



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO. 459 OF 2014

JANE CONSOLATA ADHIAMBO.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

1. The suit was commenced vide a memorandum of claim on 21st March 2014 seeking damages for wrongful and unfair dismissal.

Facts of the claim

2. The claimant was employed by the 1st respondent on 1st May 1989 as a P1 teacher based in Homa Bay District (County).

3. Initially the claimant was engaged as an untrained teacher in the same area from 1983 to 1986. Letters of interim engagement and confirmation were produced.

4. The claimant was permanent and pensionable and earned a consolidated salary of between Kenya pound 1,212 – 2082 per annum net of taxation.

The claimant was entitled to leave, and various allowances. Termination is on one month notice.

5. On 22nd August 1999, the claimant applied for personal unpaid leave for two (2) years to commence from January, 2000. Application letter was produced.

6. The respondent wrote to the claimant a letter dated 25th March 2000 informing the claimant that no such leave existed and therefore her resignation from 1st January 2000 was accepted subject to clearance.

7. The claimant wrote to the respondent on 24th May 2000 protesting the purported resignation and letter was responded to on 31st July 2000 reiterating that the claimant had resigned.

8. The claimant therefore remained at home and wrote to the respondent again on 20th August 2002 seeking reinstatement. By a letter dated 17th September 2002, respondent advised the claimant to apply for her job afresh.

9. The issue was not resolved until the Kenya National Union of Teachers Homa Bay Branch wrote to the 1st respondent on 19th March 2004 indicating that the claimant ought to be allowed to resume duty since she had applied for leave without pay in terms of the relevant Regulations Chapter VII/62/(1) and subject to condition 39(1) and 10(1) and had not resigned.

10. The union appealed to the 1st respondent to give the claimant a hearing since there was no letter of resignation as purported or at all. The union sought the claimant to be reinstated to her job.

11. At the time, the claimant had been promoted to a Head teacher based at Wiobiero Primary School Homa Bay earning a gross salary of Kshs.10,216.

12. The claimant was interdicted by a letter dated 6th January 2012 for deserting duty from 3rd January 2000 to allow TSC to investigate the matter and the claimant received a letter of dismissal dated 20th September 2012. The dismissal was with effect from 12th September 2012. The reason for the dismissal was deserting duty from 3rd January 2000 to the date while a teacher at Wiobiero primary School.

13. The claimant was notified salary overpayment would be recovered from her with effect from 3rd January 2000 to the last date of payment.

Response

14. The 1st respondent opposed the claim vide a memorandum of reply on 7th May 2014.

15. The particulars of employment of the claimant are admitted. It is also admitted that by a letter dated 22nd August 1999, the claimant applied for unpaid leave for two years with effect from 1st January 2000.

16. It is alleged that the claimant left her work station with effect from 1st March 2000 before she could get proper communication from TSC and without any formal approval or authority.

17. That the conduct of the claimant amounted to desertion and was in breach of the CORT rendering the claimant liable to disciplinary action.

18. That on 6th January 2012 the claimant was issued a letter of interdiction. The claimant responded to the letter of interdiction through a statement dated 12th January 2012, which was considered during the disciplinary hearing.

19. The claimant appeared before the disciplinary panel on 12th September 2012 where she was given opportunity to explain her case and the documentary evidence was considered.

20. Respondent alleges that the claimant admitted deserting duty with effect from 1st March 2000. The claimant was thus dismissed from service.

21. The case proceeded before Maureen Onyango J. and claimant gave sworn testimony in support of the particulars of claim.

22. RW1, Reuben Ayasi testified in support of the respondent's case. The parties filed final submissions thereafter.

Determination

23. The issues for determination are:

- (i) Whether the claimant deserted work on 1st March 2000.

(ii) Whether the dismissal of the claimant was for a valid reason and in terms of a fair procedure.

(iii) What remedies are available, if at all, to the claimant.

Issue 1

24. The court has considered the competing evidence by the parties set out herein before and has come to the following conclusion of facts;

a) The claimant applied for unpaid leave by a letter dated 22nd August 1999. The claimant did not seek to resign from employment in the letter.

b) By a letter dated 25th March 2000, TSC wrote to the claimant telling her “*your resignation effective from 1st January 2000 is hereby accepted subject to clearance.*”

25. It is the court’s considered view and finding that TSC purported to terminate the employment of the claimant with effect from 1st January 2000 without any justification and without following any fair procedure.

26. The letter was produced in court. The claimant protested the alleged termination of her employment on the basis of ‘resignation’ by a letter dated 24th May 2000. TSC wrote to her on 31st July 2000 insisting *inter alia* “*you were deemed to have resigned.*”

27. These two letters by the TSC are inconsistent with the allegations by the TSC that the claimant deserted work. It is clear that the claimant’s employment was terminated for reasons of “*resignation*” by TSC effective 1st January 2000.

28. The claimant was kept in limbo, inspite her protestation and efforts to be reinstated to work for a period of over twelve (12) years until when she received a letter of dismissal from TSC dated 20th September 2012. The purported interdiction by a letter dated 6th January 2012 was a sham and a nullity.

29. The employment of the claimant had been long terminated. The purported disciplinary hearing was also a sham and a nullity, the employment of the claimant having been terminated with effect from 1st November 2000.

30. It would appear that TSC for whatever reasons continued to pay the salary of the claimant even after unlawful and unfairly terminating her employment.

These payments though made in error were lawfully due to the claimant who had no intention to resign at all from her employment but was heavily punished for daring to apply for two (2) years unpaid leave for personal reasons, which application was not considered at all by the TSC and was therefore not granted.

Remedies

31. It is the court’s finding that TSC is not entitled to a refund of the salary payments made to the claimant from the date of purported resignation on 1st January 2000. In any event no counterclaim was made.

32. To the contrary, and in terms of the claims made by the claimant, the claimant is entitled to payment of the arrear monthly salary of Kshs.10,216 for the entire period from 1st January 2000 up to the date she was issued with a letter of dismissal dated 20th September 2012.

33. As a matter of fact and law, the claimant did not desert her work and is entitled to the payment in the sum of Kshs.1,471,104 less the salary paid and received by the claimant.

34. The claimant is also entitled to compensation for wrongful and unfair dismissal from employment on 20th September 2012. The disciplinary process was unfair and contrary to the TSC Code, and Rules of natural justice coming about twelve (12) years from the date of purported desertion on 3rd January 2000.

35. The finding that the claimant deserted work is not supported by any tangible evidence.

The claimant proved on a balance of probability that the dismissal was not for a valid reason and was not effected in terms of a fair procedure contrary to sections 41, 43 and 45 of the Employment Act, 2007.

36. In terms of sections 49(1)(c) as read with section 49(4), this is a proper case for the court to award the maximum damages of the equivalent of twelve (12) months salary for the following reasons;

the claimant was prevented from doing her work for over twelve (12) years unlawfully. The claimant suffered pain, mental anguish and embarrassment in her own work due to the purported resignation which was non-existent and hence was denied the right to work by TSC for a prolonged period. She was not paid any terminal dues upon dismissal. She lost almost all her youthful years to do the work she had been trained to do.

37. An order for reinstatement would have been appropriately in the circumstances but due to passage of time, the court does not deem it appropriate now.

38. The court therefore awards her twelve (12) months salary for the wrongful and unfair dismissal in the sum of Kshs.122,592.

39. In the final analysis the court enters judgment in favour of the claimant for;

(i) Kshs.1,471,104 arrear salary

(ii) Kshs.122,592, being equivalent of twelve (12) months gross salary as compensation.

Total award kshs.1,593,696.

(iii) The award in (i) above is payable with interest at court rates from the date of dismissal on 20th September 2012 till payment in full whereas interest on (ii) above is payable at court rates from date of judgment till payment in full.

(iv) Costs to follow the outcome.

Dated and delivered at Nairobi this 21st day of July, 2017.

HON. MATHEWS NDERI NDUMA

PRINCIPAL JUDGE