



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT KISUMU

CAUSE NO. 3/2012

(Before Hon. Justice Hellen Wasilwa on 25th September, 2013)

JOSEPH OKOTH OPIYO CLAIMANT

-VERSUS-

TEACHERS SERVICE COMMISSION RESPONDENT

JUDGMENT

The claimant herein Joseph Okoth Opiyo filed his memo of claim on 3/12/2012 through the firm of K'owino & Co. Advocates. His contention was that he was unlawfully dismissed by the respondent who failed to pay him his severance pay/gratuity pay in lieu of notice and damages for breach of the employment contract.

The respondents were duly served and filed their memorandum of defence on 24.6.2013 through Zipporah Mambo Advocate. The claimant subsequently sought and was granted leave to file an amended statement of claim.

The claimant's case is that he is a teacher by profession and was previously teaching at [particulars withheld] Primary School in Kisumu county. In November 2010, he was interdicted by the respondent for allegedly having carnal knowledge of his pupil called C. He indicates that before the interdiction, he was not accorded any hearing but was just summoned by the head teacher of his former school on 28/11/2010. He went to the school where also his children were schooling. He found the head teacher and the area A.E.O with 3 girls with some letters. The girls were E, O and another. He was asked if he knew the children and he answered in the affirmative. He was informed that the children had come to his house and he was having a sexual affair with them. He was asked to write a statement which he did and went back home. The claimant avers that he is conversant with disciplinary proceedings of the TSC. These proceedings must involve the school committee before court proceeds to the TSC. The school committee is made up of the headmaster, the deputy headmaster, parents representatives and one or 2 teachers concerned with guidance and counseling. If such a committee finds him culpable they refer the case to the DEO's office for further action. In his case however, the claimant avers that his fate was decided without the involvement of the school committee. According to the interdiction letter, he was of immoral behaviour and had had carnal knowledge of a pupil C.A. The date of such action was mentioned. The alleged action is also of a criminal nature but in this case, no report was made to the police and there was no medical report to ascertain these allegations. This case was also never recorded in the school log book and the head teacher never made his report.

He however attended a meeting on 11.10.2011 – a disciplinary committee meeting of the TSC. He was accompanied by his witnesses – his two nephews he was staying with but they were not given chance to talk. There were also the two girls who were called as witnesses and they said they left C behind with the

claimant. The claimant's assertion is that the disciplinary hearing was not conducted properly as the evidence adduced was not conclusive. He avers that whereas C, the girl alleged to have been defiled told the Committee that she reported the defilement to her mother a week later, the mother said she learnt of the issue through the head teacher. Other than this, the head teacher confirmed to the disciplinary committee that the management committee did not handle this case as was the procedure. The claimant's contention is that the Commissioners who heard this case were casual and never considered the contradictions in evidence.

The claimants further contends that he was called on 28/11/2010 and informed of this allegation whereas the alleged incident occurred in May 2010 and so the case took long as evidence was being cooked up. Claimant admits he gave the girl C 10/= but this was to enable her buy a card to go to hospital for which she had asked for and there was no medical evidence to prove the assertions. The claimants seeks this court's help to be reinstated and also to be paid his salary arrears. He also seeks to be paid costs of this suit.

In cross examination by the respondents counsel, the claimant told court that he made a statement before assessment committee. He also told court that in his statement of claim there is a letter **JO1** indicating that he was asked to pay Ksh 20,000/= to the girls guardians in order for the case to be dropped. The head teacher forwarded to him a text from the guardian. He also says he never received an amended interdiction letter indicating the date of the offence. He was expected to make a defence which he did. He also says that the school management committee was not involved in this case and that the student was of another school he was not teaching. He says that he attended the disciplinary proceedings where the girl said he had sex with her and she reported to her aunt P. His assertion is that proper disciplinary procedures were not followed.

In re – examination by his counsel, the claimant's position is that he stopped working in November 2010 and his interdiction letter is dated 16.6.2011. This letter was addressed to [particulars withheld] Primary school yet he had ceased working there so he never got the letter. Further he says that the Assessment Report does not indicate that the school management committee sat in his case.

The respondents on the other hand filed their memorandum of response on 24.6.2013 through Zippora Mambo Advocate. The respondents also called one witness an Assistant Deputy Director in-charge of teachers discipline. The respondents case is that this matter came to the knowledge of the Teachers Service Commission, TSC in October 2010. It was alleged that the claimant had had carnal knowledge of C of [particulars withheld] Primary. After this, the TSC mounted investigations in the matter through the DEO Nyakach District. Investigations were done through the office of Quality Assurance and Standards Office. The teacher was interrogated on 28/11/2010 together with complainants and 2 other witnesses. The investigations revealed that he had a case to answer. A report was done to this effect by the District Quality Assurance and Standard Committee and submitted to the District Office with all statements of those involved. Based on this, the DEO interdicted the teacher on 24.11.2010. The TSC has powers to do further investigation. The TSC's investigation led to the amendment of the letter of interdiction dated 16.6.2011. The claimant was then summoned to the TSC for a hearing which took place on 11.10.2011. The claimant was heard and given a chance to cross examine the witnesses. At the end of the hearing, a finding was made that he had carnal knowledge of the girl C and so he was dismissed from the service. On dismissal, a teacher is not entitled to any benefits. That he cannot also be reinstated unless the court orders so. He asked the court to dismiss the claimant's case.

In cross examination by counsel for claimant, the respondents witness told court that the TSC relied on oral evidence of the girl and other witnesses. That medical evidence is not necessary in such a case. However, he says that in Appendix 2, part 5 it is stated that medical evidence showed that the pupil was sexually active. That this medical report is not in the file. He also state that the assessment report is not a proceeding of the disciplinary committee of TSC and that the claimant was not given an opportunity to interrogate the witnesses. However his interdiction was based on this report. He says that it is not clear who informed the DEO of this case but ordinarily it is the head teacher who should inform him. He admitted that pg 6 of the proceedings indicate that the guardian said the head master informed her of the allegation and the girl said she is the one who informed the guardian at pg 4 and therefore there are some

contractions in the 2 statements. He further told court that the girl was consistent that Mr. O had had carnal knowledge with her. Further the witness states that the school management Committee was not involved as the pupil was not in the teacher's school however the policy does not provide for an exception.

The respondents witness further stated that in this case the management committee never met and there were no minutes of such a committee forwarded to the TSC. There was also no report of the head teacher's. That procedures were not flouted as the claimant and pupil were from different schools and so the DEO had to handle the case. This however is not in TSC disciplinary committee rules. The witness denied that there were witnesses not heard on 28.10.2010. He says that the claimant appeared before the Quality Assurance Committee and he was asked to write a statement in which he stated that his two nephews were sitting outside the house at the time. According to the witness, the claimant committed a professional misconduct and also a criminal offence but he was not interdicted because of a criminal offence but because of immoral behaviour. He also admitted that for immoral behaviour there is need for a report from the headmaster, school management committee and also exhibits are needed e.g gifts, photos, love letters or court proceedings and judgment. He concludes that the standard of disciplinary proceedings and rules of natural justice were not met to a large extend.

In re – examination, however he told court that the Commission relies on general oral and written evidence and is not bound by rules of evidence. That according to the complainant, the alleged sexual intercourse took place. He says the complainant never asked to bring his witnesses.

At the close of the evidence for both parties, they also filed their respective submissions. I have considered the evidence adduced and submissions filed. The issues for determination are as follows:-

1. Whether the disciplinary procedure followed in disciplining the claimant met the threshold.
2. Whether following the said procedure adopted, there was proof of misconduct on claimant part to warrant dismissal.
3. Whether the claimant is entitled to any remedies as he has prayed before this court.

Under Section 45 (2) (c) of Employment Act 2001:-

“A termination of employment by an employer is unfair if the employer fails to prove that the employment was terminated in accordance with fair procedure.”

The issue of procedure is further expounded at Section 45(5) which states that:-

“In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for purposes of this section, a labour officer, or the Industrial Court shall consider;

a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision

b) ---”

c) the extent to which the employer has complied with any statutory requirements connected with the termination including the issuing of a certificate under Section 51 and the procedural requirements set out in Section 41”

Section 41 deals with the requirement for hearing before dismissal and the need to have the hearing being fair and conducted in the presence of a representative of the employees Union or a person chosen by the said employee. What then was the fair procedure in this case to be. According to the Teachers Service Disciplinary Rules, Rule 8.2.1, where investigation is being conducted on allegations against a teacher, the teacher shall be invited to defend himself and during the preliminary hearing before the School Management Committee. He is supposed to be given an opportunity to defend himself against the

allegations. The witness if any, is to be interviewed in the presence of the teacher who is allowed to cross – examine them and where the witness has written statement, the same should be read to the teacher.

While being cross – examined in this court, the RW1 herein admitted that preliminary hearing before the School Management Committee did not take place. Under the same discipline rules, there is also need to have a preliminary hearing done by the Quality Standard Assessors. This hearing before the Standard Assessment Officer is to be conducted in presence of the teacher who is also invited to defend himself. These provisions were flouted by the respondent.

On the hearing itself before the TSC, respondents Exh 2 shows some contradictions as pointed out by the girl C as to who informed her mother. C stated that she reported the incident to her mother but her mother said that the head teacher is the one who informed her. This is a contradiction the hearing Committee should have taken note of but which was ignored.

Indeed as submitted by the claimant the procedural requirements for hearing of this disciplinary case were not adhered to. The claimant was also not allowed to call his 2 witnesses and he stated this even in his appeal which was not considered by the Committee.

The second issue is whether there is proof of the misconduct on claimant part. Given the unprocedural adherence to the rules and regulations provided in the law, it is actually not material whether there is proof of the misconduct. In any case the evidence adduced shows that the case took 5 months to be investigated from the time the alleged offence was committed. There is no explanation as to why this took this long. In any case, there is evidence that the girl's guardian had demanded Ksh 20,000/= in order to drop the case which is proof some blackmail. The evidence adduced plus the contradictions show that there is some doubt that indeed the alleged offence occurred and the claimant should be given a benefit of doubt.

Then what are the remedies if any that the claimant is entitled to? The claimant sought before this court orders for payment of his salary from the time of dismissal to-date and reinstatement. Given that indeed the procedure followed in reaching a verdict to dismiss the claimant flouted the rules, I do find for claimant and order as follows:-

1. The interdiction and dismissal from employment by respondent claimant was unlawful and null and void.
2. I order the claimant to be reinstated to his previous employment.
3. I order the claimant to be paid his salary arrears and all dues from the date of termination of employment to the date of reinstatement.
4. Respondent to pay costs of this cause.

HELLEN WASILWA

JUDGE

25/09/2013

Appearances:-

Mr. K'owino for claimant

Miss Mambo for respondent present

CC. Sammy Wamache.