



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NYERI
INDUSTRIAL CAUSE NO. 62 OF 2013

JWN.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

JUDGMENT

1. The claimant in this suit is a former teacher whose services were terminated and his name expunged from the Teachers Register after he was found guilty of a charge of having carnal knowledge of his own pupil namely Miss AW contrary to regulations 66(2) the Respondents Code of Conduct and Ethics.
2. The claimant disputed the conviction and the consequent disciplinary action arguing the charges were malicious and false in every sense.
3. In his pleadings, evidence and submission the claimant maintained his innocence and claimed the charges were brought by the complainant's family to extort money from him and when he refused to oblige he was dismissed. To prove his innocence, the claimant contends that he was prosecuted on the same facts in Nanyuki Criminal Case No. 2254 of 2010 and was found innocent in that the DNA test on the child allegedly conceived by the pupil did not link him as the father.
4. The claimant further contended that since the complainant had maintained throughout that she had never had any sexual contact with anyone except the claimant, it was incredible that the DNA test did not link him to the child. This he argued, was a clear proof of his innocence. The claimant further contended that his removal was unfair and unprocedural in that he was not accorded a fair hearing at all levels of the removal process. He further complained that the final verdict by the respondent was sent to wrong address thereby defeating his right of appeal as stipulated by the respondents code of regulations.
5. As a result of the foregoing the claimant seeks from the court a declaration that his termination from employment was unfair and wrongful, an order that he be reinstated, payment of his consolidated salary up to the date of reinstatement and compensation for unfair termination.
6. The respondent on its part justified its action maintaining that the allegations against the claimant were proved. According to the respondent, upon careful and in depth analysis of the circumstances of the case there were sufficient grounds to believe that the claimant violated fundamental provisions of the code of ethics and regulations hence the action taken was justified.
7. Mr. Thuku for the claimant in his submissions reiterated that the issue of carnal knowledge could not be divorced from the pregnancy since the pupil stated that the only sexual encounter was with

- the claimant. Counsel raised issue over the length of time it took to report the incident. It was his contention that whereas the alleged incident took place on 3rd July, 2010, it was only in the month of November, 2010 that the pupil told her mother about it. Counsel argued it was not possible that five months of pregnancy could go unnoticed that long.
8. Concerning procedure, counsel submitted that this fell short of the provisions of Section 41 of the Employment Act. According to Counsel the section requires a hearing of the employee before dismissal in the presence of a representative of the employees Union or another person chosen by the employee. This did not happen in the claimant's case. According to counsel, the letter inviting him to the Disciplinary Committee having deliberately failed to inform him of this right. On this point, counsel relied on the case of **Alphonse M. Mwachaga v Operation 680 Ltd.**, where the court held that an employer should show as a matter of factual evidence that it allowed a representative of the employee, either being a fellow employee or shop floor representative to be present during the information and explanation of the reasons.
 9. Counsel further submitted that the Disciplinary Committee sitting on the 14th June, 2011 did not give the claimant a chance to explain his side of the story. He made no representations before the committee but was just asked questions which he was expected to answer then cross examine from.
 10. Counsel for the respondent, Mr. Sitima on his part vigorously submitted that the respondent followed due process and accorded the claimant a fair hearing as required by the code of regulations. He further submitted that the decision reached by respondent was justified in view of the gravity of the allegations.
 11. According to counsel, the claimant was interdicted as per the recommendation of the School Management Committee and subsequently invited for a full disciplinary hearing on 14th June, 2011 alongside other witnesses. Mr. Sitima submitted that the disciplinary panel heard testimonies of both parties, considered the testimony of the claimant but the pupil's evidence was persuasive, consistent, compelling, credible and coherent both before the disciplinary hearing and in court.
 12. According to Mr. Sitima, it is upon evaluation of the facts, witness statements and the investigation reports, that the respondent reached the decision to dismiss the claimant for material breach of regulation 66(2) of the code of regulation for teachers. Counsel submitted that the Act for which the claimant was found guilty amounted to immoral behaviour on his part and did not only ridicule the dignity of the teaching profession but also eroded the trust and confidence bestowed on the claimant by his employer.
 13. Regarding fair hearing, counsel submitted that the claimant actively participated in the disciplinary process and therefore was not a stranger to the decision. According to counsel, the panel was fair, courteous and treated the claimant with dignity.
 14. Counsel submitted that the disciplinary process complied with the statutory requirements and being a quasi-judicial body, proceedings of the Commission must not be compared to those of a Court of Law. In this regard counsel relied on the cases of **Constantine Simati vs TSC, R vs Egerton University Ex- Robert Kipkemoi Koskey** and **KRA vs Menginya Salim Murgani**
 15. Two main issues stand to be determined in this dispute mainly whether there was sufficient evidence to justify the dismissal from service and deregistration of the claimant as a teacher and second whether in the removal process the claimant was accorded a fair hearing in accordance with the respondents' code of regulations and rules of natural justice generally and as a consequential order, if the court finds for the claimant, what would be the appropriate remedy in the circumstances.
 16. To answer the first question the court needs to review the evidence that triggered the disciplinary process. So what was the evidence?

17. DW1, the complainant herein in summary testified that on the material date (3/7/2010) the claimant asked her to remain behind while other pupils left school after Saturday classes and that the claimant invited her to the staff-room where he locked the door. The claimant offered her soda which she refused to take. The claimant then removed a knife and placed it on the table and asked her to do as he wanted. He then asked her to lift her dress which she did and the claimant had sex with her. The claimant then warned her not to tell anyone and if she dared, he would kill her.
18. It was the claimant's testimony that she realized she was pregnant on 16th July, 2010 but told her mother 5 months later (i.e November, 2010). The mother in turn called the complainant's teachers and told them about what happened. The mother then complained to the police and the claimant was prosecuted. According to her evidence, the claimant was the only person she has ever had any sexual contact with.
19. DW2 confirmed that DW1 told her it was the claimant who impregnated her. According to her he knew the claimant as DW1's teacher and had no other connection. She denied falsely implicating the claimant and stated they had nothing against him. It was her evidence that the claimant sent a Mr. Kimondo to talk about the issue with him. According to her the claimant asked DW1 to write down that he was not the one responsible for the pregnancy so that he could be reinstated to work. She stated that they never asked for money from the claimant instead it was him who offered to pay for the child's upkeep and pay DW1's fees.
20. DW3 who stated he was the deputy head teacher testified that he, in the company of the claimant, went to DW2's house and met with DW1 who accused the complainant of impregnating her. He consequently informed the DEO as he felt he was the one best placed to handle the matter.
21. DW4 who stated he was the head teacher stated that when he received information on the issue from DW3 he called the parties involved and the school chairperson and treasurer. After listening to the parties he wrote a letter to the DEO and was advised to arrange a whole school committee meeting. This was done in January, 2011. The claimant was called and was given a chance to state his side of the story. The committee after deliberations found the claimant with a case to answer and forwarded the matter to the DEO for further action. The DEO forwarded the case to TSC who formed a tribunal. The claimant attended and cross-examined witnesses. The accusation against the claimant at the TSC tribunal was carnal knowledge and not pregnancy.
22. According to DW4 the girl claimed the claimant had carnal knowledge of her. This according to him is done in private. He stated that the claimant was unable to defend himself despite being given a chance to do so. The committee voted at the conclusion of the hearing and majority voted in favour of the girl's allegations.
23. The claimant for his part testified that in January, 2011 the head teacher summoned him to appear before the DEO on the allegation that he defiled DW1. He further testified that he was accused in criminal case number 2254 of 2010 at Nanyuki over the same issue. Before the DEO he stated that he tried to explain his position but he was ridiculed by the DQASO calling him a rapist who should be jailed. He complained that he was pressured to accede to what the student and the mother wanted for the case to end.
24. He further testified that on 14th June, 2011 he appeared before the disciplinary committee of the respondent and gave his version of the story. He further complained that the tribunal also ridiculed him calling him a sex predator. He felt harassed.
25. He stated that he never got the verdict and only knew of it when he went to the respondent to give them the verdict of the criminal court to show he had been acquitted. It was his evidence that the dismissal letter was sent to the wrong address. He therefore could not appeal on time. He all the same appealed but did not get any response.
26. He testified that the criminal court found him with no case to answer and acquitted him. The basis

of his acquittal was that the DNA test ordered by the court turned out negative thereby exonerating him from the paternity of the child.

27. I have attempted this far to delve into the evidence as far as possible in order to answer the two questions framed earlier in this judgment. Concerning the first question, the claimant was accused of having carnal knowledge of the complainant.
28. According to the complainant her pregnancy was the evidence of the carnal knowledge. No other independent evidence was led to support the claim of carnal knowledge apart from the pregnancy. Whereas the respondent has argued that their concern was carnal knowledge and not the pregnancy, the connection between the two aspects of the complaint are so interdependent that none can stand independent of the other.
29. The complainant consistently stated that she never, prior to the incident, had any sexual contact with any person except the claimant. If the foregoing is the case, it is perplexing that the DNA test turned negative in so far as the complainant was concerned. That is to say, there was no DNA connection between the claimant and the child. To this extent, if pregnancy was the critical evidence of the carnal knowledge then the DNA Test results has significantly destroyed this piece of evidence that it can no longer be relied on. It was therefore to adduce other independent evidence implicating the claimant.
30. Whereas it maybe true that the proceedings before tribunals are not at par with those before a court, where the allegations before such tribunals are serious in nature with the possible consequence that the outcome can deprive the person accused of his livelihood, the quality of evidence to prove such allegations must be above average. The claimant was accused of a very serious offence both under the respondent's code of regulations and penal laws of the land. On one hand, a young girls education and further life had been put in jeopardy. On the other hand the person found responsible faced the risk of imprisonment for a long time and or termination of professional career. It therefore behove those tasked with the responsibility of determining the dispute to do so with care and caution. It is disturbing that it took about five months for the complainant to tell her mother of her pregnancy. The court quite appreciates doubts raised by counsel for the claimant that the complainant could have been pregnant that long without notice of her mother or teachers at the school. If her allegations of cries during science lessons and frequent sleeping were inquired into, may be some independent evidence could have been found to support her claim that the claimant or some other person was responsible for her carnal knowledge and or pregnancy. In absence of any other independent evidence, to sustain the condemnation of the claimant on the discredited pregnancy claim would occasion injustice to him.
31. I borrow the sentiments of my brother Justice Ong'aya in the case of *Mathew Kipchumba Koskei V Baringo Teachers Sacco* where he said:

“If the employer has initiated and concluded the disciplinary proceedings on account of a misconduct which also has substantially been subject of a criminal process for which the employee is exculpated or found innocent, the employer is thereby entitled to setting aside administrative punitive decision and the employee is entitled to relevant legal remedies as may be found to apply and to be just.”

33. Concerning the issue of due process and right to a fair administrative process; the court has evaluated the evidence and is persuaded that the claimant was accorded a fair hearing. It is important to note that what the law requires is not a perfect hearing but fair hearing which the court is convinced the claimant was accorded.
34. Counsel for the claimant submitted that the remedy for reinstatement ought not be made as it would amount to imposing an employee on an unwilling employer or rather imposing a contract on an unwilling party as it were. Reinstatement is a remedy like any other in settling employment disputes. The court however agrees that it should only be ordered in exceptional cases. Some of

the factors the court considers prior to making an order of reinstatement include (a) the length of time the claimant has been out of employment (b) the existence of minimum necessary confidence between the employee and the employer (c) the size of the organization and its national network (d) whether the employee has secured another job elsewhere (e) the willingness of the employee to take up reinstatement (f) the age of the employee (g) whether the same or a similar post still exists with his employer.

35. The claimant was dismissed from service on 14th June, 2011 hence has been out of employment for approximately 3 years. As a career teacher he cannot be said to have forgotten his teaching skills over this short period. Concerning the size and national network, the Commission is a national organization in charge of teachers countrywide hence if this court were to make an order of reinstatement, the claimant could be posted in any other school in the country and not necessarily the school where he taught before termination.

36. The above factors having been taken into account, the court hereby orders the reinstatement of the applicant to the register of teachers and hereby declares null and void the decision by the respondent to terminate his services on account of allegations of immoral conduct namely carnal knowledge of one A W M.

37. The court further orders the claimant's reinstatement to service without loss of benefits. His entry back to service shall be reckoned from June, 2011 when he was terminated and evaluated upwards in tandem with teachers having similar grades and length of service. That is to say the claimant shall benefit from any routine promotions and salary increments that teachers of his calibre and length of service have benefited from the time of his removal from service to date.

38. The court further awards the claimant seven months salary on account of unfair termination of service.

39. It is so ordered.

Dated at Nyeri this 16th day of May, 2014.

ABUODHA N. J

JUDGE

Delivered in open court in the presence of Mr. Thuku Advocate for the Claimant and in the presence of Mr. Mongera Advocate for the Respondent.

ABUODHA J. N

JUDGE