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Teachers Service Commission v Mulinya (Appeal 10 of 2022) [2022] KEELRC 13375 (KLR) (1 December 2022) (Judgment)

Neutral citation: [2022] KEELRC 13375 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA

APPEAL 10 OF 2022

JW KELI, J

DECEMBER 1, 2022

BETWEEN

TEACHERS SERVICE COMMISSION .... APPELLANT

AND

GEOFFREY MULINYA .... RESPONDENT

(Appeal from Judgment and Decree of Honorable E. MALESI (PM) delivered on the 1st April 2022 in Kakamega Chief Magistrate's Court ELRC Cause No. 49 of 2020)

JUDGMENT

1. On the December 24, 2022, the respondent (claimant in the trial court) filed a statement of claim against the appellant dated December 23, 2020 seeking the following orders:-
    a. A declaration that the respondent's decision to discriminately single out the claimant for dismissal while reinstating all the other teachers who had been interdicted for the same reasons amounted to unfair dismissal.
    b. An order directing the respondent to immediately reinstate the claimant to his position as head teacher of Irechero Primary School with full salary and benefits from date of interdiction.
        a. Cost of this suit.
        b. any other relief that this honourable court may deem just and fair to grant to the claimant.
2. The claimant in addition to the claim filed his witness statement and list of documents of even date together with the bundle of documents. (pages 11-41of the record)

3. The respondent entered appearance and filed response to the statement of claim dated May 7, 2021 together with list of their witnesses, witness statement of Daniel K Kioko, Cicily Musyoki, respondent's list of documents and the bundle of documents(pages 46-205 of the record).

4. The respondent filed submissions at the trial court dated February 21, 2022(pages 201-315).

5. The claimant's case was heard on the November 30, 2022 with the claimant testifying on oath as witness of fact. The respondent's case was heard on the December 21, 2021 with two witnesses of fact.

6. The Hon E Malesi (PM) delivered judgment in the claim on April 1, 2022 and decree issued in the following terms:- it is hereby ordered that:-

    a. A declaration that the claimant be reinstated to the employment as a teacher.

    b. A declaration that the claimant shall be entitled to be paid full salary from the date of his interdiction

    c. The claimant shall be entitled to an award of costs of the suit.

The Appeal

7. The employer /appellant dissatisfied with the judgment delivered in the claim on April 1, 2022 by Hon E Malesi (PM) filed the instant memorandum of appeal dated April 19, 2022, received in court on the May 5, 2022 raising the following grounds of appeal:-

    a. The learned magistrate erred in law when he granted orders of reinstatement of the respondent to employment without due regard and consideration of the factors set out in section 49 (4) (b),(c) (d),(k) of the *Employment Act*.

    b. The learned magistrate acted in excess of his jurisdiction and grossly erred in law by determining and subsequently awarding reliefs which were neither pleaded in the body of the statement of claim nor argued by the respondent during trial, being reinstatement as a normal classroom teacher as opposed to the sought prayer of reinstatement as a headteacher, and in so doing condemned the appellant unheard contrary to article 50 of the *Constitution*.

    c. The learned magistrate erred in law and fact when he directed the appellant pay the respondent the salary arrears from May 6, 2019 to date, contrary to the provisions of the *Employment Act* and the common law doctrine that salary is a reward for work done.

    d. The learned magistrate erred in law in arriving at a decision which was contrary to the evidence tendered by the appellant, law, facts, submissions and authorities and judicial precedents tendered before court.

    e. The learned magistrate has not provided legal and/or reasoned justification the awards made in favour of the respondent.

    f. The learned magistrate grossly misinterpreted and misapplied the relevant law and the facts and arrived at an erroneous conclusion of law.

8. The appeal was canvassed by way of written submissions. The appellant's submissions drawn by Patrick Mulaku Advocate dated September 19, 2022 were received in court on the October 3, 2022. The respondent's submissions drawn by Emily & Associates dated September 30, 2022 were received in court on the October 3, 2022.

Determination

9. The appellant submits that this being a first appeal the court ought to consider evidence before trial court as per decision in *Mwia Kisee v Sinota Mbusi Civil Appeal No 53 of 1995* to wit; 'It is my duty at the first appellate court of the first instance to reconsider the evidence – on record and re-evaluate it afresh with a view of reaching my own conclusion.' The court finds that is the settled position of the law and upholds the said decision.

10. This being a first appeal, the court has latitudes within the province of a retrial. Within these parameters, I am required to reconsider and re-evaluate the evidence on record and arrive at my own conclusions. In this respect, I further take guidance from the decision in *Abok James Odera T/A AJ Odera & Associates v John Patrick Machira T/A Machira & Co Advocates [2013] eKLR* where the Court of Appeal stated the following:

> ' This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.'

11. The trial court's decision in paragraph 34 and 35 the precursor to this appeal reads:-

> 'The claimant has also prayed he be reinstated to his position as head teacher Irechero Primary School with full salary and benefits from the date of interdiction. I find this a proper case of reinstatement of the employment of the claimant as teacher and not specifically as a headteacher of the aforementioned school or any other school.'

Issues for determination

12. The appellant and respondent addressed all its grounds of appeal in the submissions. The court will consequently proceed to address all grounds of appeal as issues before the court for determination in the appeal.

    Whether the learned magistrate erred in law when he granted orders of reinstatement of the respondent to employment without due regard and consideration of factors set out in section 49(4)(b)(c)(d)(k) of the *Employment Act*.

13. Section 49(4)(b)(c)(d)(k) of the *Employment Act* reads;- '4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—

    (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and

    (c) the practicability of recommending reinstatement or re-engagement;

    (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;

    (k) any conduct of the employee which to any extent caused or contributed to the termination;"

14. The court finds that the trial court erred in law as it did not apply its mind to the cited factors to be considered in issuance of remedy of reinstatement. The learned magistrate only took into account the

wishes of the employee (paragraph 34 of the judgment). The court then has to re consider the evidence and reach own conclusions which it proceeds to do.

15. The appellant submits that the order of re- engagement of the respondent as a normal teacher was inconsistent with sections 49(c) and (d) of the *Employment Act* as the respondent's duties being specific functionalities in a school require full trust and confidence. That the respondent engaged in acts to stifle the CBC curriculum and hence not possible to entrust the respondent to teach the said curriculum. That it is not practical for respondent to fit in a normal class room teacher when he was dismissed as head teacher. The appellant invited the court to be guided by decisions in *Lawrence Onyango Oduori v Kenya Commercial Bank Limited (2014) e KLR* and *Kenya Chemical And Allied Workers Union v National Cement Company limited(2014)e KLR*. The court looked into Lawrence Onyango Oduori v Kenya Commercial Bank Limited (2014) e KLR and found that the finding of the court was that reinstatement was not practical following lapse of six years meaning changes in the job and employee may not readily fit no was it easy to rebuilt trust due to long passage of time. In the instant case the decision for dismissal of the respondent was communicate vide letter dated August 23, 2019(page 30 of the record). The suit at trial court was filed on December 24, 2020. The decision of the trail court was delivered on the April 1, 2022. The court finds no long passage of time the decision being made with the statutory time under section 12(3)(vii) to wit –' (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;'

16. The respondent submits that the decision of the trial court was consistent with provisions of section 49(3) of the *Employment Act* which provides: '(3) Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to— (a) reinstate the employee and treat the employee in all respects as if the employee's employment had not been terminated; or (b) re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.'

17. To buttress its submissions the respondent relied on the decision of the Supreme Court in *Kenfreight (EA) Limited v Benson K Nguti (2019)eKLR* to wit-'38 Having keenly perused the provisions of section 49 of the *Employment Act*, we have no doubt that once a trial court finds that a termination of employment as wrongful or unfair, it is only left with one question to determine, namely, what is the appropriate remedy. The Act does provide for a number of remedies for unlawful or wrongful termination under section 49 and it is up to the judge to exercise his discretion to determine whether to allow any or all of the remedies provided thereunder. To us, it does not matter how the termination was done, provided the same was challenged in a court of law, and where a court found the same to be unfair or wrongful, section 49 applies-

> (41) Guided by the above analysis, we find that once a court has reached a finding that an employer has unlawfully terminated an employee's employment, the appropriate remedy is the one provided under section 49 of the *Employment Act*. We also need to clarify that a payment of an award in section 49(1)(a) is different from an award under section 49 (1)(b) and (c). section 49 allows an award to include any or all of the listed remedies provided that a court in making the award, exercises its discretion judiciously and is guided by section 49(4)(m).'

18. On the allegation that the respondent stifled the CBA curriculum the trial court found that the trainings continued as scheduled to their logical conclusion and no overt act attributed to the claimant which led to the disruption of the trainings in the four centers on the first day.

19. The trial court found the reasons for termination were not valid and the process was also unfair hence the court was within its mandate to award reinstatement. On the practicality, the court finds that the test would be met as the respondent was first a teacher before being head teacher. Still on practicality, the claimant was dismissed from service vide letter dated August 23, 2019. The judgment was delivered on the April 1, 2022. Reinstatement under section 12(3)(vii) of the *Employment and Labour Relations Court Act* is within 3 years of dismissal. The courts holds that the trial court decree was within the statutory timelines.

20. The court finds and holds that the order of reinstatement by the trial court meets the requirements under section 49(4)(b)(c)(d)(k) of the *Employment Act* and section 12(3)(vii) of the *Employment and Labour Relations Court Act*

Whether the order of reinstatement was outside the pleadings by claimant .

21. The appellant submits that by order of reinstatement as a normal teacher and not head teacher as pleaded amounted to unfair trial as the defence did not have opportunity to mount defence on the practicality of the respondent's reinstatement as a normal teacher.

22. The court agrees with the cited by the appellant to the extent that parties are bound by their pleadings and the court may not grant that which is not pleaded and sought in the prayers as held in *Caltex Oil(Kenya) Limited v Rono Limited (2016) eKLR* and in *Independent Electoral Boundaries Commission & Another v Stephen Mutinda Mule & 3 others (2014)eKLR.*

23. The court considered that there was a prayer of further relief as the court may deem appropriate as submitted by the respondent.

24. It is true that the award by court was to effect that the claimant be reinstated as a teacher and not specifically as a head teacher of the aforementioned school and any other school.

25. The court finds that the court gave option to the appellant of reinstating the claimant as head teacher or normal teacher. The court holds that the trial court order on the reinstatement Order was within the provisions of section 49 of the *Employment Act* having found unfair dismissal and the teacher sought to be reinstated under his claim consistent with decision of the Supreme Court Kenfreight (EA) Limited v Benson K Nguti (2019)eKLR.

Whether the learned magistrate erred in law and fact when he directed the appellant to pay the respondent the salary arrears from May 6, 2019 to-date contrary to *Employment Act* and common law doctrine that salary is a record for work done.

26. The respondent in their submission before trial court submitted no evidence was led to justify the payment for salary and benefits from date of interdiction and that it was settled principle of law to pay commensurate for work done. That the claimant did not work during the period of interdiction. The court referred to authorities relied on by the respondent at trial court. The court was not pointed to exact applicable part of decision of the court. The court perused the decision cited to guide the court in Court of Appeal *Kenya Airways Limited v Aviation And Allied Workers Union Kenya & 3 Others (2014)eKLR* and failed to find any relevant holding. The court further looked into the other decision cited in *Gilbert Michael Maigacho v Coast Development authority (2021)eKLR* where the court held at paragraph 51 as follows:- 'Having upheld the claimant's as lawful and fair, the claim for half salary withheld during the interdiction period collapses.' The court finds this authority was relevant and adds

that the converse position would be to award full salary on finding unfair termination as happened at the trial court.

27. Section 49 (3) reads- 'Where in the opinion of a labour officer an employee's summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to— (a) reinstate the employee and treat the employee in all respects as if the employee's employment had not been terminated;'

28. The court finds that where interdiction is found to have been unlawful and employee reinstated the employee is entitled to payment of the full salary for the entire period of interdiction. The rationale of payment of full salary for period of interdiction on finding that the employee was unfairly interdicted is that the employee was denied opportunity to work illegally and thus are entitled to their salary. The period of which the respondent was on interdiction was not in dispute. The appellant as employer was the custodian of the employee records under section 74 of the *Employment Act*. The court finds that the ground of appeal that the actual payment period was not pleaded to be a mere technically. See decision of Justice Wasilwa in *Patrick Wanyonyi Khaemba v Secretary Teachers Service Commission and another (2014) eKLR* where the court arrived at same decision. The court finds no basis to fault that part of the trial court decision. No contrary authority was cited by the appellant.

> Whether the magistrate erred in law by grossly having misinterpreted , misapplied the relevant law and failed to provide legal and or reasoned justification of the awards made in favour of the respondent therefore arrived at erroneous conclusion of the law, facts , evidence and submissions alluded before the court.

29. The appellant submits that the court is allowed to reconsider the evidence before the trial court as first appellate court relying on Mwia Kisee v Sinota Mbusi Civil Appeal No 53 of 1995 to wit; 'It is my duty at the first appellate court of the first instance to reconsider the evidence – on record and re-evaluate it afresh with a view of reaching my own conclusion.' The court upholds the decision to apply in the instant appeal.

30. The appellant submits that on receiving allegations against the respondent they carried out investigations through a lawful and fair disciplinary process that pointed to the commission of offence by the teacher(page 139-195 of the record). The evidence by the appellant at the trial court by DW1 vide statement is at (55-60 of the record) and his viva voce evidence (326-327).

31. The trial court in its judgment made findings on the validity of the reason for termination (338). The trial court found that RW1 relied on the investigation report on the validity of the reasons for termination. The trial court found that the teachers were addressed by KNUT executive secretary of the Local Branch , the other person in the report was DA Mwandihi who relied on reported information he received from the training centers and hence not eye witness account. The third witness account was found incomplete of what happened in the center and the forth witness also faulted the KNUT executive secretary local Branch. The trial court found that the trainings proceeded to logical conclusion.

32. The trial court (at pages 339 of the record) found the investigation of the claimant to have been flawed for failure to comply with regulation 146(6) of the Code of Regulations for Teachers,2015.

33. The appellant submits that the trial court misinterpreted the provisions of regulation 146 by alluding that the respondent was prejudiced at the investigation stage. That the investigation stage is preliminary pending the main disciplinary hearing and to buttress this submission relied on the decision of Justice BOM Manani in *Barawa Riziki Sanga v Teachers Commission and another (2022)e KLR* where the court upheld decision of Justice Murithi J in David Kimolo Kingoo v Teachers Service Commission

Machakos County Director that at the investigation stage only a preliminary inquiry is done. The accused employee still has a chance to confront the accuser at the disciplinary session should the matter escalate thus far . The court also cited the decision of Mbaru J in *Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 Others (2014) eKLR* where the court held that it would only interfere in the process if grave injustice may result.

Justice Manane proceeded to state that whatever flaw may have occurred at investigatory stage was capable of being cured and was cured at the disciplinary session.

34. The respondent on this issue submits that the trial court found at paragraph 27, non -compliance with regulation 146(6) TSC CORT, 2015 where there was no evidence of invitation of the claimant to the hearing and that one of the members of the investing panel Kennedy Mwandihi was also a witness in the investigating panel. That RWI was not on the ground when alleged incitement happened. That Mr Majengo at the disciplinary hearing maintained it was the executive secretary of KNUT local branch who addressed the participants and not the claimant.

35. From the submissions of both parties there is no dispute that the investigation process was non-compliant with regulation 146(6) TSC CORT, 2015 which provides for a mandatory hearing process. Under Clause 10(c) of the regulation 146 provides that the the panel report informs the interdiction of the teacher.

    I do not agree that this is a mere preliminary process that can be cured at the 2nd stage as injury has already occurred to the employee vide interdiction which stops his salary and related benefits and further in the instant case the disciplinary committee relied on the flawed investigatory process. The court finds and determines that the disciplinary process having been founded on the flawed investigation report then the subsequent disciplinary process on the respondent was void ab initio.

36. The court upholds the decision of the court in Patrick Wanyonyi Khaemba v Secretary TSC & another 2014 e KLR where Lady Justice Wasilwa held: 'A declaration that the 1st respondent did not comply with the law and regulations that regulated the matter in Disciplinary case No. TSC/DISC/1067/05/2011/2012 before them as a consequence of which they fell in error and infringed on the petitioner's right to a fair hearing as envisaged in Article 50(1) and therefore all consequential decisions and measures arising therefrom are null and void.'

Conclusion and disposition

37. The court holds that appeal dated April 19, 2022 received in court on May 5, 2022 lacks of merit and is dismissed with costs to the respondent. The judgment and decree of Honourable E Malesi PM in Chief Magistrates Court of Kenya at Kakamega CM ELRC No 49 of 2020 delivered on the April 1, 2022 is upheld.

38. It is so ordered.

JUDGMENT DATED, SIGNED AND DELIVERED

THIS 1ST DECEMBER 2022 IN OPEN COURT AT BUNGOMA

J.W. KELI,

JUDGE.

In the presence of

Court Assistant: Brenda Wesonga

For Appellant: Patrick Mulako Advocate

For Respondent : Ms Kadenyi