



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO. 279 OF 2014

(Before Hon. Justice Maureen Onyango on 26.1.2015)

CLIFF OMANGA ONTITA CLAIMANT

-VERSUS-

TEACHERS SERVICE COMMISSION RESPONDENT

JUDGMENT

The case herein was commenced by a Statement of Claim dated 26th February 2014 and filed on 27th February 2014. The claimant Cliff Omanga Ontita prays for the following orders against the respondent Teachers Service Commission:-

- a. **The respondent does with immediate effect reinstate the claimant to employment and put the claimant in the status he was before interdiction and dismissal.**
- b. **The respondent does pay the claimant salary at the rate of Kshs 19,900/= per month with other related benefits from 2.9.2010 to date.**
- c. **The respondent does compute and pay the claimant earned salary increments as negotiated and agreed between the respondent and the claimants union (Kenya National Union of Teachers) from 2.9.2010 to date.**
- d. **Costs of the cause.**
- e. **Such other further reliefs as the court may deem fit to grant pursuant to provisions of the relevant labour and industrial statutes.**

The respondent filed a Defence on 14th April 2014 in which it avers that the claimant is not entitled to reinstatement and payment of salary arrears and attendant allowances as the Teachers Services Appeals Tribunal (now disbanded) had no mandate to order reinstatement and further that this court does not have jurisdiction to grant the orders under Section 12(3) (vii) of the Industrial Court Act No. 20 of 2011.

The respondent prays that:-

- a. **The claimant do refund the respondent the sum of Kshs 35,307.30 being salary overpayment for the period between 2nd June 2009 and 31st July, 2009.**
- b. **The claimant's suit be dismissed for lack of merit with costs to the respondent.**

The case came up for mention for taking directions on 3rd July 2014 when parties agreed that the issues in dispute do not require oral evidence and can be disposed of by way of written submissions. The parties thereafter filed and exchanged written submissions.

The facts of the case are not in dispute. The claimant was employed by the respondent as a P1 teacher

after qualifying from Eregi Teachers College. He was allocated employment No. TSC NO. 443226 and posted to [particulars withheld] Primary School, Kisii Central District. In or about May 2008, the respondent through its agents received a report alleging that on or about 4th, 18th and 25th May 2008 the claimant had carnal knowledge with his student D M M in a rented/hired room at Mbacho trading centre. In compliance with its governing statute the Teachers Service Commission Act Cap 212 (now repealed) the respondent through its agent the District Education Officer, conducted investigations to ascertain the veracity of the allegations against the claimant. The investigations established there was a case to answer. The respondent through the District Education Officer, Masaba District interdicted the claimant and commenced disciplinary proceedings against him which culminated in his dismissal and removal from the register of teachers for breach of the Code of Regulations for Teachers.

On 2nd October 2009, the claimant appealed to the Teachers Service Appeals Tribunal which by its letter dated 8th February 2011 communicated its decision to the claimant. The tribunal set aside the respondent's decision in total and ordered that the claimant be reverted to his status before the interdiction. The tribunal advised the claimant to report to the respondent immediately for reinstatement back to the TSC Register. The wording of the relevant portion of the letter from the tribunal to the claimant reads as follows:-

"The teachers Service Appeals Tribunal considered the arguments advanced on your behalf along with the evidence provided in the Teachers Service Commission file and the record of the proceedings against you. The Tribunal found were not guilty as charged. It therefore set aside the Teachers Service Commission's decision in total. This puts your status to the state it was before the interdiction. You may report to the Teachers Service Commission immediately for reinstatement back to the TSC register."

The respondent reinstated the claimant back to the register of teachers by its letter dated 7th October 2011 but declined to reinstate the claimant back to his employment as a teacher.

It is the refusal of the respondent to reinstate the claimant back to employment that is the subject of the claimant's claim herein. According to the respondent the Tribunal has no mandate to reinstate the claimant into employment.

The issues for determination are therefore whether the Tribunal has mandate to reinstate the claimant to employment and whether the claimant is entitled to the orders sought.

The tribunal is established under Section 11 of Teachers Service Commission Act (now repealed). Section 11(1) provides as follows:-

"11(1) There is hereby established a tribunal, to be called the Teachers Service Appeals Tribunal, which shall consider and determine appeals to it under Sections 7(5) and 10(4) of this Act, and whose decision in any such appeal shall be final."

From the pleadings, I note that the claimant received two different letters from the respondent dated 2nd October 2009. One was for removal from the register of teachers while the other was for dismissal. The Tribunal's letter dated 29th July 2010 inviting the claimant for hearing is titled "**APPEAL AGAINST REMOVAL FROM TSC REGISTER TSC NO. 443226 DISC. CASE 0128108.**" The decision of the Tribunal is at page 69 of the report of proceedings. It reads as follows:

"TEACHERS SERVICE APPEALS TRIBUNAL DECISION."

The Tribunal read and considered all records on this appeal. It also carefully listened to the teacher's appeal before it and decided that the teacher was not guilty of the charges levelled against him. For this reasons, this appeal was allowed and the Teachers Service Commission's decision on this case quashed".

In the submissions filed on behalf of the claimant, Mr. J. Orange Advocate who appeared for the

claimant submitted that the respondent decided to selectively comply with the decision of the tribunal by reinstating the claimant to the register but ignored the decision to restore the claimant back to the status he was in before interdiction. That the respondent disregarded a lawful decision of the tribunal. Mr. Orange further submitted that the respondent did not prefer any appeal against the decision of the tribunal. Mr. Orange further submitted that the respondent's position that this court has no jurisdiction to make an order for reinstatement is a fallacy and a lack of understanding of the jurisdiction of the court as provided in Section 15 of the Labour Relations Act (sic). (It is apparent that Mr. Orange was either not aware or had forgotten that Section 15 of Labour Relations Act and indeed all the provisions of the Labour Relations Act relating to this court were repealed by the Industrial Court Act 2011). Mr. Orange further submitted that the respondent's action is a violation of Article 41 of the Constitution which protects employees against unfair labour practices.

Mr. Orange further submitted that the prayer for reinstatement is not time barred as the right to reinstatement arose from the decision of the Appeals Tribunal which was dated 7th October 2011.

For the respondent Ms. Zipporah Mambo Advocate, submitted that the Tribunal has no mandate to reinstate a teacher to employment as its mandate is limited to reinstatement to the register as provided in Section 11(1) of the Teachers Service Commission Act. Ms. Mambo further submitted that the claim by the claimant is statute barred by virtue of Section 90 of the Employment Act which requires claims to be filed within 3 years from the date of the cause of action and that having been dismissed on 2nd October 2009 the claimant ought to have filed his suit by 2nd October 2012 but filed on 26th February 2014. She submitted that the fact that the claimant appealed to the Appeals Tribunal does not change the date of accrual of cause of action. Ms. Mambo relied on the case of **Hilaron Mwabolo V Kenya Commercial Bank** [2013] eKLR as cited in **Benjamin Wachira Ndithi V Public Service Commission and the A. G** in Industrial Court Cause No. 953 of 2010.

Ms Mambo further submitted that the order of the Appeals Tribunal for reinstatement of the claimant is misconceived, ill informed, unlawful and legally untenable for the reasons that:-

- a. **The jurisdiction of the Teachers Service Appeals Tribunal pursuant to Section 11(1) of the old TSC Act Cap 212 now (repealed) is limited to Appeals against refusal to enter a person's name to the Teachers' Register under section 7(5) of the Act and removal of a teacher's name from the register under Section 10(4) of the Act and has nothing to do with reinstatement of teachers to employment which is a contractual relationship.**
- b. **The wording of Section 11 is clear and crystal that the Appeal's Tribunal mandate is restricted to Appeals arising under Section 7(5) and 10(4) of the Act and is loudly silent on matters of reinstatement to employment.**
- c. **It is in recognition of the above that the Instrument used by the Appeals Tribunal is properly titled "Appeal AGainst Removal from TSC Register"**
- d. **The mandate of the commission as the employer of teachers is distinct tot hat of maintaining the professional Registrar of teachers and the Appeal's Tribunal mandate is limited to the latter.**
- e. **The respondent has fully complied by the Tribunal's decision to reinstate the claimant's name into the Register of teachers as per its letter dated 7th October, 2011.**
- f. **Upon the said reinstatement of the claimant's name to the register, the Tribunal's decision, mandate and jurisdiction became *functus officio*.**

She relied on Justice Nyamu's decision in the case of **David Njoroge Kimani V The Teachers Service Commission Misc. Civil Appl 171 of 2006.**

On reinstatement Ms. Mambo relied on the following cases:-

Civil Suit No. 156/1997 (Joseph Mujibi Ouma V National Cereals & Produce Board & 2 Others); (Dalmis B. Ogoye C KNTC Civil Appeal No. 125/1995); Industrial Cause No. 379/10 (Universities Academic Staff Union V Masinde Muliro University of Science & Technology); (Nairobi High Court Judicial Review No. 260/08 (Republic V Teachers Service Appeal Tribunal & Another);

(Okong'o V AG & Another) {1988} KLR - Civil Suit No. 998/01.

On payment of outstanding dues Ms. Mambo relied on Section 49(b) of the Employment Act and Regulation 68 of the Code of regulation for Teachers and submitted that the claimant is not entitled to any pay for days that he did not work. She further submitted that the claimant was erroneously paid Kshs 35,303.30/= during interdiction which he should refund.

I have carefully considered the submissions by both parties. I have specifically considered the jurisdiction of the Teachers Service Appeals Tribunal as provided for under Section 11(1) of the Teachers Service Commission Act. The Tribunal had mandate to "consider and determine appeals to it under Sections 7(5) and 10(4)" of the Act.

Section 7 provides as follows:-

"Any person aggrieved by the refusal of the Commission to register him under this section may, within twenty eight days of the service on him of the notice, appeal to the Appeals Tribunal".

Section 10 provides as follows:-

"Any person in respect of whom a determination has been made by the Commission under this section may, within eight days of the service on him of the notice, appeal to the Appeals Tribunal".

From the foregoing, I agree with the respondent that the Tribunal's mandate is limited to appeals against refusal to register a teacher or removal of a teacher's name from the register of teachers. The Tribunal does not have mandate to order reinstatement back to employment of a teacher who has been dismissed by the respondent or any employer of a teacher.

I have also considered the proceedings and decision of the Tribunal. The words in the proceedings are:-

"... the teacher was not guilty of the charges levelled against him. For this reason, the appeal was allowed and the Teachers Service Commission's decision on this case quashed."

The claimant has not stated what his appeal to the Tribunal was. As I pointed out earlier, the claimant received two letters from the respondent, one removing him from the register, and the other dismissing him from employment. The letter inviting him to the disciplinary hearing of the Tribunal has the same title as the letter from the respondent advising him of removal from the register. The letter communicating the decision of the Tribunal has the same title. This may be an indication that the appeal was against removal from the register and that no appeal was filed against the dismissal.

The respondent raised the issue about the claim being statute barred. The claim by the claimant is to enforce the decision of the Tribunal and not directly against the decision of the respondent. Considered from this point of view, the claim was filed out of time as the decision of the tribunal was communicated to the claimant on 8th February 2011. He filed his claim on 27th February 2014, which was 19 days after the lapse of the limitation period.

Even if the claimant had filed his claim within time the orders for reinstatement would not be available to him as the Industrial Court Act provides that reinstatement cannot be ordered after the lapse of 3 years. He was dismissed on 2nd October 2009.

The respondent also referred to Section 3(2) of the Public Authorities Limitation Act Cap 39 which provides that no proceedings founded on contract shall be brought against the Government or Local Authority after the end of three years from the date from which the cause of action arose. I have held in several cases that the provisions of all laws which limit the right of an employee to file a case relating to his employment that is less favorable than that provided in the Employment Act is discriminatory against such employee and therefore unconstitutional. The legislature could not have intended that employees of the Government and those of Local Authorities be treated less favorably than other employees. Again the

Employment Act specifically provides that it binds the government and that it provides for minimum terms of employment.

For these reasons I find that the provisions of the Public Authorities Limitation Act do not apply in employment disputes in so far as they are not in consonance with the Employment Act.

In conclusion, I find that the claimant did not appeal against his dismissal, but that his appeal was against removal from the register of teachers. I further find that the Teachers Service Appeal's Tribunal had no mandate to hear or determine cases against dismissal as its mandate was limited to hearing appeals relating to refusal of registration to the register of teachers or removal from the said register.

The result is that the claim herein fails. I consequently dismiss the entire claim.

The respondent prayed that the claimant be ordered to refund Kshs 35,303.30/= erroneously paid to him. No evidence was adduced in support of this prayer nor was a formal counter claim filed. I therefore dismiss the prayer for having not been proved.

Each party shall bear its costs.

Orders accordingly.

Dated and delivered in Nairobi this 26th day of January 2015.

MAUREEN ONYANGO

JUDGE

In the presence of:

..... for claimant(s)

..... for respondent(s)