



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA
AT NAKURU
CAUSE NO. 2 OF 2019

[formerly Eldoret ELRC Cause no.316 of 2017 Formerly Kisumu ELRC Cause No.140 of 2016]

PATRICK NYONGESA MAKOKHACLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....1ST RESPONDENT

THE ELDORET POLYTECHNIC..... 2ND RESPONDENT

JUDGEMENT

The claimant is a male adult working for gain at Eldoret. The 1st respondent is a commission established under Article 237(2) of the Constitution, 2010. The 2nd respondent is a public academic and learning institution offering education services and situated within Uasin Gishu County and operating under the guidance of the 1st respondent.

The claimant was employed by the 1st respondent as Assistant lecturer graduate grade L under the TSC No.390879 and posted to work at the 2nd respondent from the year 1999. At the time the claimant's employment was terminated he was earning a gross wage of ksh.66,126.00.

The claim is that By letter dated 25th November, 2014 the claimant was interdicted. no salary was paid since or return to work. Efforts to get redress from the 1st respondent have been fruitless. The hearing of the disciplinary case did not take off following allegations which lacked evidence and despite being informed that there would be communication in 28 days but none has issued.

Without employment, a salary or communication by the respondents on the outcome of the disciplinary case, such resulted in unfair labour practice. no notice to show cause was issued to allow the claimant defend himself and since 25th November, 2014 nothing has been done to address any alleged misconduct.

The claim is also that the termination of employment is unlawful and without due process and contrary to section 41, 47, 43, and 45 of the Employment Act. even where the claimant alleged misconduct were tantamount to summary dismissal under section 44(4) of the Employment Act there exists no good grounds to amount to gross misconduct. The respondents have refused to pay ksh.743,100.00 owed to the claimant following an undertaking entered into by all teaching staff and others and being amount for production units.

Following unfair termination of employment the claimant is also seeking the following dues;

- a. Three months' notice pay ksh.198,378.00;
- b. Leave pay Ksh.481,740.00;
- c. Severance pay Ksh.367,040.00;
- d. Breach of contract of employment Ksh.1,254,400.00;
- e. Compensation for unlawful termination Ksh.793,512.00;
- f. The amount of ksh.743,100.00 owed by the 2nd respondent;

g. Certificate of service and

h. Costs

The claimant testified that he was employed by the 1st respondent and placed with the 2nd respondent and who paid him for extra work. In the year 2014 the 2nd respondent principal being the agent of the 1st respondent issued him with letter dated 25th November, 2014 a letter for interdiction. The allegations made were that he had made fraudulent claims from students and also fraudulently received cash from the students. The claimant was called before the board of management for a hearing but the proceedings were not fair as the time was at 5.15pm outside of his work hours. This was meant to be pure intimidation so as to admit the allegations made.

The claimant also testified that the complaints made against him were to the principal and not to the members of the board as the code required. The disciplinary panel which heard his case was ambiguous and its proceedings were unprocedural. Only one complainant Alice Likuyani complained and the matter was resolved when the claimant offered to pay the student back within 7 days. The 1st respondent could also surcharge him instead of termination of employment.

On 18th August, 2015 the 1st respondent called the claimant for a disciplinary hearing and where he attended with commissioners prevent but the complaint was not present. The letter of dismissal issued by the 2nd respondent was therefore personal and not from the employer. The claimant has continued to receive pay slips with zero pay which means he is still an employee of the 1st respondent. no letter terminating employment has been issued by the 1st respondent and thus seek reinstatement and compensation as set out in the memorandum of claim.

1st respondent

The 1st respondent's case is that as established under Article 237 of the Constitution it has the mandate to manage teachers employed for service in public schools and to exercise discipline. Such is to ensure teachers and employees under the commission uphold high standards of integrity and professional ethics under the Public Officers' Ethics Act and the attendant Codes of Conduct and Ethics.

The defence is also that the claimant was employed by the 1st respondent on 9th June, 1998 as a trained diploma technical teacher III and posted to WECO to teach accounts/business education. The claimant was subject to the Teachers Service Commission Act, the Code of Regulations for Teachers, the TSC Code of Conduct and Ethics, the Employment Act and other administrative policy guidelines issued from time to time by the 1st respondent or its authorised agents.

The claimant was transferred to the 2nd respondent on or about 16th December, 2004.

In August/September 2014 the principal of the 2nd respondent received complaints from a parent and three students alleging that the claimant had collected monies from them in the pretext of assisting the students to register for examinations. The complaints were received from;

Gabriel Simiyu;

Edwin Koech;

Situma M George; and

Alice Likuyani, a parent to Shirley Shitikha.

The students later discovered that they had not been registered for the examinations as promised by the claimant. The claimant admitted to these allegations vide his letter dated 12th October, 2016 and where he was given 7 days to repay the monies to the affected persons. By letter dated 3rd November, 2014 the claimant responded to the 2nd respondent letter which he indicated that he paid back monies with respect of Alice Likuyani being Ksh.33,000.00.

On 13th October, 2014 the claimant had not made good the refunds of monies he had fraudulently obtained from the students. He was invited to attend before the governing council of the 2nd respondent to answer to charges of defrauding students. The claimant attended before the governing council on 14th October, 2014 and was given an opportunity to defend himself. He was interdicted to be able to respond within 21 days and in the letter the claimant was advised of his right to give defence.

On 18th August, 2015 the TSC County Director the claimant was invited for hearing and issued with letter of amended interdiction and hearing adjourned to enable him prepare his defence. A second hearing was scheduled at Nairobi on 26th January, 2016 and the claimant's advocate notified the respondent the claimant would not attend as the reasons for appearing had not been communicated and upon his failure to attend for his disciplinary hearing for a second time he was dismissed from the service of the 1st respondent. The claims made are therefore without merit and should be dismissed.

The defence is also that the claimant was dismissed from service for professional misconduct and upon following due process. The claim for reinstatement and compensation is without justification and the principle of **Moses Moro Kaunda versus CMC Motors** is not applicable to the current suit since there was no unfair dismissal from service.

In evidence the respondent filed the witness statement of Oyucho Timon the assistant deputy director discipline and who has since become a

judicial officer and was replaced by Catherine Kertich the deputy Director Discipline and who testified that upon the employment of the claimant they deployed him with the 2nd respondent and sometime in August/September, 2014 the principal of the 2nd respondent received numerous complaints from students and parents from who the claimant had collected monies on the promise that he would register them for examinations and which he failed to do. Despite demand the claimant refused to repay the monies and failed to register these students for examinations with the 2nd respondents.

Ms Kertich also testified that the claimant was issued with interdiction and given time to attend and defend himself before the governing board of the 2nd respondent, the matter was escalated to the 1st respondent and where the claimant was invited for hearing for professional misconduct and which was in gross contravention of the provisions of the code of regulations as a public officer. The initial hearing was adjourned upon the amendment of the interdiction letter and the claimant was given more time to respond and later invited for hearing of his case vide letter dated 22nd January, 2016 for the 26th January, 2016 but his advocate wrote indicating there would be no attendance. The 1st respondent proceeded and dismissed the claimant following due process.

Ms Kertich also testified that the interdiction of the claimant did not allow for the payment of any wages to the claimant and which was in accordance with Regulation 148 of the TSC Code of Conduct. The offence the claimant faced fell within the regulations and which required the non-payment of his wages during interdiction period. His case was not a suspension per the Economic Crimes Act as the respondent has a clear demarcation between a suspension and interdiction. The claimant was also not charged with a criminal case as this was not the only remedy available to the respondent as the employer. Following the claimant's failure to attend at the disciplinary hearing and noting his case related to professional misconduct, summary dismissal from employment was properly issued

2nd respondent

The 2nd respondent defence denied all the claims made by the claimant and that it was not its duty to pay the claimant his salary and the claims made for extra pay not justified as the claimant had no capacity to carry parallel employment with each respondent.

In evidence the respondent called Nancy Wanjiru Kariuki who testified that as the human resource officer she is conversant with the case and knew the claimant well. As an employee of the 1st respondent the claimant was seconded to the 2nd respondent and termination of employment was done by the employer for gross misconduct. the principal of the 2nd respondent is an agent of the 1st respondent.

Ms Kariuki also testified that the claims made by the claimant for allegedly teaching and was not paid by the 2nd respondent should be dismissed as the claimant was an employee of the 1st respondent who was responsible for payment of salaries. The allegations by the claimant that he taught students in the year 2012 and based on performance should be paid is part of his requirement to teach and be paid by the 1st respondent and cannot claim outside of his employment from the 2nd respondent.

The claimant was dismissed for undertaking fraudulent activities at the 2nd respondent where he collected cash meant for school fees and examinations from a parent and 3 students and who complained to the 2nd respondent and this begun the process which led to the dismissal of the claimant.

The 2nd respondent does not allow the teachers and lecturers to take or ask for school fees from parents and students. This is done directly by the administration and paid to the 2nd respondent account. The claimant was thus taken through disciplinary hearing and the 1st respondent representative was present with the governing council and it was resolved that the 1st respondent as the employer was to take the decision. All proceedings went to TSC following the findings of the 2nd respondent.

Ms Kariuki also testified that the 2nd respondent decided to interdict the claimant for fraudulently receiving cash from students and a parent. The 1st respondent confirmed the interdiction and where the claimant was given another chance to a hearing and defend himself. Later the 2nd respondent received letter of dismissal of the claimant issued by the 1st respondent. the principal called the claimant to collect the letter of dismissal from employment but he declined to collect it.

At the close of the hearing, all the parties agreed to file written submissions. Only the claimant and the 1st respondent filed written submissions.

The claimant submitted that he was not accorded due process in the hearing of his case and this led to unfair termination of his employment. The claimant never appeared before the commission for the hearing of his case as required by law. the decision taken was ex parte on allegations and not on facts. The decision was arbitrary. The allegations made were criminal in nature and no report was made to the police. During the internal disciplinary hearing the members who attended save for the principal the other members are not governing council members and their deliberation of the claimant's case was in error.

The claimant also submitted that in the letter dated 21st October, 201y by the governing council the claimant was directed to refund the complainants the alleged amounts paid to him but by another letter dated 4th November, 2014 the claimant was alleged to have committed fraud and required to apologise. The 2nd respondent had no authority to dismiss or interdict the claimant as done in letter dated 25th November 2014.

The claimant relied on the cases of **Samson Kipkoech Chemai versus Richard Ekskline Leakey & 2 others [2017] eKLR**; and **Bryan Mandila Khaemba versus Chief Justice and President of the Supreme Court of Kenya & another [2019] eKLR**.

The 1st respondent submitted that the claimant was dismissed on reasonable and sufficient grounds and in accordance with sections 43 of the Employment Act. The respondent had statements from students who gave monies to the claimant and a parent who gave him Ksh.33,000.00 to register for examinations which the claimant failed to do and had asked for such monies contrary to the policy of the respondents to pay the same directly to the institution. The moneys received were never reflected on the students' account or reflected in the respondents accounts or a receipt issued. A student Situma George paid the claimant ksh.10,000.00 for fees balance; Edwin Koech paid ksh.3,000.00 for exam registration; Simiyu Gabriel paid ksh.10,000.00 for exams registration and a parent Alice Likuyani paid Ksh.33,500.00 for her daughter school fees.

The respondent also submitted that following complaints by the students and the parent the claimant was interdicted and then invited for a disciplinary hearing by the governing council which he attended. He was subsequently invited by the 1st respondent for hearing and where he claimed he had not been served with notice and another hearing was rescheduled but the claimant failed to attend on 26th January, 2016.

The claimant relied on the case of **Evans Kamadi Misango versus Barclays Bank Limited [2015] eKLR; Anthony Mkala Chitavi versus Malindi Water & Sewerage Co. Limited [2013] eKLR; and Kenya Power & Lighting Co Limited versus Aggrey Lukorito Wasike [2017] eKLR.**

There are several letters and complaints made to the 2nd respondents by a parent Ms Alice Likuyani dated 18th April, 2014 complaining that she gave the claimant a total of Ksh.33,500.00 for her daughter Shirley Shitaka as school fees and was not issued with any receipt or recorded anywhere and the daughter/student was not registered for examinations on two occasions. In the complaints it is noted that the claimant transferred ksh.27,500.00 to Ms Likuyani on 1st November, 2014.

A student Situma George made statement that he gave the claimant Ksh.10,000.00 on a promise that he would clear his school fees balance on 27th July, 2014.

Similar complaints are made by Edwin Koech who paid the claimant ksh.3,000.00 and Gabriel Simiyu who paid the claimant ksh.10,000.00.

The claimant is noted as having paid part of the monies collected from students.

With regard the complaint by Ms Likuyani, by letter dated 21st October, 2014 the 2nd respondent's principal noted that the claimant had admitted to receiving the ksh.33,500.00 the matter was discussed by the governing council and the claimant given 7 days to repay back the money. In reply, the claimant on 3rd November, 2014 wrote to the 2nd respondent and noted the following;

.....my concern is drawn on one Shirley Shitikha ... whereby I personally sent *money to her mother Mrs Alice Likuyani vide MPESA ... on 1st November, 2014* which transaction was acknowledged by the reception and further a money order of ksh.6000 in the name of the student was in consideration.

This statement confirms that all allegations of any monies received from students have been sorted out. I would therefore wish to come on record and state that my name is now clean from any disciplinary action(s)/blame/liability and therefore withdraw statements and/or accusation levelled against any member of the ...

During the hearing of the matter, In cross-examination the claimant admitted that there was money allegedly borrowed from a parent, Alice Likuyani at ksh.27,500.00 and which he paid back. Had he not paid, the TSC and the 1st respondent should have surcharged him for such monies but he paid back.

The claimant also admitted that the monies with regard to the student Shirley Shitikha, he borrowed the cash from her mother Ms Likuyani. He was directed to refund the cash as a private matter. He had received the cash from the parent and not the student and he paid back. It was strictly a private matter and had such cash related to the respondent, a surcharge would apply. Ms Likuyani had complained that she gave the claimant cash to register her daughter for examinations which the claimant failed to do and the student missed her examinations on two occasions. Such cash should have been paid to the student's account and not to the claimant.

This admission is crucial;

... in Alice Likuyani statement she stated that she gave me cash to register her daughter which I did not and she missed exams twice. Before the disciplinary committee I admitted receipt of cash from a parent. The parent ought to have paid to the student account under the respondent and not to me. ...

On 14th November, 2014 the governing council met and invited the claimant for hearing. The issue of the claimant related to *fraudulently obtaining money from students* and who were listed and the claimant made aware of the specific details. He admitted he had refunded Gabriel Simiyu ksh.10,000.00 and declined that he had not received any monies from Edwin Koech and George Situma.

Upon hearing the claimant and making deliberations, a decision was taken to interdict the claimant. Letter dated 24th March, 2015 was issued to the claimant interdicting him on the grounds set out therein and to allow for investigations. This letter was to amend the earlier letter of interdiction dated 25th November, 2014.

Indeed an employer has the prerogative to interdict an employee to allow for investigations. Following alleged workplace misconduct, the employer has the right of taking administrative action in form of a suspension or interdiction or as the case may require and the purpose is to remove the employee from the workplace to allow for investigations. Upon investigations, the employee may be issued with a show cause

notice or where found not culpable be returned to work.

In the case of **Elizabeth Cherono Kurgat versus Kenya Literature Bureau [2014] eKLR** the court held as follows;

the Claimant was suspended on being suspected to have committed the employment offence. It is not a material departure, that the Respondent termed this action as compulsory leave, instead of suspension or interdiction under the Terms and Conditions of Employment. All are terms that may be used by an Employer on sending an Employee on administrative leave. She understood she was being placed on administrative leave to allow for investigations and the disciplinary process to take place. She was given the opportunity to show reasons why disciplinary action should not issue against her. She did this. She was called to a disciplinary hearing, and was accompanied by a Trade Union Representative at the shop floor level. She was heard, her representations considered, and a decision made to terminate her contract of employment.

In See **Ezra Chiloba versus Wafula Wanyonyi Chebukati & 7 others [2018] eKLR** the court held that an employer can interdict an employee as an administrative measure to allow for investigations. The employee is therefore removed from the workplace.

As admitted between the respondents, the claimant was employed by the 1st respondent and placed with the 2nd respondent. the principal employer was the 1st respondent. upon finding of misconduct, the claimant was invited to address by the 2nd respondent, he was found to have received monies from a parent and students and money which was to be paid to the respondents in school fees and examination registration. By repaying such monies, the claimant did not clear himself from the fact of having received such monies from the parent and student irregular and what amounted to fraud.

The 2nd respondent thus escalated the matter with the claimant's employer, the 1st respondent and TSC. The claimant was summoned for a hearing on 18th August, 2018 but was deferred and the letter of interdiction amended. The claimant was given time to respond.

The claimant was then invited for hearing vide letter dated 15th December, 2015 to attend on 26th January, 2016. This letter is to the claimant as;

Rer: No. TSC/39-879

TSC/DISC/NO: 0539/11/2014/2015/22

By letter dated 22nd January, 2016 the claimant through his advocates replied and cited that he had received a text mess 'SMS' on phone and noted previously he was heard at the Uasin Gishu and was not aware why the matter had been transferred to Nairobi. The claimant also noted that he had since filed Kericho ELRC No.268 of 2015 and would not attend the scheduled disciplinary hearing on 26th January, 2016 as the reason for appearing had not been communicated.

The claimant in making the reference;

Rer: No. TSC/39-879

TSC/DISC/NO: 0539/11/2014/2015/22

As noted above was in regard to the letter and communication issued by the 1st respondent. the court going through the letter sent to the claimant and the response he made from his advocates, the details make reference to the cited communication. This confirms that he received the invitation to attend his disciplinary hearing at Nairobi and opted not to attend.

The claimant has also given the reasons that he had filed Kericho ELRC No,268 of 2015.

As held in the case of **Anthony Mkala Chitavi versus Malindi Water & Sewerage Co. Limited [2013] eKLR** due process requires the employer to issue notice to the employee setting out the allegations made and based on such allegations allow the employee to attend and give his defences. In this regard, the claimant was interdicted to allow for investigations, such investigations were conducted by the 2nd respondent and who followed the variously complaints made by a parent and students on the fraudulent receipt of monies by the claimant to pay school fees and register for examinations which he failed to do and in any event he as a lecturer was not supposed to have engaged in such conduct. The claimant failed to attend as directed. He cannot then turn around and assert that his rights under section 43 of the Employment Act, 2007 were breached.

In this case, the court finds the 1st respondent followed due process as set out under section 41 of the Employment Act, 2007 and the claimant neglected and or ignored attending to defend himself. He cannot blame the respondents over his own actions. To file suit and before any restraining orders issued stopping internal disciplinary action against the claimant did not remove him from attending before the employer to defend himself.

The claimant has also submitted that he had already paid back the monies he had collected from a parent and since such was a private matter the 1st respondent should not have been involved. Far from it! The claimant was placed at a position of responsibility as a lecturer and by borrowing money from a parent over matters relating to payment of school fees and or using his employment with the 1st respondent to secure private arrangements to his benefits over matters relating to duties which were not his responsibility particular the collection of school fees and registration for examinations, he acted fraudulently, he abused his office, such was professional misconduct and called for a sanction.

The claimant defended himself that if there was fraudulent activities the matter was not reported to the police. However, the respondents had the option of undertaking internal disciplinary action against the claimant and by sending him on interdiction, inviting him for a disciplinary hearing, the respondents met the threshold of section 41 read together with section 45 and 47 of the Employment Act, 2007.

Committing fraud, engaging in fraudulent activities at the workplace is tantamount to engaging in criminal conduct addressed under section 44 of the Employment Act, 2007 as subject to summary dismissal. No compensation or notice pay is due.

The claimant has also claimed for pay for annual leave. It is common cause that the respondents covered under the provisions of Article 237 of the constitution, 2010 is concerned with public academic institutions and which have a schedule factoring long holidays and time off to its employees. To claim for annual leave beyond the scheduled long vacations, rest days would be an unjust enrichment.

On the claim for severance pay, this case did not stand out as one subject of section 40 of the Employment Act, 2007. Such claims are declined.

On the finding that summary dismissal of the claimant had good basis, the claim for damages and compensation for breach of contract of unfair termination is lost. Such remedies are not available to the claimant.

The claimant has also claimed for payment by the 2nd respondent for extra teaching. The claimant as an employee of the 1st respondent and who paid his salary for work rendered. To claim outside of such employment would be in breach of his contract for engaging in work outside what was allocated by the employer and paid for monthly.

The 1st respondent asserted that the claimant while on interdiction was not entitled to a pay. However, up and until the claimant was issued with letter of summary dismissal and dated 26th January, 2016 he remained an employee of the 1st respondent and ought to have been paid all his due salaries. Where the rules and regulations remove the payment of such salary on the basis that the employee is on interdiction is a negation of fair labour practices. Where disciplinary proceeding took longer than anticipated under the regulations, such should not be visited upon the employee out on interdiction and awaiting to be called for hearing by the employer. To keep such a rule, regulation or requirement under the code is an unfair labour practice.

The claimant has however not made any claims for the payment of salaries unpaid during the period of interdiction. This is not pleaded. Such then denied the respondents a fair chance to address such matter and claim. It shall not be awarded.

A certificate of service should issue together with letter terminating employment.

Such is due to the employee.

According, the claims made are hereby dismissed as they lack merit save the claimant shall be issued with his Certificate of Service under the provisions of section 51 of the Employment Act, 2007. Each party shall bear own costs.

Delivered at Nakuru this 17th day of October, 2019.

M. MBARU

JUDGE

In the presence of: