



**Kimilu v Teachers Service Commission (Cause 522 of 2019)
[2024] KEELRC 1137 (KLR) (20 May 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1137 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 522 OF 2019**

JK GAKERI, J

MAY 20, 2024

BETWEEN

NICODEMUS KALUNGU KIMILU CLAIMANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim filed on 9th August, 2019 alleging wrongful termination and claiming salary arrears.
2. The Statement of Claim was subsequently amended on 13th September, 2021 and 8th March, 2022.
3. It is the Claimant's case that he was appointed as a trained teacher in 1991 and was a Head Teacher from September 2003 to the date of termination of employment and served the Respondent diligently for 28 years and was earning a gross salary of Kshs.90,490/= per month.
4. That in December 2015, he was transferred to Kitoo ABC Secondary School as a teacher without explanation as he had been serving as a Head teacher.
5. The Claimant avers that by letter dated 22nd February, 2017 by the TSC County Director of Kitui, he was interdicted on even date for desertion of duty.
6. The letter notified the Claimant of all the rights he was entitled to. However, the interdiction letter was subsequently amended to include a second ground of failure to account for Kshs.1,668,652.00 public funds issued for ICT infrastructure and other utilities in 2014, while he was the Principal of Mutulani Secondary School, Makueni.
7. The Claimant further avers that his employment was terminated vide letter dated 21st March, 2019 without a fair hearing.



8. It is the Claimant's case that following his transfer to Lundi Secondary School in 2016, he reported but in September 2016, some students notified him that the community was planning to storm the school, that on 5th October, 2016, a crowd stormed the school chanting and he escaped through the fence but on 6th October the school was deserted.
9. That he reported the matter to the Sub-County Director of Education, Mr. Mathuki Sub-County Director, Mwingi County Director and TSC Secretariat and the police on 17th October, 2016 and no investigations took place.
10. It is the Claimant's case that the auditor who investigated the alleged misappropriation did not invite him to respond to audit queries.
11. The Claimant characterises the termination as unlawful and unprocedural.
12. The Claimant prays for;
 - i. A declaration that the termination letter dated 21st March, 2019 terminating the Claimant's services was unlawful, and null and void. The same be lifted by order of the court.
 - ii. Reinstatement of employment without loss of benefits.
 - iii. In the alternative, the Claimant prays for payment of damages for unlawful loss of his job and payment of all outstanding dues, allowances and other benefits as stipulated by law and practice.
 - iv. Costs of the claim.

Response

13. In its response filed in November 2019, the Respondent avers that around 28th September, 2015, the Respondent received complaints from the Chairman, Board of Management, Mutulani Secondary School and several parents of the school about the Claimant's mismanagement of the school. That the Ministry of Education conducted an investigation and prepared an assessment report and handed over the same to the Respondent to take the necessary administrative action.
14. That attempts to transfer the Claimant precipitated Nairobi ELRC No. 2317 of 2015 Nicodemus Kimilu V TSC and interim orders were granted.
15. The Claimant was then transferred to Lundi Day Secondary School effective 17th July, 2016 as the School Principal but the Respondent learnt that he had deserted duty effective 5th October, 2016 and after an investigation, the County Director recommended interdiction of the Claimant and the same was done. That he alleged that the environment was hostile.
16. After an Audit Report for the year 2014 by the Ministry of Education, the Respondent interdicted the Claimant under an amended interdiction letter.
17. That the Claimant was invited for a hearing and cross-examined the witnesses and the termination of the Claimant's employment was fair and procedural.

Claimant's evidence

18. On cross-examination, the Claimant testified that he was a Principal for 12 years and his role included teaching, managing the school and protect school property as exemplified by the letter dated 14th July, 2016 which transferred the Claimant to Mutulani Secondary School.



19. The Claimant acknowledged that he was present when the Ministry of Education visited the school on 16th July, 2016 and was aware of the conclusion arrived at, including holding him accountable for financial irregularities and embezzlement of Kshs.1,668,652.00.
20. The witness admitted that in 2014, the school was given funds to purchase computers and it was used for the purpose for which it was given but added that he used the money for other purposes including completing classrooms.
21. That he responded to the interdiction letter dated 22nd May, 2017, was invited for a hearing 4 times and he did not call any witness but cross-examined witnesses during the hearing.
22. That he received a notice to show cause dated 9th May, 2016 but did not respond.
23. The witness admitted that he was not at the workplace on 5th October, 2016 and had not applied for compassionate leave.
24. On re-examination, the witnesses testified that the letter dated 9th May, 2016 was not styled as a notice to show cause.

Respondent's evidence

25. RWI, Mr. Benson Manei confirmed on cross-examination that he conducted an audit at Mutulani Secondary School and signed it on 10th November, 2017 and it was a Qualified Report as some issues were not fully accounted for.
26. That the report was based on the documents availed by the school and relevant circulars but some documents were unavailable for a comprehensive report.
27. The audit was actuated by the assessment and complaints about misappropriation of funds.
28. That the audit team interviewed the Claimant and the Board of Management (B.O.M) and held an exit meeting.
29. The witness was categorical that the school had no computers or money in its bank accounts.
30. That the audit report was sufficiently conclusive as a basis of termination of the Claimant's employment.
31. On re-examination, RWI testified that the Claimant was present during the audit and he had no response to the non-availability of computers in the school.
32. RWII, Judith Ethuro confirmed that she was the Assistant Director, Discipline and her duties included collection of evidence and hearing disciplinary matters.
33. That she attended all hearings of the Claimant and the audit report was a common feature and the committee relied on the report which implicated the Claimant's professional conduct.
34. The witness confirmed that the initial investigation was conducted at the instance of the County Director and an interdiction letter issued and was later amended.
35. On re-examination, the witness testified that the Claimant deserted duty and misappropriated funds and the decision of the BOM was not final.



Claimant's submissions

36. As regards the reasons or grounds of interdiction, counsel argued that the grounds cited by the Respondent, namely; desertion and misappropriation of funds were not valid as the audit was not conducted in accordance with the local and international standards and was thus illegal, unlawful and irregular.
37. Counsel urged that the Claimant was transferred by letter dated 15th December, 2015 and the audit was conducted from 10th November, 2017.
38. According to counsel, the Claimant had already been convicted on account of the transfer and was thus condemned unheard as he could not defend himself against the audit report and was not involved in the audit.
39. That Mr. Benson Manei did not sign the audit report and thus the report had no ownership and the report was neither qualified nor unqualified.
40. That there was no entry meeting and the Claimant did not understand the purpose of the audit and there was no exit meeting.
41. According to counsel, the auditor and his team were incompetent.
42. Counsel submitted that the report was sent to Mutulani Secondary School with instructions to the Board of Management to prepare accounting records and a copy was not given to the Claimant.
43. That the BOM conducted another audit and provided a generalized and defective report and exonerated the Claimant from wrong doing as per minute 4 of the BOM meeting held on 6th February, 2019.
44. As regards desertion, counsel submitted that desertion is an intentional act to discontinue employment.
45. That after the Claimant's transfer to Lundi Day Secondary School, he faced hostilities from parents, agents and associates of the school and his presence was unwanted and fearing for his life, the Claimant left his post and did not return and requested a transfer vide letter dated 7th October, 2016 but it was not acknowledged.
46. That he made physical visits to the offices for assistance but none was forthcoming and no investigation was conducted.
47. Counsel submitted that the Claimant stayed close to the school but was interdicted by letter dated 22nd February, 2017 for desertion and misappropriation of funds.
48. Finally, counsel urged that the alleged desertion was not proved.
49. As to whether termination of the Claimant's employment was inhumane, unprocedural and unfair, counsel submitted that the provisions of the *Employment Act*, 2007 were not complied with as the Respondent failed to demonstrate that it had a valid reason to terminate the Claimant's employment and the procedure was irregular and tainted with anomalies as one M/s Martha, the Chairperson of Lundi Secondary School had no locus standi in the process as the school had no legitimate BOM and no evidence was adduced to show that she was the Chairperson of the BOM at Lundi Secondary School and her evidence was admitted by the Respondent and no witness from Mutulani Secondary School was invited to address the audit report.



50. That the Claimant was not invited when the witness were being interviewed.
51. According to counsel, the County Director did not initiate an investigation in conjunction with the BOM under Regulation 146(3) of the Teachers Service Commission Code of Regulations and the Claimant was not present when witnesses were interviewed by the investigation panel.
52. That the Claimant was not given sufficient details of the Audit Report or other documents to enable him respond to the charges and those availed were insufficient.
53. That he was not accorded sufficient time to prepare for the trial and was ambushed with the hearing.
54. That he was accorded 21 days to prepare in lieu of the month under Regulation 149(1) of the Code of Regulation and he could not defend himself.
55. According to counsel, termination of the Claimant's employment was malicious, unfair and unlawful.
56. As regards the reliefs sought, counsel urged that since the Claimant's termination from employment was unfair, the Claimant is entitled to reinstatement to his position or equally suitable position, all salaries and allowances and other legal dues pending from 2017 to 2028 when he would have retired.
57. That the Claimant is a person living with disability and would have retired in 2028.
58. Counsel invited the court to allow the prayers contained in the annexure to the submissions.

Respondent's submissions

59. Counsel submitted on reason(s) for termination, fair hearing and the reliefs sought.
60. On the 1st issue, counsel cited the provisions of Section 43 of the *Employment Act*, 2007 and the Court of Appeal decision in Kenya Power & Lighting Co. Ltd V Aggrey Lukorito Wasike on the employer's burden of proof to urge that during the audit process, the Respondent examined documents, interviewed the Principal and the Accounts Clerk and undertook physical verification of assets.
61. That by letter dated 5th August, 2014, the Claimant had been given strict instructions on how to spend the sum of Kshs.1,004,902/=, the items to be bought were identified and the Claimant did not do so and did not account for the funds at any point and testified that he entered into verbal agreements on how the money would be used and no ICT equipment was bought.
62. On desertion, counsel submitted that the Claimant left the school on 5th October, 2015 after allegedly he received intelligence from some unnamed students that the community would storm the school and hid in his house in the same market and only reported the same to the police on 17th October, 2016 and never sought compassionate leave.
63. Counsel further submitted that the Claimant was interdicted, invited for a hearing, attended and was heard and his employment terminated.
64. Concerning the hearing, counsel submitted that Respondent complied with its Code of Regulations and the Claimant was accorded a fair hearing and opportunity to be heard.
65. Reliance was made on the Handbook of Financial Management Instructions for Secondary Schools, Colleges and Polytechnics issued by the Ministry of Education Science and Technology, 2006 on the role of Head of Schools in relation to books of account and audit.



66. Counsel submitted that following the allegations made against the Claimant, a Standards Assessment was conducted and a report dated 16th July, 2015 generated and an Audit was conducted for 2014.
67. On desertion, counsel urged that investigations were carried out as evidenced by the letter dated 6th February, 2017 which led to the Claimant's interdiction and was granted 21 days to respond and did so by letter dated 6th March, 2017 and responded to the amended letter vide letter dated 5th September, 2017 and the Respondent relied on all the evidence at its disposal in arriving at its decision.
68. Reliance was made on the decisions in *Nampak Corrugated Wadeville V Khoza* (JA 14/98 [1998] ZALAC24 cited in *Judicial Service Commission V Gladys Boss Shollei & another* (2014) eKLR on when a court should interfere with a sanction imposed by the employer.
69. Reliance was also made on the sentiments of the court in *BA Imonikhe V Unity Bank PLC SC 68* of 2001, *Anthony Mkala Chitavi V Malindi Water & Sewerage Co. Ltd* (2013) eKLR among others to urge that the Respondent accorded the Claimant a fair hearing and underscore the fact that the threshold of procedural fairness under the *Employment Act, 2007* was met.
70. On the reliefs sought, counsel submitted that as the termination was in accordance with the law, the declaration sought was unmerited.
71. On reinstatement, counsel submitted that the court had no jurisdiction to reinstate the Claimant by virtue of Section 12(3)(vii) of the *Employment and Labour Relations Court Act, 2011* as 3 years had lapsed since the dismissal from employment and reinstatement is a remedy of last resort.
72. The decision in *Sotik Highlands Tea Estates Ltd V Kenya Plantation & Agricultural Workers Union* (2017) eKLR was also cited to buttress the submission.
73. On damages for unfair termination, counsel submitted that the Respondent had discharged the burden of proof under Section 41 and 43 of the *Employment Act, 2007* and no compensation is due to the Claimant.

Analysis and determination

74. It is common ground that the Claimant was an employee of the Respondent from 1990, when he joined as a classroom teacher until 2nd September, 2003 when he was deployed as a Head Teacher at Mutulani Secondary School where he remained for over 12 years.
75. It is also not in contest that sometime in September 2015, the Respondent received complaints from the outgoing Chairman BOM, Mutulani Secondary School as well as parents concerning the Claimant's mismanagement of the school and misappropriation of funds.
76. The unsolicited letters clearly reveal that the ship was not steady under the Claimant's stewardship.
77. Equally not in dispute is the fact that about 1^{1/2} months earlier, the Ministry of Education had conducted an Institutions Standards Assessment and prepared a detailed report which covered all aspects of the school.
78. The assessment team found a limping institution and recommended inter alia redeployment of the Claimant to another school as a classroom teacher and surcharging him for the sum of Kshs.1,668,652.00 among other recommendations.
79. It is equally not in dispute that an earlier attempt to transfer the Claimant to Kitoo ABC Secondary School as a Biology/Chemistry teacher from 21st December, 2015 as recommended by the Assessment Report was stopped by Court Order in ELRCC No. 2317 of 2015. However, the Claimant did not



contest his transfer to Lundi Day Secondary School as Principal and Biology/Chemistry Teacher vide letter dated 14th July, 2016 with immediate effect.

80. Documentary evidence adduced by the Respondent reveal that by January 2017, things were not rosy at Lundi Secondary School as evidenced by report by the Head Teacher, Lundi Primary School, and complaints from students of the school and parents dated 20th January, 2017 and 10th January, 2017 respectively. The bottom line is that the Claimant was not performing his duties at the school from 26th July, 2016.
81. Relatedly, the Lundi Secondary School Committee filed a complaint on the Claimant's disappearance from 5th October, 2016 and attached a staff register which showed that the Claimant made technical appearances in the school, a fact corroborated by the students' complaint.
82. The parents and the committee requested for another Head Teacher.
83. The complaints culminated in the Claimant's interdiction, audit of the schools accounts and eventual dismissal from employment on the grounds of desertion and failure to account for funds under his control.
84. From the foregoing, the issues that commend themselves for determination are;
 - i. Whether termination of the Claimant's employment by the Respondent was unfair.
 - ii. Whether the Claimant is entitled to the reliefs sought.
85. As correctly submitted by counsels for the parties, the provisions of the *Employment Act*, 2007 and case law are unambiguous that for a termination of employment to pass muster, the employer is required to prove that it had a valid and fair reason to terminate the employee's employment and conducted the same in accordance with a fair procedure.
86. The provisions of Sections 41, 43, 44 and 45(2) and 47(5) of the Act set out the essentials of a fair termination of employment as held in *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR.
87. Similarly, in *Naima Khamis V Oxford University Press (EA) Ltd* (2017) eKLR, the Court of Appeal stated as follows;

“. . . From the foregoing, termination of employment may be substantively and/or procedurally fair. A termination is also deemed substantively unfair where the employer fails to give valid reasons to support the termination. On the other hand, procedural unfairness arises where the employer fails to follow the laid down procedure as per contract or fails to accord the employee an opportunity to be heard as by law required.”
88. (See also *Ndolo J. in Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR).

Reason for termination

89. Although the original letter of interdiction dated 22nd February, 2017 had only one charge against the Claimant namely desertion of duty from 5th October, 2016, it was subsequently amended by the letter dated 22nd May, 2016 by inserting a second ground, namely; failure to account for the sum of Kshs.1,668,652/= given in 2014 for ICT infrastructure at Mutulani Secondary School.
90. The dismissal letter dated 21st March, 2019 identified two grounds namely;



1. Desertion effective 5th October, 2016 while Principal at Lundi Secondary School, Kitui County.
 2. Failure to account for Kshs.1,668,652/= public funds issued for ICT infrastructure and other utilities in 2014 while Principal at Mutulani Secondary School, Makueni County.
91. As to whether the Claimant deserted the workplace, counsels adopted contrasting positions with the Claimant's counsel arguing that the Claimant feared for his life and escaped on 5th October, 2015, reported the matter to the relevant officers including the Respondent, police and sought a transfer.
 92. In his Further Witness Statement, the Claimant alleged that after only 3 months of reporting at Lundi Secondary School, he faced hostilities from the community who organized armed boda boda riders and demanded that he moves out of the school. The statement makes no reference to the date when this occurred.
 93. Strangely, the Claimant confirmed on cross-examination that he was not at the workplace on 5th October, 2016.
 94. But more significantly, the Claimant provided no evidence as to why a local community unknown to him previously would be hostile to him less than 4 months of his posting to the school. This is not typical in rural or urban areas.
 95. Similarly, the graphic details captured in the Further Witness Statement dated 9th March, 2023 are conspicuously missing in the statement dated 9th August, 2019, written about 2¹/₂ years after the event.
 96. Relatedly, the Claimant provided no corroborative evidence of how he learnt of the planned attack and yet he went to hide in his house at the same market and adduced no evidence of having relocated to another place or attacked.
 97. Significantly, not a single written complaint had been made against him before 5th October, 2016.
 98. The court finds the allegation of hostilities from the community overdramatized and not believable as it lacks supportive evidence.
 99. However, the fact that the Claimant requested for a transfer is significant. The letter dated 7th October, 2014 was addressed to the secretary of the Respondent.
 100. The letter states that the "community were saying that they need their own to head the school".
 101. The letter states that on the material day, he left the office and went to his room where he found a note threatening him, but did not keep it as evidence or hand it over to the police for action.
 102. How did he get to his room if the community had threatened him or get out later to proceed to the many places he proceeded to.
 103. Strangely, the letter makes reference to no particular date when the community was "charged."
 104. The Claimant testified that he received no response from the Respondent until he received the letter of interdiction dated 22nd February, 2017.
 105. The court is left wondering why the Claimant felt threatened on 5th October, 2016, left the office for his room instead of the police station for security to be provided, his first reaction was to request for a transfer which could take time before the circumstances were established.



106. The report to the police on 17th October, 2016, more than 12 days later would appear to have been an afterthought to reinforce the application for transfer. He testified that the police referred him to the County Director of Education.
107. There is no evidence on record to suggest that the Claimant's life was threatened or that was in danger in his house at the market.
108. By his admission, the Claimant was not rendering services from early October to the date of receipt of the letter of interdiction.
109. It is unclear as to when the Respondent received the Claimant's letter and what action it took to resolve the issue.
110. What is evident is that a preliminary investigation was undertaken in late January or early February 2017 by the DQASO, Mr. Kloll and the Sub-County Director Mwingi, Central/East Mr. Dadacha Jirmo.
111. The preliminary investigation did not find any threat directed at the Claimant.
112. Did the Claimant abscond or desert the workplace?
113. The court is not so persuaded, as at all material times the Respondent was aware that he had requested for a transfer and it was incumbent upon it to respond to the Claimant's request or provide interim relief since he was not rendering services as expected.
114. The Claimant's letter to the Secretary TSC copied to Sub-County Director TSC, who acknowledged receipt is sufficient evidence that the Claimant had not intended to desert the workplace.
115. In the often cited South African case of *Seabolo V Belgravia Hotel (1997) 6 BLLR 829 (CCMA)*, the court stated as follows:

“... desertion is distinguishable from absence without leave, in that the employee who deserts his or her post does so with the intention of not returning or having left his or her post subsequently formulates the intention not to return”.
116. Desertion is a serious form of misconduct and may lead to summary dismissal of an employee, if it is proved.
117. As held in *Felistas Acheha Ikatwa V Charles Peter Otieno (2018) eKLR*, and other decisions, the emerging jurisprudence on desertion is that an employer relying on it as a defense to unfair termination of employment is required to demonstrate the efforts made to ascertain the employee's whereabouts and make him/her aware that termination of employment on the ground of desertion was being considered.
118. In this case, since the Claimant had already written to the Respondent requesting for a transfer and he remained the substantive Principal of Lundi Secondary School, his whereabouts was known and could not be deemed to have absconded duty.
119. However, in the court's view, the Claimant would appear to have absented himself from the workplace without leave or lawful cause as he was unable to prove that he was facing any immediate any danger from the local community.
120. The charge of failure to account for public funds is very serious and requires a detailed exploration.



121. It is common ground that this charge was introduced by the amended interdiction letter dated 22nd May, 2017 and related to a school the Claimant left in December 2015 and in his response dated 5th September, 2017, the Claimant stated that he could not access the accounts documents as he was in another school and could not ask anyone to avail them citing bad blood between him and the community.
122. The Claimant made no request for facilitation to access the documents but requested the Respondent “to give the verdict of this case using the information they have without further delay.”
123. Under the Handbook of Financial Management Instruction for secondary schools, colleges and polytechnics, 2006.
- “Heads of schools are required to submit their books of accounts and financial statements and any other necessary documents to their District Schools Audit Unit by 31st January of the ensuing year to enable the Audit Unit of the MOEST to carry out the audit. . .”
- The heads of institution as accounting and supervising officers are fully responsible for all financial transactions and preparation of financial statements at the institution as well as any irregular accounting which in some cases is not deliberately or otherwise brought to the notice of the auditors. Any head who fails to submit the books of account for audit within the stipulated time is liable to discipline . . .
124. Finally, the instructions itemise the records or documents which accompany the financial statements, including a recommendation of the BOM to the DEO/PDE for authority for over-expenditure, virement or withdrawal from the General Reserve Fund or Replacement Funds as well as Minutes of the BOM on finances such as, bursary and contract awards and the approved budget.
125. As an accounting officer, the Claimant’s dealings had to be in consonance with the *Public Finance Management Act*, 2012, Education Act and the Public Procurement & Disposal Act, 2005 among other laws as well as government policies and circulars on financial matters.
126. By letter dated 21st July, 2015, the County Director of Education, Makueni, Mr. Kamau Gatheru notified the Claimant that he had not submitted books of account for audit from 2008 – 2014 and was directed to submit the books for the 7 years for audit. The Institutions Standards Assessment conducted on 16th July, 2017 made a similar finding.
127. There is no evidence on record that the directive was complied with.
128. Having been the head teacher of the school since 2003, the Claimant had evidently failed in his duties.
129. Significantly, the Institutions Standards Assessment report for 2015 reveals that the previous assessment dated 8th January, 2014 was conducted for purposes of computer readiness of Mutulani Secondary School.
130. It is common ground that by letter dated 5th August, 2014, the Principal Secretary, Ministry of Education Science & Technology informed the Claimant, as Principal of Mutulani Secondary School that the Ministry had released Kshs.1,004,902.00 under the Computer Supply Project for purposes of integrating ICT in education.
131. The school’s B.O.M was expected to;
- a. Promptly acknowledge receipt of the funds by issuing a school receipt to the Principal Secretary.



- b. Procure the following ICT equipment
 - i. 1 printer
 - ii. 11 computers
 - iii. 11 uninterrupted power supply (UPS)
 - iv. 1 Laptop
 - v. 1 LCD/DLP projector
 - vi. Installation of Local Area Network (LAN)
 - vii. Internet connectivity for 1 year

and any saving be utilized by procuring additional computers or other ICT equipment listed above.”
132. The letter required the Claimant to furnish the Principal Secretary with expenditure returns immediately detailing the make, model and serial numbers of the procured equipment copied to the CDE.
133. Finally, the Principal Secretary stated that “The funds should be used for the above-named intents only and not for any other school project or activity . . .”
134. From the evidence on record, the money was wired to the Operation Ac No. 1108807518 on 21st July, 2014 before the letter was written.
135. The Institutions Standards Assessment exercise for 2015 found that the school had no formal BOM for 2015 as its term expired on 17th February, 2015 and the process of nominating new BOM members had commenced.
136. The team interviewed the Claimant and the Accounts Clerk, one Janet Mutindi Kiio and found that the sum of Kshs.1,004,902.00 was withdrawn from the operations account by the Claimant from 22nd July, 2014 to 15th August, 2014 save for the sum of Kshs.80,000/= withdrawn by Pasha Enterprises on 30th July, 2014. Simply stated by mid-August, the funds meant for ICT equipment had been used for other purposes, a fact the Claimant admitted on cross-examination and at the hearing.
137. Puzzlingly, the school had no Tender Committee as required by law and the Claimant procured all supplies by single sourcing and the annual budget had not been implemented and as adverted to elsewhere, no audit had taken place for 8 years and there was no current bank statement for verification.
138. The team also found that the school was issuing bouncing cheques, the Claimant signed blank cheques with no payee, amount or date as evidenced by cheque Nos. 455, 456 and 458 from tuition account and Nos. 640, 641 and 642 drawn from operation account and cheque No. 651 of Kshs.120,000/= was missing in the cheque counter foil and had no payees name.
139. The team found that the school had no internal controls, nor were the ministry guidelines or the procurement law adhered to and recommended that the Claimant be held accountable for the sum of Kshs.1,668,652.00.
140. Finally, the team found other dysfunctionalities at the school and recommended redeployment of the Claimant and surcharging him the sum of Kshs.1,668,652.00 among other recommendations. This report which the Claimant did not controvert with credible evidence implicated him in embezzlement of public funds and was thus aware of the state of affairs long before the audit was conducted in 2017.



141. Contrary to the Claimant's submission that the audit team was incompetent, RWI confirmed on cross-examination that the team had opening and exit meetings, interviewed the Claimant and BOM members and relied on documentary evidence at the school, government circulars and conducted on the site audit and found that the school had neither computers nor money in its bank accounts. (See letter dated 15th January, 2016 by Mr. B. O. Manei to the Ministry of Education).
142. RWI also confirmed that he conducted the audit and signed the Report at page 81 on 10th November, 2017 and found that the Claimant had not kept proper books of accounts and the financial statement did not give a true and fair view of the state of the schools financial position as at 31st December, 2014.
143. That the Claimant had neither complied with the handbook nor the law.
144. It is essential to mention that the Claimant's letter to the Director of Education, Ministry of Education, Nairobi dated 23rd March, 2019, two days after the dismissal letter alleges that the Claimant was not invited to respond to the auditor queries identified on 30th June, 2015 which was an annual assessment and he was interviewed yet he admitted in court that he was aware of the conclusion arrived at by the team, that he be surcharged for the sum embezzled.
145. Intriguingly, the Claimant alleges that the BOM of Mutulani Secondary School cleared him as its minutes of the meeting held on 6th February, 2019 found that the Claimant had explained how he used the money to renovate the computer lab by wiring, installing computer benches and flooring and the BOM found the explanation valid and the matter would be forwarded to the Respondent for advise.
146. A cursory reading of the minute leaves no doubt that the BOM did not exonerate the Claimant from the charge, but merely expressed its opinion based on the explanation given.
147. More significantly, exoneration by the BOM was of no consequence vis-a-vis the Standard Assessment Report and the Audit report on record.
148. During the hearing, the Claimant told the committee that the Accounts Clerk disappeared with the books, yet his statement does not state so or that he notified the Respondent of the alleged disappearance of the books.
149. The Respondent dispatched a notice to show cause dated 9th May, 2016 enclosing the Ministry of Education report and a response was needed within 14 days and the Claimant admitted having received it but did not respond even after a reminder dated 22nd December, 2016 and was accorded one month to do so.
150. He admitted that he was given a copy of the Standards Assessment Report 2015 and he had no written agreement with any of the persons he allegedly contracted with.
151. The Claimant further admitted at the hearing that he used the ICF funds for other purposes without authority.
152. The Disciplinary Committee was satisfied that the Claimant was culpable as charged and recommended dismissal and surcharge of the Claimant.
153. Section 43 of the *Employment Act*, 2007 provides;
 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 the termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
154. In *Kenya Revenue Authority V Reuvel Waithaka Gitahi & 2 others* (2019) eKLR, the Court of Appeal held that;
- “The standard of proof is on a balance of probability, not beyond reasonable doubt, and all the employer is required to prove are the reasons that it “genuinely believed to exist”, causing it to terminate the employee’s services. That is a partly subjective test.”
155. The provisions of Section 43(2) of the Act require the employer to establish that it had reasonable and sufficient grounds for its belief.
156. The foregoing is consistent with the range or band of reasonable responses test in paragraph 642 of the *Halsbury’s Laws of England*, 4th Edition, Vol. 16 (1B) as follows;
- “ . . . In adjudicating on the reasonableness of employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decides whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair.
157. In the instant case, the Respondent has adduced documentary evidence, which on a balance of probabilities show that the Claimant utilized funds provided by the Ministry of Education for ICT infrastructure and computers for other purposes contrary to the directions of the Principal Secretary and neither acknowledged receipt of the cash nor furnish the Principal Secretary with the required documentation or account the same after the Standards Assessment in 2015 or after the audit in 2017.
158. Relatedly, the Respondent has evidentiary demonstrated that the Claimant rendered no services from October 2016 to the date of dismissal. He absented himself without authority or other lawful case and was thus guilty of gross misconduct.
159. In the upshot, it is the finding of the court that the Respondent has demonstrated that it had a valid and fair reason to dismiss the Claimant from employment.

Procedure

160. Section 41 of the *Employment Act*, 2007 prescribes the procedural precepts of termination of employment.
161. In *Postal Corporation of Kenya V Andrew K. Tanui* (2019) eKLR, the Court of Appeal itemised the specific elements of procedural fairness as follows;
- i. an explanation of the grounds of termination in a language understood by the employee;



- ii. the reasons for which the employer is considering termination;
 - iii. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination are made;
 - iv. hearing and considering any representations made by the employee and the person chosen by the employee.”
162. Needless to belabour, Section 41 of the Act prescribes the minimum requirements an employer must abide by in termination of employment.
 163. As regards the procedure employed by the Respondent, parties have adopted opposing positions with the Claimant’s counsel faulting the procedure on various fronts including the allegation that Ms Martha Musyoka who appeared as a witness before the disciplinary panel was not the Chairperson of the BOM at Lundi Secondary School.
 164. It is not in dispute that the witness Martha Musyoka attended the meeting held on 10th January, 2017 and is designated as Chairlady and the Chair of the meeting was one Mr. Sammy Mwanzia, the PTA Chairperson.
 165. Having served as a Chair of the BOM for a substantial part of 2016 and the Claimant having found her in office, Martha Musyoka was competent to testify at the disciplinary hearing.
 166. Significantly, at the hearing, the Claimant testified that Martha Musyoka, the Chair of the BOM at Lundi Secondary School had allegedly incited the community against him. Having admitted that she was the Chairperson of the BOM of the school, he could not controvert the statement at trial without documentary evidence, which he did not avail.
 167. As regards the absence of an investigation report at the County level, the letter by the Sub-County Director dated 6th February, 2017 reveals that he and DQASO Mr. Kloll investigated the alleged desertion and made several findings as evidenced by the letter and relied on the documentation availed by the school, namely; log-book and staff register.
 168. Significantly, the Claimant had already requested for a transfer and was allegedly fearing for his life. Mr. Kloll and the Sub-County Director found different facts at Lundi Secondary School.
 169. The report recommended interdiction of the Claimant.
 170. Did the absence of a hearing as envisioned by the Code of Regulations for teachers prejudice the Claimant?
 171. Bearing in mind that the two TSC officials were on a fact finding mission as opposed to an investigation, their finding at that stage justified the interdiction and the Claimant responded to the letters of interdiction.
 172. In the totality of the evidence availed, the court is not persuaded that the absence of a hearing before the BOM prejudiced the Claimant in any way.
 173. On availment of documents for the hearing, the Claimant admitted that he received the essential documents to prepare for his defense. Specifically, the Institutions Standards Assessment Report 2015 was forwarded to him.
 174. This is the document which exposed the Claimant’s financial improprieties among other short comings and demonstrated how he withdrew a total of Kshs.1,219,400/= from 22nd July, 2014 to 15th August, 2014, in a record 25 days after the cash was deposited.



175. Significantly, this exercise was conducted in the presence of the Claimant and he was the Principal actor.
176. The Audit Report in 2017 merely confirmed that the Claimant's school had no internal control systems and proper books of accounts had not been kept and the financial statements were unreliable.
177. The fact that no audit queries were isolated for his response does not diminish the fact that he had already been indicted for failure to account for public funds, a fact the audit affirmed contrary to counsel's submission that the Claimant was subjected to trial by ambush, the factual situation is however different.
178. The Claimant responded to the 1st interdiction letter dated 22nd February, 2017 on 6th March, 2017 and never requested for any document or more time.
179. The letter of interdiction dated 22nd May, 2017 was responded to on 5th September, 2017, almost 4 months later and the Claimant was not penalised for the delay.
180. Similarly, in relation to the notice to show cause dated 9th May, 2016 issued pursuant to the Standards Assessment Report dated 13th August, 2015, the Claimant was initially accorded 14 days to respond to the allegation of mismanagement of funds but did not. A reminder dated 23rd January, 2017 accorded him 30 days but did not elicit a response.
181. These notices were issued before the Claimant was interdicted.
182. In the absence of a response from the Claimant, no hearing was necessary at this stage.
183. Finally, as regards preparation for the disciplinary hearing, the notice of invitation dated 5th January, 2018 accorded the Claimant almost one month's notice as hearing was slated for 1st February, 2018 and his rights were clearly articulated.
184. Puzzlingly, on 1st February, 2018, the Claimant did not attend the hearing though three (3) witnesses were present and ready to testify.
185. Although the Claimant had filed a defence statement, the Commission resolved to accord him another chance to be heard.
186. It is unclear as to why the Claimant was absent as he neither tendered an apology nor explain the absence.
187. By letter dated 1st February, 2018, the Respondent notified the Claimant that he would be notified of the next hearing date.
188. The next hearing date slated for 19th June, 2018, the Claimant was present but the witnesses were absent and hearing was adjourned to ensure a fair hearing.
189. Finally, by letter dated 23rd January, 2019, the Respondent invited the Claimant for a hearing on 19th February, 2019 at 9.30 am and on the material day all the witness were present and hearing proceeded.
190. The charges were read out and the Claimant pleaded not guilty.
191. Relatedly, all the witnesses testified and were cross-examined by the Claimant.
192. The totality of the evidence on record is that the Claimant was accorded sufficient time to respond to the notice to show cause, interdiction letter and notices for the disciplinary hearing accorded him sufficient time to prepare for the hearings and at no point did the Claimant raise concerns on the duration given by the Respondent.



193. In his evidence, the Claimant confirmed on cross-examination that he was interdicted for failing to account for Kshs.1.6 million, received a notice to show cause, was invited for a hearing of his case 4 times including 19th February, 2019, witness were presented and he cross-examined them but he did not call any witness although he had been notified of the right to bring a witness(s).
194. Flowing from the foregoing, it is the finding of the court that termination of the Claimant's employment by the Respondent met the procedural threshold prescribed by the provisions of Section 41 of the *Employment Act*, 2007.

Whether the Claimant is entitled to the reliefs sought

195. Having found as above, the court proceeds as follows;
- i. Declaration
196. Having found that the Respondent has demonstrated that it had a substantive justification to terminate the Claimant's employment, and the procedure employed met the requirements of Section 41 of the *Employment Act*, 2007, the declaration sought is unmerited and is declined.
- ii. Reinstatement
197. The remedy of reinstatement is recognized and provided for by the provisions of Section 12(3)(vii) of the *Employment and Labour Relations Court Act*, 2011 read with Section 49(3)(a) of the *Employment Act*, 2007 and as held by the Court of Appeal in *Kenya Airways Ltd V Aviation & Allied Workers Union (Kenya) and others (2014) eKLR*, it is a discretionary remedy.
198. Significantly, in addition to subjecting the availability of the remedy to the provisions of Section 49(4) of the *Employment Act*, 2007, the provisions of Section 12(3)(vii) are unambiguous that the remedy is unavailable after 3 years from the date of termination or dismissal and as the Claimant's employment was terminated on 21st March, 2019 the 3 years lapsed in March 2022 and the remedy is unavailable.
- iii. The alternative reliefs comprising payment of damages for unlawful loss of employment and payment of all outstanding dues, allowances and other benefits stipulated by law and practice.
199. Notably, neither the Claimant's amended Statement of Claim nor the witness statement particularise the outstanding dues, allowances and other benefits and no oral evidence was added in support of the prayer. Being in the nature of special damages, the dues, allowances and benefits had to be pleaded and proved as by law required.
200. However, it did not escape the court's attention that counsel for the Claimant pleaded the relief in the last paragraph of the submissions filed on 23rd February, 2024 and attached copies of documents which ought to have been filed together with the Statement of Claim in 2019.
201. It is trite law that submissions are neither pleadings nor evidence and cannot be the basis of a judgment as held by the Court of Appeal in *Avenue Car Hire & another V Slipha Wanjiru Mathegu Civil Appeal No. 302 of 1997*, *Daniel Toroitich Arap Moi V Mwangi Stephen Muriithi & another (2014) eKLR* and *Muchami Mugeni V Elizabeth Wanjugu Mungara & another Civil Appeal No. 141 of 1998*.
202. (See also *Robert Ngande Kithathi V Francis Kivuva Kitonde (2020) eKLR*, *Mugi & 11 others (suing as delegates of Kenya African National Union (KANU) (Kiharu Branch) V Maina & another (2022) KEELC 2718 KLR* and *West Kenya Sugar Company Ltd V Okendo (2024) KEHC 2844 (KLR)*).
203. The dues, allowances and benefits are unproven and are declined.



- iv. Damages for unlawful loss of employment
204. Having found that termination of the Claimant's employment was neither unfair nor unlawful, the prayer for damages for loss of employment is unsustainable and is declined.
205. From the foregoing, it is clear that the Claimant's suit against the Respondent is unsustainable and it is accordingly dismissed.
206. Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 20TH DAY OF MAY 2024

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

