



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU**

**CAUSE NO. 250 OF 2013**

*(BEFORE HON. LADY JUSTICE MAUREEN ONYANGO)*

**GEORGE AMARA OSODO ..... CLAIMANT**

**-VERSUS-**

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

**JUDGMENT**

**Introduction**

The Claimant is a teacher by profession. He trained at Asumbi Teachers Training College and graduated with a P1 Teacher Certificate in August 1998. He was employed by the Respondent Teachers Service Commission on 4th September 2002 and was posted to Migori District. On 8th April 2009, an anonymous person who signed off as **Okong'o, Chairman** wrote a letter to the Respondent reporting that the Claimant used certificates of somebody else to gain admission at Asumbi Teachers College and employment with the Respondent. The letter states that the Claimant's real name is David Osodo but he used the certificate of George Amara, that the real George Amara proceeded to A Levels and then joined Kenyatta University and as at the time of writing the letter was working with a non-governmental organisation.

Upon receiving the letter the Respondent carried out investigations following which the Claimant was interdicted, taken through the Respondent's disciplinary process then dismissed from service. The Claimant appealed against the dismissal but was not successful.

The Claimant was aggrieved by his dismissal and filed this claim in which he prays for the following remedies-

- a. A declaration that the Claimant's interdiction and dismissal from employment by the Respondent were unlawful and thus a nullity.
- b. An order for reinstatement to his previous employment.
- c. An order for the payment of the salary in arrears and all dues from the date of termination of employment to the date of reinstatement.
- d. In the alternative and without prejudice to the foregoing, an order for the payment of salary and benefits for the remaining years of work up to retirement age calculated on the basis of his monthly salary at the time of dismissal.

- e. General damages.
- f. Exemplary damages.
- g. Costs of the suit.
- h. Interest.
- i. Any other relief that this Honourable Court may deem just and fit to grant.

The Respondent filed a defence denying that the dismissal of the Claimant was unlawful or unfair. The Respondent prayed that the Claim be dismissed.

At the hearing of the case the Claimant testified for himself while the Respondent called two witnesses. The parties thereafter filed and exchanged written submissions.

### **Claimant's Case**

At the hearing of the case the Claimant denied that he is David Osodo. He testified that he has a brother by that name who works with the armed forces and is based in Mombasa. He denied using the certificate of another person to gain admission to college.

The Claimant testified that at the disciplinary hearing the Respondent did not present the person whose certificate and name he is alleged to have adopted. He urged the court to grant the orders as prayed in his claim.

Under cross examination the Claimant stated that he joined Pe-Hill High School in January 1986, and that his late father's name was John Osodo. He was shown an extract of the Admission Register at Pe-Hill where the father of George Amara is recorded as Ezra Okoko while the name of David Osodo's father is recorded as John Osodo. He stated that before he went to Pe-Hill he attended primary school at Rabwao in 1977. He stated that when he was employed in 2002 he presented his certificates to the District Education Officer who was satisfied with the documents. He stated that when he was summoned by the Respondent to submit his certificates he was unable to produce them because they got burnt in 1999. He submitted a police abstract dated 12th January 2010 and explained that he lost the first abstract which he used when he was being employed and applied for another one.

The Claimant stated that he obtained his first national identity card immediately he left school in 1987, that he joined Asumbi Teachers College using the identity card and that his date of birth is 1970. He stated that the register for Pe-Hill indicates that the person called George Amara was born in 1969.

He stated that at the disciplinary hearing he informed the panel that he sat for his KCE at Rabwao and thereafter went to Sango Secondary School in Homabay. He stated that he did not have any record to show that he went to Sango Secondary School. That he further informed the Panel that he joined Pe-Hill in 1986 and not 1984. He stated that he did not go to Nyandema School and that he does not know another David Obow Osodo who went to Nyandema High School. He stated that the name of his biological father is not George Odongo. He stated that on 6th March 2004 he filled a next of kin form in which he stated the name of his wife as Alice Achieng but his wife died in 1999. He stated that the next of kin form gives particulars of the person to be contacted should he die while in service.

### **Respondent's Case**

The Respondent's 1st witness PIUS ONYINYO SEDA (RW1) testified that in 1984 he was working at St. Michael Nyandema Secondary School in Macalda Migori as a watchman at the gate and knew the pupils. He testified that he knows George Amara Odongo Okoko whose father was a teacher. He testified that George was brought to school by his sister and he would be able to recognise him. He testified that in 2010 he was called to testify at TSC about George Amara.

Under cross examination RW1 stated that when he went to TSC he testified that he was a grounds man at Nyandema Primary School. He stated that he was a watchman then became a grounds man. He stated that he was not a cook. He stated he did not handle the register for pupils. He stated the school had a head teacher who is still alive.

The Respondent's second witness JERMEN LENELIT (RW2) testified that he works with the Respondent as Deputy County Director in Uasin Gishu County but at the time of the claimant's disciplinary case he was working as a discipline officer and participated in the investigations of the case. He testified that somebody wrote a letter reporting that George Amara was using another person's certificates. That the letter stated that the person who calls himself George Amara and David Obongo Osodo were both in Pe-Hill. He testified that they went to the school and obtained the admission register from which they confirmed that the name of George Amara's father is Ezra Otho while the father of David O. Osodo is John Obow.

He testified that he also went to Nyandema Secondary School and confirmed that George Amara went to school there. He testified that they also met the chief of Nyatike whom the Claimant had alleged he reported to about his house which got burnt. That the Chief said he was informed by the Claimant that his house got burnt in 2009 and he wrote a letter to that effect.

RW2 testified that in the village they were told that the real George Amara was in South Sudan but has a house in Migori. He testified that they established that George Amara and David Osodo are two different people.

RW2 testified that he invited the Claimant for the disciplinary hearing. The first time the Claimant did not appear but he appeared when he was invited a second time. RW2 testified that he wrote the Claimant's letter of dismissal and that the claimant appealed but the appeal was not successful.

## **Submissions**

In the written submissions filed on behalf of the Claimant it is submitted that there is no evidence supporting the Respondent's contention that the Claimant is not George Amara Osodo. It is submitted that RW2 did not testify at the Claimant's disciplinary hearing and the Claimant did not have an opportunity to meet and question his accuser. It is submitted that the termination of the Claimant's employment contract was unfair in terms of section 45 of the Employment Act and the Claimant is entitled to damages.

For the Respondent it is submitted that there are several inconsistencies in the Claimant's past that came up during his disciplinary hearing.

The Respondent submitted that under the regulations for Teachers and the Teachers Code of Conduct and Ethics teachers have a duty to maintain high standards of honesty, integrity and decorum, to be transparent and accountable both in their professional and private life, that the Claimant breached the trust the Respondent had in him as a teacher.

The Respondent further submitted that qualifications go to the root of an employment contract and that the Claimant secured employment based on his qualifications, that the discovery that he did not go to Asumbi Teachers College on merit makes him unsuitable for the job. It is further submitted that it is against public policy to keep in employment a person whose employment was fraudulently acquired.

On burden of proof the Respondent submits that it is not required or expected to prove its case to the level of courts of law. The Respondent relied on the decision of **Azangalala J. in Petition No. 1 of 2010: Bett Francis Barngetuny v Teachers Service Commission and Teachers Service Appeals Tribunal** where he stated:

*"...it is illustrative that the 1st Respondent was acting in its quasi-judicial capacity. It was no bound to strictly apply the law of evidence and procedural rules which bind the regular court. The standard of proof before the 1st Respondent is not also that of beyond reasonable doubt which the*

*regular court was bound to apply."*

The Respondent submitted that nevertheless it undertook extensive investigations and the decision reached is justifiable and it has discharged its burden.

## **Determination**

I have considered the pleadings and evidence on record. I have also considered the submissions of the parties. Under section 45 of the Employment Act an employer must prove both validity of reasons for termination and fair procedure. From both the pleadings and evidence on record the Claimant appears not to be challenging the disciplinary process he was taken through, but rather, the validity of the reasons for his dismissal. The issues for determination are therefore whether there was valid reason for dismissal of the Claimant and whether the Claimant is entitled to the remedies sought.

According to both the Claimant's letter of interdiction and his letter of dismissal, the reason for dismissal is that he impersonated one George Amara by presenting his KCE Certificate No. 0695768 to the Teachers Service Commission to seek employment purporting the certificate was his.

Under section 43 and 47(5) of the Employment Act it is the burden of the employer to prove validity of reasons for termination. The two sections are reproduced below:

### **43 .Proof of reason for termination**

*(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.*

*(2) The reason or reasons for termination of a contract are the matters that*

*the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.*

### **47. Complaint of summary dismissal and unfair termination**

*(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or*

*wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.*

The evidence on record disclose several unexplained gaps about the Claimant. These include his date of birth, the name of his father, when he joined Pe-Hill High School and where he went to primary school. In the Claimant's Application for Employment Form, he indicates that he was in Rabwao Primary School from 1977 to 1983 when he did CPE, then at Pe-Hill High School from 1984 to 1987 when he sat for KCE. The School leaving Certificate from Pe-Hill which he submitted to the Respondent on the other hand indicates that he joined the school on 30th January 1986 in Form 3 and left in December 1987 after Form 4. At the disciplinary hearing he stated that he joined Pe-Hill in 1986 as indicated in the School leaving Certificate.

There is also the question as to who is David Osodo and whether the Claimant's true identity is David Osodo and not George Amara as he claims. Coupled with these questions are where the Claimant's original certificates for primary and secondary school are, whether the story about the certificates having been burnt in a fire that gutted the Claimant's house in 1999 is true, why the Claimant did not report the fire immediately, why he obtained a police abstract 11 years later in 2010 after his interdiction by letter dated 18th June 2009, whether the Claimant's wife died in the fire, why her death certificate was obtained in 2007 if she died in 1999, why her name was entered as next of kin in the Claimant's next of kin forms

filled on 6th march, 2004 if it is true that she died in 1999. There is also the issue of the Claimant changing his national identity card which he claims was because he wished to get the new generation card but which according to the letter from the anonymous whistle blower, was to change his name to conform to that of the new identity he had taken up from David Osodo to George Amara. To add to all these is the nagging question why an anonymous person would want to ruin the life of the Claimant by making up such a fantastic story about him obtaining admission to Asumbi Teachers Training College using the certificate of a different person after failing exams.

From the evidence on record it is apparent that DAVID OBOW OSODO son of John Osodo and GEORGE AMARA son of Ezra O. Okoko both did KCE at Pe-Hill High School in 1987. According to the exam records of Pe-Hill for Form 4 class of 1987, David Osodo obtained 51 points grade F(failed) while George Amara obtained 34 points(Division 3).

The Claimant was unable to explain why the names of the fathers of David Obow Osodo and George Amara got mixed up/swapped in the records at school. The Claimant could further not explain why he entered the name of his wife as next of Kin in 2004 if she died in 1999. He could further not explain why in his employment Form he filled that he joined Pe-Hill in 1984 when the School leaving certificate he supplied indicates he joined in 1986 in Form 3 and the extracts from the school records indicate that George Amara joined the school on 2nd February 1987 in Form 4. He further could not explain why he stated that he joined Pe-Hill from Rabwao Primary School when the records show that he joined Pe-Hill from Nyandema Secondary School and David O. Oboo joined from Uriri Secondary school on 29th April 1986.

Section 47(5) provides that it is the burden of the employee to prove that *an unfair termination of employment or wrongful dismissal has occurred* while the employer's burden is *justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer*. And as provided in section 43(2) *The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.*

In the circumstances of this case it is my finding that the Claimant has failed to discharge his burden of proving that there was no valid reason for the employer to terminate his employment contract based on the many unexplained questions surrounding his personal records. For this reason I find that the Claimant has failed to prove that there was no valid reason for his dismissal.

### **Remedies**

Having found that the Claimant failed to prove that the termination of his employment was unfair, is he entitled to any of the remedies sought? I do not find any of the prayers sought available to the Claimant with the result that the Claim is dismissed. Each party shall bear his costs.

Orders accordingly.

**Dated, Signed and Delivered this 22nd day of September, 2017**

**MAUREEN ONYANGO**

**JUDGE**