



**Abel v Teachers Service Commission (Cause E003 of 2023)
[2024] KEELRC 1765 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1765 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E003 OF 2023**

CN BAARI, J

JULY 4, 2024

BETWEEN

PETER ISABOKE ABEL CLAIMANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

JUDGMENT

1. Peter Isaboke Abel (the Claimant) brought this action against the Teachers Service Commission (Respondent) vide a Memorandum of Claim dated 17th October 2022 and lodged at Keroka Law Court as Cause No. E001 of 2022, on 24th October, 2022. The claim was later transferred to this court and assigned the current number.
2. Under the claim, the Claimant seeks a declaration that he was unfairly terminated and further seeks reinstatement, salary arrears from the time of interdiction, expunging of his name from the list of deregistered teachers and damages for unlawful dismissal.
3. The Respondent entered appearance and subsequently filed a Memorandum of Response dated 22nd November 2022 and filed in Court on 1st December 2022.
4. The case proceeded for hearing on 29th November, 2023, 20th February, 2024 and 12th March, 2024, when each party presented two witnesses in support of their respective cases.
5. Submissions were filed for both parties.

The Claimant's Case

6. The Claimant's case is that he was employed by the Respondent on 13th March 2015 at a salary of Kshs 372,240/= a year. He avers that he served as a teacher until 16th October 2020 when he was unlawfully interdicted.



7. It is his case that his interdiction was illegal. He asserts further that he was interrogated together with the student he was accused of having relations with, and found not culpable.
8. The Claimant's further case is that the disciplinary tribunal only relied on the minor's word and disregarded his defence. He asserts that the police after full consideration of the facts found that there was nothing to sustain criminal charges against him.
9. In recounting the events that led to his dismissal, the Claimant asserts that he was called by the Principal in August 2020 and confronted with allegations of having sexually assaulted a student.
10. It is the Claimant's case that he refuted the claims and was invited to record a statement which he did. He contends that he was thereafter invited to a Board of Management (BOM) meeting where he was interrogated together with the minor, after which he was interdicted.
11. It is the Claimant's case that the interdiction was illegal and unprocedural as the Respondent's Kisii County Director found the minutes of the BOM fraught with irregularities. He avers that he was then invited for a second BOM meeting on the 17th December 2020 in which he was absolved of the sexual assault allegations.
12. The Claimant's case is that the second meeting reached a decision that he be issued with a warning letter and also that he be transferred to another school. The Claimant states that a few of the BOM members were not happy and pushed for hearing of the case afresh.
13. This push the Claimant avers, resulted in another hearing on the 12th October, 2021, which resulted in his dismissal. It is his case that his subsequent appeals were dismissed notwithstanding that the Respondent relied on the wrong proceedings of 12th October, 2021.
14. It is the Claimant's case that the Respondent's discipline officer was biased and the BOM was illegally constituted.
15. CW2 confirmed that no charges were preferred against the Claimant.
16. The Claimant prays that the Court allows his claim.

The Respondent's Case

17. The Respondent's case is that the Claimant was a teacher at [Particulars withheld] Girls Secondary School, where a complaint was made against him on allegations of sexually assaulting a student. The Respondent avers that this necessitated a BOM meeting in which a decision was made to interdict the Claimant.
18. It is the Respondent's case that their in-depth analysis of the circumstances of the case, evidence on record and provisions of the code of conduct, provided sufficient grounds for the Claimant's interdiction.
19. The Respondent avows that the Claimant was taken through the requisite disciplinary process. It states that he was invited to attend the hearings in the company of a representative, and was allowed ample opportunity to present his case.
20. The Respondent's further case is that they found no credible grounds to review their decision on appeal as there were no new grounds to warrant a review.
21. In her testimony, the Principal of [particulars withheld] Girls Ms. MLO stated that the Claimant was subjected to investigations and heard three times. It is her evidence that at the first hearing the Claimant



was not allowed to interrogate the victim and at the end of the hearing, it was resolved that he be interdicted.

22. RW1 further told court that the resolutions of the first two meetings were withdrawn and a transfer was recommended as the BOM was divided on the matter. It is her testimony that the Claimant was issued a warning letter for giving students his phone and not for defilement.
23. She testified that the resolution to issue a warning letter was by the faction that wanted to protect the teacher, while the other faction felt that the teacher/Claimant had violated the rights of the minor/student.
24. On cross-exam, CW1 told court that the meeting of 31st December, 2020 was a normal school meeting, but that the Claimant's issue came up as a matter arising.
25. It is her case that the Respondent refused to transfer the Claimant, hence the third meeting held on 25th January, 2021. She states that the purpose of the meeting was to review the BOM resolution of 17th January, 2021, which was a majority decision.
26. The Respondent prays that the claim be dismissed with costs.

The Claimant's Submissions

27. The Claimant submits that his dismissal did not adhere to the dictates of procedural and substantive fairness. He asserts that the process leading to his termination did not align with the rules of natural justice.
28. It is the Claimant's submission that the minor's word was taken as the gospel truth to the exclusion of his evidence. He asserts that the allegation of sexual intercourse was not proven by way of medical evidence, and that the victim's evidence was not corroborated.
29. It is the Claimant's further submission that the procedure in Section 41 of the *Employment Act*, 2007 was not followed to the letter. He contends that given the seriousness of the charges, his alibi defence should not have been disregarded.
30. In support of the reliefs sought, the Claimant submits that he had proven his case on a balance of probability. He cites the sham investigations and proceedings leading to his dismissal.
31. He prays that his claim be allowed.

The Respondent's Submissions

32. In opposing the suit, the Respondent submits that the Claimant was rightfully dismissed after blatant disregard of Clause 22(1) of the Code of Conduct disallowing sexual relations with learners. The Respondent further submits that it is empowered to take disciplinary action against the Claimant pursuant to Regulation 140 of the Code.
33. The Respondent's further submission is that the allegations of sexual impropriety were proven by the victim and her mother. It contends that the BOM had evidence that the Claimant raped the student after threatening her with a metal bar.
34. It is the Respondent's submission that the Claimant and the student communicated through text messages, and that the Claimant admitted further that the student had been to his house, is confirmation of the allegations against him.



35. It is the Respondent's submission that the Claimant failed to rebut evidence of his culpability adduced at the disciplinary hearing making the dismissal reasonable. It had reliance in Nairobi ELRC Cause 1519 of 2015 *Bakery Confectionary Food Manufacturing & Allied Workers Union v Wrigley Company (Ea) Limited* to support of this position.
36. The Respondent asserts that in the circumstances of this suit it was only reasonable that the Claimant be dismissed given the parental responsibility placed on teachers in schools. It relies on Malindi ELRC 13 of 2019 *Galgalo Jarso Jillo v Agricultural Finance Corporation* where the court while making reference to Section 43 of the *Employment Act* argued that an employer would be justified to terminate a contract on grounds that they genuinely believe exist.
37. The Respondent further submits that it is not imperative that medical evidence be produced to prove sexual assault as the Code allows for reliance on general statements and circumstantial evidence. It cites Nairobi ELRC Cause No. 2532 of 2016 *Tom Ocbako v TSC* where the court in noting that the Claimant was not in a criminal court specified that the regulations did not require medical proof.
38. The Respondent submits that it had proven its case on a balance of probabilities based on Nairobi Civil Appeal 66A *Kenya Revenue Authority v Reuwel Waitbaka Gitabi & 2 others* where the court held that a near forensic examination of the facts was not necessary in proof of reasons for dismissal.
39. It is the Respondent's submission that the Claimant was informed of the charges against him, he pleaded to the charges, presented his case before a panel and was subsequently given ample opportunity to cross-examine witnesses. It sought reliance in Nairobi ELRC 1391 of 2016 *Lydia Moraa Obara v Tusker Mattresses Limited* where the court in highlighting procedural fairness, stated that the test was whether an employee was given an opportunity to rebut allegations of misconduct.
40. In respect of the Claimant's entitlement to the remedies sought, the Respondent submits to the contrary. It reiterates that the dismissal was procedural and fair. It further avers that the Claimant was not entitled to salary after interdiction as salary is only payable for service rendered.

Analysis and Determination

41. The following issues present for determination: -
 - i. Whether the Claimant's dismissal was lawful; and
 - ii. Whether the Claimant is entitled to the remedies sought.

Whether the Claimant's dismissal was lawful

42. Section 41 of the *Employment Act* demands that an employer before terminating the services of an employee on the grounds of misconduct, poor performance or physical incapacity, explains to the employee in a language the employee understands the reasons for which the employer is considering termination.
43. The process leading to the Claimant's dismissal was somewhat convoluted. The Claimant seems to have been subjected to more than one disciplinary hearing before his ultimate dismissal.
44. From the Claimants documents, it is evident that he was issued with a show cause letter dated 16th September 2020. The letter outlined the reason for the contemplated disciplinary action as defilement of a student. Vide the show cause letter, the Claimant was invited to respond to the allegations within 7 days.



45. The Claimant responded to the show cause on 29th September 2020, after which he was invited for a hearing that was scheduled for 17th December 2020.
46. A cursory look at the minutes of 17th December 2020, indicates that the Claimant was present and was allowed to make representation. The hearing culminated in the Claimant being issued with a warning letter and a further resolution that he be transferred to a different school. The warning letter issued is dated 18th December 2020.
47. Subsequently on 31st of December 2021, another BOM meeting was held wherein, it was agreed that the verdict of 17th of December, 2020 be reviewed. This led to the Claimant being invited for a second hearing over the same set of facts on 25th January, 2021, which hearing resulted in the interdiction of the Claimant, and finally his dismissal from service.
48. From the foregoing, it is evident that the Claimant was subjected to two hearings over the same set of facts with both reaching different conclusions. This in all fairness is not proper procedure.
49. From the Board of Management minutes of the meeting held on 31st December, 2020, it is decipherable that there was pressure to subject the Claimant to a second hearing due to reservations by a section of the Board.
50. In my view, it is not open for an employer to seek to discipline an employee on account of already concluded offences for which a disciplinary penalty was meted out against him. Measures such as dismissal, warnings, fines or monetary penalties mark the conclusion of a disciplinary process.
51. In *Geoffrey Nyandusi Oeri v. Security Guards Services Limited & Another* (2015) eKLR, it was held that once a warning letter is issued, the disciplinary action arising from the same incident comes to a close, and any further disciplinary action including dismissal based on the same facts, amounts to double jeopardy, hence null and void.
52. It is my considered opinion that the BOM was *functus officio* once it reached its majority decision on 17th December 2020, and could not turn around and vary the decision on its own motion. In the case of *Raila Odinga & 5 Others v IEBC & 3 Others* [2013]eKLR the Court while addressing the principle of *functus officio*, emphasised on the principle of finality; that once a court has given a decision on a matter in dispute, such a decision (subject to any right of appeal to a superior court) is final and conclusive, and cannot be revisited or varied by the same court.
53. In the circumstances of this case, the BOM was sitting as a quasi-judicial tribunal, hence the same rules apply.
54. The upshot is that the Claimant's dismissal failed the procedural fairness test, and so I hold.
55. On whether the Claimant's dismissal met the substantive fairness test, Section 43 and 45(2) of the *Employment Act*, places the burden on the Employer to prove that the reasons for termination are fair, valid and justified.
56. The reason for the Claimant's dismissal as gleaned from the letter of dismissal, is engaging in sexual intercourse with one ABO a form four student at St. [Particulars withheld] School in his vehicle near a petrol station at Ekona Shopping centre.
57. The Respondent called two witnesses, the school Principal and a teacher who worked with the Claimant. It equally produced the minutes of the hearings before the BOM and the TSC.



58. In his defence, the Claimant testified that he was in Kisii town and not at Ekona where the assault allegedly occurred, but which he could not prove. Sexual relations with students is one of the actions outlawed by both the Respondent's Code of Conduct and the TSC Act.
59. The Respondent's position and which remains uncontroverted, is that the Claimant and the student communicated through text messages, and the Claimant admitted that the student had been to his house.
60. The totality of the evidence as gleaned from the minutes point to impropriety on the part of the Claimant.
61. Section 43 (2) of the Employment Act allows the employer to dismiss an employee on the basis of reasons they genuinely believe to exist.
62. In the circumstances of this case, I find and hold that the Respondent has proven on a balance of probability that the reason for the Claimant's dismissal is valid, fair and justified.

Whether the Claimant is entitled to the remedies sought

Reinstatement

63. In making an order for reinstatement, a court is guided by the provisions of section 49 (4) (a)-(m) of the Employment Act. From the totality of the evidence on record, it is apparent that it may not be practical to reinstate the Claimant premised on the reason for his dismissal which the court has found to be justified.

Salary arrears

64. The Claimant has not provided any evidentiary basis for an award under this head.

Damages for unfair termination

65. Having found that the Claimant's termination was procedurally unfair entitles him to compensation in accordance with Sections 49 and 50 of the Employment Act. Considering the reason for his dismissal, I deem an award of five (5) months' pay sufficient compensation for the unfair dismissal.
66. The claim having partly succeeded, I order that parties bear their own costs of the suit.
67. It is ordered.

DATED, SIGNED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 4TH DAY OF JULY, 2024.

C. N. BAARI

JUDGE

Appearance:

Ms. Mosomi present for the Claimant

Mr. Jusa h/b for Ms. Musundi for the Respondent

Ms. Anjeline & Debra-C/As

