



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**CAUSE NO.2004 OF 2015**

**ANTHONY OMARI ONGERA.....CLAIMANT**

**VERSUS**

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

**JUDGEMENT**

1. The claimant was employed by the respondent as an Administrative Officer III at the head office with duties of supervising electricity supply, water supply, and sewage system flow. The respondent being a constitutional commission responsible for Teachers' employment issued the claimant with a written contract of service.

2. On 19<sup>th</sup> December, 2013 the claimant accessed the respondent premises in the presence of the police and security personnel and proceeded to ascertain the systems of water and electricity and address any complaints. He was able to secure water with the help of security personnel into his car and left the respondent premises.

3. The claim is that the respondent for unknown reasons converted the entry of the claimant to its premises into a crime under its regulations 20 of part III of the TSC Code of Conduct and Ethics for Secretariat Staff (Code) but the claimant had not breached any regulation(s) as alleged and any accusations made and later which led to his dismissal was unfair. The claimant is seeking reinstatement and payment of due salaries.

4. In the letter of interdiction dated 9<sup>th</sup> September, 2014 the claimant was accused of new allegations that he had breached regulation 55(3) of the Code which related to neglect, refusal and failure to comply with lawful orders. Such charges are invalid and not true.

5. The claim is also that the claimant did not expect a fair hearing before the respondent officers as the respondent was the accuser, arresting officer, investigator and the judge and the claimant felt highly exposed. The claimant deserved to be treated with dignity and fairly.

6. The claimant is seeking for orders of reinstatement to his position as administrative officer III with full benefits and without discrimination.

7. The claimant testified in support of his claim.

8. The evidence is that upon employment, the claimant worked diligently until June, 2013 when he was interdicted for reasons that were not true. On 19<sup>th</sup> December, 2012 the claimant went to the respondent premises to ask for water as he had a water crisis at his house. He decided to fetch water at the respondent premises and asked the police and security guards to allow him to do so as his residence was only five (5) minutes away from the respondent's headquarters.

9. The claimant also testified that the Lavington guards at the gate booked his request to fetch water. The access to the respondent premises was lawful and arose out of need following a water crisis. The guidelines made by the respondent required the booking of persons gaining access at the premises which the claimant did.

10. The interdiction of the claimant was on the grounds that on 25<sup>th</sup> June, 2013 at 10 p.m. while driving motor vehicle KAX 250M he drove to the respondent's premises at a time not allowed and such was outside work hours and the procedure for interdiction was not followed as there was no show cause notice or a written warning. The interdiction was done without the claimant being given a hearing.

11. On 3<sup>rd</sup> September, 2016 a period of six (6) months later, the claimant was served with a second letter of interdiction on the grounds that on 19<sup>th</sup> December, 2013 he drove into the respondent premises without authority. The facts in this notice were not correct. On the stated

dates the claimant had no access to the respondent's premises without authority as alleged.

12. A third interdiction was then issued on similar grounds. The allegations were that the claimant had contravened the respondent policy on security when he accessed its premises outside allowed hours after 7.30 a.m. That on special occasion only would the respondent allow access to its premises outside work hours after 5 p.m.

13. The claimant also testified that the interdiction notices issued had conflicting allegations and he was never given a hearing to defend himself. He was not allowed to call any witnesses. The claimant is seeking reinstatement as his dismissal was unfair.

14. Upon cross-explanation, the claimant testified that he was not allowed to access the respondent premises outside work hours and without special approval in accordance with the policy and Code. This was not the first time he had gone to the premises to get water. He had not informed the respondent about his need to get water from its premises. It was not correct to access the premises and engage in personal business.

#### Defence

15. In defence, the respondent's case is that upon the employment of the claimant, his employment was governed by the contract of service and the Teachers Service Commission Act; the Employment Act, the Code of Regulations for Secretariat Staff revised 2006, the Code and legal instruments which included policies issued by the respondent from time to time. The claimant was in charge of security services at the respondent's headquarters.

16. From November, 2011 and 23<sup>rd</sup> May, 2013 the respondent lost 30 cisco Access Switches procured at a cost of Kshs.17, 648,406.00. Upon investigations, the matter was also reported to Kilimani Police Station whereupon CID officers visited the respondent's premises for their investigations. The police investigations recommended administrative action be taken against the claimant among other staff.

17. Based on the investigations and following the Code the claimant was served with a letter of interdiction. This letter was amended vide another letter dated 9<sup>th</sup> September, 2014. The claimant was allowed to present his defence and he wrote a statement in defence and denied allegations made against him. The respondent then convened a disciplinary panel and invited the claimant for hearing. The claimant had the opportunity to present his case and cross-examine witnesses.

18. On 30<sup>th</sup> January, 2015 the panel recommended that the claimant be dismissed from his employment. By letter dated 17<sup>th</sup> February, 2015 the respondent issued the claimant with a letter of termination. The claimant lodged an appeal and by letter dated 10<sup>th</sup> August, 2015 the respondent rejected the appeal.

19. The defence is also that the averments by the claimant that he accessed respondent premises from time to time to carry out his duties is not correct as he admitted that he occasionally fetched water after work hours without prior authorisation and on the night in question, 19<sup>th</sup> December, 2012 he was not on duty but gained access and fetched water for personal use at his residence and that such entry and access was unauthorised.

20. The process leading to the claimant's termination of employment was procedural and justified. The claimant was informed of allegations made against him and had the opportunity to present his defence and attend a disciplinary hearing. During the period of interdiction the claimant was earning his half salary in accordance with the regulations and Code.

21. The claims made by the claimant should be dismissed as the claimant admitted to having gained access to the respondent's offices without authority and therein engaged in conduct that was contrary to regulations and the Code. The claimant was not on duty at the time of access. The claimant failed to follow security regulations.

22. In evidence, the respondent called Wanja Kamau Muigai the information Communication and Technology officer. The respondent was installing new cisco switches and upon investigations, it was revealed that the claimant was involved.

The cisco switches were stored at 7<sup>th</sup> floor and the manager was in charge where the claimant was also placed and he had access to this office and floor.

23. The other witness for the respondent was Titus Mbuvi Kitheka a security officer. On 19<sup>th</sup> December, 2012 he was on night duty at the respondent headquarters. On this day there were three (3) artisans partitioning offices. With the witness were Morris Ngwili and Nzine. There were police officers and contracted guards. While he was waiting for his colleagues to access the office to commence work, he saw a motor vehicle and found the claimant but he was not one of the artisans authorised to be within the premises. The claimant said he had come to assist another officer who had a faulty car but the witness had no such information. The claimant then left the premises.

24. Mr Kitheka also testified that around midnight, his colleague Ngwili called him to the CCTV and alerted him that he saw the claimant entering the premises in his vehicle. They proceeded to the floor and found the claimant exiting with the guards and locking the gates. There was concern as to what was going on. One guard at the gate was asleep. The others said the claimant had come to fetch water. The other guards became arrogant and an argument ensued.

25. The matter was reported to the respondent. CCTV was retrieved and the claimant was observed leaving with some goods with the guards.

26. The third witness, Buko Kiwanja Maneno the human resource officer of the respondent testified that in June, 2013 the respondent

discovered that the procured cisco switches worth Kshs.18 million had been stolen. This was reported to the police and an investigation conducted. Three officers were implicated including the claimant. They were interdicted. The claimant was called for his disciplinary hearing; he gave his defence and cross-examined the witnesses. Upon the panel reviewing all the material before it a decision was taken that the claimant was culpable, he failed to follow security policy, he access the respondent premises without authorisation and therein put the respondent property into personal use and this warranted dismissal. The respondent issued the claimant with a letter of dismissal from employment.

27. At the close of the hearing, both parties filed written submissions.

28. In my analysis of the matters herein I have put into account the pleadings, the evidence of the parties, the written submissions and the cited cases.

29. The single issue for the court to address is whether the claimant should be reinstated back to his employment with the respondent and whether the due salaries should be paid.

30. The claim herein is premised on the dismissal of the claimant from his employment with the respondent vide letter dated 17<sup>th</sup> February, 2015. The notice set out as follows;

*DISMISSAL*

*... The Commission carefully considered your case on 30<sup>th</sup> January, 2015 and determined that you be dismissed from service with effect from 30<sup>th</sup> January, 2015 for the following reasons:-*

*You breached Regulation 20 of PART III of the TSC Code of Conduct and Ethics for Secretariat staff in that:-*

***On 19<sup>th</sup> December, 2012, while stationed at TSC Headquarter, you gained unauthorised entry into the TSC building after official working hours. You accessed the building at 10:00 p.m. by use of your white motor vehicle registration KAX 250M (Toyota Sprinter) in which you were driving after failing to gain entry at 7:00 p.m. contrary to the TSC Security Policy 2006. ...***

31. Before the claimant was dismissed from his employment, on 25<sup>th</sup> June, 2013 he was issued with a letter of interdiction on allegations that he was in breach of Regulation 20(1) of the TSC Code of Conduct and Ethics. The facts were similar to what was stated in the letter of dismissal dated 17<sup>th</sup> February, 2015. That on 19<sup>th</sup> December, 2012 the claimant had accessed the respondent's premises using his vehicle KAX 250M without authority when the premises were out of bound to staff between 6.00 p.m. to 6.30 a.m.

32. On 9<sup>th</sup> September, 2014 the claimant was issued with another letter of interdiction for alleged breach of Regulation 55(3) of the Code. The facts were similar to the letter of interdiction previously issued.

33. The letter of interdiction dated 3<sup>rd</sup> September, 2013 which had wrong facts to the extent that the allegations related to 19<sup>th</sup> December, 2013 were thus corrected vide notice of 9<sup>th</sup> September, 2014.

34. The claimant was invited for disciplinary hearing by Notice of 8<sup>th</sup> January, 2015.

35. The essence of the matter herein is the entry of the claimant into the respondent's premises on the night of 19<sup>th</sup> December, 2012. The respondent's case is that this entry was unauthorised and it was in breach of the policy code and the security code. Following such unauthorised access, the claimant was observed packing cartons. The respondent had lost cisco phone switches worth Kshs.18 million and following investigations, the claimant was found culpable.

36. The claimant does not deny entry into the respondent's premises on this night. His defence is simple. There was a water crisis, he needed water in his residence and he approached the security guards at the gate who allowed him access and he fetched water. That this was not the first time he was fetching water from the respondent's premises. That the interdictions and procedures followed in the dismissal of employment were contrary to set regulations and amounted to unfair termination of employment.

37. Section 44(3) and (4) of the Employment Act, 2007 allow the summary dismissal of an employee where the employer finds a fundamental breach of the employment contract or there is gross misconduct. Section 44(4) (g) provides as follows;

*(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if—*

.....

*(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.*

38. The admission by the claimant that on 19<sup>th</sup> December, 2012 he accessed the respondent premises and therein took the property of the respondent for his personal use, whatever the rationale and need that existed, such was not with the consent of the employer and this was outside work hours to allow for supervision as to what exactly the claimant took away from his employer. The defence that the claimant was allowed access by the police and the contracted security guards is neither here or there. Such are not the employees of the respondent who had supervisory authority over the claimant to allow such conduct.

39. Taking away of the employer's property without prior authority amounts to theft. Such cannot be justified in any other manner. In addressing a similar scenario, the court in the case of **Hassan Mustapha Backhit versus Hippora Business Solutions (E.A) Limited [2015] eKLR**

*The law is clear. If the employee commits or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property, that amounts to gross misconduct and would justify summary dismissal for lawful cause. Simply put, if there is sufficient and reasonable basis to hold there is an infringement of Section 44(4) (g) then the employee can be dismissed and the dismissal will be for lawful cause. In this case, there was an invoice which was in respect of Brookside products and the invoice was fraudulent. The Claimant was the person who was identified as the person involved on the Respondent's side. The Respondent has indicated there was a polygraph test taken and the results were not in favour of the Claimant. This would be sufficient grounds for dismissal. The Claimant was thus dismissed for just cause. The arrest was not malicious as the complaint was by the client Tuskys. The fact that the Claimant did not come face to face with the accusers or the fact that no arraignment to face criminal charges does not make the arrest by Police malicious. The Claimant paid cash bail and secured his freedom. That cannot be placed at the Respondent's door. The Claimant was however entitled to procedural fairness in his termination in terms of Section 41 of the Employment Act. Section 41 provides as follows:-*

*41(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation. (underline mine)*

40. Similar findings as above were made in the case of **Charles Njagi Nyaga versus Air Connection Limited [2016] eKLR**. It is therefore apparent that where the claimant, on his own admission that he engaged in unauthorised conduct, such conduct being prohibited in law, the sanction of dismissal from his employment was justified. The claimant was interdicted and allowed to file his defence. He was invited to a disciplinary hearing. He was allowed to appeal against his dismissal. I find there was procedural fairness.

41. In a case of a dismissal that is justified, reinstatement is a remedy not available.

42. The letter of dismissal issued to the claimant on 17<sup>th</sup> February, 2015 was to the effect that his dismissal was to take effect as of 30<sup>th</sup> January, 2015. Even though the claimant was given a hearing on 30<sup>th</sup> January, 2015 the decision for his dismissal taken on the same date, this was unknown to him until the letter advising so and dated 17<sup>th</sup> February, 2015. Termination of employment should thus take effect as of the date the claimant received letter dated 17<sup>th</sup> February, 2015.

43. Equally, while the claimant was on interdiction, he was on half pay. It is not stated how the remaining half pay is addressed in the letter of dismissal. All the due wages the claimant was entitled to as of 17<sup>th</sup> February, 2015 are due and payable. Such cannot be negated by the reasons of his dismissal as of 17<sup>th</sup> February, 2015.

**Accordingly, save for the salaries due to the claimant up and until 17<sup>th</sup> February, 2015 and where there are unpaid half salary during interdiction such should be paid within 45 days from the date herein, the claim seeking reinstatement is hereby dismissed. Each party shall bear own costs.**

**Read in open court at Nairobi this 20<sup>th</sup> day of April, 2018.**

**M. MBARU JUDGE**

In the presence of:

Court Assistant:.....

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