



REPUBLIC OF KENYA

Industrial Court of Kenya

Cause 955 of 2011

WALTER OGAL ANURO.....CLAIMANT

VS

TEACHERS SERVICE COMMISSION.....RESPONDENT

AWARD

Introduction

1. By a Memorandum of Claim dated 9th June 2011, the Claimant sued the Respondent for unfair, unlawful and un-procedural termination of employment. The Respondent filed a Statement of Defence on 1st August 2011 and the matter was heard on 27th February 2013 with Mr Enonda instructed by Endonda, Makoloo, Makori & Co Advocates appearing for the Claimant and Ms Naeku appearing for the Respondent.

2. The Claimant testified on his own behalf and the Respondent called its Assistant Deputy Director in charge of Discipline Oyuchio Timo. At the close of the *viva voce* hearing both parties filed written submissions.

The Claimant's Case

3. The Claimant was employed by the Respondent on 13th May 1986 as an untrained Technical Teacher and rose through the ranks to the position of Technical Instructor. By letter dated 12th October 2009 the Claimant was invited to present himself at the Respondent's Headquarters on 27th October 2009 together with his original certificates and other relevant documents.

4. The Claimant testified that upon presenting himself together with his original documents, he met some members of staff of the Respondent who asked whether he had at any one time lost any of his original certificates to which he responded in the negative. The Claimant was then asked to leave his original documents with the two members of staff and await further communication from the Respondent.

5. In July 2010 the Claimant was again invited to the Respondent's Headquarters where he was informed that one Walter Ondhowe who claimed to be the Claimant's cousin had secured employment with the Respondent using the Claimant's certificates. The Claimant denied any knowledge of these allegations.

6. The Claimant told the Court that he received two interdiction letters in September and October 2010. He was interdicted on the charge of colluding with one Walter Ondhowe to present the Claimant's CPE and KCE Certificates on the basis of which the said Walter Ondhowe was employed as a teacher by the

Respondent. The Claimant was asked to make a written statement to the Respondent, which he did.

7. By a subsequent letter dated 5th November 2010 the Claimant was invited to a disciplinary meeting on 7th December 2010. He was required to produce his academic and professional certificates, his last payslip and identity card which he duly produced.

8. At the disciplinary meeting it emerged that one Walter Ondhowe alias Samwel Bradox had been employed by the Respondent using the Claimant's KCE Certificate. It was the Claimant's case that the said Walter Ondhowe was not known to him. On the same day that the disciplinary meeting took place, the Claimant was dismissed from the Respondent's employment. The Claimant claimed that there was no justifiable cause for his dismissal. He further claimed that he was not given adequate opportunity to defend himself. The Claimant's appeal against his dismissal did not elicit any positive response.

9. The Claimant therefore claimed the following:

- a) A declaration that the Claimant's termination was unfair;
- b) An order directing the Respondent to reinstate the Claimant to his position without loss of status or benefits or in the alternative;
- c) 12 months' salary in compensation for unfair termination.....459,816
- d) Prorata leave.....643,742
- e) Severance pay.....459,816
- f) 1 month's pay in lieu of notice.....38,318
- g) Salary for the month of December.....38,318
- h) Costs and interest
- i) Any other relief the Court may deem just to grant

The Respondent's Case

10. In its Statement of Defence the Respondent stated that the Claimant was employed as a teacher on permanent and pensionable terms on 26th March 1991. On or about 28th August 2009 the Respondent received information from a member of the public that the Claimant and another teacher by the name Walter Ondhowe were using the same KCE Certificate number 0171760. It was the Respondent's case that these allegations amounted to a grave violation of the Code of Regulations for teachers as well as the Teachers Service Commission Code of Conduct and Ethics.

11. The Respondent therefore commenced investigations into these allegations and invited both the Claimant and Walter Ondhowe to verify the said allegations. The Respondent's independent investigation confirmed that both the Claimant and Walter Ondhowe had procured employment with the Respondent using the same KCE Certificate. The Claimant was unable to satisfactorily explain how his certificates were accessed and used by someone else to procure employment with the Respondent.

12. The Respondent stated that he received a letter from Walter Ondhowe alias Samwel Bradox confirming that he and the Claimant were cousins and that the Claimant had voluntarily given the said Walter Ondhowe his KCE Certificate for purposes of securing employment with the Respondent and that the said Walter Ondhowe had returned the original certificate to the Claimant after securing employment with the Respondent.

13. Following evaluation of the case the Respondent reached a decision to interdict the Claimant. The

Claimant was then given an opportunity to prepare his defence and a Disciplinary Panel was convened on 7th December 2010 where the Claimant was invited to present his case.

14. The Disciplinary Panel, having considered the Claimant's written and oral submissions alongside evidence gathered by the Respondent concluded that the Claimant was guilty of collusion and recommended his dismissal.

Findings and Determination

15. The main issue for determination in this case is whether the Claimant's dismissal was justifiable and lawful.

16. 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.

17. Section 45 (2) of the Act provides that:

(2) A termination of employment by an employer is unfair if the employer fails

to prove-

a) that the reason for the termination is valid;

(b) that the reason for the termination is a fair reason -

(i) related to the employee's conduct, capacity or

compatibility; or

(ii) based on the operational requirements of the employer; and

(c) that the employment was terminated in accordance with fair

Procedure

18. The question then is whether the Respondent had a genuine reason to warrant the Claimant's summary dismissal and whether in reaching its decision the Respondent employed fair procedure. It was common cause that the Claimant's KCE Certificate number 0171760 was used by one Walter Ondhowe alias Samwel Bradox to secure employment with the Respondent. The said Walter Ondhowe who turned out to be an impostor was later arrested, charged and convicted. The Claimant testified that he had not given any of his certificates to the said Walter Odhowe whom he did not even know. The Claimant further testified that none of his original certificates had gone missing at any one time.

19. This case has many coincidences. First, there was the similarity in names between the Claimant and the impostor. Second, the Claimant and the impostor never sat in one disciplinary meeting together. In this regard, the Claimant blamed the Respondent for not availing the impostor for cross examination by the Claimant while the Respondent claimed that the fact the two never met was just a continuation of their collusion. Third, both the Claimant and Walter Ondhowe were employed in 1986.

20.Fourth, for some unexplained reason the Respondent did not appear to have been keen to carry out thorough investigations. The Respondent's witness Oyucho Timo testified that investigations into the matter were triggered by a letter dated 28th August 2009 written by a member of the public. The letter contained allegations of impropriety on the part of some of the Respondent's officers. Apart from instituting disciplinary proceedings against the Claimant and Walter Ondhowe alias Samwel Baradox the letter did not elicit any further action by the Respondent.

21.The Court was also intrigued as to how an impostor remained in the Respondent's employment for so long even after the practice of head count was introduced. Oyucho Timo testified that at the time the Claimant and Walter Ondhowe were hired by the Respondent, recruitment was done by agents at the zonal level who would then forward the documents of the successful candidates to the Respondent's Headquarters. It seems to me that this system, which thankfully has now been abandoned, was open to abuse and manipulation and that the security of the documents submitted at the zonal level could not be guaranteed. Yet, going by the TSC numbers the impostor was recruited before the Claimant and the Claimant was unable to explain how his documents landed in the hands of a total stranger who coincidentally had names that were quite similar to his.

22.In light of the foregoing, I find that Respondent had a genuine reason for terminating the Claimant's employment as required under Section 43 of the Employment Act. However, for a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness. I will therefore proceed to examine the disciplinary procedure adopted by the Respondent against the beams of Section 43 of the Employment Act which provides 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 reason 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 the 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 subsection (1) make.

23.It is not in contest that the Claimant was taken through some form of a disciplinary process. However, upon analysis of both the investigation and the disciplinary processes, the Court formed the opinion that the Respondent failed the test of procedural fairness in that it did not take its investigations full circle. In the light of the seriousness of the allegations against the Claimant and the resultant consequences, the Respondent should have done more, but it took the easy option and placed the Claimant and the impostor on the same chopping block. For this reason, I find the termination of the Claimant's employment by way of summary dismissal unfair for want of due procedure.

24.I will now proceed to deal with the reliefs sought by the Claimant. The first relief sought is an order for reinstatement. Reinstatement is a premiere remedy uniquely available to the Industrial Court by dint of Sections 49 and 50 of the Employment Act, 2007. However, in granting this remedy the Court is enjoined by Section 49(4)(d) of the Act to take into account:

(d) the common law principle that there should be no order for specific performance in a contract of service except in very exceptional circumstances.

25.This principle was echoed by Mukunya J (as he then was) in the case of **Universities Academic Staff Union Vs. Masinde Muliro University of Science and Technology (Industrial Court Cause No 379 Of 2010)** which was cited by Counsel for the Respondent.

26.I have examined the circumstances of this case and find that the stringent conditions set for an order

for reinstatement have not been established. I therefore decline to order reinstatement and instead award the Claimant 8 months' salary in compensation for unfair termination. I also award him 1 month's salary in lieu of notice. In making this award, the Court has adopted the monthly salary of Kshs. 55,686 being the Claimant's salary as at the time of his dismissal.

27. With regard to the claim for accrued leave, I find that the Code of Regulations for Teachers makes adequate provision for leave for teachers during school holidays. The Claimant did not demonstrate any reason why he ought to be treated differently. The claim for leave therefore fails and is hereby dismissed. The claim for severance pay has no basis as it is only applicable in cases of redundancy under Section 40 of the Employment Act. Since the Claimant was not on duty in December 2010, he is not entitled to salary for the month.

28. The final effect of this award is as follows:

a) 8 months' salary in compensation for unfair terminationKshs. 445,488

b) 1 month's salary in lieu of notice.....55,686

Total.....501,174

The Respondent will pay the costs of this case.

Orders accordingly.

DATED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 2ND DAY OF MAY 2013

**LINNET NDOLO
JUDGE**

In the Presence of:

.....**Claimant**

.....**Respondent**