



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT**  
**NAIROBI**

(ON Makau J on 18<sup>th</sup> March, 2026)

**CAUSE NO. E100 OF 2024**

**MERCY**  
**KASITI.....CLAIMANT**

**INDULI**

**-VERSUS-**

**SHINING HOPE FOR COMMUNITIES**  
**ORGANIZATION.....RESPONDEN**  
**T**

**JUDGMENT**

**Introduction**

1. By a Statement of Claim dated 7<sup>th</sup> February 2024, the Claimant instituted this suit against the Respondent alleging unfair and unlawful termination of her employment. The

Claimant prays for the following reliefs against the Respondent:-

***a) A declaration that the Respondent's termination of the Claimant's employment was unfair and unlawful.***

***b) A declaration that the Claimant is entitled to payment of compensatory damages as pleaded.***

***c) An order for the Respondent to pay compensatory damages totaling Kshs. 2,184,000/= as tabulated hereunder:***

***d) Certificate of Service.***

***e) Costs of the suit.***

***f) Interest on (c) and (e) at court rates.***

***g) Any other relief that this Honourable Court may deem fit.***

2. The Respondent filed a Response to Claim dated 26<sup>th</sup> March, 2024 admitting that it employed the Claimant but demnied having unfairly dismissed her. It averred that summary

dismissal on 18<sup>th</sup> December 2023 was warranted as the Claimant had fundamentally breached her contract of employment by failing in her duty to ensure the safety of the students under her watch. It further averred that the dismissal was procedurally fair as the Claimant was afforded an opportunity to appeal the decision within seven days which she did not utilize. Finally, it prayed for the suit be dismissed with costs as the reliefs sought are not merited.

3. The matter proceeded to full hearing on 3<sup>rd</sup> December 2025 when both sides gave evidence and thereafter filed written submissions.

### **Evidence**

4. The Claimant testified as CW1 and adopted her written Statement dated 7<sup>th</sup> February 2024 as her evidence in chief. She then produced six (6) documents as Exhibits. The said documents comprise of her Letter of Appointment dated 17<sup>th</sup> July 2014, Fixed Term Contract dated 20<sup>th</sup> September 2022, the Summary Dismissal Letter dated 18<sup>th</sup> December 2023,

her letter to the Human Resource dated 20<sup>th</sup> December 2023 and other related documents.

5. In brief her evidence was that on 17<sup>th</sup> January 2014, she was employed by the Respondent as a school teacher initially based at its Kibera Campus and rose through the ranks until 1<sup>st</sup> September 2022, when she was appointed Headteacher for a period of 3 years, earning a salary of Kshs. 156,000/= per month.

6. She states that on 18<sup>th</sup> December 2023, she received an email from the Respondent's Human Resource and a Summary Dismissal letter. The reason cited was that she had breached the Respondent's duty to protect children and failed to follow the complaint procedures of the Child Protection Policy. She contended that she was not accorded any hearing before the dismissal and upon following up, she established that the basis for the summary dismissal was an alleged incident that occurred while students were on a trip to Mombasa.

7. On 20<sup>th</sup> December 2023, she wrote to the Respondent's Human Resource denying the allegations contained in the Summary Dismissal letter since as the Head Teacher, she neither received any complaints of harassment by the students nor condoned such kind of violence. Therefore, she contended that her dismissal was unfair and unlawful.
8. She contended that she was not paid salary for December 2023 and urged the court to award the same plus terminal benefits as prayed in her pleadings.
9. On cross-examination she admitted that her duties as Head Teacher of the school, included the protection and safety of the students. She further admitted that she signed an Employee Acknowledgment Form on 19<sup>th</sup> August 2014 acknowledging that she would ensure that the students were safe from all forms of abuse and to act as soon as a report of abuse was made.
10. She confirmed that Jacob Luke Obonyo was a teacher in the school and Cypriano Nanzala was a student in the school. She denied ever receiving any complaint from students

after the Mombasa trip. She was also aware that multiple students reported abuse by Luke Obonyo during the trip. She stated that she did not remember any student by the name Harriet Akinyi and denied ever telling the students not to report abuse by teachers.

11. She was not aware of any investigation being done and whether a report by Tunza corroborated the complaints by students. She confirmed that she was called to a meeting and told that an investigation would be done, but she was dismissed without any hearing. She declined the dismissal letter because she was not heard or given any opportunity to respond to the allegations.

12. She confirmed that the dismissal letter gave her 7 days to appeal but she never to appealed. Instead, she wrote to the Human Resource disputing the allegations against her but never received any response. She admitted that she was given a certificate of service and was paid for the 18 days in December 2023.

13. In re-examination she reiterated that she was summoned for a meeting in Kibera where she was told there were investigations and that she would be notified when the investigations were conducted. However, she was dismissed before receiving any feedback on the investigations and was not given any disciplinary hearing. She clarified that she was paid the salary for December 2023 after filing this suit.
14. The Respondent called Lucy Wairimu as RW1. She adopted her Witness Statement dated 10<sup>th</sup> February 2025 as her evidence in chief and produced the bundle of nine (9) documents Respondent's Exhibits.
15. In brief her evidence that she is the respondent's Chief People and Culture Officer and held this position the Claimant was summarily dismissed. On or about November 2023, Ms. Gladys Mwende Muneve, an employee of the organization, reported that, during an excursion to Mombasa, students were subjected to inappropriate conduct by one of the school's teachers, Jacob Luke Obonyo.

16. As a result, RW1 immediately initiated a thorough investigation, fully adhering to the established policy guidelines of the Respondent. The investigations confirmed that the teacher, Jacob Luke Obonyo, had indeed inappropriately handled the minors leading to suspicion of sexual abuse and misconduct. The matter was reported and the teacher was charged with case number **MCCHSO/E008/2024, Republic v Jacob Obonyo** before Children's Chief Magistrate Court at Meru.

17. During the course of her investigation, she further discovered that the Claimant, who was the Head Teacher at the time, along with Ms. Lucy Kaleche Muema, the Deputy Head Teacher, had received reports of alleged abuse involving the minors but failed to take appropriate action against the offending teacher.

18. In accordance with the Respondent's Child Protection Policy, it was the express duty of the Head Teacher, as the first point of contact, to receive and promptly act upon any reports of abuse to ensure the protection of minors from

further harm. As the designated authority within the school, the Claimant was obligated to take immediate and appropriate steps to safeguard the welfare of the students. However, the Claimant failed to discharge this critical responsibility, after receiving reports of alleged abuse, and thereby exposed the minors to continued risk contrary the policy.

19. RW1 contended that she summoned both teachers to provide their accounts of the events and further granted them an opportunity to submit written representations regarding the incidents in question. Upon reviewing their submissions, she conclusively determined that both the Claimant and the Deputy Head Teacher had been grossly negligent in their duties, failing to comply with the Respondent's Child Protection Policy (CPP) and Code of Conduct.

20. The failure by the Claimant and her Deputy to act not only breached the Respondent's established policies but also violated the constitutional principle of the best interests of

the child, resulting in a loss of trust, as well as a climate of fear and anxiety among the students within the school. Furthermore, the Claimant's inaction brought the school into disrepute, in direct contravention of its core mandate to serve as a safe haven for girls from vulnerable backgrounds.

21. In light of the gravity of the violations, the compelling evidence, and the paramount need to safeguard the minors from any further harm, she determined that the Claimant's conduct warranted summary dismissal. Consequently, in accordance with Section 44 of the Employment Act, 2007, she proceeded to terminate her employment with immediate effect.

22. On cross-examination, RW1 confirmed that the Claimant was an employee of the Respondent. She confirmed that the respondent's Disciplinary Policy provides for suspension pending investigation but the Claimant was not suspended.

23. She testified that there was a disciplinary hearing 11<sup>th</sup> December 2023 one week before the dismissal but admitted that she has not filed copy of the minutes of the hearing and

the invitation to the hearing. She confirmed that she the Claimant was not listed as a witness in the Charge sheet had produced. She admitted that in Page 84 and 87 of the respondent's bundle the student never mentioned the Head Teacher.

24. She testified that the claimant's salary for December 2023 was paid in March 2024 because the Claimant had not cleared with the Human Resource.

25. In re-examination, RW1 testified that the disciplinary hearing was done verbally and the Claimant attended. The panel was composed of the Programme Officer Kaleche Lucy Muema (Deputy Head Teacher), and Amy Hatchingson (Director for Education in the Respondent). After the hearing, it was clear that the Claimant was aware of the complaint of abuse and the Deputy Head Teacher said so.

26. The Respondent also called Martin Luther Juma as RW2. He adopted his Witness Statement dated 31<sup>st</sup> May 2024 as his evidence in chief and produced the Investigation Report

contained in the Respondent's supplementary bundle as an exhibit.

27. In brief he states that he is the Lead Investigator with Tunza Safeguarding Consultancy, an independent third party contracted by the Respondent to investigate a school-related safeguarding concern reported to them. His team investigated the safeguarding concerns reported to the Respondent involving alleged sexual abuse of female students by a male teacher from the Mathare School for Girls.

28. The investigation team collected witness statements and evidence that supported the allegations of child sexual abuse by the said teacher. From the investigation, he confirms that the child sexual abuse allegations were reported to the Claimant who was the Head Teacher at the time of the incident but she failed and/or neglected to respond appropriately, as required by the Respondent's Child Protection Policy.

29. The Claimant admitted that she had received the sexual abuse reports but did not think they were relevant and/or that they were lies. The lack of any documentation or records of the sexual abuse reports or the actions taken by the Claimant demonstrated a failure to comply with both the Child Protection Policy (CPP) and the Respondent's Code of Conduct. The Claimant's actions were a breach of the Respondent's Code of Conduct and her omission warranted summary dismissal under Section 44 of the Employment Act, 2007.

30. On cross-examination, RW2 testified that the Consultancy was registered in 2020 but he has not filed a Certificate of Registration. He contended that he had worked with Tunza for 5 years and that previously he was working in the same sector. He clarified that he is not registered as a private Investigator by the Private Security Regulations Authority, but he is a Safeguarding Consultant who does safeguard investigations. He clarified further that he does not require registration by said authority.

31. Referring to Page 98 of the Respondent's bundle he stated that he had face-to-face interviews with the survivors and witnesses but admitted that he did not file any extracts of the interviews. He further stated that he interviewed teachers but again admitted that he did not file any extracts of their interviews. He confirmed that he was the investigator and not Lucy Wairimu (RW1). He admitted that, the report at Page 98 indicated that the investigator was Lucy Wairimu. He admitted that the report was not signed by him or any person (Page 102 of the bundle).

32. In re-examination, RW2 clarified that he conducts safeguarding investigations, not security investigations. He explained that a Safeguarding Investigation relates to violation of policies and relationship with clients. He stated that Lucy Wairimu was part of the investigation team by virtue of her being the person in charge of the Human Resource. He contended that he authored the Investigation Report he produced and his finding on SCO2 (the Claimant) was that she had violated policy because of child sexual abuse.

was reported and she failed to act as required under the policy.

### **Submissions**

33. The Claimant filed submissions dated 5<sup>th</sup> January 2025 framing three issues for determination: whether there was constructive dismissal; whether the Claimant's termination was fair and lawful; and whether the Claimant is entitled to the prayers sought in the Statement of Claim.
34. On the issue of constructive dismissal, counsel relied on the case of **Nathan Ogada Atiagaga v David Engineering Limited (2015) eKLR** where the court defined constructive dismissal as occurring when an employee resigns because their employer's behavior has become so intolerable that the employee has no choice but to resign.
35. Counsel also cited **Coca Cola East & Central Africa Limited v. Maria Kagai Lugaga [2015] eKLR** where the Court of Appeal stated that the key element in constructive dismissal is that the employee must be entitled to leave without notice because of the employer's conduct.

36. Further reliance was placed on **Godfrey Allan Tolo v Tobias O. Otieno & another [2022] eKLR**. Counsel submitted that from the evidence tendered, there was no indication that the Claimant resigned; to the contrary, all evidence confirmed that the Claimant was summarily dismissed.

37. On whether the termination was fair and lawful, counsel submitted that Section 41 of the Employment Act, 2007 is couched in mandatory terms. Reliance was placed on **Anthony Mkala Chitavi v. Malindi Water & Sewerage Company Ltd [2013] KEELRC 920 (KLR)** where Justice Stephen Radido outlined the ingredients of procedural fairness: the employer should inform the employee of the charges, give the employee a proper opportunity to prepare and be heard, and hear and consider any representations before making the decision to dismiss.

38. Counsel also cited **Joshua Rodney Marimba v Kenya Revenue Authority [2019] eKLR** for the proposition that valid and fair procedure entails according the employee an

opportunity to know the reason for termination and air representations before termination is decided. The case of **Postal Corporation of Kenya v K. Tanui [2019] eKLR** was also cited where the court of Appeal cited for the four elements that must be discernible for procedure to pass muster: explanation of grounds of termination in a language understood by the employee; the reason for which the employer is considering termination; entitlement to the presence of another employee; and hearing and considering any representations made.

39. Counsel referred to the Respondent's own Employee Handbook 2014 at Pages 43-46, particularly Policy 6.1 titled Disciplinary Policy, which provides that no disciplinary action will be taken until allegations have been properly investigated and the employee has been given an opportunity to state their response, and that employees will be advised in writing of the nature of allegations and provided with copies of relevant evidence. Section 4 of the Policy provides for summary dismissal process commencing with immediate investigation, notice of intended suspension,

suspension with full pay, investigations, disciplinary hearing, and finally a decision.

40. Counsel submitted that no evidence was provided by the Respondent on the Claimant being informed of the allegations, any suspension pending investigation, or evidence of a disciplinary hearing. The Respondent disregarded their own process and proceeded to summarily dismiss the Claimant. Though RW1 informed the Court that there was a disciplinary meeting on 11<sup>th</sup> December 2023, minutes of the meeting were not availed, implying that there was neither service of a notice to show cause nor was there a disciplinary process prior to the claimant's summary dismissal.

41. Counsel relied on the obiter dicta of the Court of Appeal in **Kenya Union of Commercial, Food and Allied Workers v Kitui Water & Sanitation Company Limited [2025] KECA 1746 (KLR)** where the court noted that in employment disputes, absent procedural justice, renders termination unlawful and entitles the employee to a remedy.

42. On whether the Claimant is entitled to the prayers sought, counsel submitted that under Section 35(1) and 49 (1)(a) of the Employment Act, the Claimant is entitled the claim for Kshs. 156,000 being one-month salary in lieu of notice since she was not given any notice before the termination.
43. On compensation, counsel referred to Section 49(4)(a-m) of the Employment Act and submitted that the Claimant was employed on a 3-year fixed term contract which was to expire on 31st August 2025. Her Certificate of Service at Page 69 of the Respondent's Bundle, showed that she worked for the Respondent from 17th July 2014 to 18th December 2023, a period of 9 years 5 months. Accordingly, the counsel submitted that maximum compensation of 12 months will suffice.
44. Reliance was placed on **Adelaide Igoki Kiura v Platinum Credit Limited [2017] KEELRC 578 (KLR) ; G4S Kenya Limited v Khawanga (Employment and Labour Relations Appeal E046 of 2022) [2024] KEELRC 13202 (KLR);** and **Kenya Revenue Authority v Mwongela (Civil**

**Appeal E268 of 2022) [2025] KEAC 262 (KLR)** where the Court of Appeal awarded maximum compensation.

45. On December 2023 salary, counsel submitted that the Respondent paid the Claimant Kshs. 25,924.80 as her December 2023 salary, purportedly pro-rated. Counsel submitted that the Claimant is entitled to the balance of her December 2023 salary amounting to Kshs. 109,200 flowing from the finding that the termination was unfair and unlawful.

46. On costs, counsel relied on **Orix (K) Limited v Paul Kabeu & 2 others (2014) eKLR** where it was held that costs follow the event, and the successful party should ordinarily be awarded costs unless its conduct is such that it would be denied costs.

47. The Respondent filed submissions dated 5<sup>th</sup> February 2026. Counsel for the Respondent identified three issues for determination: whether the Claimant's dismissal was procedurally fair under Section 41 of the Employment Act, 2007; whether the dismissal was substantively fair under

Sections 43 and 44(4) of the Employment Act, 2007 and whether the Claimant is entitled to the reliefs sought.

48. On procedural fairness, counsel submitted that Section 41 of the Employment Act mandates that before termination, the employer shall explain allegations in an understandable language, allow representation, conduct a hearing, and consider representations. It was argued that the Respondent complied with these provisions as the Claimant was informed of allegations on 15<sup>th</sup> December 2023, during fact-finding, and she submitted a response. The Tunza investigation included her interview where she denied having received reports on safeguarding allegations, yet she had been informed but did not think it was relevant.

49. The dismissal letter dated 18<sup>th</sup> December 2023 included detailed findings, referenced the Report, and offered a 7-day appeal which the Claimant did not utilize. She failed to appeal her termination as the days lapsed on 25<sup>th</sup> December 2023. On 20<sup>th</sup> December 2023, the Claimant wrote to the Respondent denying the findings in the dismissal letter and

stated clearly that she did not wish to appeal against the decision of terminating her contract and requested her certificate of service. This voluntary non-utilization of the appeal mechanism affirms her acceptance of the process at the time.

50. Counsel relied on the case of **Kenya Revenue Authority v Mengineya Salim Murgani [2010] KECA 164 (KLR)** where the court stated that the fairness of a hearing is not determined solely by its oral nature and may be conducted through an exchange of letters. The court cited with approval the cases of **Local Government Board v Arlidge [1915] A.C. 120, 132-133**; **Selvarajan v Race Relations Board [1975] 1 WLR 1686, 1694**; and **R v Immigration Appeal Tribunal ex-parte Jones [1988] 1 WLR 477, 481** for the proposition that the hearing does not necessarily have to be an oral hearing in all cases, and decision-making bodies are masters of their own procedure provided they achieve the degree of fairness appropriate to their task.

51. Counsel submitted that the Claimant's written representations and the opportunity to appeal fulfilled the hearing obligation, especially given the severity and time-sensitive nature of child protection concerns. The swift investigation was proportionate, given the paramountcy of child protection under Article 53(1)(b) of the Constitution of Kenya, 2010, which prioritizes the best interests of the child over protracted processes that could endanger minors.

52. On substantive fairness, counsel referred to Section 45(2) of the Employment Act, 2007 which deems a termination unfair if the employer fails to prove that the reason is valid and fair and related to the employee's conduct, capacity, or the employer's operational requirements. Reliance was placed on **Walter Ogal Anuro v Teachers Service Commission [2013] eKLR** where the court emphasized that for a termination to be fair, the employer must prove valid reasons and fair procedure.

53. Section 44(4) of the Employment Act permits summary dismissal without notice for gross misconduct, including

under subsection (c) willful neglect to perform any work which it was the employee's duty to perform, or careless and improper performance endangering safety; and under subsection (e) knowingly failing or refusing to obey a lawful and proper command which it was within the scope of the employee's duty to obey.

54. It was submitted that the Claimant's breaches were valid and substantiated by the independent Tunza Safeguarding Investigation Report and corroborated by survivor testimonies in the ongoing criminal proceedings in **MCCHSO/E008/2024 Republic v Jacob Luke Obonyo**. As Head Teacher, the Claimant was the designated first point of contact for child abuse reports under the Child Protection Policy which mandates immediate escalation to safeguard minors. Her failure to act on reports from students, parents and her Deputy exposed vulnerable girls to ongoing risk, directly breaching Article 53(1)(b) of the Constitution.

55. Counsel relied on the case of **Ojanga v E.A. Cables Limited [2024] KEELRC 1933 (KLR)** where the court

stated that where an act of misconduct is alleged, an employee is entitled to a hearing, and willful disobedience of the employer justifies dismissal. The Claimant's inaction and conduct was in complete disregard towards her duties as the Head Teacher and endangered children, justifying dismissal under Section 44(4)(c) for willful neglect.

56. Further reliance was placed on **Agnes Murugi Mwangi v Barclays Bank of Kenya Limited [2013] KEELRC 910 (KLR)** where the court found that policy breaches were valid grounds of termination as the employee's conduct fell below the required standard of integrity. Similarly, the Claimant's role in child protection demanded unwavering integrity, and her violations provided a valid substantive reason for dismissal.

57. On the reliefs sought, counsel submitted that the Respondent has proved that the dismissal was procedurally and substantively fair, precluding any relief. The claim for one-month salary in lieu of notice is obviated by gross misconduct under Section 44(3) of the Act. The claim for

maximum compensation under Section 49(1)(c) should be declined as the Respondent has proved valid substantive reason for termination. The December 2023 salary was paid pro-rated up to the dismissal date, and no balance is due. The certificate of service is ready for collection. On costs, counsel relied on the writings of Justice (Retired) Kuloba in **Judicial Hints on Civil Procedure, 2<sup>nd</sup> Edition, (Nairobi) Law Africa 2011, page 94** and the case of **Haraf Traders Limited v Narok County Government [2022] eKLR** which cited **Republic v Rosemary Wairimu Munene, Ex-parte Applicant v Ihururu Dairy Farmers Co-operative Society Ltd, Judicial Review Application No. 6 of 2014** for the principle that costs follow the event but are at the discretion of the court.

### **Issues for Determination**

58. Having considered the pleadings, the evidence adduced by both parties, and the submissions filed, the following issues fell for determination:-

- a) Whether the reason for the Claimant's summary dismissal was valid and fair.
- b) Whether the summary dismissal of the Claimant was procedurally fair.
- c) Whether the Claimant is entitled to the reliefs sought.

## **Analysis and Determination**

### **Reason for the summary dismissal**

59. Section 43(1) of the Employment Act, 2007 places upon the employer the burden of proving the reason or reasons for the termination of an employee's employment. Where the employer fails to do so, the termination is deemed to be unfair within the meaning of Section 45. Besides Section 45(2) provides that 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 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."***

60. The above provision clarifies the dual requirement of substantive justification and procedural fairness for a termination to be deemed fair. In this case the dismissal letter dated 18<sup>th</sup> December 2023 cited the following three reasons for the Claimant's summary dismissal:-

***“(1) Fundamental breach of your employment contract by going against your absolute duty to protect children and following the Complaint Procedure of SHOFCOs Child Protection Policy***

***(2) Breach of the SHOFCO Employee Code of Conduct.***

***(3) Failing to follow your employers lawful order and command as contained in the Child Protection Policy Code of Conduct and acting in a manner constituting the criminal offence of being an accomplice after the fact to a felony under sections 396 and 397 of the Penal Code."***

61. The above reasons related to breach of contract and employer's policies by failing to failing or neglecting to perform duties under the contract of service. Section 44(4) of the Employment Act, 2007 provides for summary dismissal for the following grounds:-

***"(c) an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it is his duty, under his contract, to perform carefully and properly;***

***(e) an employee knowingly fails, or refuses, to obey a lawful and proper command which it was***

***within the scope of his duty to obey, issued by his employer or a person placed in authority over him by his employer;"***

62. The Respondent contended that the Claimant, as Head Teacher at Mathare School for Girls, fundamentally breached her duty to protect children by failing to report or act on allegations of child sexual abuse made against a teacher, one Jacob Luke Obonyo. The Respondent relies on the independent Safeguarding Investigation Report by Tunza Safeguarding and the ongoing criminal proceedings in **Republic v Jacob Luke Obonyo, MCCHSO/E008/2024** at the Children's Chief Magistrate Court, Meru.

63. The evidence on record indicates that there were serious allegations of child sexual abuse involving a teacher at the school. RW1 testified that she received a report from Ms. Gladys Mwendu Muneve regarding an incident wherein students, during an excursion to Mombasa, were subjected to inappropriate conduct by the teacher. The Tunza

Investigation Report, despite its procedural shortcomings, indicates that allegations of abuse were made against the said teacher.

64. The Claimant testified that she never received any complaint from students after the Mombasa trip and that she was not aware that multiple students reported abuse by the teacher. RW2, however, testified in his Witness Statement that the Claimant admitted that she had received the sexual abuse reports but did not think they were relevant and/or that they were lies.

65. I have considered the evidence on record and especially the court proceedings for the Child Protection case. It is clear that the victims/survivors of the abuse were already in high School when they gave evidence against the perpetrator. They were mature enough to tell exactly what happened. They were unequivocal that they never reported the incidences of sexual abuse by the teacher both in school and during the trip to Mombasa.

66. The survivors also stated the reason for not reporting the vice as, threats from the Deputy Head Teacher. To that extend, it is clear that there is no proof that the claimant received any report of the alleged sexual abuse of the school children under her watch. Consequently, the first allegation in the termination letter was not a valid reason for dismissing the Claimant.

67. However, the second and third allegations have been approved. There is no dispute that the same perpetrator organized early morning classes for students at the school. There is further no dispute that the school organized a trip to Mombasa in or about November 2023.

68. The claimant did not deny that there were early morning remedial classes in the school involving the said perpetrator. She also did not explain what measure she put in place to ensure that the security of the girls was taken care of.

69. As regards the trip to Mombasa, the claimant confirmed that the school organized for the same. She did not also explain the measures she put in place to ensure that the security of

the girls was not compromised especially at the beach. Consequently, I find and hold that the claimant performed her duties negligently by failing to ensure the best interest of the school children was upheld during the early morning classes and the trip to coast. The said infraction amounted to gross misconduct under section 44(3) and 44(4) (c) & (e) of the Employment Act, *supra*, and the respondent was entitled to summarily dismiss her.

**Whether the summary dismissal of the Claimant was procedurally fair**

70. Section 41 of the Employment Act, 2007 provides the statutory framework for procedural fairness in cases of termination on grounds of misconduct, thus:-

***"(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 summary 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."***

71. The mandatory nature of this provision has been emphasized in numerous judicial decisions. In the case of **Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd [2013] KEELRC 920 (KLR)**, Justice Stephen Radido elucidated the ingredients of procedural fairness as follows:-

***"63. And what does section 41 of the Act require. The first observation is that the responsibility established is upon the shoulders of the employer. In a claim for unfair termination or wrongful dismissal on the grounds of misconduct, poor performance or physical incapacity, the employer is duty bound to comply with the requirements of section 41.***

***64. 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.***

***65. 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***

***defence/state his case in person, writing or through a representative or shop floor union representative if possible.***

***66. 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."***

72. In **Postal Corporation of Kenya v Andrew K. Tanui**

**[2019] eKLR** the Court of Appeal held as follows:-

***"Four elements must thus be discernible for the procedure to pass muster:***

***(i) an explanation of the grounds of termination in a language understood by the employee;***

***(ii) the reason for which the employer is considering termination;***

***(iii) entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;***

***(iv) hearing and considering any representations made by the employee and the person chosen by the employee.”***

73. I have carefully considered the evidence on record regarding the procedure adopted by the Respondent before dismissing the Claimant. The Respondent's own Employee Handbook 2014 provides several principles under Policy 6.1 of the Staff Handbook (page 43 of the Respondent's bundle) including : -

***“ No disciplinary action will be taken in relation to an employee until the allegations have been properly investigated, and the employee concerned has been given an opportunity to state his or her response; Employees will be advised in writing of the nature of the allegations that have been made against them and will be provided with copies of any evidence (such as witness statements) that is relevant in determining the allegations.”***

74. Under stage 4 of Policy 6.1 summary dismissal process must be preceded by an investigation, followed a disciplinary hearing, and finally a decision. The policy states:-

***"A disciplinary hearing date will then be set and the employee will be informed in the writing of the dates. The employee will be allowed to bring witnesses to the disciplinary hearing. The employee will also be entitled to reasonable time to prepare for the hearing.***

***As much as possible, an impartial chairperson will be appointed to chair the hearing.***

***The allegations will be read out to the employee. This should be put in writing. The employee will then be given a chance to defend himself/herself against the allegations. After having listened to the evidence presented by the Manager/Program Officer, the chairperson will consider whether the employee is guilty or not of the charges.***

***After considering all the evidence and documents placed before the hearing and after having given consideration to any mitigation offered by the employee, the chairperson may decide whether to terminate the services of the employee,***

***reinstate the employee or any other appropriate action.”***

75. The evidence adduced before this Court reveals significant procedural shortcomings. RW1 testified that there was a disciplinary hearing on 11<sup>th</sup> December 2023 where the Claimant appeared before her, the Programme Officer Kaleche Lucy Muema (Deputy Head Teacher) and Amy Hatchingson (Director for Education). However, RW1 did not produce minutes of the said hearing as an exhibit. She also did not produce any written charges and hearing notice inviting the claimant to the hearing. Consequently, it is clear that the disciplinary procedure set out above was not followed and it rendered the summary dismissal unfair within the meaning of section 45 of the Employment Act.

76. The Respondent dismissed the claimant without giving her a fair hearing as contemplated under section 41 of the Act and its own Staff Handbook. It is clear that the Respondent merely dismissed the claimant and advised her to submit an appeal but the Claimant did not appeal. It would appear that

the Respondent wanted to hear the Claimant after the decision to dismiss her had been made.

77. The Court of Appeal in **Kenya Union of Commercial, Food and Allied Workers v Kitui Water & Sanitation Company Limited [2025] KECA 1746 (KLR)** observed: -

***"It is true in employment disputes that absent procedural justice an employer may most likely be found to be in violation of the law and the employee will be entitled to a remedy. Sections 41 to 49 of the said Act cover areas relating, inter alia, to notification and hearing before termination on grounds of misconduct; reason for termination; summary dismissal; unfair termination; reasons for termination or discipline; complaint relating to summary dismissal or unfair termination; representation during disciplinary hearing and remedies for wrongful dismissal and unfair termination. Those provisions give in detail the language to be used***

***by the employer at the disciplinary hearing, which the employee understands and he is entitled to representation by a shop steward or another employee, amongst other issues that are set out."***

78. The Respondent relied on the case of **Kenya Revenue Authority v Mengineya Salim Murgani [2010] KECA 164 (KLR)** for the proposition that a hearing does not necessarily have to be oral and may be conducted through exchange of letters. However, in the instant case, the right to an oral hearing for the claimant was granted by section 41 of the Employment Act and Policy 6.1 of the respondent's Staff Handbook. She never waived that right and the respondent did not tender any evidence to prove otherwise. Where a statute or regulation provides for an oral hearing, the employer is bound to accord the employee hearing unless the employee expressly or impliedly waives that right. In such cases the employer bears the burden of proof

**Whether the Claimant is entitled to the reliefs sought**

79. The Claimant prayed for declaratory order that her dismissal was unfair and unlawful, one month's salary in lieu of notice, compensation for unfair termination equivalent to 12 months' gross salary, and the unpaid December 2023 salary.

80. In view of the finding above that the summary dismissal was not done in accordance with procedure provided under section 41 of the Employment Act and Policy 6.1 of the respondent's Staff Handbook, I award the declaration that the summary dismissal of the claimant was unfair and unlawful.

81. Accordingly, she is entitled to payment of one-month salary in lieu of notice and compensation for the unfair termination. She worked for over nine years but she contributed to her dismissal through gross misconduct. Exposing young girls to sexual abuse by their male teachers is an act of gross negligence with irreversible consequences on the physical and psychological wellbeing of the survivors therefore I award two month gross salary as compensation for the

unfair termination. Her salary was Kshs. 156,000 and therefore she will get Kshs 312,000.

82. The prayer for salary for December 2023 and certificate of service are declined because the claimant admitted in evidence that she received the same after filing the suit.

### **Conclusion**

83. I have found that the summary dismissal of the Claimant was unfair and unlawful and awarded her damages under section 49 of the Employment Act. In the end I enter judgment for her against the Respondent as follows: -

a) A declaration be and is hereby issued that the Respondent's termination of the Claimant's employment was unfair and unlawful.

b) The Respondent shall pay the Claimant

i. salary in lieu of notice Kshs. 156,000

ii. compensation Kshs. 312,000

**total Kshs. 468,000**

c) The award is subject to statutory deductions.

d) The Claimant is awarded costs of the suit plus interest at court rates from the date of this Judgment.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN OPEN COURT AT NAIROBI THIS 18<sup>TH</sup> DAY OF MARCH, 2026.**

**ONESMUS MAKAU**

**JUDGE**

**Appearance:**

Muriithi for the Claimant

Nyanchera for Mwagambo for the Respondent