



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 18 OF 2017

JAMES PETERSON NJERU.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday, 8th December, 2017)

JUDGMENT

The claimant filed the memorandum of claim on 24.01.2017 through Kimunya & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. A declaration that the claimant's termination from employment and the subsequent removal of his name from the register of teachers was unprocedural, unfair and wrongful.
- b. A declaration that the claimant be forthwith reinstated as an employee of the respondent and his name be reinstated in the register of teachers.
- c. Payment of salary from the date of interdiction until reinstatement.
- d. Costs of the claim.

The statement of defence was filed on 15.03.2017 through Patricia Naeku Advocate. The respondent prayed that the claimant's suit be dismissed as lacking in justification and merit.

The claimant was employed by the respondent as a P1 teacher effective 20.09.2012. The claimant was deployed to serve at [particulars withheld] Primary School in Kirinyaga County as per the letter dated 27.09.2012.

On or about 27.07.2015 it was alleged that it had been reported to the respondent's director at Kirinyaga County that the claimant had sexual intercourse with a pupil on or about 14.06.2015. Preliminary investigations were carried out as per the report filed for the respondent. The report recommended that the claimant be interdicted in view of the allegations.

The claimant was interdicted from duty by the letter dated 03.08.2015 upon allegations that the claimant's name be removed from the register of teachers on the ground of the allegation that the claimant was of immoral behaviour in that on 14.06.2015 sometimes between 6.00am and 9.00am the claimant had sexual intercourse with his named standard 4 pupil of around 15 years under a tree somewhere between the pupil's home and Itangi Police post while the claimant was serving as a teacher at [particulars withheld] Primary School.

Witness statements about the allegations were taken and the same were filed in court. The claimant was invited for a disciplinary hearing on 17.11.2015 at 8.30am and the record of the proceedings was filed in court. The hearing returned that the claimant was guilty in view of the evidence that was adduced and a decision was made that the claimant be dismissed and removed from the teachers' register. Subsequently the dismissal decision was conveyed to the claimant by the letter dated 16.12.2015. The dismissal was effective 17.11.2015.

The claimant's evidence was that the allegations of immoral behaviour were malicious and unfounded so that the reason for termination was therefore invalid.

The claimant's evidence was that on the morning of 14.06.2015 at about 7.00am he went to the pupil's home to request the parents to allow the girl to accompany him to Itangi Police Station to report an alleged crime in which the pupil was a victim. The report to the police was about alleged sexual molestation of the pupil by her uncle. The claimant testified that the pupil's parents were reluctant to be seen accompanying the teacher and the pupil to the Police Station. Thus he left with the girl towards the Station and while admitting that it ordinarily took about 30 minutes walk to the Station from the pupil's home, the claimant admitted that the statement was recorded at 10am or 11 am (suggesting it took about 4 hours to cover the otherwise 30 minutes' walk) . The claimant also admitted that he had acted without the authority of his supervisors, the head teacher or deputy head teacher. The claimant further admitted that he knew that it was against the teachers' code of conduct to be with a pupil in privacy as he did when he walked to the police station with the pupil and when he admitted that he had diverted to a restaurant to buy tea for himself and the pupil. It was not in dispute that the alleged crime the claimant had set out to report that morning was subject of a report to the school authorities and it was clearly not open for the claimant to take the action as he did outside the school's authority and protocol entailing the head teacher's or deputy head teacher's assignment of such or any other duty to the claimant.

The respondent's case was that the claimant acted as he did on that morning with an evil design to commit the misconduct of immoral behaviour as was alleged and subsequently established by the respondent's investigations and during the disciplinary hearing or proceedings.

The **first issue** for determination is whether the termination was unfair. It is submitted for the claimant that the specific reason for termination was that the claimant had sexual intercourse but no evidence was tabled to justify that reason both at disciplinary hearing and in the court. It was submitted that section 107 (1) of the Evidence Act, Cap. 80, applied and the respondent had failed to prove the allegations of sexual intercourse as had been alleged. The court has considered the material on record. The evidence of sexual intercourse at disciplinary hearing was essentially the pupil's word against the teacher's denial of the allegation. It was submitted for the claimant that there was no independent corroboration such as by a qualified medical practitioner. Further, in absence of the relevant criminal justice process, it was submitted for the claimant that there was no basis to show that the alleged defilement had taken place.

For the respondent it was submitted that the claimant had failed to challenge the pupil's vivid and coherent testimony about the alleged sexual intercourse. Thus, within the provisions of section 43 of the Employment Act, 2007, the respondent had reason to genuinely believe that the claimant had committed the misconduct as had been alleged. It was further submitted that the respondent had considered the other surrounding actions and omissions by the claimant and genuinely believed that the claimant was culpable as was alleged. Such aggravating actions and omissions included indulgence in domestic matters not assigned to the claimant in his official capacity as a teacher; indulging in matters outside his teaching duties; visiting the pupil's home early in the morning and without authority; unlawfully collecting a minor from her home on 14.06.2017; walking with the minor alone that early morning on a weekend; leading the minor to a hotel or to a bush; buying the pupil or minor tea and omelette; and, as was alleged, having sexual intercourse with the pupil.

The court has carefully considered the evidence. It is true that the respondent did not provide independent and corroborative evidence to establish defilement. Nevertheless, the court has considered the aggravating and unexplained breaches of the teachers' code of conduct surrounding the allegations. In particular, the court returns that the claimant set out to act as he did that material morning without authority from his

supervisors and clearly outside his official duty as a teacher. Further, it was not disputed that the claimant was in a private environment with his pupil and it was known to the claimant, and the claimant admitted, that doing so was contrary to the teachers' code of conduct. Taking into account those surrounding circumstances, the court returns that as at the time of the termination, respondent has established that it genuinely believed that the claimant had engaged in a serious misconduct and substantially as was alleged. Thus the court returns that in the circumstances of the case, the respondent had genuine or valid reason as envisaged in section 43 of the Employment Act, 2007. While making that finding, the court has considered the holding by the Court of Appeal (Waki, Karanja and Kiage JJ.A) in **Kenya Power & Lighting Company Limited –Versus- Aggrey Lukorito Wasike [2017]eKLR** thus, **“Under section 43 of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he “genuinely believed to exist,” causing him to terminate the employee’s services....”**

The court considers that for proceedings before the court the employer must prove the reason for termination existed as at the time of the termination. That burden is as per section 47(5) of the Employment Act, 2007 as read with section 43 of the Act. What is clear is that such proceedings are civil proceedings and the standard of prove in discharging that burden is the one established for civil cases being upon a balance of probabilities. The court further considers that where the reason for termination is that the employee has committed a crime, then the duty by the employer is to show that the employee was convicted as such in line with the protection under Article 50(2) (d) that an accused person has the right to a public trial before a court established under the Constitution. Section 44(4) (g) states that it is gross misconduct if an employee commits an offence, or on reasonable grounds is suspected of having committed, a criminal offence against or to the detriment of his employer or his employer's property. In view of that provision, the employer would be entitled to dismiss an employee on account of reasonable suspicion that a crime has been committed by the employee – and which is clearly different from where the ground for dismissal is that the employee has committed the crime in issue. Thus, it is the court's opinion that it all rests upon the wording and particulars of the allegations the employer will frame against the employee. Depending on the wording, Article 50(2) (d) may swing as a chain, if without a conviction by a court of competent jurisdiction, the employer alleges that the employee has committed a crime or the particulars of the allegations essentially amount to an offence. If the allegations are that the employer suspects an offence was committed, then clearly, Article 50(2) (d) will not swing as a chain. The court considers that the line is thin and every case will have to be considered on individual merits towards upholding the protection of Article 50(2) (d) as against the employer's exercise of the powers of disciplinary control over its employees.

The court has also considered the holding of the Court of Appeal (Maraga, Azangalala, and Kantai JJ.A) in **Teachers Service Commission –Versus- Joseph Okoth Opiyo [2014]eKLR** thus, **“14. In cases of sexual immorality, it is not easy to get eyewitness evidence as such acts are committed behind closed doors. Such cases are, in most cases, proved by circumstantial evidence of opportunity to commit the same....”**

As already found by the court and applying the said partly subjective test for provisions of section 43 of the Act, the court returns that the respondent had reason to validly or genuinely believe, as at the time of the termination, that the claimant was culpable of the misconduct as per the cited breaches of the teachers' code of conduct but which were not specifically referred to or cited in the interdiction letter or dismissal letter. In the court's opinion and in view of the Court of Appeal's holding in **Teachers Service Commission –Versus- Joseph Okoth Opiyo [2014]eKLR** it would be this court's advisory that employers act against an employee upon such provable breaches, like in this case, the established breaches of the teachers' code of conduct as against the claimant that surrounded the alleged sexual intercourse but which the employer could not strictly provide eyewitnesses as it would happen behind closed doors or darkness. The court's further advisory would be that where the particulars of the misconduct, in the opinion of the employer, discloses a crime and the employer does not desire to await or pursue a criminal conviction, then the proper allegations against the employee and which may lead to a subsequent termination or dismissal would be **“reasonable suspicion”** that the employee has committed an offence. Thus, in the kind of cases the respondent deals with involving immoral behaviour, it were

safer for the allegation to be that the teacher in issue “**....is reasonably suspected of sexual intercourse or defilement of...**”In that way, it is the view of the court that the Constitutional protection that only a court of competent jurisdiction can make a finding of criminal liability will be upheld and fully given effect to.

In the present case it was clear that the claimant had been accorded the due notice and hearing as per section 41 of the Act.

Thus, to answer the first issue for determination, the court returns that the termination was not unfair or unlawful in view of the established breaches of the code of teachers which surrounded the primary and only allegation of immoral behaviour as was levelled against the claimant.

The **second issue** for determination is whether the claimant is entitled to the remedies as prayed for. The prayers were based upon a finding of unfair termination but which has not been returned by the court. In such circumstances, the prayers will be declined. The court has considered that the breaches of the code surrounding the allegations were established before the court but were not subject of the disciplinary proceedings before the respondent – and the court balances justice with a finding that each party shall bear own costs.

In conclusion the suit is hereby dismissed with orders that each party bears own costs of the case.

Signed, dated and delivered in court at **Nyeri** this **Friday, 8th December, 2017.**

BYRAM ONGAYA

JUDGE