



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CAUSE NO. 201 OF 2011

JOHN MUNYAO.....CLAIMANT

- VERSUS -

TEACHERS SERVICE COMMISSION.....DEFENDANT

(Before Hon. Justice Byram Ongaya on Thursday 20th December, 2018)

JUDGMENT

The claimant John Munyao filed the statement of claim on 14.02.2011 through Kivuva Omunga Waweru & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the claimant's dismissal of his employment was wrongful, unjust and unwarranted.
- b) The respondent be and is hereby ordered to reinstate the claimant in its register.
- c) That the respondent is ordered to pay to the claimant all his salary and other benefits in full from the time of interdiction until the time of reinstatement.
- d) Any other order that the Honourable Court may deem fit to grant.

The respondent, the Teachers Service Commission, filed the statement of defence on 16.03.2011 through James Musee Nduna Advocate. On 07.03.2012 the respondent changed its advocate to Stella C. Ruto Advocate and on 22.08.2013 to Zipporah Mambo Advocate and Allan Sitima Advocate finally appeared for the respondent at the hearing of the suit.

There is no dispute that the parties were in a contract of service. The claimant was employed by the respondent as a teacher on permanent and pensionable terms effective 01.05.1988. The claimant was interdicted from work by the letter of interdiction dated 10.11.2006 that the claimant's name be removed from the register of teachers upon allegations that the claimant breached Regulation 66(2) (a) of the Code of Regulations for Teachers in that the claimant had carnal knowledge of his student E.M admission No. 2035 on 12.06.2006 at his house. The letter required the claimant to make a written reply in 21 days and it promised that the respondent would give the claimant an opportunity to be heard prior to making of a final decision.

The interdiction letter flowed from the resolutions of the Ndalani Secondary School's Board of Governors (BOG) held on 10.11.2006. The minutes of the meeting show that the claimant's wife was the aunt to the student in issue, a form 2 girl in the school where the claimant was deployed to serve. The student admitted to the School Deputy Principal that she had carnal knowledge with the claimant. The girl then wrote an apology letter and handed it to the Deputy Principal.

The Deputy Principal tabled the girl's apology letter to the BOG and the claimant was invited to the meeting. The minutes show that the claimant had previously been verbally warned by the Principal, BOG chairman and PTA chairman on account of sexual relationship with the same girl. The claimant denied the allegations but admitted that the girl had been close to him in a monopolistic manner keeping other students away from consulting him and further he admitted that he had earlier called the girl "**his girlfriend**" at one time in the school. He then requested the BOG to pardon him of the offence he may have committed. The girl had been invited to the meeting but the father walked to the meeting and requested that the daughter would not attend because he did not want her to appear before the BOG. However the father admitted that there had been a sexual affair between his daughter and the claimant. He pleaded with the BOG to pardon the claimant because of the involved family relations. The BOG then decided that the interdiction letter should be issued.

The claimant was taken through the due process including a hearing before the respondent and by the letter dated 08.05.2007 he was dismissed from the teaching service effective 08.05.2007 on account of the same allegations as was stated in the show-cause notice.

The respondent's witness No. 1 was the school Deputy Principal at the material time. She testified as follows. The claimant was the teacher on duty at the material time on 11.06.2006. The same date was a parents' visiting day. The mother to the girl in issue had visited the girl and left the school. The girl was then reported as missing in the school beginning sometime on 11.06.2006 to 12.06.2006 as per the roll call taken at 4.00pm on 11.06.2006. RW was not aware of the reason for the girl's absence. In her capacity as Deputy Principal she was in charge of discipline of the girls and under the prevailing regulations only the Principal and in exceptional circumstances the Deputy Principal would give a student permission to be away from school on overnight absence. On that day the Principal had been away and she had not given the girl permission to be away that evening and for an overnight absence.

RW discovered that the claimant as teacher on duty had irregularly signed the leave chit for the girl. The claimant summoned the girl who told her that she had been at the claimant's house that night and had a sexual intercourse with the claimant in that process of overnight absence from the school. The girl became remorseful and signed an apology letter which she handed to RW. The case was tabled to the BOG and the disciplinary process that ensued lead to claimant's dismissal from the service.

The Court has considered the evidence. The Court reckons that the claimant told the BOG that he had called the student "**his girlfriend**" and further pleaded for pardon. There is no reason to doubt that the respondent had a genuine reason to dismiss the claimant as at the time of the dismissal and on account of the allegations. In any event it was evident that the claimant had an evil design when he breached the regulations and irregularly gave the girl a leave out chit for an overnight stay which turned out to have been at his house. He was indeed culpable as was levelled against him. The girl's father while seeking a pardon for the claimant told the BOG that the girl had admitted to him that she had a sexual relationship with the claimant. In such circumstances, the Court returns that the termination was not unfair both in substance and procedure.

The Court has considered the material on record and the claimant's own evidence. The evidence is clear that the claimant was accorded a notice and a hearing as per section 41 of the Employment Act, 2007. The evidence is therefore clear that the procedure leading to the summary dismissal was fair as envisaged in section 45 of the Act. There is no reason to doubt the record of the proceedings of the disciplinary hearing before the BOG and the respondent. The Court returns that as at termination the respondent had a genuine or valid reason to terminate the claimant's contract of service as per sections 43 and 45 of the Act and as per the allegations that had been levelled against the respondent. The Court also finds that the reason for termination was not unfair as it related to the claimant's conduct and compatibility as a teacher, as well as the respondent's operational requirements as per the Code of Regulations stipulating the ethical and integrity standards for teachers and which the claimant breached and, as was envisaged in section 45 of the Act. The claimant's evidence before the BOG and the respondent's documentary and oral evidence show that the respondent had established the reason for termination as per section 47(5) of the Act and as at or prior to the termination.

The Court observes that the prayer for reinstatement would also fail because the 3 years of limitation for grant of such a remedy as per section 12 of the Employment and Labour Relations Court Act, 2011 had already lapsed from the date of the dismissal.

In conclusion judgment is hereby entered for the respondent against the claimant for dismissal of the statement of claim filed on 14.02.2011, with costs.

Signed, dated and delivered in court at Nairobi this Thursday 20th December, 2018.

BYRAM ONGAYA

JUDGE