



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI.

CAUSE NO.2004 OF 2015

ANTHONY OMARI ONGERA CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION ...RESPONDENT

RULING

1. By the Amended Notice of Motion, the Claimant is seeking for orders that the Respondent to immediately reinstate the claimant's salary as from 30th January, 2015 pending hearing of the claim; the Claimant be reinstated to service with full salary and allowances and without loss of any benefit pending hearing of his claim; and in the alternative the Respondent to pay the Claimant half salary and full allowances pending hearing of his claim.
2. The application is supported by the claimant's affidavit and on the ground that the dismissal of the Claimant from service was irregular, unfair, invalid and unlawful on the basis that the Respondent had no justifiable or valid reasons to effect the dismissal. The dismissal was effected for a non-existent offence and not specified in the Code of Regulations; there were procedural impropriety as set out in the Discipline Code; the Claimant was not given a hearing and the dismissal was premised on innuendos, material falsehoods, lies and unsubstantiated facts.
3. Further grounds in support of the application are that the Respondent disciplinary committee denied the Claimant an opportunity to call witnesses, denied him the request to produce documents and became hostile and proceeded with the hearing with a biased mind. The Claimant got 3 separate interdiction letter containing contradictory and conflicting allegations and was then dismissed on different allegations which he had no notice of.
4. The Respondent violated the claimant's rights to fair administrative action in that the entire disciplinary process was tainted with irregularities. That the Claimant was discriminated against, subjected to inhuman and degrading treatment. He was denied the right to appeal or review against the dismissal.
6. Further grounds are that the Respondent shall not suffer any prejudice where the orders sought are allowed. In the interests of justice and good governance, application be allowed as prayed.
6. In the supporting Affidavit, the Claimant also avers that he was employed by the Respondent as a Security officer and deployed at the head office. He diligently served until 23rd august, 2011 when he was re-designated as an Artisan and deployed to the Office Services Division to offer support to the office of the Facility Manager who was his supervisor. The Claimant was residing at the servant quarters in an estate in Upper Hill behind KUSCO building and about 200 meters from the Respondent head office.

7. On 19th December, 2012 the Claimant run out of water and around 9.30pm he decided to go back to the employer's premises to request for a Jerian of water to enable him assist his family. He drove in his car to the office and at the gate found 4 security officers; 2 armed administration police officers and 2 private guards from Lavington Security Guards. As they knew each other, the Claimant requested them to assist in getting water from the tank next to the gate. The officers allowed the Claimant to get water and opened the gates. The officers took a record of the same in the Occurrence book and in the hand notes for the Chief Security Officer to confirm the next day.

8. On 25th June, 2013, 7 months later the Claimant was issued with an interdiction letter alleging that he had breached code of conduct when he accessed the premises without authority. On 3rd September, 2014 the Claimant got another interdiction letter with new charges that he had beached regulations and Code of conduct for unauthorised entry into the TSC building contrary to security policy. On 9th September, 2014 a third interdiction notice was issued for alleged breach of Code of conduct that he gained unauthorised entry into the TSC building contrary to security policy. That replied to the 3 notices but they were based on erroneous allegations.

9. On 30th January, 2015 the Claimant attended a disciplinary hearing where he denied the allegations gaist him. The interdiction was not based on any known law or regulations of the respondent. There was no show cause notice leading to the interdictions. The disciplinary hearing was therefore unprocedural. The dismissal that followed was unfair and without justifiable reasons and the sanction of a dismissal was not proportionate to the alleged offence. The application should be allowed to meet the ends of justice.

10. In reply the Respondent through the **Replying Affidavit of Josephine Maundu** the Director, Human Resource Management and Development of the Respondent. She avers that the Respondent as a constitutional commission established under article 252(1)(c) of the constitution, to be able to discharge its mandate had appointed the Claimant as a security officer and later redeployed him as an artisan at the head office. Between November, 2011 and 23rd May, 2013 the Respondent lost 30 CISCO Access Switch procured as a cost of Kshs.17, 648,406.00. Investigations by the Respondent and the police from Kilimani Police Station revealed that the Claimant should be administratively dealt with for his unauthorised access to the Respondent premises after work hours and based on the code of conduct.

11. Ms Maundu also avers that the Claimant was given a chance to state his case and called for a disciplinary hearing and upon which the Respondent arrived at a decision to dismiss the claimant. This was based on the claimant's admission that he occasionally entered the Respondent premises to collect water after working hours and that on the night of 19th December, 2012 he was not on duty but gained access to collect water for his family and that such access was not authorised by the respondent. The process of interdiction and dismissal was procedural, lawful and justified.

Submissions

12. The Claimant reiterate the averments in his supporting affidavit and further on the cases of **Ephrahim Muriithi Kangagi versus TSC 7 Another, petition No.70 of 2016** and **Mary Chemweno kiptui versus Kenya Pipeline Co. Ltd [2014] eKLR**. That the Claimant was condemned unheard and his dismissal was based on non-existent charges. The provisions of sections 41, 47, 43 and article 41 of the Employment Act and the Constitution, respectively were not followed. The Court has the power under section 49 of the Employment Act to order a reinstatement.

13. The Respondent submit that they had power to discipline the Claimant as part of the internal policy in cases of misconduct. The Claimant was thus interdicted, called for a hearing and this was based on his written responses and the oral submissions and representations he made.

14. That the orders sought cannot issue in the interim as they are final in nature. The case can proceed for hearing on merit as held in **Gladys Boss Shollei versus JSC [2013] eKLR; Alfred Nyungu versus Bomas of Kenya, Cause No.620 of 2013**. That the Claimant has not demonstrated a prima facie case with a chance of success to warrant the interim orders sought as required and principles set out in the case

Determination

Whether the Claimant should be reinstated back to his employment pending hearing of the claim;

Whether the Claimant should be put on his salary or half salary pending hearing of his claim

15. Section 12(3) of the Employment and Labour Relations Court Act give the Court jurisdiction to issue interlocutory orders when moved by a party on good grounds. Section 12(3) (vii) also allow the grant of reinstatement as part of the orders that the Court may consider to grant (viii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or

16. The Court procedures are also regulated by the Rules of procedure, the Employment and Labour Relations Court (Procedure) Rules, 2016. Rule 17(10) provides that;

(10) Notwithstanding anything contained in this Rule, the Court shall not grant an ex parte order that reinstates into employment an employee whose services have been terminated.

17. The rationale is that the order of reinstatement is final in nature and should only issue in exceptional cases which warrant specific performance. In the case of **Ahmed Aden Hire versus Natif Jama and County Government of Garissa, Petition No.121 of 2016**; the Court is analysing the provisions of section 49 of the Employment Act and Rule 17(10) of the Court Rules with regard to the orders of reinstatement held that;

*The rationale [of not reinstating an employee at the interlocutory stage] is that the order of reinstatement is a specific performance order with finality. To issue such an order in the interim is essentially to deny the other party a chance to their defence unless there exceptional circumstances that the Court is appraised of to warrant the grant of the same in the interim. In **Alfred Nyungu Kimungui versus Bomas of Kenya {2013} eKLR**; though the decision was made on 28th May 2013 before the new Rules of procedure came into force on 5th August 2016, the context is not lost where the Court held that;*

The Employment Act 2007 places the burden of justifying termination decision, and showing the fairness of procedure, on the employer. In rare cases where interim reinstatement may be granted, the termination must be shown to be patently unfair, that even the ultimate remedies of compensation or reinstatement with back wages, would not have redressed the injury suffered by the employee in the pendency of the full hearing. Certain forms of termination grounds, the kind that result in automatically unfair termination such as pregnancy, race, gender or religious discrimination, may warrant the rare exercise of the Court's discretion in issue of interim reinstatement. This is more so particularly under the new liberal Constitution of Kenya, which frees the hands of the Courts in administration of justice. [Emphasis added]

18. In making further analysis of the same, the Court went further to find that reinstatement should and can issue in exceptional cases that must be demonstrated by an application particularly with regard to cases of discrimination and matters relating to rights violations as under section 5 of the Employment Act;

Reinstatement of an employee who has been terminated before coming to Court should therefore not issue. This remedy is available upon hearing and determination of all issues and can issue together with payment of back wages or as the Court may deem appropriate. looking at the exceptional grounds upon which the Court may be moved so as to order a reinstatement at the ex parte stage, caution must be taken that the list set out under section 5(3)(a) though not exclusive, each case is addressed on its own merits;

a. on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;

19. In this case, the Claimant has been dismissed and parties have since exchanged their pleadings in readiness for hearing. The Claimant has cited that he was discriminated against in the process of his hearing within the internal administrative procedures but the matters set out in that regard do not relate to some of the exceptional circumstances set out in the case of **Alfred Kinyugu versus Bomas of Kenya** or on the above cited case of **Ahmed Aden Hire**. However, the matter set out by the Claimant as having been subjected to a discriminatory practice can well be gone into during a full hearing.

20. The Claimant has also relied on the case of **Ephraim Muriithi Kangangi versus TSC & Another** cited above. My reading of this case is that the petitioner had not been terminated at the time he came to Court and hence the orders made are fundamentally based on different circumstances from the claimant's case. Equally in the case of **Mary Chemweno Kiptui versus Kenya Pipeline Co. Ltd**, the order of reinstatement was issued upon a full hearing of the matter and judgement rendered thus.

21. As the Claimant has since been dismissed from his employment with the respondent, and based on the applicable law in terms of remedies available under the provisions of section 12(3) of the Employment and Labour Relations Court Act read together with section 49 of the Employment Act and further Rule 17(1) of the Court Rules, I find the orders sought at this stage are not appropriate to issue. The application of the Claimant shall not be allowed at this stage but the Court shall allow both parties to address all the issues in dispute at a full hearing.

In conclusion thereof, based on the above analysis of the issues set out, application dated 9th November, 2015 and Amended on 12th January 2016 is declined at this stage. Costs shall be in the cause.

Delivered in open court at Nairobi this 19th day of January, 2017.

M. MBARU

JUDGE

In the presence of
