



REPUBLIC OF KENYA
IN THE INDUSTRIAL COURT OF KENYA AT NAKURU

CAUSE NO. 4 OF 2013

(Formerly Nairobi Cause No. 1082 of 2011)

SARAH NYANCHAMA RATEMO-KIZITO.....CLAIMANT

-VERSUS-

TEACHERS SERVICE COMMISSION.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 28th June, 2013)

JUDGMENT

The claimant Sarah Nyanchama Ratemo-Kizito filed the statement of claim on 05.07.2011 through Kalya & Company Advocates. The claimant prayed for judgment against the respondent for:

- a. An order that the claimant be reinstated forthwith.
- b. An order that the claimant be paid all her salary and benefits from the time of suspension until the date of reinstatement.
- c. Costs of the suit.

The respondent's statement of defence was filed on 28.07.2011 through Moraa Ondieki Advocate praying for a refund of salary overpayment of Kshs.267,939/= paid from 8th August, 2009 to 7th April 2010 and for claimant's suit to be dismissed with costs. The claimant filed a supplementary statement of claim on 02.08.2011.

The case was heard on 13.05.2013 and on 4.06.2013. The claimant gave evidence to support her case. The respondent's 1st witness (RW1) was Kevin Odhiambo Anywour, the respondent's Chief Human Resource Officer. The respondent's 2nd witness (RW2) was Henry Nyamboki Onyando, the claimant's supervisor and Principal of Riabigutu P.A.G Secondary School in Kisii County.

The claimant testified as follows:

- a. The claimant was employed by the respondent on 17.10.2005 as a teacher on permanent and pensionable terms of service and deployed to Riabigutu PAG Secondary School to teach Biology and Chemistry as per the letter of offer of employment on permanent terms dated 13.10.2005 being appendix 1 on the statement of defence.

- b. She was dismissed from employment by the letter dated 2.07.2010 being appendix 18 on the statement of claim. The letter addressed to the claimant stated as follows:

“CODE OF REGULATIONS FOR TEACHERS – REGULATION 66(6) (b) (iii) – DISMISSAL

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:

You breached the Teachers Service Commission Act. Cap 212 Section 7(3) of the Laws of Kenya and Regulation 66(2) (e) of the Code of Regulations for Teachers in that; you deserted duty at Rabugutu PAG Secondary School w.e.f 8/8/2009 to date.

NB: Salary Overpayment will be followed up w.e.f 8th August 2009 to date of last pay.

MUNENO N. WILLIAM

FOR: SECRETARY

TEACHERS SERVICE COMMISSION”

- c. She worked in second term and first terms of 2009. 2nd term ended in the 1st week of August, 2009. 3rd term was to start in the 1st week of September, 2009. In August, 2009, she was on holiday as the school had closed. She was attending school based learning at the Moi University during the school holidays. During the August vacation, her husband was also unwell and he needed her care. She was not eligible for a transfer and her supervisor, the school's Principal advised her to apply for a study leave in the circumstances of her case. She applied for the study leave as per appendix 2 on the statement of defence as she left the same with the principal and which the respondent has stated was received on 28.08.2009. After leaving the forms with the Principal, the claimant testified that he promised to communicate. The claimant left for her matrimonial home in Eldoret.
- d. While on the August vacation, she telephoned the Principal to request for permission to be late in reporting for third term and the Principal granted the permission on phone. She reported at the school one week into third term. As requested and permitted, she was late one week only.
- e. Upon reporting for third term, the Principal informed her that there had been a problem and he advised her to go back home and wait for communication.
- f. She received the Principal's communication by telephone in late June, 2010 on a date she did not recall. The Principal informed her that he had her letter from the respondent and he needed her address to forward it to her. The letter was an invitation for a disciplinary case and it is dated 21.05.2010 being appendix 1 on the memorandum of claim. It invited the claimant for hearing of her disciplinary case at the respondent's head office in Nairobi on 2.07.2010 at 8.30 am. The claimant attended as scheduled.
- g. Up to the hearing date, she had not received the interdiction letter dated 7.04.2010 being appendix 6 on the statement of defence. The letter invited the claimant to make a statement to the respondent in view of alleged desertion of duty with effect from 8.8.2009. Counsel for the respondent Patricia Naeku filed in court the copy of the certificate showing that the interdiction letter had been dispatched to the claimant on 27.05.2010 under serial No.155 of the respondent's list of registered mails with the Postal Corporation of Kenya. Whether the claimant received the interdiction letter or not, it is obvious that the 21 days mentioned in the interdiction letter lapsed on 28.04.2010 long before the dispatch of the letter on 27.05.2010. The claimant testified that she received the interdiction letter on 2.07.2010 as per her acknowledgement in appendix 10(a) on the statement of defence.
- h. Appendix 10(b) on the statement of defence being the record of the disciplinary hearing did not reflect the true responses she gave at the hearing. It was not true as per page 5 of the proceedings that she did not give a statement in self-defence because her statement as given is appendix 8 on the response and having relied on the statement, the disciplinary committee failed to consider her

defence. In particular, the committee failed to consider her difficulties associated with the ailment of her husband arising from the 2008 post-election violence, the plea on the plight of her family and the other issues stated in her statement.

- i. She appealed against the dismissal decision by her letter of 27.07.2010 as per appendix 3 on the memorandum of claim. The appeal was disallowed because she had been heard by the disciplinary committee.
- j. The Principal did not attend the hearing and the claimant had no chance to examine him on his advice on the study leave and other matters in issue.

RW1 testified as follows:

- a. The respondent received the claimant's application for the study leave dated 28.08.2009 to study a masters degree in biology at Moi University. The study leave committee declined to grant the leave in view of the prevailing policy being appendix 3 on the statement of defence. The reason for declining the leave was because the respondent had not served for the mandatory five years as per clause 5 of the policy. The meeting of the committee was held on 27.10.2009. The communication conveying the decision declining the study leave was by the letter dated 27.10.2009 addressed to the claimant through her Principal as per appendix 4 on the statement of defence.
- b. The claimant was entitled to attend studies during holidays under the school based programme and in which event she did not need to seek the respondent's permission.
- c. The Principal had no authority to approve or grant study leave. His role was to forward the application to the respondent.
- d. The respondent's Appeals Tribunal, now repealed, was an autonomous statutory body. The respondent could only review its decision internally but had nothing to do with the Tribunal's decisions.
- e. From 8.8.2009 to October 2009, the claimant earned but did not work hence the claim for the refund.
- f. The claimant wanted a transfer to study and be with her husband in Eldoret, yet she had not served for five years in her first station of appointment as per the prevailing policy.
- g. The respondent embraced a policy of deploying teachers to join spouses on health or insecurity grounds. There was no respondent's policy that spouses are deployed near their matrimonial home.
- h. The record of the disciplinary hearing was clear that whatever the claimant said when the charges were read to hear was not recorded. Only the chairperson signed the record and the other two commissioners that were present did not sign to agree or disagree with the findings. The finding that there was no statement of defence was not true because the record is clear that the statement had been forwarded by the claimant as per appendix 8 on the statement of defence.
- i. The witness did not know whether the claimant had to perform any duties during the August 2009 vacation as she was not obliged to be in school and he could not tell if the interdiction letter was ever delivered to the claimant.
- j. In absence of any duties during the vacation, desertion was 14 days from the date of absence from duty being 14 days from 7.09.2009 when schools opened and therefore accruing on 21.09.2009. In the event of desertion, there is no duty on the part of the respondent to trace the teacher.

RW2 testified as follows:

- a. Third term of 2009 commenced on 8.9.2009 and the claimant never telephoned RW2 to seek permission to report a week late after the commencement of the term.
- b. He never saw the claimant's study leave forms. He received a copy of the claimant's interdiction letter and forwarded a copy together with the August 2009 pay slip. The interdiction letter was dated 7.4.2010. He never gave the claimant permission to be away from school.
- c. He did not file in court the daily teacher attendance record which was the best evidence to show the claimant never reported on duty in 3rd term 2009.
- d. He did not fail to sign part II of the study leave application form. It was never given to him by the claimant.

- e. He reported the desertion to the respondent on 24.09.2009

The claimant's written submissions were filed on 11.06.2013 and the respondent's written submissions were filed on 18.06.2013.

The court has taken into account the pleadings, the evidence and the submissions and makes the following findings on the issues for determination.

1. The first issue for determination is whether due process was followed in terminating the claimant's employment. The first crucial issue is whether the respondent's interdiction letter was served upon the claimant. The interdiction letter was the notice meant to inform the claimant about the allegations as leveled against her. The court finds that the claimant never received the interdiction letter because the respondent acknowledged that fact before commencement of the disciplinary hearing by requiring the claimant to state in writing that she had read the letter and was ready for the hearing. It is the opinion of the court that if the claimant had received the letter prior to the hearing then she would have written acknowledging the receipt and not merely reading it. The court finds that because the claimant had not received the letter prior to the hearing date, the respondent invited her to read it before the day's disciplinary hearing commenced.

Whether the claimant received the interdiction letter or not, it is obvious that the 21 days mentioned in the interdiction letter lapsed on 28.04.2010 long before the dispatch of the letter on 27.05.2010 as per the certificate of postage filed in court. Accordingly, the court finds that even if the claimant was desirous of filing a statement in self exculpation, the same would have been and was in fact out of time by reason of the respondent's failure to dispatch the interdiction letter on time. RW2 admitted and stated that he had forwarded the interdiction letter together with the claimant's August 2009 pay slip. The witness did not state the date of the forwarding but it is the view of the court that it is not believable that the interdiction letter dated 7.04.2010 could be forwarded to the claimant together with the August 2009 pay slip long before its issuance. Further, the file copy of such forwarding by RW2 was never presented to the court as would be the case in typical management of public records.

The respondent submitted that the claimant filed the statement as forwarded by her letter of 22.06.2010 at appendix 8 of the defence so that she must have received the interdiction letter. However, in the forwarding letter the claimant clearly referred to the respondent's invitation for hearing letter of 21.05.2010 being appendix 9 on the defence as basis of her response. She clearly stated that she did not receive the interdiction letter and she did not know the particulars of the case against her. The respondent, in the court's opinion, failed to take remedial measures by issuing a belated letter of interdiction or by delivering to the claimant a copy of the earlier letter with a variation in the response time as just.

Thus, the court finds that the respondent failed to accord the claimant a fair chance for self defence and exculpation because the interdiction letter was dispatched late and the respondent's conduct at the hearing was such that the letter had not been received by the claimant.

As relates to the actual hearing of the disciplinary case, the court makes the following findings:

- a. The respondent did not accord the claimant presence of a person of her choice or a union representative as envisaged in section 41 of the Employment Act, 2007.
- b. The findings were irreparably misconceived or defective because the finding was that there was no statement of defence whereas the statement was obviously available as presented by the claimant and filed by the respondent in this case. The record does not show the disciplinary hearing's record of the claimant's response to the charges and if the finding is that the respondent's statement was also absent, it is difficult to resist the finding that the claimant suffered serious miscarriage of justice because the grounds and material leading to the imposition of the punishment of dismissal remains at large.
- c. Only the chairperson of the committee and not the other two commissioners present at the

disciplinary hearing signed the proceedings. In such circumstances, it is the opinion of the court that the proceedings as recorded amounted to failure by the other two commissioners present to exercise their good judgment and authority by directing their respective minds to the claimant's case. It is the opinion of the court that in absence of their respective signatures and record of their vote or opinion on the matter, it is difficult to make sense of the committee's decision in the matter.

The court therefore, finds that due process was not followed in terminating the claimant.

2. The second issue for determination is whether the claimant deserted duty, that is, the reason for termination was genuine as envisaged in section 43 of the Employment Act, 2007. The claimant is said to have deserted duty with effect from 8.8.2009. In view of the evidence on record, it is clear that the claimant was entitled to be away from duty during the school holidays in August 2009 and in particular to attend the school based post-graduate studies. RW1 confirmed that the claimant would be entitled to attend her masters' classes during the holidays under what the respondent called school based studies. She did not need the respondent's study leave to attend the school based studies. In any event, RW2 did not testify that the claimant was scheduled to perform any duties during the August vacation. Hence, the court finds that it cannot be said that the claimant deserted with effect from 8.8.2009. Further, RW2 did not testify and the respondent did not submit on any explanation whether the respondent's decision declining to grant the study leave was ever communicated to the respondent. It is notable that the respondent did not account on how the claimant's study leave application forms reached its office and on that point, the court trusts the claimant's account that she left them with RW2. RW2 did not deny receiving the respondent's decision on declining the study leave and did not offer evidence on performing his duty to forward the same to the claimant. If the forms had not been forwarded to the respondent by RW2, the natural flow of things was for the respondent to address the claimant directly and to demand of her to comply with the forwarding procedures. In view of the failures and glaring gaps by the respondent and its agent RW2 to render plausible explanations, the court finds that the claimant's evidence that she reported for third term one week late upon RW2's permission and was asked by RW2 to go and wait for communication is truthful. RW2 did not produce any evidence to show that he recorded the claimant's absence in the daily record of the teachers present and absent as per the respondent's operational policies.

Accordingly, the court finds that the respondent did not have a genuine reason to terminate the claimant's employment.

3. The third issue for determination is whether the claimant's termination or dismissal was unfair. The court has found that the reasons were not genuine and the relevant due process was not followed. The court finds that the termination was unfair procedurally and substantively.
4. The final issue for determination is whether the parties are entitled to the remedies as prayed for. The court makes the following findings:
 - a. The claimant has prayed for reinstatement. The factors to take into account in ordering a reinstatement are spelt out in section 49(4) of the Employment Act, 2007. In this case, the claimant is willing to resume employment in the teaching service of the respondent. The termination occurred in circumstances whereby the respondent and its agent RW2 failed in their respective statutory and public duty to afford the claimant due process and to promptly ensure that the claimant was accorded full policy information and decisions affecting her employment. The claimant is a well educated woman specializing in the subjects of biology and chemistry and that is an exceptional opportunity for the respondent to work towards the gender parity in its teaching services especially the quarter of women engaged to teach science subjects. The claimant was serving in her initial years of service having graduated from the Moi University on 7.11.2003 and employed on 13.10.2005 as a graduate teacher to serve up to the mandatory retirement age of 60 years. Her pay slip for August 2008 being appendix 7 on the statement of claim shows that she was scheduled to retire on 31.08.2033. The court has also considered that the claimant as a public

officer was entitled to due process during the disciplinary action as conferred under Article 236 (b) of the Constitution but which was contravened by the respondent. Thus, the court finds that the claimant is entitled to reinstatement as prayed for and with effect from the effective date of the unfair termination being 2.07.2010. Under section 49 (3) (a) reinstatement has the effect of the employee being treated as an employee in all respects as if the employee's employment had not been terminated and the court finds that the claimant is entitled to all salaries, allowances and any other due benefits effective the date of reinstatement.

- b. The respondent has prayed for refund by the claimant of Kshs.267,939/= being salary overpayment from 8.8.2009 to 7.04.2010. In view of the finding that the claimant was unfairly terminated, the court finds that the respondent is not entitled as prayed. In making the finding, the court's view is that the continued payment of the salary over the period of the eight months during which the respondent ought to have known that the claimant was not working goes to show the casual and unprofessional manner in which the claimant's case was handled throughout the disciplinary process.

In conclusion, judgment is entered for the claimant against the respondent for:

- a. reinstatement of the claimant in the respondent's teaching services as a graduate teacher to teach biology and chemistry with effect from the effective date of the unfair termination being 2.07.2010;
- b. the respondent to pay the claimant all the salaries, allowances and other due benefits with effect from 2.07.2010 and by 1.09.2013 failing which interest on the principal amount to be payable from the date of the judgment till full payment;
- c. the respondent to deploy and to deliver to the claimant through her Advocates on record the deployment letter to any secondary school or relevant learning institution within Uasin Gishu County by 1.08.2013;
- d. dismissal of the respondent's counterclaim; and
- e. the respondent to pay costs of the case.

Signed, dated and delivered in court at **Nakuru** this **Friday, 28th June, 2013.**

BYRAM ONGAYA

JUDGE