



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 346 OF 2015

(Before Hon. Justice Mathews N. Nduma)

DAVID MACHARIA.....1ST CLAIMANT

RICHARD WACHIRA NJUGUNA.....2ND CLAIMANT

LEONICE M. MWAZIGHE.....3RD CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

J U D G E M E N T

1. The Claimants were Clerical Officers in the cash office of the Respondents and were employed on diverse dates set out in the Memorandum of Claim, annexures thereto and in the oral testimony under oath adduced before court. The 1st Claimant had been severally promoted to Senior Clerical Officer in job group 'F' and subsequently to Accounts Assistant in job group 'H' but on acting basis and was to be paid acting allowance accordingly.

2. The other Claimants state they had served the Respondent diligently, with no adverse record until the date of interdiction. The Claimants claim various reliefs set out in the Memorandum of Claim for unlawful and unfair termination of employment particularized as:-

(a) Pension

(b) House, leave, medical and acting allowance.

(c) Three Months Notice.

(d) Gratuity

(e) Salary arrear

(f) Legal expense computed to Kshs.1,894,055.10 to the 1st Plaintiff; Kshs.1,267,670.00 for the 2nd Plaintiff and Kshs.1,214,766.00 for the 3rd Plaintiff.

3. The claimants state that on 30th June 1994, the 1st Defendant interdicted the Claimants unlawfully and wrongfully before the termination of criminal charges.

4. The Claimants were not accorded a disciplinary hearing contrary to the rules of natural justice and the Teaching Service Commission Regulations applicable to non-teaching officers of the commission.

5. That by a letter dated 3rd September 2002, the Defendant dismissed the Claimants from service unlawfully and unfairly without paying them terminal benefits due and owing to them.

6. The Claimants state that on or about June 1994, the defendant maliciously and without reasonable or probable cause preferred a complaint

to Nairobi Police upon which the plaintiffs were arrested and charged in Chief Magistrate's Court on about June 1994 in Criminal Case No.2713 of 1994.

7. The Claimants were arrested, detained and released on bond after incarceration for a number of days. The Plaintiffs were upon trial acquitted of the charges of theft made against them on 30th January, 2002.

8. That the action by the Defendant was contrary to Teachers Service Commission Act, Cap 212, TSC Regulations; Employment Act, Cap 226 and Regulation of Wages and condition of Employment Act Cap 226 (now repealed) and the 1st Defendant's Code of Regulations.

9. The Claimants suffered impairment in reputation, suffered pain of body and mind while in custody and during prolonged period of joblessness and lack of income, they incurred immense legal and transport expenses all set out in the amended plaint filed on 22nd July, 2008.

10. The Claimants suffered loss and damage. That despite demand made and notice of intention to sue the Defendants have failed, refused and/or neglected to make good the loss.

11. Wherefore the Plaintiff's pray for judgment against the defendants jointly and severally for:-

- (a) General Damages for malicious prosecution and false imprisonment.
- (b) Aggravated Damages.
- (c) Special Damages
- (d) Terminal Benefits set out herein before in the sum of Kshs.4,376,491.10.
- (e) Costs of the suit.
- (f) Interest.

Defence

12. The Respondents deny the suit in its totality and puts the Claimants to strict proof thereof.

13. The Respondents state that on or about June 2004, the 1st Respondent lost Kshs.21,205,650 following collusion that took place between the Claimants and third parties.

14. The 1st Respondent made a report to the Criminal Investigation Department following which the Plaintiffs were implicated in the theft. The 1st Respondent made a decision to interdict the Claimants. The letters of interdiction set out allegations made against the Claimants. The Claimants were informed of the right to make a defence. The Claimants made exculpatory statements in their defence.

15. Following the acquittal of the Claimants, the 1st Respondent amended the interdiction letter, and the Claimants were again given opportunity to respond to it.

16. The Claimants were subsequently invited to appear before a disciplinary committee of the commission on 3rd September, 2002 at the Commission's Headquarters.

17. The Claimants took part in the proceedings. Thereafter, the panel considered the evidence adduced before it including the defence statement's by the Claimants and arrived at the decision to dismiss the Claimants from service.

18. The Respondents state that they had valid reasons to dismiss the Claimants from service and that they followed the due process provided in the TSC Regulations and the applicable law then, Employment Act Cap 226 Laws of Kenya (now repealed).

19. The Respondent states that the provisions of the Employment act, 2007 do not apply to this case as was stated by Ndolo J in **Agnes Murugi v Barclays Bank of Kenya (2013)** and Nduma J in **Jeremian Ojwang Ojak v Central Bank of Kenya 2012** where he stated:-

"There is no provision for retrospective application of the Employment Act, 2007 to employment contracts terminated before its operationalization. The applicable law in this case is therefore the repealed Employment Act (Cap 226)"

20. Respondent adds that section 17 of cap 226 (now repealed) provided for circumstances in which an employee may be summarily dismissed as follows:-

"Any of the following matters may amount to gross misconduct so as to justify summary dismissals of an employee for lawful cause, but the enumeration of such matters shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to same, constitute justifiable or lawful grounds for the dismissal"

21. The Respondent submits that, under the repealed Act, the employer was permitted to terminate at will, without cause, subject to the employer's rules and regulations in place.

22. In **Kenya Ports Authority v Festus Kipkorir, Civil Appeal No. 1 of 2004**, Rika J stated the position then as follows:-

“Employers were not obliged to give reasons or hear the employee before termination. Employment was at will of the Employer. The Employer could terminate the contract of employment for good cause, bad cause or no cause at all. This was the law of wrongful or unlawful termination. The relationship was seen within the four corners of the Employment contract”

23. Regulation 10 of the then TSC Code of Regulations for Secretarial Staff stipulated that an officer may be summarily dismissed from the service of the commission where, he is found guilty of fraud, misappropriation of finances or grave misconduct incompatible with his continued employment in that office.

24. The Respondent submitted that the summary dismissal was regardless of whether the employees were found guilty of the Criminal charge or not because the standard of proof in the disciplinary hearing was on a balance of probabilities whereas that in the criminal trial was beyond reasonable doubt.

25. The Respondent called evidence to show that the Claimants were all involved in –

- a. Preparing of payment vouchers.
- b. Proof reading the vouchers after having been typed.
- c. Correct the vouchers and subsequently have then signed by the authorized signatory.
- d. Deliver the cheques from the cashier for signing by the signatory and
- e. Recording cheques for dispatch.

26. That evidence before disciplinary committee proved on a balance of probabilities that the Claimants acted in unprofessional manner by failing to prevent the fraud from taking place courtesy of the transactions that depended on their input at work.

27. The Respondent admits that Regulation 10 provided that the disciplinary process undertaken by the commission had to be fair. The Respondent however submits that the Respondent was fair in dealing with the Claimants.

28. That the Respondent issued the Claimants with three separate letters of interdiction on diverse dates but each one of them clearly informed the Claimants of the charges facing them and invited them

to respond to the charges. That the fact that the invitation to the disciplinary hearing asked the claimants to carry their teachers certificate was a patent typographical error. The Claimants were subjected to the current disciplinary procedure for secretarial staff.

29. That the Claimants were treated courteously, fairly, and with dignity at the hearing. The Claimants did not immediately register any objection to the manner they were treated at the hearing. That they participated fully in the proceedings, made their respective defence and the decision to dismiss them was based on evidence before the panel.

30. That the Respondent conformed to the test of procedural fairness set by Radido J. in **Anthony Mkala Chitavi vs Malindi Water & Sewerage Company Limited [2013]-**

“Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction.”

31. This is in addition to notifying the employee of the charges and opportunity to prepare and make his/her defence in writing or orally.

32. The Claimants reiterate that the threshold of fair hearing was not met by the Respondent, that they were falsely arrested and maliciously prosecuted at the instance of the Respondent and are entitled to damages as prayed.

33. That there was no iota of evidence, before the disciplinary panel or before court implicating them in the alleged theft. That the acquittal by the Magistrate court vindicated their version of events and demonstrated their innocence in this matter.

Determination

34. In the present matter the issues for determination are –

- (i) Whether the arrest, charge and prosecution of the Claimants was malicious.
- (ii) Whether it was lawful and fair to dismiss the Plaintiffs.

(iii) Whether the Claimants are entitled to the reliefs sought.

Issue i

35. The court has carefully considered the evidence before it and has come to the inevitable conclusion that the 1st Respondent had a reasonable cause to report the theft of a colossal sum of money from its coffers. The police had a lawful mandate to investigate the matter as they did by causing persons reasonably suspected to have participated, aided or committed criminal neglect to be arrested, charged and prosecuted for the offences.

36. In **Katerrega vs Attorney General (1973) E.A 289**, the court held –

“It is well established that in a claim for damage for malicious prosecution, malice in fact must be proved showing that the person instituting the proceedings was actuated either by spite or ill-will or by indirect or improper motives”

The totality of evidence by the Claimants has not shown on a balance of probabilities that the arrest, charging and prosecution of the Claimants was actuated by malice, spite, ill-will or by direct or improper motives.

37. In **Kagane vs Attorney General (1969) EA 643**, Rudd J set the test for reasonable and probable cause thus:

“Reasonable and probable cause is an honest belief in the guilty of the accused based upon a full conviction founded upon reasonable ground of the existence of a state of circumstances which assuming them to be true, would lead to an ordinary prudent and cautious man placed in the position of the accuser to the conclusion that the person has committed an offence”

38. Furthermore, whether to charge or prosecute anyone with any reported crime is the independent decision of the police investigating the matter. In **Nyanga vs Mucheke, Civil Appeal No. 59 of 1987 – Nyeri**, the Court of Appeal pointed out –

“The Appellant having reported to the police about the Respondent’s action of damaging his crops, the police took over the matter to investigate the Respondent for a possible offence ... once the Appellant gave the report, he ceased to have anything to do with the matter ...”

39. This situation is applicable in this case, where the 1st Respondent made a report of theft of money, and the police cast their net in and outside the Respondent’s organization with a view to have possible suspects arrested.

40. It is the court’s considered view that the Claimants proximity to the criminal case, made them fair game for the police and the 1st Respondent does not shoulder any blame by mere fact of having reported a theft, which took place leading to arrest and prosecution of many people some of whom were found guilty while others were acquitted of the specific offences they were accused of. Accordingly, the court answers this question in the negative.

Issue ii

41. As to whether the 1st Respondent had lawful cause to dismiss the Claimants from employment following their arrest and prosecution, it is trite that the fact that an employee has been charged with a criminal offence is not a bar for the employer to institute disciplinary proceedings against the employee.

42. In the case of **Constantine Simati v Teachers Service**

Commission and another [2011] eKLR Azangalala J stated –

“An internal disciplinary tribunal is not held to the same standards as a court of law. This becomes even more critical where an employee seeks to enforce an acquittal in a criminal trial as evidence of innocence in internal disciplinary proceedings”

43. In the present case, the disciplinary case was heard and determined upon acquittal of the Claimants. The court is satisfied that the Respondent did not violate the law by applying its disciplinary code to discipline the Claimants.

44. A fair procedure was followed as the Claimants were charged and given adequate notice to respond to the original and amended disciplinary charges. The Claimants made detailed explanation in writing and also were given audience before the TSC disciplinary committee. The court finds that the Respondent complied with the now repealed Employment Act, Cap 226 of the Laws of Kenya and Regulation 10 of TSC disciplinary code.

45. The Claimants here failed to prove on a balance of probabilities that their dismissal was wrongful or unfair and the court finds so.

Issue iii

46. Following the findings by the court on the issue of liability by the 1st Respondent in issues (i) and (ii) above, the prayers for grant of General, and aggravated damages are not suited and are dismissed.

Special Damages

47. The testimony by RW2, Buko Kiwanza, which is credible is to the effect that the Claimants were paid half salary during interdiction.

48. The Claimants were despite Regulation 10 of Teachers Service Commission entitled to the balance upon acquittal covering the rest of half salary for the entire period they remained under interdiction until they were acquitted and dismissed eventually. The sum was paid though belatedly. The Claimants also received their profund and superannuation funds in terms of the relevant regulations. No interest was payable on these funds according to RW2 and the court so finds.

49. Accordingly, the special damages comprising of pension, house allowance, leave, medical and acting allowances; three months notice, gratuity, salary arrears, and legal expenses have not been proven on a balance of probabilities and are dismissed.

50. The suit has taken many years to conclude for no fault of the parties. Circumstances have changed and the Claimants have largely borne the brunt of the delay. They have largely remained unemployed for many years. It would be unconscionable to award costs against them in favour of government. They have paid the price of the misadventure they found themselves engulfed in.

51. Accordingly, the entire suit is dismissed with no order as to costs.

Dated and Signed in Kisumu this 21st day of March, 2018

MATHEWS N. NDUMA

JUDGE

Delivered and signed in Nairobi this 6th day of April, 2018

MAUREEN ONYANGO

JUDGE

Appearances

Mr. Omondi for the 1st Claimant

Mr, Kahuthu for 2nd and 3rd Claimant

M/s. Kaluai for 1st Respondent

Anne Njung'e – Court Clerk