



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT AT KISUMU

CAUSE NO. 9 OF 2015

(Before Hon. Lady Justice Maureen Onyango)

NYANG'AU ERICK NYAKUNDI.....CLAIMANT

VRS

THE SECRETARY TEACHERS SERVICE COMMISSION.....RESPONDENT

J U D G E M E N T

Erick Nyang'au Nyakundi, the Claimant herein, is a graduate of Fairland University Uganda where he graduated with a Bachelor of Arts degree in Education, Second Class, Upper Division on 18th December, 2008. On 30th August, 2010 he was appointed as a teacher on contract terms by Teachers Service Commission, the Respondent at a salary of Shs.15,000 per month. His contract was for 3 years from the date he reported to work. He was posted to St. Augustine Otamba Secondary School to teach Kiswahili/History. He was assigned TSC No. 524602. The Claimant worked until 26th July, 2012 when he received a letter terminating his employment on grounds that he did not meet minimum entry requirements as per Teachers Service Commission recruitment Guidelines on Permanent and Pensionable Terms.

The Claimant avers that he met the qualifications and was recruited after submitting his documents to the Respondent. The Claimant also states that he applied for his degree to be equated by Commission of Higher Education (CHE) and on 29th July, 2010 he received a letter from CHE confirming that Fairland University was a recognised institution in Uganda and degrees awarded by the said institution were recognised in Uganda and by convention, in Kenya.

In his Statement of Claim filed on 13th January, 2015 the Claimant alleges that the termination of his employment was unfair as the Respondent failed to comply with the Teachers Service Commission Code of Regulations, the Employment Act, the rules of natural justice and his contractual terms that provided for one months notice or pay in lieu, and the Constitution. At the time of termination the Claimant's terms of employment had been converted to Permanent and Pensionable service with effect from 1st October, 2011. The Claimant's last salary was a gross of Shs.36,129 per month.

The Claimant seeks the following remedies:-

- a) Reinstatement to the teaching service
- b) Salary arrears from the date of termination to date together with all benefits under the Employment Act
- c) Costs of this claim

d) Interest on (a) and (b) above

e) Any other relief that this Honourable Court may deem fit to grant.

The Respondent filed a Memorandum of Defence denying that the termination of the Claimant's employment was unfair. The Respondent averred that the termination was based on established grounds and was lawful, proper and the Respondent exercised due process.

The Respondent averred that the Claimant obtained a mean Grade of C (Plain) in KSCE while

the minimum requirement for employment on permanent terms for a teacher is C+ (Plus). The Respondent further averred that the Claimant held a Degree in Education (Kiswahili and History) from Fairland University in Uganda, that on 12th March, 2013 the Commission of University of Education, Kenya (formerly Commission of Higher Education) issued a Notice to the Public stating that the license issued to Fairland University to operate in Uganda was revoked by the National Council for Higher Education. The Consequence of the Revocation of the license was that all the qualifications attained before or at the time of revocation would be deemed not valid. The Respondent states that it has a legal obligation to uphold the decision of the Commission of University Education in all matters regarding University Education.

The case was heard on 30th June, 2015. The Claimant testified on his behalf and the Respondent called one witness, Mary Cheptoo Rotich, a Senior Deputy Director in charge of Teacher Management, Post Primary Institutions (RW1). The parties thereafter filed written submissions.

I have carefully considered the pleadings, the evidence adduced in court, the submissions and authorities cited.

The issues that arise from the evidence on record are the following:-

1. Whether the Claimant met the minimum qualifications for appointment as a graduate teacher
2. Whether the termination of the Claimant's employment complied with due process
3. Whether the Claimant is entitled to the prayers sought.

Determination

According to the Respondent the qualifications for appointment of the Claimant as outlined in the two circulars dated 1st November, 2011 and December 2011 respectively were as follows:-

GUIDELINES FOR SELECTION PANELS FOR POST PRIMARY INSTITUTIONS (REVISED NOVEMBER, 2011)

3.0 IDENTIFICATION OF CANDIDATES

Applicants must:-

a) Be Kenya citizens

b) Be professionally qualified teachers with at least two teaching subjects or one teaching with special needs. For purposes of scoring in Appendix 1(b) year of completion of completion of professional training shall be taken into account.

c) Have specialized in the relevant subject areas.

d) Be below 45 years of age

e) Show willingness to participate in co-curricular activities and other duties assigned by Heads of

institution.

NB: i) Candidates whose training is in subjects that are currently not in the curriculum do not qualify for consideration irrespective of their having undertaken a Post Graduate Diploma in Education. E.g Bachelor of Science in:

- Natural Resources
- Meteorology
- Forestry
- Animal Husbandry
- Horticulture
- Farm Machinery
- Fisheries etc

ii) Institutions are instructed not to recruit any candidate whose subject combination has not been advertised.

iii) Candidates with Economics, Commerce and Accounting can apply for Business Studies vacancies. Similarly, candidates with Bachelor of Science - Agricultural Education and Extension can apply for Agriculture/Biology vacancies. Also candidates with S.E.E. are eligible for C.R.E.

iv) Candidates with English/Other subjects in the curriculum from Kagumo and Kibabii Teachers Colleges qualify for employment as Eng/Lit teachers

v) Applicants should have attained a minimum mean grade of C+ and at least C+

in the two teaching subjects in the case of graduates, a mean grade of C plan

in two teaching subject for diploma holders. A candidate applying for Agriculture with other relevant combinations and Computer Studies need not have studied these subjects at KCSE.

vi) Graduate applicants should have done at least eight (8) units in a minor subject.

vii) Diploma applicants should have undergone a three (3) year diploma course or its equivalent.

viii) Applicants who may not have attained the minimum entry requirement, should have done a relevant bridging course/A-level from a recognised institution.

x) Under no circumstances should the employment form provided be photocopied for issue by candidates.

xi) Recruitment that does not conform to the requirement of this guideline will be disqualified.

xii) Clarification and advice on issues arising from these guidelines, should be sought from the TSC if need be.

TERMS OF REFERENCE FOR THE VETTING OF DOCUMENTS FOR EMPLOYMENT OF PERMANENT AND PENSIONABLE TEACHERS - DECEMBER, 2011

2. The following issues should be verified:-

- The Serial No of the employment form against the one issued to the school.

- *The subject combination against the one in the advert.*
- *In case of change of subject combinations, authority from TSC should be attached.*
- *All foreign degrees and diplomas should be equated by the Commission for Higher Education or KNEC except for Makerere and Dar-es-salaam Universities.*
- *All applicants must have two relevant teaching subjects except computer Studies and subjects for TIVET institutions.*
- *Graduate applicants should have done at least eight (8) course units in a minor subject or should produce an enhancing certificate.*
- *Diploma applicants should have undergone a three (3) year Diploma course or its equivalent*
- *Applicants should have attained a minimum mean grade of C+ and at least C+ in the two teaching subject in the case of graduates, a mean grade of C Plain in KCSE and C plain in two teaching subjects for Diploma holders. A candidate applying for Agriculture and Home Science with other relevant combinations and Computer Studies need not have studies these subjects at KCSE*
- *Applicants who may not have attained the minimum entry requirement should have done a relevant bridging course/A - level from a recognized institution. Bridging will be accepted only for candidates who attained mean grade/subject grade of C Plan. Bridging for mean grade should be for a Minimum of 6 months and for subject grade should be for a minimum of 3 months.*
- *Candidates with Economics, commerce and Accounting can apply for Business Studies vacancies. Similarly, candidates with Bachelor of Science - Agricultural Education Extension can apply for Agriculture/Biology vacancies. Also Candidates with Social Education and Ethics (SEE) can apply for CRS.*
- *Candidates with English/other subjects in the curriculum from Kagumo and Kibabii Teachers colleges qualify for employment as Eng/lit teachers*
- *Ensure scoring was correctly done by checking the awarding of the marks.*
- *The following documents should be attached:-*

i. Minutes signed by the Secretary and Chairman of the panels

ii. Score guide (Signed)

iii. ID Card (both sides)

iv. Two passport photos (certified)

v. CPE/KCPE, KCSE, Degrees/Diploma and full transcript all certified and authentic

vi. For graduates of Diploma colleges (examined by KNEC) we shall accept official results slip from KNEC pending the availability of the certificate

The Claimant testified that he attained a mean Grade C (plain) with a C+ (plus) in Kiswahili and A- (minus) in History and Government, these being his teaching subjects.

After KCSE he went for A level and University in Uganda. CHE confirmed that Fairland University was recognised in Uganda and by Convention in Kenya. The Claimant further testified that he was aware that he should have done 8 units in the minor subject but did only 7. That when he got employment the Respondent delayed his salary and advised him to go for one more unit then present the transcript to the Commission, that he did so and presented the transcript certified by the Respondents Quality Assurance department upon which his salary was immediately released.

For the Respondent RW1 testified that the Claimant was recruited under the economic stimulus programme in 2010 which required the Respondent to recruit 18,060 teachers. The Government directed that every constituency be given an opportunity to recruit about 20 teachers and the Respondent was given 2 weeks to ensure that the teachers were in class. At the time the Respondent's policy was to advertise the posts in respective secondary schools. Interested candidates applied and were interviewed by the school management Boards. The successful candidates were issued with letters immediately after

which the process of vetting to ensure the applicants met the requirements was done by the Respondent.

RW1 testified that the Claimant did 7 units in history instead of 8 units and that from the time of vetting to the time of termination he had not met the requirements. She testified that in subsequent recruitment processes the Respondent reviewed the requirements to provide such candidates with the opportunity to get back to the teaching service.

The Respondent did not submit copies of the transcripts received from the Claimant to prove that what he had submitted to the Respondent did not meet the requirements for the appointment. It did not explain why it took two years to discover that the Claimant did not meet the minimum qualifications. The checklists submitted by the Respondent were for November, and December, 2011 yet the Claimant was appointed more than a year earlier, on 30th August, 2010. No evidence was submitted to prove that the minimum requirements as at August, 2010 were similar to the requirements for November and December 2011.

I have also looked at the letter of termination. It informs the Claimant that his employment was being terminated, for not meeting the minimum entry requirements. It did not specify how or which requirements the Claimant did not meet. Before being terminated the Claimant was never advised about the intention to do so to enable him confirm whether or not he held such qualifications.

RW1 stated that she was not aware that the Claimant had submitted his advance certificate but confirmed the Respondent had all the Claimant's documents which were however not submitted to the court.

I find that the Respondent failed to establish that the Claimant did not meet the relevant qualifications based on the documents submitted by the Claimant to the Respondent at the time of recruitment.

On the second issue, whether the termination of the Claimant's employment complied with due process, I have already alluded to the fact that the Claimant was not informed of the intention to terminate his employment. He was never given an opportunity to confirm or controvert the allegations that he did not meet the minimum qualifications.

The Respondent has an elaborate disciplinary process contained in its Code of Regulations which it did not comply with. The Respondent failed to even meet the very basic requirements of Section 41 of the Employment Act requiring that an employee be informed of the reasons for which the employer intends to terminate his employment and be given an opportunity to defend himself in the presence of a fellow employee or a union representative.

The termination of the Claimants employment was therefore procedurally unfair.

As I have already stated above, the reason for termination being that the Claimant did not meet minimum qualifications for recruitment was also not proved by the Respondent. The termination is therefore also unfair for failure to prove valid reason as provided under Section 43 of the Employment Act.

Remedies

The Claimant prayed for reinstatement to the teaching service. The Industrial Court Act provides that an order for reinstatement can only be granted within 3 years from the date of termination. Having been terminated on 1st August, 2012, it is too late for the Claimant to be reinstated.

The Employment Act however provides for an alternative remedy of re-employment. RW1 testified that teachers who were terminated for similar reasons as the Claimant were given an opportunity to go back to work upon production of all relevant documents.

The Respondent opposed the Claimant's prayer for reinstatement and relied on *J.R. No. 260 of 2008 Republic v Teachers Service Appeals Tribunal Ex parte Alfred Miriti Obed* where the court stated that the prayer for reinstatement could not be granted because "contracts of rights and obligations for both parties

and (the) court does not have jurisdiction to impose upon an employer an employee whom it does not wish to retain in its establishment."

That authority is obviously not applicable as this court has jurisdiction to make orders for reinstatement. Such jurisdiction is derived from the Employment Act and the Industrial Court Act both of which had not been enacted at the time the case relied upon by the Respondent was decided.

The Respondent also relied on the case of *James Kabengi Mugo v Sygenta East Africa Limited [2013] eKLR*. The authority is not relevant to this case as it was in respect of a prayer for payment of salary to date of retirement which is not prayed for in the claim herein.

Orders

The foregoing being the position, I order that the Respondent re-employs the Claimant and places him at the level he would have attained as at the date of re-employment had his employment not been terminated on 1st August, 2012. The re-employment should be effected within 30 days from the date of judgment and subject to the Claimant producing all relevant requirements and satisfying that he holds the relevant minimum qualifications.

The Claimant testified that he was not paid salary in lieu of notice as was stated in the letter of termination, an allegation that the Respondent did not deny. I order the Respondent to pay the same with interest from the date of filing suit at court rates.

The Respondent shall pay Claimant's costs for this suit.

Dated signed and delivered this 21st January, 2016

MAUREEN ONYANGO

JUDGE