



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

INDUSTRIAL CAUSE NO. 345 OF 2014

(Before Hon. Justice Mathews N. Nduma)

MUNG'AU SANG'ALO THOMAS.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

JUDGMENT

1. The suit was filed on 8th December 2014 by the claimant praying for or an order in the following terms: -
 - a. The respondent to reinstate the claimant.
 - b. The respondent to pay the claimant all his dues specified in his contract of employment from the date of interdiction to date.
 - c. The respondent to pay the claimant compensation for unlawful dismissal.
 - d. Costs of interest.

Facts of the claim

2. CW1, the claimant testified on oath. He relied on a written statement dated 28/11/2014 as his evidence. CW1 stated that he was a trained teacher and worked at Migori Girls High School. That he was employed by the respondent (herein after TSC) on 13th/3/2012 and posted to the said school.
3. On 25/2/2013, CW1 was summoned to appear before the Board of management and was informed that there was a complaint by a student named N.A.O who alleged that CW1 had canal knowledge of her.
4. CW1 denied the allegations. CW1 stated that the complainant testified before the board and CW1 was allowed to cross examine her. That another student by the name Everlyne Amollo also testified and CW1 also cross examined her. Other witnesses who testified included a Migori parish priest named Cavin Obeto who is the elder brother of the complainant and a member of the Board.
5. On 13/3/2012, CW1 was handed a letter of interdiction by the principal, May Clare Olang.
6. That on 8/5/2013, CW1 appeared before the TSC at Homa Bay County Director,s office for a disciplinary hearing. The hearing was adjourned since the complainant was absent.
7. The disciplinary hearing proceeded on 4/12/2013 and CW1 questioned the complainant and witnesses who testified. CW1 testified and denied the allegations.
8. CW1, stated that he was given another letter of interdiction dated 22/4/2013 and new charges were read to him. CW1 added that the complainant did not testify this time round but Cavin Obeto, Everlyne Omollo, deputy principal, the principal and the chairman of the Board testified.
9. On 27/12/2013 CW1 received a letter dated 10/12/2013 in terms of which the complainant was dismissed from employment.

10. CW1 testified that the dismissal was unlawful and irregular and prays for the reliefs set out in the claim.
11. CW1 was closely cross examined by Mr. Anyuor for the respondent and was confronted with the detailed statement of the complainant on the facts of the alleged rape at a guest house in Oyugis. He was confronted with the allegations that he had paid hospital bills at Ndiwa Hospital for the complainant.
12. CW1 was also confronted with allegations that he called the complainant to his residence within the school compound where CW1 had slept with the student for three (3) nights.
13. Furthermore, he was confronted with the information that he had told the complainant that he was going to marry her and that CW1 would pay her university fees.
14. CW1 was also confronted with the information that after the matter was reported to the administration CW1 had caned the complainant mercilessly and as a result the complainant dropped out of school.
15. CW1 however continued to deny these allegations.
16. RW1, sister Mary Claire testified for the respondent. RW1 stated that she was the Principal of Migori Girls Secondary School, the respondent. RW1 served the school from 1997 to 2013.
17. RW1 stated that in April 2013, she was still the principal of the respondent. RW1 testified that she received a report that CW1 had a sexual relationship with a form one student at the school, named N.A.O.
18. RW1 stated that she carried out investigations and got the student to record a statement. RW1 produced the statement dated 29/1/2013. RW1 testified that she also recorded statements from other students and produced copies of these statements.
19. RW1 testified that the complainant was a class representative for Kiswahili subjects which CW1 taught.
20. RW1 testified that she reported the matter to the Board of management which proceeded to conduct investigations into the matter in a Board meeting held on 26/2/2013.
21. RW1 produced minutes of the Board meeting marked exhibit I. RW1 was the Secretary of the Board. RW1 testified that the complainant and CW1 testified before the Board and other students also testified before the Board.
22. RW1 stated that CW1 cross examined witnesses and denied the allegations. RW1 testified that the complainant narrated that CW1 had sexual intercourse with her several times.
23. The Board deliberated the matter and decided to interdict CW1 pending commencement of disciplinary proceedings by TSC. RW1 produced the letter of interdiction dated 22/4/2013 as exhibit 2.
24. RW1 testified further that TSC conducted a disciplinary hearing in which RW1, other witnesses and CW1 testified. The disciplinary hearing was held at the TSC County Offices at Homa Bay. RW1 stated that the complainant did not appear at the meeting.
25. RW1 stated that CW1 was thereafter dismissed by TSC as a teacher. RW1 said that the complainant left the school and was taken to a different school. RW1 stated that the complainant was very ashamed due to the violation and that is why she did not attend the disciplinary hearing at the TSC.
26. RW1 stated that the student was about 14 years old then. RW1 denied she had any personal vendetta against CW1 as alleged or at all. RW1 insisted that investigations and the disciplinary action were independently conducted and CW1 was correctly found guilty by the members of the board and later by the TSC disciplinary committee.
27. RW2, Lawrence Kigen testified that he was the Assistant Deputy Director Discipline Division of TSC. That RW2 received the report of the investigations and interdiction of CW1 by the Board of Management and opened a disciplinary file on the case.
28. RW2 adopted a written statement dated 15/1/2013 as his evidence in chief. RW2 produced the statement made before the TSC by RW2 as exhibit '3'. RW2 produced the minutes of the disciplinary hearing held by TSC as exhibit '4' dated 4/12/2013.
29. RW2 testified that witnesses for the complaint and CW1 testified before the disciplinary committee. That CW1 was given opportunity to ask all the witnesses questions. That CW1 was also asked questions on his testimony.
30. That the complainant did not attend the hearing because TSC was unable to get the girl to attend. RW2 testified that TSC relied on the testimony of the witnesses who testified and the record of the proceedings before the Board of Management produced by RW1 at the TSC disciplinary hearing.
31. RW2 stated that TSC dismissed CW1. That CW1 appealed the dismissal but same was confirmed on 17/3/2014 in a letter of the same date marked exhibit '5'. RW2 stated that the dismissal was lawful and fair and that the suit be dismissed.

32. Both parties filed written submissions on 16/7/2019 and 3/10/2019 respectively and the matter was reserved for Judgment on 17/2/2020.

DETERMINATION

33. The issues for determination are: -

- i. Whether the dismissal of the claimant was for a valid reason and if a fair procedure was adhered to in disciplining the claimant.
- ii. Whether the claimant is entitled to the reliefs sought.

34. The Court has carefully analysed the testimony by CW1 vis avis that by RW1 and RW2 and has come to the following conclusion on facts: -

- i. CW1, a relatively new teacher has been proved to have had a sexual relationship with his student aged about 14 years at the material time in the year 2013.
- ii. The Court is satisfied that CW1 was properly notified of the charges and was given opportunity to defend himself firstly before the Board of Management of the school concerned and later on before the disciplinary committee of TSC.
- iii. The Court is satisfied that the finding by the respondent that the claimant was guilty of gross misconduct, and the decision to dismiss the claimant from service as a teacher was a lawful and fair decision given the gravity of the offence committed by the claimant.
- iv. The court further finds that upon dismissal the claimant was given opportunity to appeal the decision internally and the appeal was heard and dismissed.

35. Accordingly, the court finds that the dismissal of the claimant from the teaching service was for a valid reason and the Board of Management in the first instance and TSC afterwards followed a fair procedure in dismissing the claimant from service.

36. Indeed, the claimant has failed to discharge the onus placed on him in terms of section 47(5) of the Employment Act, 2007 to demonstrate that the dismissal was wrongful.

37. Quite to the contrary, there is overwhelming evidence that the claimant was guilty of gross misconduct of the worst kind, in having sexual relationship with a minor student.

38. The claimant should count himself lucky that no criminal charges were leveled against him. This in Court's view was an oversight on those who dealt with the matter immediately it was reported to the school administration.

39. Accordingly, the suit lacks merit and is dismissed with costs.

Ruling Dated, Signed and Delivered at Nairobi this 25th day of June 2020.

Mathew N. Nduma

Judge

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15th March 2020, this ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 rule 1 of the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by **Article 159(2)(d)** of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under **Article 48** of the Constitution and the provisions of **Section 18 of the Civil Procedure Act (chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, *inter alia*, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

Mathews N. Nduma

Judge

Appearances

Mr. Makeli for Complainant

Mr. Anyon for Respondent

Chrispo: Court Clerk