



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

CAUSE NO 2482 OF 2012

C.O.G.....CLAIMANT

VS

TEACHERS SERVICE COMMISSION.....RESPONDENT

AWARD

Introduction

1. C.O.G the Claimant in this case was employed by the Respondent on 1st September 1984, initially as an untrained teacher and later as a P1 teacher effective 29th September 1997. He served in various stations, the last one being Y.P.S. Following his dismissal on 5th October 2010, the Claimant sued the Respondent by Statement of Claim dated 10th December 2012. The Respondent filed a Statement of Defence on 4th November 2013 and the matter was heard on 15th May and 20th June 2014.

The Claimant's Case

2. On 13th July 2010, the Claimant was interdicted on allegations of engaging in sexual intercourse with F.A, a pupil at Y.P.S. He was subsequently invited for a disciplinary hearing on 5th October 2010 at the District Education Office in Rongo and thereafter dismissed. His appeal was disallowed and the dismissal upheld.

3. The Claimant denies the allegations made against him and alleges witch hunt by the then Deputy Head Teacher at Y.P.S, N.O (Defence Witness No. 2). Specifically, the Claimant states that the said N.O coached F.A to falsely implicate him. Additionally, the Claimant claims that during the disciplinary proceedings he was denied an opportunity to call witnesses.

4. The Claimant seeks the following:

- a) A declaration that the disciplinary process carried out by the Respondent culminating with his dismissal was tainted with substantive and procedural unfairness;
- b) An order compelling the Respondent to reinstate him without loss of seniority, continuity, benefits and privileges;

- c) In the alternative an order compelling the Respondent to compensate him for unlawful loss of employment;
- d) Costs of the case.

The Respondent's Case

5. In its Statement of Defence dated 1st October 2013 and filed in Court on 4th November 2013, the Respondent admits having employed the Claimant effective November 1984 initially as an untrained teacher. Sometimes in June 2010, the Respondent through its agent, the District Education Officer, Rongo District received information that on diverse dates in March 2010, the Claimant had carnal knowledge of his pupil, F.A.
6. The matter was first raised with the then Head Teacher at the School, P.J.O (Defence Witness No 1) by F.A's father, J.O.M (Claimant's Witness No 3) who complained that his daughter often went home late and sometimes disappeared from home over the weekend. The Head Teacher asked the Deputy Head Teacher to investigate the matter.
7. The Deputy Head Teacher, alongside two other teachers, B.A.O (Defence Witness No 4) and M.A.O (Defence Witness No 5) talked to F.A who told them that she had had sexual intercourse with the Claimant on several occasions and that he had given her some money ranging from Kshs. 200 to 50. At a staff meeting convened by the Head Teacher on 5th July 2010, F.A confirmed that she had severally engaged in sexual intercourse with the Claimant.
8. A meeting of the School Management Committee was convened on 7th July 2010 at which F.A and other witnesses adduced evidence in the presence of the Claimant who was also given an opportunity to defend himself. At this meeting, F.A stated that she had had sexual intercourse with the Claimant at least three times and that the Claimant had given her Kshs. 200/=, 100/= and 50/= respectively. The Respondent reached a decision to interdict the Claimant on 13th July 2010 and the Claimant wrote a statement of defence on 26th July 2010.
9. Respondent through its agent, the District Education Officer, Rongo conducted investigations by taking written statements from F.A and her father P.J.O alongside teachers at Y.P.S. F.A was said to have learning difficulties and her statement was therefore reduced into writing in the presence of the District Human Resources Officer and the District Quality Assurance Officer, Rongo as well as the Area Education Officer, Dede Division.
10. As provided under the Code of Regulations for Teachers, the Respondent convened a Disciplinary Panel at the District Education Office on 14th September 2010 at which the Claimant made his representations. F.A and her father J.O.M also testified alongside other witnesses. The Disciplinary Panel arrived at the conclusion that the Claimant had breached the Code of Regulations and recommended his dismissal and removal from the Register of Teachers.
11. The Respondent states that the evidence adduced by F.A during investigations as well as during the hearings before the School Management Committee and the Disciplinary Panel in Rongo was tendered voluntarily without any coercion or coaching. Further, the Claimant did not avail any witnesses nor did he raise any objection as to the manner in which the proceedings were being conducted.

Findings and Determination

12. The issues for determination in this case are as follows:
 - a) Whether the Respondent had a valid reason for dismissing the Claimant from employment;

- b) Whether in effecting the dismissal the Respondent observed due process;
- c) Whether the Claimant is entitled to the reliefs sought

Reason for the Dismissal

13. The Claimant's dismissal letter dated 5th October 2010 reads as follows:

“I am directed by the Teachers Service Commission to say that the Commission has carefully considered your case and has determined you should be dismissed from the teaching service with effect from the date of this letter for the following reasons:-

While teaching at Y.P.S, you were of immoral behavior in that:-

You had sex three times with your pupil F.A (STD 6W). The act took place at the corner of the staffroom after 5 pm between 6th March, 2010 and 12th March, 2010 when you were a teacher on duty by giving her money of Kshs 200/=, Kshs 100/= and Kshs 50/= in each meeting.

J.LELELIT

FOR: SECRETARY

TEACHERS SERVICE COMMISSION”

14. Section 43 of the Employment Act, 2007 provides that:

(1) In any claim arising out of termination of a contract , the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

15. In *Jessy Olukutukei Vs Feed The Children Kenya & Another [2014] eKLR* this Court held that:

“The burden on the employer imposed by Section 43 of the Employment Act, 2007 is to establish a valid reason that would move a reasonable employer to terminate the employment of an employee”.

16. Prior to reaching the decision to dismiss the Claimant, the Respondent through its agents, undertook investigations both within the School and at the District Education Office level. All the five witnesses called by the Respondent were consistent on the content of the complaint leveled against the Claimant by F.A at different fora within the disciplinary chain.

17. Further, it was common cause that prior to the Claimant's dismissal, F.A and her father had testified against the Claimant. What is new is that F.A is said to have recanted her testimony stating that she had been coerced by the Deputy Head Teacher to implicate the Claimant. To support this position the Claimant produced a letter dated 26th March 2013 allegedly written by F.A stating as follows:

“My name is F.A St 6W 2010 of Y.P.S Raaner Zone, Dede Division, in Rongo District.

I want to say the truth, my teacher the deputy Mrs. N.O told me to say that Mwalimu G is my friend.

I want to speak the truth before God that Mwalimu G is not my friend.

From Y.P.S

Yours faithfully

F.A”

18. In the course of the hearing, Counsel for the Respondent contested the authenticity of this letter and asked that F.A be given a plain sheet of paper to exhibit her writing skills. F.A wrote as follows:

“mwalimu Getambe is nto Frands” (sic)

19. There was clearly no resemblance between the writing styles of the letter dated 26th March 2013 and what F.A wrote in Court. Additionally, the Court observed that F.A thumb printed the letter dated 26th March 2013 giving the impression that she was not the author of the said letter. At any rate, it was admitted by both parties that F.A had learning difficulties.

20. Taking all these facts into account the Court has arrived at the conclusion that F.A did not author the letter dated 26th March 2013 and since no evidence was adduced as to the circumstances under which the letter was written, the Court rejects it as a futile attempt to save the Claimant's job.

21. The Claimant's case takes the line that his woes were caused by the Deputy Head Teacher who held a grudge against him because the Claimant was in charge of examinations. There was however no explanation as to why this seemingly normal arrangement in a school would cause such bad blood between the two teachers as to cause one to falsely implicate the other in such a serious offence.

22. The Deputy Head Teacher testified that when she was asked to investigate the offence, she had served at Y.P.S for less than a year. In the absence of further explanation as to the nature and magnitude of the alleged grudge, the Court rejects this line of argument as another futile attempt to save the Claimant's job.

23. F.A's father, J.O.M wrote two statements. In the first one dated 29th June 2010, he is categorical that at a meeting held on 22nd June 2010, F.A stated that the Claimant had had sexual intercourse with her in the staffroom and that he had given her money ranging from Kshs. 200 to 50. J.O.M concludes this statement by asking that severe action be taken against the Claimant and other teachers engaged in similar behaviour. In the second statement dated 26th March 2013, J.O.M states that he has no issue with the Claimant. The Court found this drastic change of heart intriguing.

24. Further, the Court found the apparent absence of F.A's mother in her daughter's case and the pronounced involvement of her father unusual. Indeed in his testimony, F.A's father admitted that in his culture, the mother of a daughter in a similar situation as F.A would in the ordinary scheme of things be more involved than the father. In the absence of any explanation of these anomalies the Court concludes that J.O.M is a compromised witness and consequently rejects his evidence.

25. In light of the foregoing, the Court finds that the Respondent has established a valid reason for the Claimant's dismissal within the requirements of Section 43 of the Employment Act, 2007.

The Process

26. The offence facing the Claimant falls under what is commonly known as gross misconduct.

Section 41 of the Employment Act, establishes the procedure for handling cases of misconduct as follows:

- (a) That the employer has explained to the employee in a language the employee understands the reasons why termination is being considered;
- b) That the employer has allowed a representative of the employee being either a fellow employee or a shop floor representative to be present during the explanation;
- c) That the employer has heard and considered any explanations by the employee or their representative;

27. In addition, Section 12 of the Act requires an employer who has more than 50 employees in its employment, to document internal disciplinary rules for use in handling disciplinary cases. In this regard, reference was made to the Teachers Service Commission Act which outlines the procedure to be followed in exercising disciplinary power granted to the Commission under the Act. The Court was also referred to Regulation 66 of the Code of Regulations for Teachers.

28. The disciplinary process against the Claimant began at the School and terminated at the District Education Office in Rongo. When the Claimant appeared before the School Management Committee and later before the Disciplinary Panel

in Rongo, he was given an opportunity to face his accusers and to present his defence. Although he claims that he was denied an opportunity to present witnesses, no evidence was adduced to support this averment and there was also no evidence that the claimant objected to any part of the disciplinary proceedings.

29. Having examined the disciplinary process adopted in the Claimant's case against the relevant provisions of the Employment Act, the Teachers Service Commission Act and the Code of Regulations for Teachers, I find that in effecting the Claimant's dismissal, the Respondent followed due process. I further find that the Respondent was justified in interdicting the Claimant without pay in light of the offence he was facing as defined in Regulation 68 of the Code of Regulations for Teachers.

Final Orders

30. Flowing from my findings that the Claimant's dismissal was justifiable and lawful both substantively and procedurally I proceed to dismiss his claim and uphold his dismissal.

31. In view of the Claimant's economic and stated health status, I direct that each party will bear its own costs.

Orders accordingly.

DATED SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS

12TH DAY OF NOVEMBER 2014

LINNET NDOLO

JUDGE

Appearance:

Mr. Nyabena for the Claimant

Ms. Naeku for the Respondent