



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO 1661 OF 2013

SAMMY GATIMU KARANJA.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

JUDGEMENT

1. The claimant alleged that he was employed by the respondent in 2008 as a teacher and posted to [Particulars withheld] Primary School in Kinangop. On 22nd October 2012 the respondent interdicted the claimant from duty on unproven and unsubstantiated allegations of dissolute manners. The respondent thereafter constituted a disciplinary panel to interrogate the claimant on accusations leveled against him. He heeded the orders and appeared before the disciplinary panel in Nyahururu which in his view turned out to be a travesty of justice.

2. The claimant alleged that his effort to rebut and invalidate the indictment leveled against him was frustrated by the panel. Further the panel utterly refused to accord him a fair hearing and denied him the right to be represented or accompanied by another employee as required by section 41(1) of the Employment Act.

3. According to the claimant his effort to cross-examine and test the veracity, integrity and reliability of the evidence as adduced by his accusers was frustrated by the respondent blocking him from fielding questions and was further deprived of copies of the proceedings. The claimant further alleged that on 7th February, 2012 in blatant violation of the law, the respondent dismissed him from employment and proceeded to strike him out from the Register of Teachers.

4. The respondent on its part admitted that the claimant was its employee and that his contract was governed by the TSC Act, Employment Act, the Code of Regulation for Teachers, the Respondents code of conduct and Ethics and other legal instruments that included administrative circulars issued by the respondent from time to time.

5. According to the respondent, the claimant was engaged as a P1 Teacher on permanent and pensionable terms of service with effect from 18th March, 2011. The respondent averred that on or about 24th May, 2012 while the claimant was serving at [Particulars withheld] Primary School, it received a written complaint from the Kenya Episcopal Conference alleging acts of sexual abuse of school girls at the school. Upon receipt of the information the TSC County Director Nyandarua undertook preliminary inquiry into the allegations by interviewing and collecting statements from witnesses. The respondent averred that the report by the County Director pointed to the commission of an offence and or gross violation of the Act and Code of Regulations for Teachers hence a decision was taken to interdict the claimant.

6. The claimant was thereafter invited to a disciplinary panel meeting on 28th January, 2013 where the matter was extensively deliberated. The claimant fully participated in the proceedings of 28th January, 2013 at which the panel evaluated the written and oral evidence relating to the matter and considered the oral and written statement of the claimant and determined that the claimant was guilty of breach of the Code and accordingly dismissed him and struck his name from the Register of Teachers. The decision was promptly communicated to the claimant through a letter dated 7th February, 2013.

7. In his oral evidence the claimant stated that he was dismissed on the allegations that he defiled a class 7 girl on 7th May, 2012. The allegations according to the claimant were untrue because at the time of the alleged offence, he was in a meeting at the school. The headteacher wrote confirming he was in a meeting at the staff-room. According to him the meeting ended at 12.00 noon and the teachers were asked to go and mark the pupils register. He further stated that all teachers were at the meeting at the time alleged. The claimant denied the allegation that he had an office and that what was called an office was actually a store and the only people with access were head teacher and senior teacher. It was a small room between the staff room and head teacher's office.

8. The claimant further stated that the head teacher was questioned by the police and recorded a statement. He and other teachers were also interrogated by the police. It was his evidence that the police in their report exonerated him. He continued working until 22nd October, 2012

when he received an interdiction letter from the respondent. He was invited to a disciplinary hearing at OI Kalau on 28th January, 2013. According to the claimant he was not accorded a fair hearing and was refused to cross-examine his accusers. After the hearing he got a dismissal letter dated 7th February, 2013.

9. In cross-examination he stated that he was expected to act in a dignified manner. After the interdiction he wrote to TSC for a defence hearing. The complainant and her mother attended the hearing. He asked the complainant some questions and that they were 6 of them and the girl identified him as the defiler and that he had defiled her previously. The claimant further stated that on the material day he reported to the school before 10:00 am and that the assembly was for more than one hour. After the assembly he went to the staff room for the meeting. In re-examination the claimant stated that the investigation report was written by Mr K (the Head Teacher). He stated that he felt the case was a make up by the pupil's parents.

10. The respondent's 1st witness Ms PCL stated that she was the complainant. In 2012 she was at [Particulars withheld] Primary School and that she left in May 2012 after the incident of defilement. It was opening day on the material day and she went to school in the morning. At break time she was in class. She was stressed because her uncle had just died. The claimant asked her to take mathematics books to him. He sent her classmate. She did not take the books instead she asked the class prefect to do it.

11. The claimant came for her in class. The other pupils were outside playing. He took her by hand and asked her to accompany him for punishment in an office. It was between the staff room and head teachers office. When they entered, the claimant closed the door and said she was going to face a severe punishment. The claimant pushed her on the table and she started struggling. He removed her pant and raped her. She jumped down and headed to the door but the claimant said if she shouted or got out he would harm her.

12. It was her further evidence that she got out of the office angry and went to her class took her bag and left for home. She decided not to go back to class because other pupils would have known what happened so she sneaked for home. She found her mother but decided not to face her because she would be harsh at her. So she went into hiding. The next morning she told her sister what happened and said she would not go back to the school. Her sister told her mother who called her father to listen to what they were saying.

13. It was her evidence that her mother took her to hospital and was told it was true the girl was raped and was asked to report the matter to the police. They reported and were issued with a P3 form for the doctor to fill. They went to Naivasha District Hospital where she was examined by a gynecologist who filled the P3 form and were issued with a rape form.

14. In cross-examination she stated that she was in class 7 in 2012 and that the teacher was teaching mathematics. She stated that she knew JK and that she was the Head Teacher and that NW was her class teacher. She had no idea of a meeting at the school and that there were no lessons on that day. It was a long break.

15. The complainant further stated that the distance between the classroom and the place she was raped was about 50 meters away. The room and the staff room and head teacher's office were under one roof and that the doors were close by. The roof had no ceiling. If she made noise she could be heard but she did not scream. It was her evidence that the claimant was most times in the room where she was defiled. The complainant further stated that she did not report to the head teacher because she did not want to go back to the school.

16. The respondent's second witness Mr Gregory Njeru stated that he worked for the respondent as subcounty Director and was based at Kipipiri. In 2012 he was based in Nyandarua South as the District Staffing Officer. In 2012 the respondent received a report from the Catholic diocese of Nyahuru through the County Director that a teacher was involved in sexual intercourse with a pupil. It was the claimant herein. He was therefore directed to constitute a team to visit the school. They interviewed the head teacher, senior teacher and the claimant. When interacting with the teachers the team found them uncooperative. The incident took place one month earlier yet there was no report filed.

17. It was his evidence that they also interacted with the pupil away from the school. They prepared a report of their investigation in which they found that claimant had a case to answer. The statement of the victim, the claimant and the medical report made them make the conclusion.

18. According to him, there was no meeting on the material day and that the incident took place during tea break. They found that during tea break teachers usually went for tea at the nearby shopping centre. He further stated that there were no minutes for the alleged meeting and that there was no entry in the schools occurrence book.

19. According to Mr Nyaru, the claimant was given a fair hearing. He was asked to interrogate him and he did not. He could not remember the claimant asking him questions.

20. In cross-examination he stated that he did not know who made the report to the Catholic Church. He never asked if the incident was reported to the head teacher first. In the report he recorded that the head teacher denied the incident and stated that the teachers were in a meeting. He never demanded the production of the minute book to find out if there was a meeting. He further stated that the claimant told him he was in a staff meeting from 9:30 am to 12:00 noon on the material day.

21. Mr Nyaru further stated that the claimant told him the alleged incident took place in the examination room and that he visited the room and interviewed other teachers to confirm if there was a meeting he however did not record this in his report. He further did not record that the head teacher was uncooperative. He recommended disciplinary action against the head teacher and the respondent issued a show cause letter to the head teacher for failing to report the incident.

22. The witness further stated that he knew NW and that she was a teacher at the school and he interviewed her. NW told him she was the senior teacher and the one with the key to the room where the incident was alleged to have taken place. The senior teacher told him they used to share the room with the claimant but he never captured this in his report.

23. The respondent's 3rd witness Mr Lawrence Kigen informed the court that he worked for the respondent at the headquarters as Assistant Director Discipline Division. He relied on his recorded statement dated 19th November, 2018 as his evidence in chief. According to him, the commission received communication from a church organization. The matter was then referred to TSC County Office for investigation. The investigation established the claimant had a case to answer. He was therefore interdicted and called upon to respond to the allegations against him which he did. A discipline committee was subsequently established to hear the claim and the claimant invited to attend. He attended and gave evidence but did not call any witnesses.

24. In cross-examination Mr K stated that the head teacher stated that there was a meeting at the school on the material day, the meeting started at 9:30 am and ended at 12:10 p.m. He further stated that the place where the alleged sexual assault took place was an examination room between the head teacher's office and staff room. The head teacher further stated that the complaint was a make up by the parents to the pupil.

25. It was his evidence that the complaint was not raised by the parents directly to TSC. It was further not raised with the head teacher. NW stated that she was in the staff room from 10:00 a.m. to four minutes past noon. The alleged scene of the offence was her office and she was the only one with the keys. Of the four interviewed, none implicated the claimant. It was further Mr K's evidence that there was no indication that verification was done to check if there was a meeting on the material date. He further stated that he never interviewed the representatives of the church organization.

26. The claimant herein was dismissed from service and eventually deregistered as a teacher on allegations that he defied a class 7 pupil on 7th May, 2012. The claimant denied the allegation and stated that at the material time when the alleged defilement took place he was at a staff meeting at the school which started around 9:30 am and ended at 12:00 noon.

27. The claimant further stated in his defence that the room where the alleged defilement occurred was under the same roof and close by to the staff room and Head teacher's office and any commotion or anyone talking therein could have been heard since the roof had no ceiling board. The claimant further stated that the key to the said room was with senior teacher NW and that he had no copy of the key. According to the claimant, the accusations against him were a make-up by the girl's parents.

28. The respondent's on their part stated that they received the report on the defilement from a local Catholic Church organization. They consequently commenced investigations into the matter at the conclusion of which they found the claimant with a case to answer. The respondent therefore started the disciplinary proceedings against the claimant by interdicting him and issuing him with a notice to show cause and thereafter taking him through a disciplinary hearing leading to his dismissal from service and eventual deregistration as a teacher.

29. The respondent through its three witnesses that is, the pupil (complainant), Mr N and Mr K gave evidence in justification for the dismissal. Mr N and Mr K however stated in material that the report on the defilement was received through a local church organization. However no one from the church organization was called to give evidence. The two witnesses further confirmed that during the investigations, the teachers interviewed indicated that there was a staff meeting at the material time when the alleged defilement took place. They further confirmed that Ms NW informed them that she was the only one with the key to the room where the alleged defilement occurred. Mr K further informed the court that the Head Teacher informed the respondent's investigation team that she thought the allegations against the claimant were made up.

30. On the side of the pupil, it was her evidence that she did not scream because the claimant threatened her with harm. The pupil further stated that after the incident she left for home but did not inform her mother because she would have been harsh on her. She therefore informed her sister who later informed her mother.

31. Section 47(5) read together with section 43(1) of the Employment Act places the burden of proof of unfair termination on the employee while the burden for justification or proof of reasons for the termination is placed on the employer. Failure by the employer to prove or justify the reasons for the termination would lead to a finding that the termination was unfair within the meaning of section 45 of the Act. The standard of proof in both cases is on a balance of probabilities.

32. Once the employee has shown prima facie that a dismissal was wrongful or termination was unfair, the burden shifts to the employer to prove or justify the reasons for the termination.

33. The claimant in this particular case, going by his own testimony and evidence relied on by the respondent showed prima facie that the reasons for his termination were not proved to the required threshold. His alibi evidence was unshaken by the respondent and further the circumstances and place where alleged offence took place do not support the commission of the offence. The room where the offence was allegedly committed was close by to the staff room where other teachers were and the head teacher's office such that anything amiss could not have gone unnoticed.

34. The only evidence relied on by the respondent to terminate the claimant's service was the P3 form and the pupil's testimony before the disciplinary panel. The pupil informed the doctor at Njabini Health Centre and it is noted therein, that she had been defiled by her former class teacher severally and that in the last two weeks she was raped by the same teacher. Further, the P3 form was filled some 8 days after the incident.

35. The court is aware that the standard of proof in criminal case is on higher standard than civil cases however where the piece or pieces of evidence relied on could have been the same as the ones to be relied on in a criminal trial, the court must scrutinize and be satisfied that they are reliable and can be used to justify a finding in a civil claim.

36. To this extent the court is not satisfied that the evidence relied on to support the termination of the claimant's service meet the threshold of proof in civil claims. The respondent ought to have called as witness a representative from the church organization where the incident was first reported and further inquiry could have been made to establish the truth or otherwise of the allegation that the accusations against the

claimant were made up and intended to make the pupil qualify for bursary for her education from a charitable organization.

37. The consequence of the respondent's decision were serious in that they meant the claimant losing his job and being struck out from the Register of Teachers. It therefore ought to have proceeded with care and caution and only acted on more probable evidence.

38 The court therefore returns a verdict of unfair termination and hereby awards the claimant eight months' salary as compensation for unfair termination. The claimant's exit salary is not stated in the pleadings the same shall be calculated on the salary at the time of termination. The award shall be subject to taxes. The court further orders the reinstatement of the claimant to the teacher's register with no obligation on the respondent to offer the claimant employment.

39. The claimant shall further have costs of the suit.

40. It is so ordered.

Dated at Nairobi this 6th day of May, 2020

Abuodha Jorum Nelson

Judge

Delivered this 6th day of May, 2020

Abuodha Jorum Nelson

Judge

In the presence of:-

.....for the Claimant and

.....for the Respondent.

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