



**EPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 871 OF 2014**

**KITHURE M'MWENDA NYAGA..... CLAIMANT**

**VERSUS**

**TEACHER SERVICE COMMISSION.....RESPONDENT**

**JUDGMENT**

**Introduction**

1. The suit herein was filed on 26.5.2014 seeking the following prayers:

- a. A declaration that the Respondent's dismissal of the Claimant was unfair and wrongful.
- b. I month salary in lieu of notice **Kshs.28,507/=**
- c. 5 months half salary not paid (between January 2004 and May 2004) **Kshs.71,267.50/=**
- d. Compensation for unfair dismissal by the Respondent **Kshs.342,084/=**
- e. Loss of future earnings **Kshs.6,984,115/=** (till retirement age).
- f. Pension dues
- g. General damages
- h. Exemplary damages
- i. An order that the Respondent issue a certificate of service to the Claimant in accordance with the law
- j. An order for the payment of costs of the claim by the Respondent.
- k. Interest on b, c and d at commercial rates.
- l. Interest on (g) at court rates
- m. Any other relief as the Honourable Court will deem just and fit to grant

2. The respondent admitted that she dismissed the claimant from employment on 5.5.2004 but denied that the dismissal was unfair. It is further defence case that the claimant was dismissed for misconduct and after being accord fair hearing through show cause letter, oral hearing before the respondents Disciplinary panel, appeal and even review. It is also defence case that the claimant was paid all his dues accruing from his contract of service and prayed for the suit to be dismissed with costs.

3. The suit was heard on 23.2.2017 and 9.2.2018 when the claimant testified and called two witnesses and the respondent called two witnesses. After the hearing, the counsel for both sides filed written submissions.

## **Claimant's Case**

4. The claimant told the court that he was employed by the respondent on 7.5.1990 as a Teacher and worked until 23.1.2004 when he was interdicted for alleged insubordination. That on 6.5.2004 he was given disciplinary hearing and thereafter dismissed on the same day. He appealed against the dismissal on 23.7.2006 but the appeal was unsuccessful. He further sought review of the said dismissal through his union, KNUT but the review was declined and the dismissal upheld.

5. The two witnesses called by the claimant only gave evidence to support his allegation that he was sick during the time he was being accused of refusing to do the work of invigilating National exams that was assigned to him by his seniors.

## **Defence Case**

6. Dr. Susan Muthoni Kinyua testified as Rw1 and stated that she was the principal of Chief Mbogori Girls Chogoria in October 2003. She further testified that the claimant was a teacher in the said school and she appointed him to invigilate exams at Chogoria Boys High School by letter dated 4.8.2003. That the exams started on 21.10.2003 but the claimant declined to go for the exams invigilation duties at the assigned centre even after the Area Education officer spoke to him. As a result he was late interdicted and dismissed after a disciplinary hearing accorded to him by the respondent. That the reason cited for the dismissal was insubordination.

7. Mr. Alfred Nyamu Karagara testified as Rw2. He stated that he was the Area Education Officer Mwimbi Division, Tharaka Nithi District on 21.10.2003 when he received a call from Rw1 stating that the claimant had refused to go for exam invigilation. He then rushed there and he personally gave the claimant the letter to go for the invigilation of the exams but he refused to go despite verbal warning that disciplinary action will be taken against him if he failed to undertake the assignment given. He further testified that on that date, the claimant never cited sickness as the reason for refusing to go for the exam invigilation.

## **Analysis and Determination**

8. After careful consideration of the pleadings evidence and the submission filed, I found no dispute in the fact that the claimant was employed by the respondent as a Teacher until 6.5.2004 when he was dismissed for insubordination; that his appeal was rejected on 18.7.2007 and the dismissal upheld; and that he sought review through his union (KNUT) but again the request for review was dismissed on 8.10.2008 and the dismissal upheld.

9. The issues for determination are:

- a. Whether the suit is statute barred.
- b. Whether the dismissal was unfair
- c. Whether the reliefs sought should issue.

## **Statute barred suit**

10. The claimant was dismissed on 6.5.2004 and as such the cause of action is governed by the provisions of the Employment Act then in force and section 4(1) of the Limitation of Actions Act. Section 4(1) of the latter Act provides that:

**“4(1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued:-**

### **a. Action founded on contract;...”**

11. Flowing from the foregoing clear provisions, the cause of action in this case having accrued on 6.5.2004 expired on 6.5.2010 when the six years limitation period lapsed. Even if one was to say that the cause of action accrued on 8.10.2008 when the internal disciplinary process ended with the dismissal of the application for review, the suit would still be statute barred. The reason for the follow going view is that the law applicable in October 2008 was the Employment Act 2007, which reduced the limitation period for employment claim, to 3 years under section 90 From 8.10.2008, the 3 years limitation period lapsed on 8.10.2011.

12. Considering the foregoing analysis, whether looked from the point of view of section 4(1)(a) of the Limitation of Actions Act or section 90 the Employment Act 2007, the suit herein was filed outside the limitation period prescribed by the law, by over 2 years. Limitation period goes to the mandate of the court to entertain a dispute. If the suit is statute barred, it means that the court is also barred from entertaining the suit. In this case however, the claim was mischievously pleaded so that the date when the cause of action arose was conspicuously omitted. In addition, the respondent who had all the facts of the case failed to plead the defence of limitation or raise the same by way of a preliminary objection. As a result, precious judicial time has gone to the drain because at this juncture I must down my tools.

## **Conclusion and Disposition**

13. I have found that the suit herein is statute barred whichever way one looks at it and for that reason alone, the suit must be dismissed for want of jurisdiction. Each party shall bear his or her own costs.

## **Dated, Signed and Delivered in**

**Open Court at Nairobi this 2<sup>nd</sup> day of November, 2018**

**ONESMUS N. MAKAU**

**JUDGE**