



**Khasiani v Teachers Service Commission (Cause 323 of 2017)
[2024] KEELRC 2201 (KLR) (13 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2201 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 323 OF 2017
J RIKA, J
SEPTEMBER 13, 2024**

BETWEEN
FERNANDES ANGOLIO KHASIANI CLAIMANT
AND
TEACHERS SERVICE COMMISSION RESPONDENT

JUDGMENT

1. The Claimant filed his Statement of Claim on 13th February 2017. The Statement was amended on 5th September 2019.
2. He states that, he was employed by the Respondent Commission, on 11th May 2000, as a Clerical Officer.
3. He gradually rose through the ranks, and held the position of Senior Human Resource Officer, as at August 2014. His salary at this time was Kshs 67,590 monthly.
4. He was alleged to have irregularly reversed the promotion of 3 Teachers. He was summoned by the Respondent, and interrogated on 6th June 2014. He was issued a letter to show cause the same date, to which he replied, on 18th June 2014. He states that the letter to show cause gave him notice of 7 days, against the Disciplinary Policy Manual, which provides for 14 days.
5. He was interdicted on 14th August 2014. He was called to disciplinary hearing on 31st October 2014. He was not advised on his right to be accompanied by a colleague or a trade union representative, at the hearing. There was no warning. The Respondent did not call any Witness to support its allegations. He states that he was unfairly and unlawfully dismissed, on 5th November 2014. He lodged an Appeal against the decision, on 2nd February 2015.
6. The decision was made by 1 Commissioner, contrary to clause 8.3.1. of the Policy on Management of Discipline of TSC Employees, which requires the involvement of a panel of 3 Commissioners.



7. Other staff who were allegedly involved in promoting Teachers irregularly, were all returned to office. The Claimant was victimized because he refused to avail to the Respondent, his M-pesa account records, which the Respondent demanded to be given within 1 day.
8. His position is that procedure was not in conformity with Section 41 of the Employment Act, and fraud was not established as a valid reason to justify termination, in accordance with Section 43 of the Employment Act. He invokes Section 45 of the Employment Act both on procedure and substantive justification, as well as Article 47 of the Constitution, and the Fair Administrative Actions Act.
9. He prays for Judgment against the Respondent for: -
 - a. Declaration that his fundamental rights and freedoms under Articles 41, 47 and 50 [1] of the Constitution, have been contravened.
 - b. Declaration that dismissal is unfair and unlawful.
 - c. A declaration that the decision made by the Respondent is null and void, having been made by an improperly constituted panel.
 - d. Reinstatement, without loss of benefits.
 - e. Re-engagement.
 - f. Salary from the date of interdiction to the date of re-instatement.
Alternatively,
 - g. Salary from the date of interdiction to the date of dismissal at Kshs 269, 748.
 - h. Notice at Kshs 202,770.
 - i. 12 months' salary in compensation for unfair termination.
 - j. Pension benefits.
 - k. Interest.
 - l. Costs.
 - m. Certificate of Service.
 - n. Any other suitable relief.
10. The Respondent filed what is described as a Statement of Defence, on 2nd June 2017. [Our Procedural Rules, refer to a Statement of Response]. It is conceded that the Claimant was employed by the Respondent as pleaded, in the Claim.
11. On 13th September 2012 and 10th April 2013, while an Officer in HRM digit 6, he irregularly and unprocedurally reversed irregular promotions of 3 Teachers. The Teachers were Kiambiti Kangentu [266685], Nthama Kibati [266684], and Kiburi Damaris Loko [395005]. He used his TSC number and password without consultation or authority of his Supervisor. These Teachers were not within the digit range he was assigned.
12. He was issued a letter to show cause why disciplinary action should not be taken for the irregular reversal of promotions. The letter is dated 7th July 2014. He was not able to satisfactorily explain, how his password was used.



13. He was interdicted on probable and honest ground, that he was involved in irregular reversal of promotion, contrary to the Code of Regulations for Secretariat Staff.
14. He was given adequate opportunity to make his defence. He wrote a statement in accordance with the Code and Rules of Natural Justice. The allegations were formally presented to the Claimant, when he appeared before the disciplinary panel. He was given the opportunity to present oral and documentary evidence. The decision was communicated to him without delay. The Respondent acted in accordance with its constitutional and statutory mandate.
15. The Claim has no merit. The Respondent prays the Court for its dismissal with costs.
16. The Claimant gave evidence and closed his case on 2nd December 2021. Auditor David Kiarie, gave evidence for the Respondent on the same date. Acting Director, Discipline, Eveline Mitei, gave evidence on 14th March 2024 closing the hearing. The Claim was last mentioned on 3rd July 2024, when the Parties confirmed filing and exchange of their Closing Submissions.
17. The Claimant adopted as his evidence-in-chief, his Witness Statement on record, and Documents listed from 1-27. He denied that he reversed any Teacher's promotion irregularly. He was a Supervisor. He authorized Advice Data Sheet [ADS]. He did not have the right to promote or demote Teachers.
18. He heard the allegation that his password was used in reversing Teacher promotions. He was called before an investigation panel in June 2014. He was not given notice of the agenda. He attended the meeting on 6th June 2014.
19. The investigations report was not shared with him, before the hearing. He had no interaction with any of the subject Teachers. No Teacher told him that he had reversed their promotions. There was no Teacher who gave information on investigation and disciplinary hearing, incriminating the Claimant. The system was not investigated forensically. He was not advised on his right to be accompanied to the disciplinary hearing. 1 Commissioner, Dr. Salome Gichira heard him. Other Commissioners, Tirop and Sadia, indicated to be present, were not part of the panel. The Regulations require composition of 3 Commissioners. A warning letter which issued in 2011, and which had expired, was taken into account at the hearing. He was not given time to submit M-pesa records, demanded by the Respondent. It was in any event, for the Respondent, to establish its allegations.
20. Cross-examined, the Claimant told the Court that he exhibited M-pesa statements, which were not meant to be used in Court. He worked at digit 6. The reversals which were made, were not within his range. His TSC number was 700397. It was his duty to protect his password.
21. He did not inform his Supervisor, that his password was compromised. He appeared before the investigator. The minutes of the disciplinary committee show 3 Commissioners were present. His position is that 1 attended. He did not protest against the composition. He was not aware of his right to be accompanied to the hearing. He did not exhibit the warning letter he complains was considered, at the hearing. It was not referred to, in the interdiction and dismissal letters. He submitted his M-pesa records before dismissal. It is not true that he declined to submit. He asked for investigations report, after dismissal. He was paid about Kshs 1.5 million in terminal benefits. The rest would be paid upon his attainment of the age of 50 years. He was not aware that his password was used to reverse promotions.
22. Redirected, he told the Court that he learnt of reversal, when he appeared at the disciplinary hearing. There was 1 Commissioner, not 3 at the hearing. Kshs 1.5 million received, was in pension benefits.



23. David Kiarie relied on his Witness Statement as his evidence-in-chief. The issue of irregular demotions / reversal of promotion of Teachers, emerged upon audit. It was not a common occurrence to reverse a Teacher's promotion.
24. The Respondent reviewed its system. It examined how promotions / reversals were done. It examined the ADS. This captured the full transactional history.
25. From this evidence, the Respondent was able to tell that the Claimant's payroll number, 700397, was used in demoting the Teachers. The historical records are shown in Respondent's exhibit 2. Officer who carried out the transactions is shown. Transaction dates are shown. The designation and workstation of involved Teachers is shown. The Teachers were demoted 1 month after promotions. The Claimant effected demotions on 13th March 2014.
26. The information is likewise contained in the investigations report, Respondent's exhibit 12. The Teachers had not done interviews to justify promotion, in the first place. The Claimant's role as a Supervisor, was to authorize hard copy of ADS, and not get into the system and effect changes. There was no direct communication between the Claimant and the involved Teachers. He used proxies. There was another irregular promotion in the year 2011, involving Teacher Damaris [395005]. Promotion was by Officer [500310]. The Claimant made the reversal.
27. Auditor David Kiarie explained that reversals were being made, because the promoted Teachers, had declined to give the Claimant and his team bribes.
28. On cross-examination, Kiarie told the Court that he is the Principal Internal Auditor. He interrogated the Respondent's system. He interviewed the Claimant. The affected Teachers did not mention the Claimant. Kiarie did not identify the proxies used by the Claimant, in reaching the Teachers. The Respondent contacted DCI. Kiarie did not have any report of the DCI. There was no forensic report. All the reversed promotions, had been done irregularly. There was no other evidence, other than the Claimant's password, to show that he did the irregular reversals.
29. The 1st column in Respondent's exhibit 2, shows transaction, and the 2nd shows demotion / reversal. Designation is not shown on the 2nd table. The Claimant's document at page 14, is a newspaper report. It indicates that the Respondent, was unable to establish who reversed promotions. The Claimant was dismissed because of the reversal of promotions. The newspaper reports state that, the Respondent, did not establish if the Claimant and other officers, were responsible. The Claimant denied having received any money from the Teachers.
30. Redirected, Kiarie told the Court that he did not issue any press release on the subject of his audit. The Respondent does not have forensic auditors. The Claimant did not complain to Kiarie, that his password had been compromised. The system is secure. None of the promoted Teachers had been interviewed. The Claimant's TSC number, was used.
31. Eveline Mitei, Director Discipline, served as the Deputy Human Resource Manager, at the time of the Claimant's dismissal. She relied on her Witness Statement, and Documents filed by the Respondent, in her evidence-in-chief.
32. On cross-examination, she corroborated the evidence of her colleague, Kiarie. The Claimant's credentials were used to reverse promotions. The Respondent learnt about demotions around June 2014. Investigations revealed that promotions and demotions had been made irregularly between 2012 and 2014. The Claimant was interviewed by the investigator.



33. Once the password was shown to have been abused, it was deactivated. Mitei was not sure when the Claimant's password was deactivated. It was around March 2014. He was assigned other roles not requiring use of the password, before dismissal.
34. Mitei was one of the investigators. She is a trained Teacher, but also holds a Master's Degree in Human Resource Management. She is not a cybersecurity professional. The Respondent did not involve other government agencies. It has its own ICT experts.
35. Mitei told the Court that she is not an expert, in password hacking. The Human Resource Manual has a procedure on promotions and demotions. 1 Officer, cannot carry out these procedures alone. The Claimant's password, could be used to promote and demote Teachers.
36. He was issued letter to show cause. He replied asking for a forensic audit. There was no direct link between him and the Teachers. He used proxies. He reversed promotion of 3 Teachers. He was given 7 days to respond to the letter to show cause. The Code provided for at least 7 days, while the Policy on Management of Discipline, says 14 days. He was advised on his right to be accompanied at the hearing. Dr. Gichira chaired the panel. Procedure allowed her to sign the proceedings alone. Other Officers who were implicated were similarly dismissed. A digit is a unit, and operates from an open space.
37. Redirected, Mitei told the Court that the Claimant was a regular user of the payroll system. Mitei was part of the investigations team. The Chief Auditor was also a member. Investigations covered implicated Officers, Teachers and Supervisors in the respective digits. The information collected by the Respondent was detailed. There was adequate audit trail, to justify dismissal of the Claimant. The system is secure and used all over by government agencies. Events in the payroll were recorded. Movement of Teachers from one grade to the other was captured. The Claimant did not complain, that his password had been hacked. He was part of a well-organized cartel. He was fairly investigated and heard. A decision was made and communicated expeditiously to the Claimant. He was advised on his right of appeal.
38. The issues are whether the Claimant's contract was terminated by the Respondent on valid reason, under Sections 43 and 45 of the *Employment Act*; whether termination was fairly executed in accordance with Sections 41 and 45 of the *Employment Act*; and whether the Claimant merits the remedies claimed.

The Court Finds: -

39. The Claimant was employed by the Respondent, on 11th May 2000 as a Clerical Officer. He was promoted, and held the position of Senior Human Resource Officer, as of 5th November 2014, when the Respondent dismissed him. His last salary was Kshs 67,590 monthly.
40. His dismissal followed the unearthing during audit, of a payroll scandal, where Teachers were irregularly promoted by Staff within the Respondent, and demoted when they failed to pay bribes to the promoters.
41. According to newspaper reports, exhibited by the Claimant in support of his Claim, this was one of the most shocking payroll frauds, witnessed in the country.
42. The Staff connived with Teachers, and moved them to superior job grades, enabling them to earn higher salaries. The beneficiaries would then share the salary increments with the corrupt Senior Staff at the Respondent.



43. The Teachers did not sit any interviews before they were promoted. About 20 Teachers were irregularly promoted. They were to pay their promoters, amounts ranging between Kshs 12,000 to Kshs 14,500, through designated mobile phone lines.
44. Validity of Reason: The Claimant was among 4 Officers, who were implicated. The evidence gathered by the Respondent through its investigation and audit team, disclosed that his payroll number 700397, was used in reversing promotion of 3 Teachers.
45. Reversal was done, because the beneficiaries, had failed to pay their bribes to the Claimant and his team, through the designated mobile phone lines.
46. On cross-examination, the Claimant conceded that he worked in digit, or unit, 6. The reversals were not within his range. He conceded that his TSC number, was 700397. It was his duty to protect his password. He told the Court that he did not inform his Supervisor that his password had been compromised.
47. In his statement upon investigation, he stated that he was not aware that his password was used in making reversals. He alleged unconvincingly, that the office from where he worked, was not safe. There was what he called, an influx of work. He alleged without providing evidence, that the system was given to breaking down, and someone with ulterior motive, or ill mind, could steal his password, and use it irresponsibly.
48. The Court does not find this statement persuasive. It is diversionary. The Claimant conceded that it was his responsibility to protect his password. There is no dispute that his password was used, in reversing promotion of 3 Teachers, Kiambiti, Kibati and Loko. He did not as much as report to his Supervisor, the minute he suspected his password had been compromised, or even suggest to the investigation team, who among his colleagues, who shared digit 6, would have stolen and used his credentials, in reversing promotion of Teachers.
49. As a Senior Human Resource Officer with over 14 years' experience, he did not report theft of his credentials to his Supervisor. Considering the magnitude of the scandal, he could have reported theft of his password to the Police. Even after it was alleged by the Respondent that he was involved in illegal promotion and demotion of Teachers, and implicated in a mega scandal, he did not deem it fit to engage the Police, to assist him in establishing who had stolen his credentials.
50. When he was asked to supply his M-pesa statements for the last 3 years, he resisted, invoking his right to privacy and *Fair Administrative Action Act*. At the disciplinary hearing, he explained that he could not supply his M-pesa statements to just 'anybody.' When asked whether the Respondent was just 'anybody,' he quickly resiled, and apologized to the Respondent. In Court, he repeated his objection to his M-pesa statements being availed to the Respondent. This led to the view that the Claimant could indeed have been privy, if not a beneficiary, of the bribes that were being paid by irregularly promoted Teachers. Why did he not supply his M-pesa statements before the disciplinary hearing? What was he hiding?
51. Sections 43 and 45 of the *Employment Act* prohibit termination of employment, unless the Employer establishes a valid reason. Section 43 defines valid reason to comprise matters that the Employer genuinely believes to exist, at the time of termination. Section 45 refers to specific instances- capacity and conduct of the Employee, or operational requirements of the Employer.
52. The use of the Claimant's password, in facilitation of the payroll fraud, was a fact commonly pleaded by both Parties. It was documented in IPPD reference data sheets, exhibit 2 of the Respondent's Documents. The history of the fraudulent transactions was adequately captured in this exhibit. The



Claimant was either actively involved in the fraud, or was grossly negligent in allowing fraudsters access to his confidential password. The use of his password, to perpetrate monumental payroll fraud in a public institution, amounted to a valid reason, under Sections 43 and 45 of the *Employment Act*, in the hands of the Respondent, justifying its decision to terminate the Claimant's contract.

53. The Court does not think that it was important in establishing an employment offence, for the Respondent to show the criminal involvement of the Claimant. It was not necessary to have a forensic audit and report. The audit and investigation carried out by the Respondent internally was adequate, in sustaining the employment offences, over which the Claimant was dismissed. The criminal aspect of the fraud, was reported to the DCI and the report of the DCI, or the outcome of the criminal investigation, is not significant to the employment dispute herein.
54. The Court is satisfied that the Claimant was dismissed on valid ground, in accordance with Sections 43 and 45 of the *Employment Act*.
55. Procedure: The Claimant concedes that he was issued a statement of the allegations against him. He received the letter to show cause dated 2nd July 2014 He was required to respond, and did so in writing. He was called before the investigations and audit teams. He was interviewed. He recorded lengthy statements, which he exhibits before the Court. He was interdicted through a letter dated 23rd July 2014.
56. He was invited for disciplinary hearing through a letter dated 26th September 2014. A written record of the proceedings, which supersede the evidence of the Claimant to the contrary, show that the Disciplinary Committee was comprised of 3 Commissioners – Dr. Salome Gichira [Chair], Cleopas Tirop, and Saadia Abdi Kontoma.
57. Others participants included the Claimant, Julie Ogoye from the Integrity Section, Commission Secretary Representative Aileen Ntinyari and Jermen Lelit, prosecuting.
58. The Claimant is not shown to have protested the composition of the Disciplinary Committee.
59. The Chair to the Committee signed the disciplinary proceedings. There is no provision in the Respondent's Human Resource Manual, which was shown to the Court to require signing by other panellists.
60. The Claimant was dismissed with effect from 31st October 2014.
61. He appealed through his letter dated 2nd February 2015. He again regurgitated his unconvincing position, about the possibility that his password was hacked. He advanced the ground that he had made an offer for production of his M-pesa records to the Respondent, which was still open on appeal. He alleged that he was a victim of circumstances.
62. He followed up his appeal with a letter seeking review, dated 30th November 2015.
63. He was advised on 4th January 2016 through the Secretary to the Respondent, that his appeal and review did not disclose new evidence, and dismissal decision stood.
64. The Court is satisfied that the Claimant was accorded fair procedural standards. Sections 41 and 45 of the *Employment Act*, the Respondent's Human Resource Manual, the Code of Regulations for the Secretariat Staff and Rules of Natural Justice, were observed.
65. Termination of the Claimant's teaching service was substantively and procedurally fair. The Respondent exercised its constitutional and statutory mandate lawfully and fairly.

It is ordered: -



- a. The Claim is dismissed.
- b. No order on the costs.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY AT NAIROBI, UNDER PRACTICE DIRECTION 6[2] OF THE ELECTRONIC CASE MANAGEMENT PRACTICE DIRECTIONS, 2020, THIS 13TH DAY OF SEPTEMBER 2024.

JAMES RIKA

JUDGE

