



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**

**CAUSE NO. 108 OF 2013**

(Before Hon. Justice Hellen S. Wasilwa on 18<sup>th</sup> September, 2014)

AURA NIMROD ..... CLAIMANT

**-VERSUS-**

THE TEACHERS' SERVICE COMMISSION ..... RESPONDENT

**JUDGMENT**

The claimant herein filed his memo of claim on 30th April 2013 through the firm of Mochama & Co. Advocates. The claimant's case is that he was an employee of respondent working at [particulars withheld] Secondary School in Kisumu County earning a salary of Kshs 41,578/= per month. He had been employed on 8.2.2012 as per copy of his appointment letter. His contract of employment was governed by the provision of the Code of Regulation established by the Teachers Service Commission Act Cap 212 and the Act itself.

It is the claimant's case that on 21.2.2013, the respondent dismissed the claimant from employment for allegedly being of immoral character and having carnal knowledge of one M R on the night of 8.8.2012. The claimant avers that sometimes in October 2012, the student M R denied before the school, full Board of Governors the allegation levelled against the claimant by the Principal of [particulars withheld] Secondary School. The claimant was later interdicted and compelled to face the respondent's disciplinary committee on 12.2.2013 at Kisumu County offices. The claimant avers that his request to bring his witnesses at the hearing was denied and/or refused by the said committee even after he forwarded his witnesses statements to the respondent. On 12.2.2013, the student M R had informed the committee that she was threatened by the Principal into admitting that the claimant had carnal knowledge of her on 8.8.2012 at his residence but the committee proceeded and dismissed the claimant from the teaching service.

It is the claimant's submission that this dismissal was unlawful, unprocedural and Ill-motivated as there was no ground or justification for the same. He avers that it was not established that he had had carnal knowledge with the minor and the there was no medical proof of this alleged sexual intercourse. Furthermore, the claimant avers that the respondent relied on hearsay and unsubstantiated evidence. That they also denied the claimant an opportunity to defend himself adequately and call his witnesses.

The claimant claims against the respondent:-

- (a) A declaration that the interdiction and dismissal from employment by the respondent was unlawful and declare the same null and void.**
- (b) An order for reinstatement to his previous employment.**

**(c) An order for the payment of salary arrears from the months of September 2012 and all dues from the date of termination to the date of payment of exemplary damages, costs of this suit and interest as amounts claimed.**

The respondent on the other hand filed their memorandum of defence on 24.6.2013 through Patricia Naeku Advocate. It is the respondent's case that their contract of service with claimant was governed by Code of Regulation for Teachers (COR) and Administrative Circulars issued from time to time by the respondent and/or its authorized agents.

The respondent's contend that in compliance with the Code of Regulation through their agent, the Board of Governors of [particulars withheld] Secondary School, they did their investigations and took a statement from M R Form 2 Admission No. 2366. The claimant was thereafter on 11.10.2012 invited to the Board of Governors of [particulars withheld] Mixed Secondary School to answer to the allegations levelled against him. After evaluating the evidence of the case, and the circumstances surrounding the same, they determined that the claimant be interdicted to facilitate investigations. The respondent annexed minutes of the Board of Governors meeting of 16.10.2012 as part of their evidence. The claimant was thereafter interdicted. He wrote a response to the interdiction which was duly considered by the respondent. The respondent further convened its disciplinary panel on 12th February 2013 at Teachers Service Commission County Directors' office where the claimant was invited to present his case and was given an opportunity to cross-examine the respondent's witness. The panel further interrogated all the witnesses in the matter and considered both oral and written statements presented at the hearing. They then found claimant guilty and in breach of the Code of Regulation and was therefore dismissed from the teaching service.

It is the respondent's contention that they acted impartially, independently and with utmost professionalism and arrived at a fair, just and appropriate decision based on the merits of the case and evidence adduced before it. The respondent reiterated that they have a legal duty to regulate the teaching service and ensure its employees maintain the highest degree of integrity, honesty and public morality. Accordingly, the respondent's position is that the claimant's conduct and attitude towards work was inappropriate hence the need for disciplinary measure that followed. They aver that the decision was executed with a view to ensure sanity and confidence of all stakeholders in the teaching service. They ask court to dismiss this case accordingly.

The respondent called 2 witnesses the Principal of [particulars withheld] Secondary and their disciplinary officer who reiterated the case of respondent and denied that the claimant asked to call his witnesses during the executive committee meeting. M R – aunt to M R contended that she had her investigations and established that indeed the claimant had a sexual relationship with M R.

I have considered evidence of both parties. The issues for determination are as follows:-

- 1. Whether the claimant was dismissed on valid and sufficient reasons.**
- 2. Whether the claimant is entitled to p**
- 3. Whether or not due process was followed before the claimant was terminated from the service.**
- 4. rayers sought.**

Section 43(1) of the Employment Act 2007 states that:-

**“In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of S. 45.”**

Under S. 5(2);

**“The reason or reasons for termination are the matters that the employer at the time of termination of contract genuinely believed to exist and which caused the employer to terminate the**

## **services of the employee.”**

The question then is whether there existed any such reasons to warrant the respondent's action. It is true allegations of sexual impropriety had been made against the claimant. Investigations began and the Board of Management of the School did the initial investigations. The claimant appeared before the Board of Management on 11th October 2012 for deliberations over the case.

Under S. 66 of the Code of Regulation for teachers (Revised 2005) the fact of a teacher being of immoral character is a good reason to warrant dismissal as a teacher. Was this reason established by the investigation panel? Exh 3 are minutes of the full Board of Governors meeting held in the School on 11.10.2012 at 10.30 am.

Under Min 06/11/10/2012, the case of the claimant was discussed. Several witnesses were called and they gave their evidence. The girl Mercy denied she had carnal knowledge with the claimant. The claimant too denied the allegation. One B C who was a house mate of M stated that M never slept in the house that night of 8th – 9th August 2012. H a form 3B student stated he had seen M with the claimant that night and he saw them leave towards the claimant's house. After hearing these witnesses, the board decided that there was evidence that the claimant committed the alleged offence and should therefore be interdicted. At the Teachers Service Commission Discipline Committee meeting on 12.2.2013 there was also the claimant and other witnesses.

The claimant denied he committed the act. He denied meeting the victim M that evening. He denied a statement shown to him as his and stated that it was not in his handwriting. The girl M also denied having sexual relationship with the teacher and stated that she had been forced by the Principal to write a statement admitting she had had a sexual relationship with the claimant. She also denied even meeting H – her school mate that same evening. B C stated that M did not spend the night with her on the night of 8.8.2012. The Principal and member of Board of Governors stated that they did their initial investigations and found the claimant culpable.

The reason as it stands, is a reason that would warrant dismissal of the claimant from the service. This is a reason which was investigated and despite the denial of the claimant and the victim, the evidence of the witnesses point to the fact that the claimant committed the offence in question. It is a reason the respondent genuinely believed to exist and which caused the respondent to terminate the services of the claimant.

Was due process followed? There is proof that the claimant was interdicted and subsequently invited for a full disciplinary hearing on 12.2.2013. He was allowed to testify and cross-examine the witnesses. The process to be followed is set out in S. 66 of Code of Regulation for teachers. Under S. 66(4) of the Code of Regulation:-

### **“The Commission shall;**

**(a) Inform the teacher concerned on/about the nature of the allegations made against him/her afford that teacher adequate time for the preparation and presentation of his/her defence and the opportunity of being heard in person.**

**(b) Act on general evidence or statements relating to the character or conduct of the teacher concerned and shall not be bound to receive and consider only evidence admissible in a court of law and**

**(c) Administer oath and may for the purpose of dealing with any matter before it, summon any person to attend and give evidence and to produce any relevant documents**

**(d) Consider only those allegations that the teacher has been informed and charged with.”**

The respondent indeed followed these processes and invited the claimant to a personal hearing. In

the initial stages, he was also accompanied by union officials in line with the provisions of S. 41 of the Employment Act 2007 which provides for a right to be heard as follows:-

**“(1) Subject to Section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reasons for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.**

**(2) Notwithstanding any other provision of this part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under Section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within sub – section (1) make.”**

I do find that due process was followed in the circumstance. Is the claimant entitled to the prayers he has sought? I do not find any malicious or wrong doing on the part of respondent. The punishment meted out on claimant is as provided by the law. In the circumstances, I find the case of the claimant has no merit and I dismiss it accordingly. There is no order as to costs.

**HELLEN S. WASILWA**

**JUDGE**

**18/9/2014**

**Appearances:-**

Ondego for claimant present

Mumalasi h/b for respondent present

CC. Wamache