



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT KISUMU

CAUSE NO. 326 OF 2017

(Before Hon. Justice Mathews N. Nduma)

JOB KUNSINJILU ALERO.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

JUDGMENT

1. The suit was filed on 17th July 2017, by the Claimant praying for the following reliefs:-

- a. A declaration that the termination of his services was unlawful and unfair.
- b. Payment of salary arrears from February 2016, severance pay and notice pay.
- c. Reinstatement and in the alternative payment of compensation and general damages.
- d. Interest and costs.

2. CW1 recorded a written statement dated 4th July 2017, which he adopted as his evidence in chief. CW1 testified that he was employed by the respondent (herein after TSC) on 15/2/1985 as a P I teacher. He was promoted through the ranks due to good performance until the 28/4/2004 when he was promoted to ATS IV grade with effect from 1/1/2004 and posted to Lubambo primary school.

3. The claimant continued in different schools and the last school served was Itulubini primary school where he was head teacher until the 2nd December 2016, when he was dismissed from service.

4. CW1 testified that on 10/2/2016, he was charged with the offence of defilement in that he had defiled "RA" a pupil aged 12 years contrary to section 8(1)(3) of the sexual offences Act.

5. CW1 was arrested detained and prosecuted for the said offence in Kakamega CM S.O No. 22 of 2016.

6. CW1 was acquitted on 3/10/2016 under section 215 of the Criminal Procedure Code. The Judgment delivered on 3/10/2016 was produced as evidence before court.

7. Meanwhile on 4/3/2016, CW1 was served with a letter of interdiction on even date and on 2/12/2016 the claimant was served with a dismissal letter dated 2/2/2016 for having forceful sexual intercourse with "RA" a class 4 pupil of Ishieywe primary school on Wednesday 10/2/2016 between 7.00 pm and 8.00 pm while he was a head teacher at Itulu (B) Primary school.

8. Upon acquittal, CW1 wrote to the respondent through his advocates requesting the respondent to reconsider the dismissal. The respondent did not revisit the dismissal hence the suit.

9. CW1 testified that the allegations by the minor pupil were false since on the material day, CW1 was in Nairobi attending his son's graduation.

10. CW1 said that at the time of dismissal he earned Ksh. 38,662 as per the pay slip he produced before court.

11. The claimant prays to be awarded as prayed stating that he had an outstanding career for many years which had been taken to waste on account of false allegations.
12. The respondent filed a response to the claim on 7th August 2017. RW1 Margatet Lieru Ambala testified for the respondent.
13. RW1 stated that she was the Curriculum Support Officer Kakamega Central Sub – County. That in the year 2016 she was based in Ikholumani South. RW1 adopted a written statement dated 5/3/2019 as her evidence in chief. RW1 testified that an anonymous call was made to the office that the head teacher of Itulu (B) primary school had defiled a pupil in standard 4 at Ishewe primary school.
14. The District Education Officer authorized a panel to be constituted to investigate the matter. RW1 was in the panel. RW1 stated that the panel conducted investigations and compiled a report she produced in court as exhibit 'I'.
15. RW1 stated that they interviewed CW1, the pupil concerned, one Emma, the guardian of the pupil who was also a grandmother of the pupil and the wife of CW1 called Deborah.
16. RW1 testified that the panel found that CW1 had defiled the pupil. That the panel recommended the pupil to be taken for counseling and be allowed to continue with education. That the panel recommended disciplinary action to be taken against CW1.
17. RW1 testified that TSC constituted a disciplinary committee which heard the claimant's case. RW1 was called as a witness by TSC on 12/7/2016 but matter was deferred to 10/10/2017. RW1 stated that CW1 and RW1 testified before the panel. RW1 testified that CW1's wife had called the pupil to their house to take maize to the grinding mill.
18. That CW1 waylaid her and raped her whilst she came from the mill. RW1 stated that CW1 had opportunity to rape the pupil since he was at the house and not at Nairobi on the material evening.
19. RW1 stated that CW1 had first said he had attended a KNUT meeting on the day but contradicted himself later by saying that he had attended his son's graduation ceremony at Nairobi which was to take place on 12/2/2016.
20. RW1 stated that she had no information about the Criminal trial in respect of the CW1. RW1 said that they were satisfied that CW1 was at the scene of the crime on 10/2/2016 and not at Nairobi as he alleged.
21. RW2, Pricila Nyoro testified that she was Deputy Director Discipline at the TSC. RW2 stated that she received letter of interdiction of CW1 dated 4/3/2016 from the TSC county Director, Kakamega. RW2 constituted the disciplinary panel, prepared charges against CW1 and summoned him to appear which he did to defend himself. RW1 testified that the defiled pupil, RW1 and CW1 attended the hearing. The investigation team also attended and produced the investigation report.
22. RW2 produced the minutes of the disciplinary hearing. RW2 told the court that the pupil testified that CW1 way laid her between 7.00 pm to 8.00 pm outside the compound and defiled her there after the wife of CW1 sent her to the maize mill to get maize flour.
23. RW2 stated that CW1 did not produce documentary or any evidence that he had travelled to Nairobi at the material time. In particular, CW1 did not produce a letter excusing him from work to travel to Nairobi during week days. RW2 testified further that CW1 visited the grandmother of the pupil asking her to drop the case. RW2 said that TSC found CW1 guilty of defilement and TSC dismissed him lawfully and fairly since CW1 had opportunity to defend himself but failed in that endeavor, RW2 produced the record of the disciplinary hearing proceedings.
24. RW2 stated that CW1 had not gotten certificate of service yet. RW2 said that he had not participated in the criminal trial of CW1 and was not aware that CW1 had been acquitted of the same charges by a Magistrate court. RW2 said that CW1 was a good teacher with a good record but this was his first offence. RW2 downplayed the issue raised on the time when defilement took place stating that the wife of CW1 had sent the pupil in the evening and the rape took place whilst the pupil was returning from the mill.

Determination

25. The issues to be determined are:-

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

26. The offence the claimant was accused of is probably the most serious and heinous/misconduct a teacher may commit in the course of duty.

27. CW1 was accused of defiling a 12 years old pupil from a neighboring school. CW1 was a headmaster of long standing and in the words of RW2 had a good work record for the many years he had served the TSC. Indeed, CW1 was employed as a teacher on 15/2/1985 and in the words of RW2 he had a clean record for the many years he had served the TSC. In the words of RW2 he had a clean record until TSC found him guilty of defiling a pupil in the year 2016.

28. CW1 testified under oath and denied having committed the alleged offence. CW1 stated that he had been tried by a competent magistrate court and on the same facts was acquitted. CW1 further provided an alibi that on the material date he could not have committed the offence

of defilement because he had travelled to Nairobi to attend a pass-out parade of his son at Kiganjo.

29. The claimant produced the Judgment of the trial magistrate but did not produce any evidence that he had indeed travelled to Nairobi on the material day.

30. Investigations conducted prior to the suspension of CW1 from work according to RW1 and RW2 clearly demonstrated that CW1 had waylaid the pupil whilst coming from a maize mill to which the pupil had been sent by the wife of CW1. Several persons had testified during the investigations and the claimant was given opportunity to defend himself.

31. Similarly, the claimant defended himself before the TSC panel that held disciplinary proceedings against him and CW1 was found guilty of gross misconduct for defiling a 12 year old pupil.

32. It is trite that an acquittal in a criminal trial does not exonerate a person from being found guilty in civil proceedings including disciplinary proceedings in which the standard of proof is much lower than that which appertains in a criminal trial.

33. That CW1 had been found not guilty of Criminal defilement by the Kakamega Magistrate Court does not by itself exculpate him of civil liability or provide him with immunity against internal disciplinary action. ***See Industrial cause No. 1492 of 2011 David Kemei – VS- Energy Regulatory commission (2013) eKLR per Justice Rillaand Clement Mutiso Muinde – VS- British American Ins. Co. Industrial cause No. 14150 of 2011 per Rillas.***

34. This court has evaluated the testimony by CW1 vis a vis that by RW1 and RW2 and the court has come to the conclusion that there is sufficient evidence to support the finding by TSC that CW1 had indeed waylaid a 12 year old pupil and had canal knowledge of her forcefully whilst she was coming from an errand to which she had been sent by the wife of CW1.

35. The Court finds that the misconduct had been proved on a balance of probabilities.

36. It cannot be doubted that a lengthy due process was followed in investigating the offence and the eventual holding of a disciplinary hearing by TSC. CW1 participated fully in the investigation and the disciplinary hearing. The court is satisfied that due process was properly followed in the matter. CW1 was given opportunity to defend himself which he did.

37. The defence was however not satisfactory hence the finding of guilt by the disciplinary panel of TSC.

38. Accordingly, the court finds that CW1 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.

39. To the contrary TSC clearly rebutted the evidence by CW1 and demonstrated that it had complied with the provisions of section 41, 43 and 45 of the Employment Act 2007 by showing that it had a valid reason to dismiss the claimant after following a fair procedure.

40. The court finds therefore that the dismissal was lawful and a fair procedure was followed by the respondent.

41. However, TSC through RW2 testified that the Claimant had served diligently and had a clean record between the year 1985 and 2016 before he committed the alleged offence.

42. The Claimant had served TSC therefore for a period of 31 years in which he was a permanent and pensionable teacher. Pension funds had accumulated and accrued in his favour for a period of 31 years. The pension is meant to cushion an employee and members of his family upon retirement.

43. The principle of legality militates against retroactive application of punitive measures on a person for an offense or misconduct committed after the fact,

44. It cannot be disputed that pension fund is accumulated and accrued separately in an independent fund on a day to day basis until the date of retirement.

45. It is the considered Court's opinion and finding that it is unconscionable to deny an employee pension due and owing to the employee for the benefit of his innocent family, if not for himself.

46. I have in several cases found that regulations that purport to deny an employee pension retroactively due to an anticipated offence, violates Articles 40 and 41 of the constitution of Kenya 2010.

47. In particular Article 40 gives every person a right to own property. Property in this matter include accrued pension over many years. TSC, which is a government organ is prohibited from depriving a person property duly worked for by the person, in this case, accrued pension for reasons not provided under sub – articles 40(3) (a) 8 (b) (i) & (ii). Acquisition of pension does not become unlawful by fact of a person committing a work related misconduct many years down the line.

48. In the present matter, the decision by the Magistrate Court which acquitted the claimant of the offence of criminal defilement comes into play in weighing the Justice of the matter. The Magistrate court had given the claimant benefit of doubt even though applying a lesser burden of proof this court has found that the claimant was guilty of misconduct.

49. Article 41 on the other hand gives every person a right to fair labour practices. It is the court's considered view and finding that retroactive deprivation of an employee of pension accumulated over thirty-one years by an employer is unfair labour practice.

50. Accordingly, this court commutes the dismissal of the claimant to a normal termination of employment and directs TSC to facilitate the processing and payment of pension to the claimant with effect from the 2nd December 2016, the date of termination.

51. For the avoidance of doubt, the rest of the reliefs sought by the Claimant lack merit and are dismissed.

52. The parties to meet their own costs of the suit.

Ruling Dated, Signed and Delivered at Nairobi this 16th day of July 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:

Chrispo: Court Clerk