



IN THE INDUSTRIAL COURT OF KENYA

CAUSE NO 2064 OF 2012

DAVID NZUE.....CLAIMANT

VS

TEACHERS SERVICE COMMISSION.....1ST RESPONDENT

AWARD

Introduction

1. David Nzue, the Claimant in this case is a teacher employed by the Teachers Service Commission, the Respondent herein. He filed High Court Civil Case No. 288 of 2008 against his employer which was transferred to this Court pursuant to an order made by **Odunga J** on 27th July 2012.
2. The Respondent filed a Statement of Defence on 25th November 2013 and the matter was heard between 9th December 2013 and 20th March 2014. The Claimant testified on his own behalf and the Respondent called its Senior Deputy Director-Teacher Management, Mary Cheptum Rotich.

The Claimant's Case

3. The Claimant was employed by the Respondent as an untrained teacher in 1975. He was thereafter employed on permanent and pensionable terms in 1979 upon completion of his teacher training course. In 1987, he was appointed Acting Headmaster and was confirmed to this position on 22nd August 1991. On 12th November 1991, the Claimant was designated ATS III/Headmaster, a position he held until February 1993 when he was demoted.
4. Between October and November 1993, the Claimant was removed from the payroll. Upon objections by the Claimant, he was reinstated to the payroll and was paid his accrued salaries except responsibility allowance. The Claimant states that on 15th June 1994, all the head teachers were, by presidential directive, promoted to at least Job Group L. According to the Claimant, were it not for the demotion effected by the Respondent, he would have been in job group M in 1996.
5. In 1996, the Claimant wrote to the Respondent asking to be reinstated to the position of ATSIII/Headmaster and to be promoted to the next job group in accordance with the presidential directive and in July 1996, the Respondent undertook to reinstate the Claimant to the position of ATSIII/Headmaster and to promote him to job group M.
6. On 6th March 2001, the Respondent posted the Claimant to Mutha Secondary School as Head

Teacher but the Kitui District Education Officer failed to supervise the handing over. The Provincial Director of Education subsequently directed the Claimant to remain in his previous station, a decision the Claimant contested.

7. In 2007, the Principal for Kitui School together with the Kitui District Education Officer asked the Claimant to go and open a new school, Matinyani Mixed Day Secondary School. The Claimant obliged and asked the Respondent to formalise his redeployment from Head Teacher, Mutha Secondary School to Head Teacher, Matinyani Mixed Day Secondary School.

8. On 6th July 2007, the Respondent's Secretary and Deputy Secretary visited Kitui School and denied knowledge of the existence of Matinyani Mixed Day Secondary School and consequently summoned the Principal for Kitui School and the Claimant to appear before them on 10th July 2007. The Claimant explained his case and was notified by the Respondent's Deputy Secretary that he would be notified of the Respondent's decision on the matter.

9. In September 2007, the Claimant received a warning letter alleging insubordination, negligence of duty and collusion. The Claimant contested the warning letter. The Claimant continued working at Matinyani Mixed Day Secondary School and on 1st October 2007, he was removed from the payroll.

10. While still working at Matinyani Mixed Day Secondary School, the Claimant was summoned to appear before the Board of Governors, Kitui School on allegations of desertion of duty. The Board interdicted the Claimant by their letters dated 13th March, 7th April and 7th May 2008. The Claimant contested the interdictions.

11. Following the Claimant's interdiction, he was summoned by the Respondent for a hearing which was conducted on 2nd November 2010. The Claimant was thereafter issued with a warning letter. The Claimant was reinstated on 2nd November 2010 with all incremental credits but his hardship allowance was reduced from Kshs. 8,053,50 to Kshs. 6,118.

12. The Claimant claims the following:

- a. A declaration that his demotion in 1993 was unprocedural, illegal, null and void;
- b. A declaration that the summons, interrogation and subsequent interdiction by the Board of Governors, Kitui School was illegal, unprocedural, null and void;
- c. Reinstatement to the position he held in 1987;
- d. Payment of salaries and allowances for 40 months from 24th July 2007 to 24th November 2010;
- e. A declaration that he was in job group L from 1994 to 1996;
- f. A declaration that he was in job group M from 1996;
- g. Payment of benefits attached to job groups L and M;
- h. Withdrawal and quashing of warning letters dated 21st August 2007 and 2nd November 2010;
- i. Unpaid hardship allowance at Kshs. 1,935.50 from November 2010 to date;
- j. A declaration that Regulation 66 of the Teachers Service Commission Code of Regulations for Teachers is null and void as it is founded on a non existent provision of law;
- k. An order directing the Respondent to promote him to a minimum job group P;

- Costs and interest.

The Respondent's Case

13. In its Statement of Defence filed on 25th November 2013, the Respondent admits having employed the Claimant as a P1 Teacher on 1st May 1979. The Claimant served in various primary schools until August 1985 when he was deployed to County High School in Garissa. He was subsequently deployed to Kyaani Girls Secondary School as an Assistant Teacher effective 28th July 1987. On 3rd November 1987, he was appointed Acting Head Teacher in the same school and was later confirmed to this position.

14. The Claimant was subsequently transferred from Kyaani Girls Secondary School to Ikutha Boys Secondary School as an Assistant Teacher and thereafter redeployed to Migwani Secondary School effective 26th March 1993. The Respondent claims that the Claimant failed to handover at his previous station prompting his removal from the payroll, an action that was reversed upon the Claimant complying with the Respondent's instructions to hand over.

15. While teaching at Kitui School, the Claimant made requests to be deployed as a Head Teacher which requests the Respondent did not accede to due to unavailability of vacancies. The Respondent denies ever authorising the Claimant's transfer from Kitui School to Matinyani Mixed Day Secondary School. Consequently, upon realisation that the Claimant had unprocedurally moved to Matinyani Mixed Day Secondary School, the Respondent commenced disciplinary proceedings against him on the grounds of desertion of duty and insubordination. The Claimant was therefore interdicted and thereafter issued with a warning letter.

16. It is the Respondent's case that the mere fact that the Claimant was designated ATS III/Head Master did not entitle him to serve permanently as a Head Teacher. According to the Respondent, ATS III is a promotional grade and not an administrative position. The fact that the Claimant was promoted to ATS III did not therefore entitle him to an administrative position. The Respondent further contends that at the time the Claimant was reinstated to the payroll, he was not holding an administrative position and was therefore not entitled to responsibility allowance.

17. In response to the Claimant's claim that he was unprocedurally demoted, the Respondent states that the Claimant was not demoted but was redeployed from the position of Head Teacher to an Assistant Teacher since the Claimant who was not a degree holder and was not therefore qualified for appointment as a Head Teacher in the first place. The Respondent denies promising the Claimant redeployment as a Head Teacher. Further, promotion to job group L was not automatic but was dependent on availability of vacancies. The Claimant's deployment as Head Teacher, Mutha Secondary School was canceled because there was no vacancy at the School.

Findings and Determination

18. The issues for determination in this case are as follows:

- a. Whether the Claimant's deployment from Head Teacher to Assistant Teacher amounted to a demotion
- b. Whether the Claimant deserted duty
- c. Whether the Claimant's interdiction was procedural and lawful
- d. Whether the Claimant is entitled to the reliefs sought

The Claimant's Redeployment

19. In February 1993, the Claimant was transferred from Kyaani Girls Secondary School where he was the Head Teacher to Ikutha Boys Secondary School and immediately thereafter to Migwani Secondary School in the position of an Assistant Teacher. The Claimant states that this

amounted to a demotion which was meted against him without being afforded an opportunity to be heard.

20. The Respondent on the other hand maintains that the Claimant's movement from Kyaani Girls Secondary School to Ikutha Boys Secondary School and then to Migwani Secondary School was a normal deployment and not a demotion. The Respondent's witness, Mary Cheptum Rotich strenuously tried to draw a distinction between redeployment from an administrative position and demotion from a professional teaching grade.

21. According to the Respondent, headship of a school is an administrative position that is awarded depending on performance of a teacher and availability of a vacancy.

22. Regulation 33 of the Code of Regulations for Teachers provides for promotion/deployment to administrative posts in the following terms:

1. ***Promotion of teachers from one grade to another is governed by the relevant Schemes of Service. Such teachers may be deployed by the Commission in administrative posts such as Principal/Headteacher, Deputy Headteacher, Head of Department, Dean of Studies etc.***
2. ***All administrative posts are deployment posts.***
3. ***A teacher promoted in accordance with a Scheme of Service may be deployed to fill professional posts such as Lecturer, Head of Department, Senior Lecturer, Principal Lecturer etc.***
4. ***A teacher may be promoted to other professional grades such as P2, P1, Approved Teacher IV etc in accordance with TSC Act, Section 4(1)(a) and conditions set out in Schedule XXIII and the relevant schemes of service.***

23. In my view, Regulation 33 sets out different forms of advancement of teachers either through professional grades or by administrative appointment. It is not in contest that apart from the career advancement that comes with deployment to an administrative position, a head teacher, enjoys some monetary compensation by way of a responsibility allowance. It is therefore incorrect to hold that a head teacher who is removed from this responsibility does not suffer loss.

24. Blacks Law Dictionary (Ninth Edition) defines the verb demote as

“To lower a person in rank, position, pay or other status”

25. When the Claimant lost the position of head teacher, he not only lost status but also income. Moreover, the Respondent's witness, Mary Cheptum Rotich testified that the Claimant was removed from headship because the stakeholders at Kyaani Girls Secondary School had complained that he had misappropriated school funds. The logical conclusion therefore is that the Claimant's removal from his position as head teacher was not a routine transfer but some form of disciplinary action taken against the Claimant without giving him an opportunity to be heard.

26. Consequently, the Court finds that the Claimant's redeployment from Kyaani Secondary School to Ikutha Boys Secondary School and then to Migwani Secondary School was a demotion effected on disciplinary grounds. This action was clearly taken without affording the Claimant a hearing as demanded by the rules of natural justice.

Did the Claimant Desert Duty?

27. The Claimant told the Court that in 2007, the Principal for Kitui School where the Claimant was a teacher together with the Kitui District Education Officer asked him to go and open a new school known as Matinyani Mixed Day Secondary School. The Respondent denied any knowledge

of this arrangement.

28. The Court was referred to Regulation 27(4)(a) of the Code of Regulations for Teachers which provides that:

No teacher shall move from one station to another before his/her application for transfer is approved and has received a letter of transfer from the Commission or its Agent, forwarded through the Head Teacher, authorising such a transfer. Such a teacher shall only proceed to the new station after clearance by the Head Teacher and formal release in writing by the Agent for a teacher in a primary school and by the Head Teacher for a teacher in a post-primary institution.

29. The Claimant was accused of moving from Kitui School to Matinyani Mixed Day Secondary without proper authorisation and his defence was that he had in fact been asked by the Kitui School Head Teacher and the District Education Officer, Kitui to go and start the school at Matinyani. The Respondent did not call any evidence to counter the Claimant's account of the circumstances surrounding his move from Kitui School to Matinyani Mixed Day Secondary School.

30. Granted that the Claimant's transfer from Kitui School to Matinyani was not properly effected, I do not think that this by itself renders the Claimant guilty of desertion of duty. In my view, an employee is said to have deserted duty when on their own volition they absent themselves from their place of work. The Claimant states that he was instructed to move to Matinyani by his Head Teacher at the time together with the District Education Officer. It is therefore incorrect to say that the Claimant deserted duty. In fact, when the Respondent needed to speak to the Claimant about what the Respondent took to be an irregular transfer, the Claimant was readily available.

The Claimant's Interdiction

31. While the Claimant was at Matinyani Mixed Day Secondary School, he was summoned to appear before the Board of Governors, Kitui School on allegations of desertion of duty on 24th July 2007. The Claimant was subsequently issued with three interdiction letters dated 13th March, 7th April and 7th May 2008.

32. The Claimant states that the Board of Kitui School had no power to interdict him. The Court was referred to Regulation 66(3) (b) which according to the Claimant denies any Board of Governors the power to summon and interview a teacher facing a charge of desertion of duty. The Respondent submits that this is a misinterpretation of the Regulation and holds that the import of the Regulation is that the Board is not obligated to interview a teacher who has deserted duty since it may not be possible to find the teacher in any event.

33. Further, the Claimant takes issue with the issuing of the interdiction notices in 2008 when the alleged offence had occurred on 24th July 2007. The Claimant also faults the issuing of multiple interdiction notices on the same offence.

34. While the Court is sympathetic to the Respondent's interpretation of Regulation 66(3) (b) of the Code of Regulations for Teachers, the reason for the delay in issuing the interdiction notice is inexplicable. To my mind, interdiction on grounds of desertion seeks to address an immediate wrong committed by an employee.

35. The first interdiction notice was issued to the Claimant on 13th March 2008. Yet the Claimant was said to have deserted duty on 24th July 2007. According to the Respondent, the subsequent two interdiction notices were meant to clarify the charges against the Claimant. It seems to me however that the Respondent was on a fishing expedition to find fault against the

Claimant in order to justify a premeditated decision.

36. Having examined the process undertaken by the Respondent in interdicting the Claimant and issuing him with the warning letter dated 2nd November 2010, the Court has reached the conclusion that said process was irregular. The interdiction and the resultant warning letter were therefore unlawful.

Reliefs

37. In view of the foregoing findings I make the following orders:

- a. The Claimant's re-deployment/demotion from the position of Head Teacher is hereby quashed and set aside;
- b. The Claimant's interdiction by the Board of Governors, Kitui School and the resultant warning letter dated 2nd November 2010 are hereby quashed and set aside;
- c. The Respondent is directed to reinstate the Claimant to the position of Head Teacher without loss of benefits, promotions and incremental credits within the next three months from the date of this award;
- d. The Respondent is further directed to calculate and pay the Claimant's salary and allowances for the entire period he was on interdiction;

38. The Respondent will pay the costs of this case.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 11TH DAY OF JULY 2014

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JUDGE

Appearance:

Mr. Wang'ombe for the Claimant

Ms. Kaluai for the Respondent