



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI
CAUSE NO.1123 OF 2015

DAVID NJOROGE KAMAU.....CLAIMANT

VERSUS

BOARD OF MANAGEMENT KIAMBU INSTITUTE OF

SCIENCE AND TECHNOLOGY.....RESPONDENT

JUDGEMENT

1. The claimant is a male adult and a Teacher by profession while the respondent is a corporate under the Basic Education Act and with mandate to manage Kiambu Institute of Science and Technology.
2. The claimant was employed by the Teachers Service Commission (TSC) as posted to the respondent to teach technical drawing which he diligently did. He also supports the Applied Sciences department.
3. On 30th March, 2015 the claimant was accused of failing to invigilate exams during the March, 2015 series of end term examinations. On 3rd April, 2015 the claimant responded to the accusation and wrote to the principal explaining that there was confusion in the examination timetable and double allocation of assignments as well as inconsistent use of lecturer's name. That all through the claimant had been referred to as D.N. Kamau and has never been used D. Kamau since this name refers to a different lecturer called Kamau David Maina.
4. On 13th May, 2015 the claimant was issued with a letter accusing him of failing to invigilate exams on two occasions during the March, 2015 series of end of terms examinations and that he failed to submit mark sheets, marked scripts and marking schemes for continuous assessment tests to the respondent's registrar officer and hence impeding the students from assessing their supplementary results on time and further being issued with a Court Requirement Not Met.
5. On 4th June, 2015 the claimant responded giving details and nothing that he submitted all the mark sheets and scripts after marking the same and they are in the safe custody of the respondent examination officer; that he was referred to as D.N. Kamau and not D. Kamau which refers to another lecturer; and that the affected students had been absenting themselves only to appear for the end of stage exams which are normally administered by the respondent at the end of every year and this matter as reported to the head of department but no action was taken.
6. The claim is also that the respondent has a lecturer in the name of Kamau David Maina who is different from the claimant. On the timetable the claimant is registered as DN Kamau and his colleague as D. Kamau.

7. The respondent principal met the claimant and threatened him with an interdiction.

8. On 29th June, 2015 the claimant received a letter summoning him to a full board meeting for 30th June, 2015. There was no due process in undertaking the disciplinary process as no investigations were conducted. This was in violation of the TSC Code of Conduct which required that the claimant should receive allegations against him; an investigation be conducted before the claimant can be called to answer; invite and interview the claimant so as to defend himself; and interdict, warn or make a finding on the case.

9. The respondent went ahead and planned for a meeting on 30th June, 2015 where a decision was taken to interdict the claimant. The claimant as an innocent party made all efforts to have the respondent follow due process to no avail. The decision taken without due process is null and void.

10. The claimant is seeking for an order that the meeting held on 30th June, 2015 be found null and void; the respondent be restrained from executing its decision arrived at during this meeting affecting the claimant; and costs of the suit.

11. In evidence to support his case, the claimant reiterated his claims and testified that upon his employment and posting to the respondent, he was registered on the timetable as DN Kamau as there was another colleague called D Kamau. On the Duty Roll for January/December, 2015 his name is registered as DN Kamau.

On 17th March, 2015 the claimant was invigilating a class on Entrepreneur at 2 to 4pm and noted as DN Kamau; on 23rd March, 2015 he did the same noted as DN Kamau for a class on Technical Drawing; on 17th March, 2015 while the claimant was invigilating, in the morning session a Mr D Kamau was supposed to invigilate. The practice was that each teacher had to invigilate in one exam and not have a double allocation. The accusation that the claimant did not invigilate any class on 17th March, 2015 is wrong as the one noted was D Kamau and not the claimant known as DN Kamau.

12. The allegations that the claimant failed to submit mark sheets, there is evidence to support the submissions. The records submitted by the respondent are not correct as the claimant entered his details once he made the submissions.

13. The decision therefore taken by the respondent to interdict the claimant was therefore based on wrong information and should be set aside and the respondent restrained from conducting any disciplinary action based on the same.

Defence

14. In defence, the respondent case is that the claimant, without good reason, failed to perform his duties assigned to him by failing to invigilate examinations for the classes DGS/DCI/DAR/DBC 1409 on Tuesday 17th March 2015 from 8 to 10am; he failed to invigilate examinations on Wednesday 25th March 2015 from 10.45 to 12.35pm; and he failed to submit marked scripts, mark sheet and marking schemes for the Technical Drawing subjects for classes SLT 1405, DQS 1309 and CPW 1405.

15. The respondent is ISO certified and has a set of procedures guiding administration of examinations which include the display of the draft timetable and final timetable on the teachers and student's notice boards. The timetable is kept in the teachers' lounge and the claimant had sufficient time to peruse and seek clarifications.

16. David Njoroge Kamau, DN Kamau and D Kamau refer to the same teacher in the respondent Building and Civil Department. On 26th June 2015 the respondent board met and as part of management recommended that the claimant should attend disciplinary hearing following claims made by the claimant against the principal that he was maliciously treated.

17. The claimant was accorded the right to fair hearing and the board recommended that the claimant should attend the TSC wellness centre for counselling. At the time the matter had not crystallised into an interdiction issue. The claims as framed should be dismissed with costs.

18. In evidence the respondent witness was Simon Gathii Njoroge the respondent's Deputy Principal in charge of administration and at the time of the cause of action herein was the Registrar.

19. The respondent had internal examinations and term in march, 2015 and a timetable was issued. A draft was circulated to all teachers and poste don the notice boards to have teachers correct any anomalies. Such anomalies were to be reported to the register's office for corrections. The final timetable was issued and displayed on the notice boards.

20. During the administration of examinations, a supervisor is appointed to check on the same and attend at the examination room. There are also invigilators, the teachers. Each supervisor must report to the register and transmit a report to Deputy Principal, Academic and who reports to the Principal. Teachers who fail to invigilate receive a notice to show cause from the principal for failing in their duty and must give an explanation. The matter is then escalated to the board if there reasons given are not satisfactory. This is the body with the mandate to take action. A recommendation is then made to the TSC.

21. The claimant was accused of failing to invigilate several sessions. The matters arose on 17th march, 2015 from 8 to 10am; on 25th march, 2015 classes at 2pm ; he also failed to submit examination marked scripts and marks sheets. The claimant gave the reasons for such failures that here was a D Kamau indicated as the invigilator. The name David Njoroge Kamau, DN Kamau and D Kamau refers to the claimant. The other teacher is Maina while the claimant is Njoroge which are not similar at all.

22. The claimant was required to submit marks and scripts by 10th April 2015 but he failed to do so. This matter was escalated to the principal and the board. When the claimant was called the alleged that some students did not attend to their exams and thus he could not submit their marks. Such marks are supposed to be submitted by the teacher and when missing the teacher is responsible. The claimant as the subject teacher had to give an account. The affected students made complaints with the registrar and there was evidence they had submitted their examination sheets. As the class teacher the claimant was responsible to ensure all students sat for their examinations and if not take action. There is no report that the claimant made a record or report on missing student examination sheets to the head of department of registrar.

23. Following the omissions and commissions of the claimant, a notice to show cause was issued and due process followed. The defence by the claimant that other teachers would submit their mark sheet late is wrong as he never made any submissions at all.

24. Both parties filed written submissions.

Determination

25. The orders sought are that;

a) An order that the process for setting up the meeting of 30th June, 2015 was illegal, unprocedural and irregular;

b) A permanent injunction restraining the respondent whether by themselves, their agents/principal and /or servants from acting on, implementing or executing any decision arrived at the meeting or subsequent meetings affecting the claimant.

c) Costs of this suit

d) Any other relief the court deems fit to grant.

26. The essence of the suit is that the claimant was alleged to have failed to attend to his work duties and as a result was issued with a show cause letter and a decision taken to interdict him. That such decision was taken contrary to the TSC code of conduct which required an investigation be conducted, the claimant invited to attend so as to defend himself and that a warning, interdiction or any other sanction was to follow after such due process.

27. The claimant also asserted that the allegations made against him are not true as he never failed to attend examination invigilation as he was known as *DN KAMAU* whereas there was another teacher known as *D KAMAU* noted on the examination timetable as the one to attend.

28. The defence is that the claimant failed to attend to his work duties which affected student's examination and when he was invited for hearing a decision was taken with a recommendation that he should attend the TSC wellness centre. The claimant had failed to attend to his duties where the timetable was clear that he was the one to attend and the claims that he was not *D KAMAU* is erroneous as the other teacher was MAINA and the claimant is NJOROGGE and the two are not similar.

29. With the Memorandum of Claim, the claimant fields a Notice of Motion seeking various orders. Attached to this application is respondent's letter dated 26th June, 2015;

PERFORMACNE OF DUTY

Reference is made to your letter dated 4th June 2015 in regard to your performance of duty and letter earlier whiten to you by the principal.

On consultations with the Board, it has been decided you be invited to appear before the full board meeting on Tuesday June 2015 any time from 9.00 am to 5.00pm

30. Attached to the application is respondents letter dated 13th may, 2015 on the claimants failure to mark, key in continuous assessment tests (CATS) marks and failure to submit marked end of stage scripts, and mark sheets. The claimant was required to explain and give reasons for not invigilating on two occasions.

31. To these notices, the claimant assertions are that on the timetable he was to be registered as DN Kamau and not D kamau. That he invigilated all examinations he was scheduled to attend without fail.

32. The claimant admitted that he was employed as a teacher by TSC and posted to the respondent to teach Technical Drawing and gave support to Applied Science department. The respondent had another teacher David Maina Kamau and from the records he was in the Social Studies department.

33. On the charges facing the claimant that;

1. he failed to mark term 1 2015 CAT 2 and CAT 3 for science Laboratory Technician class SLT1045, Technical Drawing subject and therefore all the four students had Course requirement not met (CRNM) result during the awards meeting held on Tuesday 14th April 2015.

2. Submit required documents ... marked scripts, mark sheet and marking schemes for Technical drawing subject for the following areas ...

3. To explain the reason for not invigilating on two occasions during the March 2015 series end term Examinations

34. On the contested dates, on 17th march, 2015 the timetable has *D Kamau* invigilating the class DOS1409A&B 8-am under the subject *Social Studies*.

35. Vide letter dated 13th May, 2015 noted above, the claimant was informed that following his

allegations that there was inconsistent use of names;

You were informed after missing the 17th March, 2015 invigilation that you are the referred on the timetable by the Deputy Registrar –Exams and the Deputy HOD- Building but you went ahead and missed the Wednesday 24th March 2015 invigilation.

36. I have followed the thread of communications between the claimant and the respondent officers and the standing out issues particularly the averments by the claimant that he failed to attend to examination invigilation on the grounds that he is noted on the registered as DN Kamau and not D Kamau. However, such inconsistent use of names was addressed with him and when he missed the invigilation on 17th March, 2015 the same brought to his attention to attend. He however missed the invigilation on 24th March, 2015.

37. Where there was an error or misunderstanding on 17th march, 2015 this was corrected before the same could happen again. In any event, on the 17th march, 2015 there was no double allocation of work for D Kamau and or with DN Kamau. Where the claimant was conflicted as to which D Kamau was referred to, this position was clarified with him by his supervisor.

38. On 24th march, 2015 in the examinations running 8-10am there is

M KAMAU DAC 1305;

N KAMAU DQS1209 A&B;

G KAMAU CEP1309;

39. There is no D KAMAU or DN KAMAU on this date. However the point that there was a clarification made to the claimant on the use of D KAMAU and DN KAMAU to refer to him is clear. Any failure to attend to duty after such clarification is failure to abide lawful instructions and directions of the employer. Such is not permitted pursuant to section 44 of the Employment Act. Such is a matter tantamount to gross misconduct which warrants summary dismissal.

40. The application of the TSC Code of Conduct is a good work place practice. However such code only applies to the unique circumstances of the respondent and the officers deployed to teach or work there by the TSC. Fair labour practices allow such code of conduct to apply and where the respondent is required to attend to any disciplinary matter, the minimum standards is set out under section 41 of the Employment Act. I find the requirements of the TSC Code of Conduct are well outlined over and above the minimum requirements as under the applicable law.

41. The claimant cannot fail to thus attend at a disciplinary hearing directed by the employer on the grounds that he has not been interviewed, he has not been issued with allegations against him; invagination's had not been done and that he had not been invited to defend himself. In the light of the various letters issued to the claimant to explain the failures and allegations against him to which he replied and the further requirement that he should attend at the hearing, such I find to be reasonable and fair process of addressing matters as between the claimant as the employee and the respondent as the employer.

42. Where the claimant has a good defence and the apparent error that he had no examination invigilation to attend on 24th March, 2015 this is a matter that can well be addressed at the disciplinary hearing and put into account by the respondent in making a final decision. To otherwise stop the entire disciplinary process noting the notice and show cause letter is to stall an otherwise lawful process commenced to address workplace misconduct.

43. Whatever sanctions the respondent to arrive at after hearing him claimant, such is a prerogative of the respondent and cannot be stopped by the court. to do so would be to ignore primary evidence on the shop

floor and without the benefit of allowing the employer to hear the claimant in his defence. It would be a premature gagging of the respondent before the process of hearing the claimant is completed.

Based on the claims and orders sought herein, the claim is hereby dismissed save that the claimant shall unconditionally submit himself before the respondent as directed within the next 30 days for the disciplinary process commenced and stopped by the court on 30th June, 2015 to complete. Each party shall bear own costs.

Delivered in open court and dated this 29th day of June, 2017.

M. MBARU

JUDGE

In the presence of:.....