



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

CAUSE NO. 323 OF 2013

(BEFORE HON. LADY JUSTICE MAUREEN ONYANGO)

ZAKAYO MBOGO MBOGOCLAIMANT

-VERSUS-

TEACHERS SERVICE COMMISSIONRESPONDENT

JUDGEMENT

Zakayo Mbogo Mbogo, the Claimant was employed by the Respondent Teachers Service Commission on 1st September, 1993 as a teacher and was posted to [particulars withheld] Secondary School as an Assistant Teacher. On 25th February, 2011 the Claimant received a letter of Interdiction dated 17th February, 2011. The letter was signed by the Principal of [particulars withheld] Secondary School.

The ground for interdiction was that the claimant had irregular encounters with a school girl for intended immoral behaviour on 27th June, 2008. The letter of interdiction required the Claimant to respond to the accusations against him within 21 days. He responded on 1st March 2011 denying the charges against him.

On 4th April, 2011 the Claimant received another letter of interdiction amending the earlier letter of interdiction. In the amended letter of interdiction dated 4th April, 2011, the particulars of the charges were as follows:-

"Immoral Behaviour

You are of Immoral Behaviour in that on 27th June 2008 you were found with your student by the name (xx) of form (xx), Admission No.(xx) in your house at Birongo Market and you had carnal knowledge of her between 8.00pm and 10.00pm."

Note: The name and particulars of the student have been withheld to protect her identity as she was a minor at the time the incident occurred.

The Claimant again responded to the charges denying the allegations by his letter dated 12th April 2011.

The claimant was invited to a disciplinary hearing on 26th May, 2011 but it did not take place. He was again invited for a disciplinary hearing on 6th September, 2011.

On 6th September 2011 the Claimant was dismissed on the grounds stated in the amended letter of interdiction.

The Claimant appealed against the dismissal by his letter dated 18th October 2011. By letter dated 1st November 2011 the Respondent advised him that his appeal was not successful.

In the Amended statement of claim filed on 19th June, 2014 the Claimant alleges that the dismissal was unlawful and seeks the following remedies:-

1. 1 months Notice pay	Ksh.	49,346.00
2. Unpaid salary during 17/2/2011-6/9/2011	Kshs.	441,114.00
3. General damages	Kshs.	592,152.00
4. Compensation for unlawful termination	Kshs.	592.152.00
5. Loss years Kshs.49,346 x 17 years		<u>Kshs.10,066,586.00</u>
	Total	Kshs.11,741,348.00

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The Claimant prays for an award against the Respondent for:-

(a) A declaration that the said dismissal of the Claimant by the Respondent on 6/11/2011 was unfair, and unfair, and unlawful.

*(b) An order compelling the Respondent to pay the Claimant his terminal benefits plus maximum compensation amounting to **11,741,348/-**.*

(c) Costs and Interests of this claim.

The Respondent filed a defence to the Amended Statement of Claim. It denied that the dismissal of the Claimant was unfair. The Respondent stated that the charges against the Claimant were proved at a hearing by an impartial, independent and professional panel which was attended by the Claimant and the decision reached was fair, just and appropriate based on the merits and evidence adduced. The Respondent prayed that the Claim be dismissed for want of merit.

At the hearing of the case the Claimant testified on its behalf while the Respondent called four witnesses, Josephat Nyambane (RW1), Thomas Nyariki Ongori (RW2), Martin Nyasani Nyabuto (RW3) and Geoffrey M. Chemos (RW\$).

The parties thereafter filed and exchanged written submissions.

Claimant's Case

The Claimant's case is that his dismissal was unfair both substantively and procedurally. He denied the charges against him.

The Claimant testified that he was employed in 1993 and posted to [particulars withheld] mixed Secondary School where he worked until his dismissal in 2011. He testified that while working at the school he first resided at Nyanturagu Shopping Centre from 1993 to 1999, then at Birongo Shopping Centre from 1999 to March, 2008 and finally at Keumbu Shopping Centre from 2008 to 2011. While at the school he was in charge of games.

He testified that student DM joined the school in form 1 in 2006 and left in third term of 2007. Thereafter she joined Birongo Secondary School.

He testified that 27th June, 2008 which was a Friday was sports day held at Riondonga Secondary School. His school, [particulars withheld], was participating and he took the students for the games. At around 7pm after releasing the students he was waiting for a matatu to take him to Keumbo where he was residing when he saw a group of boys molesting a girl in school uniform and on moving closer he recognised the girl was DM his former student. He rescued her from the boys who were rowdy and called the Assistant Chief who took both himself and the girl to the nearby Birongo Police Post where they were accommodated for the night and allowed to leave the next day.

The Claimant also testified that he was never called for a meeting by the Board of Governors before his interdiction. He testified that the case against him was never proved as DM did not testify at his disciplinary hearing. He also testified that he was not given a chance to examine witnesses. He testified that the Respondent did not comply with chapter 10 of the Code of Regulations for teachers which provides for disciplinary process.

Respondents Case

The Respondent's case is that the Claimant violated the terms and conditions of his service by breaching Regulation 66(2) of the Code of Regulations for Teachers, the Teachers Service Commission Code of Conduct and Ethics and Circular No.3 of 2010. The Respondent avers that the dismissal was effected after a rigorous process as outlined in the Code of Regulations for Teachers (the Code).

RW1 testified that in June, 2008 he was living at Birongo market and the Claimant was his next door neighbour. On 27th June, 2008 at around 5pm the Claimant went to his house with a girl who was his student. This was not the first time the claimant took a school girl to his house.

RW1 testified that the girl was wearing school uniform. a skirt, blouse and white socks. The Claimant locked the girl in the house and left.

At around 8pm the Claimant returned to the house and locked himself inside the house with the girl. RW1 who was suspecting that the Claimant wanted to sleep with the girl called neighbours and alerted them about what was happening. The neighbours crowded around the house and started shouting. One of the people who came was a clan elder by the name Tom Nyariki (RW2) who after being asked by RW1 to ask the girl to come out of the Claimant's house, decided to call the Assistant chief on his cell phone from fear that the Claimant may be injured by the crowd. The Assistant Chief came after a short while and following discussions with RW2 asked the Claimant to open the door. The Assistant chief and RW2 got into the house. The Claimant's house had 2 rooms, the sitting room and the bedroom. The girl's shoes were found under the Claimant's bed and her school seater was on the bed. Upon searching further the girl was found hiding behind the door. Because the crowd wanted to beat the teacher, the Assistant Chief, RW1 and RW2 escorted the teacher and the girl to Birongo Police Patrol Base where they left them. RW1 stated that they did not record a statement at the police station but he recorded one later at the school where he was summoned to appear before the Board of Governors on 23rd June, 2009. At the Board meeting he was asked questions by both the Board members and the Claimant.

RW2 testified that he was a clan elder in June 2008. On 27th June, 2008 he was guarding lorries working on the road when he saw people gathered along the road at around 9pm. Upon going to inquire what was happening he was called by RW1 who told him a teacher had taken a school girl to his house. RW2 called the Assistant Chief Paul Nyaosi on his cell phone. The Assistant Chief called out to the Claimant who opened the door. Together with the Assistant Chief he searched the house and found the girl hiding behind the bedroom door.

RW3 Martin Nyasani Nyabuto the Principal of [particulars withheld] Secondary School testified that DM was a student at the a school from 2nd February, 2006 when she was admitted to the school to 27th June, 2008 when she left and joined a school called Birongo Secondary School.

RW3 testified that during the week of 27th June, 2008 he was attending a National Head Teachers meeting. On 27th June 2008 there were games at Riondong'a Secondary School. RW3 instructed the

Claimant who was the games master to take the school volley ball team for the games. On 30th June 2008 he had rumours about the Claimant and carried out investigations. He learnt from the games captain and the girls who went out for the games that DM accompanied the girls to go and cheer the team. He testified that the Claimant later approached him and asked for his help.

At the time the Board of Management was in charge as the term of the School Board had expired. He called the first meeting to investigate the issue on 7th October 2008. The investigations involved interviewing the Claimant who was also asked to write a statement. The Claimant was invited from a full board meeting on 23rd June 2009 after the Board was reconstituted. DM and her parents did not show up for the meeting but other witnesses including the Assistant Chief, RW1 and RW2 attended and testified. A further meeting was called on 17th February, 2011. At the meeting all the witnesses attended except DM and her parents. RW3 took the minutes of the meeting. The Assistant Chief (who is now deceased) also attended the meeting and it is at that meeting it was decided to interdict the Claimant. RW3 wrote the letter of interdiction. He was later invited to give evidence at the hearing of the case by the Teachers Service Commission.

He further testified that at the beginning there was an element of distortion of evidence at the police post but he later collected a copy of the OB.

RW 4 testified that at the time of hearing of the claimant's disciplinary case he was working at TSC headquarters as a discipline officer and he is the one who prosecuted the case. He testified that the claimant's case was investigated by the Board as agent of the Respondent. The Board invited the Claimant and he was given an opportunity to present his case before interdiction as confirmed by the Board minutes. He testified that the case took three years from the date of the incident to the date of dismissal of the Claimant because DM was not available to testify. He testified that at the hearing by the Commission the claimant was given ample opportunity to examine the witnesses and present his case before a determination was made to dismiss him.

Determination

I have considered the evidence and the submissions by both parties. I have also considered the authorities cited by the parties. The issues arising for determination are the following:-

1. Whether the Claimant was residing at Birongo Market as at 27th June, 2008 when he is alleged to have committed the offence for which he was dismissed.
2. Whether the Claimant was found in his house with DM and taken to the police post by the assistant chief (deceased).
3. Whether the Claimant was unfairly terminated.
4. Whether the Claimant is entitled to the remedies sought.

Where Claimant was residing as at 27th June, 2008.

The claimant testified that he moved to Irondi Centre in January 1999 and stayed there until the beginning of March, 2008 when he moved to Keumbu. It is therefore his evidence that he was not living at Irondo Centre on 27th June, 2008 when he is alleged to have been found with DM in his house.

The Respondent's witnesses RW1 and RW2 both testified that the claimant was found with DM in his house. This is also corroborated by the written statement of Assistant Chief Nyaosi (deceased). The Claimant testified that it is the Assistant Chief who took him to the police Post on the 27th June, 2008.

The Claimant also testified that on that day he had taken students to Riondong'a Secondary School for games and was at the stage waiting to take a vehicle to his house at Keumbu when he found DM being molested by some boys.

The Claimant did not submit any evidence to corroborate his story such as evidence of tenancy at Keumbe. On the other hand, RW1 and RW2 explained in detail how they found the claimant with DM at his house in [particulars withheld]. The Claimant did not controvert the evidence of RW1 and RW2.

I therefore find no proof that the claimant was not living in Irondi on 27th June, 2008.

Whether the Claimant was found in his house with DM and taken to the police station.

The Claimant testified that he met DM at the bus state waiting for a vehicle to her home at around 8pm on 27th June, 2008. DM in her statement also stated that the Claimant, her former teacher rescued her from some school boys while she was waiting for her sister at the bus stop.

DM further stated in the statement that they went to the Police Station where they slept.

The Assistant Chief (deceased) however stated in both his hand written statement and during the disciplinary hearing that he was called by RW2 and that the Claimant was taken to the police by the Assistant Chief, RW1 and RW2.

The Claimant's story to the effect that he was taken to the police post by the Assistant chief because of boys at the bus stop who were hostile leave a lot of questions. Why would the Assistant Chief take him to the Police Station to save him from rowdy boys at the bus stop who were molesting DM? If DM was being molested by the boys at the bus stop why did the teacher and the Assistant chief not just assist her to go home instead of taking her to the police post? Why did the Claimant also sleep at the police post if the only reason he went there was to secure safety of DM? Why would the assistant Chief tell a different story from that of the Claimant? The Claimant did not in his entire testimony contest the written statement of the Assistant Chief (deceased) whom he agrees took him to the police post together with DM and left both of them there.

From the evidence on record, I believe that the Claimant did not tell the truth about the reasons why he was taken to the police post by the Assistant Chief. I believe that the Claimant was arrested from his house at Birongo market by the Assistant Chief together with DM and both of them were escorted to the police post by the Assistant Chief, DW1 and DW2 where they were locked up.

Whether the Claimant was unfairly dismissed

For termination to be valid there must be both a valid reason as provided under section 43 of the Employment Act and the process must be fair as provided in section 41.

In the present case the Claimant was subjected to a disciplinary hearing as is evidence from the minutes of both the Board of Governors minutes and the proceedings of the Commission held on 6th September, 2011 at which the Claimant participated. I therefore find that there was a fair hearing of the disciplinary case in compliance with the Code of Regulations for Teachers (Revised 2005) and section 41.

On the grounds for dismissal, the claimant is alleged to have had carnal knowledge of DM between 8.00pm and 10.00 pm on 27th June, 2008. The evidence on record is that he was found with the girl in his house. There was no proof of carnal knowledge of DM by the Claimant. The circumstance under which the Claimant was found by DW1, DW2 and the Assistant Chief (deceased) are such that had they not intervened, there was clear intention that the Claimant intended to have carnal knowledge of DM who he admitted was his student.

For these reasons, I reduce the summary dismissal to termination.

Whether the claimant is entitled to the remedies sought.

The Claimant prayed for notice, unpaid salary between 17th February, 2011 and 6th September, 2011, general damages, compensation and lost years.

Having reduced the Claimant's dismissal to termination, he is entitled to pay in lieu of notice in the sum of Shs.148,038/- being 3 months salary as provided in the Claimant's letter of appointment.

The Claimant is however not entitled to damages or compensation in view of the circumstances under which he left employment. The claim for lost years is also not granted as there is no legal basis for the same.

Each party shall bear its costs.

Dated and signed and delivered this 16th day of June, 2016

MAUREEN ONYANGO

JUDGE