



**John v Teachers Service Commission (Cause E017 of 2024)
[2026] KEELRC 343 (KLR) (6 February 2026) (Judgment)**

Neutral citation: [2026] KEELRC 343 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MACHAKOS
CAUSE E017 OF 2024
JW KELI, J
FEBRUARY 6, 2026**

BETWEEN

FRANCIS MUTUNGA JOHN CLAIMANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

JUDGMENT

1. Vide a memorandum of claim dated the 22nd of May 2024, the Claimant sued the Respondent and sought the following Orders:-
 - a. The court declares that the Claimant's termination was unfair, unprocedural and unlawful.
 - b. An order that the Claimant's name be restored in the register for teachers.
 - c. One month's salary in lieu of Notice Kshs. 66,000/-
 - d. Twelve Month's compensation for unlawful and unfair termination Kshs. 792,000/-
 - e. The Claimant be reinstated back to his position.
 - f. Cost of the Claim.
 - g. Interest on 3 and 4 above.
2. The Claimant in support of the claim filed his list of witnesses dated 5th June 2024; witness statement dated 22nd May 2024; and list and bundle of documents dated 5th June 2024. The Claimant later filed a further list of documents dated 14th March 2025; a further list of witnesses of the same date; and witness statements of John Muthini Muthike and Andrew Nzioka, both dated 14th March 2025.
3. The Respondent entered an appearance through the law firm of Amos Langat Advocate on 25th June 2024 and filed a statement of defence dated 4th January 2025. In support of their response, they filed a



list of witnesses dated 22nd May 2025; witness statement of Jacqueline Ndeti dated 26th May 2025; and witness statement of Lawrence Kigen dated 22nd May 2025.

Hearing and evidence

4. The claimant's case was heard on the 19th September 2025 when the claimant testified in his case on oath, adopted his witness statement dated 2nd March 2024 as his evidence in chief and produced documents under list dated 5th June 2025 as C-exhibits 1-14 and documents under list dated 14th March 2025 as C-exhibits 15-17. The claimant was cross-examined by counsel for the respondent Mr. Ochieng and re-examined by his counsel. The claimant called a witness in his case, John Muthui Muthike (CW2), who testified on oath, adopted his witness statement dated 14th March 2025 as his evidence in chief, and produced documents under the claimant's list of 14th March 2025 as C-exhibit 16-17. The claimant further called a 2nd witness (CW3) by the name Andrew Nzioka, who adopted his witness statement of 14th March 2025 and produced C-exhibit 15 under the list of 14th March 2025. The witnesses were cross-examined by counsel for the respondent, Mr Ochieng, and re-examined by his counsel.
5. The respondent case was heard on the 3rd October 2025 when the respondent called Jacqueline Ndeti as RW1. RW1 testified on oath and adopted her witness statement dated 26th May 2025 as her evidence in chief, and produced documents under list dated 4th January 2025 as R- Exhibits 1-13. The witness was cross-examined by counsel for the claimant Lokol and re-examined by their counsel. RW2 was Catherine Wavinya Matuku, who testified on oath, adopted her witness statement dated 26th May 2025, and was cross-examined by counsel for the claimant, Lokol, and re-examined by her own counsel. RW3 was Lawrence Kigen, who was the assistant director of teacher discipline. RW3 testified on oath and adopted his witness statement dated 22nd May 2025 as evidence in chief. He was cross-examined by counsel for the claimant, Lokol, and re-examined by own counsel.

The Claimant's case in summary

6. The Claimant's case is that he was employed by the Respondent on 3rd January 2017 as a teacher stationed at Kibauni Secondary School, earning a salary of Kshs. 31,200/-. The Claimant performed his duties until 21st January 2022 when he was issued with a letter to show cause why disciplinary action should not be taken against him, on charges of having engaged in immoral behaviour with a student in the school on 17th February 2021 at 3 pm. The Claimant replied through his letter dated 24th January 2022. The Claimant was summoned to appear before the school Board and was heard on 7th February 2022. Subsequently, The Claimant was issued with a letter of interdiction dated 8th February 2022, but on this letter, the timing of the alleged immoral act was amended to read between tea break and lunch break. The letter of interdiction was signed by the Principal of Kibauni Secondary School. Following the issuance of the letter of interdiction, the Claimant made his reply and denied the allegations. The Claimant complains that he was not afforded a proper opportunity to defend himself.
7. To illustrate this, the Claimant states that the Secretary of the Board was not the Principal but an ordinary Board member one Mrs Catherine Ndiku, but the minutes do not show how the said Catherine Ndiku was made the Secretary of the Board. Further, the minutes of the School Board were not confirmed by the Board but the Chairman of the Board and the Principal seem to have confirmed the minutes without the other members of the Board.
8. The Claimant states that he lodged an appeal against the School Board to the County Board. During this appeal, in further violation of his natural right to be heard, the Principal of the School and the Chairman of the Board were allowed to participate as witnesses, when they had participated as Judges



at the Board level. He takes the view that it was improper for the Principal and the Chairman to present the minutes that they had not confirmed at the County Board level, and they should not have been allowed to appear to influence the members of the Board. The witnesses of the Board were allowed to give evidence, but the Claimant's witness was not.

9. The Claimant states that he lodged a second appeal to the TSC Review Board on 8th November 2022 but, again, his witnesses were not allowed to give any evidence.
10. It is the Claimant's case that the Principles of natural justice were never adhered to for the reason that the Respondent's School Principal participated as prosecutor and judge in the Claimant's case. The Principal received the report of the alleged professional misconduct, issued the Claimant with a notice to show cause and interdiction letter bearing different particulars of the alleged offence, specifically in respect of the time when the alleged offence was committed, made a report of the same to the School Board, participated in the Board meeting where she was a board member and not the Secretary of the Board, confirmed the minutes, and also attended the Trial at the County Board. While she did not participate at the TSC Commission Review Board, the said Principal still exerted a lot of influence.
11. At the conclusion of the disciplinary process as aforesaid, the Claimant was terminated from employment but states that he was not offered an explanation or reasons for his termination. He is emphatic that the termination of his employment contract was unlawful, wrong, unfair and tainted with malice.
12. The Claimant's father, John Muthini Muthike, averred that the Claimant was away from his place of work on 17th December 2021 from 1.00 pm to 5.00 pm when the alleged immoral conduct with a student is purported to have occurred.

Respondents' case in brief

13. The Respondent's case is that is a constitutional commission established under Article 237 (1) of *the Constitution* of Kenya, 2010 mandated to register trained teachers; recruit trained teachers; assign them to public institutions; promote and transfer teachers; exercise disciplinary control over teachers; and terminate the employment of teachers in the public service. It states that its operations are governed by *the Constitution* of Kenya, 2010; the *Teachers Service Commission Act* 2015; and the Code of Regulations for Teachers (CORT), among others.
14. The Respondent admits that the Claimant was its employee, having been employed as a teacher at Kibauni Secondary School. The Claimant's contract of employment was governed by the provisions of the *Basic Education Act*, No. 14 of 2013, *Teachers Service Commission Act*, No. 20 of 2012, Code of Conduct for Teachers (CORT) compiled and published by the Respondent and as well such Circulars as may be generated from time to time. The Code of Ethics for Teachers (CORT) and Code of Conduct and Ethics (COCE) outline the general Rules for the teaching service, the procedures and penalties to be applied in the event of a breach of the Regulations. Specifically, the CORT outlines in detail the procedure to be followed where allegations of professional misconduct have been made against a teacher. In lien with all the foregoing, the Respondent published Circular No. 3 of 2010 whose main objective is to guide the relationship between teachers and learners and to curb incidences of sexual abuse from teachers against learners, with teachers, by the virtue of being a guardian to their respective student's/pupils, being bound to uphold the loco parentis principle.
15. In 2018, the Respondent's Guidance and Counselling Mistress at Kibauni Secondary School, indicates that she was involved in the case against the Claimant in that on 13th January, 2022 at around 1540 hours, she was summoned to the Guidance Office by madam Ndambu concerning a form one student who needed to be guided. The student was CN in form 1 West and she had been accompanied to



school by her mother as she had missed the first week of opening. The mother narrated that CN did not want to report to school and that she had carried some prednisolone to take after getting to school as she did not plan on staying alive. She wanted to commit suicide. On being asked the reason as to why she wanted to commit suicide, CN stated that she did not want to attend Kibauni Secondary School, because since she reported to school in term one there was a teacher, Mr. John Mutunga, who had made sexual advances towards her. On 17th December, 2021 between tea break and lunch, he engaged in sexual intercourse with her in the staffroom within the school compound.

16. Considering the gravity of the allegations, the Claimant was issued with a show cause letter dated 21st January 2022 setting out the allegations levelled against him and further requiring him to respond accordingly. The Claimant responded vide a letter dated 21st January 2022. Subsequently, the Respondent through its agents, the Board of Management of the School, convened an investigatory meeting to carry out preliminary investigations on 7th February, 2022, with the Guidance and Counselling Mistress attending as a witness. Upon consideration of all the evidence adduced before the Board of Management panel, it was resolved that the Claimant should be interdicted. The Claimant was informed of the decision to interdict him vide letter dated 8th February 2022 which contained the reasons for his interdiction. He was further informed of his right to prepare a defence statement in writing within 21 days after which he will be accorded an opportunity to be heard in person. The Claimant tendered a detailed and comprehensive response, in which he denied the allegations against him vide a letter dated 20th February, 2022. His response was duly considered by the Respondent.
17. The Respondent's Disciplinary Panel convened on 10th June 2022 to further interrogate the matter, and the Claimant was invited to the meeting. The Claimant attended the meeting, and had already been accorded an opportunity to respond to the allegations vide a letter dated 5th May 2022. He was also allowed to cross-examine the witnesses for the Respondent including the said Guidance and Counselling Mistress. The following became apparent during the disciplinary hearing;
 - a. The Victim girl, CKN, informed the panel that during a lesson in the laboratory the Claimant asked her to remain behind after the rest of the students left and asked her, her name. He then started calling her to the staffroom after the teachers had left and would touch her breasts, buttocks and privates.
 - b. That on 17th December 2021, when there was talent show in the school which she participated in, the Claimant called her to the staffroom and when she entered, he closed the door, arranged three chairs, laid her there and had sexual intercourse with her.
 - c. That she then left and went to the dining hall to perform the fashion show. This happened after tea break and before lunch break.
 - d. She further informed the panel that the Claimant had given her one thousand shillings on 29th September 2021 to buy snacks as they proceeded for holidays.
 - e. She informed the panel that when the School opened for third term she did not want to go back to Kibauni Secondary School because students were talking about her having a relationship with the Claimant.
18. After consideration of all the evidence proffered during the disciplinary hearing, the Respondent arrived at the decision to dismiss the Claimant which decision was communicated to him through the Respondent's letter dated 17th June 2022. The Claimant was further notified of his right of review within 90 days. The Claimant lodged an application for review of his vide a letter dated 2nd August 2022. He appeared before the review panel on 8th November 2022, and the decision to dismiss him



from service was upheld. This decision was communicated to him vide a letter dated 21st November 2022.

19. As such, it is the Respondent's position that the Claimant attended the hearing of his case in person and was granted an opportunity to ventilate his case before the Disciplinary Panel, which was properly constituted. The Respondent states that the investigations conducted into the allegations against the Claimant complied with the Respondent's Code of Regulations, and he was afforded a fair hearing.

Determinaton

20. The parties filed written submissions after the close of the defence case.

Issues for determination

21. The claimant outlined the following issues for determination in the claim-
- i. Whether the Respondent's termination of the Claimant's employment was unlawful, unfair and unprocedural.
 - ii. Whether the Claimant is entitled to the reliefs sought.
22. The Respondent outlined the following issues for determination in the claim-
- a) Whether the Respondent had valid reasons to dismiss the Claimant.
 - b) Whether the standard of proof applicable in disciplinary proceedings was misapplied.
 - c) Whether there was procedural fairness in the initiation and conduct of disciplinary proceedings
 - d) Whether or not the Claimant is entitled to the prayers sought.
23. The court having perused the pleadings, found the issues for determination in the suit to be -
- a. Whether the Respondent's termination of the Claimant's employment was unlawful, unfair and unprocedural.
 - b. Whether the Claimant is entitled to the reliefs sought.

Whether the Respondent's termination of the Claimant's employment was unlawful, unfair and unprocedural.

Claimant's submissions

24. On the first issue on whether the Respondent's termination of the Claimant's employment was unlawful, unfair and unprocedural, the Claimant humbly submits that; Section 43(1) of the [Employment Act](#), 2007 provides that: In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45. Section 45 (2) of the [Employment Act](#) provides that:

"A termination of employment by an employer is unfair if the employer fails to prove) that the reason for the termination is valid;

- b) that the reason for the termination is a fair reason. related to the employee's conduct, capacity or compatibility; or ii. based on the operational requirements of the employer; and



c) that the employment was terminated in accordance with fair procedure.

25. (A) Procedural Unfairness - Failure to provide the Claimant with Evidence and Witness Statements prior to the Disciplinary Hearing of 10/6/2022; The disciplinary process leading to his termination was fundamentally flawed and procedurally unfair, contrary to the provisions of Section 41 of the Employment Act and the Code of Regulations for Teachers. Section 41 of the Employment Act, on Notification and hearing before termination on grounds of misconduct provides;

- 1) "Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- 2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

The Code of Regulations for Teachers (CORT), 2015, lays out the disciplinary proceedings under the TSC framework. The principles are reinforced under Regulations 141-155 of the Code of Regulations for Teachers, which require that the teacher be given a fair opportunity to respond, be furnished with all evidence and witness statements and be allowed to call witnesses. The Respondent's witness; Lawrence Kigen, admitted under cross-examination that the Claimant was not availed with the full record of evidence and witness statements prior to the hearing because the Claimant had not paid Kshs.2,000/=. The action by the Respondent amounted to a denial of the Claimant's right to a fair hearing and contravened both Article 50 and Article 47(1) of the Constitution of Kenya as well as Code of Regulations for Teachers. The Court in *Mary Chemweno Kiptui -vs- Kenya Pipeline Company Ltd* (2014) KEELRC 905 (KLR), held that,

"failure to provide the employee with all evidence prior to the hearing renders the process procedurally unfair".

26. Failure to allow the Claimant's Witness to Testify;- The Respondent's witnesses confirmed that the Claimant's witness; John Muthini Muthike, though listed among the Claimant's witness for the disciplinary hearing was not accorded the opportunity to testify. 18. Your Ladyship, this violated the Claimant's right to present his defence and call witnesses as enshrined under Section 41 of the Employment Act; and Article 50 (2) (k) of the Constitution; on the right to adduce and challenge evidence. The unexplained delay and irregular timelines of the disciplinary panel; - The Claimant submitted his response to the show-cause letter on 20/2/2022, yet, the disciplinary hearing was convened nearly four (4) months later, on 10/6/2022, without any reasonable delay. Such delay violated the principle of expeditious administrative action under Article 47 (1) of the Constitution and Regulation 149 of the CORT. Article 47 (1) provides; "Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair" Regulation 149 provides; "A teacher on interdiction shall be invited in writing in the manner set out in the Thirty Fifth Schedule for the hearing of the discipline case at least one month before the date of hearing..."
27. Reliance on a Contradictory Show-Cause Letter; - The show-cause letter dated 21/1/2022 indicated that the alleged misconduct occurred at 3:00pm, on 17/12/2021, yet the Respondent's own witnesses (including Catherine Wavinya Mutuku-the Principal and CKN's own statement) could not link that



time to the Claimant and to the location of the alleged incident. The Claimant humbly submits that, the evidence tendered by CKN and the Respondent's witnesses did not place the Claimant at the alleged scene of the offence on 17/12/2021 at about 3:00 pm.

28. Denial of Payment of Notice and Terminal Dues; - The Respondent's witnesses (Catherine Wavinya Mutuku and Lawrence Kigen) admitted that the Claimant was not paid one month's salary in lieu of notice neither was the Claimant paid terminal dues following termination. The action by the Respondent violates Section 35 (5) of the Employment Act. The section provides that; "An employee whose contract of service has been terminated under subsection (1)(c) shall be entitled to service pay for every year worked, the terms of which shall be fixed".
29. The Substantive Unfairness - the Claimant humbly submits that, the Respondent has failed to establish a valid and fair reason for terminating the Claimant as required by Section 43 (1) of the Employment Act; Section 43 (1) on Proof of reason for termination provides; "(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.....". I. Absence of credible Evidence of Misconduct; - It is the Claimant's humble submissions that, the allegations against the Claimant were based solely on an uncorroborated student statement; unsupported by any eye-witness testimony; and or physical evidence. (Refer to page 26-27 of the Respondent's pleadings). The Guidance and Counseling mistress (Jacquiline Ndeti) confirmed that she did not witness any inappropriate conduct of the Claimant; did not refer the student for medical or, psychological examination nor did she document the student's statement at the time the student visited the guidance office on 13/1/2022. The principal (Catherine Wavinya Mutuku) also confirmed that she never received any complaint prior to 13/1/2022 and only relied on the student's statement; which is on page 26-27 of the Respondent's documents. Reliance on contradictions and inconsistencies; - The Claimant humbly submits that, the Respondent's witnesses contradicted each other on material facts, including the timing of the alleged incident, the use of the CCTV camera, and the existence of power outage on the material day (17/12/2021)., yet, the school had a talent show event that was captured, documented and covered in the school magazine; which would only be possible with the availability of a back-up generator in the school; if indeed there was power outage on the said day. The court in Walter Ogal Anuro -vs- Teachers Service Commission (2013) eKLR, held that; "... An employer must not only prove the reason for termination but also that the reason is valid and justifiable, mere suspicion or inconsistent testimony does not meet that standard." The Court proceeded to hold that; "....There must be both substantive justification and procedural fairness. Substantive justification has to do with the establishment of a valid reason for the termination while procedural fairness addresses the procedure adopted by the employer in effecting the termination" The Court in Alphonse Maehanga Mwachaya-vs- Operation 680 Limited [2013] eKLR, stated that; "...It is not enough for an employer to simply set out the reasons for the termination in the dismissal letter and that Section 41 imposed a statutory obligation upon the employer to explain to the employee the reasons for the termination and listen to any explanations". Similarly, in Nicholas Muasya Kyula -vs- Farmchem Limited [2012] eKLR it was held that, "It was not sufficient for an employer to make allegations of misconduct against the employee and that the employer was required to have internal mechanisms and processes for undertaking investigations and verify the occurrence of the misconduct before terminating the services of the employee..." In view of the foregoing, the Claimant humbly submits that, he was not afforded the safeguards under Section 41 of the Employment Act and that despite offering proof of his whereabouts, the Respondent went ahead and dismissed him. The Respondent had an obligation under Section 43 of the Employment Act to prove that the reason or reasons for termination and that having failed to do so, the termination was deemed to be unfair. 34. The Claimant's termination was therefore unfair in terms of Section 45(2) of the Employment



Act. IH. Failure to Observe Principles of Natural Justice; - The Claimant humbly submits that, the "audi alteram partem" rule (hear the other side) is a very cardinal principal of administrative law, which the Respondent failed to observe. The said rule is fundamental of natural justice, as it requires that before decision is made that affects a person's rights, the person must be given a fair opportunity to present their case, be informed of the charges against them, and have the right to examine the evidence and cross-examine witnesses. The Court in David Onyangó Oloo -vs- Attorney General (1987) eKLR, held that; "...A decision arrived at in violation of the principle of natural justice is void ab initio, regardless of the merits of the case..." The Respondent violated the principles of natural justice by; 1) Denying the Claimant an opportunity to fully defend himself; 2) Excluding the Claimant's witness from testifying; Basing its decision on evidence not disclosed to the Claimant. Thus, making the Respondent's proceedings null and void, and any disciplinary decision flowing therefrom cannot stand. The Doctrine of Proportionality and Reasonableness; - It is the Claimant's humble submission that, even where a wrongdoing is alleged, disciplinary sanctions must be proportionate to the alleged offence. 40. The Court in Mary Chemweno Kiptui -vs- Kenya Pipeline Company Limited (2014) eKLR, stated; "An employer must ensure that the punishment imposed is commensurate with the gravity of the offence, and that the decision is not arbitrary or capricious..." Given the unsubstantiated nature of the allegations and the flawless disciplinary record of the Claimant, the sanction of dismissal was manifestly excessive, unreasonable and punitive.

30. Legitimate Expectation and Right to Fair Labour Practices; - the Claimant humbly submits that, Article 41 (1) of the Constitution on Labour relations provides that, '...every employee has the right to fair labour practices, including fair treatment in disciplinary process... The Claimant had a legitimate expectation that the Respondent, as a constitutional commission, would observe its-own regulations and the Constitution in handling the Claimant's case; the Respondent however failed to do so pushing the Claimant to seek remedy from this Honourable Court. This action of the Respondent offends the principle of administrative regularity as observed by the Court in the case of Republic -vs- Kenya Revenue Authority ex parte Shake Distributors Limited (2012) eKLR, that; " Public bodies are bound to act within the law and their established procedures, failing which their actions are amenable to judicial review."
31. On the Allegations of Kshs.1,000/= given to the Student; - The Respondent further relied on the allegation that the Claimant allegedly gave the student Kshs.100/=during term one closing time to buy snacks. Notably, the student (CKN) alleged that on 29/9/2021, as students were preparing to go home, the Claimant called her to staffroom 2 at 6:20 pm and gave her Kshs.1,000/= to buy snacks on the way home. (Refer to page 26 of the Respondent's pleading). -it is the Claimant's humble submissions that the allegation was materially inconsistent with the testimony of the Respondent's own witnesses. Ms. Jacqueline Ndeti claims at paragraph 17 of her statement that; "it took them time to calm the student down and she told them about thousand shillings that she had been given by the Claimant during term one closing time to buy snack on the way home...". When asked during cross-examination to confirm whether the alleged money was in any way tied to sexual intent, Ms. Ndeti expressly stated that she did not know. The witness could not establish any causal link, improper motive, or suggestion that the money was offered in exchange of sexual offers. The admission by Ms. Ndeti is significant; it demonstrates that the allegation, even as framed by the Respondent was speculative, unsupported, and not probative of any misconduct under the Employment Act or the Code of Regulations for Teachers. Without evidence of coercion, inducement or impropriety, the giving of money- a gesture that could equally be culturally normative; and cannot lawfully be used as a basis for disciplinary action or termination. The Claimant humbly submits that, the Respondent therefore failed to meet the statutory threshold under Section 43 and 45 of the Employment Act requiring proof of a valid and fair reason for termination. Burden and Standard of proof in Disciplinary



Cases. While disciplinary proceedings are not criminal in nature, the Respondent bears the burden to establish valid and justifiable reasons for dismissal. The applicable standard is proof on a balance of probabilities. The Respondent failed to discharge the burden of proof for reason that; 1) No witness personally observed and or saw any misconduct by the Claimant; 2) The student's statement (CKN) lacked specificity on date and time when the alleged incidences occurred; and 3) The Respondent's own records contradicts the alleged timeline. G. Claimant's Existence of an Alibi; the Claimant's humble presence at the material time was corroborated by two independent witnesses, Andrew Nzioka (CW-3), who confirmed that the Claimant attended the school event up to noon, then left. This was evidenced by the photographs produced that were taken using the Claimant's phone. CW-3, when asked why the photos he produced do not contain time and date, confirmed that, the originality of a photo is retained in the camera or phone when printed, so time and date is still retained in the phone; thus, the same cannot appear on a printed photo, which would appear as editing. The other alibi of the Claimant is; John Muthini Muthike (CW-2), who confirmed that, on 17/12/2021, the Claimant went home at around 1:00pm, whereby an emergency family meeting was called which started around 1:30pm and ended at 5:00pm. CW-2, attached a marriage certificate and a leave of absence to corroborate his evidence. The leave of absence dated 16/12/2021, was stamped and signed by the Deputy Principal, as the Principal was not within the school compound on 16/2/2021. And on 17/12/2021, the Principal arrived in school in the evening when the Claimant had already left the school. The Claimant humbly submits that, these accounts were consistent and supported by documentary evidence, including the photographs and copy of the leave form.

32. Why the copy of the leave form showed subjects and lessons yet the school was closing; - the Respondent's witness (Catherine Wavinya Mutuku) testified that the school was closing and therefore there were no lessons to be studied during that time. However, the Claimant humbly submits that, since he had sought leave to be absent from school on 17/12/2021 from noon, the school always gives students holiday assignments. The Claimant therefore, had to indicate the assignments to be given to the students as they break off for the holidays in his absence. I. Staffroom 2 Windows; - . The Respondent's witness (Catherine Wavinya Mutuku), confirmed that staff-room 2 windows are about one (1) meter low. This makes the staffroom very open and anybody that is standing outside sees what is happening inside and the teachers in the said staffroom see what the students are doing outside. The said windows are transparent and not a one way as alleged by the witness.

The respondent's submissions

33. We reiterate that on or about January, 2021 the Respondent received a Report from the Principal of Kibauni a Secondary School touching on the Claimant alleging that on 17th December, 2021 between tea break and lunch he had sexual intercourse with CKN at the staffroom within the school compound. The student in question recorded a statement, which was never recanted and/or denounced by the student, narrating the full particulars of the incident which took place and identified the Claimant as the culprit. These alleged acts were in blatant breach of Regulation 140 (a) of the CORT, Clause 9 of the COCE read together with inter alia the *Teachers Service Commission Act* Cap 212, Laws of Kenya and in compliance with Regulation 146 of its CORT the Respondent initiated independent investigations to confirm the veracity of these allegations. Regulation 140 (a) (ii), of the CORT stipulates that "The Commission may take disciplinary action against a teacher who commits any of the following offences- (a) Immoral behaviour, including but not restricted to- (ii) sodomy; As per the investigation of the allegations levelled against the Claimant, the Commission found that he had a case to answer to which he was duly notified and allowed adequate time to write a statement of defence to the allegations. Considering the gravity of the allegations, the allegations levelled against him and further requiring him to respond accordingly. Indeed, the Claimant vide a letter dated 21st January, 2022 responded to the show cause letter. The Respondent through its agents, the Board Claimant was



issued with a show cause letter dated 21st January, 2022, apprising him of the of Management of the School, convened an investigatory meeting to carry out preliminary investigations on 7th February, 2022, which meeting was attended by the Claimant and other witnesses. Upon consideration and elaborate deliberations of all the evidence adduced before the BOM panel, it unanimously resolved to interdict the Claimant. The Claimant's case was then heard before a Disciplinary Panel, where he was given a chance to attend in person, cross-examine witnesses called by the Respondent, and call his own witnesses. He was further heard by a Review panel which both reached to the same conclusion to dismiss the Claimant and remove his name from the Register of Teachers as they were satisfied that the Claimant's actions were in breach of his employment contract as well as the Teachers Service Commission regulations. The Respondent, in handling the Claimant's case, fully acted within the confines of the law, the principles of natural justice and public interest and that the decision to dismiss the Claimant from employment of the Respondent was fair and lawful. Further, the Respondent submits that as a statutory body, it is mandated to uphold high standards of professionalism, realize the ethos of integrity and in the instant claim, adherence to the *locos parentis* principle, is fully discharged in the instant case.

34. In employment disciplinary processes, all the employer is required to prove are the reasons that it "genuinely believed to exist," causing it to terminate the employee's services. Article 53(1) (d) of [the Constitution](#) imposes an obligation on all institutions, including the Respondent, to protect children from abuse noting that "a child's best interests are of paramount importance in every matter concerning the child." We submit that in handling a case involving alleged misconduct by a teacher, the Respondent was discharging a constitutional duty. We rely on the Court of Appeal decision in *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* [2017] eKLR where the Court opined; "Under Section 43 of the Act, the onus is on the employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he "genuinely believed to exist" causing him to terminate the employee's services," The Claimant's termination was premised upon substantiated allegations of professional misconduct of a grave nature, specifically concerning improper engagement with a student as will be demonstrated in the next issue. Moreover, the Respondent rigorously adhered to the procedural safeguards enshrined within the regulatory framework of CORT, particularly under Regulations 139, 146, 147, 149, 150, 151, 153, 154, and 156. These provisions governed the entirety of the disciplinary process, ensuring its procedural propriety and fairness.³¹ The termination decision was rendered following due consideration of the evidence adduced, the gravity of the misconduct, and the overarching necessity to uphold institutional standards. The legality of the dismissal is further buttressed by the jurisprudence articulated in; *Nyeri Civil Appeal No. 97 of 2016: Reuben Ikatwa & 17 Others v. Commanding Officer British Army Training Unit Kenya & Another*, wherein the Court of Appeal held; "In a claim such as this, the burden of proving an unfair termination of employment or wrongful dismissal has occurred rests with the employee, while the burden of justifying the grounds for the termination of employment rests with the employer. See Section 47(5), of the [Employment Act](#). In the present case, the Respondent discharged this burden by demonstrating the existence of valid, fair, and reasonable grounds for the Claimant's dismissal and removal from Register of Teachers, coupled with adherence to procedural safeguards. We submit it is not sufficient for the Claimant to allege unfair termination but must be put to strict proof on the extent of the employer's unfairness.³⁴ Further reinforcement of this position is found in; *Judicial Service Commission v. Gladys Boss Shollei & Another* [2014] eKLR, where the court held;

“Accusing an employee of misconduct, etc. by way of a query and allowing the employee to answer the query, and the employee answers it before a decision is taken satisfied the requirement of fair hearing or natural justice. The appellant was given a fair hearing since



he answered the queries before he was dismissed." It is therefore evident from the totality of the facts and the procedural chronology that the Respondent discharged its administrative and statutory obligations with diligence and in strict conformity with the principles of fairness, natural justice, and regulatory compliance. Consequently, the Claimant's dismissal was lawful, procedurally sound, and substantively justified, leaving no basis for a claim of unfair termination. The Respondent genuinely believed that the Respondent had sexually violated the Minor. We therefore submit that the Respondent had a justifiable reason to dismiss the Claimant and have his name removed from the register of teachers.

35. WHETHER THE STANDARD OF PROOF APPLICABLE IN DISCIPLINARY PROCEEDINGS WAS MISAPPLIED.-the Claimant submits that the Respondent did not establish a valid and justifiable reasons because no witness personally observed and saw the misconduct. We wish to reiterate that the applicable standard in administrative and disciplinary proceedings is on a balance of probabilities not beyond reasonable doubt even where the misconduct alleged amount to criminal offence. This degree of proof is well enunciated in the case of *Miller vs Minister of pensions* [1947] cited with approval in *D.T. Dobie Company (K) Limited vs Wanyonyi Wafula Chabukati* [2014] eKLR where the court stated: -That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say 'we think it more probable than not, thus proof on a balance of probabilities means a win however narrow. A draw is not enough. So, in any case in which the tribunal cannot decide one way or the other which evidence to accept, where both parties' explanations are equally unconvincing the party bearing the burden of proof will lose, because the requisite standard will not have been attained. We also rely on the case of *Palace Investment Ltd -vs- Geoffrey Kariuki Mwenda & Another* [2015] eKLR, the Judges of Appeal held that: "Denning J, in *Miller -vs- Minister of Pensions* [1947] 2 All ER 372 discussing the burden of proof had this to say;- "That degree is well settled. It must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that a tribunal can say: we think it more probable than not; the burden is discharged, but, if the probabilities are equal it is not. With regards to allegation that the hearing was unfair due to unavailability of a witness who personally observed or saw the misconduct, we urge that this Honourable Court be persuaded by the Court of Appeal decision in *Teachers Service Commission -Vs- Joseph Okoth Opiyo* [2014] eKLR where the Court pronounced itself as follows:

"In matters of sexual immorality, it is not easy to get eyewitness evidence as such acts are committed behind closed doors. Such cases are, in most cases, proved by circumstantial evidence of opportunity to commit the same." The Claimant made a frantic effort to alleged alibi. However, the same totally flopped because the Leave of absence presented by the Claimant was proved to be a forgery. Additionally, the Claimant testified that he was notified of an emergency meeting on 17/12/2021 yet the leave of absence was signed a day before, that is, 16/12/2021. The principal confirmed that she was in school on 16/12/2021 hence she is the one who ought to have signed the letter. Additionally, the Claimant's father also confirmed at paragraph 2 of his statement that a problem was raised by his in-laws in the morning of 17/12/2021 thus the urgency of the family meeting, how the Claimant got leave the previous day is not adding up. All the evidence show that the teacher was clearly in school on the said date hence his allegations that he was away does not add up. The Respondent acted within its statutory mandate under the CORT and the TSC Act and was not constrained to meet the higher criminal standard. We rely on the Court of Appeal decision in *Kenya power & Lighting Company Limited v Aggrey Lukorito Wasike* [2017] eKLR where the Court pronounced itself as follows: "Much as courts are right to be solicitous of the interests of the employee, they must remain fora where all, irrespective of



status, can be assured of justice. Employers are Kenyans, too, and have rights which courts are duty bound to respect and uphold. As is often stated, justice is a two-way highway." We humbly submit that disciplinary proceedings are not criminal in nature which require that the employer had a valid reason and followed a fair procedure. It is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before it can take appropriate action subject to the requirements of procedural fairness that are statutorily required. We further submit that the Respondent produced credible evidence, including the testimony of its witnesses and supporting documentation. This included records from the disciplinary hearing, internal investigation reports, and the testimony of the victim. The minor's statements and those of other witnesses, with respect to the events that took place were enough to draw a conclusion of culpability based on the test of balance of probabilities.

As observed earlier, the standard of proof in a criminal prosecution is beyond reasonable doubt, which is an entirely different and much higher standard from that which a civil court should require of a party before it. In the Court of Appeal decision in *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, the court remarked as follows;

"However, it is a truism that the guilt of an Accused person can be proved by either direct or circumstantial evidence. Circumstantial evidence is evidence which enables a court to deduce a particular fact from circumstances or facts that have been proved. Such evidence can form a strong basis for proving the guilt of an Accused person just as direct evidence." We further anchor our submission in relying on the Court of Appeal decision in decision in *Ahamad Abolfathi Mohammed and Another v Republic* [2018] eKLR, where the court referred with approval to *R v Taylor, Weaver, and Donovan* [1928] Cr. App. R 21 where it was held: "It has been said that the evidence against the Applicant is circumstantial. So it is, but circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation from evidence to say that it is circumstantial" In this case, the disciplinary process was grounded on circumstantial evidence and witness testimony, including that of the victim and that this type of evidence is sufficient to meet the required civil threshold.

36. Whether there was procedural fairness in the initiation and conduct of disciplinary proceedings- The Respondent denies all the procedural issues raised by the Claimant and contends that it did not invalidate the disciplinary proceedings. Moreover, the Claimant did not demonstrate any prejudice suffered due to the alleged procedural lapses, if any. In the case of *Local Government Board Vs Arlidge* [1915] A.C. 120, 132- 133, *Selvarajan Vs Race Relations Board* [1975] I Wlr 1686, 1694, And In *R Vs Immigration Appeal Tribunal Ex-Parte Jones* [1988] I Wlr 477, 481 it was held: -"The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing. "Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made ..." The Claimant had an opportunity to cross examine all the witness who were present, present his case and was present at all material time. The Respondent submits that the disciplinary process met the procedural threshold outlined in the *Employment Act* and the *CORT*. The disciplinary measures, methods, and procedure in accordance with Articles 47 and 50 of *the Constitution* of Kenya 2010 was upheld. The Respondent



relies on *Republic v National Police Service Commission Ex- parte Daniel Chacha Chacha* wherein the High Court held as follows: "Therefore, the principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision- maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material." Further in *Anthony Mkala Chitavi v. Malindi Water & Sewerage Company Ltd [2013] eKLR*, the Court had this to say on fair process: "The ingredients of procedural fairness as I understand it within the Kenyan situation is that the employer should inform the employee as to what charges the employer is contemplating using to dismiss the employee. This gives a concomitant statutory right to be informed to the employee. Secondly, it would follow naturally that if an employee has a right to be informed of the charges, he has a right to a proper opportunity to prepare and to be heard and to present a defense/state his case in person, writing or through a representative or shop floor union representative if possible. Thirdly if it is a case of summary dismissal, there is an obligation on the employer to hear and consider any representations by the employee before making the decision to dismiss or give other sanction."

37. The Victim recorded her statements on pages 26 and 27 of the Respondent's Memorandum of Defence. She narrated what transpired to her in the hands of the Claimant. She repeated the same testimony during the BOM on 7/2/2022 at page 22 and during the disciplinary hearing on 10/06/2022 at page 47. These Statements/testimonies were never recanted at any time. The Claimant was served with a notice to show cause and a letter of interdiction, he was invited to attend the disciplinary together with his witnesses if any (see page 41 of the Respondent's memorandum of Defence. He attended disciplinary hearing in person. All the witnesses testified in his presence and he was given a chance to cross-examine them. He received written decision. He was informed of the right to appeal the commission's decision which he did and was unsuccessful before filing the present claim. The Respondent asserts that it had met the procedural fairness test stipulated in the Court of Appeal case of *Postal Corporation of Kenya v Andrew. K. Tanui [2019] eKLR*, where the court delineated four elements for procedural fairness as follows: An explanation of the grounds of termination in a language understood by the employee;

The reason for which the employer is considering termination; Entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made; Hearing and considering any representations made by the employee and the person chosen by the employee.

38. The Respondent is established under Article 237(1) of *the Constitution* of Kenya, 2010 with the mandate to among other functions, exercise disciplinary control over teachers and terminate the employment of teachers. In addition, it is bound by the provisions of the TSC Act, and the regulations thereunder in the conduct of disciplinary proceedings. We submit that the disciplinary process was in accordance with the law and there was no influence from any other third parties, real or imagined. The COURT broadly outlines procedures to be followed in exercising disciplinary powers under the Act.58. Specifically, Regulations 146 to 156 outline specific steps to be followed. The respondent submits that it meticulously followed the procedures and adhered to the principles of natural justice. Upon receiving information that the claimant herein had breached the provisions of the COURT in engaging in immoral behavior with a minor, the Respondent commenced investigations into the matter to verify the allegations in accordance to Regulation 146 of the COURT. Evidence shows that there was a Board



of Management meeting where the Claimant was in attendance with his accuser. Further to that, there was a disciplinary hearing. Both parties were heard and the Claimant was given an opportunity to cross-examine the witnesses. Upon careful consideration and evaluation, the disciplinary panel arrived at a considered decision to dismiss the claimant. Subsequently, the claimant was duly informed of the decision to dismiss him from the teaching service and was equally informed of the reasons for the dismissal. Upon being dismissed he was afforded a chance to appeal or seek for review of the decision within 90 days as stipulated under the TSC Code. It is our humble submission that the claimant was accorded fair hearing and taken through the stipulated disciplinary process under the CORT hence the respondent employed a fair procedure and that the claimant was terminated for proper and established reasons pursuant to section 43(1) of the *Employment Act*.⁶³ It is evident from the above that the Respondent fully adhered to its own set out administrative policies and regulations while discharging its obligations to the Petitioner as governed by the *Teachers Service Commission Act* No. 20 of 2012, CORT and COCE.

39. For the Claimant to plead unfair termination, the Respondent must have subjected him towards going through an unfair process both substantially and procedurally. Section 42 (2) of the *Employment Act* provides that a termination of employment by an employer is unfair if the employer fails to prove-
- i. That the reason for the termination is valid; With the reasons for the Claimant's termination being on account of immoral behaviour in blatant breach of Regulation 140 (a) of the CORT and Clause 9 of the COCE through a thorough investigation and disciplinary process were proven to be valid reasons for the termination.
 - ii. That the reason for the termination is a fair reason (i) related to the employee's conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer; and In relation to the Claimant's conduct it has already been established herein that the termination was fair and based on the operational requirements of the Respondent it has also been shown herein that each and every one of their actions was conducted within the operational requirements of the CORT, *the Constitution* of Kenya, 2010, the TSC Act and other authorities that serve to regulate the Respondent's actions.
 - iii. That the employment was terminated in accordance with fair procedure.
40. The CORT within Regulations 139, 146, 147, 149, 150, 151, 153, 154 and 156 provides various procedures which the Respondent was duly guided by when dealing with the eventual termination of the Claimant's employment and acted accordingly making the resulting decision fair, just and appropriate based on the merits of the case, evidence adduced before it and the nature of the offence committed by the Claimant. It is apparent from the foregoing that the dismissal of the Claimant was based on established grounds hence lawful and as the Court of Appeal held in Nyeri Civil Appeal No. 97 of 2016: Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another,

“In a claim such as this, the burden of proving that an unfair termination of employment or wrongful dismissal has occurred rests with the employee, while the burden of justifying the grounds for the termination of employment rests with the employer. See Section 47(5) of the *Employment Act*...” The upshot of the foregoing is that the Claimant was subjected to a fair, procedural and lawful disciplinary process from the time the allegations were received up to the time of dismissal. His dismissal from service was therefore justified, procedural and lawful as all the tenets of fair hearing and natural justice were strictly adhered to prior to the said dismissal. This is reinforced in another case, of Judicial Service Commission v Gladys Boss Shollei & Another [2014] eKLR the court held that; "Accusing an employee



of misconduct, etc. by way of a query and allowing the employee to answer the query, and the employee answers it before a decision is taken satisfied the requirement of fair hearing or natural justice. The appellant was given a fair hearing since he answered the queries before he was dismissed." We therefore submit that the Claimant was accorded a fair hearing and the opportunity to be heard as is in harmony with the Code of Regulations, the Employment Act and tenets of Natural Justice. As demonstrated in the evidence and material presented, the Respondent undertook fundamental steps to ensure proper adherence to its administrative policies and regulations while discharging its obligations towards the Claimant.

Decision

41. The threshold for determination of fairness of termination of employment is according to the provisions of section 45 (2) of the Employment Act to wit:- '45(2) A termination of employment by an employer is unfair if the employer fails to prove—
- (a) that the reason for the termination is valid
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employees conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure." To pass the fairness test the termination must pass the substantive (in terms of reasons) fairness and the procedural fairness under section 41 of the Employment Act (Walter Ogal Anuro v Teachers Service Commission[2013] eKLR)

The respondent issued the claimant with a dismissal letter dated 17th June 2022 which disclosed the reason for dismissal as follows- 'Decision of the Commission Dismissal

Pursuant to the hearing of your discipline case held on 10/6/2022 I am directed by the Teachers Service Commission to inform you that, the Commission has carefully considered your case and has determined that you are guilty of the charges leveled against you and that you are hereby Dismissed with effect from 10/6/2022 for the following reason:

You were of immoral behaviour in that: -

On 17th December, 2021 between tea break and lunch time you had sexual intercourse with Clara Kwanzu Noni of Kibauni Secondary School, Admission No. 2667 a form 1 West student at the staffroom 2 in the School compound.

As per the provision of Regulation 156 (4) of the Code of Regulations for Teachers, you have a right to appeal for review against the decision within ninety (90) days..."(emphasis on the reasons).Section 43 requires the employer to prove the reason for termination as follows: ' 43. Proof of reason for termination

(1)In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.(2)The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee." The said test of reason genuinely believed to exist is partially subjective as held by the Court of Appeal in Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike [2017] eKLR where the Court observed -"Under Section 43 of the Act, the onus is on the employer to prove the reason or reasons



for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he "genuinely believed to exist" causing him to terminate the employee's services," .

42. In the instant case, the claimant denied the allegations of sexual act with the student on basis that he was away on leave, he had alibi of his father (CW2) who he had called as witness but was not given the opportunity to be heard, and had alibi of CW3 who took photos to prove the students were in talent show in the material time alleged. During cross-examination the claimant confirmed he was accused of sleeping with a student. He was interdicted on grounds of having sex with a pupil in the staff boardroom between break and lunch, the pupil/victim testified at the disciplinary proceedings in his presence. The pupil explained the sexual act at the hearing. The claimant confirmed that, at the disciplinary, on being asked whether he had questions for the pupil, his answer was 'no'. The claimant told the court that witnesses were called and had the opportunity to cross-examine them. In re-examination, he told the court that the staff room had chairs where the teachers sat, and that he was not allowed to bring his witness, his father, to the disciplinary hearing. CW2 was the claimant's father, who told the court on 17th December 2021 that they had a family emergency meeting and that his son, the claimant, was in school that morning. CW2 confirmed that his son called him as a witness, but he was denied entry into the room. He was not given a reason for the denial to testify before the employer. That he signed the attendance list but was not allowed to testify, CW3 was Nzioka, a colleague of the claimant, and a teacher in the same school, Kibauni. He told the court that on the material date there was a talent show, and the claimant was designated as the cameraman. He said he was present. The photos had no time indication. The witness said leave of absence was granted and relied on a stamp by the deputy teacher.
43. Conversely, the respondent's RW1, Ms Ndeti, told the court that on 13th January 2022, the pupil informed her of the allegation of sexual encounter with the claimant. The pupil had been brought to the school by her mother. She was a counsellor and was called in. The student did not make a statement at that time, and she did not refer her for a medical exam. The mother referred the pupil to her based on suicidal thoughts. The witness confirmed the claimant never changed her story before her or the BOM. The witness told the court the pupil told her the claimant gave her Kshs. 1000 for doing well in academia. She did not know if the money was tied to sexual acts. CW 2 was Ms Matuku the school principal. She denied having signed leave of absence for the claimant on 16th December 2021. The form did not indicate the leave was granted in the column for approval. She told the court on 17th December 2021 they had a talent show in the morning. The witness told the court there were no lessons on 16th December 2021 and she was in school yet the form for leave was not placed on her desk. She doubted it was genuine. The witness confirmed the claimant had no prior disciplinary issues. She confirmed that 17th December 2021 was a talent show, and the students were interacting with other students. She confirmed there were no witnesses to the incident. She told the court they had CCTV and on that day had blackout. She further said the CCTV does not cover the inside of the staff room. She relied on the statements of the pupil to issue the show cause, which stated the incident was at 3 pm. The witness told the court that one cannot see inside the staff room from outside.
44. The court having analyzed the evidence before it and read the submissions of the parties found that the respondent had basis to believe the claimant had immoral behavior with a pupil. The pupil's witness statement was on pages 19 and 20 of the claimant's documents. The document gave a vivid account of the nature of sexual acts, the claimant. In his submissions, the claimant appeared to justify the giving of the pupil Kshs. 1000 allegedly on cultural basis. This is an admission of having a close relationship with the pupil. Why would a teacher give a pupil money? On what basis? The court finds the employer had a reasonable basis to believe the money was a favour related to the sexual act as the claimant did not give a plausible reason for giving the pupil the cash. The court, in making the conclusion, was persuaded



to apply in the instant case the decision of Court of Appeal decision in Teachers Service Commission -Vs- Joseph Okoth Opiyo [2014] eKLR where the Court pronounced itself as follows:

“In matters of sexual immorality, it is not easy to get eyewitness evidence as such acts are committed behind closed doors. Such cases are, in most cases, proved by circumstantial evidence of opportunity to commit the same.” The act happened inside a room without CCTV. The claimant was not caught in flagrante delicto with the pupil. The claimant produced a leave signed and stamped by a deputy while the head teacher was in school. The column for approval is blank. The teacher was present at school on the material date of talent show. The finding of valid reasons is thus based on the circumstances of the case, like the fact that it was a talent show day and students were mingling with other students and of course the teachers, the lack of proof of the teacher having been granted leave by the school principal who was on duty, and the act of the claimant giving cash to the pupil. The court finds that the trust relationship between the claimant and the respondent, based on the loco parentis principle, had broken down irretrievably. The court found the reason for believing the claimant had sex with the pupil was according to section 43 of the [Employment Act](#). The court noted the difference between the timing from 3 pm to between tea break and lunch. It is possible that due to the trauma of the forced sex, the pupil may have been disoriented in timings. The pupil was clear in the statement she had sex with the claimant. It was during the talent show, and after the act, the teacher told her to go on. I uphold the reason for the dismissal from service as valid.

45. On the procedure- the procedure is as stated in section 41 of the [Employment Act](#) to wit ‘Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.’ The respondent did not deny the fact that the claimant came to the disciplinary hearing with his father as his witness, and the father was denied the opportunity to testify. The right to a hearing includes the right to have one’s own witnesses allowed to make representations. The father’s position was unshaken at cross-examination. For that reason, I find the claimant was denied the opportunity to a fair hearing. The respondent did not justify its denial of the claimant’s father, who signed the attendance list, from testifying. The court faults the process for that reason and deems it unfair for lack of compliance with section 41 of the [Employment Act](#).

Whether the claimant is entitled to relief sought

46. The claimant sought for the following relief-
- a. The court declares that the Claimant’s termination was unfair, unprocedural and unlawful.
 - b. An order that the Claimant’s name be restored in the register for teachers.
 - c. One month’s salary in lieu of Notice Kshs. 66,000/-
 - d. Twelve Month’s compensation for unlawful and unfair termination Kshs. 792,000/-
 - e. The Claimant be reinstated back to his position.
 - f. Cost of the Claim.
 - g. Interest on 3 and 4 above.



47. The court upheld the reason for termination as justified. The child /parent trust relationship of the claimant as a teacher with students had broken down irretrievably. The prayer for re- registration and reinstatement as a teacher is thus denied.
48. The claimant is awarded 1 month's notice for procedural unfairness Kshs, 66,000 which is awarded with interest at court rate from date of judgment.
49. The claimant is awarded costs in the suit.

DATED, SIGNED, AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 6TH DAY OF FEBRUARY, 2026.

J.W. KELI,

JUDGE.

In the Presence of:

Court Assistant: Otieno

Claimant: Lokol

Respondent: Njau h/b Ochieng

