



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

CAUSE NO. 43 OF 2019

(Formerly Nyeri ELRC 527 of 2017)

DOROTHY GATAKAA ANGAINE.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent her erstwhile employer by instituting this suit in December 2017. She accused the Teachers Service Commission of unlawfully and unfairly demoting, interdicting and dismissing her from employment. In the Amended Memorandum of Claim dated 23rd September 2019, she avers that she was in the formal employment of the Respondent since 1991 and worked through the ranks from a classroom teacher to a Head Teacher at Chuka Girls in 2012. That in December 2015, she was transferred to St. Judes Karurumo Day Secondary School but the handover scheduled for 28th December 2015 was suspended by the School's Board of Management pending consultations with the School's sponsor. That the said handover was however conducted on 5th January 2016 in the absence of both her and the Board and that she wrote to the Respondent to protest against her demotion from a 3-streamed extra County School to a single-streamed Day School.

2. The Claimants avers that she was thereafter interdicted vide a letter dated 13th January 2016 on the grounds that she deserted duty from 23rd December 2015 while at Chuka Girls and had failed to handover the said school upon her transfer. She avers that on 13th January 2016, she received the letter requesting her to hand over the School on 8th January 2016 when in fact the handover had already happened on 5th January 2016. She is further aggrieved that she was demoted from being a Principal to an Assistant Teacher and avers that the Respondent did not sit to hear her interdiction claim nor respond to her letter. That it is after she had severally complained to the Ombudsman that the Respondent sent her a second amended interdiction letter dated 17th November 2016 further citing that she had failed to report for her transfer for assignment of duties as directed. She avers that she was invited for a hearing on 15th December 2016 and attended the same but by the time she was receiving the decision of the commission, she had already served her 1 month suspension. That she appealed against the suspension and was later given a posting letter to Chogoria Girls Secondary School, after which she was served with a third interdiction letter. That the said posting was irregular as the Respondent ought to have posted her within 14 days before the end of the suspension period and that her appeal against the suspension was also not heard within three months as required under the regulations. She further avers that she was unfairly dismissed from TSC effectively from 27th February 2019 and that she had never had any disciplinary case prior to the aforementioned incidents for the 26 years she had been a teacher. That the interdiction and demotion were unjust and without any reasonable cause and caused her mental anguish, torture and distress and particularises the special damages in her Claim. The Claimant thus prays for judgment against the Respondent for:

- a) *Special as pleaded in paragraph 24 above and general damages compensation under section 49(c) of the Employment Act.*
- b) *An order for reinstatement of the Claimant to her previous job designation as a principal of an extra County Secondary or High School.*
- c) *That a declaration order that the claimant's demotion and interdiction was unlawful and unfair and was not within the ambits of the Employment Act 2007 and all other Laws relating to employment Laws and contrary to the rules of natural justice.*
- d) *That a declaration order that the claimant's demotion and interdiction and the consequential dismissal was unlawful and unfair and was not within the ambits of the Employment Act 2007 and all other Laws relating to employment Laws and contrary to the rules of natural justice.*
- e) *An order payment of the salary of the Claimant for the period as from 1st March 2015 up to date of judgment plus interest.*

f) Costs and interest of the claim.

3. The Respondent filed an Amended Memorandum of Response dated 25th September 2019 averring that when the Claimant failed and/or declined to report for handover of the School and take up transfer at the new School, it wrote to her requesting for her cooperation which she also ignored. That it thus interdicted her and asked her to answer to charges of desertion and failure to obey lawful instructions of the employer after her whereabouts remained unknown. It avers that she was afforded an opportunity to respond to the allegations in writing and in person at a disciplinary hearing and after deliberation and evaluation of evidence the Respondent's County Disciplinary Panel directed that she be suspended without pay for one month. That it then considered the Claimant's request for a review of its decision to suspend her but determined to uphold the same.

4. That when she also persisted in refusing to take up the posting to Chogoria Girls after the suspension, it again interdicted her and that she failed to appear for her disciplinary hearing upon invitation. That the said disciplinary panel thus determined she was guilty and she was therefore dismissed from service and further informed of the decision. It is the Respondent's averment that the Claimant's first transfer was not a demotion but a deployment in the capacity of a head of institution and properly exercised in accordance with the law. That it is the Claimant who demonstrated a general lack of commitment and willingness to continue working for the Respondent throughout the disciplinary process. It prays that the Claim be dismissed with costs as it is devoid of merit.

5. The Claimant responded in her Reply dated 8th October 2019 averring that St. Judes Karurumo Day Secondary School was handed over to a different Principal without any notice or reference to her and there was thus no school to report to. That her appeal was heard after nearly three years without any income and further avers that she was always in constant communication with the Respondent even when she could not be accessed due to illness.

6. Oral testimony was adduced in the above lines and parties were to file submissions to bolster their cases. In her submissions, the Claimant submits that the handover of Chuka Girls was done in the absence of the Board of Management contrary to article 70(7) of the Code of Regulations for Teachers, 2015 (CORT) and that as per article 111 of the CORT she provided evidence of the medical leave she applied during the said period of handover. That during the disciplinary process, the Respondent violated her right to fair administrative action as per Article 47 of the Constitution of Kenya by not hearing her within the set time frames and not investigating the allegations as per article 146 of the CORT. That she was further not accorded a fair hearing because instead of holding the same in Tharaka Nithi County which was her last working station, the hearing was held in Nairobi and the hearing panel was not constituted as specified in article 151 of the CORT. She relies on the case of **Bett Francis Barngetuny & Another v Teachers Service Commission** where the Court of Appeal held that:

"The general principles that should guide statutory, domestic or administrative tribunals sitting in a quasi-judicial capacity.... are incorporated in the Regulations... accusing an employee of misconduct by way of query and allowing an employee to answer the query before a decision is taken satisfies the requirement of fair hearing or natural justice. If an employer has conducted disciplinary proceedings fairly in accordance with statutory or laid down regulations, a court of law should exercise great caution before it interferes with the employer's findings"

7. She further submitted that there must be a clear reason for interdiction and relied on the case of **Frederick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 Others [2014] eKLR, Industrial Court at Nairobi Cause No. 747 of 2014** where the court stated – "...An interdiction or suspension is the employment equivalent of criminal trial arrest, with the consequence that an employee suffers palpable prejudice to reputation, advancement and fulfilment. Thus a suspension or interdiction should only follow pending a disciplinary enquiry only in exceptional circumstances, where there is reasonable apprehension that the employee will interfere with any investigation that has been initiated, or repeat the misconduct in question. The purpose of such removal from the workplace even temporarily, must be rational and reasonable and conveyed to the employee in sufficient detail to enable the employee to defend himself in a meaningful way..." The Claimant also relies on the case at the Constitutional Court of South Africa of **Chirwa versus Transnet and Others [2008] 2 BLLR 29**, reiterated by this Court in **Industrial Petition No. 150 of 2012, Joseph Mburu Kahiga & Another v KENATCO Taxis Ltd & Another [2013] eKLR**. She prays that this Honourable Court do find that she has proven her case on a balance of probability and allow her claim as prayed.

8. The Respondent submitted that in light of Section 43(1) and (2) of the Employment Act which provides that the employer shall be required to prove the reasons or reasons of termination in any claim arising out of termination of a contract; and that the reason or reasons for termination are the matters the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee, it has demonstrated through evidence that the Claimant's dismissal from service was based on valid reasons of gross professional misconduct and that she breached the provisions of Regulations 17(1), (3) & (4), 63(5) & (6), 70(7) 140(b)(vi) of CORT. The Respondent submitted that it has the constitutional, statutory and contractual mandate derived from Article 237 of the Constitution and Regulation 67 of CORT, to post and transfer its employees and that it is the corresponding obligation of the employee to report to the new allocated station. It relies on the case of **Anne Wairimu Kimani v Kenya Agricultural Livestock Research Organization (KALRO) [2017] eKLR** and submits that failure to report is insubordination and desertion of duty. The Respondent cited the case of **Henry Ochido v NGO Co-ordination Board [2015] eKLR** and **Nakuru Civil Appeal No. 122 of 2015: Teachers Service Commission v Thomas Joseph O. Onyango [2019] eKLR** where the Court of Appeal case held that the court cannot usurp the appellant's mandate to determine the school the appellant should be transferred to and for how long. The Respondent cited **Civil Appeal No. 11 of 2018: Pevans East Africa Limited & Another v Chairman Betting Control & Licencing Board & 7 Others [2018] eKLR** the Court of Appeal held that where the Constitution had reposed specific functions in an institution or organs of State, the courts must give those institutions or organs sufficient leeway to discharge their mandates and only accept an invitation to intervene when those bodies are demonstrably shown to have acted in contravention of the Constitution.

9. The Respondent submits that it adhered to the set out procedure during the Claimant's disciplinary process and accorded her a fair hearing. That it informed her of the allegations against her and the right to file a defence; invited her to appear before the disciplinary panel; and communicated its decision to her. It relied on the case of **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] eKLR** where Radido J. discussed the ingredients of procedural fairness to include: informing the employee the charges the employer is contemplating to use to dismiss the employee; secondly, informing the employee of their right to present a defence/ case in person or through a representative or shop floor union representative if possible; and thirdly, the employer is obligated to hear and consider any representations

by the employee before making the decision to dismiss or give other sanction. Further, that the Disciplinary Committee that heard the Claimant's case was properly constituted in tandem with Regulation 151(3) of the CORT as it had two Commissioners and two representatives of the Director as required. It submits that its second witness (DW2) who was the Claimant's supervisor, confirmed that the Claimant was aware of the handing over date but intentionally failed to attend the event so as to frustrate the exercise since she was reluctant to report to her new school. That DW3 also stated that the Respondent duly explained to the Ombudsman the reasons for the inadvertent delay in hearing the Claimant's case, which was occasioned by the increase in the number of cases in the year 2016. It further submits that the reason for the delay is thus justifiable.

10. The Respondent submits that it is trite law that any claim for special damages ought to be particularized as clearly as possible and proven accordingly and that this position was stated in the case of **Kenya Airline Pilots Association v Kenya Airways Limited [2020] eKLR** citing with approval the case of **Hann v Singh [1985] KLR 716**. That the special damages sought by the Claimant are ambiguous, vague and unsubstantiated and that further, the prayer for basic salary is speculative and cannot be discerned from her pleadings. That the Claimant cannot claim salaries and allowances for a period she did not work as that will only amount to unjust enrichment. That the claims for *Kenya Education Management Institute training bonuses, British Council tender, Master's in Education Management, Youth Mentorship, Mwalimu SACCO penalties* have no relationship whatsoever with the employment contract between the Respondent and the Claimant and neither did the Respondent assign the Claimant any responsibility related to the above. It urges the Court to dismiss the same.

11. The Respondent submitted that an order for reinstatement is a remedy for specific performance that is not an automatic remedy but discretionary depending on the circumstances of each case and that this position was affirmed by the Court of Appeal in the case of **Kenya Airways v Allied Workers Union Kenya & 3 Others [2014] eKLR** where the Court of Appeal held that under the traditional common law, courts will not force parties in a personal relationship to continue in such relationship against the will of one of them. The Respondent urged this Court to be guided by the decision in **Jane Achieng & Another v University of Nairobi [2015] eKLR** where it was held that in adjudicating disputes between employers and employees, the Employment and Labour Relations Court is well advised to respect decisions made by the employer in as far as they comply with the law and internal policies.

12. The Claimant from the evidence adduced was a teacher who was transferred to a School that was slightly smaller than the one she was heading though in the same capacity. She deemed this a demotion of sorts and did not hand over the School she was leaving contrary to the Respondent's Code of Regulations For Teachers (CORT). She was subsequently interdicted and ultimately dismissed after hearings which took longer than she had expected. Whereas the Respondent was indolent in the pace of conducting the disciplinary procedures, the Claimant was accorded an opportunity to be heard in terms of the CORT as well as the law. She was given the particulars of the charges facing her, allowed to mount her defence, was heard as well as witnesses and a determination made. In the case of **Jane Achieng & Another v University of Nairobi (supra)**, the Court held

In adjudicating disputes between employers and employees, the Employment and Labour Relations Court is well advised to respect decisions made by the employer in as far as they comply with the law and internal policies. However, where the employer's action fails to comply with the relevant legal and policy parameters, the Court is obliged to intervene.

13. The Claimant attacked her interdiction as being unwarranted and cited the case of **Frederick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 Others (supra)** where the Court delved into the merits of the interdict that is issued to employees. It was stated thus:

“...An interdiction or suspension is the employment equivalent of criminal trial arrest, with the consequence that an employee suffers palpable prejudice to reputation, advancement and fulfilment. Thus a suspension or interdiction should only follow pending a disciplinary enquiry only in exceptional circumstances, where there is reasonable apprehension that the employee will interfere with any investigation that has been initiated, or repeat the misconduct in question. The purpose of such removal from the workplace even temporarily, must be rational and reasonable and conveyed to the employee in sufficient detail to enable the employee to defend himself in a meaningful way....” (emphasis mine)

I do not see how the interdiction by the Respondent abridged the Claimant's rights as the interdiction was pending the disciplinary process.

14. The only aspect the Claimant seems to have made some headway is on Respondent's evident failure to abide by the strict timelines in the CORT where the discipline case dragged on for 3 years. This is perhaps the singular failure of the Respondent for which there can only be sanction by way of censure and costs of this suit. The Claimant did not plead for relief for the delayed administrative process in the claim before me hence the failure to award her any damages for the Respondent's failure. The Claimant's prayer for an order for reinstatement to her previous job designation as a principal of an extra Country Secondary or High School fails as does the prayer for a declaration order that her demotion and interdiction was unlawful and unfair. The disciplinary action taken was within the mandate of the Respondent and was within the rules of natural justice. In the final analysis I find that the Respondent shall only be liable to costs of the suit as it failed to conclude the disciplinary process within the period stipulated in CORT. She is entitled to costs of the suit to be agreed or taxed.

It is so ordered.

Dated and delivered at Nairobi this 18th day of February 2021

Nzioki wa Makau

JUDGE