



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 1001 OF 2011**

**(Before Hon. Justice Hellen S. Wasilwa on 4<sup>th</sup> October, 2018)**

**EZEKIEL MUCHESI.....CLAIMANT**

**VERSUS**

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

**JUDGEMENT**

1. The Claimant filed suit on 19<sup>th</sup> May 2011 which was later Amended on 10<sup>th</sup> June 2016 and filed through the firm of K. N Wetsusa and Company Advocates seeking damages for unlawful dismissal.
2. He avers that at all material times, he was a bona fide employee of the Respondent, employed in the year 1990 vide TSC No 302969. He states that during the year 2014, while a teacher at Shanderema Secondary School within the County of Kakamega, he was arrested and charged before the Chief Magistrate's Court Vide Kakamega Criminal Case No 2135/04 with the offence of breaking and committing a felony contrary to Section 306 (a) of the Penal Code, specifically he was charged with stealing books.
3. He further avers that thereafter the Respondent, through his agent viz, the Provincial Director of Education, Western, transferred him from Shanderema Secondary School to Lirhembe Girls' Secondary School and upon receipt of the transfer letter, he handed over his duties to the heads of department.
4. He states that the headmaster did at no time communicate to him at the point of handing over concerning his release. He thus sought guidance from the Provincial Director of Education who advised him to report to Lirhembe Girls Secondary School. The headmistress of Lirhembe Girls Secondary School did indeed confirm that to the Respondent that he had in fact reported to the school as directed.
5. He states that he missed his salary for October 2004 and wrote to the TSC and TSC on 1<sup>st</sup> November 2011, wrote to the Principal asking that he be served with his interdiction letter which he received on 24/12/2004 which was over 30 days from the date when he reported to Lirhembe Secondary School. The letter of interdiction informed him that on 10<sup>th</sup> September 2004, he was interdicted by the Respondent from allegations stemming from the criminal case.
6. On 27<sup>th</sup> April 2005, he was invited to the Respondent's headquarters in Nairobi to defend himself against the allegations but upon arrival, he was served with an amended letter of interdiction on the same morning that the disciplinary proceedings against him took place and by a letter dated 11<sup>th</sup> October 2006, the Respondent dismissed him from service.
7. He further states that on 12<sup>th</sup> April 2007, the Chief Magistrate's Court at Kakamega, dismissed the allegations against him and acquitted him under Section 210 of the Criminal Procedure Code. He therefore wrote to the TSC for a review of the disciplinary case against him saying that he had been acquitted. However the TSC wrote back on 23<sup>rd</sup> November 2007 informing him that his acquittal does not influence their decision.
8. He avers that during the period of interdiction he was not paid half salary as is the standard procedure making the dismissal against him unfair as none of the allegations leveled against him by the Respondent were proved. He says that despite demand and notice to sue in default, the Respondent has declined to acknowledge liability.

**Submissions**

9. The Respondent filed their submissions where they submit that the evidence of the witnesses in Court and during the hearing of the

Claimant's discipline case raised reasonable grounds to believe that he had violated the provisions of the code and was therefore culpable for a disciplinary action and upon evaluation of the facts, witnesses and the investigation reports, the Respondent reached the decision to dismiss the Claimant for material breach of code of regulations for teachers as these acts did not only ridicule the integrity of the teaching profession but also eroded the trust and confidence bestowed on the Claimant by its employer and in an effort to protect the nobility and the integrity of the teaching profession, safeguard public property and learning resources from unscrupulous individuals bent on disadvantaging learners, they made the decision to dismiss the Claimant.

10. They aver that the Claimant was accorded a fair hearing and the opportunity to be heard in compliance with the rules of natural justice. The Claimant was present in person throughout the proceedings conducted on 14<sup>th</sup> July 2005 where the commission presented 7 witnesses who testified in his presence.

11. He also avers that he was accorded and accepted the opportunity to cross-examine adverse witnesses, present his case and tender executory evidence, which he did to his satisfaction. In consequence thereof the panel considered the evidence adduced before it, the Defence Statement of the Claimant, the relevant regulations, the circumstances of the case and arrived at the decision to dismiss him based on overwhelming evidence of violation of the code. This means that the Claimant was subjected to a fair, procedural and lawful disciplinary process from the time the allegations were received upto the time of dismissal hence justifying his dismissal from service.

12. They aver that Regulation 72 of the Code prohibits payment of half salary during period of interdiction on account of misappropriation, fraud among others. They submit that the Claimant was not entitled to half salary during the period of interdiction as he was facing serious charges of fraudulently appropriating public property which he was under duty to protect in his capacity as a teacher/public officer. Therefore, their disciplinary process adhered to the due process and principle of natural justice hence his claim for compensation for unfair termination lacks merit and has no legal or factual basis. They humbly pray that the claim before this Court be dismissed with costs to the Respondent as the same is devoid of any merit.

13. I have examined the evidence and submissions of both Parties. The issues for determination are as follows:-

**1. Whether there were valid reasons to terminate the Claimant.**

**2. Whether due process was followed.**

**3. Whether the Claimant is entitled to remedies sought.**

14. On the 1<sup>st</sup> issue, the Claimant was dismissed for the following reasons:-

***“you breached the TSC Act Cap 212 Section 7(3) of the Laws of Kenya and Regulation 26(3) of the Code of Regulations for Teachers in that you embezzled Kshs.48,250/= which you received as a result of stealing school text books from the library and selling them on 13.8.2004 (see the attached list).***

***You breached TSC Act Cap 212 Section 7(3) of the Laws of Kenya and Regulations 26(1) of the Code of Regulations for Teachers in that you sought for transfer without using the right procedure. This was in the same month of August when you knew very well that you had a case with the school. This is insubordination”.***

15. Indeed the Claimant was charged with the offence of stealing before the CMs' Court at Kakamega in Criminal Case No. 2135/2004 but he was acquitted under Section 210 of CPC because the person who had alleged he sold the books to them were never called as witnesses.

16. Whereas the Claimant appeared before the TSC, the same issues of the Vendors he sold the books arose and there was no eye witness evidence properly adduced to show Claimant was one who stole books and sold to street Vendors. The Vendors did not testify nor were they charged with being found in possession of stolen books.

17. On the issue of transfer, the Claimant was transferred by PDE Western on 27.8.2004. He was later charged before the Teachers Service Commission with offence of going on a wrong transfer without following the right procedure. Whereas the TSC found him guilty of insubordination due to this transfer, the Claimant cannot wholly be found to blame because he did not transfer himself. There is also no indication that he instigated the transfer on his own.

18. It is therefore my finding that there were no valid reasons to warrant dismissal of the Claimant.

19. On due process, the Claimant indeed appeared before the TSC where a disciplinary hearing was held, charges were read to him and witnesses were called.

20. The process of a hearing was therefore conducted. The evidence result may have not been based on sound evidence but it is my finding that the Claimant was accorded a hearing and therefore due process was followed as per the Respondent's own disciplinary manual.

21. Given that the reason for dismissal were not based on sound evidence and it is true that professional disciplinary hearings are not criminal or quasi criminal in nature despite their potentially serious sanctions as held in **Dr. Anil Mussani and College of Physicians and Surgeons of Ontario (reported at (2003) 64 O.R (3d) 641**; however, even the disciplinary proceedings held against the Claimant failed to take into account the need to call crucial witnesses such as Vendors who were found with stolen books to explain how they came in possession of the said books. It cannot just be said that the Vendors said the Claimant sold the books to them. That is hearsay evidence which has no probative value. It is therefore my finding that the dismissal of the Claimant was unfair and unjustified.

22. In view of the above finding, I find for the Claimant and award him as follows:-

**1. Unpaid salary during the period of interdiction being salary from 10<sup>th</sup> September 2004 to 11<sup>th</sup> October 2006 = 30,917 x 25 months = 772,925/=.**

**2. Damages for unfair and unlawful termination = 12 months x 30,917 = 371,004/=.**

**TOTAL = 1,143,929/=**

**3. The Respondent will pay costs of this suit plus interest at Court rates with effect from the date of this judgement.**

Dated and delivered in open Court this 4<sup>th</sup> day of October, 2018.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Kalwayi holding brief for Mambo for Respondent – Present

Claimant – Present in person