

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

CAUSE NO. 31 OF 2018

(Formerly Nyeri ELRC Cause No. 43 of 2014)

JOSECK MUTHURI MWARANIA.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

JUDGMENT

1. This is the case of a teacher named Joseck Muthuri Mwarania. He worked as such for the greater part of his life until the teaching career was cut short in the year 2003. At the time he was teaching at Tharaka Boys Secondary School. His suit against the Respondent was commenced on 2nd December 2004 at the High Court of Kenya at Meru as Civil Suit No. 98 of 2004. It was later transferred to this Court when the new Constitution established this Court and a Judge posted to Nyeri. Subsequently when the Court begun sittings in Meru the case was domiciled at the Meru registry hence the two numbers at the head of the Judgment. It has taken 16 years for the case to be concluded and it is regretted that it has taken this long to be determined. In the claim he filed, he sought to recover for the unprocedural and unfair dismissal from service. He asserts that he was not notified of the proceedings and without due regard to the relevant regulations and without him being afforded the opportunity of being heard in person. He averred that the Respondent did not hear his appeals and the proceedings commenced against him were malicious. He sought a declaration that the dismissal was unlawful as the proceedings were irregular, improper, null and void. He prayed for the setting aside of the proceedings culminating in his removal from the Respondent's register as a teacher and for payment of his entitlements from the date of removal. He sought costs, interest and any other relief the Court may grant.

2. The Respondent was opposed to the suit and filed a defence in which it denied that the dismissal of the Claimant from its employ was malicious. The Respondent denied that the removal of the Claimant from its register and the hearing of the appeals were not irregular, improper or null and void. The Respondent averred that the Claimant was accorded an opportunity to present his case but deliberately or otherwise failed to present himself. The Respondent asserts that the Claimant was the author of his own misfortune and he is not entitled to any of the reliefs he seeks in his claim. The Respondent sought the dismissal of the Claimant's suit with costs.

3. When the suit was transferred to this Court by the High Court at Meru in 2014, the parties filed pleadings in accordance with the Rules of this Court. They included documents and evidence as required under the Rules but maintained the gist of their respective cases. I will not rehash their rival positions but will where necessary and relevant delve into the evidence attached. The Code of Regulations for Teachers (Revised 1986) (hereafter referred to as CORT here necessary) was attached and even a copy of the latter version of the document was availed. The Board of Management interdiction letter issued by the Head Teacher Tharaka Boys Secondary School was also produced as were the invitation letters for the disciplinary panels convened on 19th August 2003, 14th October 2003, 17th December 2003 as well as minutes of the meetings and the decision of the appeal panel in early 2004.

4. The Claimant and a witness for the Respondent testified at Meru and thereafter submissions were filed. The gist of the Claimant's testimony was that the head teacher at the School where he deputized was jealous of his performance the subjects – agriculture and biology as opposed to the head teacher's dismissal performance in physics causing some rivalry to develop and a vendetta against him by the said head teacher. His dismissal followed a series of complaints on absenteeism and insubordination which he said were unfounded as his attendance booklet showed he was not absent on the dates he is alleged to have been absent and there were classes he taught on the days he is alleged to have been absent. He asserts that the invitations to attend the disciplinary panel hearings were not delivered to him and that on the last hearing he was unwell and arrived at Nairobi late only to find that the disciplinary panel had proceeded in his absence despite his making efforts to contact the TSC headquarters. He said his dismissal was without basis as the complaints raised against him were as a result of the insecurities of the head teacher who wanted to ensure the Claimant was removed from service. The Respondent's witnesses Peter Mwangi Nyaga the former principal (headteacher) who supervised the Claimant at Tharaka Boys Secondary School. He testified that he was not jealous of the Claimant and that in fact, the Claimant was chronically absent and did not teach as required leading to the letters issued in warning and the subsequent interdiction and disciplinary hearings culminating in the Claimant's dismissal. He denied having any vendetta against the Claimant and denied having it in for the Claimant. He said that the Claimant was the one who authored the lesson plan and it was that – a plan but was not evidence of actual teaching undertaken. He testified that he was a TSC agent and only TSC could discipline the teacher. The second defence witness Lawrence Kigen testified that the Claimant's dismissal was informed by the Claimant's breach of the contract he had with the Respondent by refusing to undertake supervision of exams which was deemed a fundamental breach of contract as well as the failure to attend the disciplinary panel hearings scheduled in his case.

5. Parties filed submissions and in the Claimant's submissions the Claimant asserted that the notice to show cause did not give him sufficient time to prepare a response as the time given to respond was less than the stipulated 14 days per the code of regulations for teachers. The Claimant took issue with the final show cause letter dated 21st January 2002 which gave an indication that the Claimant was absent on future dates – 28th January 2002 and 29th January 2002. The Claimant submitted that the warning was a form of punishment and interdiction and dismissal were therefore untenable as he had been punished for the alleged offences and could not be punished again. The Claimant thus sought the award of the sums claimed in the suit as well as costs.

6. The Respondent in its submissions was of the view that the Claimant was not merited in his claim as there was basis for the interdiction and subsequent dismissal for chronic absenteeism, insubordination and negligent performance of his duties. The Respondent submitted that the Claimant's case was presented before the BOM of the school in tandem with the provisions of the CORT and that the prior warnings as well as the records on indiscipline were considered before the dismissal. The Respondent asserted that all the processes were followed and that the Court in assessing the Claimant's case should be guided by the applicable law at the time and not the new law. The Respondent cited the case of **Gerald Muli Kiilu v Barclays Bank of Kenya [2014] eKLR** where the Court of Appeal held that the Claimant could not seek remedies under the new Act that were not available in the repealed Employment Act. The Respondent submitted that the repealed Employment Act under Section 17 made provision for circumstances under which an employee may be summarily dismissed. The Respondent also relied on the case of **Kenya Ports Authority v Festus Kipkorir Kiprotich [2014] eKLR** where Rika J. held that under the repealed Employment Act the employer was permitted to terminate the contract at will without cause subject to the employer's rules and regulations in place. The provisions of CORT 26(1) were cited in aid of the submission that the uncontroverted facts in this case were that the Claimant refused to undertake supervision of national examinations assigned to him by the employer and that during the trial before the disciplinary panel all the allegations against the Claimant were proved. The Respondent submitted that the prayers the Claimant sought in regard to the teachers register were misplaced as the Teachers Service Appeals Tribunal and the Teachers Service Commission were distinct and separate legal entities with capacity to sue and be sued and also because no evidence was tabled before court to prove that the Claimant's name was removed from the Register of Teachers. The case of **Julius Situma v Teachers Service Commission [2015] eKLR** was cited for this proposition. The Respondent submitted that the discharge of the Claimant was justified and therefore the suit should be dismissed with costs to the Respondent as it was devoid of merit.

7. The Claimant was colourful in his description of his supervisor asserting that the head teacher/former principal suffered from an inferiority complex. From the proceedings before the court and the plethora of letters that the two exchanged, it was clear the principal and the Claimant had some beef that resulted in a letter being issued with future dates for the alleged chronic absenteeism. The Respondent was sucked into a vortex that was crafted by years of disrespect and disregard for the truth exhibited by the two antagonists. The Claimant was the one who suffered the brunt of the dishonesty as he was accused of being absent on two dates in the future when he was served with the show cause letter of 21st January 2002. Regarding the invitations to attend the disciplinary panel hearings, the Claimant was less than forthright in his inability to attend the hearings. On one occasion he left present day Meru County and failed to reach the TSC Headquarters in time to attend the hearing. He however was handicapped on other occasions as there was no proof he was given the letters of invitation by his main protagonist the former head teacher. In the final analysis, I find that though there could have been basis for the dismissal from service, the manner in which the Respondent handled the issue left a little more to be desired as the Claimant was not heard before he was condemned and dismissed without benefit. The law applicable at the time was however the Employment Act cap 226 (now repealed) which did not make the same provisions as the present Act does. In the previous legal regime as Rika J. pointed out in the appeal case of **Kenya Ports Authority v Festus Kipkorir (supra)**, the employer had the right to dismiss at will. In the case before me, the Claimant sought that the proceedings culminating in his dismissal were irregular, unfair, null and void. The proceedings at the TSC Headquarters were not irregular, unfair null and void. He suffered the indignity of an early exit and though the Respondent had a right to dismiss, the dismissal was in my view short of fair as the accusations against him on the show cause letter dated 21st January 2002 were in relation absenteeism in future. Though the process of arriving at the dismissal was not unfair, this singular error makes the dismissal unfair in my view. He was however given an opportunity to present his side of the case and he did so with flourish though as noted earlier he was denied the opportunity to appear by the principal who did not forward the letters to the Claimant. He ought to have joined the Teachers Service Appeals Tribunal if he felt aggrieved by the decision made to uphold the dismissal. The Appeals Tribunal did not require to hear him in person unlike the TSC disciplinary panel and the representations made in writing on his appeal sufficed for purposes of discharge of the Appeals panel. In the final analysis the Claimant is entitled to only the declaration that the dismissal was unfair and to half the costs of the suit as the larger part of his claim was unproved.

It is so ordered.

Dated and delivered at Nyeri this 17th day of January 2019

Nzioki wa Makau

JUDGE

I certify that this is a true copy of the Original

DEPUTY REGISTRAR