



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**  
**CAUSE NO 383 OF 2011**

**NAHASHON MURIITHI WAMBUGU.....CLAIMANT**

**V**

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

**AWARD**

**Introduction**

1. Nahashon Muriithi Wambugu worked for the Teachers Service Commission in the position of Senior Clerical Officer, TSC Grade 3. This action was precipitated by his dismissal on 24th April 2006. The claim is contained in a Memorandum of Claim dated 10th March and filed in Court on 15th March 2011. The Respondent filed a Statement of Defence on 27th April 2011.

**The Claimant's Case**

2. The Claimant was employed by the Respondent on 6th March 1995 in the position of Clerical Officer rising through the ranks to Senior Clerical Officer, TSC Grade 3 at a gross monthly salary of Kshs. 16,638.

3. On 27th August 2004, the Claimant was arrested and thereafter charged with the offence of making a false document contrary to Section 347(a) of the Penal Code. The Claimant was subsequently interdicted without pay on 4th October 2005. He states that he could not respond to charges made against him internally because the same matter was pending in the criminal case. The Claimant was later dismissed on 24th April 2006 and on 3rd April 2008 he was acquitted by the Criminal Court under Section 210 of the Criminal Procedure Code.

4. Following the acquittal, the Claimant asked to be reinstated but the Respondent declined.

5. The Claimant's claim is as follows:

- a. A declaration that his interdiction was unlawful
- b. A declaration that his termination was unlawful
- c. Re-engagement or in the alternative:
  - i. Gratuity (11 years x Kshs.16,638/30x15.....Kshs.91,509.00
  - ii. 12 months' salary in compensation for unlawful termination.....199,656.00
  - iii. Statutory entitlement during interdiction:

iv. Salary (10,310/30x15x7 months).....	24,056.70
v. Medical allowance (1,328x7 months).....	9,276.00
vi. House allowance (5,000x7 months).....	35,000.00

d. Costs plus interest

### **The Respondent's Case**

6. In its Statement of Defence filed in Court on 27th April 2011, the Respondent concedes that it recruited the Claimant by letter dated 2nd June 1995 and deployed him as a Clerical Officer in the Accounts Division.

7. On 13th August 2004, the Respondent received complaints against the Claimant to the effect that:

- a. The Claimant had made or participated in the making of a false purchase check-off scheme agreement, purporting it to be genuine and valid for the purchase of electronic goods from a hire purchase firm known as Economic Credit Traders Limited;
- b. The Claimant had falsified or forged or participated in the making of a false payslip purporting that it had been issued by the Respondent;
- c. The Claimant had presented the said documents to the said Economic Credit Traders Limited with a view to obtaining electronic goods.

8. Following these allegations, the Claimant was interdicted by letter dated 4th October 2005, which also required him to respond to the allegations. The Claimant's response was considered by the Respondent at the inquiry stage prior to the termination of employment on 24th April 2006.

9. It is the Respondent's case that the Claimant was afforded ample opportunity to defend himself. In particular;

- a. On 9th March 2005, he was invited but failed to appear at the 1st disciplinary hearing prompting a deference of the case;
- b. On 13th May 2005, he attended the 2nd disciplinary hearing when the case was deferred to allow for calling of more evidence;
- c. On 25th August 2005, he was present when the charge was formally read out to him;
- d. The case came up for hearing again on 19th January 2006 and 1st March 2006 but was adjourned on both dates owing to the Claimant's absence despite having been notified accordingly.

10. On 24th April 2006 the case proceeded in the Claimant's absence who had declined to attend.

11. In spite of the Claimant's refusal to appear for the disciplinary hearing, the Respondent considered his written statement of defence and arrived at the conclusion that his conduct was inappropriate. Consequently, a decision to dismiss him was made.

12. The Respondent states that the fact that the Claimant was acquitted in the criminal case does not divest the Respondent of the legal duty to execute its administrative functions as enumerated in the Teachers Service Commission Act.

### **Findings and Determination**

13. There are two issues for determination in this case:

- a. Whether the termination of the Claimant's employment was justifiable and fair;
- b. Whether the Claimant is entitled to the remedies sought.

### **The Termination**

14. On 4th October 2005, the Claimant was interdicted by letter stating as follows:

*“Dear Sir*

#### **INTERDICTION**

*It has been decided that you be interdicted with immediate effect on grounds that:-*

***On 13.8.2004 you presented false payslips to Economic Credits Traders Limited to enable you obtain Samsung Coloured TV and L.G TVD (sic) Player on hire purchase.***

*During the period of interdiction, you will not be entitled to any salary, and Commission offices will be out of bounds to you.*

*You should make your own written defence within 21 days from the date of this letter.*

*You should, however, note that failure to defend yourself will not prevent the Commission from hearing and determining your case.*

*This letter amends ours Ref. TSC/CON/600579/13 of 27.8.2004*

*Yours faithfully*

*(Signed)*

**C.M KARIUKI,**

**FOR: SECRETARY/CHIEF EXECUTIVE,**

**TEACHERS SERVICE COMMISSION”**

15. The Claimant's employment was terminated by letter dated 24th April 2006 which stated as follows:

**“RE: DISMISSAL-C/S/17/04**

*Following the hearing of your discipline Case No. S/17/04 on 24/04/2006, I am directed by the Teachers Service Commission to inform you that the **COMMISSION** has carefully considered and determined your case and has found you guilty of the following:-*

*That on 13/08/2004, you presented false pay slips to Economic Credit Traders Limited to enable you obtain Samsung Coloured T.V and L.G DVD player on higher (sic) purchase.*

*You are therefore **DISMISSED** w.e.f the date of this letter.*

Note that the salary overpayment if any will be recovered from your **WITHDRAWAL**

**BENEFITS.**

(Signed)

**S.R. MUNGANIA**

**FOR: SECRETARY**

**TEACHERS SERVICE COMMISSION**

16. By the time the Claimant was dismissed on 24th April 2006, the Employment Act, 2007 had not been enacted. The applicable law would therefore be the repealed Employment Act (Cap 226). The Respondent however also had an elaborate Code of Regulations. In reaching its decision, the Court will therefore rely on both the applicable employment law as well as the Respondent's Code of Regulations.

17. From the evidence on record, the Claimant was accused of an offence falling

under what is commonly referred to as gross misconduct. In dealing with gross misconduct Section 17 of Cap 226 states as follows:

*17. Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal -*

- a. *if, without leave or other lawful cause, an employee absents himself from the place proper and appointed for the performance of his work;*
- b. *if, during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable properly to perform his work;*
- c. *if an employee willfully neglects to perform any work which it was his duty to have performed, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;*
- d. *if an employee uses abusive or insulting language, or behaves in a manner insulting, to his employer or to a person placed in authority over him by his employer;*
- e. *if an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.*
- f. *if, in the lawful exercise of any power of arrest given by or under any written law, an employee is arrested for a cognizable offence punishable by imprisonment and is not within ten days either released on bail or on bond or otherwise lawfully set at liberty;*
- g. *if an employee commits, or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer or his employer's property.*

18. In response to the letter of interdiction, the Claimant wrote a letter dated 13th September 2004 denying the allegations made against him. The Claimant also asked the Respondent to allow the criminal court to determine his case. The Claimant subsequently declined

to appear before the Respondent's Disciplinary Committee on the ground that the matter was pending in court and when he was acquitted he sought reinstatement.

19. This Court has in the past, held that there is no obvious nexus between a criminal trial and internal disciplinary proceedings at the work place, even when the charges and particulars are identical (see *Wilberforce Ojiambo Oundo v Regent Management Limited [2013] eKLR* and *Milkah Khakayi Kulati v Sandstorm (Africa) Limited [2014] eKLR*). The only exception would be where it is expressly provided either by law or in disciplinary rules that internal disciplinary proceedings will await the outcome of a criminal trial.

20. The Court had occasion to read the Respondent's Code of Regulations for Secretariat Staff (Revised 2006) which applied to the Claimant and did not find any provision connecting a criminal trial and internal disciplinary proceedings. It follows therefore that the Respondent was well within its right to require the Claimant to submit himself to disciplinary proceedings despite the pendency of a criminal trial for the same offence. Additionally, the fact that the Claimant was acquitted by the criminal court did not hand him an automatic clearance at the internal disciplinary stage.

21. As held by **Azangalala J** (as he then was) in *Constantine Simati v Teachers Service Commission and Another [2011] eKLR* an internal disciplinary tribunal is not held to the same standards as a court of law. This becomes even more critical where an employee seeks to enforce an acquittal in a criminal trial as evidence of innocence in internal disciplinary proceedings.

22. In reviewing disciplinary action taken against an employee by an employer, the Court does not apply the '*beyond reasonable doubt*' standard of proof applicable in criminal cases. In fact, the Court does not even ask what it would have done if it were in the shoes of the employer, all it asks is whether the action by the employer was one that would have been taken by a reasonable employer acting on a fair understanding of the facts and appreciation of the law.

23. In light of my finding that there was in fact no nexus between the criminal trial and the internal disciplinary proceedings, the Court finds no justification for the Claimant's failure to attend the disciplinary hearing as required. Having squandered the opportunity to defend himself before the Disciplinary Committee, the Claimant cannot turn around and say that he was not heard.

24. The Court therefore finds that in terminating the Claimant's employment, the Respondent observed due procedure as provided in law and the applicable Code of Regulations.

25. The only issue remaining for determination is whether the Respondent had a valid reason for terminating the Claimant's employment. The Claimant's defence both in his written statement and testimony was that he knew nothing about the forged payslip. He was however unable to explain the origin of the Purchase Check Off Scheme Agreement which was in his name and carried a signature that looked like his. The salary figure on this Agreement tallies with the figure on the forged payslip and in the absence of any further evidence by the Claimant, the Court rejected his testimony that he knew nothing about the forged payslip.

26. The result is that there were reasonable grounds to believe that the Claimant was directly involved in the preparation and production of the forged payslip and the Respondent had a valid reason for dismissing him. With regard to the Claimant's complaint about his interdiction without pay, the only thing to say is that Regulation 59 of the Code of Regulations provides that staff facing charges of fraud, such as the one the Claimant faced, are not entitled to pay during the period of interdiction.

27. Overall, the Court finds the Claimant's claim to be without merit and proceeds to dismiss it.

28. Each party will bear their own costs.

29. Orders accordingly.

**DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS**

**12TH DAY OF FEBRUARY 2016**

**LINNET NDOLO**

**JUDGE**

**Appearance:**

Mr. Ongicho for the Claimant

Miss Naeku for the Respondent