



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT UASIN GISHU

COURT NAME: ELDORET LAW COURT CASE NUMBER: ELRC.C/147/2018

CITATION: MONICA JEPKORIR KIPKETER

VS

TEACHERS SERVICE COMMISSION

JUDGMENT

ON 2021-09-24 BEFORE HON. JUSTICE J. N. ABUODHA

1. By a memorandum of claim filed on 20th March, 2018, the Claimant alleged that she was employed by the respondent as a primary school teacher and later deployed to be a tutor or lecturer at Eldoret Polytechnic earning a salary of Kshs. 63,906/= per month.
2. According to the Claimant she was transferred by the respondent through a letter dated 15th May, 2012 to Eldoret Polytechnic to teach Mathematics, Geography and Human Resource. She taught there until 31st August, 2016 when the respondent on unjustified grounds dismissed her from her teaching services.
3. The Claimant contended that her dismissal and removal from Register of Teachers was frivolous and without reasonable cause as the respondent alleged, she absconded duty from 1st February, 2013 to September, 2016 and that she submitted a forged transfer letter for her deployment from Kipkaren Primary School to Eldoret Polytechnic yet she has never been prosecuted for alleged forgery.
4. The Claimant further alleged that the respondent failed to warn her, investigate the matter before dismissal and further failed to issue her with a Show Cause letter.
5. The Claimant therefore sought from the respondent payments of her terminal dues and compensation for unfair termination of employment.
6. The respondent filed a memorandum of response on 16th May, 2018 in which it averred among others that the Claimant was in May 1987 employed as a P1 teacher by the respondent and posted to **perform teaching duties within Uasin Gishu District**.
7. While serving at Kipkaren Primary School the Claimant applied for deployment to Eldoret Polytechnic having successfully completed a degree Course in Education. The Claimant was however advised that the application for transfer was unsuccessful due to unavailability of vacancies.
8. On 2nd June, 2009 the Claimant once again applied for transfer to Eldoret Polytechnic and thereafter presented a letter dated 15th May, 2012 to Municipal Education Officer, Eldoret purporting to have been signed by one A.M. Kasimu deploying her from Kipkaren Primary School to Eldoret Polytechnic. The letter indicated she was being deployed to teach Mathematics, Geography and Human Resource.
9. Subsequently the Head Teacher, Kipkaren released the Claimant vide a casually return dated 8th June, 2012 to proceed on transfer to Eldoret Polytechnic. The causally return was transmitted to the Respondent Headquarters. Further the Chief Principal, Eldoret Polytechnic informed the Respondent's Secretary that the Claimant had reported to the institution and had been assigned duty.
10. By a letter dated 3rd July, 2013 the Claimant submitted a copy of the transfer letter dated 15th July, 2012 for purposes of coding her station.
11. The respondent however informed the claimant that having perused the document submitted by the Claimant, It was not clear how her transfer to Eldoret Polytechnic had been processed hence she was required to go back to her former station. Accordingly, she was released from Eldoret Polytechnic back to her former station at Kipkaren Primary school.

12. In spite of being released the Claimant neglected or refused to report back to her former station hence her whereabouts were unknown. The respondent therefore requested its County Director in charge of Uasin Gishu to ascertain her whereabouts.
13. The Claimant continued to earn full salary and allowances despite her failure to attend duty.
14. The respondent averred that failure by the Claimant to report to Kipkaren Primary School without any formal approval or authority amounted to desertion and thus a flagrant breach of regulation 140(b)(iv) of the respondent's code of regulation thereby rendering her liable to disciplinary action.
15. The respondent further conducted investigations to ascertain the manner through which the Claimant obtained the transfer letter dated 15th May, 2012 and the purported author of the said letter Mr. Alfred Karimu denied issuing the said letter. He stated that the signature on the letter was not his hence a forgery.
16. In view of the averments by Mr. Kasimu and the fact that the Claimant was required to answer to allegation of failure to report to duty at Kipkaren Primary School despite being released on 31st January, 2013 from Eldoret Polytechnic thereby deserting duty and submitting a forged transfer letter dated 13th May 2012 to the Municipal Education Officer, Eldoret, the Claimant was subsequently issued with a Show Cause letter why disciplinary action, should not be taken against her which included removal from the Register of Teachers.
17. The Claimant was thereafter invited for disciplining hearing on 31st August, 2016. She collected the letter of invitation and interdiction on 10th August, 2016. The Claimant however did not tender her response to the allegations raised against her through the letter of interdiction despite being advised to do so.
18. The disciplinary panel commenced on 31st August, 2016 at the TSC Headquarters to deliberate on the Claimant's case. In the course of proceedings, the panel interrogated the Claimant as well as several witnesses including Mr. Kasimu and the Head Teacher Kipkaren Primary School.
19. During the proceedings the Claimant admitted the charges against her and could not explain how she obtained the letter dated 15th May, 2012.
20. After deliberation and evaluation of statements on record and considering the gravity of the matter the panel directed that the Claimant be dismissed from service and her name be struck from the Register of Teachers. This was duly communicated to the Claimant through a letter dated 14th September, 2016.
21. The respondent therefore averred that the dismissal was lawful and in accordance with Code of Regulations for the respondent.
22. The respondent in counterclaim sought judgement against the Claimant for Kshs. 1,392,097/80 being salary and allowances drawn between 1st February, 2013 to 30th June, 2015 when the Claimant did not render any services.
23. At the hearing the Claimant adopted her witness statement filed on 20th March, 2018 as her evidence in Chief and further restated that her second application for redeployment made in 2011 was responded to by the Respondent and she was redeployed to Eldoret Polytechnic. It was her evidence that the letter was given to her by the Municipal Education Officer. She was officially released from Kipkaren and reported to Eldoret Polytechnic. The principal of Eldoret Polytechnic received her and assigned her duties.
24. She stated that she worked at the Polytechnic for almost four years and in 2013 the principal called her and asked her why she was still teaching at the Polytechnic yet she was released back to Kipkaren in January, 2013. The principal told her verbally but never gave her any release letter. She denied receiving any release letter and further that if she received one, she would have obliged.
25. In 2015 the County Director called her to her office and asked her why she was still at the Polytechnic yet she had been released back to Kipkaren but she answered her that she had never received any transfer letter. The Director then told her not to continue teaching at the Polytechnic and wait for communication from TSC. She waited for two weeks and when the month ended, she never received any salary. She suspected something was wrong and wrote to TSC enquiring.
26. It was further her evidence that she visited the TSC Headquarters to find out but was told to go back and wait for a report. She never received any report.
27. In August, 2016 the Claimant stated she went to TSC Headquarters and was referred to the Disciplinary Office where she was given an interdiction letter. She was also given a letter for disciplinary hearing dated 5th August, 2016.
28. It was the Claimants evidence that she responded to the interdiction letter and also attended the disciplinary hearing on 31st August, 2015. It was her evidence during the hearing that she was not given time to explain herself and that she was dictated to and harassed. She denied admitting to the charges and never apologized or begged for her job back.
29. In cross-examination she stated that she applied to be deployed to Eldoret Polytechnic in 2011 and got her deployment letter in 2012 through the Municipal Education Office (MEO) . It was her evidence that TSC used to communicate through the MEO's and her immediate supervisor was the head teacher.
30. The Claimant admitted that in Post Primary Institutions one could only teach two subjects.

31. She further stated that her performance at the Polytechnic was okay and that she taught there for four years and that she never got any letter releasing her back to Kipkaren, she only learnt of the release from the Polytechnic Principal and the County Director.
32. It was her evidence that she never wrote to TSC to clarify the issue of her transfer and that she could not complain because she never received the letter releasing her back to Kipkaren. She continued to teach at the Polytechnic and earned her salary and receive her pay slips while there.
33. The Claimant further stated that her pay slips were later returned because they read kipkaren Primary School. They were redirected there and the principal called her to collect them.
34. It was her evidence that she stopped teaching in June 2016 when she was told to do so and wait for communication from TSC. At the end of June 2016, she did not get her salary.
35. Regarding her forwarding address during interdiction, she stated that it was c/o Eldoret Polytechnic P.O Box 4461 Eldoret.
36. The respondent's witness Mr. Alfred Muli Kasimu stated, that he was retired but previously worked for the respondent as staffing Officer Rift Valley. He used to staff Primary Schools only. He denied the signature on the transfer letter as his. He further stated that the deployment letter was not in the usual format. The letter was usually written through the County Director MEO and the Principal of the Primary School. The letter before Court was like a personal letter. Further it was the head Teacher Kipkaren who was supposed to release the Claimant.
37. It was further his evidence that there was no application for deployment to Eldoret Polytechnic in the Claimant record at TSC. The letter of deployment was also not in the file. The letter according to him was therefore a forgery.
38. In cross-examination he maintained the letter was a forgery but he never lodged any complaint with the police over the forgery. The matter was dealt with at TSC and concluded.
39. Mr. Kasimu denied he had the capacity to deploy the Claimant and that there was no such letter in the TSC records.
40. The Claimant's second witness Ms Doris Oyoo stated that she worked for the respondent at the Headquarters as a Quality Assurance and Standards Officer. At the material time she was a Discipline Officer.
41. The respondent received an interdiction letter from the County Director Uasin Gishu. The Claimant was interdicted for desertion of duty and presenting a forged deployment letter. The Claimant was called upon in the interdiction letter to do a defence within 21 days. She did not write her defence as required.
42. The Claimant was mailed her letter for disciplinary hearing to her last known address and an SMS sent to her.
43. It was her evidence that during the disciplinary hearing the Claimant admitted both the charges.
44. According to her the Claimant first alleged she received the transfer letter from her Head Teacher and later changed that she received it from the Post Office. It was further her evidence that the Claimant admitted not reporting back to Kipkaren Primary school upon being released by Eldoret Polytechnic.
45. In cross-examination she stated that the County Office dispatched the interdiction letter through the Claimant's last known address. It was dispatched to P.O Box 4461-Eldoret. The Institution is stated as Eldoret Polytechnic and that the disciplinary hearing address was P.O Box 9287-30100. This was the Claimant's last known address.
46. It was further her evidence that the Claimant was given the release letter by the Polytechnic however the letter was not before the Court.
47. Regarding the second application for transfer, it was Ms Oyoo's evidence that the Claimant sought to be transferred to either Eldoret Polytechnic or Mosoriot. There was however no letter declining or accepting the 2nd application for transfer.
48. Regarding disciplinary hearing it was her evidence that the Claimant attended but did not sign the minutes and there was no provision for signing of minutes by the Claimant
49. It was further her testimony that the Claimant was assigned duties at the Polytechnic up to a particular time. The Claimant was teaching Math's, Geography and Human Resource which was an anomaly since TSC only allocates two subjects. She further stated that the timetables were never forwarded to TSC or brought during the disciplinary hearing. She further stated that the Polytechnic informed the Respondent that the Claimant was no longer there.
50. Regarding coding, she stated that coding was reflected on the pay slip and it was about where the teacher should be working. The coding reflected on the Claimant's pay slip showed Eldoret Polytechnic.
51. Concerning the release letter found at page 17 of respondent bundle of documents., Ms Oyoo stated that it was a communication between

the Respondent and Principal Eldoret Polytechnic. The letter was not copied to the Claimant and further that there was no clearance letter from the Polytechnic regarding the Claimant.

52. The Court having reviewed the pleadings and summarized the evidence herein as above, considers the main issues to be resolved to be whether there was valid or justifiable reason for dismissing the Claimant from service and removing her name from the Register of Teachers.

53. Second whether the Claimant is entitled to the remedies sought and or whether the respondent is entitled to judgment on the counter-claim.

54. The Claimant was accused of forging a transfer letter dated 15th May, 2012. According to the respondent, this letter was a forgery. The reasons why the respondent considered the letter a forgery was that the purported author Mr. A.M. Kasimu denied he wrote and signed the same. Mr. Kasimu further stated that the letter was not in the usual format. According to him, transfer letters were usually written through the County Director or Municipal Education Officer and the Principal of the Primary School. In his view the one before the Court was like a personal letter. The witness further stated that a copy for the same was not in the Claimant's file held by the respondent.

55. The transfer letter in issue is framed as follows:

Kipketer J. Monicah.

Thro.

The Municipal Education Officer

ELDORET

RE; DEPLOYMENT OF TEACHERS

Please refer to your letter dated 15th /3/2012 requesting us to re-deploy you from primary to Technical Polytechnic.

It has been decided to post you to Eldoret Polytechnic to teach Math, Geography, Human Resource.

The MEO Eldoret is requested to inform the commission on the date you are released. Similarly, the Principal Eldoret Polytechnic is requested to inform this office on the date you report for duty.

A.M KASIMU

FOR; SECRETARY

TEACHERS SERVICE COMMISSION

CC

The principal

ELDORET POLYTECHNIC

The Provincial director of education

RIFT VALLEY

56. Based on this letter, the head teacher Kipkaren Primary School Stephen Nyamweya prepared and forwarded appointment and casually return dated 8th June, 2012 stating that the reason for the Claimant stopping to teach at Kipkaren was because she had been transferred to Eldoret Polytechnic.

57. Further by a letter dated 6th June, 2012 the Chief Principal Eldoret Polytechnic MR. Cleophas K. Langat informed the respondent's Secretary that the Claimant had reported to duty at the Polytechnic and had been assigned work. The Court also noted that presumably based on the disputed letter of transfer, the Claimant's pay slip was directed to Eldoret Polytechnic.

58. Based on the disputed transfer letter, the claimant reported to Eldoret Polytechnic where she took up duties and received salary until 31st January, 2013 when Principal Eldoret Polytechnic allegedly released her back to Kipkaren Primary School with effect from 31st January, 2013. This letter, it was admitted in evidence, was not copied to the Claimant. It was further admitted by the respondent's witness that no copy of the release letter to Kipkaren Primary School by Eldoret Polytechnic was produced in court. The Claimant denied receiving such release letter.

59. The Court finds it disturbing and difficult to understand why the respondent's Head Office acted on a letter which was a forgery in the first place and changed the coding for purposes of identifying the Claimant's workstation from Kipkaren Primary School to Eldoret

Polytechnic. It is further difficult to understand that it took the respondent over one year to notice that the transfer letter the basis upon which they acted was not in the correct format hence a forgery.

60. Ms Kaluai for the respondent has argued that the actions by the respondent were innocent mistakes as the respondent initially but mistakenly believed that the transfer letter was genuine.

61. As much as the contention by Counsel may sound plausible, the question then arises whether the burden shifts to the Claimant to prove the letter was genuine. Further would it not be acceptable as well to accord the Claimant the benefit of innocent mistake pleaded by the respondent over the letter which the respondent turned to allege was a forgery? The allegations against the Claimant were that she used a forged transfer letter. No allegation was made that she is the one who authored or procured the same. Although the respondent's witness Mr. Oyoo alleged that the Claimant could not explain how she got the letter, the Court has perused through the minutes of the disciplinary hearing and notes that the Claimant stated unequivocally that she got the letter through her station from the Post Office.

62. The Claimant was further accused of desertion of duties. That is to say, upon her alleged release back to Kipkaren Primary School from Eldoret Polytechnic she never reported there.

63. As observed earlier the letter dated 31st January 2013 releasing the Claimant back to Kipkaren Primary School was not copied to her. Further the Respondent did not produce the release letter to Kipkaren primary School as was the case when the Claimant was released from Kipkaren to Eldoret Polytechnic. It is therefore not clear or rather not proved that the Claimant was indeed released from Eldoret Polytechnic.

64. In her evidence at the disciplinary hearing the Claimant stated that she was released from the Polytechnic on 31st January, 2012 but did not know the reason why. She further stated that she was not given a release letter so she continued teaching but was stopped by County Director and Head of Department. The County Director told her not to go to class.

65. From the foregoing, it is not clear whether the Claimant was properly and procedurally released from Eldoret Polytechnic to Kipkaren Primary School to sustain an accusation of desertion. Besides **the respondent did not produce any letter addressed to the Claimant seeking her whereabouts and calling upon her to show cause why she should not be terminated on account of desertion.**

66. From the foregoing analysis, whereas the Claimant may not have reasonably and to the satisfaction of the respondent explained how she came across the transfer letter, her explanation that she got the same at her station through the Post Office is as plausible as the chain reaction of the respondent in acting on the said letter which it later disowned as a forgery.

67. It may be probable that the letter was a forgery however its circumstances created a shadow of doubt to make the same the sole evidence against the Claimant.

68. Further the allegation of desertion against the Claimant was clouded by the fact that it was not shown satisfactorily that the Claimant was properly released from Eldoret Polytechnic back to Kipkaren to sustain a charge of desertion. Besides as observed earlier the respondent did not produce any evidence showing attempts were made to seek out from the Claimant, her whereabouts.

69. An accusation of forgery is a serious offence and where proved would be a sufficient ground for summary dismissal. However, the Court is alive to the fact that proof in Civil cases is on a balance of probability. That is to say it is sufficient to demonstrate that it is more probable than not that the act or omission alleged took place or did not take place.

70. The Claimant struck the Court as someone who was very eager to move from Kipkaren Primary School to a Polytechnic or higher-level educational institution. There could be possibility that she fell victim to some rogue individuals within the respondent as an institution. This might explain the mystery around the disputed letter of transfer and the chain reaction that followed it .

71. Under section 43 of the Employment Act, it is the responsibility of the employer to prove reason or reasons for termination of employment and failure to so prove would lead to a finding that the termination was unfair.

72. Based on the analysis of reasons and circumstances under which the claimant was summarily dismissed above, the Court is not persuaded that the respondent has proved to the required standards, the reasons for summarily dismissing the Claimant. In the upshot the Court returns a verdict of unfair termination of service.

73. Concerning the counterclaim, the Court not being persuaded that the Claimant was procedurally released from Eldoret Polytechnic and further in absence of evidence that the respondent made additional efforts to seek the Claimant's whereabouts from her, it could not be reasonably said the Claimant deserted duties yet continued to earn salary. The Counterclaim is therefore disallowed.

74. In conclusion and considering the circumstances of this case as adumbrated above the Court will award the Claimant as follows.

KSHS.

(a) Three months salary in lieu of notice 191,718

(b) Six months salary as compensation for Unfair termination of service 383,436

575,154

(c Costs of the suit

(d) the respondent shall further restore the Claimant to the Registrar of Teachers. Items (a) and (b) shall be subject to taxes and statutory deductions.

75. It is so ordered.

GIVEN under my hand and Seal of this Court on 2021-11-02 13:35:28

SIGNED BY: HON. JUSTICE J. N. ABUODHA (ADMINISTER JUSTICE)

THE JUDICIARY OF KENYA.

ELDORET ELRC

EMPLOYMENT AND LABOUR RELATIONS COURT

DATE: 2021-11-02 13:35:28