



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 407 OF 2013

THOMAS JOSEPH O. ONYANGO.....CLAIMANT

- VERSUS -

THE STATE.....1ST RESPONDENT

-AND-

TEACHERS SERVICE COMMISSION.....INTERESTED PARTY

(Before Hon. Justice Byram Ongaya on Friday 13th June, 2014)

JUDGMENT

The claimant filed the memorandum of claim on 20.11.2013 in person. The claimant prayed for orders:

- a. That all overdue payments between 11.9.1990 to 5.10.1991 to 18.9.1991 be paid in full at equivalent present value.
- b. That the process of interdiction dated 30.4.1991 and forwarded on 21.6.1991 be declared un-procedural.
- c. That the three annual increments and their corresponding percentage increments, where applicable, be effected from 1.7.1996 to date.
- d. That the unilateral change of yearly incremental date to the detriment of the claimant is reversed and one annual increment for six months yearly with effect from 1.01.2003 to date be effected.
- e. That the due reimbursement of travelling and accommodation subsistence claims dated 30.4.2009 be effected.
- f. That the constant interruptions of the claimant's services namely that of 5.10.2010, 9.2.2011 is declared malicious, un-procedural and illegal.
- g. The deductions from the claimant's pay in the months of October 2010, November 2010, February 2013 and May 2013 be declared illegal.
- h. That the act of putting the claimant in indefinite suspense without a station and any payment of salaries and allowances as the one on 5.5.2013 and that of October, 1990 be

declared illegal.

- i. That the severance and general damages for the periods the claimant has and had been without salaries and allowances be compensated for.**
- j. That the claimant be offered remedies for the defamation he has been suffering as result of ad hoc and irresponsible behaviour of the employer, Teachers Service Commission.**
- k. That the claimant be stationed in a position and status commensurate with his grade or rank.**
- That Teachers Service Commission and its agents be restrained from harassing, intimidating or unduly interrupting the services of the claimant.**
- m. That the costs of the suit be met by the respondent.**

The Attorney General entered appearance for the respondent on 29.11.2013 and the interested party proceeded to defend the suit as the claimant's employer. The interested party filed the Notice of Appointment of Advocate on 18.12.2013 through Stella Ruto Advocate who appeared for the interested party throughout the proceedings. The interested party filed a reply to the claimant's memorandum of claim on 10.02.2014. The interested party prayed that the honourable court dismisses the claimant's memorandum of claim dated 19.11.2013 as the same is unjustified and devoid of any merit. The respondent filed the memorandum of defence on 11.02.2014 through Kiprotich Kirui, Litigation Counsel but did not subsequently participate in the hearing.

The case was heard on 27.3.2014 when the claimant gave evidence to support his case. The interested-party's evidence was heard on 28.4.2014 when the respondent's administrative officer from the teacher management directorate testified to support the interested-party's case.

The court has considered the pleadings, the evidence and the submissions filed for the parties. The main issues for determination in this case are as follows:

- a. Whether some of the claimant's claims and prayers are time barred.**
- b. Whether the claimant is entitled to the other remedied with respect to the claims that are not time barred.**

For the 1st issue, the interested party has submitted that the claimant has raised the following claims that are time barred:

- 1. That the claimant's salary and allowances was stopped sometimes in October, 1990 while he was stationed at Nyakeiri Secondary School.**
- 2. That the claimant was not paid special subject allowance effective 1.7.1996.**
- 3. The claimant was not paid travelling expenses on 30.04.2009 despite submitting claims for the same.**
- 4. The claimant's salary annual increment was unilaterally altered from 1.01.2003.**

It was submitted for the interested party that the claims were time barred under section 3(1) and (2) of the Public Authorities Limitation Act and section 4 of the Limitation of Actions Act that prescribes 3 years and 6 years respectively for contractual claims like the ones urged by the claimant. The interested party relied on the Court of Appeal holding in **Thuranira Karuri –Versus- Agnes Ncheche [1997]eKLR** that a suit filed out of time is incompetent and should be struck out as the issue of limitation goes to jurisdiction and the same was sufficient to dispose of a suit.

The claimant did not oppose the submissions made that part of his claims were time barred. The court finds that the submissions made for the interested party are valid and find that part of the claims are time barred. In particular, the court finds that the claimant's claims in so far as they further and support prayers (a), (b), (c), (d) and (e) are time barred and the prayers will therefore fail. While making that finding, the court further finds that the claimant did not advance any reason why he could not and did not make the claims within the prescribe statutory time limits.

The 2nd issue for determination is whether the claimant is entitled to the other remedies as prayed for. The court makes findings as follows.

The claimant has prayed that the constant interruptions of the claimant's services namely that of 5.10.2010, 9.2.2011 is declared malicious, un-procedural and illegal. The claimant's case is that he was maliciously interdicted on 5.10.2010 by the principal at Nyandiwa Secondary School. The School Board of Governors had not deliberated the case at the meeting of 30.9.2010 and the complainant was the principal who was the Board's secretary leading the case against the claimant. It was the claimant's further case that Eliud Otieno Ochieng was a KUPPET union chairman at Rachuonyo South and being a teacher in the interested-party's employment, he was not competent to sit and participate in the Board's deliberations to interdict the claimant.

The claimant further case was that the board gave him a one day notice to attend the board meeting while under the interested-party's procedures and policies he was entitled to 14 days notice. The allegations of professional misconduct and insubordination could not lead to half pay under the interested-party's regulation 68. The claimant further stated that the confirmed allegations by the interested party dated 05.10.2010 and flowing from those of 27.9.2010 and were further different from those of 29.12.2010. It was the claimant's case that the changing allegations in the various letters were calculated to maliciously fabricate charges against him. The changes in allegations further lead to serious miscarriage of justice in the interdiction and disciplinary proceedings. For both proceedings at the school board and the interested-party, the claimant submitted he was not given a fair hearing as his union representative (KNUT) was not allowed at the meeting and the claimant's students, school girls, were paraded at the interested-party's offices to testify against the claimant without the claimant's prior notice or knowledge of the girls' line or content of the evidence. The claimant's pay was withheld from 01.01.2011 to May, 2012. The claimant produced documents to urge that he was never formally transferred from Got-Rateng to Nyandiwa Secondary Schools because upon transfer to Igwamiti in Laikipia County, the transfer was shown to have been from Got-Rateng and not from Nyandiwa. Thus, it was the claimant's case that he could not be validly taken through the disciplinary process by the board at Nyandiwa. The claimant complained that he never received payslips from the date he left Got-Rateng School till he reported to Igwamiti in April to May, 2012. The claimant therefore submitted that the interdictions of 05.10.2010, 29.12.2010 and 09.02.2011 were malicious, un-procedural, improper and illegal.

The interested party has submitted that if the claimant needed more time to prepare for his defence then he was at liberty to do so; the presence of the KUPPET union official did not prejudice the claimant's case; the school girls were proper witnesses; the claimant had chance to attend the hearing and cross-examine witnesses; the claimant did not request that his KNUT union representatives attend the hearing; and the interested party accorded the claimant fair hearing within the rules of natural justice.

The court has evaluated the rival evidence and submissions. The interested party has not explained or denied that the allegations made against the claimant kept on varying. The court finds that it was unfair and inconsistent with the claimant's right to due process of law during a disciplinary action for the notice of the allegations to have continuously varied. In the opinion of the court, the changing of the charges prejudiced the claimant's case and gave a strong indication of bad faith throughout the proceedings. In proceedings that had a possibility of leading to the termination of the claimant's employment, the interested party and its agents such as the school board was obligated to comply with section 41 of the Employment Act, 2007 on notice and hearing. The court further holds that the claimant was entitled to due process of law under Article 236 of the Constitution throughout the disciplinary case. The court has noted that the interested party has failed to confirm or deny that the claimant was never officially deployed from Got-Rateng to Nyandiwa Secondary Schools. As submitted by the claimant, without

prove of the deployment, the board at Nyandiwa could not establish valid basis to initiate and continue the disciplinary proceedings against the claimant. Further, due process entitled the claimant to witness statements by the school girls called as witnesses prior to the hearing time. The court further finds that the interested party and the school board were obligated to afford the claimant reasonable time to prepare for the hearing and the one day notice prior to appearing before the board was not reasonable and sufficient time for the purpose in the circumstances of the case. Thus, the court finds that the claimant is entitled to **the declaration that the constant interruptions of the claimant's services namely that of 5.10.2010 and 9.2.2011 and the ensuing six months suspension was malicious, un-procedural and illegal.**

The claimant has prayed for orders that the deductions from the claimant's pay in the months of October 2010, November 2010, February 2013 and May 2013 be declared illegal. The claimant testified and submitted that he was deducted salaries in the cited months without any explanation. He testified that he was not paid from 1.1.2011 to 7.7.2012. In October 2012, he was paid Kshs.506,000.00 instead of Kshs.1,200,000.00 he had claimed and demanded. After the interdiction hearing of 30.08.2011, the claimant testified that the interested party suspended him for 6 months on top of the earlier 11 months interdiction by the school board. He appealed against the suspension but the appeal was never determined. After serving the six months suspension, the claimant was deployed to Igwamiti Secondary School in Laikipia County effective 5.3.2012 despite his request for a school in Nairobi. He applied for transfer from Laikipia in June and September, 2012 but received regret. On 8.5.2013, he received a transfer to Thiru Secondary School. On 9.05.2013, the claimant went to interested-party's headquarter to appeal against transfer. He was referred to complain to the County Director at Laikipia. He was told to report to Thiru pending appeal. He reported on 17.05.2013 and the school principal at Thiru humiliatingly endorsed on the claimant's transfer letter that the claimant was to be posted elsewhere because the school had excess staff. It was the claimant's case that the transfer to Thiru was malicious and calculated to humiliate and lock him out of work. The county director, Laikipia then transferred the claimant to Garrison Secondary School at Nanyuki on 26.06 2013. The claimant's salary had been stopped on 14.06.2013.

Upon reporting, the claimant testified that the headteacher rejected him on the ground that she had not received the transfer letter. The claimant reported at the same school about 28th or 27th June, 2013 and met the Deputy Principal who declined to receive him because such was a duty for the principal but who was then absent. The claimant testified that he then sent a message on the principal's phone but she did not reply. The claimant then went to the county director's office, he was out, and the claimant signed the visitor's book to confirm his visit. An officer at the office informed the claimant that he had been transferred to Naibor School near Turkana or in Turkana County. The claimant was shown the letter and asked to return it to the officer because it had errors that could be corrected only by the county director.

The claimant testified that he later went to the interested-party's office in Nairobi and met Rotich, the Senior Deputy Director of Teachers Management. Meetings with Rotich took place for 5 days but Rotich failed to solve the problem. The interested-party's Public Relations Officer advised the claimant to go back to Laikipia. It was the claimant's testimony that it was such serious administrative inconsistency that the interested party could not resolve the issues at its head office. It was 1st week in July, 2013 and the claimant testified that he was seriously desperate as he could not work and the employer was unable to resolve his predicament but a vicious cycle had emerged in his case. He was then called by the county director at Laikipia to collect a corrected letter for deployment to Naibor in Turkana. He collected the letter from the Laikipia District Staffing Officer and soon after the same officer called him to return it to the county director. The County Director took the letter and told the claimant to go and report him anywhere or to go and hang. The claimant testified that his present predicament then started and he moved all-over including seeing the Secretary and Chief Executive Officer for the interested party called Gabriel Longoibon but he did not see him because it was very difficult to see him. He eventually saw the interested-party's legal officer who advised him to seriously consider taking a legal action. At the hearing of the case, the claimant had not received any deployment letter. His salary was stopped on 14.6.2013 for unexplained reasons and he had failed to remit loan deductions as expected. The claimant's testimony was that he had seriously suffered and his children had dropped from school because he could not pay school fees.

The interested party did not provide any evidence to rebut the claimant's detailed and elaborate evidence on how he was thrown out of valid deployment and was therefore unable to work. The court has found no good reason to doubt the claimant's account of the predicament that confronted him until after the taking of the evidence, by consent of the parties, he was deployed to teach at Mama Ngina Secondary School.

Taking the claimant's evidence into account, the court finds that the claimant is entitled to **the declaration that the deductions from the claimant's pay in the months of October 2010, November 2010, February 2013 and May 2013 were illegal.**

The claimant prayed that the act of putting the claimant in indefinite suspense without a station and any payment of salaries and allowances as the one on 5.5.2013 and that of October, 1990 be declared illegal. The court has found that the claim for October, 1990 was time barred. However, the court finds that in view of the evidence, the claimant is entitled to **the declaration that the act of putting the claimant in indefinite suspense without a station and any payment of salaries and allowances as the one on 5.5.2013 was illegal.**

The claimant has prayed for an order that the severance and general damages for the periods the claimant has and had been without salaries and allowances be compensated for. The court has considered the prayer and find that the claimant is entitled to be paid all salaries and allowances; the court has found the claimant was either interdicted, suspended or not deployed unfairly or illegally. The court finds that the claimant is entitled to salary and allowances from 1.01.2011 to 7.03.2012 at Kshs.80,000 x 15 months making **Kshs.1,200,000.00** as claimed and submitted. The court finds that the claimant is entitled to recover unfair deductions of his salary in October, 2010 (Kshs.14,000.00), November, 2010 (Kshs.5,000.00), February, 2013 (Kshs.14,745.60) and May, 2013 (Kshs.5,694.00) making **Kshs.39,539.60** as submitted. The court further finds that the claimant is **entitled to salary and allowances from 1.06.2013 to 28.04.2014 when he resumed duty by court order and** at the prevailing pay for the period and thereafter to continue earning at the prevailing monthly pay terms.

The claimant prayed that the claimant be offered remedies for the defamation he has been suffering as result of *ad hoc* and irresponsible behaviour of the employer, Teacher Service Commission. The court has considered this prayer and the settled definition of defamation as consisting in the publication of a false and defamatory statement concerning another person without lawful justification. Defamation is the publication of a statement which tends to lower a person in the estimation of right-thinking members of the of society generally; or which tends to make them shun or avoid that person (**see P. H. Winfield, A Textbook of the Law of Tort page 242, 5th Ed. 1950**). In the present case, the court finds that the claimant did not establish by evidence the alleged defamatory material. Secondly, the court finds that all the communication in this case was between the claimant and persons representing his employer in circumstances whereby the court finds that it was strictly an employer-employee communication that fell short of the kind of publication to pass the test for a finding of the alleged defamatory tort. In the circumstances, the court finds that the claimant has not established the tort of defamation and the claim and prayer will therefore fail.

The claimant has prayed that the claimant be stationed in a position and status commensurate with his grade or rank. The court has considered the unfair manner in which the claimant has been unfairly precluded from performing his duties as employed and finds that he is entitled to the prayer as made.

The claimant prayed that Teachers Service Commission and its agents be restrained from harassing, intimidating or unduly interrupting the services of the claimant. The court has found that the interested party and its employees or agents have unfairly and for long periods of time interrupted the claimant's service in unexplained manner. The court finds that the claimant is entitled to the permanent injunction as prayed.

As the claimant has substantially succeeded, the court finds that the interested party will pay costs of the suit. Taking all the circumstances of the case into account, the complexity of the case, the pleadings and the documents filed, and that the claimant appeared in person, the court fixes the costs at **Kshs.150,000.00.**

The claimant submitted that he was entitled to interests accrued and unpaid arising from unpaid monthly instalments for loans. The court finds that in his evidence, he did not specifically establish the loans and the interests as submitted and the claim will fail. The claimant further prayed for punitive damages for the manner in which the interested party treated him unfairly and contrary to law. The court has considered that prayer and finds that in the circumstances of the case, the reliefs already found as due to the claimant will meet the ends of justice in this case which is primarily founded upon the contract of service between the claimant and the interested party. The court therefore finds that the claimant is not entitled to the general and punitive damages as set out in the submissions because the same constitute a claim remote to the contract of employment and the claimant has not established the justification for the same in his submissions as in the opinion of the court, the remedies found due will meet the ends of justice.

In conclusion, judgment is entered for the claimant against the interested party for:

1. **The declaration that the deductions from the claimant's pay in the months of October 2010, November 2010, February 2013 and May 2013 were illegal.**
2. **The declaration that the act of putting the claimant in indefinite suspense without a station and any payment of salaries and allowances as the one on 5.5.2013 was illegal.**
3. **The respondent to pay the claimant Kshs.1,389,539.60 plus the salary and allowances from 1.06.2013 to 28.04.2014 when he resumed duty by court order.**
4. **The claimant to compute the salaries and allowances in 3 above at the prevailing pay at material time and serve the interested party in seven days for recording the figure in court on a date convenient to the parties.**
5. **The respondent will pay the amount in 3 and 4 above 3 by 1.08.2014 and in default, interest at court rates will be payable from the date of the judgment till the date of full payment.**
6. **The claimant to continue teaching at the Mama Ngina Kenyatta Secondary School with full pay and benefits and to remain so deployed for at least 3 years unless deployed to a school or institution within Nairobi area as per his initial desires or deployed on promotion or otherwise in his best interests.**
7. **The declaration that the claimant be stationed in a position and status commensurate with his grade or rank.**
8. **A declaration that the interested party by itself or by its employees or agents is hereby restrained from harassing, intimidating or unduly interrupting the services of the claimant.**

Signed, dated and delivered in court at Nakuru this Friday 13th June, 2014.

BYRAM ONGAYA

JUDGE