



**Ng'ang'a v Board of Management Nakuru Boys High School & another
(Cause E017 of 2022) [2024] KEELRC 2175 (KLR) (4 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2175 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE E017 OF 2022
DN NDERITU, J
JULY 4, 2024**

BETWEEN

PETER NJOROGE NG'ANG'A CLAIMANT

AND

**BOARD OF MANAGEMENT NAKURU BOYS HIGH SCHOOL 1ST
RESPONDENT**

TEACHERS SERVICE COMMISSION 2ND RESPONDENT

JUDGMENT

I. Introduction

1. The claimant commenced this cause by way of a memorandum of claim dated 12th May, 2022 filed in court on 19th May, 2022 through A. Mukira & Associates Advocates. As expected, the memorandum of claim is accompanied with a verifying affidavit, a list of witnesses, a list of documents, and a bundle of copies of the listed documents.
2. The claimant is seeking the following reliefs: -
 - a. A declaration that the disciplinary action taken against the claimant which resulted to the claimant's interdiction on 6th December, 2019 and the subsequent disciplinary hearing which resulted to the claimant's dismissal are illegal and unlawful.
 - b. Reinstatement of the claimant herein with full payment of salary arrears during the interdiction period.
 - c. Compensation for the unlawful and unfair termination of employment of the claimant by the 2nd respondent
 - d. Costs of this cause.



3. The 1st respondent entered appearance on 12th July, 2022 through the Attorney General while the 2nd respondent entered appearance on 25th August, 2022 through Patrick Mulaku, Advocate. The 1st respondent filed a response to the memorandum of claim, witness statement, list of documents, and a bundle of copies of the listed documents. The 2nd respondent filed an amended memorandum of response on 11th November, 2022, with a supplementary list of witnesses, witness statements, list of documents, and a bundle of copies of the listed documents.
4. This cause came up for hearing on 21st June, 2023 when the claimant (CW1) testified and closed his case. The 2nd respondent's witnesses Samuel Muyanzi (RW1), Sammy Wakaba (RW2), and David Mukui (RW3) testified on 16th October, 2023. The 1st respondent's witness, Prof Mahungu (RW4), testified on 22nd November, 2023, closing the respondents' case.
5. Counsel for all the parties summed up the case for their respective clients by way of written submissions. Mr. Mukira, counsel for the claimant, filed his submissions on 14th February, 2024. Mr. Muthuri for the 1st respondent filed his submissions on 13th March, 2024. Mr. Mulaku for the 2nd respondent, filed his submissions on 22nd March, 2024.

II. The Claimant's Case

6. The claimant's case is expressed in the memorandum of claim, oral and documentary evidence adduced through the claimant (CW1), and the written submissions by his counsel.
7. In the memorandum of claim, the claimant pleads that at the material time he was an employee of the 2nd respondent as a registered teacher based at 1st respondent's high school. The claimant states that he was employed on 1st September, 1994 and served in many high schools as a graduate teacher.
8. It is pleaded that in a letter dated 20th August, 2013, the 2nd respondent, through county director of education, Nakuru, transferred the claimant from St Joseph's Elburgon Secondary School to Nakuru Boys' High School with effect from 27th August, 2018. The claimant states that he reported to his new school on 27th August, 2018 and was received by the secretary to the 1st respondent.
9. The claimant states that he attended classes as assigned and performed his duties diligently while adhering strictly to the code of ethics as set by the 2nd respondent. The claimant further states that on 23rd December, 2019 he was called by the 1st respondent's secretary (the principal of the school) and handed an interdiction letter which stated that he had been interdicted with effect from 6th December, 2019.
10. The letter of interdiction contained several allegations against the claimant such as inciting staff during a staff meeting held on 12th April, 2019, and failing to repay money advanced to him by the school. A second letter of interdiction was issued, reiterating the previous allegations and allegedly adding new ones. The claimant responded to those allegations and provided what he considered to be the necessary supporting documents.
11. It is pleaded that after responding to the above letter, the secretary to the 1st respondent purported to summon the claimant to attend a disciplinary hearing on 2nd December, 2019. He pleads that the letter inviting him to the hearing was not served upon the claimant but the same was served upon the 2nd respondent. Subsequently, after issuing the second letter to attend the disciplinary hearing, which was not served the claimant, the 1st respondent proceeded to discuss the matter on 6th December, 2019 in the claimant's absence resulting in a unanimous decision to have the claimant interdicted with immediate effect.



12. The claimant states that pursuant to the said decision, the claimant's case was forwarded to the 2nd respondent for further action since the claimant was an employee of the 2nd respondent. The matter was forwarded to the 2nd respondent and the claimant was summoned for a disciplinary hearing vide a letter dated 21st May, 2021. The hearing was scheduled for 24th June, 2021. The claimant pleads that he attended the disciplinary hearing notwithstanding serious reservations about the process including lack of response to his request that he be supplied with various documents, inter-alia, communication on the disciplinary meeting of 6th December, 2019, to no avail.
13. Subsequently, the 2nd respondent dismissed the claimant vide a letter dated 1st July, 2021.
14. On 3rd March, 2022, the claimant's dismissal was upheld after his request for a review/appeal was dismissed. It is contended that the acts of omission and commission on the part of the 1st and 2nd respondents were not only illegal and fraudulent but also a breach of the rules of natural justice.
15. The particulars of the alleged illegality on the actions by the respondents are alleged to include -
 - a. The 1st respondent's purport to interdict the claimant without complying with regulations 145, 146, 147, and 149 of the Teachers' Service Commission Code of Regulation.
 - b. The 1st respondent purporting to proceed with a disciplinary action in the absence of the claimant while at the same time offering a verdict to interdict
 - c. The 1st respondent purported to conduct a disciplinary meeting against the claimant on 6th December, 2019 while the same had not been notified to the claimant and was not part of the agenda
 - d. The 2nd respondent purporting to participate in the disciplinary action against the claimant in contravention of the 2nd respondent's code of regulations
 - e. The 2nd respondent purporting to interdict the claimant at the behest of the 1st respondent knowing well it was in contravention of the regulations and without adhering to the rules of National Justice
 - f. The 1st and 2nd respondents purporting to carry out disciplinary hearing against the claimant without following the laid down procedures for such hearing
 - g. The 2nd respondent purported to interdict and eventually dismiss the claimant on unsubstantiated allegations while knowing very well that the entire process was sham and flawed.
16. It is pleaded that the entire disciplinary process and the subsequent dismissal was null and void ab initio. It is pleaded that despite several attempts to have the matter resolved in compliance with the laid down laws and regulations, and after giving notice of intention to sue, the respondents have continued to perpetuate the alleged illegality.
17. In his testimony in court the claimant reiterated the foregoing pleadings and testified that he was an employee of the 2nd respondent as from 1st September, 1994. He stated that he taught in schools in Laikipia and Nakuru Counties. He stated that he was interdicted by the 1st respondent on 6th December, 2019. He alleged to have received the letter of interdiction on 23rd December, 2019. In the letter it was alleged that he had breached several clauses including clauses (iv), B (vi) and (vii) of the Teachers Service Commission (TSC) Code of conduct.



18. He was accused of inciting teachers in a staff meeting held on 12th April, 2019, insubordination for failing to attend a Board of Management (BOM) meeting after invitation on 6th December, 2019, and soliciting for funds from parents and the public. He stated that the letter was inviting him to attend a meeting on 2nd December, 2019 which was allegedly communicated via text message.
19. In his testimony in court the claimant stated that on 15th January, 2020, he received an undated letter from his employer, the 2nd respondent, and subsequently he was contacted by the county director and informed of his interdiction which he was unaware of. He was advised to submit his defence to the interdiction, if he so intended. However, on 27th October, 2020 he was served with an amended letter of interdiction that contained the same allegations as the previous two letters.
20. He stated that he lodged a defence and refuted all the allegations and demanded to be supplied with the documents that the respondents had applied in interdicting him. He stated that the disciplinary hearing was to be held in a week and that he received some of the documents. He stated that he was not served with a disciplinary hearing notice and that he was given only some of the documents that he had requested for.
21. He stated that he was invited to a virtual disciplinary hearing conducted by the 2nd respondent on 24th June, 2021. He stated that witnesses were called and questioned on each of the allegations. The claimant admitted that he asked for money from parents for text books and that he allegedly delivered the books as agreed and to his knowledge there were no complaints from parents or the students.
22. On a loan of Kshs20,000/= advanced to him by the 1st respondent, he said that he was suspended before starting the repayment process. He claimed to have repaid a sum of Kshs5,000/= in January 2020 but the balance of the money remains unpaid to this day.
23. On the allegation of solicitation of funds he stated that he was not teaching at Afraha High School in 2018 but he taught there in 2017. He stated that he provided Mpesa statements for 2017 and 2018 in demonstrating that he had not received any funds as alleged. However, the court notes that no such statements were filed in court.
24. He stated that he was dismissed but appealed the dismissal on the basis that he was not notified of the hearing scheduled for 6th December, 2018. He stated that his appeal was dismissed and the dismissal was upheld vide a letter dated 9th March, 2022. He stated that he was not invited to the 1st respondent's meeting held on 6th December, 2019 as confirmed in the minutes presented in the court. He stated that the meeting was unprocedural as no witnesses were called and he did not get an opportunity to cross-examine the witnesses. He stated that the interdiction was based on the resolutions of the 1st respondent's meeting held on 6th December, 2019. He stated that there was no written complaint filed against him in any of the schools where he taught.
25. He further stated that during the interdiction he was supposed to be receiving half of his basic salary but it is only after the dismissal that the same was paid in arrears. He stated that no investigation report was filed with TSC and he was not served with any such report. Additionally, he stated that the disciplinary hearing panel was supposed to be chaired by a commissioner but this did not happen. He stated that the proceedings at the TSC were for all intents and purposes illegal and unprocedural.
26. He added that he was not charged with any criminal offence(s). He produced his filed documents as exhibits 1 to 24.
27. In cross-examination by counsel for the 1st respondent, the claimant stated that he was in Afraha High School until he was suspended on grounds of desertion. He confirmed that the 1st respondent's meeting



- of 6th December, 2019 discussed his alleged misconduct and that he agreed to refund same money to one Samuel Muyanzi (RW1), who had complained against him vide a letter dated 23rd January, 2019. He admitted that there was another complaint from Marline Nanzela over money paid to him in similar circumstances.
28. He confirmed that he took an advance of Kshs20,000/= from the 1st respondent out of which he only repaid Kshs5,000/= and the balance remains unpaid to date notwithstanding that he was supposed to settle the same by December, 2018. He admitted that he had attended at least three disciplinary hearings with the 2nd respondent, two of which were about desertion of duty. He stated that he was aware and understood the charges against him.
 29. He stated that currently he is not teaching but he worked for the 2nd respondent for over 25 years prior to the dismissal. He stated that he is familiar with the code of conduct and regulations of the 2nd respondent. He confirmed that he worked at Afraha High School whereat he had interacted with one Samuel Muyanzi (RW1). He acknowledged that he was aware of the allegations that he had received money from Mr. Muyanzi. He further stated that when he joined Nakuru High School in 2018 he received money from parents for purchase of text books without the knowledge or authorization from the 1st respondent.
 30. On cross-examination by counsel for the 2nd respondent, the claimant stated that it is untrue that he was dismissed due to the complaints from the parents and alleged that he did not know the reasons for his removal. He stated that he did not know that there was a BOM meeting at the school on 6th December, 2019, and he only came to know about it on 23rd December, 2019 when he received the letter of interdiction.
 31. He admitted that according to Regulation 148 of the TSC regulations a teacher may be denied the half pay when on interdiction. He further admitted that that 2nd respondent issued him with an amended letter of interdiction as provided for under Regulation 147 of the TSC Code of Regulations.
 32. He stated that he was not subjected to the disciplinary process in regard to the money that he received from parents and members of the public while teaching at Afraha High School. He stated that he was not charged in any criminal proceedings.
 33. In re-examination by his counsel, he stated that solicitation of money from one Merlin Zanzila was not one of the charges that he faced during the disciplinary hearing. He clarified that in 2018 he was not teaching at Afraha High School. He reiterated that he was not invited to the 1st respondent's meeting held on 6th December, 2019 and that he only learnt about the said meeting upon interdiction on 23rd December, 2019. However, he admitted to soliciting and receiving money from one Samuel Muyanzi (RW1) and allegedly repaying it back while he was still a teacher at Afraha High School.
 34. It is on the basis on the foregoing evidence and circumstances that the claimant is seeking that judgment to be entered in his favour as prayed in the memorandum of claim. The submissions by his counsel shall be considered in a succeeding part of this judgment.

III. The Respondents' Case

35. The 1st respondent's position is contained in the response to the memorandum of claim filed on 14th February, 2023 while the 2nd respondent's is as per the amended memorandum of response filed on 11th November, 2022. The 2nd respondent adduced its oral and documentary evidence through RW1, RW2, & RW3 while the 1st respondent delivered its evidence through RW4.



36. In the 1st respondent's response to the memorandum of claim it is contended that the claimant had on many occasions failed to carry out his duties diligently in breach of the 2nd respondent's code of conduct and ethics.
37. It is pleaded that the claimant was served with an interdiction letter which was to take effect from 6th December 2019 and subsequently served with a second letter of interdiction over the same allegations/charges.
38. It is pleaded that the claimant was duly summoned to attend a disciplinary hearing scheduled for 2nd December, 2019 which was rescheduled to 6th December, 2019. It is further stated that the claimant was duly informed of the charges vide a letter dated 27th November, 2019 yet the claimant deliberately failed to attend the disciplinary hearing.
39. It is pleaded that the 1st respondent acted in observance of Regulations 145, 146 (2) (a), 147 (1) and 149 of the Teachers Code of Conduct and Ethics 2015.
40. In the 2nd respondent's amended memorandum of response it is admitted that the claimant was an employee of the 2nd respondent. It is stated that the claimant was a graduate teacher and his last workstation was Nakuru Boys' High School.
41. It is contended that the claimant was bound to uphold the highest standards of professional ethics as a teacher as provided for in the code of conduct and ethics for teachers and other administrative circulars. It is stated that in or around January 2019, the claimant was made aware of allegations against him by the Principal Nakuru Boys' High School about his misconduct in falsely obtaining financial assistance amounting to Kshs20,000/=, collecting money from parents and members of the public in the false pretences that he was capable of securing jobs for them or their children with the 2nd respondent, soliciting for money, inciting staff against new school policies, and insubordination.
42. It is pleaded that the claimant was issued with two show-cause letters dated 29th April, 2019 and 2nd September, 2019 respectively, and that he responded to both letters denying the said allegations. It is stated that the 1st respondent convened an investigatory meeting on 6th December, 2019 to accord the claimant an opportunity to respond to the allegations that faced him. Despite the claimant being invited to attend the said meeting, he failed to attend on the said date. It is pleaded that after reviewing the information presented the 1st respondent resolved that the claimant be interdicted and the matter was forwarded to the 2nd respondent for further action in accordance with the applicable regulations and the law.
43. Subsequently, the claimant was issued with an amended letter of interdiction dated 25th September, 2020 stating the allegations against him and calling upon him to defend himself in writing within 21 days. The claimant put in his defence on 27th October, 2019 in response to the amended letter of interdiction.
44. The claimant was invited to a disciplinary hearing on 24th June, 2021 in accordance with the Code of Regulations for Teachers 2015 vide a letter dated 21st May, 2021. It is pleaded that on 24th June, 2021, the hearing proceeded virtually and the claimant was given an opportunity to defend himself. He was also given an opportunity to cross-examine the witness present.
45. Subsequently, the disciplinary panel found the claimant guilty of the charges levelled against him and a decision was reached to dismiss the claimant from service. The 2nd respondent communicated that decision to the claimant vide a letter dated 1st July, 2021 and informed him of his right to seek for review or appeal within 90 days as per the Code of Regulations for Teachers.



46. It is stated that the claimant appealed the decision vide a letter dated 17th September, 2021 and he was invited for the hearing of the appeal on 3rd March, 2022. The claimant appeared before the 2nd respondent's review committee and he was given an opportunity to argue his appeal. The review committee heard the claimant's appeal and upheld the decision of the disciplinary panel dismissing the claimant from service and that decision was communicated to the claimant in a letter dated 9th March, 2022.
47. It is pleaded that the claimant was accorded a hearing in person throughout the entire disciplinary process as it can be discerned from the proceedings in accordance with Regulations 145, 146, 147 and 149 of the Code of Regulation for Teachers.
48. Samuel Muyanzi (RW1), a businessman in Nakuru town, relied on and adopted his written statement dated 24th October, 2022 together with the list of documents filed on 11th November, 2022 as his evidence-in-chief. He stated that the claimant refunded to him the money he had paid to the claimant for his son to secure a job with the 2nd respondent. He stated that subsequently his son was lawfully and regularly employed without any assistance from the claimant. He stated that he was refunded his money by the claimant after writing a letter on 23rd January, 2019 by which time the claimant had joined Nakuru Boys' High School. He had to pursue the claimant in his new school to demand for the refund.
49. In cross-examination, he stated that in 2017, he gave Kshs30,000/= to the claimant but he could not remember whether he paid the claimant in cash or via Mpesa but his written statement indicates that he paid the claimant via Mpesa. The payment was made in the promise that the claimant was to facilitate the claimant secure a job for his son with the 2nd respondent.
50. RW2, Sammy Wakaba, a high school principal from Narok County, relied on and adopted his written statement dated 8th November, 2022 as well as the list of documents filed as his evidence-in-chief.
51. In cross-examination, he confirmed that in 2017 he was a deputy principal at Afraha High School, Nakuru County, and that the claimant was a geography teacher in the same school. He stated that there were several allegations and complaints raised against the claimant and a meeting was called. He stated that the BOM called a meeting but the claimant failed to attend and thereafter the claimant was transferred to St. Joseph's Elburgon and later to Nakuru Boys' High School.
52. RW3, the 2nd respondent's deputy director, field services disciplinary division, relied on and adopted his written statement dated 24th October, 2022 together with the list and bundle of documents dated 30th September, 2022 which he produced and were marked as exhibits 1 to 20.
53. In cross-examination, he stated that he primarily handles disciplinary matters for teachers, in accordance with the laid down procedures. He stated that a complaint against a teacher may be lodged by any person in writing. He stated that the complaints from the 1st respondent came in by way of the letter of interdiction and the minutes of the 1st respondent's meeting held on 6th December, 2019.
54. He elaborated on the disciplinary procedure to the effect that once a complaint is made, a show-cause letter is issued and then the matter is settled down for hearing. He stated that the show-cause letter against the claimant contained charges of insubordination and infamous conduct as elaborated elsewhere in this judgment. He confirmed that the minutes of the 1st respondent's staff meeting of 12th April 2019 were not on record. He stated that the particulars of misconduct are clearly stated in the letter dated 2nd September, 2019. He stated that after the show-cause letter is issued and served a teacher is given an opportunity to defend him/herself.



55. He admitted that there is no evidence on record confirming that the notice inviting the claimant to the 1st respondent's meeting of 6th December, 2019 actually reached him. However, the 2nd respondent was served with a copy of the notice.
56. He stated that the claimant was served with an interdiction letter from the 2nd respondent dated 28th January, 2020, which interdiction was backdated and took effect from 6th December 2019.
57. He stated that before the claimant was interdicted in 2018 his workstation was Afraha High School and thereafter he was transferred to St. Joseph Elburgon on 16th June, 2018 before he joined Nakuru Boys' High School in 2018. He stated that when on suspension a teacher cannot be allowed into the school's premises. He stated that after interdiction, the claimant was invited for a hearing and the hearing was conducted virtually from the 2nd respondent's county director's office, Nakuru. He stated that the claimant was dismissed and accordingly informed vide a letter dated 1st July, 2021.
58. RW4 was the chair of the 1st respondent at the material time. In his testimony in court he relied on and adopted his written statement dated 8th November, 2022. He produced the listed documents as exhibits 1 to 40.
59. In cross-examination, he stated that a board of management (BOM), and the 1st respondent is such one, deals with discipline of staff, management of physical structure, amongst many other functions. He stated that the principal is ordinarily the secretary to the BOM and initiates the disciplinary process by carrying out the investigation and presenting the same to the BOM for action and decision-making.
60. He confirmed that the 1st respondent held a disciplinary meeting on 6th December, 2019 in regard to the alleged misconduct by claimant and he was present as a member. He confirmed that the claimant did not attend but the principal had informed the claimant of the meeting by inviting him through a letter followed with a phone call. He stated that the letter dated 13th November, 2019 bears the claimant's telephone number for ease of communication. He conceded that there was no evidence confirming that indeed the claimant was served with the said letter but the said meeting proceeded as scheduled on 6th December, 2019. The claimant was accused of inciting staff, fraudulently obtaining money in guise of assisting desperate persons in securing employment with the 2nd respondent, among other charges/allegations.
61. It is on the basis on the foregoing evidence and circumstances that the respondents pray that the claimant's cause be dismissed with costs. The submissions by the counsel for the 1st and 2nd respondents shall be considered in the succeeding parts of this judgment alongside those by counsel for the claimant.

IV. Submissions By Counsel For The Claimant

62. The claimant's counsel identified the following three issues for determination - Whether the interdiction of the claimant by the 1st respondent was lawful and procedural; Whether the claimant's subsequent dismissal by the 2nd respondent was lawful and procedural; and, Whether the claimant should be granted the orders sought.
63. On the first issue, it is submitted that for a dismissal or termination to be fair and lawful it should pass the substantive and procedural fairness test. Counsel cited Section 41 of *Employment Act* (the Act) as well as the Regulations for Teachers 2015 (the Regulations) promulgated under the Teachers Code of Conduct and Ethics for Teachers (the Code). It is submitted that any complaint against a teacher shall be in writing in accordance with Regulation 145(1).



64. It is submitted that the interdiction of the claimant followed a meeting held by the 1st respondent on 6th December, 2019 in the absence of the claimant as he had neither been served with the charges/allegations nor invited to the meeting. It is submitted that no formal complaint had been made against the claimant as required in the legal provisions cited above. Yet, it is further submitted, the respondents allege that there were charges of the claimant inciting staff in a meeting held on 12th April, 2019, allegations of solicitation of money while the claimant was a teacher at Afraha High School in 2018, and for failing to repay a loan of Kshs20,000/= that was advanced to him by the school, and soliciting for money from students and members of the public.
65. It is submitted that the allegations/charges against the claimant when he served at Afraha High School were not the subject of the disciplinary process and no complaints had been made against the claimant in writing. It is submitted that the respondents veered off the procedure when they considered extraneous matters for which no charges had been filed and for which the claimant had not been called to defend himself. In any event, it is submitted, the BOM Afraha High School is not a party in this cause.
66. It is submitted that the respondents, and more so the 1st respondent, failed to carry out proper investigation of the allegations and that is why no report was served upon the claimant and none was filed or availed in court during the trial of this cause. It is submitted that this casual approach by the respondents violated Regulations 144, 145, & 146(6) as well as the rules of natural justice.
67. Counsel cited *Mary Chemweno Kiptui V Kenya Pipeline Company LTD* (2014) eKLR, *Walter Anuro Ogaro V Teachers Service Commission* (2013) eKLR, and *Joseph Mwaniki Ng'ang'a V United Millers* (2022) eKLR amongst other decisions in his assertion that the entire process as undertaken by the respondents was unfair and unlawful.
68. On the second issue, it is submitted that having failed to comply with the provisions cited in the foregoing paragraphs the resultant dismissal of the claimant was wrongful, unfair, and illegal. It is submitted that the reason(s) for the interdiction and the procedure adopted were defective and as such the dismissal was unlawful. In that regard counsel cited *Godfrey Khalitiba Lukorito V Teachers Service Commission* (2019) eKLR.
69. It is submitted that the dismissal was a nullity, ab initio, for lack of substance and the procedure was equally defective and unlawful. The court is reminded that the claimant was not charged with any crime notwithstanding all the unsubstantiated claims against him and no reports were made to the police yet Regulation 139(5) mandates the 2nd respondent to work with law enforcement agencies where criminal conduct is alleged. Counsel has cited *James Peterson Njeru V Teachers Service Commission* (2017) eKLR in driving that point home.
70. On reliefs, it is submitted that having been denied both substantive and procedural fairness the claimant is entitled to the reliefs sought in the memo of claim. Again, counsel has urged the court to be persuaded by the reasoning in *Godfrey Khalitaba Lukorito V Teachers Service Commission* (Supra).

V. Submissions By Counsel For The 1st Respondent

71. The counsel for the 1st respondent identified the following three issues for determination - Whether the claimant's interdiction and subsequent disciplinary hearing was lawful; Whether the claimant should be granted the reliefs sought; and, whether the claim offends the provisions of section 107 of the [*Evidence Act*](#) on the burden of proof.
72. On the first issue, it is submitted that the claimant was interdicted on various counts of gross misconduct. The charges/allegations included inciting members of staff in a staff meeting, collecting



money from unsuspecting parents and members of the public in guise that he could secure employment for them with the 2nd respondent, failure to repay money advanced to him by the school, and failure to execute his duties diligently and in accordance with the Code and Regulations. It is submitted that the respondents complied with the law in conducting the entire process culminating in the dismissal of the claimant.

73. It is submitted that under Section 20 of the *Teachers Service Commission Act* the 2nd respondent may generally or in particular delegate its mandate or part thereof to a committee, member, officer, staff, or agent in exercise of any of its functions and duties under the said law. It is submitted that it is on the basis and strength of the above law that the 1st respondent carried the investigations, conducted the disciplinary hearing, and issued an interdiction letter to the claimant in accordance with Regulations 146(2)(a) & 147(1). It is submitted that the claimant was informed of the disciplinary meeting held on 6th December, 2019 but he deliberately failed to attend the hearing. Counsel cited *Jennifer Osodo V Teachers Service Commission (2013) eKLR* in advancing the argument that a teacher should not hold the 1st respondent at ramson by insisting that disciplinary proceedings be conducted at the convenience an employee.
74. It is submitted that in any event the interdiction was only a preliminary step in the entire disciplinary process and the claimant was afforded full and fair hearing in accordance with the Code and Regulations. Counsel cited *Judicial Service Commission V Gladys Boss Shollei & Another* in emphasizing that when considered in its entirety the disciplinary process against the claimant was fair, just, and lawful as the claimant was given a fair hearing in accordance with the law, the Code, and the Regulations.
75. On the second issue, it is submitted that the claimant is not entitled to the reliefs sought as the dismissal was fair and lawful. It is submitted that in *National Bank of Kenya V Samuel Nguru Mutonya (2019) eKLR* the Court of Appeal held that the reliefs provided for under Section 49 of the Act are discretionary not mandatory.
76. On the third issue, it is submitted that the claimant failed to prove his claim hence offending Sections 107 & 112 of the *Evidence Act*. In that regard the court is urged to follow the reasoning in *Leonard Otieno V Airtel Kenya Limited (2018) eKLR* & *David Githinji Kibuge V New Kenya Co-operative Creameries Ltd (2019) eKLR*.
77. The court is urged to dismiss the claim with costs for all the reasons alluded to above.

VI. Submissions By Counsel For The 2Nd Respondent

78. The 2nd respondent's counsel identified the following three issues for determination- Whether the claimant was dismissed on reasonable grounds; Whether the due process for dismissal was followed; and, Whether the claimant is entitled to the prayers sought.
79. On the first issue, it is submitted that the claimant was fairly and lawfully dismissed for infamous conduct after due process. It is submitted that the respondents had good and reasonable grounds in taking the disciplinary action all the way to the dismissal. It is submitted that based on the information and the allegations made against the claimant the respondents took the right action under Section 43 of the Act based on genuine believe and reasonable grounds of the alleged misconduct. It is submitted that based on Section 33 of the *Teachers Service Commission Act* & Regulation 146 of the Code the 2nd respondent investigated the allegations against the claimant as provided by the 1st respondent from the latter's meeting of 6th December, 2019, and found substance to escalate the matter to hearing.



80. It is submitted that the 2nd respondent, the employer, genuinely believed the allegations against the claimant, including the fact that the claimant had admitted refunding money to RW1 which money he had obtained with false pretences and or fraudulently. It is submitted that the above victim testified in this trial and indeed confirmed that the claimant had obtained a sum of Kshs30,000/= in the guise that he could secure employment with the 2nd respondent for the victim's son. The evidence on record is that the claimant subsequently refunded the money.
81. It is submitted that the claimant admitted in the trial that he borrowed a sum of Kshs20,000/= from the 1st respondent which he failed, refused, and or neglected to repay. He also admitted receiving money from parents to allegedly purchase text books for the learners outside the established official structure of school fees. It is submitted that based on the evidence availed the respondents took the appropriate action culminating in the fair and lawful dismissal of the claimant.
82. Further, it is submitted that the claimant failed to prove that the dismissal was unfair and unlawful under Section 47(5) of the Act. Counsel cited Reuben Ikatwa & 17 Others V Commanding Officer British Army Training Unit Kenya (BATUK) (unreported) & Kenya Power & Lighting Company Limited (2017) eKLR among other decisions on this point.
83. It is submitted that on a balance of probabilities the claimant failed to prove his cause while the respondents demonstrated that there were good and sound grounds for taking the disciplinary action based on genuine believe and indeed proved gross misconduct and infamous conduct on the part of the claimant.
84. On due process, it is submitted that the respondents complied with Part XI of the Code, the Act, and Rules of natural justice. It is submitted that the claimant was issued with a show-cause letter spelling out the specific charges/allegations against him and he was given an opportunity to defend himself.
85. It is submitted that while the original allegations related to the misconduct of the claimant while serving at Nakuru Boys' High School, to wit incitement of staff, soliciting for funds from parents, and failing to repay the money advanced to him, it was subsequently discovered that the claimant had other serious and gross misconduct while serving at Afraha High School relating to fraudulently obtaining money in the guise of securing jobs with the 2nd respondent for desperate job-seekers. It is submitted that the case of RW1 alluded to above is a clear case of gross misconduct and the claimant admitted to the same.
86. It is submitted that the evidence on record proves that the claimant was issued with a show-cause letter, investigation was carried out, interdiction served, defence to the allegations filed, invitation to the hearing served, disciplinary hearing held, and a lawful decision arrived at based on the evidence adduced. The decision of dismissal was promptly communicated to the claimant. The court is urged to find that the respondents subjected the claimant to due process and as such to uphold the decision reached. It is submitted that upon filing his appeal /review dated 17th September, 2022 the claimant was invited to argue and he indeed argued his appeal at length on 24th February, 2022. The appeal was considered on merit but the dismissal was upheld.
87. It is submitted that considering the entire circumstances in this cause the claimant was afforded both substantive and procedural fairness and the court is urged to uphold the dismissal. Counsel cited Judicial Service Commission V Gladys Boss Shollei & Another (Supra) to the effect that due process need not be so elaborate as demanded of a trial in court and that as long as the basic rules and tenets of natural justice are complied with the process should be deemed adequate and satisfactory.



88. On reliefs, the court is urged to find that since the dismissal was fair and lawful the claimant is not entitled to any of the reliefs sought. It is submitted that in view of his demonstrated infamous conduct and gross misconduct the 2nd respondent lost trust and confidence in the claimant and it is inconceivable that the claimant is seeking reinstatement yet he was the author of his own misfortune. It is submitted that the claimant is not a good example to the learners in view of his corrupt and unprofessional conduct.
89. Further, it is submitted that since the dismissal was fair and lawful the issue of compensation does not arise. In any event, it is submitted, the claimant failed to prove that he was entitled to such compensation including gratuity which was in any event not provided for in his contract of service. As if a reminder was needed, the court is urged not to be driven by sympathy but by justice and consider the interests of both parties in the entire circumstances of this cause.

VII. Issues For Determination

90. The court has carefully and dutifully gone through the pleadings filed, the oral and documentary evidence presented from all the parties, and the written submissions by counsel for all the parties. In the considered view of the court the following issues commend themselves for determination: -
- a. Was the dismissal of the claimant wrongful, unfair, and unlawful?
 - b. If (a) above is in the affirmative, is the claimant entitled to the reliefs sought? And,
 - c. Costs?

VIII. Substantive Justification And Procedural Fairness

91. The jurisprudence on what constitutes unfair and unlawful termination and wrongful dismissal is somehow now settled. Besides the employer establishing a good reason for the termination or dismissal (substantive fairness) it has to be established that the employee was afforded and granted a hearing to defend himself against any allegations or charges levelled against him/her (procedural fairness). The substantive and the procedural fairness are what is collectively referred to as due process – See *Mary Chemweno V Kenya Pipeline Company Limited* (2017) eKLR, *Loice Otieno V Kenya Commercial Bank Limited* (2013) eKLR, and *Walter Ogal Anuro V Teachers Service Commission* (2012) eKLR.
92. Without the necessity of repeating the analysis of the evidence availed, which has been so well analysed by counsel for the parties in their respective written submissions as summarized above, the court shall weigh the facts, evidence, and circumstances of this cause against the test stated above – substantive and procedural fairness – in determining whether the dismissal was unfair and unlawful as pleaded and prayed by the claimant.
93. Vide a letter dated 1st September, 1994 the 2nd respondent engaged the claimant as a graduate teacher on the terms and conditions set out therein and his appointment was confirmed on 7th October, 1996. The claimant thereafter served in several schools including *Afraha High School*, *St. Joseph’s Elburgon*, and *Nakuru Boys’ High School*, the latter being his last station before dismissal vide a letter dated 1st July, 2021.
94. The claimant joined *Nakuru Boys’ High School* on 27th August, 2018 as confirmed in a letter dated 7th September, 2018 as per the letters that he exhibited in court.
95. In a meeting held by the 1st respondent on 6th December, 2019, whose minutes were exhibited in the trial by the claimant, the conduct of the claimant was discussed. It was alleged that he had failed to refund or repay a sum of Kshs20,000/= that he had borrowed from the school; and, that RW1



had written to the principal of the school to the effect that the claimant had conned or fraudulently obtained from him a sum of Kshs30,000/= when the claimant was a teacher at Afraha High School in the guise that he would secure a job with the 2nd respondent for the son of the victim. It is stated in the said minutes that the claimant had admitted to the misconduct and undertaken to refund the money. A similar complaint had been made by one Kogo Kipng'etich Noah. Further, it was alleged that the claimant had on several occasions incited members of staff against the administration and one such incident was cited to have occurred during a staff meeting held on 12th April, 2019. It was also alleged that the claimant had been asking for and receiving money from parents to allegedly purchase books for learners without the knowledge and or approval by the school administration. It was also alleged that he had received money from parents in the promise of securing admission of their children to the school.

96. The letters of complaint by the persons named above were exhibited and produced as exhibits by the 2nd respondent. In my considered view those letters constituted the written complaints against the claimant.
97. It was alleged that the claimant had been informed of the foregoing allegations and charges but no evidence was availed to prove that indeed the claimant had been informed of the charges and or invited to the meeting held on 6th December, 2019. The letter dated 13th November, 2019 inviting the claimant to the meeting and informing him of the charges bears no evidence that the claimant was served with the same.
98. However, the court notes that the claimant filed the said letter as an exhibit in his bundle of documents and no explanation was offered as to how he obtained the same if the same had not been served upon him.
99. Subsequent to the above meeting, the claimant was served with two undated letters of interdiction. In his evidence, the claimant admitted that he was served with the said letters on or about 23rd December, 2019. The interdiction took effect from 6th December, 2019. The claimant was accused of insubordination, incitement of staff, solicitation of funds, obtaining funds from parents, as stated in the minutes alluded to above, and he was invited to respond thereto in writing.
100. The court has seen the response/defence by the claimant dated 25th December, 2019 in which he denied the charges and allegations levelled against him.
101. As required by the Code and the Regulations, the 1st respondent escalated the matter to the 2nd respondent and in a letter dated 28th September, 2020 the claimant was interdicted by his employer in line with Regulation 146. The letter reiterated the charges and enumerated them as per the minutes of the meeting of 6th December, 2019, and the letter of interdiction earlier on issued by the 1st respondent. The claimant was invited to respond to the charges/allegations in writing and avail any evidence or defence that he had. As noted above, the claimant filed his amended response in the letter dated 25th December, 2019 following the initial interdiction by the 1st respondent.
102. The court finds and holds that even if the claimant was not invited to the meeting of 6th December, 2019, by the 1st respondent, which is however in doubt as he readily filed in court the letter inviting him, such defect in the process was cured and rectified when he was served afresh by the 2nd respondent and invited to defend himself and to attend the disciplinary hearing.
103. In a letter dated 21st May, 2021 the claimant was invited for a virtual hearing of his disciplinary case on 24th June, 2021 which hearing was to take place in the 2nd respondent's county director's office at Nakuru. For ease of reference the said letter provided as follows –



Ref: No. TSC/351854 21/5/2021

TSC/DISC/NO. 0503/01/2019/2020/35

Mr/Mrs/Miss Peter Njoroge Ng'ang'a

Re: Invitation For Hearing Of Discipline Case

Further to the interdiction letter dated 6th December, 2019, I am directed to inform you that, your case will be heard virtually on 24th June, 2021 at TSC County Director's office – Nakuru at 8.30 a.m. or soon thereafter. You are invited to attend in person together with your witnesses (if any).

Please bring the falling documents which the Commission may wish to examine during the hearing:

- a. Original copies of your academic and professional certificates;
- b. Last payslip;
- c. National Identification Card;
- d. Certificate of Registration as a teacher;

You are also advised to bring your letter of interdiction together with any documents that may be useful in your defence.

You are advised to contact the Teachers Service Commission if communication of the decision of the case is not communicated to you within 28 days from the date of the hearing.

David Mukui

For: Secretary/Chief Executive

Teachers Service Commission

104. The proceedings of the disciplinary hearing were exhibited and produced by the 1st respondent capturing the entire hearing. Ultimately, a decision was made that the claimant be dismissed from service of the 2nd respondent. The decision was communicated to the claimant in a letter dated 1st July, 2021.
105. Dissatisfied with the decision to dismiss him, the claimant appealed vide a letter dated 17th September, 2019. The appeal/review was considered on 3rd March, 2022 and the minutes indicate that the claimant attended the hearing and he argued his case extensively.
106. However, the dismissal was upheld and the claimant was accordingly informed vide a letter dated 9th March, 2022.
107. Of course, it is in the backdrop of the above background that the claimant filed this cause in court on 4th October, 2022 seeking for the reliefs alluded to in the introductory part of this judgment. For avoidance of doubt, the time of three years within which the claimant was to file his claim in court started running on the date when the appeal process concluded and the claimant informed of the outcome on 9th March, 2022.
108. It is the finding and holding of this court that the employer, the 2nd respondent, had genuine and reasonable grounds upon which to found disciplinary action against the claimant. Section 43(2) of the Act sets out a subjective test upon which an employer decides on whether to take disciplinary action against an employee. So long as the employer genuinely and reasonably believed that the alleged and



- disclosed misconduct or that the circumstances thereof disclosed misconduct, the employer had good and sound grounds to act.
109. This court (ELRC) has to warn itself not to trespass into the arena of human resources management at the workplace as that should be the province and within the purview of an employer. Unless there is established illegalities or irregularities, the court should not and shall not intervene or interfere with and in the human resources management at the workplace.
 200. The claimant was accused of gross misconduct and or infamous conduct as set out in the show-cause letter. The details thereof were supplied right from the level where the matter was handled by 1st respondent to the level when the matter was escalated to the 2nd respondent. The charges, in my view, as enumerated elsewhere in this judgment, were gross and grave.
 201. The allegation and claim by the claimant that he was charged with misconduct that did not occur while serving at Nakuru Boys' High School but at Afraha High School is, to say the least, escapist and naïve. At all material times the claimant was an employee of the 2nd respondent regardless of the school wherein he was teaching. In any event, the claimant's proved misconduct while at Afraha High School followed him to Nakuru Boys' High School. Suffice to say that all the charges against the claimant at whatever locus committed were laid out to him and he was called upon to defend himself.
 202. In my considered view, on the basis of the charges/allegations against the claimant, the respondents acted fairly and lawfully in pursuing disciplinary action against him in the genuine belief that the claimant had violated the law, the Regulations, and the Code. In terms of substance, in my considered view, the respondents complied with the law and more so Sections 43 & 45 of the Act.
 203. The claimant in his evidence admitted receiving and failing to repay the sum of Kshs20,000/= to the 1st respondent, he also admitted in cross-examination that he had received money from RW1 as charged and that he had refunded the same. He also admitted asking for money from parents to allegedly buy textbooks for learners outside the established school fees structure and without the knowledge and or approval from the 1st respondent. It does not matter that the claimant was not charged in a criminal court. Besides the provisions in the Regulations and the Code as cited by counsel for the respondents the claimant also violated Section 44(4)(g) of the Act.
 204. In terms of the procedure adopted, the court finds and holds that the claimant was informed of the charges and the particulars thereof, he was served with a show-cause letter and given a chance to respond thereto in writing, and he was invited for a hearing and informed of his right to bring his evidence and even call witnesses. He attended the hearing in person and as per the minutes was heard and afforded due process. The decision to dismiss him was promptly communicated to him and he was informed of his right of appeal/review which he exercised. Upon rejection of his appeal and upholding of the dismissal, the claimant was promptly informed of that outcome.
 205. With all due respect to the claimant and his counsel, the court finds and holds that the claimant was heard and due process accorded to him. The court finds no reason to fault the substantive and procedural steps as undertaken and executed by the respondents.
 206. For all the above reasons, the court upholds the dismissal and hereby declares and proclaims so. The court takes this position based on the facts and evidence adduced and presented in court in full cognizance of the fact that the claimant is a person living with a disability having appeared in the physical court to give his testimony and also tendering documentary evidence of his disability. There is no evidence of discrimination whatsoever as the claimant alleged in his evidence in court.



207. The claimant is the author of his own misfortune for the path of self-destruction that he chose. He confirmed that he is well informed in the regulations and ethical dictates of his profession. As much as the court may be empathetic of the claimant and his condition, the facts and evidence in this court portrays the claimant as a person on a mission of self-destruction. I hope he learns from the experience of this matter and picks himself up towards a better future.

208. For all the foregoing reasons, the claimant’s cause is hereby dismissed.

IX. Orders

209. The claimant’s cause is hereby dismissed in its entirety with no order as to costs.

DELIVERED VIRTUALLY, DATED, AND SIGNED AT NAKURU THIS 4TH DAY OF JULY, 2024.

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DAVID NDERITU

JUDGE

