



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI**

**CAUSE NO. 97 OF 2014**

**DOUGLAS MURITHI MAGIRI.....CLAIMANT**

**VERSUS**

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

(Before Hon. Justice Byram Ongaya on Friday 9<sup>th</sup> December, 2016)

**JUDGMENT**

The claimant filed the memorandum of claim on 26.08.2014 through Basilio Gitonga, Muriithi & Associates. 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) General damages for unfair termination of service.
- d) Costs of the claim.

The response to the claim and counterclaim was filed on 17.10.2014 through Zipporah Mambo Advocate. The respondent prayed for judgement against the claimant for:

- a) The claimant to refund the respondent the sum of Kshs.162,380.70 being salary overpayment for the period between 18.07.2011 and 30.01.2012.
- b) The claimant's suit be dismissed for lack of merit with costs to the respondent.

The respondent is the employer of teachers in the public service. The respondent employed the claimant by the letter dated 05.12.1990 as a P1 teacher on permanent and pensionable basis. The claimant served until 29.09.2011 when his services were terminated.

By the charge sheet dated 16.05.2011 the claimant was charged with the offence of defilement contrary to section 8(1) and (3) of the Sexual Offences Act No.3 of 2006. It was alleged that the claimant had defiled a child of 14 years old between 4<sup>th</sup> and 5<sup>th</sup> March 2011. The other count was indecent act with the child contrary to section 11(1) of the same Act.

By the letter dated 18.07.2011 the respondent interdicted the claimant on account of alleged immoral behaviour in that he had canal knowledge of a class 8 pupil (in a school the claimant had not been deployed to) on 4<sup>th</sup> March 2011 at midnight at his home, and while being a teacher in a school known as Igandene primary school. The pupil was same child mentioned in the criminal proceedings.

The claimant was subsequently dismissed from service by the letter dated 27.09.2011 on account of the misconduct as had been alleged. By the letter dated 27.09.2011 and in view of the disciplinary proceedings, the claimant was removed from the register of teachers.

The record shows that prior to the dismissal the claimant attended a disciplinary hearing on 27.09.2011. The claimant had written in August 2011 the letter received by the respondent on 09.08.2011 stating that he denied the false allegations made against him. The teacher testified that he lived with the pupil because she was a child to a single father and a pupil at the school the claimant's wife taught. On the night of 4<sup>th</sup> to 5<sup>th</sup> March 2011, the claimant told the disciplinary panel that his wife was not at home and that she had travelled to Nairobi. The account by the pupil in the panel's record was that she had allegedly been defiled by the claimant.

The accused was acquitted on both counts under section 215 of the Criminal Procedure Code in the criminal case in the judgment delivered on 10.10.2012.

The main issue for determination in this case is whether the claimant's termination was unfair. The court considers that criminal liability can only be determined by a court of competent jurisdiction. In that regard the court upholds its opinion in **David Nyamai and 7 Others –Versus- Del Monte Kenya Limited [2015]eKLR** thus, **“The claimants were subsequently charged with the offence of stealing by servant contrary to section 281 of the Penal Code. The court finds that a criminal allegation is a continuing injury which is resolved one way or the other upon the criminal court deciding the case. Only the criminal court has the necessary jurisdiction to determine and render a finding on criminal liability. Under Article 50(2) (d) of the Constitution of Kenya, 2010, every accused person has the right to a fair trial which includes the right to a public trial before a court established under the Constitution. Under sections 4 of the Criminal Procedure Code Cap75, an offence under the Penal Code Cap 63 is tried by the High Court or a subordinate court by which the offence is shown in the fifth column of the first schedule to the Criminal Procedure Code to be triable. Under section 4 of the Criminal Procedure Code Cap75, an offence under other statute is tried by the court as prescribed under the statute or by the High Court or a subordinate court as prescribed to try the offence under the Criminal Procedure Code. Thus, the court holds that an employer exercising the administrative disciplinary control over the employee is not a prescribed court for the purpose of making findings on criminal liability of the employee and employers lack power or authority to make a finding of criminal liability against the employee. The court further holds that where in the opinion of the employer the employee's conduct amounts to a criminal liability, such allegation would be a continuing injury against the employee to be resolved on the date of judgment by the trial court vested with the relevant criminal jurisdiction. Thus as a reason for termination, the injury will cease and crystallise on the date of the judgment by the trial court vested with the relevant criminal jurisdiction. Thus for purposes of section 90 of the Employment Act, 2007, the employee is entitled to file the suit within 12 months from the date of the cessation of the injury being the date of the judgment in the relevant criminal case prosecuted against the employee.”**

The court considers that the only reason the respondent dismissed the claimant and removed him from the register of teachers was due to the alleged offences. The claimant having been acquitted, it cannot be said that at the time of the dismissal, the respondent had a valid reason to dismiss the claimant; the reason being substantially similar to the offences which the claimant was subsequently acquitted by the trial court with competent jurisdiction.

In the present case, from the outset, it was clear to the respondent that the allegations leveled against the claimant had an element of a crime and indeed, the appropriate criminal report was made and the prosecution of the claimant was commenced accordingly. In the opinion of the court, nothing prevented the respondent from emplacing the claimant on interdiction or suspension pending the outcome of the

criminal case and thereafter taking appropriate disciplinary action or allowing the claimant to resume work in line with the outcome of the criminal case or imposition of such other just action in view of the outcome of the criminal proceedings.

The court has considered the holding of the court of appeal in **Teachers Service Commission –Versus- Joseph Wambugu Nderitu [2016]eKLR** . The court held that a successful outcome of a criminal process against an employee did not have primacy over an internal disciplinary process against such an employee arising from the same set of circumstances and that the two processes were distinct. In that case, the appellant had concluded its disciplinary process and had accorded the respondent an internal opportunity to challenge the allegations but the respondent had failed to utilize the opportunity and which had been fore-closed long before the pronouncement of the successful criminal decision. In the present case, the claimant challenged the allegations at the disciplinary panel's hearing. Like in that case there was circumstantial evidence suggesting that the claimant had defiled the pupil. However, during the criminal proceedings, it was returned by the trial court that the offences had not been committed.

The court agrees with the respondent's submissions that criminal proceedings are clearly separate from the employer's disciplinary process. However, where the reason for termination or dismissal is solely that the employee has committed an offence, the opinion of the court is that the employer must stop and await the determination of the alleged criminal liability by a court of competent jurisdiction as provided in the Constitution. In the instant case, such was the case, but the respondent failed to stop to wait the outcome in the criminal case and it is the opinion of the court that the respondent is bound by the outcome of the claimant's criminal trial that acquitted the claimant of any criminal liability as had been alleged. The court has considered the record by disciplinary panel and all correspondence about the allegations. Taking the stated particulars into account, it is clear that the allegations were that the claimant had defiled the girl or pupil. The court's opinion is that determination of criminal liability is such a serious matter that the Constitution has reserved its determination in the court with competent jurisdiction and there is no constitutional or statutory basis for employers to make determination of the employees' criminal liability. Further, once a court with competent jurisdiction has made a determination about an employee's criminal liability as may have been alleged by the employer, the employer is thereby bound and cannot turn around to defeat the court's finding.

Thus whereas the criminal process and the administrative disciplinary processes are clearly distinct, where the sole reason for the disciplinary process is that the employee has committed an offence, the court's opinion is that determination of such criminal liability would constitutionally be the preserve of the trial court with the relevant competent jurisdiction. Where the employee is acquitted, the employer may have options on the next cause of action and in the opinion of the court, that would not include validating or removing the employee or terminating the contract of employment on account of the same particulars for which the court would have found the employee criminally not liable.

Thus the court returns that the termination of the claimant's employment was unfair for want of a valid reason as envisaged in section 43 of the Employment Act, 2007.

In this case, the court finds that the claimant was accorded due process of a notice and a hearing as envisaged in section 41 of the Employment Act, 2007. The respondent has denied that the claimant's appeal was received and in absence of evidence for the alleged delivery, the court finds that the same was not delivered.

The **2<sup>nd</sup> issue** for determination is whether the claimant is entitled to the remedies as prayed for.

It has been submitted for the claimant that reinstatement was not available owing to the lapsing of the three years' bar as per section 12 (3) (vii) of the Employment and Labour Relations Court Act, 2007. The respondent has submitted as much. Thus, the court returns that reinstatement is not available in the instant case.

As the court has found that the reason for removing the claimant from the register of teachers was invalid, the court returns that the claimant is entitled to be reinstated to the register.

The claimant had served for a long time since 05.12.1990. He desired to continue in employment. His record of service appears to have been satisfactory or good throughout his service. The court has considered that the claimant contributed to his predicament by accepting to stay with the pupil at his home. The claimant further contributed to his predicament when on 04.03.2011, the claimant said the pupil or girl failed to come home yet the claimant failed to take prompt action to report the matter to the police or such other relevant authority or person. To balance justice, he is awarded 6 months' salaries under section 49 (1) (c) of the Employment Act, 2007.

The **3<sup>rd</sup> issue** for determination is whether the respondent is entitled to the remedies as prayed for. The respondent in the submissions abandoned the claim and the counterclaim will accordingly be declined.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

- a) The declaration that the claimant's termination from employment and the subsequent removal of his name from the register of teachers was unfair.
- b) The declaration that the claimant's name be forthwith reinstated in the register of teachers.
- c) The respondent to pay the claimant 6 months' gross salaries (less tax) under section 49 (1) (c) of the Employment Act, 2007.
- d) The counterclaim is dismissed with costs.
- e) The respondent to pay the claimant's costs of the suit.

**Signed, dated and delivered** in court at **Nyeri** this **Friday, 9<sup>th</sup> December, 2016.**

**BYRAM ONGAYA**

**JUDGE**