



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
CAUSE NO. 143 OF 2014

(Before Hon. Lady Justice Maureen Onyango)

LORNA AMUNGA ESHIMULI.....CLAIMANT

- Versus -

TEACHERS SERVICE COMMISSION.....RESPONDENT

J U D G E M E N T

Lorna Amunga Ishimuli, the Claimant, is a teacher by profession having attended Kaimosi Teachers College and attained the grade of P1 teacher. She was employed by Teachers Service Commission, the Respondent, in 1995 as a P1 teacher. In 2004 she applied for study leave of 3 years to attend Kyambogo University in Uganda from 2004 to 2007. By letter dated 9th October 2009 the Claimant applied for upgrade from P1 teacher to Diploma Teacher following her graduation on 8th February 2008. She attached the relevant documents which included an academic transcript and Diploma in Special Needs Education certificate No. KYU D 003026 dated 1st May 2007 indicating she attained a Second Class Upper.

The Claimant was consequently upgraded to an Ordinary Diploma Teacher III with effect from 12th September 2009. The letter communicating the upgrading is dated 28th June 2010.

By a letter dated 20th March 2014 and received by the Respondent on the same day the Claimant forwarded another Certificate No. KYUD 052507. In the letter she states that the certificate she submitted earlier had a misprint on the year of completion which was indicated as 2007 and she had returned it to the university.

Vide an anonymous letter dated 14th December 2012 addressed to the Respondent by a person who signed off as "A good Samaritan" the Respondent was informed that the Claimant had two forged certificates and copies of both were attached to the letter. Upon receipt of the letter the Respondent wrote to the Academic Registrar of Kyambogo University to confirm if the Claimant was a student at the university in the year 2004 to 2007 under Registration No. 04/DSNEE.017/BUK and if Diploma Certificate No. KYU D 003026 was issued by the university.

Kyambogo University responded by letter dated 9th April 2013 signed by the Academic Registrar stating as follows in respect of the photocopy of certificate sent by the Respondent for verification:

- The date of graduation was reflected as 1st May 2007 whereas the Kyambogo Graduation date for 2007 was held on 9th February, 2007.

- The signatories on the certificate though at that time were employees of Kyambogo University only one moreover his signature was forged and entered for the Vice Chancellor was the Academic Registrar by then.
- There are many other secret features which do not conform to Kyambogo University Certificates.
- From the above observation, it is evident that the document presented for verification was neither genuine nor issued by Kyambogo University.
- I kindly implore the Kenya Teaching Service to apprehend the person for uttering a false document.

Upon receipt of the letter from Kyambogo University the Respondent interdicted the Claimant by letter dated 25th September 2013. The grounds for interdiction were that-

You submitted to the Commission a forged Diploma Certificate (Special Needs Education) No. KYU D 003026 on 30/3/2010 purporting you graduated in may 2007 from Kyambogo University seeking for upgrading from PI to ATS III with the intention of defrauding the Commission.

The letter of interdiction invited the Claimant to make a statement in her defence against the charges to the Commission in writing within 21 days.

In her statement dated 23rd October 2013 the Claimant denied that certificate No. KYU D 003026 was forged. She stated that her certificate was erroneously dated and that it was a contradiction which the university had promised to correct. She promised to present the correct certificate when attending the disciplinary hearing.

The Claimant was invited for the hearing of her Discipline Case at TSC House, Nairobi on 6th March 2014 but the hearing was rescheduled to 19th March 2014. The record of proceedings at the hearing reflects that the Claimant attended the hearing and was questioned about the certificates from Kyambogo. The Claimant was thereafter dismissed from service by letter dated 26th March 2014. The grounds for dismissal are the same as those in the letter of interdiction.

In her Memorandum of Claim dated 20th June 2014 the Claimant avers that the Respondent did not comply with regulations for disciplinary proceedings and investigations or determine the Claimant's case in a transparent and impartial manner. It is further the Claimant's averment that the dismissal was based on malicious and baseless allegations and was contrary to the Employment Act, The Commission Act, The Constitution, Teachers Service Commission Act and Code of Regulations, ILO Declaration of Fundamental Principles and Rights of a Worker.

The Claimant prays for the following remedies-

- a) THE RESPONDENT to RE-INSTATE the CLAIMANT IN A PROMOTED STATE.
- b) THE RESPONDENT to pay the claimant all her dues specified in her terms of employment right from the date of stopping to finality.
- c) The Respondent to pay claimant disturbance allowance.
- d) The Respondent to pay the cost of this suit with interest.
- e) Any other orders and/or relief that this Honourable court may deem just and expedient to grant.

The Respondent filed a Memorandum of Defence in which it pleads that the decision to dismiss the Claimant was reached after giving her an opportunity to be heard and in lawful exercise of the

disciplinary powers bestowed on the Respondent under Article 237(2) of the Constitution, the TSC Act, the Code of Regulations (COR) and all other relevant and enabling enactments. It pleads that the particulars of established grounds were that:

- a) The Claimant was severally awarded leave to attend classes in Kyambogo University by the Respondent.
- b) The Claimant presented three (3) different certificates with her names from Kyambogo University.
- c) The first certificate indicate the graduation date as 1st May, 2007.
- d) The second certificate indicates the date of graduation as 9th February, 2008.
- e) The third certificate indicate the date of graduation as 27th February 2009.
- f) The University confirmed to the Respondent that the Signatures in the Certificate dated 1st May 2007 was forged and that the same lacked secret features of the university.
- g) Kyambogo University Certificate dated 1st May 2007 was forged and the same was confirmed by the university.
- h) The date of graduation for Kyambogo University in 2007 was 7th May 2007 and not 1st May 2007.

The Respondent further pleaded that-

It is an offence to submit false or misleading information under Section 44(2) of the TSC Act to the Commission. Further, the Claimant breached Regulation 66(2) (g) of the COR, and was thus served with a notice of Interdiction.

Having ascertained the allegations against the claimant herein, and following due process, the Respondent proceeded to interdict the claimant for submitting a forged Diploma Certificate allegedly obtained after graduating in May 2007 from Kyambogo University seeking upgrading from P1 to Diploma Teacher with the intention to defraud the Commission.

The Respondent avers that the Claimant, upon appointment to Diploma Teacher was subject to salary increments. The Claimant therefore derived benefits fraudulently in terms of increased salaries and allowances to the detriment of the Respondent and the government at large.

The Respondent further avers that it has lost confidence in the Claimant, following the forgery and has also lost the trust bestowed in the Claimant and therefore is unable to continue the Claimant in its employment.

Having followed due process under law and as set out in the TSC Act and Regulation 66(4) of the COR, and having accorded the Claimant a fair hearing and fair administrative action as set out in Article 47 of the Constitution, the Respondent found the Claimant unfit to be continued in employment. Following this decision, the teacher was dismissed from service.

The Respondent avers that in dismissing the claimant, it exercised due process as set out in its COR, the TSC Act and in lawful and proper exercise of its powers as set out in Article 237 (2) of the Constitution of Kenya 2010 and all enabling enactments.

The Respondent further pleads that -

- a) At the earliest opportunity, the respondent informed the Claimant of the allegations levelled against her and was invited to submit her Defence within 21 days.
- b) The Claimant wrote an elaborate defence and it was duly considered during the disciplinary process.
- c) The Claimant appeared before the Respondent's panel when the allegations were formally read to him.
- d) The Claimant was accorded the opportunity to present his evidence both oral and written and to cross examine the witnesses before the disciplinary panel.
- e) The Respondent duly and without delay communicated its decision to the Claimant.
- f) All issues of fact involved in the Claimant's matter were completely evaluated by the Respondent.

The Respondent filed a counter claim in which it contends that the Claimant erroneously/fraudulently earned salary and allowances with effect from **12.09.2009** to **30.04.2013** amounting to **Kshs.454,070.93** and prays for -

- a) Payment of **Kshs.454,070.93** being Government liability owned by the Claimant.
- b) Dismissal of the Claimant's suit as the same is devoid of merit.
- c) Costs of defending this suit.

At the hearing of the case the Claimant testified on her behalf led by Mr. Watanga instructed by Makokha Wattanga & Luyali Associates. The Respondent called one witness, DAVID KYALO MUNGUTI, an Assistant Deputy Director, Administration. The Respondent was represented by its counsel, Ms. Patricia Naeku. The parties thereafter filed and exchanged written submissions.

In the brief written submissions filed on behalf of the Claimant it is urged that the proceedings of the disciplinary hearing produced by the Respondent do not reflect the true position, that the witness called by the Respondent was not part of the panel at the disciplinary hearing and his evidence is hearsay and further that the Claimant did not append her signature to confirm the proceedings. It is submitted that the interdiction and dismissal were malicious. It is submitted that the claimant corrected the mess caused by her estranged husband whom she had sent to collect the certificate from Kyambogo University Uganda on her behalf. It is submitted that the Respondent failed to ventilate the issues raised by the Claimant and that she is entitled to reinstatement.

For the Respondent it is submitted that the Claimant was dismissed on genuine grounds being that she tendered a forged/fake certificate to the Respondent to secure a promotion and higher pay knowing that the certificate was fake and the promotion unmerited. The Respondent relied on section 43(2) of the Employment Act. The Respondent further submitted that the Claimant made a mockery of the trust and professionalism the Respondent had in her. It is submitted that there was ample evidence of forgery as the Claimant presented 3 certificates yet she graduated only once, secondly there was breach of confidence, thirdly the status of the Claimant's certificates cannot be ascertained and finally it is against public policy and morality to keep in public employment a person who has fraudulently obtained a benefit from the public.

On the burden of proof the Respondent submitted that as an administrative body it is not expected to prove a case beyond reasonable doubt. 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** in which he held that: *"...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."

On remedies sought by the Claimant the Respondent submitted that the TSC Act and the COR empower the Respondent to terminate the services of an employee after due process, that section 41(1) of the Employment Act confirms the mandate of an employer to terminate the services of an employee on inter alia, grounds of misconduct. It was submitted that the Respondent complies with section 9 of the TSC Act which broadly outlines the procedure to be followed in exercising disciplinary power and Regulation 66 of the COR for Teachers which sets out specific steps for discipline of teachers. It is submitted that the Respondent first interdicted the teacher by letter dated 25th September 2013 and informed her of the charges against her giving her time to respond to the charges, she responded with her letter dated 23rd October giving her defence, was invited for a hearing which took place on 19th March 2014 during which she was given ample time to present her evidence. It was submitted that the Claimant did not raise any objection about the manner in which the proceedings were handled. Thereafter she was promptly informed of the decision of the Respondent.

On the prayer for reinstatement, Respondent relied on **Civil Suit No. 156 of 1997; Joseph Mujibi Ouma vs. National Cereals and Produce Board and two others**; where Justice Serگون quoting the famous Court of Appeal decision in **Dalmas B. Ogoye vs. KNTC Civil Appeal No. 125 of 1995** held that *'it is a well-established fact that courts have been reluctant to make orders for reinstatement because such relationships are purely contractual hence if an order is made in that direction it would be like imposing a contract on another which is not the function of the Court.'*

The Respondent further relied on **Industrial Court Cause No. 379 of 2010; Universities Academic Staff Union vs. Masinde Muliro University of Science and Technology** in which Mukunya J. in refusing to order reinstatement of the Claimant held *'Reinstatement is one of the remedies available to a dismissed employee. It is not an automatic remedy as the court must consider other factors such as practicability of implementing the remedy. It is considered that it would **NOT** serve the interests of furtherance, securing and maintenance of good employment and labour relations in Kenya as envisaged by Section 4(1) of the Industrial Court Act.'*

It Further relied on the decision of **Korir J. in Nairobi High Court Judicial Review No. 260 of 2008 Republic vs. Teachers Service Appeal Tribunal & Another. Exparte Alfred Mwiti** held:- *'As regard the prayer for an order of Mandamus to compel the Respondent to reinstate the Applicant to employment, such an order cannot be granted because contracts of service have mutuality of rights and obligations for both parties and this court does not have jurisdiction to impose upon an employer an employee whom it does not wish to retain in its employment.'*

The Respondent submitted that the Claimant having been employed on a contractual relationship is not entitled to reinstatement as doing so would amount to imposing a contract on unwilling parties.

It was submitted that the Claimant has an untrustworthy background as the Respondent's investigations had revealed, that she knowingly tendered to the commission a forged/fake document with intention to defraud the commission and secure an unqualified promotion.

The Respondent prayed that the Claim be dismissed for being devoid of merit.

Determination

I have carefully considered the pleadings, evidence and written submissions together with authorities cited. The issues arising for determination are whether the dismissal of the Claimant was unfair and whether she is entitled to the remedies that she prayed for.

Section 47(5) of the Employment Act provides for the burden of proof in employment cases as follows-

(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 reason for interdiction and subsequent dismissal of the Claimant was that she submitted to the Respondent a forged/fake certificate no. KYU 003026 on 30th March 2007 purporting that she had graduated from Kyambogo University and seeking upgrading from P1 to ATS III.

In her testimony the Claimant stated that she graduated on 27th February 2009 as reflected in the graduation booklet. During cross examination the Claimant admitted writing a letter dated 9th October 2009 in which she stated that she graduated on 8th February 2008. She also admitted writing another letter dated 30th March 2010 applying for upgrade from P1 to ATS III in which she stated that she graduated on 1st May 2007 and submitted a copy of a certificate of that date. In her personal file with the Respondent there is yet another letter dated 9th October 2009 in which she requests for posting from her (then) current station to Kimilili D.E.B. Special Unit following her graduation from Kyambogo University Uganda on 9th February 2008.

It is instructive that the Claimant did not submit her graduation certificate No. KYUD 052507 to the Respondent until 20th March 2014 when she wrote a letter titled "AMENDED CERTIFICATE" in which she enclosed a copy of the certificate. In the letter she writes ***"This cancels the previous certificate presented to you which had a mis-print in the year of completion being 2007, which has been returned to the university."*** It is important to note that by the time she wrote this letter forwarding the "correct" certificate she was already under interdiction having been interdicted on 25th September 2013. It is further worth noting that in her Memorandum and in her testimony in court the Claimant stated that her letter of promotion dated 28th June 2010 was based on her certificate dated 27th February 2009, yet she had not submitted the certificate to the Respondent until 20th March 2014.

Section 43 provides that an employer must prove the reasons for termination of employment which reasons must be those that the employer ***"genuinely believed to exist, and which caused the employer to terminate the services of the employee"***.

Based on the foregoing, it is clear that the grounds for interdiction and subsequent dismissal of the Claimant were genuine as the Claimant had submitted the impugned certificate which was confirmed by Kyambogo University to be neither genuine nor issued by the University.

Section 41 provides for procedural fairness. The Respondent has demonstrated that it complied with the statutory procedure set out in section 9 of TSC Act and Regulation 66 of the Code of Regulations for Teachers. The Claimant did not complain about the process. She only contested the reasons for dismissal.

I find that the dismissal of the Claimant was procedurally fair.

Remedies

Having found that the dismissal of the Claimant was substantively and procedurally fair, she is not entitled to any of her prayers.

Counterclaim

Although the Respondent filed a counterclaim seeking refund of Kshs.454,070.93 erroneously paid to the Claimant between 12th September 2009 and 30th April 2013, no evidence was led in respect thereof and I find that the counterclaim has not been proved.

Conclusion

In conclusion I find that both the claim filed by the Claimant and the counterclaim filed by the Respondent have not been proved and dismiss both. Each party shall bear its costs.

Orders accordingly.

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

MAUREEN ONYANGO

JUDGE