



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT KISUMU**

**CAUSE NO. 69 OF 2015**

*(Before Hon. Justice Mathews N. Nduma)*

**WICKLIFF MANG'OLI WEKULO.....CLAIMANT**

**VERSUS**

**TEACHERS SERVICE COMMISSION.....RESPONDENT**

**JUDGMENT**

1. The claimant filed this suit on 2<sup>nd</sup> March 2015 seeking the following reliefs set out in the memorandum of claim:

- (a) Reinstatement to his employment as a head teacher.
- (b) Payment of salary from 1<sup>st</sup> November 2010 to date.
- (c) Payment of responsibility allowance from May 2007 to date.
- (d) Payment in lieu of 105 leave days earned and not taken.

2. The suit is defended by a reply to a memorandum of claim filed on 4<sup>th</sup> November 2015.

3. The claimant testified under oath as CW1 that he was a teacher employed by the respondent on 1<sup>st</sup> January 1990 as a PI teacher. That he was promoted to head teacher in May 2005 and served in different schools. That on 1<sup>st</sup> November 2010, CW1 missed his monthly salary from his account without explanation. CW1 followed up the matter with the TSC. That on 1<sup>st</sup> May 2013 and 7<sup>th</sup> May 2013, he wrote letters to TSC to resolve the matter in vain. In April 2014, CW1 was replaced as a head teacher and was not deployed to another school. On 5<sup>th</sup> May 2014, the District Education Officer stormed the school to install a new head teacher. CW1 was not given letter of suspension or termination but did not receive salary. CW1 application for promotion was also rejected.

4. On 22<sup>nd</sup> February 2016, CW1 received a letter to attend a disciplinary hearing on 13<sup>th</sup> April 2016. CW1 received a letter of interdiction on 13<sup>th</sup> April 2016 and was invited to attend a hearing on 23<sup>rd</sup> January 2017. CW1 responded to the show cause letter in writing and also attended the disciplinary hearing where he defended himself on allegation that he had presented a forged certificate to TSC the basis of which he sought to be promoted to a graduate teacher.

5. On 19<sup>th</sup> February 2017, CW1 was dismissed from teaching service with effect from 24<sup>th</sup> February 2017. CW1 was not paid arrear salary from 1<sup>st</sup> November 2010 to 24<sup>th</sup> January 2017 which he now claims.

6. The claimant also stated that he was entitled to 105 leave days which he had not taken and claimed payment in lieu of the leave days. The claimant told court that he wished to be reinstated to his employment. CW1 testified that he wrote a letter appealing the decision to dismiss him from service but had not received any response. The claimant also told the court that he should upon reinstatement be promoted from PI teacher to ATS IV teacher. That he should if not reinstated receive certificate of service.

7. Under cross examination by M/S Kaluai for the respondent CW1 stated that he did not apply for promotion and had not submitted to TSC a degree certificate. CW1 admitted having known one Jonathan who was his neighbour and worked with him at Luanda Primary School. That Jonathan was Deputy Head then. CW1 confirmed that Jonathan had since been dismissed from service. CW1 did not know that Jonathan was dismissed for presenting to TSC a forged certificate.

8. CW1 denied having assisted Jonathan to get the forged certificate. CW1 denied Jonathan paid him Kshs. 75,000 for the certificate. CW1 stated that he did not complete his Diploma programme at Masinde Muliro University. CW1 said he went abroad to study between 2007 to 2009 but did not complete the course. CW1 denied involvement in forgery of certificates.

9. RW1 Ephatus Mwenda testified that he was the Chief Human Resource Officer of TSC. That he was familiar with the case of the claimant. That the claimant had submitted a certificate from Moi University seeking to be promoted from PI teacher to Graduate teacher. RW1 produced the application letter made by the claimant and the certificate attached to the application. That TSC checked with the university graduate booklet for the particular year and the name of the claimant was not listed among the graduates. TSC then wrote to Moi University seeking to know whether the certificate presented to TSC by the claimant was genuine. The university responded to TSC by a letter dated 23<sup>rd</sup> March 2010 produced before court in which the university stated that the said certificate belonged to another person who had also forged his degree certificate serial number 222890, which is a forged certificate. RW1 testified that upon receipt of this information, TSC stopped the salary of the claimant. That TSC conducted internal investigations and found out that the claimant had forged the certificate and had also received a bribe from his deputy one Jonathan to whom he also gave a forged certificate for promotion application. RW1 produced a statement procured during investigations from Mr. Shem Atila who was a teacher at St. Kizito Primary School.

10. RW1 testified that Mr. Jonathan was dismissed from service. That he had recorded a statement from Jonathan and was subjected to disciplinary hearing whose record was produced before court. RW1 testified further that the claimant was subjected to disciplinary hearing for forging a certificate and he was found guilty and dismissed from service. RW1 admitted the claim for arrear salaries up to April 2014 from November 2010. RW1 also admitted the claim for promotion from PI teacher to ATS 4 in the year 2009 and the payment claimed in respect thereof is valid.

11. RW1 denied the claim for progression and allowance arrears made by the claimant. RW1 stated that there was no provision for payment in lieu of leave for 105 days. That leave arrears is paid once a year and has been included in the tabulation by TSC. RW1 stated under cross examination that CW1 presented the forged certificate in the year 2009. TSC did not report to the police but did internal investigations and dealt with the culprits. CW1 had applied to be promoted using the forged certificate. RW1 stated that claimant worked for TSC up to 6<sup>th</sup> April 2014. RW1 admitted that claimant was last paid in the year 2010 in November. RW1 denied the claim for progression, salary and responsibility allowance. RW1 stated that the claimant is entitled to arrear salary from 1<sup>st</sup> November 2010 to 6<sup>th</sup> April 2014 and arrears for promotion from 1<sup>st</sup> January 2009 from PI. RW1 denied all claims from 6<sup>th</sup> April 2014 when the claimant stopped working. RW1 stated that the claimant did not receive half salary during the period of interdiction. RW1 said that claimant should not be paid up to the date of dismissal but up to 6<sup>th</sup> April 2014. RW1 said the claimant did not receive certificate of service. RW1 stated in terms of Regulation 148 of the TSC Code, half salary is paid to teachers under interdiction except in stated cases up to the date of termination.

### **Submissions**

12. The parties filed submissions in which the respondent referred to Regulation 68 of the TSC Code 2005 which provides that:

*“During the period of interdiction referred to in Regulation 66(2) and 67(6) (e) the teacher shall be paid half salary except in case of:*

*(a) .....*

*(b) .....*

*(c) .....*

*(d) .....*

*(e) .....*

*(f) .....*

*(g) Forgery, impersonation, collusion*

*(h) .....*”

Counsel for the respondent submitted therefore the claimant was not entitled to half salary during the period of interdiction to date of dismissal. Counsel admitted the arrear salary in terms of the evidence by RW1 with regard to salary progression and allowance arrears. Counsel for the respondent submitted that claimant would only be entitled to same if he was actually on payroll and only to the period he had served the Respondent.

13. On leave days earned for 105 days, Counsel submitted that any leave days taken are paid for in the salary that a teacher is entitled to and therefore cannot be claimed for in a separate contract.

14. The claimant in his submissions prays to be awarded all the reliefs set out in the amended statement of claim dated 27<sup>th</sup> December 2017 including:

(i) arrear salary for 1<sup>st</sup> November 2016 to 24<sup>th</sup> January 2017 in the sum of Kshs. 1,998,825

(ii) Salary progression arrears and allowances in the sum of Kshs. 525,781 and

(iii) 105 leave days earned but not taken in the sum of Kshs. 72,376. The claims total Kshs. 2,596,987.

The claimant withdrew the claim for reinstatement in the submissions and the salary claimed during the six years he was under interdiction between 5<sup>th</sup> August 2014 to 13<sup>th</sup> April 2016

(iv) Claimant seeks in the submissions promotion payments from P1 to ATS IV which claim was admitted by RW1.

(v) The claimant also seeks certificate of service, costs and interest. The claimant does not seek damages and/or compensation in this matter in the amended statement of claim and in the submissions.

### **Determination**

15. The following claims are admitted by the respondent and the court grants the reliefs sought accordingly as follows:

(i) Payment of arrear salary by the Respondent to the claimant with effect from 1<sup>st</sup> November 2010 to 6<sup>th</sup> April 2014.

(ii) Payment of salary arrears with respect to the promotion of the claimant from P1 to ATS IV (Approved Teachers) from 1<sup>st</sup> January 2009 to 6<sup>th</sup> April 2014.

16. The following claims are in dispute and to be determined by the court:

(i) Payment of arrear salary from the date of interdiction on 6<sup>th</sup> April 2014 to date of dismissal on 24<sup>th</sup> January 2017.

(ii) Payment of salary progression arrears and allowance arrears from 1<sup>st</sup> November 2010 to 24<sup>th</sup> January 2017.

(iii) Payment of 105 leave days earned and not taken from 1<sup>st</sup> November 2010 to 24<sup>th</sup> January 2017.

17. The court has dealt with the issue whether the claimant was entitled to payment of salary progression and allowance arrears firstly from 1<sup>st</sup> November 2010 to the date of termination on 24<sup>th</sup> January 2017 first as the determination of the same shall impact the other reliefs sought. It is not in dispute that employees of TSC experienced annual salary progression. It is not in dispute that salary progression was not implemented with respect to the claimant from the date his salary was stopped on 1<sup>st</sup> November 2010 up to the date of dismissal. The respondent has admitted that the claimant was entitled to payment of salary and allowances from 1<sup>st</sup> November 2010 up to the date of interdiction on 6<sup>th</sup> April 2014 because he had continued to teach without pay. The court finds that there is no justification for the claimant not to be awarded annual salary progression and salary arrears for the period 1<sup>st</sup> November 2010 to 6<sup>th</sup> April 2014. The court grants the claimant salary progression and allowance arrears accordingly in respect of the period 1<sup>st</sup> November 2010 to 24<sup>th</sup> January 2017.

### **Issue iii**

18. The next question for determination is whether the claimant is entitled to half salary during the period he was under interdiction between 6<sup>th</sup> April 2014 to 24<sup>th</sup> January 2017.

19. It is clear that Regulation 68, excluded teachers who had been interdicted on grounds of forgery, impersonation or collusion from getting half salary during the period of interdiction. It is not in dispute that the claimant was charged with and eventually found guilty of forging a university Degree which he presented to the respondent for purposes of promotion in the year 2009. The court is satisfied that the respondent properly placed the claimant under interdiction without pay during the period of the disciplinary process that led to the dismissal of the claimant. Accordingly, the claimant is not entitled to payment of Arrear salary at all during the period he was under interdiction from 6<sup>th</sup> April 2014 to 24<sup>th</sup> January 2017. This claim is therefore dismissed.

20. It follows therefore the claim for payment of progression arrears and allowance for the period 6<sup>th</sup> April 2014 to 24<sup>th</sup> January 2017 lacks merit and is dismissed also.

21. The claim for leave days earned and not taken with respect to the period 1<sup>st</sup> November 2010 to 6<sup>th</sup> April 2014 is valid since the claimant continued to work and the respondent has admitted that the claimant was entitled to and should be paid arrear salaries and allowances during the period.

22. In the same vein the claimant was entitled to annual leave and/or payment in lieu of leave not taken due to no fault on his part during the period he was not paid any salary but continued to work between 1<sup>st</sup> November 2010 to 6<sup>th</sup> April 2014. The court grants the claimant payment in lieu of leave days not taken between 1<sup>st</sup> October 2010 to 4<sup>th</sup> June 2014. The claimant did not work and was not entitled to leave days during the period of interdiction between 4<sup>th</sup> June 2014 and the date of dismissal on 24<sup>th</sup> January 2017. The claim for payment in lieu of leave days not taken during this period lacks merit and is dismissed.

23. In the final analysis judgment is entered in favour of the claimant as against the respondent as follows:

- (i) Payment of arrear salary and allowances with effect from 1<sup>st</sup> November 2010 to 6<sup>th</sup> April 2014.
- (ii) Payment of salary progression arrears and allowance arrears for the period 1<sup>st</sup> November 2010 to 6<sup>th</sup> April 2014.
- (iii) Payment in lieu of leave days earned and not taken for the period 1<sup>st</sup> November 2010 to 6<sup>th</sup> April 2014.
- (iv) The respondent to tabulate the amounts in respect of (i) (ii) and (iii) above within 30 days and filed in court failing which the claimant to file their tabulation 7 days after the 30 days.
- (v) Interest at court rates from the date of filing suit till payment in full.
- (vi) Costs of the suit.

**Judgment Dated, Signed and delivered this 8<sup>th</sup> day of October, 2019.**

**Mathews N. Nduma**

**Judge**

**Appearances**

Mr. Kilenga for Claimant

M/S Kaluai for Respondent

Chrispo – Court Clerk