

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KAKAMEGA
APPEAL NO. E018 OF 2024

TEACHERS SERVICE COMMISSION APPELLANT

VERSUS

MATHEWS SHIHEMI RESPONDENT

(Being an appeal from the judgment and decree issued in Kakamega Chief Magistrate's Court in ELRC No.60 of 2021 by Hon. A. ODAWO (PM) delivered on 11th September 2024)

(BEFORE HON. JUSTICE DAVID NDERITU)

JUDGMENT

I. INTRODUCTION

1. In a judgment dated and delivered on 11th September 2024 the lower trial court ordered that the respondent (the claimant in the lower court) was unfairly and unlawfully terminated, that he be reinstated, be paid one month's salary of Kshs70,632/= in lieu of notice, and he was awarded costs of the cause.
2. Thereafter, the appellant through Patrick Mulaku Advocate commenced this appeal by way of a memorandum of appeal dated 11th October 2024 raising the following grounds of appeal –

1) The learned magistrate grossly erred in law and seriously

misdirected herself when she granted orders of reinstatement of the respondent to employment after the expiry of 3 years from the date of dismissal, contrary to the provisions of Section 12(3) (vii) of the Employment and Labour Relations Court Act thereby arriving a wrong conclusion in law.

- 2) The learned magistrate erred in law when she granted orders of reinstatement of the respondent to employment without due consideration of the provisions set out in Section 49(4) (b), (c), (d), (k) of the Employment Act thereby arriving at a wrong conclusion in law.*
- 3) In holding that reinstatement of an employee after the lapse of 3 years is “neither here nor there”, the learned magistrate not only failed to uphold a clear and unambiguous provision of law, but also ignored a cardinal duty to judiciously interpret the law based on facts and evidence presented.*
- 4) The learned magistrate acted in excess of her jurisdiction and grossly erred in law by determining and subsequently awarding the relief of one month’s pay in lieu of notice which was neither pleaded in the body of the statement of claim nor argued by the respondent during trial and in so doing condemned the appellant unheard contrary to the provisions of Articles 47, 48 and 50 of the constitution.*
- 5) The learned magistrate erred in law and fact when she held*

that the respondent did not bear the responsibility to ensure the well-being and safety of learners in the school. In so doing, the learned magistrate failed to appreciate the constitutional, statutory and contractual duty of the respondent to secure, uphold and protect the best interest of the child as articulated in Articles 53(2) of the constitution.

- 6) In placing full and exclusive responsibility of management of the school on the Board of Management and the Parents Teachers Association, the learned magistrate failed and/or ignored to appreciate the administrative and supervisory role of the respondent as a Senior Institutional Administrator with a solemn duty of ensuring the welfare, safety and security of children of tender age entrusted in his care by the society.*
- 7) The learned magistrate erred in law and fact when she failed to find that by virtue of his position, the respondent had duty of care towards the learners which duty he performed negligently and/or carelessly without due care, diligence and attention expected of him.*
- 8) The learned magistrate erred in law and fact when she failed to apply the legal principle of “a reasonable man test” in the circumstances of this matter and in doing so arrived at an unfair, unjust and unmerited conclusion.*
- 9) The learned magistrate erred in law in arriving at a decision*

which was contrary to the evidence tendered by the appellant, law, facts, submissions and authorities and binding judicial precedents tendered before court.

- 10) *The learned magistrate awarded reliefs which are contrary to the provisions of the Employment Act.*
- 11) *The learned magistrate erred in law when she failed to provide rational, legal and/or reasoned justification on the awards made in favour of the respondent.*
- 12) *The learned magistrate grossly misinterpreted and misapplied the relevant law and arrived at an erroneous conclusion of law.*
- 13) *The learned magistrate erred in law and fact and indeed misinterpreted the nature of the legal burden placed on the appellant under Section 43 of the Employment Act. In so doing, the learned magistrate imposed on the appellant a higher and disproportionate standard of proof contrary to law.*
- 14) *The learned magistrate erred in law and fact when she failed to find that the respondent was negligent in the circumstances of this case.*
- 15) *The learned magistrate erred in law when she failed to determine the date on which interest on costs would accrue and the rate of the impugned interest.*

3. The appellant is seeking for the orders that –

a) This appeal be allowed.

b) The judgment, orders and decree of Hon. A. Odawo (PM) delivered on 11/9/2024 and all consequential orders be set aside and be substituted with an order dismissing Cause No.60 of 2021.

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

d) Any other order as the court may deem fit and just.

4. By consent, the appeal was canvassed by way of written submissions. Mr. Mulaku for the appellant filed written submissions dated 14th March 2025 while Miss Mukhwana instructed by Maobe Mukhwana & Co. Advocates for the respondent filed submissions dated 16th April 2025.

II. BACKGROUND

5. In a statement of claim dated 29th June 2021 the respondent pleaded that at the material time to the cause he was the deputy head teacher at Mukoyani Primary School. On or about 13th June 2018 the respondent was approached by one of the teachers in the school, Judith Mutola, who sought permission to be away from work to attend to some personal matters. The respondent allowed the teacher the permission to be away and took over her duties as in-charge of class 3. However, later on in the day a pupil in class 3 was reported to have fallen into uncovered empty borehole and died.

6. On 26th June 2018 the claimant was served with a notice to show-

cause why disciplinary action should not be taken against him for failing to adhere to learners' safety directions resulting in the death of the pupil.

7. The respondent pleaded that he underwent a disciplinary hearing at the Kakamega County offices of the appellant and it was recommended that he be issued with a warning. However, he was subsequently subjected to further disciplinary hearing after interdiction in 2019 and this time round he was dismissed as per a letter of dismissal dated 9th May 2019. It is the respondent's case that the second disciplinary hearing was not fair and just as he was denied a hearing.
8. The respondent prayed for the following reliefs –
 - 1. A declaration that the respondent unfairly terminated the employment of the claimant.**
 - 2. An order for reinstatement of the claimants back to his employment at the status and job group he was serving.**
 - 3. Damages/compensation for the unfair termination from 9/5/2019 to date.**
 - 4. Costs of this suit to be borne by the respondent.**
 - 5. Interest on (4) above at court rates.**
9. In a response to the claim dated 29th September 2021 the appellant denied the claim in toto pleading that the dismissal of the respondent was fair and lawful both in substance and procedure. It was pleaded

that the respondent was issued with a show-cause letter dated 14th June 2018 following the death of a pupil, as alluded to above, for his failure to adhere to Safety Standards Manual of 2008. The respondent replied to the show-cause in his letter dated 25th June 2018.

10. It was further pleaded that investigation confirmed that the respondent had been negligent in performance of his duties resulting in the death of the pupil alluded to above and he was thus interdicted through a letter dated 31st October 2018 and called upon to comprehensively respond to the charges that he faced. It was pleaded that the respondent admitted to his negligence in his response dated 16th November 2018.
11. Thereafter, the respondent was invited to a disciplinary hearing on 28th February 2019 but the respondent failed to appear on that date but ultimately the hearing was conducted on 27th March 2019. The respondent was thereafter dismissed and his subsequent request for a review was declined and the dismissal upheld.
12. It was thus pleaded that the respondent was given a fair hearing culminating in his dismissal for gross misconduct for grossly neglecting his duties. It was pleaded that the dismissal was lawful and fair and the lower trial court was urged to dismiss the same with costs.
13. It is upon the hearing of the parties that the lower trial court entered

judgment in favour of the respondent as stated above. It is that judgment that is now challenged by the appellant in this appeal.

III. SUBMISSIONS BY COUNSEL

14. Counsel for the appellant condensed the grounds of appeal into three thematic areas and submitted on three issues –

- a. *The learned magistrate erred in law and fact in finding that there was no valid reason and therefore the respondent's termination from employment was unjustified, unfair and unlawful.*
- b. *The learned magistrate erred in law and seriously misdirected herself when she granted orders of reinstatement of the respondent to employment after the expiry of 3 years from the date of dismissal, contrary to the provisions of the in law.*
- c. *The learned magistrate erred in law by awarding reliefs to the respondent that were neither pleaded nor tenable in law.*

15. On the first issue, counsel submitted that the respondent was dismissed on justifiable lawful grounds and thus the lower trial court erred in not upholding the same. It is submitted that upon comprehensive and thorough investigation the appellant prepared a report – pages 40-42 of the record of appeal – that discloses a good cause for dismissal as envisaged under **Section 43 of Employment Act** based on the gross negligence resulting in the unnecessary death of a pupil.

16. On the second issue, it is submitted that the lower trial court misdirected itself in ordering reinstatement after expiry of three years from dismissal. It is submitted that that order flies on the face of **Section 12(3)(vii) of the Employment and Labour Relations Court Act. Counsel cited Kenya Airways Limited V Aviation & Allied Workers Union & 3 Others (2014) eKLR** in support of this argument.
17. It is further submitted that the lower trial court failed to consider other alternative reliefs that may have been available to the respondent instead of issuing an unlawful order for reinstatement.
18. On the third issue, it is submitted that the lower trial court granted to the respondent reliefs that he did not pray for thereby demonstrating partiality. Counsel cited **Independent Electoral & Boundaries Commission & Another V Stephen Mutinda Mule & 3 Others (2014) eKLR** to the effect that a court should refrain from granting orders not sought for as that amounts to the court amending the pleadings *suo motu*.
19. It is further submitted that the lower trial court failed to consider the factors provided for in **Section 49(4) of the Employment Act** in granting the orders that it did. It is submitted that the lower trial court further fell into error for failing to give reasons for granting the orders that it did. It is submitted that the orders made are untenable and the lower trial court clearly and evidently took sides

with the respondent – the employee – while completely disregarding the need for justice and equity to the appellant – the employer.

20. On the other hand, counsel for the respondent submitted on three issues. On the first issue, counsel submitted that the open borehole into which the pupil accidentally fell and died existed in the school compound for a long time and as such it was unfair and unjustified for the appellant to have held the respondent responsible for the unfortunate accident. It is submitted that the reason for the dismissal was unfair and that is what the lower trial court found and held. It is submitted that the inspectorate of schools was to blame for the uncovered borehole and it was thus unfair for the appellant to blame the death on the respondent.
21. It is submitted that the open borehole into which the pupil fell and died was always there and the pupil accidentally fell therein when all students were on break and playing in the same ground. It is submitted that the death was purely accident. In any event, it is submitted that the respondent was neither the head teacher nor the manager of the school. It is submitted that the appellant was covering up for the persons responsible for the death and in so doing sacrificed the respondent.
22. On reliefs awarded by the lower trial court, it is submitted that the three-year statutory period within which reinstatement may be ordered expired while the matter was pending trial in the lower

court. The court is urged to apply a progressive and purposive interpretation of the decision of the Supreme Court in Kenya Airways Limited V Aviation & Allied Workers Union (supra) and find that reinstatement as ordered by the lower trial court was a viable, tenable, and lawful remedy in the circumstances of the case.

23. It is further submitted that the appellant is a public institution with the capacity to absorb the respondent in its many schools and institutions across the Republic. It is submitted that being a professional teacher it is difficult for the respondent to secure another job.
24. It is further submitted that the lower trial court had the discretion to issue the other orders that it did or as it deemed fit to meet the ends of justice.

IV. ISSUES FOR DETERMINATION

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

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

V. THE DISMISSAL

26. As the first appellate court, this court is obligated to re-evaluate the evidence on record and arrive at its own conclusions bearing in mind that it neither heard nor recorded the evidence during the trial – see *Selle & Another V Associated Motor Boat Company Ltd (1968) EA*.
27. The facts of the employment relationship between the appellant and the respondent are uncontested and are as laid out in the summary of the pleadings and submissions in the foregoing part of this judgment. It is not contested that the respondent was dismissed on grounds of alleged gross neglect of duty as per the letter of dismissal dated 9th May 2019. The dismissal took effect from 27th March 2019.

28. The reason for the dismissal was stated to be “***on 13.6.2018 you unprocedurally gave verbal permission to Judith Mutola TSC/..... class 3 teacher to be away without making arrangements for supervision of the class. This left class 3 unattended leading to RL to wander from class to the area of an uncovered borehole into which he fell and died on 13.6.2018.***”
29. The circumstances leading to and culminating in the dismissal are largely not contested by the parties. At the material time, the respondent was the deputy teacher at the school and he verbally granted the named teacher permission to attend to some personal matter. It is not contested that the said permission was not documented. The respondent took charge of the class but as fit would have it, during a break a pupil accidentally fell into an open borehole and died.
30. While the appellant takes the view that the respondent was accorded both substantive and procedural fairness the respondent takes the position that he was denied both and as such the dismissal was wrongful, unfair, and unlawful as held by the lower trial court.
31. On the first issue, the jurisprudence on what constitutes or does not constitute fair and lawful dismissal or termination is to a large extent now settled. There are two main components to this – ***substantive and procedural fairness***. Substantive fairness is about the employer having a genuine lawful reason for taking disciplinary action that

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

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

33. The process that culminated in the summary dismissal of the respondent was commenced by the appellant vide a show-cause letter dated 14th June 2018. For ease of reference the said letter stated as follows –

TEACHERS SERVICE COMMISSION

Telephone: Kakamega

056 -

Email: cdrkakamega@tsc.go.ke

Web: www.tsc.go.ke

When replying please quote Ref

Ref. No. KK/TSC/PRI/STAFF/KKS

Mathews Shihemi

TSC COUNTY DIRECTOR

KAKAMEGA COUNTY

P.O. BOX 2964-50100

KAKAMEGA

DATE: 14th June 2018

TSC/467201
The Deputy Head teacher
Mukoyani Primary School

Thro'

The Sub-County Director
KAKAMEGA SOUTH

RE: SHOW CAUSE

Following the demise of a class 3 pupil in your school by the name Racado Luseno on 13th June, 2018 who fell in an uncovered borehole, you flouted the Ministry of Education and TSC Circular concerning the learner's health and safety in learning institutions. As the Deputy head teacher of the institution, you breached clause (b) of the Third Schedule of the Act.

The purpose of this letter therefore, is to accord you an opportunity to offer a written explanation why disciplinary action should not be taken against you for this professional misconduct. Your response should reach this office within seven (7) days from the date of this letter.

LAMECK RASUGU
FOR: TSC COUNTY DIRECTOR
KAKAMEGA

Copy to:

The Secretary
Teachers Service Commission
NAIROBI

34. The respondent was issued with a letter of interdiction dated 31st October 2018 which informed the respondent that ***“You neglected your duty by failing to supervise roll call, delegate supervision in class 3 on 13th June 2018. You also unprocedurally gave verbal permission to class teacher, class 3, which led to the death of RL class 3 pupil on 13th June 2018 by falling into an uncovered borehole in the school compound.”***
35. Clearly and evidently, the show-cause letter and the letter of interdiction were substantially at variance.
36. The respondent replied to the above show-cause in a letter dated 25th June 2018 and denied the allegations and charges against him. He detailed the events of the material day and the timelines. He specifically stated that the borehole into which the pupil fell and died had been open for a while as the school sought for funds to cover the same as efforts to fully cover the same had proved futile due to theft of the materials covering from time to time.
37. A disciplinary hearing was subsequently held on 28th February 2019 wherein the respondent attended accordingly. The court has seen and read the minutes of that disciplinary hearing and the letters dated 24th January and 21st February, 2019 inviting the respondent for the hearing. The said invitations did not inform the respondent of his right to come along with his witnesses or a trade union representative of his choice. Nonetheless, the disciplinary hearing

proceeded and the respondent was dismissed as per the letter of dismissal dated 9th May 2019 alluded to above.

38. The respondent applied for a review of the dismissal but the dismissal was upheld by the appellant in a letter dated 13th August 2020. This date is important as it effectively marked the conclusion and completion of the dismissal process and time for any legal action by the respondent started running.
39. In my considered view, while the appellant had the duty and obligation to investigate the circumstances that led to the disheartening death of the pupil, it was equally under obligation and duty to ensure that all those under its jurisdiction who may have failed in their duties or were negligent were fairly and lawfully held to account.
40. Looking at the procedural steps taken in ensuring that the respondent was heard, the court notes that the charges, though specified in the show-cause letter, were not exactly the same as stated in the letter of interdiction. The court also notes that the respondent was not informed of his right to call witnesses and or come along with a representative of his choice from his trade union, if he belonged to any. There is also no evidence that the respondent was supplied with the investigation report at any point. It does not matter that he did not request for the same.
41. While a disciplinary hearing is not a court case where strict rules of

procedure apply, it is absolutely necessary that employers comply with the fundamental rules of natural justice in that regard. While the omissions enlisted and isolated above may seem minor they actually go to the core of due process. The court finds and holds, contrary to the finding and holding by the lower trial court, that the respondent was not granted proper procedural fairness for the reasons stated above.

42. In regard to substantive fairness, the lower trial court found and held that the death was accidental and the respondent was not to blame for the same. He was neither negligent nor culpable for the said death. This court agrees with this finding and holding by the lower trial court. While it is true and factual that the respondent was careless and negligent in releasing the class teacher in such a casual verbal manner and not documenting the same, it cannot be said that he was personally responsible for the open borehole into which the pupil fell and died.
43. It is important to note that the respondent was the deputy head-teacher. No action, at least the evidence does not disclose any, was taken against the head-teacher for this open borehole that had been so open for a while. There is also no evidence of any action taken by the Ministry against the inspector(s) of schools who was supposed to have ensured that the borehole was completely covered to avoid a calamity like the one that occurred. There was also the Parents

Teachers Association or a Board of management of the school that ought to have secured the borehole.

44. For the foregoing reasons, the court finds that the respondent was not accorded substantive justice. It is my view that the appellant adopted a knee-jerk reaction to safe face and sacrificed the respondent for the systemic failure alluded to above. Clearly and evidently, the only wrong that the respondent committed was to let go of the class teacher without documenting the same. Otherwise, the borehole, as per the evidence, was always open presenting a blatant danger to the pupils and even the teachers. The lack of documentation of the absence of the class teacher which was, in case, admitted by the respondent in his evidence was not enough for the appellant to dismiss him.
45. For all the reasons stated above, the dismissal was excessive, unreasonable, illogical, unfair, and unlawful. To that extent this court agrees with the judgment of the lower trial court.

V.RELIFES

46. The lower trial court awarded to the respondent as stated in the introductory part of this judgment. The reliefs sought or prayed for were also set out elsewhere in this judgment.
47. In allowing and ordering reinstatement of the respondent, the lower trial court had this to say – ***“the issue of three years is neither here nor there, as the three years lapsed while this matter was before***

court.”

48. Clearly and evidently, the lower trial court misapprehended and misapplied *Section 12(3)(vii) of the Employment and Labour Relations Court Act*. This law provides that a court may issue “*an order for reinstatement of any employee within three years of the dismissal, subject to such conditions as the court thinks fit to impose under the circumstances contemplated under any written law.*”
49. In *Kenya Airways Limited V Aviation & Allied Workers Union (supra)* the Supreme Court made it clear that reinstatement can only be ordered within three years of termination or dismissal. It does not matter that the three years expired while the claim was pending in court. It is the duty of the court, and indeed the litigants, to ensure that where and when reinstatement is one of the reliefs sought the claim is heard and determined within three years of the dismissal or termination. There is no way of escaping this limitation.
50. While there is no magic in the three years, the logic is that where an employment relationship has ceased or paused for a period longer than three years, it is hard and or impossible to reignite the same and obliterate the time lapse. It is also intended to avoid force mending of employment relationships that have irretrievably broken down by passage of time or other reasons.
51. Now, applying the above principles to this appeal, the respondent

was dismissed vide a letter dated 9th May 2019 which indicated that the dismissal took effect from 27th March 2019. However, the respondent applied for a review of the decision and the appellant communicated the outcome of the review vide a letter dated 2nd October 2020. This is the letter that concluded the process with finality as per **Regulation 159(9) of the appellant's Code of Regulation for Teachers.**

52. In my considered view, the three years within which the reinstatement was available to the respondent started running on the above date, 2nd October 2020, upon which the hearing of the disciplinary process came to a final conclusion. Therefore, as at the time the lower trial court rendered its judgment on 11th September 2024 the statutory three years had long expired.
53. For the foregoing reasons, the lower trial court clearly erred in ordering reinstatement of the respondent and that order is for setting aside.
54. The lower trial court also awarded the respondent one month's salary in lieu of notice in the sum of Kshs70,632/=. It is the appellant's argument that the respondent had not sought for this relief and the lower trial court effectively amended the statement of claim *suo motu*. However, the court finds and holds that the court may not necessarily be restricted by the prayers in the pleadings as the overarching objective is for the court to be fair and do justice.

This is the reason that **Section 12(3)(viii) of the Employment and Labour Relations Court Act** provides that the court may order or grant any other or further appropriate reliefs as it may deem fit.

55. In my considered view, as long as the orders or reliefs granted are not far off the orders sought or outrageous and or out rightly untenable and inappropriate in the entire circumstances of the case, a court may exercise its discretion and grant reliefs and remedies that meet the dictates of justice.
56. The court has this far demonstrated that the lower trial court was right in finding and holding that the dismissal of the respondent was unfair and unlawful. This court has found and held that the dismissal was unfair and unlawful both in procedure and substance.
57. In the circumstances, the court finds and holds that instead of the reinstatement as ordered by the lower trial court, the respondent shall be paid compensation equivalent to ten months' of his gross salary under **Section 49(1)(c) of the Employment Act**. He is also entitled to one month's salary in lieu of notice.

VI. ORDERS

58. Flowing from the foregoing, the court makes the following orders –
- a) ***The judgment of the lower court is partially upheld and partially set aside and the same is substituted with the following orders as judgment of this court.***
 - b) ***A declaration be and is hereby issued that the dismissal of the***

respondent by the appellant was unfair and unlawful.

- c) The order of reinstatement issued by the lower trial court is hereby set aside.*
- d) In place of the order of reinstatement the respondent shall be paid compensation equivalent to ten months' gross salary in the sum of Kshs70,632/= * 10 = 706,320/=.*
- e) The respondent is awarded Kshs70,632/= being one month's gross salary in lieu of notice.*
- f) The respondent shall be paid any other or further benefits that may have accrued during and after his period of employment.*
- g) All the awards are subject to statutory deductions.*
- h) The respondent shall have the costs of the trial in the lower court.*
- i) Each party shall meet own costs for this appeal.*

**DELIVERED VIRTUALLY, DATED, AND SIGNED AT
KAKAMEGA THIS 13TH DAY OF NOVEMBER, 2025.**

.....
DAVID NDERITU
JUDGE