

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT BUNGOMA

APPEAL NO. E014 OF 2023

TEACHERS SERVICE COMMISSION APPELLANT

VERSUS

PAUL OKUMU MUCHANGA RESPONDENT

(Being an appeal from the judgment and decree issued in Bungoma Chief Magistrate's Court in ELRC No.26 of 2019 by Hon. Charles Soi Mutai (SPM) delivered on 25th August 2023)

(BEFORE HON. JUSTICE DAVID NDERITU)

JUDGMENT

I. INTRODUCTION

1. In a judgment dated and delivered on 25th August 2023 the lower trial court ordered that the respondent be reinstated to his employment with the appellant and be paid all salary arrears. He was also awarded costs of the cause.
2. Thereafter, the appellant through Mr. Patrick Mulaku, Advocate, commenced this appeal vide a memorandum of appeal dated 15th September 2023 raising the following grounds of appeal –

- 1) *The learned magistrate grossly erred in law when he granted orders of reinstatement of the respondent to employment after the expiry of 3 years from the date of dismissal, contrary to the provision of section 12(3)(vii) of the Employment and Labour Relations Court Act.*
- 2) *The learned magistrate erred in law when he granted orders of reinstatement of the respondent to employment without due consideration of the provisions set out in Section 49(4) (b), (c), (d), (k) of the Employment Act.*
- 3) *The learned magistrate failed to appreciate that it is trite law that the Criminal Law regime/standards has no application in employment contracts.*
- 4) *The learned magistrate erred in law and fact when he made awards both on reinstatement and damages contrary to the provisions of the Employment Act and the common law doctrine.*
- 5) *The learned magistrate erred in law in arriving at a decision which was contrary to the evidence tendered by the appellant, law, facts, Submissions and Authorities and binding judicial precedents tendered before court.*
- 6) *The learned magistrate awarded reliefs which are contrary to the provisions of the Employment Act.*
- 7) *The learned magistrate has not provided legal and/or*

reasoned justification on the awards made in favour of the respondent.

8) The learned magistrate grossly misinterpreted and misapplied the relevant law and arrived at an erroneous conclusion of law.

3. The appeal is opposed and the appellant is seeking for orders that –

a) This appeal be allowed.

b) The Judgment, orders and decree of Hon. Charles Soi Mutai (SPM) delivered on 25/8/2023 and all consequential orders be set aside.

c) The Chief Magistrate’s Court, Employment & Labour Relations Cause No. 26 of 2019 at Bungoma be dismissed.

d) The costs of this appeal and that of the lower court case be awarded to the appellant.

4. By consent, the appeal was canvassed by way of written submissions.

Mr. Mulaku for the appellant filed written submissions dated 21st March 2025 while Miss Ayieko, Advocate, instructed by Wamalwa Simiyu & Co. Advocates for the respondent filed submissions dated 27th March 2025.

II. BACKGROUND

5. The respondent was an employee of the appellant as a teacher for the period from 5th December 2007 to 27th March 2019 when he was dismissed on grounds of gross misconduct while based at Nzoia Sugar

Company Primary School. After the dismissal the respondent moved to court and filed the cause cited above in the lower trial court.

6. In a memorandum of claim dated 16th September 2019 the respondent herein (claimant in the lower trial court) pleaded, in summary, that he was accused of sexually assaulting a pupil and charged with criminal charges under the ***Sexual Offences Act*** but he was subsequently acquitted of the charges.
7. However, he was subsequently interdicted and disciplinary proceedings commenced against him notwithstanding the acquittal in the criminal trial.
8. The respondent pleaded that he was invited for a disciplinary hearing on 23rd March 2019 but he was not given a fair hearing as he was allegedly denied the right to ask questions and adduce his evidence. He pleaded that the dismissal was wrongful, unfair, and unlawful. He prayed for the following reliefs –
 - a) *A declaration that the purported termination offends the constitution of Kenya 2010 and particularly Article 40, 47 and 50 thereof the employment Act 2007 and fair labour practices and consequently wrongful and that the claimant is entitled to the most appropriate redress.*
 - b) *As prayed for in paragraph 18, 19 & 20 of the claim above.*
 - c) *An order directing the respondent to issue a certificate of service to the respondent.*

d) Costs & interest.

9. The claim was denied in toto by the appellant (the respondent in the lower trial court) in a reply to the claim dated 14th February 2022. It was pleaded that the acquittal in the criminal case initiated by the police did not take away the disciplinary jurisdiction of the appellant over the respondent and the appellant proceeded as such. It was further pleaded that the respondent was given a fair disciplinary hearing and that the dismissal was fair and lawful.
10. Upon hearing the cause, the lower trial court arrived at the orders stated above in favour of the respondent and the appellant is hereby challenging those orders in this appeal.

III. SUBMISSIONS BY COUNSEL

11. In his written submissions counsel for the appellant condensed the grounds of appeal into three thematic areas as follows –
- a. The learned magistrate erred in law and fact in failing to arrive at a finding that there was valid reason and therefore the respondent's termination from employment was justified, fair and lawful.*
 - b. The learned magistrate erred in law and seriously misdirected himself when he granted orders of reinstatement of the respondent to employment after the expiry of 3 years from the date of dismissal, contrary to the provisions of the in law.*
 - c. The learned magistrate erred in law by failing to give reasons*

for the award and in so doing awarded reliefs to the respondent that are not tenable in law.

12. On the first issue it is submitted that the termination of the respondent was justified under ***Section 45 of the Employment Act*** and that the lower trial court failed to consider and appreciate the evidence adduced by the appellant. It is submitted that the appellant had lawful grounds for terminating the respondent under ***Section 43 of the Employment Act***.
13. It is further submitted that the criminal trial dealt with the criminal aspects of the respondent's misconduct. It is submitted that the acquittal of the respondent of the criminal charges did not bar the appellant from considering the misconduct and taking disciplinary action therefor.
14. It is submitted that according to the appellant the gross misconduct by the respondent was proved to the required standard during the disciplinary hearing. It is further submitted that the very nature of the misconduct, sexual assault on a pupil, was so gross that it called for swift action to protect the young pupils from further assault and violation by the respondent.
15. Counsel cited ***Tom Ochako V Teachers Service Commission (2022) eKLR*** to the effect that the general evidence availed pointed towards gross misconduct by the respondent for sexually assaulting a pupil against the Code of Regulations. It is submitted that the general

evidence availed was adequate to sustain the dismissal. It is thus submitted that the standard of proof beyond reasonable doubts did not apply in the disciplinary hearing unlike in the criminal trial.

16. On the second issue it is submitted that it was wrong and unlawful for the lower trial court to order reinstatement after three years had expired. Counsel cited ***Section 12(3)(vii) of the Employment and Labour Relations Court Act*** to the effect that reinstatement is not an available remedy after expiry of three years from the date of dismissal or termination. In this regard counsel cited ***Kenya Airways Limited V Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR.***

17. It is submitted that the respondent was dismissed on 9th May 2019 and the impugned judgment was delivered on 25th August 2023 way outside the statutory period of three years within which reinstatement may be ordered. It is further submitted that the appellant is no longer willing to engage the respondent in view of his gross misconduct and the danger that he poses to learners. The court is urged to consider the doctrine of impossibility and loss of mutual trust and confidence and find and hold that the relationship between the parties has irretrievably broken down. It is further submitted that as of now the respondent has been out of work for over six years and the appellant has moved on in that regard of and replaced the respondent.

18. It is submitted that the lower trial court was grossly wrong in

- ordering reinstatement of the respondent in the circumstances.
19. On the third issue it is submitted that the lower trial court gave no reasons at all for the other reliefs granted to the respondent beyond the order of reinstatement and thus the awards made were baseless, unexplained, and unsupported. It is submitted that the lower trial court failed to adhere to the provisions of **Sections 49 and 50 of the Employment Act**. It is further submitted that the lower trial court abused its discretionary powers under **Section 49(4) of the Act**.
 20. It is submitted that the proceedings and the judgment from the lower trial court is full of grammatical and typo errors making the same incomprehensible to read and understand. Citing **Mbogo & Another V Shah (1968) EA 93** it is submitted that this is an appropriate case for the court to interfere with the discretionary power of the lower trial court as the said power was clearly abused and violated.
 21. It is reiterated that the appellant had reasonable grounds upon which it took disciplinary action against the respondent and arrived at the right decision in dismissing the respondent guided by **Sections 41 & 43 of the Employment Act**.
 22. Counsel for the respondent banded the grounds of appeal into two categories for purposes of the submissions. On the first category counsel submitted on the issue of the order of reinstatement. Citing **Selle & Another V Associated Motor Boat Co. Ltd & Others (1968) EA 123** counsel reminded this court of its role as a court of first

appeal in evaluating the evidence to arrive at a fair and just conclusion of the issues in contention but bearing in mind that it neither heard nor recorded the evidence from the witnesses.

23. It is further submitted that although **Section 12(3)(vii) of the Employment and Labour Relations Court Act** provides that reinstatement shall not be ordered after expiry of three years from the date of dismissal or termination of an employee, this shall not render the entire judgment of the lower trial court void as the court also granted other reliefs besides reinstatement.
24. It is submitted that **Order 42 Rules 31 & 32 of the Civil Procedure Rules** gives wide discretion to this court on the order it can make on an appeal. It is urged that the court should uphold the other reliefs awarded to the respondent as the same are lawful and merited.
25. On the second band combining grounds 2, 3, & 7 of the appeal, it is submitted that while the remedy of reinstatement may not have been available to the respondent, the other reliefs on salary arrears were lawful and correct. It is further submitted that **Regulation 143(2) of the Teachers Service Commission Code of Regulation for Teachers 2015** provides that where a teacher under suspension is discharged or acquitted of criminal charges by a competent court, the suspension shall be lifted and the teacher paid all salary arrears and any other benefits accrued and payable to the teacher over the period of suspension. It is submitted that as at the time of disciplinary hearing

the respondent had been acquitted and he brought this fact to the attention of the appellant but the same was ignored.

26. It is submitted that having been acquitted by a competent court of the sexual offences, it was unlawful for the appellant to investigate the same issues and use the same in dismissing him.

IV. ISSUES FOR DETERMINATION

27. The court has perused the record of appeal, including the proceedings in the lower trial court, the memorandum of appeal, and the submissions by counsel for both parties as summarized above. In my considered view, there are two main issues raised in the grounds of appeal and counsel for both parties submitted on the same – whether the dismissal was fair and lawful; and, whether the remedies granted to the respondent were fair and just. Overall, the issues that commend themselves to the court for determination in this appeal are -

- a) Whether the dismissal of the respondent by the appellant was fair and just.***
- b) Whether the lower trial court arrived at the right and proper verdict and made the right lawful orders in the impugned judgment.***
- c) Is there a reason(s) for this court to interfere with the decision of the lower trial court as prayed by the appellant?***
- d) What appropriate orders should this court make in regard to***

the above issues and on costs?

V. THE DISMISSAL

28. As the first appellate court, this court is obligated to re-evaluate the evidence on record and arrive at its own conclusions bearing in mind that it neither heard nor recorded the evidence during the trial – see ***Selle & Another V Associated Motor Boat Company Ltd (supra)***.

29. On the first issue, to a large extent the jurisprudence on what constitutes or does not constitute fair and lawful dismissal or termination is to a large extent now settled. There are two main components to this – ***substantive and procedural fairness***.

Substantive fairness is about the employer having a genuine lawful reason for taking disciplinary action that culminated in the termination or dismissal. Procedural fairness is about the process, due process, and fair hearing. The foregoing is captured in ***Articles 47 & 50 of the Constitution and Sections 35, 40, 41, 42, 43, 44, 45, & 47 of the Employment Act (the Act)***, amongst other provisions of the law that deal with natural justice including those in the ***Fair Administrative Actions Act***.

30. A multitude of decisions have also come from this court (ELRC) on this issue – see ***Walter Ogal Anuro V Teachers Service Commission (2013) eKLR***, ***Pamela Nelima Lutta V Mumias Sugar Co. Ltd (2017) eKLR***, and ***Beatrice Nyambune Mosiria V Judicial Service Commission (2019) eKLR***.

31. It is important to state upfront that an acquittal in criminal charges is not an insulation against disciplinary action. The fact that the respondent was acquitted did not bar the appellant, as an employer, from taking disciplinary action for the alleged misconduct on the same facts and circumstances. The criminal trial interrogated the criminal aspect of the alleged misconduct and curiously the respondent was acquitted of the charges and yet the criminal trial court did not comment on whether the respondent could have been guilty of lesser or alternative criminal offences. Needless to state, the standard of proof in a criminal trial is beyond reasonable doubts as opposed to a balance of convenience in a civil trial.

32. ***Section 45 of the Evidence Act*** provides as follows – “***Judgments, orders or decrees other than those mentioned in sections 43, 44 and 45 of this Act are inadmissible except where the existence of such judgment, order or decree is a fact in issue or is relevant under some other provision of this Act.***”

33. From the above law it is deducible that the outcome of a criminal trial is *only* relevant in subsequent civil proceedings as evidence of such acquittal but it is not binding in terms of the outcome for the obviously diametrically opposed standards of proof in criminal and civil cases. In any event, the subject matter of the trial in the lower court was not the fact of the acquittal of the respondent but his misconduct as alleged and charged by the appellant. And that is the

import and essence of ***Section 45 of the Evidence Act.***

34. This court is not a criminal court and as such the criminal aspect of the misconduct shall be left at that. However, this court has the jurisdiction to interrogate the alleged misconduct in the lenses of labour law within the employment relationship between the parties herein.
35. The court has gone through the entire bundle of the lower trial court file and the record of appeal and noted the very serious allegations of sexual assault on a pupil that were levelled against the respondent. The court has also noted the statement made by the victim to the police alongside those made by other witnesses. In my considered view, the appellant was right and within the confines of the law in taking disciplinary action against the respondent for his alleged misconduct. Further, it is the view of this court that the appellant complied with ***Section 43(2) of the Act.***
36. In a letter dated 22nd November 2018 the respondent was interdicted with immediate effect and directed to respond to the allegations made in the letter within 21 days. The charges against him were that – *You are of immoral behavior in that you had sexual intercourse with your pupil (name withheld here) of standard six admission number (same withheld here) on various dates and including on 20/7/2018 in class (name withheld here) while a teacher at Nzoia Sugar Company Primary School.*

37. The respondent replied in a letter dated 7th December 2018 and denied the above allegations in toto. Subsequently, the respondent was invited to a disciplinary hearing held on 27th March 2019. In a letter dated 9th May 2019 the respondent was dismissed from service with effect from 27th March 2019. Vide a letter of 9th May 2019 the respondent was accordingly removed from the register of teachers in employ of the appellant.
38. The court has read the minutes and proceedings of the disciplinary hearing as contained in pages 136 to 159 of the record of appeal and noted that the respondent was accorded a fair hearing. He was allowed to cross-examine the witnesses and present his defence. It is the finding and holding of the court that the respondent was accorded fair hearing both in substance and procedure.
39. There were serious allegations and charges of sexual assault by the respondent to a pupil. The appellant with or without an acquittal or conviction was obliged to investigate the matter and take an appropriate disciplinary action. Upon due consideration of the evidence availed from both sides the appellant found the respondent culpable of gross misconduct and terminated him accordingly as stated above.
40. As pointed out by counsel for the appellant the proceedings and the judgment of the lower trial court are so full of grammatical and typo errors that one wonders how that lower trial court allowed and or

signed the same. However, notwithstanding the pains and struggles in reading and comprehending the same, the court is of the considered view that the lower trial court arrived at the wrong decision.

41. Firstly, the appellant had a lawful right in taking disciplinary action against the respondent. Secondly, notwithstanding the acquittal in the criminal trial, which acquittal this court does not agree with, there is plenty of evidence of gross misconduct on the part of the respondent for engaging in sexual intercourse with a minor, a pupil for that matter. Further, it is the finding and holding of this court that the appellant was right in terminating the services of the respondent not only to protect the particular victim but many other pupils who were placed in the hands and care of the respondent.

42. The court has said enough in demonstrating that the termination of the respondent was fair and just both in substance and procedure.

43. The court shall now examine the reliefs awarded by the lower trial court. The lower trial court awarded to the respondent the following

–

a) General damages for unlawful/unfair dismissal;

Basic salary months years that claimant could have worked

Kshs.34,395/= x 12 x 15 = Kshs6,191,100/=

b) Amount in lieu of notice 34,395/= x 3 = Kshs103,000/=

c) Two months leave allowance 34,395/=x2 = Kshs68,000/=

d) *Gratuity for fifteen years* $34,395/= \times 15 \times \frac{1}{2} =$ *Kshs257,963/=*
e) *Five months' salary* = *Kshs171,975/=*
f) *House allowance for five month* = *Kshs16,000/=*
TOTAL = **Kshs6,808,038/=**

g) *immediate re-instatement of his employment and payment of all salary arrears since the claimant's interdiction and dismissal till the said reinstatement and subsequent payment of the said salary on monthly basis onward.*

h) *Costs to the claimant.*

44. Clearly and evidently, the lower trial court was wrong in awarding general damages for unlawful/unfair dismissal on two counts. Firstly, **Section 49(1)(c) of the Act** provides for compensation and not for general damages. Secondly, as the court has held above, the dismissal was fair and just considering the entire circumstances of the case and as such no compensation was due and or payable to the respondent. The award of Kshs6,191,100/= is hereby reversed and set aside.

45. Item (b) is also set aside as the respondent was not entitled to notice of dismissal for his own gross misconduct. He was the author of his own misfortune and thereby readied himself to meet the natural and legal consequences thereof. The award of Kshs103,000/= is reversed and set aside.

46. Item (c) is for two months leave allowance in the sum of Kshs68,000/=. The two months are not named and the year is not

mentioned. The said claim is not supported in the evidence adduced at the trial and the same is hereby set aside and dismissed.

47. ***Regulation 181(2) of the Code of Regulation for Teachers*** is to the effect that a teacher dismissed from service shall forfeit all claims relating to pension and gratuity. In that regard, therefore, the award for gratuity in the sum of Kshs257,963/= was completely out of tune with the terms and conditions of the employment relationship between the parties and the same is hereby reversed, set aside, and dismissed.
48. Likewise, the awards for five months' salary arrears in the sum of Kshs171,975/= and the house allowance for an equal period in the sum of Kshs16,000/= were unfounded, bad in law, and unsupported both in particulars and evidence. Both are hereby set aside and dismissed.
49. It is amazing that besides granting the awards that have been set aside above, the trial lower court simultaneously awarded to the respondent the alternative prayer for reinstatement. As far as I know and understand pleadings and the law thereof, an alternative prayer is in form of another remedy in case the court fails or denies the main or first or preceding prayer. Common sense thus dictates that a court shall not award a main prayer and then proceed to grant an alternative prayer without giving cogent reasons for the same. The trial lower court was completely wrong and out of order in awarding

the main prayers and thereafter heaping the alternative prayer thereon.

50. Either way, the remedy of reinstatement was completely out of reach of the respondent in view of the very clear and unambiguous provisions in **Section 12(3)(vii) of the Employment and Labour Relations Court Act** which provides that – “***an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law***”.

51. The respondent was dismissed on 9th May 2019 as per the letter from the appellant communicating the same. The dismissal was with effect from 27th March 2019. By the time the lower trial court delivered its judgment on 25th August 2023 the statutory period of three years had long expired and clearly reinstatement was not available to him as a remedy.

52. Ultimately, the judgment of the lower court is hereby set aside in its entirety and a judgment entered therefor dismissing the cause in its entirety.

VI. ORDERS

53. Flowing from the foregoing, the court makes the following orders –

- a) This appeal is hereby allowed and the judgment of the lower court set aside in its entirety.***
- b) Each party shall meet own costs both in the lower court and in***

this appeal.

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT
BUNGOMA THIS 26TH DAY OF SEPTEMBER, 2025.**

.....
DAVID NDERITU
JUDGE

ORIGINAL