



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

CAUSE NO. 2169 OF 2015

(Formerly HCC 107/2009)

Before Hon. Lady Justice Maureen Onyango

JONES MUYANGA MBOLE.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

JUDGMENT

The Claimant, Jonas Muyanga Mbole filed a Plaint dated 6th March 2009 against the Teachers Service Commission. He avers that he was employed by the Respondent as a Teacher under TSC No. 215925 on permanent and pensionable terms and served for many years while enjoying merit increments on his salary until 26th September 2006 when the Respondent without any just cause and/or excuse and without giving any reasons summarily terminated his services. That the termination was irregular, unprocedural and a breach of the tenets of natural justice. That he has lost working years as a consequence of his summary dismissal which he says was ill-motivated, unlawful, malicious, prejudicial and calculated to financially and socially embarrass him. That he has also suffered loss and damage and seeks reinstatement.

He continues to aver that he was lawfully tried at Mwingi Law Courts vide Criminal Case No. 1223/2006 and was found innocent and acquitted forthwith and that the false allegations against him were meant to terminate his lawful services as a trained teacher. That despite demand and notice to sue being served upon the Respondent, it has refused and/ or neglected to reinstate him. He prays for judgment against the Respondent for:-

- a) An order directing the Defendant to reinstate the Plaintiff and payment of his full salary from September 2006 to date.
- b) Damages for loss of employment and embarrassment.
- c) Costs of this suit.
- d) Any other relief this court may deem fit and just to grant.

The Respondent filed a Defendant's Statement of Defence and Counter-Claim dated 31st March 2009 admitting that it employed the Claimant but averring that it reviewed his case and arrived at its decision based on merit. It denied all the averments made by the Claimant in his Plaint. It avers in the alternative and without prejudice that it is the Claimant who owes it Kshs.24,974.60 for salary overpayment erroneously made to him for the period 17th May 2006 to 30th June 2006 which it counterclaims. The Respondent prays that:-

- a. The Plaintiff's suit be dismissed with costs to the Defendant.
- b. Judgment to be entered against the Plaintiff for the sum of Kshs.24,974.60 as claimed in the counterclaim.
- c. Interest on (b) above at current court rates.
- d. Any other relief deemed just and fit to grant by the Court.

The Claimant filed a Reply to the Defence and Counter Claim dated 3rd April 2009 denying that there was any overpayment ever made to him.

Upon this matter being transferred to this Court, the claimant filed a Statement dated 22nd September 2016 stating that he was employed on 23rd January 1985 and has a clean record having taught in various schools at Mwingi. That he was dismissed on unfounded rumours that he had an affair with a Class 8 girl which allegations were false and that the procedure adopted to dismiss him from employment was unlawful and unprocedural. That he was not accorded fair hearing and that the Respondent and its agents are biased against him.

The Respondent filed a Witness Statement of its Assistant Deputy Director Discipline, Lawrence Kigen on 3rd October 2016. In the statement Mr. Kigen states that while the Claimant was serving at Nduvani Primary School, the Commission received a complaint of sexual abuse of school girls at the said school. That the District Education Officer (DEO) at the Ministry of Education then assigned an investigating officer, Mr. Ndumbu, who undertook his role by interviewing and collecting witness statements. He then convened the School Management Committee. That based on the findings, the DEO proceeded to interdict the Claimant on the grounds of immoral behaviour. That when the Claimant was allowed to defend himself, he wrote a statement denying all the allegations.

That the Claimant was invited for a disciplinary hearing through a written invitation dated 17th August 2006 which he attended and was given an opportunity to cross-examine the witnesses present before the panel. That when the decision of his dismissal was communicated to the Claimant, he appealed, which appeal was forwarded to the Ministry of Education, Teachers Service Appeal Tribunal (TSAT). That the Claimant was invited for a hearing by the Tribunal on 19th December 2006 and allowed to bring his own witnesses. That after the hearing before the Tribunal, he received formal communication that the decision to dismiss him had been upheld.

That despite numerous demand letters addressed to the Claimant on the abovementioned overpayment, he has failed to reimburse the Commission. That the Respondent has acted within the confines of law, natural justice and public interest. That its decision was fair and lawful, adhering to its legal mandate to exercise disciplinary control over its teachers and that the Claimant is therefore not entitled to the reliefs sought in his Claim which this Court should dismiss.

Evidence

CW1, the Claimant testified in court and adopted his statement as his evidence in this case. He testified that he was accused of facilitating a family planning injection, buying clothes for a schoolgirl and promising to marry her. He confirmed that he was subjected to disciplinary hearing by TSC but was not given an opportunity to ask the witnesses questions. On cross-examination, he stated that he stopped working on 17th May 2006 while in re-examination he confirmed he was dismissed on 26th September 2006, the same date of the trial.

CW2, MUSUNZA MUTHUI testified in court that he was a brother to the girl the claimant was accused of having an immoral relationship with. He testified that being orphans, they lived with their Aunt Mwendu who used his sister to reach the Claimant but his sister refused which led to a quarrel. That the case between his sister and the Claimant was reported to Mwendu who chased his sister away. That he was not called to the disciplinary hearing of the teacher. That it is not true there was a relationship between his sister and the Claimant and that he wished to adopt his affidavit dated 14th August 2016 as part of his evidence. On cross-examination, he stated that he had not been paid by the claimant to testify on his behalf and that he was telling the truth. On re-examination, he stated that he did not see any clothes bought for his sister by the Claimant. That his sister was not given any money by the Claimant and that it is his Aunt Mwendu who wanted money from the Claimant.

RW1, JULIUS NDUMBO testified that as an inspector of schools, he prepared the report at page 2 of the Respondent's List of Documents after his investigating the Claimant's case. That the person who complained to their office was the girl's guardian. That when he discussed with the girl's schoolmates, they also said that the Claimant was having an affair not only with that girl but with other school girls. That he interviewed a nurse who told him that she had injected the school girl so that she cannot get pregnant at a fee of Kshs.150 but she did not know she was dealing with a pupil. That the Claimant went to pay the money later.

RW1 testified that everyone he interviewed including the girl wrote statements. He forwarded his report to the DEO. He testified that the girl was living with the Claimant as husband and wife. On cross-examination, he stated that he had never found the Claimant with an untucked shirt and slapped him, that even if the Claimant was his friend, there was no friendship in court. That he is stating in court what people told him. He confirmed he did not have a certificate of translation.

RW2, FRANCISCA MWENDE testified in court that she is the girl's guardian and was living with her at the time material to this suit. That one time the girl did not come back home after school and came back the following day. That when she asked her, the girl told her that she had slept at the Claimant's house. That there was a time the Claimant came to her house looking for the girl and the claimant was beaten up by her children who are the girl's cousins. She confirmed that she is the one who reported to the Education Office and that the girl eloped with the teacher while they were at the court in Mwingi for the hearing of the teacher's criminal case.

RW3, LAWRENCE KIGEN testified in court reiterating his evidence as in the filed witness statement and presented documents in the Respondent's bundle as evidence in this case.

Claimant's Submissions

The Claimant submits that his interdiction which is based on unfounded and unsubstantiated allegations has ruined his career and reputation and that he was wrongly dismissed without following due procedure under Section 41 of the Employment Act. He cites the case of *Frederick Saundu –v- Principal Namanga Mixed Secondary School & others eKLR* where Mbari J referred to a 3 dimension criteria and stated the grounds as follows:

“First, the employer must have a justifiable reason to believe the employee has engaged in serious misconduct to form what is commonly called a prima facie case;

Secondly, there is some objectively justifiable reason to deny the employee access to the workplace based on the integrity of any pending investigation into the alleged misconduct, or some relevant factor that would place the investigation or the interest of the affected parties in jeopardy; and

Thirdly, the employee is given the opportunity to state his case or be heard before any final decision to interdict is made.”

That there was no evidence or medical report tabled by any of the witnesses to ascertain that he was ever found engaging in sex with the girl (name withheld). That this court should also note that RW2 was denied guardianship of the victim by the court in **Children’s Case No. 1223/2006 at Mwingi** due to mistreatment. That the girl went to live with another aunt as her guardian. That the testimony and statement of RW2 cannot therefore hold water in this case and that it was the testimony of RW3 that when they interviewed the girl, she denied the charges.

He submits that he was dismissed without any reasonable cause as provided under Section 43(1) of the Employment Act. That he appeared before a disciplinary board that did not accord him a fair hearing. That the right to fair administrative action and fair hearing are envisaged under Articles 47 and 50 of the Constitution. That he was heard, dismissed and removed from the Register of Teachers on the same date being 26th September 2006. That this matter was heard and tried by a competent court that found him ‘not guilty’ citing insufficient evidence and that this court should find that he was unlawfully terminated because the Respondent has failed to prove the reason for terminating him beyond reasonable doubt.

It is submitted by the Claimant that the procedure of granting reliefs sought in wrongful termination was espoused by Linnet Ndolo J in **Cause 2525 of 2012, Abisalom Ajusa Magomere –V- Kenya Nut Company Ltd [2014] eKLR** where she stated that while awarding damages to the Claimant, the court considers whether there was procedural fairness and substantive justification and proceeded to award the claimant 12 months’ salary in compensation. The learned judge also considered the length of the claimant’s service with the respondent. That since he worked for the Respondent for 21 years, he is entitled to maximum compensation as provided under Section 49(1) of the Employment Act and that he further prays for damages for loss of employment and embarrassment plus interest and costs calculated as follows:

a) General damages for wrongful and unlawful termination based on gross monthly wages on 21 months

(21 x Kshs.18,895)..... Kshs.396,795

b).. 3 months’ pay in lieu of notice (18,895 x 3)..... Kshs.56,685

c).. Lost income from date of dismissal to retirement age

(19 x 12 x 18,895)..... Kshs.4,308,060

d).. Annual leave calculated per one month for years worked

(21 x 8,895)..... Kshs.396,795

TOTAL..... Kshs.5,158,335

Respondent’s Submissions

The Respondent submits that the Claimant violated the terms and conditions of his service under Regulation 66(2)(a) of the Code of Regulations for Teachers and that his dismissal was procedural, lawful and regular. That the girl’s guardian was not bound to strict procedure to first report the complaint to the Police but owed a duty to the public and herself to inform the Respondent about the Claimant’s immoral behaviour. That it cannot demonstrate the existence of a love affair between the girl and the Claimant because the same was in private and did not involve the whole village. It relies on **Civil Appeal No. 8 of 2014, Teachers Service Commission –v- Joseph Okoth Opiyo** where the Court of Appeal stated that it is not easy to get eyewitness evidence in matters of sexual immorality as such acts are committed behind closed doors and that such cases are mostly proved by circumstantial evidence of opportunity to commit the same.

That the Claimant’s behaviour ridiculed the dignity of the teaching profession and eroded the trust and confidence bestowed on him by the Respondent his employer. That it dismissed him so as to protect the constitutional rights of the girl child to access to education and restore public confidence in the teaching service.

It is submitted by the Respondent that in proving that it accorded the Claimant a fair hearing, it has demonstrated in court how it conducted investigations, how it served him an interdiction notice dated 17th March 2016 informing him in a clear language of the allegations against him, inviting him for a hearing, considering his presentation and response, and arriving at its decision. That the proceedings of a Commission must not be compared to those of a court of law as was demonstrated in **Petition No. 628 of 2006: Constantine Simati –v- Teachers Service Commission & Another** where Azangalala J held that the 1st respondent’s disciplinary committee in its quasi-judicial capacity was not expected to conduct its proceedings as a Court. That in **Republic –v- Egerton University Ex parte Robert Kipkemoi Koskey [2006] KLR**, the court held that where an administrative body has complied with Rules of Natural Justice, courts will be reluctant to interfere with the proceedings. That it strictly adhered to the threshold of administrative hearing envisaged under the Employment Act and the TSC Act and that the Claimant’s dismissal ought to be upheld.

The Respondent submits that a court's decision (in the criminal matter) had no impact on its mandate as an employer and could not in any way restore the relationship of trust which had been irreparably damaged by the Claimant's action. That it would be grossly erroneous and illegal in their view to impose the Children's Court verdict on the Commission's decision. It urges this court not to delve into criminal matters that are not the subject of the Respondent's disciplinary process. That it is settled law that decisions of a criminal court have no relationship whatsoever in employment matters and that in **Cause No. 1492 of 2011: David Kemei –v- Energy Regulatory Commission**, Rika J held that:

“The finding of not guilty in the criminal process did not tie the hands of the employer from arriving at a guilty finding in the disciplinary process. The timing and pace of the disciplinary process did not follow the criminal process....he was not but only put through two legitimate but different processes; one private and the other public, which processes are not bound to reach the same outcome”

The respondent further relies on **Civil Suit No. 156 of 1997, Joseph Mujibi Ouma –v- National Cereals & Produce Board and Two Others** where Seron J while quoting the Court of Appeal decision in **Dalmas B. Ogoye –v- KNTC Civil Appeal 125 of 1995** held that courts have been reluctant to make orders for reinstatement because such relationships are purely contractual and such an order would be like imposing a contract on another which is not the function of the Court. The respondent also urges this Court to embrace the sentiments made in **Nairobi Misc. Civil Application No. 171 of 2006: David N. Kimani –v- TSC** where the court refused to reinstate a teacher accused of similar conduct by holding that courts must address the effects of reinstatement on the teachers and pupils and the erosion of discipline in schools.

That the Claimant stopped teaching on 21st June 2006 upon his interdiction and was not entitled to any salary thereon pursuant to Regulation 68(h) of the Code and neither is he entitled to the same now because he thereafter never rendered any service to it. That it has properly discharged the burden imposed by Sections 43 and 45 of the Employment Act to prove fair termination and that the Claimant's claim lacks merit and should be dismissed with costs.

Determination

The law applicable to this case is the repealed Employment Act, 1976 and the Code of Regulations for Teachers, 2005 Edition.

The submissions of the parties based on the Employment Act, 2007 and the Constitution 2010 enacted after the termination of the claimant's employment are therefore not relevant. Under the old law, employment contracts were terminable without assigning any reason provided the employer gave notice or pay in lieu of notice.

The claimant's case is that the reason for his dismissal was never proved in court. He has however not contested that the respondent complied with the procedure under the Code of Regulations for Teachers.

The fact that the claimant was discharged from criminal charges by the court does not automatically make him innocent as the standard of proof in the two proceedings are different, the one in criminal proceedings being beyond any reasonable doubt while the standard of proof in administrative tribunals is on a balance of probabilities. In any event, the claimant did not present the proceedings or judgment in the criminal case as evidence. There is thus no evidence on record that he was charged and acquitted of the said charges. What he has produced in his bundle of documents are criminal charges against the girl. The proceedings therein support the evidence of the respondent.

For the foregoing reasons, I find that the claimant has not proved his case against the respondent with the result that the same is dismissed.

The counterclaim by the respondent is for salary paid to the claimant from 17th May 2006 to 30th June 2006. His letter of dismissal is dated 26th September 2006. The letter of interdiction does not stat he is not entitled to salary during interdiction. The salary, could only be stopped from date of termination. I do not see how he could have been over a paid salary and allowances while still in employment. The respondent did not explain this. I therefore find the counterclaim also not proved.

The same is also dismissed.

Based on the foregoing, both the claim and counterclaim are dismissed with each party bearing its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF JUNE 2019

MAUREEN ONYANGO

JUDGE