



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NUMBER 302 OF 2008

PATRICK KILONZO. APPELLANT

VERSUS

TEACHERS SERVICE COMMISSION. RESPONDENT

*(From the judgment and orders of C W GITHUA (MRS) Ag. Senior Principal Magistrate in Milimani
CMCC NO. 4603 of 2005)*

J U D G M E N T

The Appellant Patrick Kilonzo, by a plaint dated 27th April 2005 sought: -

a) A declaration that the Plaintiff's interdiction of the Defendant from his employment was without lawful cause and was in breach of the Plaintiff's contract of employment.

b)A declaration that the defendant, the Teachers Service Commission, is liable for breach in (a) above.

c) Payment of his accrued salaries amounting Ksh.331,760/- together with other lawful dues from June 2004 to-date, or until payment in full.

d)Plaintiff's immediate reinstatement to his lawful duties unconditionally.

e) Refund of his co-operative loan penalty charges amounting to Ksh.16,594/- and accruing penalties until the date of reinstatement and/or payment of accrued salaries.

f) A waiver of penalties in (e) above in the alternative.

g)Costs of the suit.

h)Any other relief.

The summary of facts in the plaint are as follows. The Defendant/Respondent on 17th October 1991,

employed the Appellant on permanent basis upon terms of service on the Respondent's letter of appointment. Appellant's monthly salary was Ksh.30,160/- at the material time. On 27th May 2004, the Respondent interdicted the Appellant on the grounds that he had conspired to defraud the Teachers Service Commission of Ksh.149,012,300/-. During the interdiction the Appellant would not be paid any salary. The Appellant was to make his defence within 21 days and thereafter, the Respondent would determine the case after a hearing fixed on 23rd March 2005.

The appellant was soon arrested by the Banking Fraud Police Officers and detained for four days. Finally, the hearing before the Respondent for Appellant to defend against their interdiction, did not take place nor did the Respondent lift the interdiction or give explanation for it. The Respondent also failed to give the Respondents any findings after interdiction, despite several requests for the same in writing. Also the Respondent did not give reasons of denying the Appellant his salary or part thereof. The Respondent did not also formally terminate the Appellant's employment until this suit was filed. However, the Banking Fraud and Investigation Unit completed investigation and by their letter to the Respondent dated 6th September 2004, notified the Respondent that there was no evidence found which involved the Appellant with the suspected fraud for which Appellant was arrested. They could not, therefore, charge him with any known criminal offence. The Respondent, however, even then, neither discharged the interdiction nor terminated Appellant's employment. Nor did it Respond to Appellants demand for the withheld payment of salary.

In its Statement of Defence to the claim filed herein by the Appellant, the Respondent made general denials as well as averred that it had furnished Appellant with particulars of allegations against him; that it had conducted its own investigations and disciplinary hearing without inviting the Appellant; that it informed Appellant why the date of disciplinary hearing to which Appellant had been invited, was postponed indefinitely and that its action of interdiction was lawful and reasonable in accordance with Section 72 of Code of Regulations of the Teachers Service Commission. The Respondent also denied any malice on its part in acting as it did. It denied any breach of contract as it also claimed that the Teachers Service Commission Code of Regulations applied to this case. It denied that Appellant was entitled to the reliefs sought.

During the hearing, the Appellant testified in support of the matters averred in the plaint. The Respondent neither turned up to defend the same nor submitted anything in contravention of the Appellant's evidence on record. At the close of the hearing, the Appellant under took to submit in writing and claimed he did so finally. He pointed to a submission in writing apparently received by the lower court on 23rd January, 2008. In her judgment dated 12th may 2008, five months down the line, from the date of the filing of the written submission, the learned trial magistrate appears to have not seen the Appellant's said written submissions.

In her judgment, the trial magistrate observed that the Appellant's evidence in support of his case was not controverted by the respondent who did not in any way participate in the hearing of the case. She however, noted that the respondent's statement of defence in the record had stated thus: -

“The defendant in its defence denied that plaintiff's interdiction was unlawful, unjustified or actuated by malice. It was their contention that plaintiff's interdiction was lawful and in accordance with Section 72 of the Code of Regulations of Teachers Service Commission and that it was based on reasonable grounds.”

Later on in the judgment the learned magistrate after stating that the Plaintiff had in his evidence explained that he was arrested on suspicion of conspiracy with two others on fraudulent dealing of Ksh.149,012,300/- belonging to the Respondent added: -

“On this basis alone I find that the interdiction on the initial stage was based on suspicion of having committed a criminal offence and could have been justified. Why the interdiction was not lifted or any other action taken after the Banking Fraud & Investigation Division confirmed having failed to find incriminating evidence against the plaintiff is a question (in) which was not answered in these proceedings as defendant did not offer any evidence in support of averments in its defence.”

The trial magistrate despite the above conclusions, found that the evidence on record by the Appellant did not prove his claims on the balance of probabilities especially since they were alleged by him and the onus was on him to prove them. He dismissed the Plaintiff's claim. That is what triggered this appeal by the Appellant who enumerated eleven grounds of Appeal. They can however, be summarized as follows: -

1. The learned trial magistrate erred in finding that Appellant's uncontroverted evidence did not prove his case on the balance of probability.

2. The learned trial magistrate erred in law in considering the Respondent's defence pleadings which were general and unsupported by any evidence.

3. The learned trial magistrate erred in law and fact in failing to find that the interdiction of the Appellant was malicious, without good or reasonable cause and unlawful.

4. The learned trial magistrate erred in fact and law in withholding to pay the Appellant half salary during interdiction and thereafter in failing to terminate the interdiction and pay him all his unpaid salary.

5. The learned trial magistrate erred in law and a fact in failing to find that it was Respondent's unlawful conduct that caused the appellant to default in paying his loans.

6. The learned trial magistrate erred in failing to follow the provisions of the Teachers Service Commission Code of Conduct on employment.

I have carefully perused the lower court pleadings including the plaint and defence. I have also perused and considered the Appellants evidence in support of his pleadings and case. And finally, I have considered the written submissions of both parties in support and in opposition of the grounds of appeal herein.

The Respondent did not call any evidence in support of its defence. In my understanding that means that the Respondent abandoned its written and filed defence, more so because it also chose not to cross-examine the Plaintiff/Appellant on his adduced evidence. This brings in question, whether the learned trial magistrate's approach to the filed defence was proper. It is noted that the Appellant complained in one of his grounds of appeal that the learned trial magistrate had no legal right to consider and take into account the unproven and unsupported written defence.

Clearly, the earlier quoted statement of the learned trial magistrate took into account and accepted the Respondent's filed defence, to the effect that the Plaintiff's interdiction was lawful and justified and not actuated by malice. In my view, like the statement of claim which must be proved by the Plaintiff on the balance of probability, the defence too if it is deliberately pleaded, requires evidence to prove it. That is to say that in this case, the onus of proof that the interdiction was lawful, justified and not malicious, was upon the Respondent/Defendant because it pleaded so in the defence.

In conclusion on this point, therefore, it is the view of this court that the learned trial magistrate erred in law in picking a raw and unproven statement of pleading and relying on it to disprove the Appellant/Plaintiff's evidence.

Having said the above, it was otherwise upon the Appellant/Plaintiff to adduce quality and sufficient evidence to prove his case on the balance of probability and to that aspect of this case, I now turn by examining the evidence on record in relation to the grounds of appeal.

There was no dispute that the Respondent interdicted the Appellant by a letter dated 27th May 2004. The reason of interdiction was that between 7th May 2004 and 10th May 2004, the Appellant conspired to defraud the Teachers Service Commission of Ksh.149,012,300/-. By the same letter the Appellant would not be entitled to any salary and was to file his defence within 21 days. He also was informed that the Teachers Service Commission would hear and determine his case whether or not the Appellant wanted to defend himself.

There was furthermore no dispute that the Appellant wrote a letter of defence, was given a date of defence and determination but that the hearing was put off and was never fixed again. That, notwithstanding, the Appellant's conspiracy to defraud allegation by the Respondent, was investigated by the Banking Anti-Fraud and Investigation Unit, which eventually informed the Respondent, by its letter dated 6th September, 2004 to the Teachers Service Commission, that they found no evidence to link the Appellant to the alleged suspected criminal offence.

It was the Appellant's case that after being so officially informed by the Police who investigated the case, the Respondent should have lifted his interdiction and allowed him to resume his job after paying him the withheld accumulated salary and other emoluments. The Appellants case was, however, that the Respondent instead, not only failed to fix the hearing of his interdiction case, but failed to ever lift the same. He testified that up to the time he was giving evidence in court, the Respondent had neither lifted his interdiction nor terminated his employment on any ground, lawful or otherwise. The Respondent had also not paid him his unpaid salaries and other emoluments which led him to file this suit for relief.

I have considered the Appellant/Plaintiff's evidence. It was not controverted or disproved in any way by the Respondent/Defendant. The latter's pleadings in the statement of defence were mere allegations which were never supported by evidence and which, therefore, had no evidentiary value, as already earlier found by this court. In my view and finding, the Appellant's evidence was clearly believable and therefore acceptable. The learned trial magistrate had no lawful or reasonable cause not to accept the evidence. While the trial magistrate had the advantage of listening to the evidence and watching the Appellant's demeanour at close range and would be best placed to make a better conclusion, her conclusions in this respect are not clear and are not supportable. Nor did she note on the record why she rejected Appellant's the evidence which was clear and uncontroverted.

The conclusion this court reaches, therefore, is that the Respondents/Defendant's interdiction of the Appellant, while it appeared lawful at first, turned out later to be unjustified. This was so when the Banking Anti Fraud and Investigations Unit cleared the Appellant of any conspiracy. At that stage the respondent should have lifted the interdiction of the appellant and paid him, at least to that point in time. In case the Respondent did not then wish to continue employing the Appellant, it could follow the laid down procedure of terminating his employment after giving the relevant notices. As things stand, however, the Respondent did not lift the interdiction and did not pay the Appellant any arrears of salary despite demands made by the Appellant, the last of which was one dated 20th December 2004, from M/s Kilonzo & company.

The Appellant raised the above as one of the grounds of appeal. I find that the learned trial magistrate should have held that the Respondent/Defendant was under legal obligation to lift the interdiction of the Appellant and to pay him his withheld salaries and other emoluments after the Appellant was in September 2004, absolved from any criminal blame. I proceed to hold so.

I have examined the Teachers Service Commission code of conduct and ethics. It does not provide regulations to control conduct of the Employer or employee. The Appellant argued that in the circumstances the Public Service Commission Regulations, 2005 applied because teachers are public servants and the regulations are not excluded from applying to them. In the alternative, they argued that ordinary Rules and Principles of Natural Justice apply.

I observe that the Public Service Commission Regulations, exclude the office of the Kenya Police Force, The Kenya Prisons Service and the Local authorities. If the Regulations were intended not to apply to a teacher, Parliament would declare so as it did to those other institutions mentioned above. I accordingly hold the Public Service Commission Regulations apply to this case.

In relation to interdiction, Regulation 23(2) (3) of Public Service Commission Regulations state as follows: -

“(2) A public servant who is interdicted shall receive such salary, not being less than half his salary, as the authorized officer shall think fit.

(3) Where disciplinary or criminal proceedings have been taken or instituted against a public officer under interdiction and such public officer is neither dismissed nor otherwise punished under these Regulations, the whole or part of any salary withheld under paragraph (2) shall be restored to him upon the termination of such proceedings.”

Applying the above Regulation to the Appellants case, I hold that he was entitled to all his salaries. Since for some reason, which clearly appears malicious and punitive, he was not paid half salary during interdiction, he would be entitled to the recovery of the whole salary withheld. It is difficult to understand why the Respondent/Defendant would not either lift the interdiction or go ahead to lawfully terminate Appellants employment by giving the relevant notices, even after being served with several demand notices. That makes it not easy to determine the period when interdiction should be assumed to have come to an end. However, since the Appellant finally filed this suit in court to determine his rights finally, the same date will be taken as the end of his interdiction and the beginning of the process of terminating the employment contract at the Respondent’s instance. That fits in well with the fact that the Appellant/Plaintiff claimed a total sum of Ksh.331760/- from the date of interdiction, June 2004 until the date of filing the suit.

The Appellant also claimed co-operative charges of Ksh.16594/- being loan penalties arising from his failure to receive his salaries from the Respondent due to the interdiction. He did not show how the Respondent was directly and immediately liable to compensate him of the loan penalties. In my view, that claim although connected with the unlawful stoppage of salary payment by the Respondent is remote. I would disallow it.

I note that apart from seeking declarations, that Defendant/Respondent’s interdiction was in breach of contract, the Plaintiff did not specifically seek general damages for any wrongful conduct or breach of contract by the Respondent. All he pleaded is that the Defendant be declared liable for breach thereof. It is not clear what benefit such declarations would give to the Plaintiff/Appellant but because he adduced sufficient to deserve the declarations, the same shall be granted as sought.

The summary of my findings are as follows and they make my orders: -

a) A declaration that the Appellant/Plaintiff's interdiction was without good cause and was in breach of Appellants contract should have been made by the trial court. It is hereby made.

b)A declaration that the Defendant/Respondent was liable for the breach of contract is similarly made.

c) Payment of Appellant/Plaintiff's accrued salaries of sh.331,760/- is hereby allowed and ordered.

d)Payment of salary in lieu of notice for termination of employment, of one month, is hereby awarded and ordered. In the alternative thereto the Respondent is hereby ordered to reinstate the Appellant to his former employment.

e) The Respondent shall pay gratuity to the Appellant at the rate of 25% of Basic Salary earned from the day of Permanent employment until the date of filing of this suit. This order is made under any order the court deems fit and under prayer (c) of sought reliefs.

To the extent shown above, this appeal is allowed with costs to the Appellant. Orders accordingly.

Dated and delivered at Nairobi this 13th day of March 2012.

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D A ONYANCHA

JUDGE



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