

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT AT KISUMU

CAUSE NO. E053 OF 2024

(Before Hon. Justice Dr. Jacob Gakeri)

FRED	APIMA	OBITA..
..... CLAIMANT		
VERSUS		
TEACHERS	SERVICE	COMMISSION.....1ST
RESPONDENT		
KISII (TSC)	COUNTY	DIRECTOR.....2ND
RESPONDENT		
FORMER NYAMACHE (TSC)		
SUB-COUNTY	DIRECTOR.....3RD	
RESPONDENT		
PRINCIPAL, ST GABRIEL RIYABO		
SECONDARY	SCHOOL.....4TH	
RESPONDENT		
BOARD OF MANAGEMENT,		
ST GABRIEL RIYABO	SECONDARY	SCHOOL.....5TH
RESPONDENT		
NYAMACHE, SUB-COUNTY		
DIRECTOR	OF	EDUCATION.....6TH
RESPONDENT		
KENYA UNION OF POST		
PRIMARY	EDUCATION	TEACHERS.....7TH
RESPONDENT		

**THE COMMISSION OF ADMINISTRATION OF JUSTICE
(OFFICE OF THE OMBUDSMAN).....8TH
RESPONDENT**

JUDGMENT

The claimant commenced the instant claim on 4th July 2024 vide a Memorandum of Claim dated 3rd July 2024 which he later amended on 9th October 2024. The claimant sued (8) respondents whom he alleged to have acted in a manner inconsistent with the law and/or his rights and sought numerous reliefs including a total of 24 declarations against the respondents singly or jointly for interdiction by the 1st respondent, failure to provide a conducive working environment, incitement of students against him, violation of his right to fair labour practice, mistreatment, delayed transfer, legitimate expectation, deletion from the 1st Respondents Human Resource Information Management System (HRMIS) and withholding of salary among others.

Other reliefs sought include an Order of *certiorari* to annul interview conducted by the 2nd respondent in Kisii in January 2024 involving unnamed persons, permanent injunction to restrain the 1st respondent from taking disciplinary action against him for failure to produce module certificate or victimize, intimidate or threaten

him, the court Orders the 1st respondent to investigate actions of the 2nd and 3rd and 4th respondents, general damages of Kshs.4,000,000.00 against the union, salary for March to August 2023 Kshs.384,744. September to October 2023 Kshs.131,290.00

Salary recovered from November 2023 to date (unclear to the court), damages for discrimination, salary and servitude and torture Kshs.15,000,0000.00, exemplary, punitive damages Kshs.1,000,000.00, damages for defamation Kshs.3,000,000.00, exemplary, punitive and aggravated damages for defamation Kshs.1,500,000.00, costs, interest and any other relief the court deemed just and equitable to grant.

The claimant's case against the respondents is that all of them failed him in one way or another after the issue of insecurity arose at his place of work in 2022 which led to his interdiction by the 1st respondent.

The 1st, 2nd, 3rd, 4th, 5th, 7th and 8th respondents denied the claimant's allegations vide responses dated 30th September 2024, 31st October 2024 for the 7th respondent and 26th September 2024 for the 8th respondent.

While the 1st, 2nd, 3rd, 4th and 5th respondents case was that they acted in accordance with the law and the Teachers Service Commission Code of Regulation for Teachers, the 7th respondent contended that its official visited the school after he was notified by the 4th respondent and the 4th respondent promised that the issue would be addressed internally.

The 7th respondent denied having received any written complaint by the claimant as he had no stamped copy. The 8th respondent availed evidence to show that it acted on the claimant's complaint.

Claimant's evidence

According to the claimant's written witness statement various occurrences took place on specified dates but for many of them, the claimant lacked credible and reliable evidence of the alleged occurrence. For instance, the meeting allegedly held on 10th January 2022 during which Mr. James Onyinkwa (the Deputy Principal and Mr. Samuel Nyakari Kocha (Vice-Chairman of the Board of Management (BOM) allegedly incited students.

The claimant's evidence was that the Principal of the school, Deputy Principal, students and the community

was against him yet he was discharging his duties as by law required and reported the security threat severally to the police and it had been discussed by the BOM and the Principal of the school, the 4th respondent had written about it as early as 4th February 2022, to the Sub-County TSC Director since 2019.

Significantly, the claimant joined the school in 2018.

On cross-examination, the claimant confirmed that he was at the 5th respondents school from 18th September 2018 to 6th October 2022 teaching Mathematics and Physics. That the number taking Physics progressively reduced from 2018 to 2022. In 2022 no student registered for the examination in the unit and was interdicted on 28th October 2023 and transferred to Nyabururu School.

The claimant continued receiving a salary until after the disciplinary hearing the interdiction notwithstanding.

The claimant admitted having received the notice to show cause from the Secretary to the BOM and he responded to the allegation of absenteeism citing insecurity.

It was his evidence that one Elijah Obwoye, a Form One (1) student threatened him with a dagger and remained in school and admitted that it was an isolated case of indiscipline and could happen in any school.

The claimant admitted that he left the school without any injury.

On incitement of students, although the claimant testified that four (4) Form 3 students (Faith Nancy, Loice and Alice) had been incited, he confirmed that none of them had recorded a witness statement and none was testifying in this matter although they could provide evidence and although he had reported the issue to the police, he had not disclosed that the police summoned the Principal, the Deputy Staff and students.

The witness confirmed that no member of the BOM extorted money from him. He denied owning a Cyber a Mpesa Shop at Nyamache, notwithstanding the evidence had filed of the Mpesa line and was seeking monies not paid by the 1st respondent between March and August 2023. That the BOM overstepped its mandate by interdicting the claimant, he was removed from the

medical scheme, lost a child and became a pauper, a violation of his right.

That special damages comprised hospital bill arrears and penalties and had no reporting attributing the expenses to the BOM.

It was the claimant's evidence that he had been requested to stay away pending transfer to another school.

That the school closed due to insecurity directed at the teachers.

On cross-examination by Ngere for the 1st respondent the claimant confirmed that the interdiction was based on desertion of duty. He admitted that was not on duty at the 5th respondent school from 6th October and did not attend the hearing even after being invited vide letter dated 27th January 2023 and received the interdiction letter in March 2023 but had no evidence of having filed a defence statement within 21 days of receipt of the letter.

The claimant admitted that he attended a disciplinary hearing at the 1st respondents office, was found culpable

for desertion was suspended for one (1) month and recovery of salary would ensue.

That he applied for a review but was not invited for a review hearing and his defense was insecurity as there was unrest at the school and it was closed but re-opened after one (1) week. That he was unaware that other employees resumed duty at the school. **CWI** confirmed that the standard Assessment Report conducted 7th November 2022 stated that it was only the claimant who did not report on duty on 6th October 2022.

The claimant denied having been difficult and harsh notwithstanding the dwindling number of students who studied the unit he taught.

On cross-examination by Muthiga for the 8th respondent, the claimant testified that his complaint was that his case had not been heard by the 1st respondent and hearing had been cancelled.

The claimant, however, admitted that the 8th respondent addressed the matter and the 1st respondent acted accordingly. The claimant affirmed that his issue was resolved to some extent.

CWII, one Sheila Kwamboka the claimant's wife adopted her written witness statement and while Ngere opted not to cross-examine the witness, Mr. Nyamweya was absent.

The 1st, 2nd, 3rd, 4th and 5th respondents had five (5) witnesses.

RWI, Mr. Julius Mariita Gesuka the 5th respondent's Principal, on cross-examination confirmed that he gave the claimant a letter dated 14th September 2022 to report the insecurity threat to the Sub-County Director after leaflets were circulated in the school warning the Principal and another unnamed teacher, but whom the Principal thought was the claimant and reported the matter to the police, recorded a witness statement and obtained an OB Number.

The witness confirmed that he had written a report to the County Director on insecurity at the school on *inter alia* riot by Form 3 students and insecurity involved some teachers.

That he called one Joseph Mogire Abincha on the issue.

RWI admitted that the threat of insecurity necessitated the Executive B.O.M. meeting held on 14th September

2022 which recommended the transfer of the Principal Deputy Principal. It also proposed that Mr. Apima be transferred for insecurity and in the meantime cautioned him to be careful and in eating at school or elsewhere to avoid poisoning.

That the meeting of the Executive BOM on 29/9/2022 resolved that the school be re-opened on 6th October 2022 but the claimant's transfer was not a pre-condition.

The witness confirmed that one Rose Oenga was a teacher at the School and Head of Humanities Department and Guidance and Counselling and last clocked in on 25th October 2022 but the witness disclosed that he was unaware of whether the teacher had permission to be out of school.

It was his testimony that the Standard Assessment Report was conducted at the school and all staff were present except the claimant.

RWI admitted having released Rose Oenga vide letter dated 25th October 2022 to the Nyanza Regional Director.

That Rose Oenga was not released because of having been assaulted by the Deputy Principal and was unaware of the matter having been reported to the police.

RWI testified that Mr. Evans Sambora was a Biology and Agriculture teacher at the school and it was reported on 9th February 2023 that he had been transferred. The witness denied having a letter of transfer of Mr. Sambora or that he was chosen without permission.

The witness denied that the Deputy Principal had made the school unmanageable or was close to school girls or incited them to disobey school rules.

RWI further confirmed that the had no evidence to show that Mr. Evans OKido was a teacher or Secretary but had given him a laptop.

The witness denied knowledge that a teacher was selling cigarettes and alcohol to students but admitted it was his duty to ensure that the environment was conducive for teaching and learning.

The witness testified that although BOM members felt sorry for the claimant he did not file the report with the

Directorate Criminal Investigations (DCI) and could not trace evidence to prove that the claimant had a business at Nyamache town.

On cross-examination by Mr. Kokeyo, the witness confirmed that Mr. Abincha of KUPPET visited the school on the issue of insecurity but informed him that the matter would be addressed internally.

On cross-examination by Mr. Nyamweya, RWI admitted that the claimant was never assaulted at the school and his residence was about 2Km from the school and lives there to date and had never been attacked and no one prevented him from going to school or class to teach and was heard before interdiction.

According to **RWI** all other teachers attended to their duties at the school and the conditions were safe for all and the claimant did not make any requests for attending to his duties at the school although the school had no financial wherewithal to accord him security. He added that the Deputy Principal was never reported as having incited students.

RWI testified that the claimant was not subjected to torture and did not seek any counselling or guidance and there was no transfer letter that was withheld and in any case he had not served for 5 years at the school.

The witness denied having colluded with the 1st respondent to remove the claimant's name from the portal or hack his account and did not complain about any hacking of his account.

RWI denied having authorised the police to arrest the claimant at his home and was unaware of any arrest having been made and in any case police operate under their regulations and the law. He denied having snatched the claimant's phone or denied him access to the KCSE results in school.

As regards the disciplinary panel RWI testified that the 1st respondent was responsible for empanelling it.

The witness characterised the claimant as dishonest and a serial liar who fabricated things to suit his case and was argumentative.

On re-examination the witness reiterated that the BOM resolved to interdict the claimant on 9th February 2022

and he was taken through a hearing and was the only member of staff who complained about insecurity at the school.

That in October 2022 students had complained about teachers who were not teaching.

RWII, Mr. James Onyikwa the Deputy Principal confirmed that he was transferred to Borangi Secondary School on 17th May 2023 and was responsible for discipline, curriculum, custody of documents and clocking in and out of school but had not filed the evidence that the claimant was abusive or disrespectful to the BOM.

The witness maintained that the claimant owned a business and had no evidence of the claimant's uncooperativeness, business, threats or having made derogatory remarks.

On cross-examination by Mr. Nyamweya, **RWII** confirmed that he was unaware of the meeting allegedly held on 10th January 2022 in the Library or heard anyone inciting students to chase the claimant or demand for examination cash to facilitate leakage of the examination. He denied having changed the school uniform, no meeting was held on 8th January 2022 and the

claimant was pushed out. It was his testimony that he was unaware of the taking of chang'aa or smoking of bang by students in the school.

RWII testified that the claimant missed classes and spent time on the phone but had no evidence to prove the allegations.

According to **RWII**, the claimant's allegation that he could not attend classes owing to insecurity was untrue and the leaflets did not mention the claimant's name and had once found the Principal at the claimant's cyber business.

That the claimant was never assaulted by anyone and neither Mr. Samuel Koja, the Assistant Chief nor Mr. Ouga threatened the claimant and the County Director did not recommend his transfer.

According to the witness students were transferred to another school for examination purposes because the number was below 30, which is the minimum for an examination centre.

That the climate did not report that any student was smoking bang and had slapped a student and tore his examination sheet.

The witness confirmed that he was unaware that the claimant was arrested by the police and had a shop at Nyamache which he operated to date.

According to **RWII**, the claimant was disrespectful, had no passion in teaching and was generally untruthful.

RWIII, Mr. Elias Yoge Ngere confirmed on cross-examination by the claimant that the BOM provided leadership and strategic direction of the school, could conduct investigations and had disciplinary powers over teachers and any action taken against a teacher had to be documented.

That he became the chair of the BOM on 17th May 2022 and participated in the meeting held on 9th February 2022 as the chairman of the BOM and the letter of interdiction was a consequence of the meeting and the claimant was present and the charge was absenteeism and the BOM conducted investigations and a report prepared.

On cross-examination by Mr. Nyamweya, **RWIII** confirmed that he was unaware of the report dated 7th November 2022 on the alleged insecurity at Riyabo Secondary School and the finding that the claimant had conducted himself unprofessionally.

That it was the duty of security agencies to investigate complaints reported to them.

The witness confirmed that the claimant had been issued with a notice to show cause, was invited for the disciplinary hearing, found culpable and suspended for one (1) month and was thus afforded a hearing by the BOM and the Teachers Service Commission (TSC).

On re-examination, the witness testified that his witness statement had a typo-graphical error on the date of a meeting.

RWIV, Catherine Kerich, confirmed that she was the Deputy Director and her directorate oversaw disciplinary matters, investigations and reporting on complaints by teachers and complaints had to be resolved within 7 days and the claimant's complain was investigated and a report prepared and the BOM interdicted the claimant.

It was **RWIV's** testimony that all members of the disciplinary panel completed the conflict interest forms, but neither the forms nor the list was filed.

Equally, the minutes did not identify the attendees but the panel made a decision after a hearing and the claimant did not request that the Principal of the school be availed as a witness.

That the directorate received the claimant's appeal on 30th November 2023 but was unaware of the duration within which an appeal ought to be heard and determined.

RWIV testified that although the claimant was invited for the appeal hearing he did not attend and the respondent responded to the letters from the 8th respondent.

On cross-examination by Mr. Nyamweya **RWIV** confirmed that a school BOM had disciplinary powers under the Code of Regulations for Teachers (CORT) and had power to interdict the claimant and acted as by law required and as an agent of the 1st respondent and its Secretary signed the notice to show cause.

That the claimant did not object to the composition of the panel and explained himself during the hearing and was punished for his misconduct and salary paid when he had deserted duty up to the date of suspension was recoverable because he was not entitled to payment as he had not rendered any service and was to blame for the ensuing consequences.

That the claimant snubbed the review hearing even after being called to attend and did not suggest when he would be available.

On cross-examination by Ngere, **RWIV** testified that the claimant was accorded a fair hearing and allowed to avail witnesses.

On re-examination, **RWIV** testified that the claimant did not object to the panel members and was dishonest by referring the disciplinary panel as anonymous.

7th Respondent's evidence

RWI, Mr. Joseph Abincha confirmed that he was the Executive Secretary of KUPPET, Kisii County, which was a full-time job and the claimant was a fully paid member of

the union. That the unions constitution guided on how grievances were addressed and it was his duty to follow up. RWI admitted that and had received a call from the Principal of Riyabo Secondary School about insecurity at the school, the Principal of the school informed him that the claimant's complaint would be dealt with internally.

The witness testified that he did not report the matter to the police.

It was his evidence that the union's constitution has no provision on the transfer of teachers and the timelines for handling a teachers complaint was not 30 days and there was no time limit.

That the claimant did not present his grievance to the union officially and never requested for facilitation to travel to Nairobi for the hearing.

On re-examination, the witness stated that transfer of teachers was the mandate of the 1st respondent and the claimant reported the grievance to the TSC.

RWII, Mr. Jared Kinyanchui confirmed that he was an elected official of KUPPET, Kisii Branch serving as the

Organising Secretary, had served for 9 years as a teacher and his duties included dissemination of information on union activities to members by calls or messages but had not filed the manual his written witness statement referred to and did not request for the investigation report and had no evidence of communication with the claimant on the issue of insecurity.

RWII testified that the claimant had not sent any email to him on the complaint and his hands were tied when the matter reached the 1st respondent.

Claimant's submissions

The claimant identified seventeen issues for determination touching on unregistered teachers, working environment, effect of insecurity at the work place, interdiction, circumstances leading to disciplinary action, fair hearing, review application, his record at the school, removal from AON Minet Medical Scheme, non remission of loan contributions, discrimination, collusion between 3rd, 4th and 7th respondents, defamation by the 4th respondent, breach of duty by the 4th respondent, the 8th respondent's failure to investigate his complaint and entitlement to reliefs. He cited a total of 251 decisions.

In summary, in this 228 page submissions prepared contrary to the court's directions issued on 15th December 2025, the claimant submitted that Mr. Evans Okindo Mosoti and Hesborn Omurwa were not registered teachers but were teaching at Riyabo Secondary school.

Reliance was placed on the decision in **Stephen Michuki V East African Safari Air Express Ltd & Another** on custody of employment records as well as provisions of the Teachers Service Commission Act (TSC Act) on teachers and registration as were the decisions in **Khalsa Schools & another V Balume** [2022] KEELRC 13202 (KLR) and **Republic V Teachers Service Commission & 2 Others; Musyoka (Ex Parte Appicant); Muthaiga Academy Interested Party** [2022] KEHC 13607 (KLR), to urge that all teachers must be registered.

On the working environment, the claimant submitted that students dropped the subject he was teaching owing to incitement by the Deputy Principal and one Evans Okindo in July 2022 and September 2022 and his notice to produce was ignored by the 1st, 2nd, 3rd, 4th and 5th respondents citing the sentiments of the court in **Casmir Nyankuru Nyaberi V Mwakikar Agencies Ltd** [2016]

KEELRC 1323 (KLR), among other cases on production of documents.

According to the claimant, the teachers clock in and out attendance register was hidden placing reliance on the sentiments of the court in **Kiyaku V Waiganjo Investments Ltd** [2025] KEELRC 3337 (KLR), to urge that the Deputy Principal concealed the document.

On teacher appraisal, reliance was placed the decision in **Chemelil Outgrowers Co. Ltd V Lens Charles Ndago & 3 Others** to submit that he was not overly involved in the administration of performance appraisal at the school.

Reliance was also placed on **Alex Wainaina Mbugua V Kenya Airways Ltd** [2017] KEERLC 469 (KLR) as well as **Jane Samba Mukala V Ol Tukai Lodge Ltd** [2013] eKLR, on the essence of performance appraisal to reinforce the submission.

On incitement of students, reliance was placed on the decisions in provisions of the Code of Conduct and Ethics for Teachers on various aspects to urge that during the

tenure of Mr. James Onyinkwa, student discipline deteriorated as he incited them.

Reliance was placed on the decision in **Francisca Makena Mutiga V Proto Energy Ltd [2025] KEELRC 1747** (KLR) as well as **Kabiro V Kartasi Products Ltd [2025] KEELRC 2319** (KLR).

Samira Schwarz V Fauzana Naurang & 2 others [2015] eKLR and **Ongugo V Mombasa Parents Club [2025] KEELRC 2968** (KLR) among others to submit that the employer was bound to provide a conducive work environment. On insecurity threats and necessity of transfer, the claimant cited the decision in **Ogeyo V Highland Creamers & Food Ltd [2025] KEELRC (3559)** (KLR) as well as the provisions of CORT on transfer policies and the discretion of the 1st respondent to determine the circumstances which may occasion the transfer of a teacher other than medical grounds.

Reliance was further placed on the decisions in **Peeush Premlal Mahajani V Yashwant Kumari Mahajani [2017] eKLR** and **Kapio Simon V Centenary Bank LDC No.003 of 2015** on signature.

According to the claimant the BOM of Riyabo Secondary School had no jurisdiction to revisit or alter finalised decisions and in particular his transfer to another institution due to insecurity as the BOM was *functus officio* on the issue citing the sentiments Nzei J in **Njonge V Auto Continental Ltd** [2023] KEELRC 964 (KLR) among others to urge that the 4th respondent and the Deputy Principal were transferred after recommendation by the BOM but he was not.

The claimant cited the decision in **Oyatsi V Judicial Service Commission** [2022] KEELRC 3 (KLR) and **Irungu V Kenya Pipeline Co. Ltd** [2023] KEELRC 459 (KLR) among others on the importance of Human Resource Policy and Procedure documents, to submit that the respondents hid his letter of transfer which amounted to an unfair labour practice.

On interdiction, the claimant submitted that investigations by the 3rd respondent was biased and malicious, that the respondents used his response to the notice to show cause to invent accusations against him. Reliance was placed on the sentiments of the court in **James Mulinge V Freight Wings Ltd** [2016] KEELRC [1561] (KLR) and **Peter Kamwi V standard Group Ltd**

[2016] KEELRC 1239 (KLR) among others, to submit that after the response to the Notice to show cause is received, hearing follows if the response was deemed unsatisfactory. The claimant urged that the grievance meeting on 9th February 2023 was premeditated.

That the 3rd and 4th respondents and some members of the BOM were subjective, biased and hostile to the claimant citing the sentiments of the court in **Mutisya V G4S Security Services Ltd** [2025] KEELRC 2474 (KLR) and **Mulekano V Attorney General** [2024] KEELR 634 (KLR) on likelihood of bias and urge that the BOM did not make a fair decision because members felt sorry for his grievances.

Sentiments of the court in **Winnie Gichovi & 2 Others V Preach Peace Community Organization** [2021] KEELRC 1557 (KLR) and **Valerie Rugene V Public Service Commission & 2 Others** [2016] KEELRC 754 (KLR) among others were relied upon to urge that a decision making body must base its decision on valid grounds.

On the events leading to the hearing, the claimant submitted that the 1st respondent did not avail all the

documents he asked for citing the decisions in **Nyongesa V Maseno University** [2025] KEELRC 2246 (KLR) and **Roy Silvester Akala V Kenya Commercial Bank Ltd** [2025] eKLR among others, to urge that all the documents he sought ought to have been availed to enable him prepare for the hearing.

The claimant faulted the 2nd and 4th respondents on service of the letter of interdiction and invitation for hearing dated 9th February 2023 and 23rd February 2023. He cited the sentiments of the court in **Rebecca Ann Maina & 2 others V Jomo Kenyatta University of Agriculture & Technology** [2015] eKLR and **Wefende Esther Kelvin V Kenya University** [2024] eKLR among others on the need to comply with timelines and processes.

On fairness of the hearing, the claimant relied on Regulation 151(3) of CORT to urge that the panel was not properly constituted, citing the sentiments of the court in **Wanyonyi V Teachers Service Commission** [2024] KEELRC 1697 (KLR) **Mutava V Tribunal Appointed to Investigate the conduct of Joseph Mbalu Mutava** [2019] KESC 49 (KLR) and **Eckla Jesang Kiprop V Kenya Ports Authority** [2017] KEELRC 1796 (KLR)

among others on the composition of a disciplinary panel and fair hearing, to urge that the hearing lacked integrity and had a predetermined outcome and minutes were not signed.

On the application for review, the claimant cited the provisions of CORT to urge that the 1st respondent employed dilatory tactics in dealing with the appeal citing the decisions in **Shitsama V Kenya Meat Commission** [2025] KEERLC and **Jasper Roli V Kenya Tea Development Agency Ltd** [2013] KEELRC 411 (KLR) among others, on the essence of an appeal being heard and determined.

On his record at Riyabo Secondary School, the claimant submitted that he had a clean record as no document attested to his blemish and according to him the allegations of professional misconduct were orally made and oral evidence was susceptible to manipulation, citing **Mula V Kiane** [2022] KEELRC 12923 (KLR) while documentary evidence could not be altered as held in **Tororei V Catholic Diocese of Nakuru** [2023] KEELRC 1859 (KLR). The claimant submitted that the respondents had all his records as by law required citing the decisions in **Okanga V Mombasa Island Cargo Terminal** [2023]

KEERLC 1117 (KLR), **Jason Mogaka Otiso V Shadrack Obuga Mukanda** [2016] eKLR and **David Maina Ndirangu V Tusker Mattresses Ltd** [2016] eKLR among others.

On withdrawal of salary by the 1st respondent, the claimant submitted that the lack of salary subjected him pecuniary embarrassment and financial hardship placing reliance on **Peter Ndung'u & 5 others V Kenya Power & Lighting Co. Ltd** [2014] KEELRC 319 (KLR) **Mutai V Kisa & another** [2022] KEELRC 1543 (KLR) and **Christian Samba Obath V Fossil Fuels Ltd** [2016] KEELRC 369 (KLR) among others, to urge that withholding of his salary was punitive, un contemplated by the Employment Act, that salary was a fundamental term of the contract of employment and the respondent's conduct amounted to unfair labour practices as held in **Odhiambo V Hisa Technologies Ltd** [2025] KEELRC 3451 (KLR) and **Joseph Muriungi Rukioya V Methodist Church of Kenya** [2021] eKLR among others. According to the claimant the denial of salary was inhuman and degrading.

Further reliance was placed on the sentiments of the court in **Jonathan Spangler V Centre for African**

Family Studies [2017] eKLR, **Tom Omondi Ngoko V Bank of Africa** [2015] KEELRC 1310 (KLR) and **Ojiambo V Islamic University** [2025] KEELRC 2267 (KLR) among others.

On removal from medical cover and non-remission of NHIF deductions, the claimant submitted that he was entitled to both covers by virtual of his employment status.

Reliance was placed on the decisions in **James Mulinge V Freight Wings Ltd** (supra) and **Boniface V Teachers Service Commission & another** [2024] KEELRC 2075 (KLR) to reinforce the submission.

As regards repayment of the KCB loan, the claimant submitted that the loan arrears of Kshs.96,306 was outstanding and had to borrow cash to repay it and survive and the bank imposed penalties totalling Kshs.160,316.00 by 30th November 2023.

Reliance was placed on the sentiments of the court in **Mulinge V Co-Operative Bank of Kenya Ltd** [2015] eKLR on the relationship between the loan and the employment contract.

On discrimination, the claimant cited the transfer of the Principal Deputy Principal, Rose Oenga, Evans Sambora, refusal to be interviewed by the 2nd respondent and refusal to appraise him in Term 2 of 2022 as the factual basis of the allegation.

According to the claimant his letter of transfer was withheld, respondents colluded to transfer Mr. Evans Sambora the claimant and was not interviewed for the position of Senior Master.

That the 1st, 2nd and 3rd respondents relied on the minutes of the BOM to transfer the Principal and Deputy of the school but failed to transfer the claimant.

Reliance was placed on the sentiments of the court in **Collins Osoro Lukhale V AAA Growers Ltd** [2014] eKLR, Black's Law Dictionary 10th Edition, the Bill of Rights Handbook, 3rd Edition and **Gichuru V Package Insurance Brokers Ltd** [2021] KESC 21 (KLR) among others on the concept of discrimination.

As to whether the 3rd and 4th respondents acted in concert with the 7th respondent's Organizing Secretary

and instructed a 3rd party to access the claimant's email account, the claimant submitted that they did as he had forwarded his email to the Organizing Secretary of the 7th respondent and unknown "people" tried to hack his email account.

Concerning defamation by the 4th respondent, the claimant submitted that the 4th and 5th respondent's action of taking the KCB Kisii West Branch Manager and police to his ancestral home on 6th September 2023 where he was handcuffed and the 4th respondent referred to him as a thief and criminal, allegedly in Kiswahili in the presence of villagers and was arrested and detained by police, constituted defamation.

Reliance was placed on **Street of Torts Scott V Sampson** [1882] Q BD 491 **Parmitter V Coopland** [1840] 6 M & W 105 **Winfred and Jolowicz** on Tort 13th Edition among others to urge that the sentiments made injured the claimant's reputation.

As to whether the 7th respondent breached its duty of fair representation of the claimant, reliance was placed on the sentiments of the court in **KUDHEIHA V BOM Wambasa Secondary School** [2025] KEERLC 3292 (KLR), **Kenya Shipping Clearing and Warehouse**

Workers Union V Africair Management and Logistices Ltd [2016] eKLR on the right to union membership and **Dominic Ngolo & 7 others V Registrar of Trade Unions** [2016] eKLR on the role of trade unions.

Further reliance was placed on the decisions in **Nyaga V Mucheka** [1987] LLR 271 **Dock Workers Union V Kenya Ports Authority** [2015] KEELRC 523 (KLR) and **Catherine Wanjiku Kariuki V Attorney General** [2011] KEHC 2423 (KLR) among others, on the duty to report crime to the police.

According to the claimant the 7th respondent breached its duty of utmost good faith to him as no meeting was held on how to protect him against threats and intimidations by the 2nd, 3rd and 4th respondents citing the decisions in **Kenya National Union of Nurses V Kenneth Misoi** [2017] eKLR among others, to reinforce the submission.

On the 8th respondents failure to investigate his complaint, the claimant contended that the 8th respondent refused to discharge its statutory mandate citing the sentiments of the court in **Kenneth Nyaga**

Mwige V Minister for Justice, National Cohesion & Constitutional Affairs [2018] KEELRC 120 (KLR).

On entitlement to reliefs, the claimant submitted that he was entitled to unpaid wages during interdiction Kshs.516,034.00, December 2023 to November 2024 Kshs.251,035.80, special damages Kshs.82,300 paid to Mwalimu Sacco, Interest Kshs.93,360.67, KCB Kshs.256,520.00, medical Kshs.42,410.00, amount paid to the JSC Kshs.7,000, Total Kshs.1,225,592.37.

The claimant urged that he was entitled to damages as prayed for in the amended Memorandum of Claim.

1st, 2nd, 3rd and 4th Respondents submissions

As to whether there was reasonable cause to discipline the claimant, counsel relied on the provisions of Article 237(1) of the Constitution of Kenya and provisions of the Teachers Service Commission Act CORT and the Employment Act to submit that the 1st respondent had the constitutional and statutory mandate to commence disciplinary action against the claimant and considered the relevant factors including absenteeism from school in suspending him and he had been heard previously.

Counsel submitted that the 1st respondent had valid grounds to discipline the claimant by suspension.

On whether the claimant was accorded a fair hearing, counsel relied on Constitution of Kenya Regulation 139(1) of CORT to submit that the claimant was accorded a fair hearing in that his conduct was investigated, was issued with a letter of interdiction for deserting duty, he declined to file a defence after being requested to do so, invited for a hearing and attended in person and a decision was made.

According to counsel, the disciplinary panel was properly constituted.

Counsel, further submitted that the claimant applied for review of the decision but he did not attend the appeal hearing.

Reliance was placed on the decision in **Bett Francis Barngetuny & Another V Teachers Service Commission & Another** [2015] eKLR.

On the alleged discrimination, counsel submitted that the claimant did not lay a basis for the averment as he provided neither a factual nor legal basis for the claim.

As to whether the claimant was entitled to the reliefs sought, counsel submitted that he was not and sought dismissal of the suit with costs.

7th Respondent's submissions

As to whether the claimant had proved his case against the 7th respondent, counsel relied on the provisions of Sections 107, 108 and 109 of the Evidence Act to submit that the claimant failed to discharge the burden as no evidence was adduced to prove that the 7th respondent refused to represent him as he had no evidence of having filed a complaint with the union and a copy of the alleged attendance register was not availed.

Counsel submitted that the claimant had innumerable avenues to register his complaint but failed to invoke any of them and the security threat was channelled through the school and was followed up by Mr. Abincha, the Organising Secretary.

On entitlement to the reliefs sought, reliance was placed on the decisions in **Odinga & 5 others V Independent**

Electoral & Boundaries Commission (I.E.B.C) & 3 Others [2013] KESC 6 (KLR) and **Leonard Otieno V Airtel Kenya Ltd** [2018] eKLR on the burden of proof of a Petitioner or claimant to adduce evidence to prove the alleged violations of constitutional rights.

Also cited were the sentiments of the Supreme Court of Kenya in **Wamurere & 5 Others V Attorney General** [2023] KESC 3 (KLR) to urge that the claimant did not deserve the orders sought and in any case although he was not attending to his duties, his employment was not terminated and he was transferred to another school.

On costs, reliance was placed on the sentiments of the Court in **Party of Independent Candidate of Kenya & Another V Mutula Kilonzo & 2 others** [2013] eKLR to urge the court to award the 7th respondent's costs.

Analysis and determination

As adverted to elsewhere in this Judgment, the claimant faulted the respondents variously both individually or jointly, which accounted for the numerous declaratory orders sought and other than the Order of *certiorari* sought against the 2nd respondent, and general damages against the 7th respondent, all other reliefs namely salary

and damages are invariably against the employer, the 1st respondent.

Thus the claimant's case was primarily against the 1st respondent and in any event no evidence was adduced to show that the 2nd, 3rd, 4th and 5th respondents acted in a personal capacity or for their own benefit.

It is common ground that at all material times the claimant was and remains an employee of the 1st respondent (TSC No. 691437) and worked at Riyabo Secondary School from 18th September 2018 till 29th September 2022 when he stopped attending to his duties allegedly because of insecurity in and outside the school.

According to the claimant, the students were hostile to him on account of having been incited by among others the Deputy Principal of the School, the former Vice Chairman of the BOM, Mr. Samuel Kocha and an Assistant Chief and the incitement allegedly started at a meeting called by the Deputy Principal in the Library on the morning of 10th January 2022 attended by among others Hesbon Omurwa, Evans OKindo, Polycarp Omwebu, all non-teaching staff, BOM teachers, BOM members and some villagers and the claimant was on duty that week.

That Mr. Samuel Kocha and Mr. James Onyinkwa incited students against the Principal and the claimant.

Mr. James Onyinkwa **RWII**, denied that such a meeting took place on that day or that students were incited.

Equally, the claimant adduced no evidence to show that he reported the incitement to the Principal or the school BOM.

The same applied to the meeting allegedly held on 14th January 2022 in RWII's office.

However, documents produced by the claimant show that a meeting took place on 17th January 2022 at 10:30am and resolved that the BOM investigates the Deputy Principal (**RWII**) over incitement of students, remarks on examination malpractices and being close to 3 named Form IV students among others.

The meeting appear to have been precipitated by a student unrest on 14th January 2022, when students walked out of school and returned after sometime.

The claimant stated that he was threatened by Mr. Samuel Kocha and reported to the TSC Sub-County Director and the DCI on 26th January 2022 and the Principal reported the same to the police on 27th July 2022.

The claimant availed Police OB Nos. 14/26/11/2022, 17/06/09/2022, 18/29/07/2023 and 07/19/10/2022 and 23/14/9/2022 all reported at Nyamache police station. The court could not trace any for January 2022 or the actual complaint by the claimant.

On 1st September 2022 the claimant was allegedly on duty and the Assistant Chief, Mr. Kennedy Osure, Samuel Kocha, Omwebu Ooga, Omas Ogega, Josephine Onyari, Zablon Osoro 3 BOM teachers and Form 3 students were all armed with stones, hoes, handles, machetes and slashers and allegedly chased the claimant to the gate hurling stones at him, vowing to kill him and **RWII** joined them chanting that he was the Principal of the school and when the Principal came at 5:30pm he did nothing about it.

Strangely, the claimant remained in school even after the alleged chase and stoning by the group and was not

injured by the stones and made no report to the police or the BOM until 6th September 2022 and 5th September 2022 respectively and went home safely.

Relatedly, the claimant was allegedly threatened by the Principal and Mr. Omwebo Ooga, whom **RWI** confirmed was differently abled.

Subsequently, leaflets against the Principal and an unidentified teacher surfaced whom the claimant stated was him as told by the Principal and he reported to the police on the same day.

It is true that student unrest at Riyabo Secondary School was not uncommon as admitted by the Principal in his letter to the Sub-County TSC Director dated 4th February 2022 and continued culminating in the closure of the school for one (1) week on 29th September 2022.

Without providing any supportive evidence, the claimant alleged that the Deputy Principal, Samuel Kocha Omao Ogega, Miriam Moreka, Okemwa Meroka and several villagers were arrested for inciting students.

Intriguingly, although the claimant alleged that there was violence in the school on 29th September 2022, he did not show against whom it was directed and the aftermath such as injuries, including what happened to him.

This was important bearing in mind that the claimant did not report to work thereafter until he was interdicted by the BOM.

The claimant admitted on cross-examination that the school was scheduled to open on 6th October 2022 and he did not report back and never taught at the school again.

From the foregoing, the court is unable to find the *nexus* between the claimant's absence from school and the alleged insecurity.

At this juncture, it is essential to determine whether a school BOM has power to interdict a teacher. This is because the claimant contended that the BOM of Riyabo Secondary School acted *ultra vires* (beyond its powers). However, the claimant tendered no explanation of the framework on which the allegation was grounded.

Under Regulation 140 (a)(iv) of the Teachers Service Commission Code of Regulations for Teachers, 2015, (CORT), desertion is one of the offence which could lead to disciplinary action against a teacher employed by the 1st respondent as was the claimant and allegations of misconduct against a teacher may be made to different persons including the Secretary of the BOM and the allegation must be investigated at the instigation of the Commission, BOM or the County Director if there is no functional BOM, Head of Institution in consultation with the BOM and the teacher must be accorded a fair hearing and the letter of interdiction may be served upon the teacher by the BOM or the Commission.

The claimant faulted the sequence of events adopted by the respondents because the Standard Assessment was conducted after the notice to show cause had been served by the Principal.

Clearly, nothing prevents an employer from conducting an investigation after issuing a notice to show cause provided it issues a new notice to show cause, if need be, to bring out new charges, if any, and where no changes are necessary, the earlier notice to show remains valid.

In this case, the respondents made no changes to the charge.

RWIV, Catherine Kerich confirmed that a school BOM had jurisdiction to receive a complaint against a teacher, investigate the same, notify the teacher the allegations, afford him an opportunity to present his or her defence, hear the teacher and make a determination.

Regulation 146(10) of CORT empowered the BOM to interdict a teacher where the report of the investigating panel discloses that an offence has been committed.

The Standard Assessment Report – Special Assessment Report dated 7th November 2022 revealed that the 1st, 2nd, 3rd, 4th and 5th respondents conducted an investigation to ascertain the extent of the insecurity of the claimant.

The report on record revealed that the Investigation Panel comprising Mr. James Wanyele, SCD, Nyamache, Henry Ogeta SCQASO, Nyamache and Mr. Peter Nyangate CSO Mochengo Omosaria visited the school on diverse days and invited the claimant who declined an oral interview and opted to provide a written response which he

presented on 16th November 2022 and refused to state the source and reason for the alleged insecurity but cited OB No. 23/14/9/2022.

The panel found the claimant culpable for the desertion.

Although the claimant included a copy of his response to the notice to show cause dated 4th November 2022, he adduced no evidence as to how he presented or delivered a copy of the response to the Principal of Riyabo Secondary School bearing in mind that he was not reporting on duty.

The B.O.M found the claimant culpable for desertion and resolved to interdict him. The B.O.M was not satisfied that the claimant faced more insecurity than any other member of staff and in particular, the Principal whose name was mentioned by the leaflets circulated in September 2022, who had been attending to his duties, the leaflets notwithstanding.

Moreover, the claimant confirmed that he had never been confronted or fought by any person at school or outside the school, including his residence.

The claimant challenged the approach taken by the B.O.M on the issue of his transfer suggesting that board minutes were unalterable in a subsequent meeting, which is untenable. A B.O.M is akin to a Board of Directors of a company or state corporation, and has discretion to amend minutes if circumstances so justify. This practice is generally accepted as it is pragmatic and facilitative and enable the board make changes or modification to their decisions as and when circumstance dictate.

The claimant was invited and attended the disciplinary hearing by the 1st respondent on 22nd September 2023 which he faults on various fronts.

The disciplinary panel found the claimant culpable and imposed a one (1) month suspension, which the claimant served and was transferred to Borangi Secondary School where he teaches to date.

It is trite law that it is the duty of the employee to justify absence from duty by availing verifiable evidence.

Concerning the claimant's transfer to another school and as adverted to above, the BOM made a recommendation at its meeting held on 14th September 2021 and thus

discharged his mandate. The claimant too applied for a transfer.

Without any shred of supportive evidence, the claimant faulted the respondent's for not doing enough to ensure that he was transferred to another school. He faulted the 2nd, 3rd, 4th 5th and 7th respondents for the failed transfer and that the 3rd respondent demanded a bribe of Kshs.35,000.00

In the case of the 7th respondent a letter was not served because the claimant allegedly did not find any official of the Branch Executive Committee but had already presented the letter on the insecurity to one Mr. Abincha. Mr. Abincha denied the claim on cross-examination by the claimant.

The 2nd respondent was accused of withholding the claimant's letter of transfer alleged dated 11th October 2022.

Puzzlingly, the claimant alleged to have written to the 1st respondent about the alleged letter of transfer but did not avail a copy of the letter or response.

With no concrete evidence of the existence of a letter of transfer in his favour, or written confirmation that a copy had been dispatched to him, the claimant failed to prove that any of the respondents failed to perform their official duties.

Similarly, the claimant, without any iota of evidence alleged that the 2nd, 3rd, 4th and 6th respondents colluded and transferred Mr. Evans Sambora to Father Kaisser Secondary School, Nyamira North.

The claimant tendered no evidence to prove the circumstances in which Mr. Evans Sambora or indeed Rose Oenga were transferred. The claim of collusion in the case of Mr. Evans Sambora was unsubstantiated and RWI confirmed on cross-examination that Mr. Sambora and Rose Oenga had served for more than 5 years at the school.

Under the CORT, the mandate to transfer teachers is vested on the 1st respondent in the circumstances prescribed by the Regulations.

A teacher who desires to be considered for transfer is required to make an application to the Commission in the

prescribed form and a teacher on a first appointment may not be considered for transfer before serving in a station for a period of not less than 5 years save in exceptional circumstances and all transfers were considered and approved by staffing panels.

The claimant led no evidence to show that his request for transfer had been considered and approved by a staffing panel.

From the evidence on record, nothing turns on the issue of the claimant's application for transfer.

Another issue for consideration is whether the respondents discriminated the claimant in any way.

While the claimant did not specifically plead discrimination by any of the respondents, he prayed for general damages of Kshs.4,000,000 against the 7th respondent for discrimination and Kshs.5,000,000.00 for discrimination and violation of the right to fair labour practice, freedom from slavery and servitude, psychological torture, mental distress and anguish.

Neither the claimant's written witness statement dated 3rd July 2024 nor the amended claim dated 9th October 2024 enumerated particulars of the alleged discrimination or when it took place.

The respondents denied owing the claimant damages for discrimination.

It is trite law that Article 27 of the Constitution of Kenya and Section 5(3) of the Employment Act prohibit direct and indirect discrimination generally and in the context of employment respectively.

The law prohibits an employer from discriminating an employee or prospective employee on the grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, marital status or HIV status.

Black's Law Dictionary defines the term discrimination as:

"Failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured".

Similarly, in **Peter K. Waweru V Republic** [2006] eKLR the court stated:

“...Discrimination means affording different treatment to different persons attributable wholly or mainly to their description whereby persons of one such description are subject to... restrictions to which persons of another description are not made subject or are accorded to persons of another such description...Discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex... a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured”.

Finally, in **Nyarangi & 3 others V Attorney General** [2008] KLR 688 Nyamu J held:

“The law does not prohibit discrimination but rather unfair discrimination. The said Handbook defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human being who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that

attribute in the same circumstances. Indirect discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without justification...”

These definitions are clear that discrimination arises where persons who are in similar circumstances are treated differently without justification.

Concerning the burden of proof, Section 5(7) of the Employment Act provides:

In any proceedings where a contravention of this Section is alleged the employer shall bear the burden of proving that the discrimination did not take place as alleged and that the discriminatory act or omission is not based on any of the grounds specified in the Section.

In **Gichuru V Package Insurance Brokers Ltd** [2021] KESC 12 (KLR) the Supreme Court held:

“The protection of employees against any form of discrimination at the work place is therefore a significant matter and the burden placed upon an employer to disprove the allegations of discrimination is enormous. The employer must prove that the discrimination did not take place as alleged and that where there is

discrimination, it was not with regard to any of the grounds specified...

This however does not automatically shift the burden of proof in cases of discrimination against an employee to the employer”.

Equally, in **Raila Odinga & Others V Independent Electoral & Boundaries Commission & Others** [2014] eKLR, the Supreme Court held:

“... a Petitioner should be under obligation to discharge the initial burden of proof before the respondents are invited to bear the evidential burden”.

In the instant case, it is discernible that the claimant did not particularize the acts or omissions of the 7th respondent or any of the respondents which constituted discrimination.

In the absence of particulars of the alleged discrimination, the court can only infer that it was perhaps based on the transfer of other teachers namely, Rose Oenga and Evans Sambora.

The claimant adduced no evidence as to what led to the transfer of Mr. Evans Sambora.

As regards Rose Oenga, the claimant alleged that she was assaulted by the Deputy Principal. The Principal's evidence was that the two had been at the school for more than 5 years. It is also common ground the Principal and the Deputy were transferred. The claimant provided no evidence as to when the two were transferred as the date mentioned in the case of the Deputy Principal was incorrect as he confirmed that he was transferred on 17th May 2023.

With regard to the 7th Respondent, the claimant's allegation was that the union did not follow up his complaint about insecurity.

However, on cross-examination, Mr. Abincha to whom the claimant alleged to have received the complaint denied that the complaint was indeed served upon the union and challenged the claimant to produce the copy on which the union acknowledged receipt and the claimant availed no evidence.

Mr. Abincha confirmed that he received a call from RWI who briefed him on the issue, a fact RWI confirmed on cross-examination and Mr. Abincha visited the school and met RWI who informed him that the complaint would be

dealt with internally. Since the claimant had already reported the matter to the BOM, the 1st respondent and the police, the 7th respondent could only follow up to ascertain the position.

This is because an employee does not lose his right to pursue his rights against an employer by reason of union membership and is not obligated to report every complaint to the union. The employee had liberty to go it alone.

The claimant adduced no evidence to show that he called or visited unions office at any time after interdiction on 29th February 2023. While the union could have done more, the claimant does not appear to have considered the union as his third port of call after reporting the insecurity to the police.

Verifiable evidence of service of the complaint on the union was core to his case against the union.

With regard to transfer to another institution, the claimant's case appears to be that he was treated differently because Evans Sambora and Rose Oenga were transferred yet he was not.

Regrettably, and as mentioned elsewhere in this judgment, the claimant did not avail any scintilla of evidence to show the circumstances in which Mr. Evans Sambora and Rose Oenga were transferred. Evidence to demonstrate when the two applied for transfer, reason (s) given and the duration it took for the transfer to be approved would have bolstered the claimants allegation.

No doubt the claimant, Evans Sambora and Rose Oenga, were similarly circumstanced and unjustifiable different treatment of any of them could have been a basis for a claim for discrimination.

For the foregoing reasons, it is discernible that the claimant failed to demonstrate that he was treated in a discriminatory manner by the 7th Respondent or any other respondent.

Another issue that requires consideration was the claimant's use of statements allegedly made by the persons he dealt with without demonstrating that the statements attributed to the individuals concerned originated from them and were made in the manner they appear on record.

This is conspicuously noticeable from the text of the claimant's written witness statement.

Coupled with the foregoing is the impression that emerges on perusal of the claimant's case that virtually all the person(s) and institutions he dealt with were or was against him and did not deal with his case as they or it should have. A case in point is the Commission on Administrative Justice, the 8th Respondent which after receipt of the claimant's complaint about inaction dated 3rd May 2023 wrote to the respondent on 16th May 2023 and the 1st respondent responded vide letter dated 26th May 2023 and 13th June 2023 on the status of the complaint resolution process.

Another letter on documents and hearing dated 19th June 2023, 4th July 2023 for a status update, 14th August 2023, 23rd January 2023 on insurance cover, 8th February 2024 and 20th March 2024.

The 8th respondent wrote to the 1st respondent a total of seven (7) times on the claimant's case and the claimant was copied in all of them.

On cross-examination by the 8th respondent's counsel, the claimant admitted that the 8th respondent resolved the issue to some extent which enabled the claimant access documents and hearing took place.

Intriguingly, this was not adequate for the claimant because the Commission did not investigate the matter notwithstanding the fact the 1st respondent and the police were investigating the same matter.

It is instructive to note that although the claimant accused the respondents for having violated his rights under the Constitution of Kenya, he failed to lay bare the provisions allegedly violated and the manner in which the violation took place as dictated by **Anarita Karimi Njeru V Republic.**

Similarly, the allegations that the respondents colluded or connived not to do or do something such as attempting to hack his email or account, removal of his details sounded vexatious as no supportive evidence was provided.

Finally, although the claimant prayed for damages for defamation, he did not provide particulars of the alleged defamation.

Concerning fair hearing, the claimant submitted that he was not accorded a fair hearing because the 1st respondent concealed the identity of members of the disciplinary panel, the chairperson tore his written defence, was not accorded an opportunity to defend himself and was intimidated and threatened by the chairperson.

Equally, the claimant contended that the disciplinary panel was improperly constituted because it was chaired by a Deputy Director in the Discipline Directorate, one Catherine Kerich.

Regulation 151 of the Code of Regulations for Teachers provides:

- (1) The discipline process will be administered at the Commission's headquarters and at the County level.
- (2) The Commission may by way of an administrative circular determine the offences or category of offences to be heard at the Commission's headquarters and at the County level.
- (3) The Discipline Panel at the headquarters shall comprise—

- (a) at least one member of the Commission who shall be the chair of the panel;
- (b) two directors or their representatives, appointed by the Commission Secretary; and in attendance;
- (c) an officer representing the division dealing with matters touching on discipline; and
- (d) any other technical officer whose attendance shall be deemed necessary.

Section 2 of the Teachers Service Commission Act defines member as

“a member of the Commission appointed in accordance with the Constitution and Section 8 of this Act”.

The Teachers Service Commission is one of the Constitutional Commissions under Article 250 of the Constitution of Kenya whose membership must be at least 3 but must not exceed nine and under Section 5(1) and (2) of the Teacher Service Commission Act, the TSC consists of a chairperson and 8 members who serve for a non-renewable term of 6 years.

In the amended Memorandum of Claim, the claimant referred to the disciplinary panel as anonymous for want

of names and designation of members of the panel, and a copy of the minutes provided by the 1st respondent established that fact beyond peradventure in that it had no list of names of members of the panel and those in attendance except the claimant and the minutes were not signed.

First, as regards the composition of the disciplinary panel, the Regulation is couched in mandatory tone and uses the term “shall” twice in Regulation 151(3)(a) for emphasis.

In this case, the record does not tell who the members of the disciplinary committee or panel were and RWIIV, Catherine Kertich confirmed on cross-examination that she attended the hearing on 22nd September 2023 and her name was not indicated on the minutes. The witness further confirmed that she chaired the disciplinary panel and the minutes were not signed.

Evidently, the disciplinary panel had no member of the Commission, who would have been the chairperson and was thus improperly constituted even assuming that the other requirements of membership were complied with, which does not appear to have been the case.

It is trite law that an improperly constituted body lacks legal capacity to discharge the mandate it is required to discharge and any proceedings or decision made is a nullity as held in **Mutava V Tribunal Appointed to Investigate the conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya** (supra) cited the claimant.

Consequently, the proceedings of the disciplinary panel conducted on 22nd September 2023 and the decision made were a nullity and of no effect. The claimant's suspension for one (1) month did not exist in law.

Relatedly, it is also trite that an unsigned document has no legal effect for want of authorship and authentication.

The copy of the minutes of the disciplinary panel as confirmed by **RWIV** were not signed and had no probative value.

Having found that there was no disciplinary hearing by the 1st respondent as required of it, the claimant was not found guilty for having deserted duty because the disciplinary process was incomplete.

The issue of availment of witnesses, opportunity to present evidence and/or submissions fell by the way side.

As regards the appeal or review, the claimant submitted that the 1st respondent deliberately refused to hear and determine the same. This was not the case.

RWIV confirmed that the Directorate received the claimant's application for review of the decision of the disciplinary panel on 13th December 2023.

The witness also confirmed that the application for review was heard and determined in the claimant's presence and a decision made and implemented.

Puzzlingly, the 1st respondent did not avail verifiable evidence of having invited the claimant for the hearing of the application for review or minutes of the hearing.

The letter dated 24th June 2024 which was precipitated by the incessant inquiries by the claimant, was not an invitation for a hearing.

For unexplained reasons the 1st respondent took no steps to schedule a hearing of the claimant's application for

review until sometime in May or June 2024, almost 7 months after the application was lodged, which was inordinately long.

Needless to emphasize under the provisions of Section 45 of the Employment Act, the manner in which an employer handles the employee's appeal after termination of employment or dismissal is one of the parameters the court takes into consideration in determining whether it was just and equitable for the employer to terminate the employee's employment.

It is however, not determinative.

On defamation, in **Paramount Bank Ltd V Vaqui Syed Qumara & another** [2017] KECA 528 KLR, the Court of Appeal stated:

“For a statement to qualify as defamatory it must tend to bring the person named in it into hatred, contempt or ridicule and the words used in the statement tend to lower him in the estimation of right thinking members of society generally. See **Winfred & Jolowicz on Torts** 16th Edition; 2002 at Page 404.

Defamatory representations whether by word, pictorial, gestures, music or statutes implicates a person reputation. For the tort of defamation to be established it

must be demonstrated that:- (i) there was a defamatory representation by the respondent (ii) the representation referred to the claimant or Petitioner (iii) publication of the representation and (iv) malice. See **Street on Torts** 4th Edition at Page 287 - 301.

Strangely, the claimant neither particularized the alleged defamatory representations nor demonstrate any of the elements of defamation against any of the respondents and the prayer for damages for defamation is unsustainable.

The attempt to bridge the gap through submissions could not ameliorate the situation or avail the claimant.

Appropriate relief

(a) Declarations

As adverted to elsewhere in this Judgment, the claimant prayed for many declarations and the court proceeds as follows:

- (i) Declaration that the chain of events leading to the interdiction of claimant were wrongful, unfair, irregular, irrational and unconstitutional is unmerited and is declined.

- (ii) A declaration that the 1st, 2nd, 3rd, 4th and 5th respondents created a toxic and volatile working station and exposed the claimant is unmerited and is declined for want of proof.
- (iii) Declaration that the 1st, 2nd, 3rd, 4th and 5th respondents colluded and connived not to implement resolutions of meetings is unmerited and is declined for want of proof.
- (iv) Declaration that acts and omissions of agents of the 1st respondent and the 5th respondent incited students and the community against the claimant is unmerited and is declined for want of verifiable evidence.
- (v) Declaration that the 1st, 2nd, 3rd and 4th respondents violated the claimant's right not to be held in slavery or servitude, is unmerited and is declined for want of supportive evidence.
- (vi) Declaration that the 1st, 2nd, 3rd, 4th and 5th respondents mistreated, threatened, intimidated, coerced, humiliated and publicly embarrassed the claimant is unmerited and is declined for want of proof.

- (vii) Declaration that the 1st, 2nd, 3rd and 4th respondents transferred two colleagues of the claimant while withholding the claimant's letter of transfer amounted to discrimination of the claimant and contrary to law is unmerited and is declined.
- (viii) Declaration that 1st, 2nd, 3rd and 4th respondents violated the claimant's right of legitimate expectation is unmerited and is declined for want of context and proof.
- (ix) Declaration that the 1st, 2nd, 3rd, 4th and 5th respondents colluded connived and clandestinely expunged the claimant's details from the TSC Entry and Exit Portal and deleted his transfer on the system is unmerited and is declined for want of proof.
- (x) Declaration that the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th respondents threatened to hack into the claimant's email address with a view to withdraw his complaint was irrational, unlawful and illegal is unmerited and is declined for want of proof.
- (xi) Declaration that the withholding of the claimant's salary by the 1st respondent violated his right to property is unmerited

and is denied as money is not property but a medium of exchange.

- (xii) Declaration that employment is the source of income, the foundation of the claimant's enjoyment of rights and fundamental freedoms and the 1st respondent's reaction of stopping the claimant's salary was illegal and unlawful is unmerited because the claimant was on interdiction. It is declined.
- (xiii) Declaration that the 1st respondents refusal to remit monthly deductions to the claimant's KCB check off system loan serviced on his salary led to accruing of loan interest and penalties and interest review, is unmerited and is declined for want of proof.
- (xiv) Declaration that the 1st respondent's refusal to remit monthly deductions to the National Hospital Insurance Fund (NHIF) was illegal, irregular, unfair is merited.
- (xv) Declaration that the 1st respondent's action of deregistering the claimant from AON Minet Medical Scheme was irregular and is merited.

- (xvi) This declaration rehashes declaration (xiv) and (xv) above and is declined for being repetitious.
- (xvii) Declaration that the 4th and 5th respondent's action of taking police to the claimant's ancestral home and instructing them to handcuff, have him kneel him down with hands up, arresting and bundling him in a police vehicle and confining him at Nyamache Police Station. Flogging and torturing him and releasing him at night was capricious, irrational, unlawful and unconstitutional is declined for want of proof.
- (xviii) Declaration that the 3rd, 4th and 5th respondents' action of directing untrained and unregistered teachers to seize the claimant's mobile phone and documents was illegal, unlawful and unreasonable is declined for want of proof.
- (xix) Declaration that the refusal by the 1st, 2nd, 3rd and 4th respondents' to furnish the claimant's Letter of Appointment to Grace C3 and analysed results for 2020, 2021 and 2022 timeously for purposes of an interview

violated his right of access to information is declined for want of proof.

(xx) Declaration that the 1st, 2nd, 3rd and 4th respondents' refused to avail a copy of the DCIO investigation report and plucking pages of the 3rd respondent's investigation report dated 7th November 2022 violated the claimant's right of access to information is declined on account that the claimant as a complainant had the right to obtain a copy from the police as opposed to the respondents and made no attempts to secure the same from the source and availed no verifiable evidence to show that pages had been plucked from the document.

(xxi) Declaration that the TSC Disciplinary Panel lacked constitutional authority to adjudicate his case and make a decision is merited on account that the panel was not constituted in accordance with the provisions of the CORT and its proceedings and decision were a nullity in law.

(xxii) Declaration that the right to education is only attainable or achievable subject to

availability of resources is declined because the issue was not canvassed evidentiary and was not identified as an issue for determination by the court.

(xxiii) Declaration that the 8th respondent's failure to investigate the claimant's complaint was a contravention of its legal mandate and obligations is declined on account that the 8th respondent discharged its obligations by seeking facts from the 1st respondent.

Its mandate includes investigating complaints. The Commission's role is to ascertain the facts on the issue and demand corrective action or give advisory opinions.

As adverted elsewhere in this judgment the 8th respondent wrote not less than seven (7) letters to the 1st respondent in the course of its inquiry and action was taken, a fact the claimant acknowledged on cross-examination.

The 8th respondent had no mandate to take over the tasks or responsibilities of other state bodies or agencies.

The declaration is declined.

(xxiv) Declaration that the 7th respondent's failure to represent the claimant was a contravention of its Constitution and the Labour Relations Act and illegal is unmerited and it is declined for want of proof.

(b) *Certiorari*

The claimant sought the Judicial Review Order to quash interviews conducted in Kisii County by the 2nd respondent on unknown date and Order fresh interviews.

Puzzlingly, the claimant's written witness statement made no reference to any advertisement and interviews being conducted by any of the respondents and led no evidence in court during the hearing.

It is unclear to the court as to who was interviewed for what position or positions, date of interview, outcome and why the interview ought to be quashed.

The prayer is unmerited for want of proof and it is dismissed.

(c) Permanent injunction to restrain the 1st respondent's, its agents, servants, proxies or employees from taking disciplinary action or

victimizing, intimidating or threatening the claimant for instituting the instant suit.

The claimant tendered no evident to prove that the 1st respondent, its agents, servants, proxies or employees had threatened to take disciplinary action against him or that there was a likelihood that he would be victimized intimidated or threatened.

It is common ground that the claimant is not the only employee who has sued the 1st respondent and employees of the 1st respondent routinely sue the employer akin to other employees of other state bodies and agencies. This is because the right to seek judicial redress for any alleged violation or conduct is a constitutional right.

Having failed to place any material before the court to show that adverse steps were likely to be taken against him, the prayer for a permanent injunction was unmerited and it is declined.

(d) Order of Investigation

The claimant sought an Order to compel the 1st respondent to investigate the 2nd, 3rd and 4th respondents for purposes of taking disciplinary action against them

Regrettably, the claimant adduced no evidence to prove that he had written to the 1st respondent setting out the complaints against each of the three respondents and action had not been taken and even if the 1st respondent had not taken action, the court has no jurisdiction to supervise internal affairs of parties before it and employers enjoy managerial discretion in dealing with their employees.

The order sought lack justification and it is declined.

(e) Salary March to August 2023 Kshs.384,744.

The claimant's written statement made no reference to any unpaid or outstanding salary.

During the hearing, the claimant confirmed that the salary claimed related to the period he was under interdiction and prayed for its revocation by the court.

Having found that the interdiction was justifiable and the claimant was punished for desertion, the unpaid salary is irrecoverable because the claimant rendered no services as by law required. Any payment during interdiction would constitute unjust enrichment.

The prayer is declined.

(f) Salary for September to October 2023 Kshs.131,744.00 and from November 2023 to date

Although the claimant led no evidence to prove that he was not paid after serving the suspension he was entitled to remuneration from the date the interdiction ended.

No salary is payable during interdiction as no work is being done consistent with the provisions of Section 17(1) of the Employment Act.

Consequently, salary not paid after the claimant's interdiction is due and payable to him unless previously paid.

(g) General damages for discrimination, violation of right to fair labour practices, slavery and servitude psychological torture, mental distress and anguish.

Having declared that the deregistration of the claimant from AON Minet Medical Scheme was irregular, oppressive, unfair and unlawful as it denied the claimant medical benefits of self and members of his family yet he remained the 1st respondent's employee, interdiction

notwithstanding, the claimant's right to human dignity was violated.

Although the CORT empowered the 1st respondent to deny the claimant the 50% salary payable during interdiction depending on the reason for the interdiction, and the 1st respondent acted accordingly, medical cover is not part of the salary and the claimant ought to have had access to treatment under the existing arrangement.

Denial of the medical benefit was unreasonable and unfair and violated the claimant's right to human dignity.

The claimant is awarded the sum of Kshs.200,000.00 as general damages against the 1st respondent.

(h) Special damages Kshs.15,000,000.00

Neither the claimant's written witness statement nor the oral evidence adduced in court adverted to this prayer.

On cross-examination, the claimant indicated that claim comprised hospital bills, arrears and penalties.

The claim remained unpackaged and the court could not ascertain how the sum of Kshs.15,000,000.00 was arrived at.

The amounts incurred in respect of hospitalization or transport among other expense items ought to have been computed from the receipts and tabulated in the Amended Memorandum of Claim and the claimant's written witness statement and the relevant evidential proof for each category of expense attached. This is because special damages are easily quantifiable.

On cross-examination, the claimant stated that he had provided copies of receipts in volume 2 of his bundle of documents.

However, without furnishing the court with credible evidence as to when the expenses were incurred, and in respect of what and demonstrating the specific amounts claimed under each item, the sum of Kshs.1,500,000.00 or Kshs.15,000,00.00 is tantamount to throwing a figure to the court to award without supportive evidence.

It is trite law that special damages must be specifically pleaded and strictly proved.

In **Hahn V Singh** [1985] KLR 716 the Court of Appeal stated thus:

"...special damages which must not only be claimed specifically but proved strictly for they are not the direct natural or probable consequences of

the act complained of and may not be inferred from the act. The degree of certainty and particularity of proof required depends on the circumstances and nature of the act themselves”.

See also in this regard **Securicor (K) Ltd V Esther Oliech** [1996] KECA 89 (KLR), **Mohammed Ali & Another V Sagoo Radiators Ltd** [2013] KECA 163 (KLR), **Supermarine Handling Services Ltd V Kenya Revenue Authority** [2010] eKLR, **Premier Diary Ltd V Amarjit Singh Sagoo & another** [2013] KECA 95 (KLR), **Idi Ayub Shabhan V City Council of Nairobi** [1982-88) 1 KAR 681, and **Bonham Carter V HydePark Hotel Ltd** [1948] 64 TLR 177.

In **Coast Bus Service Ltd V Sisco & Murunga Danii & 3 Others** Civil Appeal No. 192 of 1992, the Court of Appeal held:

“We would restate the position special damages must be pleaded with as much particularly as circumstances permit and in this connection, it is not enough to simply aver in the plaint as was done in this case that the particulars of special damage were to be supplied at the time of the trial if at the time of filing the suit the particulars of

special damages are not known with certainty, then those particulars can only be supplied at the time of the trial by amending the plaint to include the particulars which were previously missing. It is only where the particulars of the special damage are pleaded in the plaint that a claimant will be allowed to proceed to strict proof of those particulars”.

See also **Ouma V Nairobi City Council** [1976] KLR 304 **Ratcliffe V Evans** [1892] 2 QB 524, **Banque Indoshez V D J Lowe & Co. Ltd** [2006] 2 KLR 208 **Sande V Kenya Co-operative Creameries Ltd.** C. No. 15 of 1992 and **Bank of Baroda (K) Ltd Timwoo Products Ltd** Civil Appeal 132 of 2001.

In this case, the claimant neither pleaded the particulars in the amended Memorandum of Claim nor adduce evidence in court.

The claim was not proved and it is declined.

(i) General damages for defamation

Neither the claimant’s written witness statement nor the Amended Memorandum of Claim particularised the alleged defamatory representation and by whom among the eight (8) respondents and the form it took.

The claim for defamation was neither pleaded nor proved and the prayer is accordingly dismissed.

(j) Exemplary/punitive damages

As regards the definition of exemplary damages in **Godfrey Julius Ndumba, Mbogori & another V Nairobi City County** [2018], the Court of Appeal stated:

“Exemplary damages are essentially different from ordinary damages. The object of damages in the usual sense of the term is to compensate. The object of exemplary damages is to punish and deter.

*We are guided by the case of **Rookes V Barnard** [1964] A. C. 1129, where Lord Devlin set out the categories of cases in which exemplary damages may be awarded which are:*

- (i) In cases of oppressive, arbitrary or unconstitutional action by the servants of the government*
- (ii) Cases in which the defendants conduct has been calculated to make a profit for himself which will exceed the compensation payable to the plaintiff and*
- (iii) Where the exemplary damages are expressly authorised by statute”.*

See also **Obongo V Kisumu Council** [1971] EA 91, **CAM V Royal Media Services Ltd** [2013] eKLR and **Ken Odondi & 2 others V James Okoth Omburah t/a Okoth Ombura & Co. Advocates** [2013] eKLR.

Needless to underscore, the award of exemplary damages is discretionary and the amount awarded depends on the circumstances of each case.

In **Nation Media Group V Gideon Mose Onchwati & Kenya Oil Co. Ltd** [2019] eKLR the Court of Appeal held that:

“...Now, exemplary damages are awardable in very rare instances where the conduct of the defendant is deserving of punishment, and they are meant to vindicate the law.

*They have nothing to do with compensating the plaintiff. This court in the **Nairobi Star Publication Ltd V Elizabeth Otieno Oyoo** [2018] eKLR addressed this issue as follows; and we agree;*

“As regards exemplary damages, the same are only to be awarded in limited instances...”

Puzzlingly, neither the claimants written witness statement nor the Amended Memorandum of Claim enumerated the conduct of any of the respondents which met the threshold for the award of exemplary damages to punish and deter the person.

The claimant left it to the court to determine against whom the remedy of exemplary damages ought to be made, which implies that the claimant did not establish entitlement to exemplary damages against any of the respondents.

The prayer was unmerited and it is declined.

(k) Exemplary/punitive and aggravated damages for defamation

Having found that the claim for defamation was neither pleaded nor proved against any of the respondents, the prayer for exemplary and aggravated damages for defamation falls by way side and it is accordingly dismissed.

In the upshot, the claimant's claim against the 1st respondent is successful to the extent that:

- (a) Declaration that deregistration of the claimant from AON Minet Medical Scheme was irregular, unfair, unlawful and unconstitutional.
- (b) Award of Kshs.200,000.00 as general damages.
- (c) Declaration that the 1st respondent's disciplinary panel lacked jurisdiction to adjudicate the claimant's case.
- (d) Declaration that failure to remit NHIF deductions was illegal.

The 1st respondent shall reimburse the claimant Kshs.20,000.00

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 24TH DAY OF FEBRUARY 2026.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil**

Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI
JUDGE