



**REPUBLIC OF KENYA**

**Industrial Court of Kenya**

**Cause 271 of 2011**

**KANGARA WANYOIKE .....CLAIMANT**

**VERSUS**

**TEACHERS SERVICE COMMISSION .....1<sup>ST</sup> RESPONDENT**

**KENYA NATIONAL UNION OF TEACHERS .....2<sup>ND</sup> RESPONDENT**

**Judgement**

On 25<sup>th</sup> February 2011 the claimant through his advocates filed the claim herein seeking the following prayers:

1. *An order for reinstatement of the claimant as a teacher in the employ of the first respondent*
2. *A declaration that the claimant is entitled to be admitted in Murang'a south branch of the 2<sup>nd</sup> respondent and engage in all union activities upon payment of the requisite fees*
3. *An injunction compelling the 2<sup>nd</sup> respondent to admit the claimant to join as a union member of its Murang'a south branch upon payment of the requisite fees*
4. *Costs of the suit plus interest thereon*
5. *Any other relief that this court may deem fit to grant*

This claim was filed together with a Notice of Motion seeking to stop the 2<sup>nd</sup> respondent MUrang'a South branch elections set for 26<sup>th</sup> February 2011 on the basis that the 2<sup>nd</sup> respondent had failed to clear the claimant and or to admit him to vie in this election despite his intentions to vie for the seat of executive secretary. This application was dismissed vide the ruling of this Court dated 15<sup>th</sup> November 2011, which declared claimants claim as incompetent and interim orders granted were vacated. That since his dismissal from employment and upon lapse of 5 years, he ceased being a member of the 2<sup>nd</sup> respondent and therefore not eligible to vie for any elections in its branches or within any of its ranks.

The claimant was therefore left to prosecute his claim against the 1<sup>st</sup> respondent where he stated that he was unlawfully dismissed from his employment. That he was employed by the 1<sup>st</sup> respondent on or about 1983 as a teacher until 17<sup>th</sup> September 1999 when he was interdicted on allegations of being a habitual absentee and a deserter of duty where he was invited to write his defence but the letter of invitation only arrived after the lapse of the 21 days period he was required to do so.

Claimant further stated that he had a very good defence but due to receiving his notification letter late, he was not able to attend or defend himself from the disciplinary proceedings that took place against him. Consequently, he was dismissed from his employment on 26<sup>th</sup> November 1999 and he only got to learn of

this dismissal very late as his dismissal letter also took time to reach him on 23<sup>rd</sup> March 2000. This prompted the claimant to write to the 1<sup>st</sup> respondent severally but he only received negative responses.

That in 2008 the claimant appealed and or sought a review of the case through the 2<sup>nd</sup> respondent whereupon a joint respondents sub-committee meeting of 29<sup>th</sup> February 2008 met in the absence of the claimant and upheld the decision of the 1<sup>st</sup> respondent to dismiss the claimant which decision only came to the notice of the claimant in 2010 when he sought assistance from the Public Complaints Standing Committee.

For reasons based on the ruling on the Notice of Motion stated above, the claim against the 2<sup>nd</sup> respondent was not restated nor were there submissions on the case in evidence. This part of the claim seems to have been ignored by the claimant and when the Court asked him about this part of the claim, he stated that since he did not see them in Court, he decided not to address himself to that claim. Despite Court warning the claimant that his failure to prosecute this part of the claim would be to his disadvantage, he still ignored to act on it.

The 1<sup>st</sup> respondent on their part filed their defence on 10<sup>th</sup> March 2011 admitting that indeed the claimant was their employee since 1982 who served in various schools but his contract was effectively terminated on 26<sup>th</sup> November 1999 following reports from the 1<sup>st</sup> respondent agent, the District Education officer, Maragua District, that the claimant was in breach of the 1<sup>st</sup> respondent Code of Regulations, that on diverse dates in February and May 1998, the claimant had been absent from duty without permission and that he deserted duty from 21<sup>st</sup> January 1999 to the date of his interdiction and his whereabouts were unknown.

That following preliminary investigations by 1<sup>st</sup> responded agent the District Education Officer reached a decision to interdict the claimant with his letters being forwarded through his last known address that is Gathungururu Primary School. That he never wrote his defence or appeared at the time the hearing of his case was scheduled by the 1<sup>st</sup> respondent. That without a defence and in the absence of the claimant the 2<sup>nd</sup> respondent noting that this was the second interdiction that the claimant was under due to chronic absenteeism proceeded and dismissed the claimant from its employ. However on appeal, the 2<sup>nd</sup> respondent were present and they confirmed the dismissal. This was communicated to the claimant.

This Court notes that after long and protracted preliminaries, this matter came up for hearing on 25<sup>th</sup> October 2012. Claimant called three (3) witnesses and he stated that he has been to several high offices, to the Director of Education, to the Public Complaints Committee (ombudsperson), to the Permanent Secretary but they all referred him to the 1<sup>st</sup> respondent (TSC). His case was that on 28<sup>th</sup> January 1999 the head teacher at Gathungururu Primary School gave him a letter of transfer but when he saw the school he was to report to next, Manjuu Primary School, he was devastated as this meant he was being moved from Makuyu Division a 'hardship' area, which was very emotive issue as this meant he was to lose the 'hardship' benefit of Kshs3000 that go with being in a 'hardship' area. That since his salary was kshs9000, by loosing Kshs3000, he says this transfer as a punitive measure against him. He further stated that by moving to this new school, he would incur travel costs of kshs100 every day plus having a long walk to reach hi this school.

To compound his problems, he felt this punitive transfer was ill-intentioned as he had not applied for a transfer and those two days before this transfer, a new teacher had already reported in his school to replace him and he was to move to his place. That all these transfers were against Article 41 of the Constitution where every worker has a right to reasonable working conditions. That what teachers would do in such a case was to seat together and agree on where they wanted to work and then do a joint letter to TSC since teachers in primary school have no specialisation and cam work anywhere but in his case he had not written seeking a transfer.

That these transfers were all due to corruption. However no evidence was produced to confirm these allegations.

He further gave evidence that despite being aggrieved by the transfer from a hardship area, he reported to the new school but the head teacher had no letter indicating claimant was on transfer there but advised him to report to the Staffing Officer responsible for directions. He stated that he decided never to go back to Manjuu Primary School.

He was thus interdicted citing the following:

1. *You are habitually absent from duty without permission. You were absent from duty without permission from 17<sup>th</sup> to 27<sup>th</sup> February 1998 and from 5<sup>th</sup> to 14<sup>th</sup> may 1998 all days inclusive.*
2. *You deserted duty with effect from 21<sup>st</sup> January 1999 and to date your whereabouts is not known. (left school on transfer but never reported to the new station)*

He now seeks reinstatement as a teacher with the 1<sup>st</sup> respondent as the resultant dismissal was unprocedural, it deprived him of his dignity, it was done when he was 42 years old at his prime and for 10 years he has been seeking justice without success.

On cross examination by Ms Moraa for the 1<sup>st</sup> respondent, the claimant admitted that he suffered anxiety upon being transferred from a school in a 'hardship' area to an area that he was to lose the financial benefit. That under the Code of Regulations for Teachers it required that teachers could be moved anywhere in the Country. That before this case came up there had been previous disciplinary issues against the claimant with the TSC representative in the area being accused of absenteeism and desertion of duty and he received a punishment where 1<sup>st</sup> respondent recovered salary for the days not worked. That indeed several cases of being absent had been reported against the claimant and had previously been interdicted.

He further admitted that after his last visit to Manjuu primary School, he never reported what the head teacher there had done or told him to anyone. He however wrote to the Permanent Secretary that he did not have a school or a duty station. This Court notes the said letter to Mr Sogomo the PS Ministry of Education.

Claimant witness Mr. Joseph Wanyoike gave evidence that when the claimant reported to his school he did not have the required documents to record him in his daily return and the transfer copy that the claimant had he refused and or failed to give it to him and therefore he had no record of him. He never reported back to his school. That indeed at this time he needed four teachers but he needed a posting letter in order to accept the claimant. The District Education Officer of the areas as the agent of TSC had not sent a transfer letter to him.

The second witness Mr. David Ngochi Kirika stated that as head teacher of Gathungururu Primary School, the claimant was a habitual absentee and on several occasions his school records indicated this and when the transfer letter came from Staffing officer he had to release him by signing. He never followed to know if he reported to the new school but when his letters came to his school eh ensured they were delivered immediately. That when the claimant would be absent, he ensured that his teaching books and materials were removed from the classroom to avoid damage by the students as this was in lower class and kept them in a safe place. His daily returns in the Casualty Record indicated that days the claimant was absent from duty.

Court notes that this claim revolves around the dismissal of the claimant by the 1<sup>st</sup> respondent vide letter dated 26<sup>th</sup> November 1999 and further the confirmation of the same upon appeal vide letter dated 6<sup>th</sup> July 2007 following several letters from the claimant. So effectively from 26<sup>th</sup> November 1999, the claimant was dismissed from the employ of the 1<sup>st</sup> respondent. In this case, Section 90 of the Employment Act is very informative thus;

**90.** *Notwithstanding the provisions of section 4 (1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted*

*unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.*

Looking at the claim and the evidence in Court the claimant seems to have been motivated to file this claim by the impending elections of the 2<sup>nd</sup> respondent whose relationship with the 1<sup>st</sup> respondent was the casuistic link for this claim. Otherwise there is no explanation as to why for the 10 years since his dismissal he never came to court to challenge it. Also since he last heard from the 1<sup>st</sup> respondent in 2007, the provisions of Section 90 of the Employment Act still bar him due to being out of time. The fact that the claimant was no longer in the employ of the 1<sup>st</sup> respondent yet he wanted to run for elections for the Murang'a South branch of the 2<sup>nd</sup> respondent, that was motivation enough to file this claim.

I note that since his dismissal in 1999, the claimant has been to several offices seeking assistance, he has indeed been to the see a Permanent Secretary, Director of Education, Standing Committee on the Administrative of Justice, but only remembered there is an Industrial Court in 2011 when the issue of stopping the impending elections arose.

In a case like this, the operative section of the Employment Act has to apply, as parties will not seat on their rights and then wake up one day and remember that they can rush to court and get their orders that the law states should be claimed within a specific period. In this case within 3 years.

Even if the claimant was not comfortable with moving the industrial Court as previously constituted, he had a right to move the High Court to advance his claim as many other cases like his have been arbitrated. For this reason the claimant, not having sought to extend time to be able to file his claim, it must fail on this ground.

That as it may, I must state that The claimant as he appeared in Court seemed to be a well read person, conversant with the Constitution and indeed very aware of his rights and as a former teacher he impressed this Court with his vast knowledge of his employment requirements but failed to indicate why it took him over 10 years to approach Court with his claim. Initially he was represented by an Advocate who I believe helped him get initial orders in his claim against the 2<sup>nd</sup> respondent but soon after that he seems to have abandoned his legal counsel as he was his own best advocate. That may not have been wise as he was not able to seek extension of time to be able to prosecute this claim.

**In Civil Appeal No. 15 of 2011 *Bi-Mach Engineers Ltd versus James Kahoro Mwangi*.** The Court of Appeal seating in Nairobi found a delay of 2 months being inordinately long and proceeded to dismiss a claim filed out of time.

The ground on time notwithstanding, the contentious issue that arose at the hearing was that upon the dismissal of the claimant, he was never given a chance to defend himself which according to him he should have been given a chance to appear before the disciplinary committee and or body of the 1<sup>st</sup> respondent to defend himself. However this Court noted with keen interest that at no time did the claimant challenge the grounds upon which he was dismissed. It is important to note that despite the fact that the claimant was not called to defend himself, all employers have a right to undertake disciplinary proceedings against any employee on good course and an employer has at all material times the right to terminate the services of an employee through summary dismissal.

Despite the claimant being absent from duty and failing to report to the agent of the 1<sup>st</sup> respondent when he realised that his transfer to Manjuu primary School had not been regularised, the claimant vowed never to go back to that school. He opted to seat on his rights. He also opted to visit various offices and only came to court when time had lapsed.

Under the Employment Act, there are few instances that an employer can terminate an employee as per the law. These are indeed very few cases which in law amount to *gross misconduct* outlined under Section 43. Under part (4)

*... Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:—*

*(a) Without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;*

*(b)...*

*(c) an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;*

*(e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer.*

This court finds that there was no reasonable explanation regarding the allegations for absenteeism and desertion of duty. Failure to report what transpired at Manjuu Primary School and or returning back to the previous place of work or back to the Staffing Officer as advised made it impossible for the 1<sup>st</sup> respondent or their agents to know his whereabouts. Further, on claimants own admission in evidence, he stating that he would never go back to Manjuu Primary School despite requirements of the 1<sup>st</sup> respondent that he was to work anywhere in Kenya. This was tantamount to wilfully neglecting his duties and a failure to obey his employers orders.

The letter of dismissal clearly stated the grounds for termination of claimant's employment which grounds have not been negated in evidence as being false, unfair or unwarranted. The claimant opted to go on a tangent of his own citing corruption, abuse of office, immorality and other issues that were not relevant to his case and totally unrelated to the issues raised in his letter of dismissal.

The 1<sup>st</sup> respondent witness clearly stated that the claimant was a habitual absentee from duty without permission on various occasions that had earlier warranted him an interdiction and further he deserted duty which the claimant himself confirmed he did when he appeared in Court and gave his evidence. This conduct was indeed gross misconduct noting the noble duty put in the hands of the clamant that he neglected to undertake.

I have carefully read the defence that that the claimant had submitted to the 1<sup>st</sup> respondent, the defence which he would have wished considered at the disciplinary hearing. What comes out clearly is that the claimant was not happy for being transferred from a hardship areas where he lost a substantial allowance and that corruption allegations of the agents of the 1<sup>st</sup> respondent which was not his responsibility to follow as in pursuing this corruption allegations as well as being unhappy with his transfer, he forgot his primary duty lay with his employer who could dismiss him if he failed or neglected to perform his duties.

There was no evidence to support the allegations of corruption. All the witnesses called contradicted the claimants evidence.

I wish to note that the claimant being a member of the 2<sup>nd</sup> respondent at the time of termination had a right to be represented by his Union which he should have pursued with diligence and vigilance but opted to follow other persons that made him absent from work and thus the serious charge of desertion of duty. Indeed, the 2<sup>nd</sup> respondent did represent him at the appeal stage where they confirmed the decision of the 1<sup>st</sup> respondent to dismiss him from duty. This aspect has not been disputed as being erroneous and or illegal as at all material times, a unionised member gives the right of representation to the union officials in such cases.

This Court has been asked to make and order of reinstatement. I note this is the only prayer that the Court has without any other option. An order for reinstatement is made based upon the court finding that the termination of employment was substantively unfair. However in this case, based on presentations made in Court and the evidence on record, the termination was based on reasonable grounds.

Court notes that the only prayer sought by the claimant was for reinstatement. The law is very clear that this order can only be made by Court in the clearest of cases where there has been wrongful dismissal and unfair termination. This Court finds that this is not such a case and will therefore not grant the prayer sought.

For want of time and the reasons advanced above, this Court will therefore dismiss this case. Each party to bear their own costs.

These are the orders of the Court.

Dated and delivered in open Court at Nairobi this 28th day of November 2012.

Justice Monica Mbaru  
**Judge**

**Appearances**

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