



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT

AT NAIROBI

CAUSE 1966 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 27th October, 2020)

MUCHIRI KIRAITHE.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

JUDGMENT

1. The Claimant Muchiri Kirathe instituted this suit vide a Memorandum of Claim dated 2nd November 2015 against the Respondent, Teachers Service Commission for wrongful and unfair interdiction. He avers that he was interdicted by the Respondent through the Secretary of the Board of Governors of Bathi Secondary School, by a letter dated 16th July 2012 followed by another dated 8th August 2012. The facts leading to his interdiction were that he had queried the handling of the 2011 KCSE examinations by the Principal and the Board of Governors of Bathi Secondary School which led to massive failure in the subjects he had taught. This is after candidates with fee arrears delayed sitting for the exams and ended up doing the chemistry practical with chemicals of questionable quality.

2. The Claimant annexes to his Claim an audio CD recording evidencing a conversation he had with the principal who also threatened him in front of the other teachers, and which threats he reported at Kimende police post under OB No. 20/14/6/2012.

3. He avers that the said interdiction was based on various allegations including desertion of duty, negligence of duty and infamous conduct and contends he has been an advocate of good governance and transparency in the education sector. That upon invitation he filed a defence against the interdiction in disciplinary case number 0056/07/2012/2013 but was not given an opportunity to make representations. That he was then suspended without pay vide a letter dated 18/10/2012 and he filed an appeal which was dismissed and that he also made a follow-up to the dismissal of his appeal vide a letter dated 05/01/2015.

4. He further avers that his salaries from June 2012 were stopped contrary to **Regulation 68 of the TSC Code of Regulations for Teachers**, which provides for payment of half salary during the period of interdiction. That based on the wrongful interdiction, he consequently suffered financial loss especially on loan interests and post graduate degree studies and the Respondent also denied him study leave and prospective career development.

5. The Claimant thus seeks to be paid:-

i) Salary for the 12 months that he had been wrongfully suspended amounting to Kshs. 879,240/-

ii) Loss incurred due to inability to complete post graduate studies at Kenyatta University amounting to Kshs. 200,000/-

iii) Loss incurred due to lack of promotion after graduating with 1st degree at Kenyatta University on July 2008 amounting to Kshs. 403,200/-

iv) Loss incurred due to inability to service loans amounting to Kshs. 1,113,219.30/-

v) Interest of the above amounts.

vi) Damages arising from wrongful disciplinary action.

6. The Claimant prays for award and orders against the Respondent for: a declaration that the disciplinary actions him were irregular, unfair

and in breach of the Employment Act and the Code of Regulations for Teachers; payments as sought herein above (i to vi); and any other/further relief that this Court may deem fit to grant in the interest of justice.

7. In his witness statement made on 2nd September 2019, the Claimant states according to the 2005 TSC Code of Regulations, the functions of interdicting a teacher accused of desertion falls directly under the Commission and therefore the Board and the principal unlawfully interdicted him. That all the other actions that followed thereafter by the Respondent were consequently illegal.

8. He further states that he reported some of the issues the school had with the Respondent, the Ministry of Education, the Parliamentary Committee on Education, the EACC and the National Commission on Administration of Justice. That one of the issues he reported was the charging for remedial lessons which was by then outlawed but his report to the Respondent was however ignored.

9. He contends that had the Respondent not intentionally violated the law, he would have retired upon attaining the mandatory 60 years, after having lectured at the university for 5 years thus achieving the self-actualisation stage in accordance with Maslow's Hierarchy of needs.

10. The Respondent filed a Defence dated 29th April 2016 averring that its contract with the Claimant was governed by the Teachers Service Commission Act, Cap 212 (Repealed by Act No. 20 of 2012), the Code of Regulations for Teachers (COR) and the Teachers Service Code of Conduct and Ethics, 2005 as well as the Labour Laws in force in Kenya. It states that the Claimant is now retired from the Commission's service upon attaining the mandatory age of retirement.

11. It avers that after the Commission received through its agents the allegations levelled against the Claimant, the Head teacher at Bathi Secondary issued the Claimant with a show cause letter dated 13/06/2006 in accordance with the COR. That the Claimant was invited to appear before the Board to answer to the allegations of professional misconduct vide a letter dated 18/06/2012 but he neglected and/or failed and/or refused to appear before the Board on the scheduled 22/06/2012. That the Board nevertheless reviewed the documentary evidence collated and presented before it setting out the various allegations against the Claimant, including the numerous warning he had received and resolved to interdict him for material breach of the COR. It further avers that the Claimant failed to submit his defence in writing within 21 days as indicated in his interdiction letter and that it expressly invited the Claimant for a disciplinary hearing while notifying him of the date, time and venue of the hearing and it also summoned witnesses.

12. That the disciplinary panel meeting was convened on 09/10/2012 whereupon the Claimant presented his case and cross-examined the Respondent's witnesses and after deliberations and evaluation of the statements and oral evidence, the panel directed the Claimant be suspended for six (6) months. It admits receiving the Claimant's appeal against the decision to suspend him but avers that due to challenges of constituting a full Commission, a Review Board had not been created for purposes of hearing appeals from decisions of the Discipline Committee. That the Claimant was upraised accordingly vide a letter dated 12/02/2014 and that when his appeal was eventually considered on or about November 2014, it upheld the decision to suspend him for material breach of the COR and which decision was communicated to him vide a letter dated 24/11/2014. It further avers that the Claimant was reinstated to employment and was posted to Githithia Girls Secondary School after serving the suspension period.

13. It is the Respondent's averment that the Claimant is misleading this Court and that the electronic evidence adduced in support of the Claimant's assertion is misplaced and not in any way related to the discipline case that led to his suspension. It contends that the Claimant's promotion to a higher job group is not pegged on attainment of higher education qualifications but is through a rigorous process of recruitment and selection. That ever since the Claimant graduated, his salary has been progressed accordingly and payments are up to date and that it is not its fault that the Claimant has never applied to be considered for any advertised vacancy or participated in an interview for a vacancy that he is qualified to fill. It also avers that the Claimant was duly informed of the reason why his request for study leave was denied and that the Claim herein discloses no reasonable cause of action, is vexatious, frivolous scandalous and is an abuse of the court process. The Respondent prays that the suit be dismissed with costs to it.

Evidence

14. The Claimant testified in court that another accusation made against him in the interdiction letter is smoking tobacco near the teachers' toilet which he contends was fabricated by the Respondent and that he has a lab report showing he had never taken narcotics. He stated he was not allowed access in the school after his interdiction.

15. He confirmed attending the disciplinary hearing and trying to explain and further stated that he was entitled to promotion upon getting his second degree but was never promoted. He relies on all the documents produced in court as exhibits. Under cross-examination, he stated he did not honour the Board's invitation to appear before it because the principal had threatened him and confirmed that he admitted not attending morning assembly during his disciplinary hearing. He further stated that he was interdicted in 8 days instead of 14 days as per regulations. In re-examination, the Claimant stated that the Respondent did not call any witness who saw him smoking and that he was never invited for hearing of his Appeal.

16. RW1, Lawrence works for the Respondent as Assistant Director in the Discipline Division and relied on the Witness Statement he made on 06/12/2019 and filed on 10/12/2019 as his evidence. He stated that the Claimant did not produce any medical report during his disciplinary hearing and did not object to the manner the said hearing was done. That the Claimant was allowed to cross-examine the witnesses and further stated that the Claimant was not given study leave as he was the only Chemistry teacher in a double streamed school and had further come from suspension. That the Claimant's salary was adjusted when he got a degree but the same did not qualify him for an automatic promotion.

17. RW2, Evans Nyambati adopted his filed witness statement dated 06/12/2019 as evidence in court and testified that the Claimant always reported late after 8am and when he raised the issue with the Claimant, he would say that working hours start at 8am. Under cross-examination, he stated he had a record where teachers sign in and out but which was not in court and that he had found the Claimant sniffing tobacco many times, for which he gave him a show cause but the Claimant never responded. In re-examination, he stated that the Claimant used to report at 8.15am when on duty.

18. In his Memorandum of Claim, the Claimant submits that the decision to interdict and suspend him was unlawful and unjustified as he was never given a chance by the Respondent to make any representations on the allegations against him contrary to **Sections 41 and 45 of the Employment Act** as read together with **Regulation 66 (3) (a) and (b) of the Code of Regulation for Teachers**. That the Respondent's actions breached the rules of natural justice and were biased, malicious and aimed at victimising him and that the dismissal of his appeal was without legal justification or factual basis. That the Respondent also failed to comply with the dictates of the Employment Act 2007 and the Code of Regulation for Teachers during his alleged interdiction. He further submits that the unjustifiable interdiction and suspension amounts to unfair labour practices contrary to the express provisions of **Article 41 of the Constitution**.

Respondent's Submissions

19. The Respondent submits that it has proved the allegations against the Claimant which fundamentally breached the contract between the Commission and the Claimant and that therefore the suspension was proper and well within its powers and the law. That the Claimant was further subjected to a fair disciplinary process as under **Regulation 66 of the then Code** that adhered to rules of natural justice as demonstrated in its defence herein and that the Claimant was convicted on his own plea of guilt. Further, that the threshold of an administrative hearing as envisaged under the Employment Act, TSC Act and the then Code was strictly adhered to.

20. It is the Respondent's further contention that its action to interdict and suspend the Claimant was based on fair reason and that there was a prima facie case to warrant the interdiction and subsequent disciplinary action against the Claimant. That it is noteworthy that the Claimant's history of professional misconduct (infamous conduct and negligence of duty) had severally been made known to him and for which he had been cautioned by the Respondent's agents. That the Claimant's behaviour was contrary to the provisions of **Regulation 65 of the Code** and that this Honourable Court ought to uphold that the reason for the Claimant's suspension was valid and lawful.

21. It also submits that the Respondent is a quasi-judicial body whose proceedings must not be compared to those of a court of law created under the Judicature Act and the Constitution. That the same was observed in **Civil Appeals No (S). 26 & 27 of 2012: Bett Francis Barngetuny & Another vs. Teachers Service Commission and Another**, where the Court of Appeal held that if an employer has conducted disciplinary proceedings fairly in accordance with statutory or laid down regulations, a court of law should exercise great caution before it interferes with the employer's findings.

22. The Respondent further submits that the standard of proof in cases of professional misconduct is not proof beyond reasonable doubt as is required in criminal cases. It relies on **Judicial Service Commission v Gladys Boss Sholei & another Nairobi Civil Appeal No. 50 of 2014** to submit that it would thus be erroneous to impose the strict rules of evidence on its disciplinary hearings.

23. On the Claimant's assertion that he was denied his right of appeal as he was not given an opportunity to be heard in person during the appeal, the Respondent submits that the Commission did not require to hear him in person during the appeal unlike the disciplinary hearing. That the representations made by him in writing on his appeal were sufficient for the purpose of discharging the appeal.

24. The Respondent submits that the Claimant is not entitled to any salaries and attendant allowances for the period he was under interdiction and suspension, pursuant to **Regulation 68 and 66 (6) (b) of the COR** and that the prayer must fail. It asserts that salary only accrues to an employee who has rendered quantifiable service and in this case the Claimant did not render any service from June 2012 to May 2013 and is thus not entitled to payment of remuneration for that period. It further submits that the reliefs sought by the Claimant for his inability to service loans, inability to complete studies and not being promoted after his first degree are misconceived and lack basis and that it cannot be prejudiced for exercising its disciplinary control over its employees. On the prayer for general damages or compensation for wrongful disciplinary action, the Respondent submits that statute does not give room for general damages in employment matters and that since the Claimant did not lay any basis for compensation the same must fail.

25. I have examined the evidence and submissions of the Parties herein. The issues for this Court's determination are as follows:-

- 1. Whether the decision to suspend and interdict the Claimant was based on fair reasons and upon due process.*
- 2. Whether the Claimant was denied his right of appeal during the disciplinary process.*
- 3. Whether the Claimant is entitled to the remedies sought.*

1st issue

26. The Claimant has averred that he was a good teacher and was concerned with good governance and transparency in the education section. He avers that he reported issues of charging for remedial classes and this is what escalated his problems.

27. The Claimant exhibited a number of exhibits. The claimant was served with a letter of interdiction dated 16th July 2012 and another of 8th August 2012 alleging desertion of duty, negligence and infamous conduct.

28. Before this, on 13/6/2012, the Claimant was served with a letter by the Principal Bathi Secondary School indicating a number of misconduct including inciting students to reject remedial teaching, calling the Head Teacher a criminal, incompetent and other unrespectable terms, sniffing tobacco in the school compound and being against school co-curriculum activities and games amongst other complaints.

29. He was asked to explain why disciplinary action should not be taken against him. The response was to be received within 3 days. There is no indication that he responded to this show cause letter.

30. He was thereafter on 18/6/2012 to appear before BOG over the incitement and insubordination allegation vide a letter of 18/6/2012. He

was expected to appear before the BOG on 22/6/2012 at 11 am.

31. On 22/6/2012, the claimant failed to appear before the BOG and the BOG resolved to interdict him and the Head Teacher was mandated to write to him the interdiction letter. The Claimant admits that he failed to attend to the BOG invite.

32. The Respondents aver that they subjected the Claimant to a proper disciplinary process as provided under Regulation 66 of the Code.

33. Regulation 66(1) & (2) of the Code of Regulation of Teachers (Revised 2005) states as follows:-

1) "Powers of the Commission

The Commission shall in accordance with the Section 8(3) of the Act refuse to register an unsuitable teacher and/or remove such a teacher from the register.

2) Letter of Interdiction

Where it comes to the knowledge of the Commission or its Agent and it is alleged that a registered teacher should be removed from the register because he/she is an unsuitable person to be a teacher, on any of the following grounds he/she:-

a) is not of good moral character,

b) has been convicted for a criminal offence which, in the opinion of the Commission, renders him/her unfit to be a teacher,

c) is guilty of infamous conduct in any professional respect,

d) has been engaged in any activities which, in the opinion of the Commission, are prejudicial to peace, good order or good government in Kenya,

e) has deserted duty,

f) has mismanaged/misappropriated public funds,

g) has submitted forged documents to the Commission or its Agents.

The Commission or the Agents will serve the teacher with notice of interdiction in the form prescribed in Schedule XXXVIII.

34. Indeed, under the Regulation 66(2) the power to interdict is vested in the Commission or the Agents as prescribed in Schedule XXXVIII.

35. The letter of interdiction was served upon the Claimant herein by the Head Teacher who is a Teachers Service Commission Agent.

36. Section 2 of the Regulation defines an agent as anybody or person appointed by the Commission in accordance with Section 4(1)(b) of the Act (TSC Act).

37. Section 4(1)(b) of the then TSC Act gave the Teachers Service Commission power to delegate any of its power to any, body or any person with the consent of the Minister.

38. The Claimant contended that the Head Teacher did not have power to interdict him and therefore any action taken after the interdiction was unlawful.

39. Indeed as submitted by the Claimant, there is no indication that the Teachers Service Commission had delegated its powers to interdict upon the Head Teacher who wrote the interdiction letter.

40. Following the interdiction of the Claimant, he was invited for a disciplinary hearing by the Teachers Service Commission vide a letter dated 11/09/2012 on 9/10/2012 at 8.30 am.

41. The Claimant attended the scheduled hearing on 9/10/2012 whereupon a decision was made to suspend him for 6 months.

42. He avers that his suspension was also unlawful as it violated the Code of Regulations for teachers 2005. The claimant appealed against the suspension and this was never heard in time. He received a communication on his appeal vide a letter of 24/11/2014.

43. I have set out the chronology of events in this matter in order to ascertain whether there were valid reasons to institute the disciplinary processes against the Claimant and whether due process was followed.

44. The Claimant was asked to show cause for committing 3 offences as set out in the body of this judgement. The 1st one was about

absconding duty, negligence of duty and infamous conduct.

45. The reason assigned to absconding duty relate to the fact that he arrived at school at 8 am and left at 5 pm and refused to participate in any activities beyond these timings. The claimant accepted this fact and exhibited the Basic Education Act, which indicated the school working hours were from 8 am to 5 pm.

46. On issue of unbecoming conduct, he was said to have been absconding conduct sniffing tobacco in school. To this, the Claimant exhibited a report from the Government Chemist, which show that he was tested for presence of tobacco in his blood and the test was negative. In this respect, the Respondent did not prove that the Claimant was actually sniffing tobacco in school.

47. The only reason that however fits in the interdiction reasons is the issue of negligence of duty and for which the Claimant admit he did not attend school beyond the times he was asked for including attending school assembly.

48. In the circumstances then there were some valid reasons that would have led to the Claimant's disciplinary action.

49. Now on the process as discussed above, the process was commenced properly by the Head Teacher but the Claimant refused to respond to the accusations against him.

50. The interdiction letter however was written to the Claimant by the Head Teacher, yet only an agent of the Teachers Service Commission would have been able to do so.

51. The Respondents have not produced any evidence that the Head Teacher had been delegated the duty of being a Teachers Service Commission agent by the Respondent. In the circumstances, it is my finding that the process was flawed ab initio

52. The Claimant averred that he appealed against the Respondent's decision to suspend him. The Respondent admit this fact but also admit that they did not act on this appeal until 2014 dismissing the appeal and without also giving him an opportunity to be heard. In the circumstances, the Respondent breached the Claimant's right to appeal and also did not allow him an opportunity to be heard.

3rd issue – Remedies

53. Following the above finding, I find that the Claimant is entitled to the following:-

1. Salary for the month of June 2012 to May 2013, when the Claimant was on suspension = $12 \times 73,270 = 879,240/=$

2. Damages due to wrongful disciplinary process equivalent to 8 months' salary = $8 \times 73,270 = 586,160/=$

TOTAL = 1,465,400/=

Less statutory deductions

3. The Respondent to pay costs of this suit plus interest at Court rates with effect from the date of this judgment.

Dated and delivered in Chambers via zoom this 27th day of October, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Chege for Claimant – Present

Respondent – Absent