



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 2 OF 2017**

**PETER NJOROGI KIBE.....CLAIMANT**

**VERSUS**

**TEACHERS SERVICE COMMISSION.....RESPONDENT**

(Before Hon. Justice Byram Ongaya on Friday, 21<sup>st</sup> July, 2017)

**JUDGMENT**

The claimant filed the memorandum of claim on 05.01.2017 through Mugeria & Company Advocates. The claimant prayed for judgment against the respondent for:

- a) A declaration that the dismissal of the claimant was unfair and unlawful.
- b) Reinstatement of the claimant to service without loss of benefits.
- c) Payment of consolidated salaries due to the claimant until reinstatement.
- d) General damages or compensation for wrongful dismissal.
- e) Costs of the suit.

The respondent's statement of defence was filed on 15.02.2017 through Faith K. Kaluai Advocate. The respondent prayed that the claim be dismissed with costs.

Parties are in agreement that the claimant was at all material times employed by the respondent as a P1 teacher effective 01.05.1979. It is the respondent's case that about 26.02.2014 the claimant had been deployed at [Particulars withheld] Primary School when a report was made against the claimant that the claimant had allegedly sexually abused a child being a pupil at [Particulars withheld] Primary School.

The claimant was interdicted by the letter dated 17.04.2014 on account of immoral behaviour in that on 25.02.2014 at around 4.30pm he dragged the standard 8 pupil into the claimant's house situated in [Particulars withheld] village, pushed her onto the claimant's sofa seat and had sexual intercourse with the pupil and thereafter the claimant gave the pupil Kshs.50.00. The respondent undertook disciplinary proceedings in accordance with its internal disciplinary procedures including a disciplinary hearing. By the letter dated 13.08.2015, the respondent conveyed the dismissal of the claimant from the teaching service with effect from 12.05.2015 on account the said immoral behaviour and as was alleged in the interdiction letter.

On account of the same allegations, the claimant had been charged in criminal case no. 193 of 2014 at Baricho for defilement contrary to section 8(1) as read with section 8(4) of the Sexual Offences Act, 2006 that on 25.02.2014 at [Particulars withheld] village in Mwea West District within Kirinyaga County he intentionally and unlawfully defiled the pupil in issue who was then a girl of 15 years. The alternative charge was committing an indecent act with a child contrary to section 11(1) of the Sexual Offences Act, 2006 that the claimant had intentionally touched the pupil's private part on 25.02.2014. The judgment in that criminal case was delivered on 20.02.2015. The honourable trial court found that the prosecution had failed to prove its case beyond reasonable doubt as required by law and thus the claimant was acquitted under section 215 of the Criminal Procedure Code.

The 1<sup>st</sup> issue for determination is whether the termination was unfair. The court finds that there is no doubt that the allegations in the criminal case and the allegations leading to the termination of the claimant from employment were substantially similar and essentially amounting to an alleged crime. As submitted for the claimant, the claimant having been acquitted in the criminal case on 20.02.2015, it cannot be said that as at the time of dismissal on 13.08.2015, the respondent had a valid reason to dismiss the claimant from the teachers' service and on account of allegations substantially similar to those that the claimant had been acquitted by the trial court. The court considers that criminal liability can only be determined by a court of competent jurisdiction. In that regard the court upholds its opinion in **David Nyamai and 7 Others –Versus- Del Monte Kenya Limited [2015]eKLR** thus, “The claimants were subsequently charged with the offence of stealing by servant contrary to section 281 of the Penal Code. The court finds that a criminal allegation is a continuing injury which is resolved one way or the other upon the criminal court deciding the case. Only the criminal court has the necessary jurisdiction to determine and render a finding on criminal liability. Under Article 50(2) (d) of the Constitution of Kenya, 2010, every accused person has the right to a fair trial which includes the right to a public trial before a court established under the Constitution. Under sections 4 of the Criminal Procedure Code Cap75, an offence under the Penal Code Cap 63 is tried by the High Court or a subordinate court by which the offence is shown in the fifth column of the first schedule to the Criminal Procedure Code to be triable. Under section 4 of the Criminal Procedure Code Cap75, an offence under other statute is tried by the court as prescribed under the statute or by the High Court or a subordinate court as prescribed to try the offence under the Criminal Procedure Code. Thus, the court holds that an employer exercising the administrative disciplinary control over the employee is not a prescribed court for the purpose of making findings on criminal liability of the employee and employers lack power or authority to make a finding of criminal liability against the employee. The court further holds that where in the opinion of the employer the employee's conduct amounts to a criminal liability, such allegation would be a continuing injury against the employee to be resolved on the date of judgment by the trial court vested with the relevant criminal jurisdiction. Thus as a reason for termination, the injury will cease and crystallise on the date of the judgment by the trial court vested with the relevant criminal jurisdiction. Thus for purposes of section 90 of the Employment Act, 2007, the employee is entitled to file the suit within 12 months from the date of the cessation of the injury being the date of the judgment in the relevant criminal case prosecuted against the employee.”

The court further follows its opinion in **Douglas Murithi Magiri –Versus- Teachers Service Commission [2016]eKLR** thus, “The court agrees with the respondent's submissions that criminal proceedings are clearly separate from the employer's disciplinary process. However, where the reason for termination or dismissal is solely that the employee has committed an offence, the opinion of the court is that the employer must stop and await the determination of the alleged criminal liability by a court of competent jurisdiction as provided in the Constitution. In the instant case, such was the case, but the respondent failed to stop to wait the outcome in the criminal case and it is the opinion of the court that the respondent is bound by the outcome of the claimant's criminal trial that acquitted the claimant of any criminal liability as had been alleged. The court has considered the record by disciplinary panel and all correspondence about the allegations. Taking the stated particulars into account, it is clear that the allegations were that the claimant had defiled the girl or pupil. The court's opinion is that determination of criminal liability is such a serious matter that the Constitution has reserved its determination in the court with competent jurisdiction and there is no constitutional or statutory basis for employers to make determination of

**the employees' criminal liability. Further, once a court with competent jurisdiction has made a determination about an employee's criminal liability as may have been alleged by the employer, the employer is thereby bound and cannot turn around to defeat the court's finding.**

**Thus whereas the criminal process and the administrative disciplinary processes are clearly distinct, where the sole reason for the disciplinary process is that the employee has committed an offence, the court's opinion is that determination of such criminal liability would constitutionally be the preserve of the trial court with the relevant competent jurisdiction. Where the employee is acquitted, the employer may have options on the next cause of action and in the opinion of the court, that would not include validating or removing the employee or terminating the contract of employment on account of the same particulars for which the court would have found the employee criminally not liable."**

Thus the court returns that the termination of the claimant's employment in the present case was clearly unfair for want of a valid reason as envisaged in section 43 of the Employment Act, 2007.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to reinstatement and the other remedies as prayed for. The court returns that the respondent has not raised any bar to reinstatement. The court has considered the claimant's otherwise clean and long service commencing 01.05.1979. The court returns that the claimant is entitled to reinstatement and the remedies as prayed for with exception of compensation under section 49(1) (c) of the Employment Act, 2007 because reinstatement and the consequential pay back should be sufficient justice in the case.

In conclusion judgment is hereby entered for the claimant against the respondent for:

- a) The declaration that the dismissal of the claimant was unfair and unlawful.
- b) The Reinstatement of the claimant to the respondent's teaching service with effect from the effective date of dismissal 12.05.2015 and without loss of benefits; and the claimant to report to his last station of deployment not later than Wednesday 26.07.2017 at 8.00am for appropriate assignment of duty.
- c) The respondent to pay the claimant all monthly gross salaries from the date of reinstatement 12.05.2015 till the date of resumption of duty being not later than 26.07.2017; and the respondent to pay the same by 01.09.2017 failing interest to be payable thereon at court rates from the date of this judgment till full payment.
- d) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered in court at Nyeri this Friday, 21<sup>st</sup> July, 2017.**

**BYRAM ONGAYA**

**JUDGE**