alternative and sane means of dealing with the situation without resort to this draconian outcome. I therefore find that the termination of the employment of the claimant by the Respondent was wrongful, unfair, unjust and unlawful and hold as such.
38. The 2nd issue for determination is whether the respondent is entitled to the counter claim. Firstly, the counter claim as pleaded by the respondent has not been established. There is no evidence adduced in support of the same. It therefore must fail and I so find.
39. The 3rd issue for determination is whether the claimant is entitled to the relief sought. He is. Having succeeded on a case of unlawful termination of employment he becomes entitled to the relief sought.
40. The elephant in the room now becomes the relief due to the claimant in the circumstances. The claimant at the onset of his pleadings prays for a declaration that the termination of the employment was unlawful, wrongful, unfair, unjustifiable, inequitable and bad in law. This is followed by a prayer for reinstatement to employment.
41. Section 12 (3) (vii) of the *Employment and Labour Relations Court Act*, chapter 234B of the laws of Kenya offers the guiding principle on reinstatement. It comes out thus;
- "(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; or
- (viii) Any other appropriate relief as the court may deem fit to grant."
42. A scrutiny and reading of this provision of statute leads to an interpretation that the law is not cut throat it awards room to a judicial officer applying it to interpret and implement the law with regard to time and space. It does not command rigidity in approach. This supposedly is borne out of a consideration of the fluid circumstances belying every situation at the work place. Diverse scenarios are expected at the shop floor and this would call for different interpretations and applications of the law. I suspect that the law is clear on this but all is lost to our shyness in interpretation and application of the same.



43. This common law stance could have been applicable in the background and prevailing circumstances of the time. The local environment would also have sustained the good thinking. Most of all, those charged with the application of the law were duty bound to manage the same so as to come up with open, appropriate and sustainable results that would not hurt or be injurious to the employment contract.
44. In our context, we live in a situation where termination of employment is equivalent of a death sentence. This is one in which employment is a matter of life and death and a situation where employment as we know it is scanty, rare and apart. The law should therefore appreciate this and accommodate the same in its interpretation and application. Anything short of this would result in absurdity. It would be a total nonsense of law. It would spew injustice.
45. This being the case, is an order for reinstatement issuable in the circumstances? Courts have grappled on this issue since time immemorial. It is an issue that calls for interrogation of the place of law and its close cousin, justice.
46. It is not in dispute that the touch stone of the law as we know it is jurisprudence. This is the science of law. It is the philosophy of law or laws philosophy. This enables and facilitates a situation that we are able to apply the law in the context of prevailing circumstances. In context.
47. The essence of theory in the mainstay of thinking and everyday life cannot be gainsaid. Theory is the corner stone of research and a quest for solutions to everyday life. We cannot allow a situation where we are hell stuck on positions that do not make sense or add value to our situations. Without theory, we are as good as dead.
48. In the present circumstances, we are immersed in a context between law and justice. The law situation provides this whereas a justice situation would call for something diametrically opposed to the law. What is the way out of this kind of situation? The sensuality of the law must be established so as to imbue a case for justice.
49. I had occasion and privilege to read a newspaper article during the run down for the search of the 15th Chief Justice of the Republic of Kenya early last year. This was in the Standard, Thursday April 22, 2021. The eloquent author and student of the Kenya School of Law came out loud to request the incoming Chief Justice to lay emphasises on justice other than the law. It was his argument that this was the better for the society and a pleasantly for all. I chose to cite this verbatim for fear of losing its content and personalised sense. He put it thus;

To future CJ: Please bring back the glory of courts

For the past one week, the Judicial Service Commission (JSC) has been conducting interviews for a new Chief Justice.

But even as we wait to know who will head the Judiciary, may I take this opportunity to write to the future Chief Justice thus: to you My Lord or Lady, there is an urgent need to bring back the respect and esteem that the courts once had. It is a worrying trend that the courts today are being seen as tools that perpetrate injustice- tools that dance to the tune of the highest bidder.

Great Judges who walked this earth brought respect to the courts and the legal profession. Judges who stood for what was right and nothing else. Judges like Lord Hewart, the then Lord Chief Justice of England who firmly states that “justice must not only be done, but must also be seen to be done.”



My Lord, the country needs a Chief Justice who is not so much concerned with the law at the expense of justice. Always remember the words of Lord Denning who stated: “unlike my brother judge here, who is concerned with law... I am concerned with justice.”

To the future Chief Justice, in as much as the courts derive their power from the Constitution, that power will be useless once the same courts lose their credibility in the eyes of people. Your first duty in office, should be to strike hard on all corrupt persons in the Judiciary. Go after every corrupt person and leave no one out. Deliver to the common man by staying true to the concept of justice.

To you future Chief Justice, let people judge you and let that judgment be filled with praise of how you came to the rescue of the poor and downtrodden. Interpret the law in a manner that gives life to it lest the law stands still while the rest of the world goes on.”

Lastly My Lord or Lady, make sure your junior judicial officers are competent. Make sure their judgments are sound. Make sure they bring back the glory and sweetness that judgments once had. Make sure you go down in history as the Lord Chief Justice in whose era jurisprudence was brought back.

As a young law student who wishes to become a great judge one day, I pray that during your tenure, the Lord gives you strength and wisdom to stand for justice and with the common man.”

50. This is our prayer for Kenya, courtesy of Pareno Solonka, our upcoming scholar.
51. This thinking is echoed by Marcus Tullius Cicero in his treatise *De Officiis*, (Source: On Duties) where he comes out thus;

“Law applied to its extreme is the greatest injustice”
52. This cannot be truer.
53. This is an appropriate situation for departure from the law due to its causation of injustice. We have established a case of unlawful termination of employment by employment of draconian tactics in a determination for dismissal of the claimant from employment. This is despite a long stint of blemish free service. Would it be just that the claimant remains out of employment and loses investment in his career on mere operation of the law?
54. It cannot have been intended that at the close of the day, this law becomes a fetter to justice. It would amount to absurdity. The law was intended to facilitate a harmonious atmosphere at the work place which was not contemplated in situations of long absence from the work place and later day reinstatement. This was thought to engineer disruption and smooth running of the shop floor.
55. In the circumstances of our case, the respondent is the Teachers Service Commission of Kenya. It is nationwide and a massive employer. The reinstatement of the claimant would not make a difference or prejudice the respondent in any manner. She has a national character and is capable of absolving and deploying the claimant in her extensive jurisdiction. The justice of this case calls for reinstatement of the claimant in the circumstances and I find this as, *inter alia*, the appropriate remedy.
56. I am therefore inclined to allow the claim and order relief as follows;
 - i. A declaration be and is hereby issued that the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful.



- ii. That the claimant be and is hereby reinstated back to employment without loss of emoluments, rank and promotion.
- iii. That the claimant be and is hereby ordered to report to work on November 1, 2022 at 800 hours
- iv. Twelve (12) months salary as compensation for unlawful termination of employment.....Kshs 1,167,528.00
- v. The costs of this cause shall be met by the respondent.

DATED AND DELIVERED AT NYERI THIS 31ST DAY OF OCTOBER, 2022.

D.K.Njagi Marete

JUDGE

Appearances

- 1. Miss Kaluai instructed by Faith Kaluai Advocate for the Respondent.
- 2. Mr.Gikonyo instructed by Gikonyo & Ngugi Advocate for the Claimant.

