



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 251 OF 2018

ERIC OWINO OUMA.....CLAIMANT

VERSUS

SECRETARY, TEACHERS SERVICE COMMISSION.....1st RESPONDENT

HON ATTORNEY GENERAL.....2nd RESPONDENT

JUDGMENT

1. Eric Owino Ouma (the Claimant) instituted these legal proceedings against the Secretary, Teachers Service Commission (the Commission) and the Attorney General (the Attorney General) on 5 July 2018, alleging unfair termination of employment and breach of contract.

2. The Commission filed a Response on 18 April 2019, and the Claimant filed a Reply to the Response on 19 June 2019 (the Attorney General did not file a Response).

3. On 22 July 2020, the parties entered a consent that the Cause proceeds on the basis of the record and submissions to be filed.

4. The Claimant filed his submissions on 11 December 2020 in which he identified the Issues for determination as:

- (i) Whether the Claimant was an employee of the 1st Respondent?
- (ii) Whether the Claimant breached the Teachers Service Commission Code of Conduct?
- (iii) Whether the Claimant was irregularly, illegally, unlawfully and unprocedurally terminated?
- (iv) Whether the Claimant is entitled to the reliefs sought?

5. The Commission filed its submissions on 19 January 2021, and it outlined the Issues for adjudication as:

- (i) Whether the action by the Claimant contravened the COR and amount to his dismissal on reasonable/sufficient grounds?
- (ii) Whether or not due process of termination was followed?
- (iii) Whether or not the standards of proof under the employment law are similar to those of criminal law? and
- (iv) Whether or not the Claimant is entitled to the prayers sought?

6. The Court has considered the pleadings and the submissions and condensed the Issues for a determination as examined hereunder.

Pleadings and evidence: standard of proof

7. Under section 35 of the Evidence Act, a party should call their witnesses to produce or adopt their written witness statements under oath.

8. In the case at hand, the parties consented to the Court proceeding on the basis of the record and submissions.

9. The parties had filed witness statements, but they were not adopted under oath.
10. The evidence from a witness is only that contained in his or her witness statement verified in oral evidence, together with such oral evidence as the witness gives on oath/affirmation.
11. It is within the purview of legal practitioners that pleadings, even if supported by a verifying affidavit, are not evidence. A verification of an allegation in a pleading does not amount to evidence.
12. Parties seeking to proceed in the manner the parties herein consented to proceed should advisedly file affidavits.
13. In the view of this Court, a written witness statement that is not produced or adopted under oath does not have any probative value or weight, if at all.
14. Consequently, in the matter at hand, the Court has no evidence before it with which could establish that the Claimant discharged the initial burden expected of him by section 47(5) of the Employment Act, 2007, and the Court finds that the Cause should fail on that ground.
15. However, were the Court to be wrong on that position, it will examine the Cause on the merits.

Unfair termination of employment Procedural fairness

16. The Claimant contended that his dismissal was unfair because he was not accorded an opportunity to present his case before the Disciplinary Committee.
17. He further challenged the process on the ground that at the time of his dismissal, criminal proceedings were ongoing.
18. The assertions by the Claimant are far from the truth.
19. The record shows that investigations were conducted on 10 July 2014, and those interviewed included the Claimant.
20. The record also shows that the Claimant appeared before the County Disciplinary Committee on 18 September 2014 and that the Committee recommended his interdiction.
21. The Claimant was interdicted on the same day, and the interdiction letter set out 3 allegations and invited the Claimant to make a written response. The Claimant made the response on 22 October 2014.
22. On 16 March 2015, the Commission issued another interdiction letter to the Claimant. The allegations had been reduced to 2. The Claimant was invited to make a written response which he made on 13 April 2015.
23. The Commission then held a disciplinary hearing on 13 July 2015. The Claimant was present, and he made representations, after which a decision to dismiss was taken.
24. The Claimant appealed on 10 September 2015, and an appeal hearing was held on 9 September 2016. The appeal was dismissed.
25. From the material on record, the Court is satisfied that the Commission informed the Claimant of the charges to confront, afforded him an opportunity to respond both in writing and orally and later on considered his appeal, thus meeting the statutory threshold of procedural fairness as envisaged by sections 35(1) and 45 of the Employment Act, 2007 as well as the Teachers Service Commission Act and its attendant Regulations.

Substantive fairness

26. The Claimant also challenged the validity and fairness of the reasons leading to his dismissal, and he anchored this on the fact that he was acquitted of criminal charges based on the same facts in Ndhiwa Magistrates Court Criminal Case No. 19 of 2016, *Republic v Eric Owino Ouma & Ors*.
27. To justify that the dismissal was for valid and fair reasons, the Commission filed copies of the investigations report and disciplinary committee proceedings.
28. The Court of Appeal addressed the nexus between criminal proceedings and disciplinary proceedings in *Kenya Power & Lighting Co Ltd v Aggrey Lukorito Wasike* thus:

the outcome of the criminal case should have no effect whatsoever on the learned judges approach since the two processes are separate and distinct with different rules to engagement and standards of proof.

29. A similar opinion was reached in *Nelson Mwangi Kibe v Attorney General* (2003) eKLR, where the Court of Appeal stated:

Notwithstanding the acquittal in the criminal trial, an award of punishment, including dismissal as had happened, may still be imposed to discipline him.... The dismissal was not founded on the criminal culpability of the appellant. It was based on his being

liable for neglect of duty.

.....

An acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer. The reason for this is straightforward; a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedural and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee, going against the outcome does not by itself render the employer's decision wrongful or unfair.

30. From the case law, it is evident that a mere fact of an acquittal in a criminal case would not render a dismissal invalid or unfair.

Breach of contract

Unpaid leave

31. Under section 28 of the Employment Act, 2007, an employee is entitled to at least 21 annual leave days with full pay.

32. The Claimant sought for outstanding leave of Kshs 24,646/- for some 19 months prior to separation.

33. The Commission responded to the claim by submitting that under Regulation 53(4)(a), an employee could not carry forward leave days from year to year and further that the Claimant had not disclosed the leave year in contention.

34. In light of section 10(3) and (7) of the Employment Act, 2007, and that it is the employer who keeps leave records, the Court would allow this head of the claim.

Unpaid salaries October 2014 to August 2015

35. The Claimant was interdicted on 18 September 2014, but he still claimed for salaries from the date of interdiction to dismissal.

36. The Commission's response was that a teacher on interdiction was not entitled to salary by virtue of Regulation 68(h) of the Code of Regulations for Teachers.

37. The said Regulation provides that a teacher on interdiction is entitled to half salary except in certain conditions, including allegations of having had carnal knowledge. The allegation against the Claimant related to such, and the Court finds this head of the claim misplaced.

Back pay

38. The Claimant pleaded for Kshs 837,946/- being back pay for the months he had been out of employment.

39. The Claimant did not lay an evidential foundation to this head of the claim, and relief is declined.

Certificate of Service

40. A certificate of service is a statutory entitlement, and the Commission should issue one to the Claimant within 21 days.

Conclusion and Orders

41. From the foregoing, the Court finds the Cause unsupported by evidence, and it is dismissed with costs save for leave and certificate of service.

Delivered through Microsoft teams, dated and signed in Kisumu on this 12th day of May 2021.

Radido Stephen, MCI Arb

Judge

Appearances

For Claimant M.I. Wafula & Co. Advocates

For Commission Faith Kaluai, Advocate, Teachers Service Commission

Court Assistant Chrispo Aura