



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR

RELATIONS COURT AT KISUMU

CAUSE NUMBER 340 OF 2013

BETWEEN

HERMAN MUSABI.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION [TSC].....RESPONDENT

AND

THE ATTORNEY-GENERAL.....THIRD PARTY

Rika J

Court Assistant: Benjamin Kombe

Phoebe Munihu Muleshe & Company Advocates for the Claimant

Calvin Anyuor Advocate for the Respondent

State Law Office, Kisumu for the Third Party

JUDGMENT

1. This Claim was initiated by the Claimant at the High Court in Kakamega, through a Complaint, filed on 24th April 2009. It was transferred to the Industrial Court [presently E&LRC] at Kisumu, through a consent order recorded at the High Court, on 2nd December 2013.
2. The Respondent filed its Statement of Defence on 15th June 2009. There is on record an Amended Statement of Defence, filed on 25th August 2010, and a Further Amended Statement of Defence, received at the Court's Registry on 11th April 2017. The Attorney- General joined the proceedings pursuant to an order of the Court made on 27th February 2017.
3. The Claimant gave evidence on 11th July 2018 and 15th November 2018. Respondent's Deputy Director of Human Resource, Pamela Achieng' Ochieng' and Accountant Zachary Wachanga Kabaya, both gave evidence for the Respondent on 15th November 2018 when proceedings closed. The Third Party did not give evidence.

Claimant's position

4. The Claimant states that he was employed by the Respondent in the year 1979, as a P2 Teacher. He became P1 Teacher in 1982. He applied for promotion to S1 Teacher. This was granted and effected retrospectively to 1995.
5. Promotion to S1 Teacher was reversed in May 2005 on the ground that it was procured irregularly. The Claimant faults the decision to demote him. He states it was not made in accordance with the Teachers Service Commission Act and the Constitution of Kenya.

6. He was not taken through a disciplinary process prior to demotion. Demotion was occasioned by extraneous matters. He was earning over Kshs. 25,000 monthly, at the time of demotion. All salary increment paid to him based on promotion to S1 Teacher was to be recovered upon demotion.

7. He prays the Court to make Judgment against the Respondents in the following terms:-

- a) Declaration that Claimant's demotion was wrongful, null and void *ab initio*.
- b) Reinstatement to duty, or payment of deducted salary till age of retirement.
- c) Any other suitable relief.

8. He was never investigated or convicted for any offence, arising from his promotion to S1 Teacher. He just made an application, and was promoted. His letter of promotion was signed by the Director of Education in the Ministry of Education [Ministry].

9. Cross-examined, the Claimant told the Court he is now retired. He has been paid his retirement benefits. His complaint is that he was promoted to S1 Teacher from 1st January 1995. He was promoted and demoted without giving him a hearing.

10. He received a letter dated 30th March 2005 from a Committee of the TSC and the Ministry, stating that Claimant's promotion was found to be irregular. TSC acted on the basis of this Committee's report.

11. His salary had been increased based on promotion. There were other promotions made between P1 and S1. The Claimant was thrice promoted in between. These were common cadre promotions, given automatically to all Teachers. The Claimant did not receive Pay Change Advice, saying there would be deduction from his salary, from May 2005. Redirected, the Claimant told the Court he did not know if procedure was followed in promoting him. He was certain it was not followed, in demoting him.

Respondent's position.

12. The Respondent holds the position that Claimant's promotion was not genuine and resulted from forgery. Forgery was discovered by a Promotion/ Grading Committee established by the TSC and the Ministry.

13. It is conceded that the Claimant was employed by the Respondent on 1st May 1979 as a P2 Teacher. He was posted to Kware Primary School in the then Kakamega District.

14. His employment was governed by his Letter of Appointment, Code of Regulations for Teachers, The TSC Act [repealed], the Education Act Cap 211 [repealed] and other relevant Legislation relating to Public Service.

15. He made an Application to the Ministry on 25th January 1982 for promotion, from P2 to P1. He was successful. The Ministry directed the TSC to upgrade the Claimant from P2 to P1, through a letter dated 25th February 1982. TSC complied and promoted the Claimant through Pay Change Advice dated 26th March 1982.

16. On or around 7th December 1996, the TSC received a certified copy of a letter dated 22nd December 1994, alleged to have issued from a Mr. E.N.Njoka, Director of Education, directing that the Claimant is promoted from P1 to grade S1 with effect from 1st January 1995.

17. TSC acted on this letter by promoting the Claimant to S1, effective 1st January 1995.

18. In 2003, the Ministry unearthed a monumental scandal, where some Teachers, in collusion with some unscrupulous staff in the Ministry, obtained irregular promotion letters. This called for verification, which was carried out by the joint TSC/ Ministry Committee.

19. A total of 617 letters of promotion, including the Claimant's, were found to be not genuine. The TSC had incurred Kshs. 391,261,068, paying Teachers who were irregularly promoted.

20. The Ministry and the Vetting Committee directed the TSC to cancel all the flawed promotions, and recover all salary overpayments from the affected Teachers.

21. The Claimant was given 3 months' notice before reversal and recovery of salary irregularly made to him, was effected.

22. The Respondent states further that Section 5[2] of the TSC Act, read together with Regulation 40 [2] and 41[2] of the Code of Regulations [1986], conferred the mandate of promotion of Teachers in grades P3, P2, P1, and S1, upon the Ministry, not the TSC. Any liability under this Claim, if any, should be borne by the Ministry.

23. Pamela Achieng' Ochieng' confirmed that P2 Teacher would be promoted by the Ministry, by being given an upgrade and a letter of promotion. From P2 a Teacher would be promoted to P1. The Ministry would send a list of promoted Teachers to TSC. From P1 to S1 was likewise merit-based promotion, done by the Ministry. Certificate of promotion would issue in each case. This would be sent to the TSC by the Ministry, together with a list of all promoted Teachers.

24. TSC would acknowledge receipt of the documents forwarded by the Ministry. The promotion documents would be placed in respective Teachers' personnel files at the TSC. Pay Change Advice would be issued by the TSC to promoted Teachers.
25. It was not acceptable for individual Teachers to take their own letters of promotion to TSC.
26. TSC sought information from the Claimant in a letter dated 9th June 2004, about his promotion from P1 to S1. The Respondent enquired whether the Claimant was on the promotion list forwarded by the Ministry.
27. Another letter dated 24th April 2004 was written to the Claimant by TSC through his School Headmaster. The Claimant was asked to provide academic and vocational certificates. He was invited to TSC Head Office to shed light about his promotion.
28. The Claimant shed no light. He did not supply the required certificates. Similar request had been made by the TSC to the Claimant in writing in 2001. TSC concluded that the Claimant was promoted irregularly.
29. The joint Committee of the TSC and the Ministry established that there was a racket involved in corrupt promotions. An Officer names James Mogusu, was dismissed from the Ministry, for involvement in processing of the scandalous promotions.
30. The TSC Code was part of Claimant's terms and conditions of service. It enabled the Employer to recover salaries irregularly paid.
31. Cross-examined, Ochieng' told the Court that the letters calling for Claimant's certificates were posted to his School. His salary was not stopped; it was revised. Revision was part of the disciplinary action against him. He was downgraded. Investigations took place. He was not condemned unheard. Redirected, Ochieng' told the Court that the Claimant was invited to TSC Head Office in writing, to explain his promotion. He did not accept the invitation. The letter was sent through his Headmaster and the District Education Office.
32. Zachary Wachanga Kabaya associated himself with the evidence given by Ochieng'. He was a member of the Committee put up by the TSC and the Ministry to look into the scandal.
33. The Committee prepared a Report. There were 10,000 Primary School Teachers registered with the TSC. The Committee divided the Teachers into 4 categories. 1st category belonged to those Teachers who were genuinely promoted, and genuinely paid salary increments; 2nd belonged to a category of Teachers who were genuinely promoted, but not paid enhanced salary; 3rd was a category of Teachers who were not genuinely promoted, but who received enhanced salary; and 4th, was a category of Teachers who were not genuinely promoted, and who were never paid enhanced salary.
34. The Claimant fell in category 3. His name is number 132 on the list. He was not genuinely promoted, but received salary increment.
35. The Committee looked into the financial implications generated by this corruption. 617 Teachers fell in category 3. It cost the Government Kshs. 397,477, 188 in paying the irregularly promoted Teachers' salary increments. In category 2, there were 608 Teachers. It would cost the Government Kshs. 227,888,318, to pay these deservingly promoted Teachers, their arrears of salary increments. All promotions were stopped upon uncovering of the scandal. It would save the Government Kshs. 169,588,318, if salary increments were recovered from those not genuinely promoted, and paid to those Teachers who earned their stripes. On cross-examination, Kabaya testified that the Committee investigated all Teachers who were involved. The Claimant was involved. He had benefited from common cadre promotions, even after the irregular promotion. All promotions were affected by reversal of promotion to S1. The Witness reaffirmed on redirection that common cadre promotions could not be sustained, upon reversal of promotion to S1.

The Court Finds:-

36. The Claimant was employed by the TSC as a Teacher grade P2, on 1st May 1979. It is agreed that he was promoted in 1982 to grade P1 upon his application for promotion.
37. The dispute arises from the Claimant's next promotion from P1 to S1. This promotion was made based on a certified copy of a letter from a Mr. E.N. Njoka, alleged to have been the Director of Education in the Ministry. The letter is dated 22nd December 1994. TSC was required to promote the Claimant from P1 to S1, effective from 1st January 1995. TSC complied. The Claimant was promoted, and enjoyed enhanced salary from the date of promotion.
38. He enjoyed 3 other promotions under what the TSC calls common cadre promotion. It was explained to the Court that this is automatic promotion, extended to all Teachers after a specific period.
39. In 2003 the Ministry unearthed a scandal where Teachers had been irregularly promoted. A Committee of which Respondent's Witness Number 2, was a member, was constituted by the TSC and the Ministry to look into the issue.
40. The Report of the Committee is on record. 617 Teachers were found to have been irregularly promoted. The Claimant was among these Teachers.
41. The Claimant in his evidence before the Court was not able to explain how he received his promotion. He was content to say it was the Respondent and the Interested Party, who would know the procedure involved, in promoting and demoting Teachers.
42. He did not explain why his promotion was not communicated by the Ministry to the TSC, in a collective list of promoted Teachers. He

was called on several occasions by the TSC, in writing to shed light on his promotion. He was sent letters through his Headmaster, copied to the District Education Office. The Respondent called on the Claimant to avail his original educational and professional certificates. He was invited to defend his promotion at the TSC Head Office. He balked. He kept away from the TSC Head Office. He did not even write, forwarding his certificates, or explaining why the certificates were unavailable. He did not explain to the Court, his unwillingness to defend himself before the TSC, when given a chance.

43. The Court is not in any doubt that the Claimant received the invitation letters from the Respondent. He cannot say he was condemned unheard. He was given a 3 month notice, before the decision to reverse promotion, and recall of salary increments paid under the irregular promotion, was made. He did not write any complaint to the TSC, or give a belated explanation on his promotion, during this window period of 3 months. He did not even approach the Court to restrain the TSC from acting on the reversal decision before it was given effect, if he had a justifiable grievance against his Employer.

44. The Claimant was not the only Teacher affected by the clean-up exercise. 617 Teachers were caught up in the racket. The evidence by Respondent's 2nd Witness was powerful on the financial implication. Without repeating the entire evidence here, it is clear that taxpayers would be saved Kshs. 169,588,318, through the corrective measures taken by the TSC.

45. The Court is satisfied that the TSC acted in accordance with the TSC Act and the Code of Regulations, in demoting the Claimant, and recalling benefits paid to him pursuant to irregular promotion. TSC is a public agency, and acted as a defender of public interest. The Employment Act sanctions deduction from an Employee's salary, of any amount paid to the Employee in error. Employers are also permitted by the Act to give Employees particulars of remuneration, and scale or rate of remuneration. In event of change to such particulars, the Employer shall consult the Employee, and revise the contract to reflect such change. The Claimant was consulted, called to explain himself, and failed to offer any explanation on his promotion. The Respondent did not act unilaterally, in revising Claimant's terms and conditions of service. The Respondent acted within the confines of the law to which the Parties' employment relationship was subject.

46. Lastly, promotion of the Claimant has been proved to have arisen from an illegal transaction, demonstrably harmful to public interest. Deserving Teachers who were genuinely promoted remained unpaid, while their corrupt colleagues, who had swindled their way to the top, continued to draw unmerited salary increments. Promotion in the public sector is intended to be based on merit. School children risked falling under the tutelage of unskilled or half-baked Teachers. Taxpayers continued to finance reprobate Teachers, until the scandal was unearthed and remedial measures put in place. Public interest was at stake. In the **High Court Case Mohamed v the Attorney General KLR 146**, it was held: no Court ought to enforce an illegal contract, or allow itself to be made an instrument of enforcing obligations, alleged to arise out of a contract or transaction which is illegal. The Claimant is asking for orders from this Court, which would uphold obligations arising out of an illegal employment transaction, in which he was himself implicated.

IT IS ORDERED:-

a) The Claim is rejected.

b) No order on the costs.

Dated and signed at Mombasa this 22nd day of November, 2018

James Rika

Judge

Dated, signed and delivered at Kisumu this 6th day of December, 2018

Mathews Nderi Nduma

Judge