



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA

AT NAKURU

CAUSE NO.142 OF 2017

FRANCIS KARIUKI GATU.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

JUDGEMENT

The claimant is a teacher TSC No.481884 and the respondent a constitutional commission under article 248 of the constitution with the mandate to employ, deploy and discipline teachers.

The claim is that in the year 2012 the claimant was involved in the invigilation of the Kenya Certificate of Secondary Examinations (KCSE) in Al-Iman Secondary School in Garissa County when he came across student who were involved in examination irregularities and he reported to his supervisors. Upon such report the claimant started receiving threats to his life from the students and community and as a result he decided to leave Garissa immediately. He informed his immediate supervisor of his inability to perform his duties as an invigilator due to threats on his life.

The claim is also that the claimant reported to the respondent who asked him to make a report to the Kenya National examination Council.

The claimant also expressed his inability to go back to his former school and pleaded to be transferred to a school outside of North-Eastern Kenya due to threats over his life. This request was supported by a letter from the Chief Executive Officer dated 13th November, 2012 recommending the transfer to ensure safety.

In March, 2013 the claimant learnt that his salary had not been processed. This was without official communication and he wrote letter dated 3rd April, 2013 to the respondent stating his grievances and victimisation for reporting examination irregularities in Garissa County.

The respondent transferred the claimant to Marsabit Boys secondary School within Marsabit County and the claimant could not report due to threats on his life the respondent interdicted him vide letter dated 12th June, 2013.

The claimant remained on interdiction until 22nd January, 2014 when he received letter notifying him of a hearing for 19th February, 2014 when he attended and gave his defences as to why he could not report to the school in Marsabit County.

On 27th February, 2014 the claimant received letter notifying him that his case had been addressed and he would not be removed from the register of teacher and a warning that any further allegations against him would result into a section. On 26th March, 2014 the claimant received letter of posting to Dr Godana Memorial Secondary School within Marsabit County and being aggrieved he appealed by letter of equal date noting he could not report due to insecurity whereupon the respondent interdicted him on 9th September, 2014 until 13th March, 2015 when he was suspended over allegation of failing to report to the school and such would be without pay for 2 months.

The claimant remained on suspension until 28th April, 2015 when he received letter notifying him he had been posted to Marsabit Mixed Secondary School with effect from 7th May, 2015 and another letter dated 30th April, 2015 that he had been posted to Ole Tipis Girls Secondary School with effect from 7th May, 2015.

The claim is that the claimant was subjected to unfair disciplinary process and punished for standing for truth and honesty. The actions of interdiction, suspension and deductions of his salary in what was termed as overpayment were unfair labour practices contrary to article 41 of the constitution. the claimant was interdicted and suspended for his inability to work in North Eastern Kenya owing to threats over his life and this amounted to a violation of his constitutional rights.

There is no other suit filed save for Nairobi Cause No.597 of 2014 which has been overtaken by events.

The claimant is seeking for a declaration that his interdiction, suspension and disciplinary process be found unfair; an order for the respondent to pay the claimant his full salary from March, 2013 to May, 2015; a refund of all monies deducted from salary due in May, 2015 alleged to be overpayments and costs of the suit.

The claimant testified in support of his claims.

The claimant testified that following threats over his life after reporting examination irregularities in Garissa County he requested to be transferred from North Eastern Kenya but the respondent transferred him to Marsabit County which neighbours Garissa County. He could not report and he requested for another transfer. He did not report to the assigned school.

The respondent interdicted the claimant and was invited to a hearing and after which he was posted to another school in Marsabit County and could not report. He was interdicted for a second time. The claimant was then suspended and later he received two letters of posting to Ole Tipis girls School in Narok County and another school in Marsabit County. He has since reported to Ole Tipis Girls School.

The claimant also testified that upon his interdiction he lodged an appeal and spent most of his time at the respondent's offices to explain his case. There is no record of such reports and was thus accused of desertion of duty.

Defence

The defence is that the claimant was employed by the respondent as a teacher in May, 2010 and posted to County School in Garissa County and remained bound by the terms and conditions of employment and provisions of the TSC Act, Code of Regulations for Teachers, 2005 the Code of Conduct and Ethics and administrative circulars issued from time to time. Regulation 26 of the Code of Regulations allow the respondent to assign any teacher for service in any public school or institution in Kenya.

In December, 2012 the claimant while a teacher at County Secondary School Garissa reported to the respondent that he had received threats to his life while invigilating examinations and urged his to report to KNEC and who recommended a transfer from North Eastern Kenya. The respondent in good faith transferred the claimant to Marsabit Boys Secondary School, a school within Eastern Province and situate in Marsabit

County and in Marsabit town by letter dated 22nd November, 2012.

On 16th January, 2013 the claimant responded stating his inability to report as posted and asked to be transferred to Laikipia West, Narok or Nyanza. The respondent also received letter from Tandare Secondary school a school within Laikipia County requesting the respondent to transfer the claimant to its school. The respondent reiterated the earlier posting to Marsabit County.

The claimant's whereabouts remained unknown prompting an interdiction on grounds of desertion vide letter dated 12th June, 2013 and returns dated 7th January, 2013.

The claimant was allowed a response thereof which he did on 25th July, 2013. A disciplinary hearing was conducted on 19th February, 2014 and the claimant pleaded guilty to professional misconduct and desertion of duty. The sanction issued was a warning by letter dated 27th February, 2014 and deployed to Dr Godana Memorial School in Marsabit County vide letter dated 26th March, 2014. The claimant appealed against the transfer, he refused to take the transfer and deserted duty and he was interdicted vide letter dated 9th September, 2014.

The claimant was invited to a hearing on 19th February, 2014 and upon deliberations the claimant was suspended vide letter dated 6th March, 2015. The claimant was found guilty of desertion with effect from 9th November, 2012 and where he had continued to earn a salary and allowances to February, 2013 which sums are due for recovery by the respondent.

The defence is also that the claims made are time barred under the provisions of section 90 of the Employment Act, 2007 and the court is without jurisdictions.

Antonina Lentoijoni the assistant director teacher management with the respondent and in charge of Coast, Nairobi and eastern regions for the transfer, promotions, deployment and recruitment of teachers since the year 2006 and thus conversant with the claimant's case.

Ms Lentoijoni testified that the claimant requested to be transferred from north eastern province following alleged insecurity and which request was allowed and he was posted to Marsabit Boys High School in eastern region where there was a vacancy and was to report in January, 2013 but he failed to take up the posting. He lodged an appeal that he could not take up the posting due to insecurity but failed to demonstrate that the new station was the same as in Marsabit. The claimant therefore was in desertion of duty and was interdicted and allowed to respond and invited to a hearing where he admitted to desertion and professional misconduct. The claimant was issued with a warning and posted to another school in Marsabit County and he failed to report and lodged an appeal. He was invited to a hearing on 19th February, 2014 whereupon he had no satisfactory reasons and was suspended for 2 months and allowed to take another posting.

Ms Lentoijoni also testified under the respondent's regulations, once on interdiction, no pay is allowed. The code of conduct has set out offences where a teacher is not to be paid once such is committed and desertion is one such offence which does not warrant payment.

Following the claimant's desertion, the respondent noted that he had erroneously paid for days not worked and such was deducted accordingly. The claims thus made are not with merit and should be dismissed.

The claimant has since reported to Ole Tipis Girls School and in the employment of the respondent.

At the close of the hearing both parties filed written submissions.

The claim should be dismissed with costs to the respondent.

On the pleadings, the evidence and written submissions the issues which emerge for determination are;

Whether the claim is time barred;

Whether the interdiction, suspension and disciplinary process against the claimant were unfair;

Whether the remedies sought are due.

On the first issue for determination, it is trite that employment and labour relations claims should abide the provisions of section 90 of the Employment Act, 2007 (the Act) and be lodged with the court within 3 years from the date the cause of action arose.

The claim is that the claimant was interdicted, suspended and a disciplinary process undertaken against the claimant following his request to be removed from Garissa County for fear of his life. This was allowed save that he was posted to Marsabit County and could not report and thus was interdicted, suspended and invited to a disciplinary hearing.

The claimant is seeking that the actions of the respondent be declared unfair and that his withheld salaries from March, 2015 to May, 2015 be paid. That the May, 2015 salary deductions be refunded.

The claim was filed on 11th April, 2017.

This is a period of under 3 years from May, 2015 when the claims for the due salaries and deductions are alleged to have occurred.

The claimant is within the limitation period.

The claimant made request for a transfer from north eastern Kenya following what he considered threats to his life following his report of examinations irregularities at Al-Iman Secondary School in Garissa County.

His request was vide letter dated 8th November, 2012.

In response, the respondent vide letter dated 22nd November, 2012 and taking into account the request by the claimant to be removed from North eastern Kenya posted him to Marsabit Boys High School in Eastern province Kenya.

The claimant did not report. His reasons are that such school, Marsabit Boys High School in Marsabit County neighbours north eastern Kenya and he feared for his security.

It is not in contest that the claimant as an employee of the respondent was bounder by his terms and conditions of employment and which included the Code of Conduct, Code of Regulations for Teachers and which required him to work in any institution of posting to serve the public.

Following the claimant's failure to report vide letter dated 22nd November, 2012 he was interdicted and allowed to write his defence and was then invited to a hearing on 19th February, 2014. The record of the disciplinary hearing is clear to the extent that the claimant admitted he did not attend to the posted school. His whereabouts after leaving Garissa County in November, 2012 remained unknown.

Fundamentally, the claimant was not at work with the respondent from such date up and until the 19th February, 2014.

There was desertion of duty.

As correctly submitted by the respondent in the case of **Frederick Saundu versus Principal Namanga**

Mixed Secondary School & 2 others [2014] eKLR where there are clear reasons for the interdiction of an employee and upon investigation such an employee is found to have been of misconduct, then the employer's action is with good foundation.

On the 19th February, 2014 the claimant attended a disciplinary hearing with the respondent and the charges against him were read by the panel;

Q – were you made aware that you were on transfer to Marsabit Boys High?

1 – yes I was informed through an SMS.

Q – you did not want to go to Marsabit?

A – no I was ready to work anywhere.

Q – did you report to Marsabit Boys High?

A – because of insecurity 9exam irregularity related).

Mitigation

I love my work I am sorry for the mistake and I am planning to get married. I would like the commission to give me back my job.

The claimant's request to be removed from one region to another was allowed. He however failed to report to the new station different and separate from Garissa County on the north eastern region. In cross-examination the claimant testified that he never reported to Marsabit Boys High School and does not know its location. That this region neighbours that of north eastern province/region and he still feared for his life.

Without reporting to the subject school in eastern province and to Marsabit Boys High the perceived insecurity and danger to his life is unreasonable and without a foundation. The claimant never reported to such region or school for him to hold such a position. a search of the distances from County High School , Garissa to Marsabit Boys Secondary School is approximately 604 kilometres and a road distance of 9 hours to travel. The apprehension to report to the new posting is unfounded.

The respondent as a constitutional commission pursuant to the provisions of article 237 of the constitution, 2010 is vested with a duty to account for all resources placed at its disposal from the exchequer. In the management of the human resource capital, the claimant was employed as a teacher and posted to a public school and following his request for a transfer from County High School, Garissa in north eastern province this was allowed and he was posted to another republic school, Marsabit Boys Secondary school vide letter dated 22nd November, 2012 but he failed to report.

From the point the claimant left County High School and up and until he reported to Ole Tipis Girls School in Narok, he did not render service to the respondent and to the people of Kenya for which he now claims a payment.

Such absence from work was without permission and or approval by the employer and for which he was interdicted and invited to a hearing and whereupon he admitted he had failed to report to the posted station as directed. As at 16th January, 2013 when the claimant lodged his appeal against the posting to Marsabit High School he was thus aware of the requirement to attend work but his whereabouts remained unknown.

In the case of **Anne Wairimu Kimani versus Kenya Agricultural Livestock Research Organisation (KALRO) [2017] eKLR** the court held that;

- *The transfer of an employee is the prerogative of the employer and not the choice of an employee to choose where to work. The respondent followed its policy to transfer the claimant and failure to attend is insubordination and being absent from work.*
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- *the respondent by use of its policy effected a decision to transfer the claimant as this is the respondent's prerogative to organise the business as appropriate. In the process therefore, the duties the claimant was undertaking at the Thika station were allocated to other employees of the respondent. What was the claimant therefore left to do at Thika? Effectively, the claimant had no role in such station. Her new duties was allocated at a new station. Failure to move as directed by the respondent thus compromised the business of the respondent.*

Like the claimant above referenced, the respondent having acted upon the request of the claimant to be transferred, he failed to oblige. There was work desertion. Section 44(3) and (4)(a) of the Act allowed for summary dismissal where the claimant was in breach of his work terms and conditions and failed to attend work. However, the respondent went a step ahead to secure the claimant's rights in employment and applied the due process and allowed him a hearing on 19th February, 2014 and issued him with a warning and posted him to a different school, Dr Godana Memorial Secondary School in Marsabit County. His reasons were that his preferences were a posting to Laikipia West, Narok County or Nyanza.

By letter dated 9th June, 2010 the claimant was appointed by the respondent as a teacher and under the terms and conditions of service was clause 6 that;

Employment is subject to the Code of Regulations compiled and published by the Teachers Service Commission under section 6 of the Teachers Service Commission Act, Cap 212 and to any amendment of such Code which may from time to time.

The claimant thus bound cannot be found to claim there was unfair treatment, unfair labour practice or unfairness in terms of the respondent addressing his failed to attend work as directed and required under his terms and conditions of employment. The reliance on the provisions of section 14(i) of the Occupational Health and Safety Act on the basis that there was fear of security and life does not hold as a justification. The claimant having been moved from County High School, Garissa and posted to other schools on three (3) different instances failed to abide.

The claims for salary payments for the periods the claimant did not attend work for no good cause are without merit. To claim payment of salaries from March, 2013 to May, 2015 while aware there was no work attendance after the 8th of November, 2012 is without a foundation. Equally the deductions of salary for May, 2015 for days not at work are justified.

Section 19 (1) (c) of the Employment Act, 2007 allow an employer to deduct from the wages/salary paid to an employee for every day the employee is absent from work. This is stated in the following terms;

- c. *an amount not exceeding one day's wages in respect of each working day for the whole of which the employee, without leave or other lawful cause, absents himself from the premises of the employer or other place proper and appointed for the performance of his work;*

Accordingly, the claims made are hereby found without merit. As the claimant has since reported to Ole Tipis Girls School, Narok and parties are in an employment relationship, no orders to costs.

Delivered at Nakuru this 23rd day of January, 2020.

M. MBAR?

JUDGE

In the presence of: