



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO 5 OF 2019

STELLA NDUNGE KIMATU also

known as STELLA NDUNGE MUE.....CLAIMANT

-VERSUS-

TEACHERS SERVICE COMMISSION.....RESPONDENT

JUDGMENT

1. The Claimant is employed by the Respondent as a teacher. She brought this suit on 9.1.2019 and amended the claim on 4.4.2019. The suit seeks the following reliefs:

- (i) A declaration that the Respondent's decision to reduce/slash/cut the claimant's salary was unlawful and therefore null and void.
- (ii) A declaration that the Respondent's decision to demote the claimant was unlawful and therefore null and void.
- (iii) An order permanently restraining the respondent, its officers, agents, employees, or any other person whomsoever from implementing, proceeding with, or acting on the respondent's decision demoting and reducing/cutting/slashing the claimant's salary and other allowances.
- (iv) An order reinstating the claimant to the position of Senior Teacher 1, Job Group L with all the salary, allowances and benefits applicable thereto.

2. The Respondent admits that the claimant is her employee but denied that she unlawfully demoted the claimant. She further avers that all what she did was to rectify the erroneous promotion and restore the claimant to her correct position. She therefore prayed for the suit to be dismissed with costs.

Claimants case

3. The Claimant testified as CW1 and adopted her written statement as her testimony herein. She stated that she is a teacher registered with the respondent since 27.4.2000 number TSC/393294/7. She further stated that by the letter dated 13.2.2002, she was appointed as a P1 teacher effective 21.9.2001. The appointment was confirmed on permanent and pensionable terms by the letter dated 30.6.2005.

4. In the year 2013 she graduated from the Catholic University of East Africa with a Bachelors Degree in Education and applied for a promotion, in line with respondent's policies. However, by a reply dated 12.3.2014, the respondent informed her that due to unavailability of vacancies/funds at that time the promotion was not possible.

5. On 19.5.2015, the respondent wrote to her informing her that she had been appointed to the position of Graduate Teacher II, Job Group K at a salary scale of Kshs. 372,240 to 499,080 per annum. The appointment per annum. The appointment was backdated to 1.10.2014 and was in the nature of promotion from P1 Teacher and it was entered into the IPPD data capture sheet of the respondent's staff and approved.

6. As a result of the matters aforesaid, her salary changed as follows:

- (i) Basic salary from Kshs. 21,304 to 3,1020/-
- (ii) House allowance from Kshs. 3,000 to 6,000/-
- (iii) Medical Allowance from Kshs. 954 to 1,897/-

(iv) Hardship Allowance from Kshs. 5,008 to 9,306/-

(v) Commuter Allowance Kshs. 4,000 to 5,000/-

Total from Kshs. 34,266 to 53,223/-

The salary was subsequently reviewed periodically and as at July 2017, the basic salary was Kshs. 35,927.

7. She further stated that under the respondent's policy and practice, she was entitled to promotion to the position of Senior Teacher I, Job Group L after serving for 3 years in Job Group K. According to her the said promotion fell due on 1.10.2017 but in December 2017 she was promoted to the position of Senior Teacher 1, Job Group L and her emoluments increased as follows:

(i) Basic Salary.....Kshs. 37,721/-

(ii) Rental House Allowance.....Kshs. 13,000/-

(iii) Hardship Allowance.....Kshs. 12,300/-

(iv) Committee Allowance.....Kshs. 6,000/-

TotalKshs. 69,021/-

8. She further testified that in May 2018, the respondent reduced her salary and demoted her to the position of Primary Teacher II (formerly P1 teacher) unilaterally without her consent. The new salary was lowered to: -

(i) Basic salary.....Kshs.24,250/-

(ii) Rental House allowance.....Kshs. 3,200/-

(iii) Hardship Allowance.....Kshs.6,600/-

(iv) Computer Allowance.....Kshs. 1,000/-

Total.....Kshs. 35,050

9. She contended that the demotion and salary reduction was unjustified and amounted to an unfair administrative action. She produced 17 documents annexed to the claim and prayed for reliefs as set out in her amended claim.

10. On cross examination, she admitted that she never received any letter promoting her to Job Group L. However, she received the letter promoting her to Job Group K and after working for 3 years, she was paid salary for Job Group L and received a payslip for Job Group L. However, she was shocked when she went to withdraw her money and found her bank account with negative balance and upon inquiry she learnt that she had been demoted and her salary reduced. She reiterated that the employer had no right to reduce her salary without consulting her.

Defence case

11. The Respondent Deputy Director HR Management and Development Ms. Pamela Achieng Ochieng, testified as RW1 and she also adopted her written statement as her testimony. She admitted that the claimant was employed by the respondent as a P1 teacher and thereafter confirmed into permanent and pensionable terms of service. She further testified that on 1.11.2013, the claimant informed the respondent that she had attained a Bachelor of Education Degree from Catholic University of East Africa and requested to be considered for promotion on the basis of obtaining higher qualifications. The respondent acknowledged receipt of the degree certificate on 13.1.2014 but advised her that the promotion could not be effected immediately due to unavailability of vacancies and funds.

12. She went on to state that by a letter dated 19.5.2015 the claimant was mistakenly promoted to Graduate Teacher II Job Group K effective 1.10.2014. she contended that the said promotion went against the criteria set out in the respondent's Code of Regulations, Schemes of Service and Administrative circulars which provides that promotion is subject to availability of vacancies and budgetary provision and the following: -

- (a) merit and ability in the teacher's work
- (b) seniority and experience
- (c) existence of a vacancy in the authorized establishments
- (d) academic and profession qualifications and

(e) any other criteria considered relevant

13. She went on to state that in July 2013, the respondent suspended the automatic promotion of teachers in recognition of higher qualifications due to exhaustion of available vacancies in the establishment and lack of funds. In her view, the said considerations were not taken into account when the claimant was promoted and as such the promotion was irregular.

14. She further stated that in May 2018 when the respondent was giving another common cadre promotion, she discovered the said irregular promotion of the claimant to graduate teacher II and the respondent reviewed it and regularized the claimant's job grade and adjusted her salary to reflect the correct designation in accordance with the code of conduct, scheme of service and administrative circulars for promotion of teachers. At the end of the day, the claimant was restored to Primary Teacher II (formerly P1 teacher).

15. Rw1 denied that the said action amounted to a demotion and contended that all that was done was to rectify an error. She contended that there was no requirement of consulting the claimant before such a move because it is allowed by the law as the government does not pay money where there is a wrong. She further contended that the claimant had not been promoted regularly to Job Group K and as such the issue of demotion did not arise.

16. In cross examination, Rw1 admitted that the claimant was promoted to Job K in 2015 but the effective date was backdated to 1.10.2014. She, however, reiterated that the said promotion was irregular. She contended that no letter of promotion was given to the claimant promoting her to Senior Teacher Job Group L but admitted that her payslip for December 2017 and April 2018 indicated her as Senior Teacher 1 and the basic pay was Kshs. 37,721/-. She reiterated that the promotion to Job Group K was irregular because the claimant never met the academic qualifications. She, however admitted that the claimant had availed to the respondent a degree certificate.

17. She maintained that there were no vacancies and funds when the promotion letter was given to the claimant. According to her, the funds available were for the persons who applied for the promotion before 8.1.2014. She contended that the claimant's documents reached the respondent's office after 8.1.2014. She admitted that the letter dated 12.3.2014 to the claimant, never stated that she had not met academic qualifications.

18. She admitted that the claimant was never notified of the intention to reverse her promotion and reduce her salary. She also admitted that the respondent has not yet recovered the salary paid to the claimant during the period of the reverse promotion.

19. She explained that the process of promotion involves keying in the salary, giving a letter of promotion and paying salary arrears. She admitted that the claimant's new salary was keyed in but it was stopped in May 2018 before the promotion letter was issued or salary arrears were paid.

Claimant's submissions

20. The Claimant submitted that her promotion to Job Group K and then L was proper and justified because she held the necessary qualifications. She however, contended that the unilateral reversing of her position from Senior Teacher I to Primary Teacher II without consulting her and obtaining consent was oppressive unlawful, discriminatory, unfair, illegal and unprocedural. She contended that after the said promotions she committed herself to financial obligations and legitimately expected that the respondent would not arbitrarily, unfairly and without any consideration slash her salary.

21. For emphasis she relied on **Melisa Akinyi Ayoyi v Claudio Benaglia t/a Royal Tulia Resort [2018] eKLR** where Rika J held that the Employment Act does not allow unilateral change of contracts of employment without notifying and consulting the employee about the change.

22. She further relied on Article 47 and 50 of the Constitution to urge that the reversal of her promotions without according her a hearing violated her right to fair administrative actions. For emphasis, she relied on **Judicial Service Commission vs Mbalu Mutava & another [2015] eKLR where Githinji JA** held that Article 47(1) of the Constitution marks an important and transformative development of administration of justice because it lays the constitutional foundation for control of the powers of state organs and other administrative bodies and further entrenches the right to fair administrative action in the Bill of Rights. The court further held that the law is that although there is no general duty to give reasons for an administrative decision, such duty can be implied in appropriate circumstances.

23. The Claimant concluded by urging the court to grant the reliefs sought because the respondents action breached the rules of natural justice, as documented in the said provisions of the Constitution and Employment Act.

Respondent's submissions

24. The respondent submitted that the promotion of the claimant was irregular and she had a duty to rectify the irregularity once it was discovered. She reiterated the averments in the defence and the testimony by RW1 to justify her decision to reverse the claimant's promotion to her position before her promotion to Job Group K.

25. She concluded by urging that the promotion was not in accordance with the CORT, schemes of service and administrative circulars and as such the claimant is not entitled to the reliefs sought in the suit. For emphasis she relied on **Nicholas Muturi Okemwa & 8 Others v Judicial Service Commission [2016]eKLR** where Ndolo J held that a court of law cannot confirm actions taken illegally. She maintained that her action of reversing the promotion was justified and urged the court to uphold it.

Issue for determination

26. There is no dispute that the claimant is still employed by the respondent as a primary school teacher. There is further no dispute that the claimant was promoted by the respondent from P1 Teacher to Graduate Teacher II and again to Senior Teacher I in 2015 and 2017 respectively. There is further no dispute that in May 2018, the respondent reversed the said promotions and reduced the claimant's salary to that of a P1 Teacher (now Primary Teacher II). The issues for determination are:

- (a) Whether the promotions were regular and lawful
- (b) Whether reversing the promotions was irregular, unfair and unlawful and equaling to a demotion
- (c) Whether the claimant is entitled to the reliefs sought.

The Promotion

27. The Claimant attained her Bachelor of Education degree in 2013 and immediately applied for promotion as a Graduate Teacher Job Group K. RW1 confirmed in her written statement that the claimant's application for promotion was dated 1.11.2013. She however contended that it was received by the respondent on 13.1.2014 and deferred due to lack of vacancy and funds.

28. It is common ground that the promotion was subsequently given vide the respondent's letter dated 19.5.2015 whereby she was appointed Graduate Teacher II Job Group K with effect from 1.10.2014. The respondent contends that the said promotion was irregular because it was not done in accordance with the respondent's COURT, Schemes of Service and administrative circulars. None of the said documents were produced as exhibits herein as such, the allegation that they were violated was not substantiated.

29. RW1 let the 'cat out of the bag' when she contended that the promotion was irregular because the claimant lacked academic qualifications and also because the vacancies and the funds available for promotions were only for the persons who made applications before 8.1.2014. That contradicts the pleadings in the defence that there was no money and funds during the time when the claimant was promoted.

30. It appears to me that from the evidence by RW1 that the claimant possessed the necessary academic qualifications and that there were indeed vacancies and funds available for the persons who, like her, applied for the promotions before 8.1.2014. RW1 admitted that the claimant's application was made on 1.11.2013 but alleged that it was received on 14.1.2014. She however did not adduce any evidence to prove that the application was indeed received by the respondent after 2 months. I therefore find and hold that the promotion of the claimant to the position of Graduate Teacher was regular and lawful because it was confirmed by RW1 that there was a vacancy and funds available.

31. As regards the automatic common cadre promotion to Job Group L, I must also return that it was regular and lawful flowing from the finding that the first promotion to Job Group K was lawful and regular. Although no promotion letter had been received by the claimant, the contract had already been sealed by the conduct of the parties. RW1 admitted that the promotion was automatic after serving in Job Group K for 3 years; and that the promotion had been effected via the payroll and the claimant paid the corresponding salary for several months before the promotion was reversed in May 2018.

32. All what was remaining in the promotion process according to RW1, was to issue the claimant with a letter to communicate the promotion and pay her backdated arrears. It follows therefore that the delay in issuing the promotion letter and paying salary arrears did not negate the fact that the claimant had already been promoted to Job Group L.

Reversing of the Promotion

33. The Claimant contended that the reversal of her promotions back to her P1 Teacher (Primary Teacher II) position was irregular, unfair, discriminatory and unlawful and it amounted to demotion. She further argued that the said demotion was done unilaterally for no just reason and without according her any hearing. RW1 admitted that the claimant was not given any hearing before the said action but contended that consulting or hearing the claimant was not necessary because all what was done was only to rectify any irregularity immediately it was discovered.

34. I have carefully considered the rival contentions by the parties. It is common ground that the decision by the respondent to reverse the promotion of the claimant was detrimental to her including loss of income and status. In **Judicial Service Commission vs Mbalu Mutava & Another [2015] eKLR** the Court of Appeal held that:

“Article 47(1) marks an important and transformative development of administrative justice for it not only lays a consultative foundation for control of the powers of the state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in Article 10 such as rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”

35. Article 47 of the Constitution provides that;

“(1) Every person has the right to administrative action that is expeditious, efficient, lawful and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by action, the person has the right to be given written reasons for the action.”

36. The foregoing provision is amplified by section 4(2) & (3) of the Fair Administrative Action which provides that:

“(2) Every person has the right to be given reasons for any administrative action that is taken against him

(3) When an administrative action is likely to adversely affect the right on fundamental freedoms of any person, the administrator shall give the person affected by the decision;

(a) prior and adequate notice of the nature and the reasons for the proposed action;

(b) an opportunity to be heard and make representations in that regard;

(c) notice of a right to review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons . . .”

37. In addition, section 10(5) of the Employment Act provides that:-

“where any matter stipulated in subsection (1) changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.”

38. The foregoing constitutional and statutory provisions are in consonance that, whenever an entity or an officer intends to make any administrative action that affects another person adversely, consultation or hearing the representation of the affected person is mandatory. In this case the claimant lost income and status and further suffered financial embarrassment after her salary was reduced drastically without prior notice and consultation. I therefore, find and hold that the failure to comply with section 4 of the Fair Administrative Action Act, section 10(5) of the Employment Act and Article 47 of the Constitution before reversing the claimant's promotions rendered the said action irregular unfair and unlawful. It matters not, whether in the respondent's view, that the impugned decision was meant to reverse an “irregular promotion”.

Relief

39. In view of the foregoing finding, I must, which I do, return that the claimant is entitled to prayer (i) to (vii) in the amended claim and proceed to enter judgment for her in the following terms: -

(i) A declaration that the Respondent's decision to reduce/slash/cut the claimant's salary was unlawful and therefore null and void.

(ii) A declaration that the Respondent's decision to demote the claimant was unlawful and therefore null and void.

(iii) An order permanently restraining the respondent, its officers, agents, employees or any other person whomsoever from implementing, proceeding with, or acting on the respondent's decision demoting and reducing/cutting/slashing the claimant's salary and other allowances.

(iv) An order reinstating the claimant to the position of Senior Teacher 1, Job Group L with all the salary allowances and benefits applicable thereto.

Dated, signed and delivered in open court at Nairobi this 29th day of April, 2020.

ONESMUS M. MAKAU

JUDGE