



REPUBLIC OF KENYA
EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 196 OF 2013

(Before Hon. Lady Justice Hellen S. Wasilwa on 25th January, 2017)

DUNCAN KABURU MANYARA.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

JUDGMENT

1. Before the Court is a claim for wrongful termination of employment where the Claimant prays for judgment against the Respondent for:

- 1. A declaration and quashing of the findings and/or decision by the Teacher's Service Commission and/or its Tribunals that their decision(s) are null and void.***
- 2. A sum of Kshs. 12,191,8282.00 plus interest at 14% p.a. from the date of this suit being 15th July 2008 until payment in full.***
- 3. General damages for wrongful termination of employment and/or dismissal and for loss of future earnings capacity.***
- 4. Exemplary & Aggravated damages.***
- 5. Cost of this suit***
- 6. Interest thereof at Court rates.***
- 7. Any other or further relief that this Honourable Court may deem fit to grant and/or in alternative reinstatement to employment.***

Facts

2. The Claimant was an employee of the Teachers Service Commission, the Respondent herein, as from 1st May, 1982. The appointment was on Pensionable Terms of service in line with other management personnel, and run until on 4/1/2001 when the Claimant received a post-dated dismissal letter dated 3/2/2001 from the Respondent. The dismissal date was later brought forward to 20th December 2000 by another letter dated 15/02/2001.

3. In the course of the Eighteen (18) years that he worked with the Respondent's Secretariat, later as an Audit Examiner the Claimant was never served with any warning reprimand and/or disciplinary remark. He was meritoriously promoted and/or graded to various job groups. The Particulars of the promotions and grading are as follows:-

i. By letter dated 26th April, 1982 appointed to a post in the Grade of clerical office job group "D" attracting a gross salary of Kenya pounds 774 per annum.

ii. By letter dated 15th August, 1986, his services were transferred to Audit Division acting Capacity as Audit Examiner.

iii. By letter dated 1st August, 1990 appointed to the post of Audit Examiner Grade III-job group "G" attracting a gross salary of Kenya pounds 2514 per annum.

iv. By letter dated 1st January 1993 appointed to the post of Audit Examiner, attracting a gross salary of Kenya pounds 3519 per annum.

v. By letter dated 6th October, 1994 appointed to a post in the grade of Auditor II, job Group "J" attracting a gross salary of Kenya Pounds 6066 per annum.

vi. By letter dated 18th March, 1998, appointed to the post of Internal Auditor Grade I, job Group "K" attracting a gross salary of Kenya Pounds 8790 per annum.

4. The Respondent received allegations that the Claimant received a bribe of **Kshs. 10,000** from a teacher named Henry Matura Muguongo **TSC/NO. 181520** who was facing a disciplinary action for fraudulent promotions. It was alleged bribe was paid to the Claimant to assist the teacher in his **Discipline Case No. 795/2000**.

5. The Claimant advised the same teacher to give false information in his defence statement before the Disciplinary Panel that the fraudulent promotions were done by a Commission staff from the Kisii tribe, and un-procedurally removed fake Promotion Documents/Letters from the file of a teacher named Agnes Gichuru TSC/ NO. 74852 who was also facing a disciplinary case before the Commission.

6. Further, upon receipt of the allegations, the Commission conducted internal investigations and deliberated on the gravity of the allegations. The Respondent collected statement from the teacher who narrated how the bribe was given to the Claimant. Accordingly, in exercise of its disciplinary power, the Commission made a decision to interdict the Claimant.

7. The Claimant's employment was permanent and pensionable and he was entitled to remain in employment till the age of fifty five (55) years or later. The letter dated 30th October, 2000 and 3rd February, 2001 for termination aforesaid cited grounds of dismissal and/or termination as; receipt of money as a form of bribe, giving false information.

8. The Respondent has filed a statement of defense dated 7th of January 2014 and filed on the 24th of January 2014. In it, they admit that the Respondent was in their employ during the stated period as a clerical officer deployed to the Internal Audit department at its headquarters in Nairobi.

9. They aver that on or about October 2000 they received complaints against the claimant alleging that he received 10,000/= from Henry Matura TSC/NO.181520 in order to assist him in his disciplinary case NO 795/2000.

10. They aver that he advised the same teacher to give false information in his defense statement and removed promotion documents from the file of a teacher named Agnes Gichuru TSC/NO.74852.

11. The Respondents in their statement aver that following these allegations it reached the decision to

interdict the Claimant but affirms that the decision was on probable and reasonable grounds of suspicion based on the belief that the claimant was a suspect in the commission of an act or offence punishable by law specifically Code of Regulation for Secretariat Staff.

12. The Respondent avers that they served the Claimant with a proper Interdiction Notice and given adequate time to organize his defense which he wrote and presented. They aver that the defense was considered by the Respondent in compliance with the provisions of the COR and principles of Natural Justice.

13. The Respondent aver that the Claimant was also given a fair opportunity to be heard when he appeared before the disciplinary panel and had the allegations read to him, as well as given the opportunity to cross examine the witnesses before the panel.

14. They Respondent aver that the Claimant was communicated to the decision of the panel as soon as it was made.

15. The Respondent avers that it acted within the law, and in public interest that the allegations of unfairness leading to abrupt termination of the Claimant's employment are denied.

16. They aver that the Respondent at all times had a duty to maintain public morality, integrity and nobility of the teaching profession and that the decision meted on the Claimant was proportionate to the offence committed.

17. They pray that the Court dismisses the claim.

Submissions

18. The Plaintiff submits that the letters outlining reasons for his dismissal have been filed and produced by the Claimant and Claimant prays that the letters, the ensuing disciplinary process and decisions be declared null and void, and consequently quashed.

19. The termination and/or dismissal was actually victimization, malice and false allegations, hence wrongful and unfair. The manner in which the Claimant's services were terminated and the method employed is so prejudicial and adverse to his career that it is unlikely that any other institution would consider offering him a job. In any event he would be unable to obtain either reference or testimonial of service from the Respondent. His commission career was irretrievably damaged, as happened when his newly found employment with the then Kenya Institute of Education was adversely affected, and terminated summarily as a consequence of the TSC termination and purported findings. Since then, the Claimant attempts to get employment elsewhere have not borne any fruits.

20. The Claimant submits that the Respondent issued the Claimant with a letter of dismissal alleging the reasons for termination to be receiving Kshs. 10,000/= from Henry Mutura Kaguongo TSC No. 181520 in order to assist him with disciplinary case No. 795/2000, advising the same teacher to give false information in his defence, removing promotion documents from the file of TSC No. 74852 and letting down the audit division by indulging in deeds which are in conflict with his role as an auditor; but have given no evidence to support the same.

21. They submit that Section 43(1) of the Employment Act, 2012 creates a burden on an employer to provide proof and or reasons for terminating an employee which reasons must then be assessed by the Court to establish that they are valid. They then remain mere allegations which are yet to be proved, and were not even corroborated at the hearing.

22. The allegations remain biased and malicious and have cost him a job at the Kenya Institute of Education as a Higher Clerical Officer Job Group C. The Respondent is therefore legally liable for the damage occasioned against the Claimant in terms of loss of career and adverse negative publicity.

23. To this end they rely on the matter of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] Eklr**; the Claimant was employed by the Respondent as a Legal Officer and was promoted through the ranks to Company Secretary. The Claimant was then charged and arraigned in Court in Chief Magistrate's Court and as a result the Respondent suspended the Claimant and consequently terminated her employment on the grounds of public interest. The Court held that:

"...The duty was on the respondent to demonstrate to this Court that there existed valid grounds to justify the termination of the Claimant."

24. The Claimant submits that the Claimant's summary dismissal and termination was unfair and without any justifiable reason which is a direct contravention of the Employment Act, Section 45 (4) as the respondent failed to prove that the claimant ought to have been summarily dismissed.

25. They cite the case of **Kenya Union of Commercial Food and Allied Workers vs. Meru North Farmers Sacco Limited Cause No. 74 of 2013** held that whatever reason or reasons that arise to cause an employer to terminate an employee, that employee must be taken through the mandatory process as outlined under section 41 of the Employment Act. These apply in a case for termination as well as in a case that warrant summary dismissal. The said Section states:

"41. (1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation".

26. The Claimant submits that he was permanent and pensionable as he was appointed via appointment letter only and never signed a contract specifying a duration of employment.

27. They submit that Courts have upheld the principle that fixed-term contracts carry no expectancy of renewal, in a catena of judicial authorities. Say in **Industrial Court Petition No. 35 of 2012 between George Onyango vs. The Board of Directors Numerical Machining Complex Limited & Ors, [2014] e-KLR** and in **the Industrial Court Cause No. 1541 of 2010 between Bernard Wanjohi Muriuki v. Kirinyaga Water and Sanitation Company limited & Ors.** Therefore, lasts up to the age of retirement or later.

28. The Claimant submits that the Claimant herein was employed by the Respondent as an auditor not as a teacher. However, the Respondent used the provisions of the Teaching staff code of conduct to set up the disciplinary procedures he should have been subjected to a civil service disciplinary proceedings, if any, regulated by the code of conduct binding ordinary civil servants not one that was exclusive for the teaching staff. This is confirmed in the promotion letter dated 8th February 1991 by the Respondent to the Claimant and filed in the List of Documents filed in the High Court on 18th April 2009.

29. The Claimant submits that the procedure of constituting the disciplinary tribunal and the disciplinary proceedings fell short of the provisions of Section 41 of the Employment Act. The said Section requires a hearing of the employee before dismissal in the presence of a representative of the employees Union or another person chosen by the employee which was not done in this instance. The letter inviting the Claimant to the Disciplinary Committee failed to inform him of this right. On the contrary, it required the Claimant to produce among other documents, a certificate of registration as a teacher.

30. They submit that for want of procedure alone, termination was unfair. To this end they rely on, **WALTER OGAL ANURO -VS-TEACHERS SERVICE COMMISSION [2013] EKLR**, where the Honourable Lady Justice Linnet Ndolo J. in emphasizing the importance of procedure when it comes to termination of an employee held that the termination of the Claimant was unfair for want of procedure.

31. The right to fair hearing is submitted by Claimant as a vital right under Article 50 (1) of the Constitution of Kenya. They submit that the right to a fair hearing includes the ability of a disciplinary

tribunal to verify and satisfy itself that the case against the employee, allegations made before it, as well as evidence, if any, placed before it was proved, to the requisite standards.

32. In this instant case, the Claimant was convicted and dismissed based on unfounded allegations that were discriminatory and grossly unfair to him, including information based on unverified stories from witnesses who had interest. His termination and/or dismissal was actually victimization, malice and false allegations, hence was wrongful and unfair.

33. Further, they submit that in an employment disciplinary cases where the criminal element exists in the opinion of the employer, the employer has an election to conduct the investigations using the internal administrative systems or to report to the relevant criminal justice agency and in which event the agency's findings would be binding upon the employer in that matter.

34. To this end, they rely on **Patrick Njuguna Kariuki –Versus- Del Monte (K) Limited, Cause No. 9523 of 2011**, as well as in the case of, **Mathew Kipchumba Koskei V Baringo Teachers Sacco** where the Court said:

“If the employer has initiated and concluded the disciplinary proceedings on account of a misconduct which also has substantially been subject of a criminal process for which the employee is exculpated or found innocent, the employer is thereby entitled to setting aside administrative punitive decision and the employee is entitled to relevant legal remedies as may be found to apply and to be just.”

35. The Claimant submit that as a result of the loss of a career, loss of self-esteem and adverse negative publicity all suffered as a result of the actions of the Respondent, they are entitled to the reliefs sought. They rely on the matter of **Daniel Musinga T/A Musinga & Co. Advocates v. Nation Newspapers Limited (2006) ECLR**, where the court in awarding the Plaintiff Kshs. 10,000,000/= in damages stated;

“The Court has to look at the whole conduct of the parties before action, after action and in compensatory damages such sum, a will compensate him for the wrong he has suffered. An award of damages must cover injured feelings, the anxiety and uncertainty undergone during the court trial.”

36. They pray that their claim is allowed.

37. The Respondent submits that the Claimant's reference to the Employment Act 2007 which came into effect on **2nd June 2008** is grossly erroneous since the 2007 Act was non-existent at the time the cause of action accrued.

38. The Respondent submits that its processes, procedures and actions in respect of the Claimant's dismissal was governed by the repealed Act which it strictly adhered to. They submit that the Employment Act 2007 does not act retrospectively to causes of actions that arose before its operationalization. This position they submit was re-affirmed by Ndolo J in **AGNES MURUGI VS BARCLAYS BANK OF KENYA (2013** who was guided by an earlier judgment by of Nduma J in **JEREMIAH OJWANG OJAK VS CENTRAL BANK OF KENYA {2012}** where he stated that:

“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).”

39. Further the Court of Appeal in **GERALD MULI KILLU VS. BARCLAYS BANK OF KENYA [2016]** held:

“The Appellant's employment having been terminated in 2005 the cause of action was governed by the repealed Employment Act Cap 226 and the repealed Trade Disputes Act Cap 234 Laws of Kenya through the saving provisions in the new laws that replaced them. It was wrong for the

appellant to base his claim on the new laws and seek remedies that were not available in the repealed laws.”

40. The Respondent submits that the Claimant was dismissed on reasonable and sufficient grounds. They state that Section 17 of the (then) Employment Act (Cap.226) provided for circumstances in which an employee may be summarily dismissed:

“Any of the of the following matters may amount to gross misconduct so as to justify summary dismissal 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 the same, constitute justifiable or lawful grounds for the dismissal (underlined for emphasis).”

41. Moreover, under the repealed Act Employment Law, the employer was permitted to terminate at will, without cause, subject to the employer’s rules and regulations in place. Termination at will was stated in **KENYA PORTS AUTHORITY VS. FESTUS KIPKORIR, CIVIL APPEAL NO.1 OF 2004** Rika J acknowledged that:

“Employers were not obliged to give reasons or hear the employee before termination. Employee 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 4 corners of the employment contract.”

42. They submit that Regulation 10 of the then Code of Regulations for Secretariat Staff of the Respondent prohibited bribery and described it as an offence. Receipt of a bribe is an abhorred practice in public service and the Claimant had a cardinal obligation and duty to conduct himself with dignity and decorum. He breached this duty hence his dismissal has justified and lawful.

43. The Respondent submits that a review of the Disciplinary Proceedings and the 1ST Respondent’s oral evidence before the Honourable court confirms that the Claimant indeed breached the Regulations. The Respondent’s 1st Witness narrated to the Court how he visited the Claimant at his Rural home a fact the Claimant admitted, how he was received by the Claimant’s wife and how he paid the 5000/= bribe. A Clan Elder who witnessed the same testified before the Disciplinary Panel. (page 3 of the attached proceedings).

44. The Respondent therefore submits that it discharged the burden required under the law and that the dismissal was sound, sufficient and compelling.

45. The Respondent submits that the said Regulation 10 (i) of the Code) in conformity with the repealed Employment Act 66 provided that:

“an officer may be summarily be dismissed from the service of the Commission or may suffer such lesser penalty as the Commission may decide if he interalia...” and the provision leaves out the procedure at the discretion of the commission.

46. They submit that the following process was submitted to investigation upon the receipt of allegations that the claimant had breached code of conduct, followed by an interdiction notice dated 30th October 2000, informing him of the nature of allegations and inviting him to respond to the same.

47. Further there was receipt of a statement of defense dated 6th November 2000 in response to the allegations and invitation to hearing where the case was head on the 20th of December 2000 at the TSC headquarters. The notice they submit specified a place, time giving the Claimant ample time to prepare.

48. They submit that while the invitation addressed the Claimant as ‘teacher’ and not ‘auditor’, it was but a typographical error which did not prejudice the claimant in any way. The process was fair. To this end

they rely on ANTHONY MKALA CHITAVI vs. MALINDI WATER & SEWERAGE COMPANY LTD. Justice Radido developed the test of procedural fairness as follows:

“The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee.

Secondly, it would follow naturally that if an employee has a right to be informed of the charges he has a right to a proper opportunity to prepare and to be heard and to present a defence/state his case in person, writing or through a representative or shop floor union representative if possible.

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.”

49. They submit that the procedure meets the above threshold.

50. As to quashing of the Respondents decision, they submit that under the then law, the Court had no jurisdiction to quash the findings of an employer. Secondly, there is no justified reason to support the prayer. Accordingly the prayer lacks basis.

51. They further submit that this claim is not payable as there was no guarantee that the Claimant would work for the Respondent till retirement. We further submit that an employment relationship is not servitude and any party has a right to terminate the relationship as per the law.

52. They rely on Nairobi Cause No. 379 of 2009: D.K. Njagi Marete vs. Teachers Service Commission Justice Rika held:

“This Court has advanced the view that employment remedies, must be proportionate to the economic injuries suffered by the employees. These remedies are not aimed at facilitating the unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way:

A grant of anticipatory salaries and allowances for a period of 11 years left to the expected mandatory retirement age of 60 years, would not be a fair and reasonable remedy. The Claimant has moved on after the unfortunate and capricious decision of the TSC. He no longer renders any Labour to the Teachers Service Commission. The Employment Act 2007 requires he moves on as he has done, and mitigated the loss of his job as the Senior Legal Principal Officer of the TSC.

53. Further NAIROBI CAUSE NO. 203 OF 2011 ENG. FRANCIS N. GACHURI vs. ENERGY REGULATORY COMMISSION [2013] EKLR this Court held:

“There is no provision for payment of damages to the date of retirement. This is because employment like any other contract provides for exit from the contract. The fact that the Claimant’s contract was referred to as permanent and pensionable does not mean it could not be terminated and once terminated, he can only get damages for the unprocedural or lack of substantive reason for the termination. No employment is permanent. That is why the Employment Act does not mention the word ‘permanent employment’.

54. As to general damages, they submit that statutory compensation provided law does not give room for General damages in employment law. The Claimant did no lay any basis for compensation under this head and the same must fail. The Respondent submits that it is not fair nor just to have the Respondent pay the aggravated and exemplary damages as it was just exercising its authority.

55. On Non-payment of the Pension benefits, the Respondent submits that the Claimant was paid his dues under the Benefits Scheme and NSSF Scheme as confirmed by the payment Voucher annexed the Respondent's Supplementary List of documents. They also submit that his dismissal for KIE was due to failure to reveal crucial details to the governing council and not any fault of the Respondent.

56. Finally, the Respondent submits that the Claimant's reference to the constitution which was promulgated on **27th August, 2010** is grossly erroneous since the constitution was non-existent at the time the cause of action accrued. The Law in this regard is now settled. The Constitution does not act retrospectively to causes of actions that arose before its promulgation.

57. They pray that the case dismissed with costs.

58. Having considered the evidence and submissions of both parties, the issues for determination are as follows:

1. Whether there were valid issues to dismiss the Claimant's service.

2. Whether the Claimant was subjected to due process before termination.

3. What remedies to give in the circumstances?

59. On the 1st issue, the Claimant's dismissal letter dated 3.2.2001 state that he was dismissed with effect from the date of that letter for the reason of receiving a bribe of 10,000/= from Henry Mutura Kaguogo TSC/No. 181520 in order to assist him in his disciplinary case No. 795/2000 and for advising the same teacher to give false information in his defence statement.

60. Further he was accused of removing promotion documents from File No. TSC/No.74852 and letting down audit division by indulging in deeds which are in conflict with his role as auditor and therefore betrayed the confidence placed in him by the commission. Vide a letter dated 15/2/2001 the Respondents clarified that the letter purportedly written on 3.2.2001 had an error and that he correct dated was 20/12/2000. This in effect means that the date of dismissal was 20/12/2000 and not 3/2/2001.

61. Given that the cause of action arose then whether in 2000 or 2001, the Employment Act 2007 cannot be the operative law to guide in determining this cause because Employment Act 2007 cannot apply retrospectively.

62. The law in issue then is the Employment Act (repealed) and the Trade Disputes Act and the Code of Regulation for Secretariat Staff of the Teachers Service Commission.

63. Under Section 10(g) of Code of Conduct an officer could be summarily dismissed if he:

"Receives or solicits any reward, fees, commission or present".

64. Under Section 17 (g) of the repealed Employment Act an employee could be summarily dismissed:

"if an employee commits or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property.

65. In case of the Claimant, he was suspected of having been engaged in a corruption offence but the Repealed Employment Act did not make it mandatory that an employee be given reason before dismissal. However in case of the Claimant he was informed of the reasons pertaining before his dismissal which was good practice.

66. As per the circumstances of the hearing, the Claimant was informed of the reasons leading to his interdiction and later to dismissal. He went through a formal disciplinary hearing process whereby

witnesses were called and they stated what had transpired.

67. The reason of soliciting and receiving a bribed though not escalated to a criminal trial was a good reason for his dismissal as per Section 17 of the repealed Employment Act.

68. On the 2nd issue, the Claimant was also taken through a disciplinary process which involved a hearing. The Respondent called several witnesses who testified and were cross examined by the Claimant. In essence the Claimant was accorded a chance to be heard and so rules of natural justice were adhered to.

69. That being the case and the Claimant having been dismissed for just cause, it is my finding that the claim by the Claimant cannot succeed. I find the claim not proved and I dismiss it accordingly.

Read in open Court this 25th day of January, 2017.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Ayuor for Respondent– Present

C. N. Kihara for Claimant - Present