



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NYERI

CAUSE NO. 325 OF 2017

BENSON MUNENE MBUGI.....CLAIMANT

VERSUS

BOARD OF MANAGEMENT

KAHITHE SECONDARY SCHOOL.....1ST RESPONDENT

TEACHERS SERVICE COMMISSION....2ND RESPONDENT

JUDGMENT

1. The Claimant sued the Respondent for his unlawful interdiction and for the illegal surcharge of his salary without a fair hearing. The Claimant averred that he was employed by the 2nd Respondent on 1st September 1990 under TSC No. 303110. He averred that he worked in various

schools as a teacher and subsequently as a Principal. He averred that the issue of financial misappropriation at Kahithe Secondary School was raised by the Ministry of Education and the 2nd Respondent via letters dated 26th November 2014 and 5th December 2014. He averred that in light of the said accusations he was to be transferred to Kutus Secondary School as an assistant teacher to pave way for investigations pending the outcome of the school audit report. The Claimant averred that the 1st Respondent was tasked with the carrying out of investigations by the Ministry of Education vide a letter dated 9th October 2015. The Claimant averred that members of the 1st Respondent on 6th May 2016 unanimously agreed that he had misappropriated money and that he be surcharged Kshs. 2,552,100/- by attaching his salary. The Claimant averred that he was interdicted thereafter by a letter dated 16th June 2016 on allegations of misappropriating Kshs. 3,194,825/-. He averred that he replied to the allegations vide a letter dated 9th July 2016 which was not considered during the making of the recommendations by the 2nd Respondent. The Claimant averred that he was not granted a fair hearing by the Respondents as he was not given time and material to prepare a defence, he was not allowed to adduce evidence, and was not also allowed to produce documents. The Claimant thus prayed for judgment against the Respondents for:-

a. A declaration that the recommendation/s made by the 1st respondent on 6th May 2016 and by the 2nd respondent on 19th February 2017 are unlawful, null and void.

b. A declaration that the recommendation/s and /or order that the claimant be surcharged by way of attachment of his monthly salary by the 2nd respondent on behalf of Kahithe Secondary School be set aside and / or vacated.

c. Costs of the suit.

2. The defence of the 1st Respondent was to the effect that it acted upon an audit report of the School Audit Unit dated 9th October 2015 and informed the Claimant of the allegation according to the report. The 1st Respondent averred that the Claimant was thereafter invited to a meeting in which he was unable to address the said issue causing the 1st Respondent made a recommendation to surcharge the Claimant as mandated by the 2nd Respondent's Code of Regulations. The 1st Respondent averred that it works under the directions of the 2nd Respondent and the Ministry of Education and therefore its role is limited in such matters. 1st Respondent prayed that the Claimant's claim be dismissed with costs.

3. The 2nd Respondent's defence was to the effect that there was misappropriation of funds amounting to Kshs. 3,194,825/- by the Claimant as was shown in the audited accounts of various schools including Kahithe Secondary School that was received from the Ministry of Education. The 2nd Respondent averred that the findings were an outright violation of the Code of Regulations for Teachers which offence

could lead to disciplinary action. The 2nd Respondent averred that however, the report recommended that the funds be recovered from the Claimant. The 2nd Respondent averred that it arrived at a decision to transfer the Claimant to another school on probable and reasonable grounds founded on honest belief that the Claimant had engaged in financial mismanagement, an offence punishable in law and specifically the Code of Regulation for Teachers. The 2nd Respondent averred that the 1st Respondent held a meeting on 17th February 2016 and it was resolved that they should give the Claimant an opportunity to defend himself. The 2nd Respondent averred that therefore, the meeting was held on 6th May 2016 and the Claimant was granted an opportunity to defend himself. The 2nd Respondent averred that a subcommittee was appointed and it scrutinized various suspense accounts from the year 2013 and after a careful analysis of the Audited accounts it was ascertained that the Claimant had misappropriated the school funds to a tune of Kshs. 3,194,825/-. The 2nd Respondent averred that the 1st Respondent agreed that Kshs. 622,925/- be lifted but the Claimant be surcharged for the balance of Kshs. 2,553,100/-. The 2nd Respondent averred that the Claimant was issued with the interdiction notice and given a chance to defend himself and cross examine witnesses. The 2nd Respondent averred that his defence statement and his evidence were duly considered by the 2nd Respondent and the committee's decision was communicated to him without delay in compliance with the Code of Regulations for Teachers and the rules of natural justice. The 2nd Respondent averred that it has a duty to maintain public morality, integrity and nobility of the teaching profession and that the decision meted was proportionate to the offence committed. The 2nd Respondent averred that it adhered to the provisions of the Code of Regulations for Teachers and rules of natural justice and that its decision was fair, procedural and lawful. The 2nd respondent prayed that the Claimant's claim be dismissed as the same is unjustifiable and devoid of any merit.

4. The Claimant testified as did the witnesses for the Respondents. The Claimant adopted his statement, list of documents and stated that for the 4 years he worked at Kahithe Secondary School, there was no financial misappropriation. He stated that a surcharge was ordered after an audit was carried out by the Ministry Auditor for the 2013/2014. He said he was then transferred to Kutus Secondary School and after working for 1½ years he was issued with an interdiction letter for misappropriation of funds. He stated that he was then asked to write a defence in 21 days and he was summoned for hearing but he was not given time to ask questions. He said that he was intimidated by the panelists and was not allowed to call witnesses. He testified that his defence was not considered and that the audit team summoned his juniors and wanted to him to answer questions in their presence. He added that he was not given enough time to prepare. He testified that he was not able to defend himself before the BOM as he had already been transferred and that he was not invited to the crucial meetings by the BOM committee that was carrying out investigations and that he was only invited to the final meeting.

5. The 1st Respondent's first witness was Nelson Maingi Chege a school auditor for Ministry of Education. He stated that school accounts were audited after every financial year but in addition to the ordinary auditing, a complaint was recorded by a supplier to TSC Murang'a and copied to the Sub County Director who requested that an audit on the issues raised be carried out as well. He stated that they invited the Claimant twice via a letter to appear before the audit team to answer audit questions. He testified that they only invite the client if there is anything not clear and that in this case they invited the Claimant, the accounts clerk, storekeeper and the caterers. He stated that the Claimant was given a chance to defend the books of accounts but he did not account for Kshs. 3,128,825/- properly and so the audit team requested for TSC procedure to be invoked. He testified that according to the audit report the Claimant flouted procurement procedures by not instituting and actualizing the tender committee and that similarly, authenticity of documents in support of the payments was questionable and when the Claimant failed to clarify he was surcharged. He stated that the quantities of the goods supplied were not in agreement with the store records and on looking at the invoices, the prices were exaggerated and the goods were ordered verbally by the Claimant as there were no LPOs or purchase orders. The 1st Respondent's second witness Simon Kinyua Wacera who was the current Principal of Kahithe Secondary School testified that he received the audit report from the Ministry of Education and he convened the full BOM meeting to adopt the report. He stated that a sub-committee was formed to investigate and establish if the accounts were in suspense as per the audit report. He testified that the Claimant was thereafter called to defend the accounts after which the Board decreed that he be surcharged which is within its mandate. He testified that the minutes were forwarded to TSC and the Ministry and that he was later summoned to the TSC together with the Board chair, the County School's Auditor and the Claimant. He stated that again, the Claimant was given a chance to defend himself, and that the Claimant produced documents which were scrutinized and considered when the resolution was made. He maintained the hearing was very fair.

6. The witness for the 2nd Respondent was Zacharia Wachanga an employee of TSC deployed as an auditor. He relied on his statement and list of documents as part of his evidence in chief. He stated that he was the first one to review the report and that he was also present during the hearing of the case and that the Claimant was present. He stated that he established that key documents to financial accounts were missing including suspense account, monthly trial balances and bank reconciliation statements. He said that the store ledger was also missing. He testified that he also established that there was a suspense figure of 3,184,825/- which could not be accounted for. He stated that the audit report was properly done, dated and signed and communicated to the relevant departments. He stated that audit threshold was met and the Claimant was called to answer to the audit queries and after answering the queries some amount of money was lifted from the initial amount of 3.19 million. In re-examination he confirmed that the Claimant was interdicted for misappropriation of Kshs. 3,194,825/ but that figure was reduced after documents were produced and after further verification and analysis was done. That marked the end of oral examination.

7. The Claimant submitted that though the Teachers Service Commission has powers under Article 237(2)(e) of the Constitution to exercise disciplinary control over teachers, he is protected under Article 236 of the Constitution and more so not to be subjected to disciplinary hearing without due process. The Claimant submitted that he was denied a right to be heard and produce documents which is against the rules of natural justice. The Claimant submitted that there were no minutes, proceedings, answers and/or questions that were produced by the Respondents to show that the Claimant was given a chance to give oral evidence and/or produce documents. He relied on the case of **Board of Education v Rice [1911] AC 179** and submitted that there should be a reasonable opportunity for a person to be heard. The Claimant submitted that his exhibits no. 8 to 53 confirms payment made to the 1st Respondent's suppliers which was further confirmation that he did not mismanage and/or embezzle any funds or commit any offence as set out in Third Schedule of the Teachers Service Commission Act. The Claimant submitted that no particulars of forgeries were made by the Respondents against those documents as required by Order 2 Rule 4(1) of the Civil Procedure Rules and that the documents should thus be admitted. The Claimant submitted that though the 2nd Respondent has powers to exercise disciplinary action including surcharge as provided for under section 34(3)(b) of the Teachers Service Commission the process should adhere to the principles in Article 47, 50(1) and 236 of the Constitution. The Claimant submitted that the Respondent's disciplinary process was fraught with illegalities rendering the whole process a nullity. He placed reliance on the case of **David Oloo Onyango v Attorney General (UR) Civil Appeal No. 152 of 1986** (unreported), and submitted that failure to comply with rules of natural

justice renders any decision or any other administrative action taken by the Respondents null and void. The Claimant prayed that his suit be allowed as prayed.

8. The 1st Respondent submitted that from the evidence adduced, the Claimant was given a chance to defend himself on three occasions before the Murang'a County School Audit Office, before the Board of Management and finally before the Teachers Service Commission but he was unsuccessful hence the decision to surcharge him. The 1st Respondent thus submitted that the Claimant was accorded a fair hearing and his claim should be dismissed with costs to the Respondents.

9. The 2nd Respondent's submissions were to the effect that the Claimant was accorded. The 2nd Respondent cited the case of **Judicial Service Commission v Gladys Boss Shollei [2014] eKLR** and submitted that the Claimant was not only accorded a fair hearing but the opportunity to make his rebuttal and heard as per Article 50 of the Constitution, the Employment Act, the general principles of natural justice and fair administrative action. The 2nd Respondent submitted that the Claimant remained present throughout the various meetings that were held and he was at all material times aware of the allegations, was given an opportunity to respond, and that he presented his case and cross-examined witnesses. The 2nd Respondent submitted that the decision to surcharge the Claimant was based on established grounds hence lawful, fair and procedural as the respondent adhered to the Code of Regulation for Teachers and the rules of natural justice in dispensing the constitutional mandate on teacher discipline. The 2nd Respondent consequently submitted that it adhered to Section 43 of the Employment Act as the circumstances informing the punishment meted out to the Claimant were sound, sufficient, compelling and lawful and that these should be upheld by the court. The 2nd Respondent also relied on the case of **Herman Musabi v Teachers Service Commission & A.G [2018] eKLR** where the court held that the respondent acted within the confines of the law to which the parties employment relationship was subject. The 2nd Respondent submitted that the evidence presented by its witness was not rebutted or diminished in any way by the Claimant. The 2nd Respondent demonstrated at trial that due process was followed as the Claimant was informed of the allegations, was invited to defend himself, given opportunity to present his evidence orally and in writing, cross examine witnesses, the decision to surcharge was duly communicated to him and that all the issues of fact involved in the Claimant's matter were completely and sufficiently evaluated by the 2nd Respondent. The 2nd Respondent submitted that all facts and circumstances of this case leave no doubt that the Claimant's conduct was unacceptable in a school as that is where heads of institutions are expected to act as guardians of the resources entrusted to them. The 2nd Respondent submitted that the trust and confidence bestowed on the Claimant by the Respondents was breached beyond repair thus the punishment merited. The 2nd Respondent submitted that it properly discharged the burden imposed on it by Section 43 of the Employment Act and urged the court to dismiss the claim with costs as it is unjustifiable and devoid of merit.

10. The Claimant was a headteacher entrusted with the 1st Respondent's resources. An audit carried out by the Ministry of Education led to an additional query being raised and further audit carried out. It was established that there was money that was misappropriated to the tune of slightly over 3.1 million shillings. After further verification, the sum was reduced to around 2.5 million shillings. The accusations were that the Claimant failed to implement proper procurement processes and ended up misapplying funds and not being able to account for the goods allegedly purchased with the funds. Having failed to properly account for the funds the Claimant was surcharged in line with the Code of Regulation for Teachers. As seen in his testimony and that of the 3 witnesses for the Respondents, the Claimant was heard and his rights observed in the process. There is nothing to suggest that the 2 Respondents abridged his rights in any way as the Claimant was heard on three separate occasions. The first hearing was before the Murang'a County School Audit Office, the second was before the Board of Management and finally he was heard by the Teachers Service Commission. In totality his rights to a fair trial were observed as he was permitted to ask questions and interrogate witnesses. As provided for in statute law, apart from the need for impartiality and the right to a fair hearing under Article 50(1) of the Constitution encompasses, in this context, the right of the employee to being informed of the case against him; the individual being given an opportunity to present his side of the story or challenge the case against him by presenting his defence and rebutting the evidence from the opposite side. In this case, despite having been transferred from the 1st Respondent, the Claimant's ability to defend himself did not seem compromised as he sought and was given documents at various stages of the process. In the proceedings before the surcharge he was able to avail documentation which led to the sum initially subject of the potential surcharge reduced by over Kshs. 600,000/-. Had he not been heard the surcharge would have been for over Kshs. 3.1 million. Having received a fair hearing is he entitled to any relief? In my view there is nothing for him to recover as the surcharge was applied after due process and in line with the Code for Regulation of Teachers. The Claimant's case is thus devoid of merit and is only fit for dismissal. In the case, the Respondents sought an order for costs but granted the peculiar circumstances of the relationship between the parties it would be appropriate to make an order that each party bears their own cost.

It is so ordered.

Dated and delivered at Nyeri this 4th day of February 2020

Nzioki wa Makau

JUDGE