

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
ELRC APPEAL NO. E040 OF 2024

BETWEEN

JOASH **ANYONA**
ONDIEKI.....APPELLANT

AND

TEACHERS SERVICE COMMISSION.....RESPONDENT

(Appeal from the Judgment of the Chief Magistrate’s Court at Kerugoya in CMCELRC Cause No. E005 of 2022 delivered on 31st October 2024 by Hon. Martha W. Mutuku (Chief Magistrate))

JUDGMENT

1. The Appellant, **Joash Anyona Ondieki**, instituted proceedings against the Respondent before the Chief Magistrate’s Court at Kerugoya in *CMELRC Cause No. E005 of 2022*. In his Memorandum of Claim, the Appellant averred that he was employed by the Respondent as a Graduate Teacher II pursuant to a letter dated 31st July 2017, with confirmation taking effect from 1st September 2016.

2. The Appellant averred that by a letter dated 25th May 2021, he was interdicted without lawful justification on allegations that he had engaged in sexual relations with two students at Rwambiti Secondary School. He maintained that his eventual dismissal was unfair, unlawful, malicious, and intended to embarrass him among right-thinking members of the society.
3. He further contended that following his dismissal, he became entitled to retirement benefits, pay in lieu of notice, gratuity, leave allowance, and other outstanding dues in accordance with the applicable pension scheme rules.
4. The Appellant further asserted that he was denied a fair hearing in breach of the rules of natural justice. Consequently, he sought an order of reinstatement, notice pay, rental and commuter allowances, gratuity, retirement benefits, compensation for unlawful termination, re-registration as a teacher, and issuance of a certificate of service.
5. The Respondent opposed the claim through a Memorandum of Defence dated 16th November 2022, contending that in March 2021, it received reports that the Appellant had, on several occasions, engaged in sexual relations with two students at Rwambiti Secondary School. The Respondent averred that the Appellant was issued with a Notice to Show Cause and afforded an opportunity to respond, but his explanation was found to be unsatisfactory.

6. It was the Respondent's assertion that the Appellant was invited to a Board of Management meeting where he was given an opportunity to cross-examine witnesses, including the alleged victims. Thereafter, he was interdicted and later invited, by a letter dated 5th November 2021, to attend a disciplinary hearing scheduled for 6th December 2021. The Appellant attended the hearing, accompanied by a witness, and was allowed to present his case, cross-examine witnesses, and call his own witness. Following the hearing, the Respondent resolved to dismiss him from employment.

7. The Respondent maintained that the Appellant was accorded a fair hearing in compliance with the law and that the dismissal was based on valid and justifiable grounds.

8. At the trial Court, both parties adduced oral evidence which was subjected to cross-examination. The Appellant testified in support of his case and further called an additional witness, who was one of the alleged victims of the sexual misconduct attributed to him. On its part, the Respondent called Mr. David Muga Rugendo and Ms. Catherine Kertich as witnesses. Thereafter, the parties filed written submissions, which the trial Court considered in its evaluation of the evidence.

9. Ultimately, the trial Court dismissed the Appellant's claim with costs. In her judgment, the learned trial Magistrate found that the reasons for the Appellant's dismissal had been established and existed at the material time, thereby justifying the termination. The Court further held that the Respondent had substantially complied with the requirements of procedural fairness and due process.

The Appeal

10. The Appellant was dissatisfied with the findings and orders of the trial Court, and consequently, lodged the present Appeal raising the following five (5) grounds as set out in the Memorandum of Appeal dated 26th November 2024:

- 1) THAT the Honourable learned trial Magistrate erred in law and fact in arriving at the conclusion that the Respondent had valid reasons to dismiss the Appellant's employment.**
- 2) THAT the Honourable learned trial Magistrate erred in law and fact in holding that the Appellant had been accorded a fair hearing before the decision to terminate his employment.**
- 3) THAT the Honourable learned trial Magistrate erred in law and fact in arriving at the conclusion that the Appellant was undeserving of the reliefs that he had sought in the Memorandum of Claim.**

- 4) **THAT the Honourable learned trial Magistrate erred in law and fact for considering irrelevant matters and against the weight of the evidence on record in arriving at the said decision in favour of the Respondent as against the Appellant.**
- 5) **THAT the Honourable learned magistrate erred in law and in fact in failing to consider or even adequately adopt and appreciate the written submissions of the Claimant on record and the authorities annexed therein in support of the Appellant's case.**

11. Accordingly, the Appellant seeks the following orders from this Court:

- 1) **THAT the appeal herein be allowed.**
- 2) **THAT the costs of this appeal be awarded to the appellant.**

The Submissions

12. The Appeal was canvassed by way of written submissions. Both parties complied and filed written submissions, which the Court has duly considered.

13. On his part, the Appellant contended that the learned trial Magistrate erred both in law and fact in concluding that he had been accorded a fair hearing prior to the termination of his employment.

14. In the same breath, the Appellant argued that his dismissal was premised on allegations that he had engaged in sexual relations with a learner (PW2), who later recanted her statement and was not called to testify before the disciplinary panel. He maintained that he was never formally charged with any sexual offence arising from the allegations. Consequently, he asserted that the termination was unfair for lack of a valid reason as required under Section 43 of the Employment Act.

15. On the other hand, the Respondent submitted that the learned trial Magistrate correctly found that there existed a valid reason for dismissing the Appellant. It maintained that, at the time of termination, it genuinely believed that the Appellant had engaged in a sexual relationship with a learner. In support of this position, reliance was placed on the case of ***Mobile Link (K) Limited v Tabitha Masege [2017] eKLR***.

16. Referencing the case of ***Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR***, the Respondent further submitted that there were reasonable and sufficient grounds at the time of dismissal to conclude that the Appellant had committed gross misconduct.

17.The Respondent further argued that it duly discharged its statutory obligations under Sections 41 and 43 of the Employment Act by demonstrating that the termination was both procedurally and substantively fair.

18.The Respondent maintained that the learned Magistrate properly held that the Appellant had been accorded a fair hearing prior to the termination decision.

19.It was further submitted by the Respondent that the Appellant was not entitled to the reliefs sought, as the termination was lawful and any award in his favour would amount to unjust gain.

Analysis and Determination

20.Being a first appellate Court, this Court is enjoined to re-evaluate the evidence that was before the trial Court, together with the judgment, and to arrive at its own independent determination on whether the appeal is merited. In doing so, the Court is entitled to subject the entire record to a fresh and exhaustive scrutiny and draw its own conclusions, while bearing in mind that it did not have the benefit of seeing and hearing the witnesses testify. This position was enunciated in the case of *Selle & another vs Associated Motor Boat Co. Ltd. & others (1968) EA 123*.

21. Upon reviewing the Record of Appeal, the rival submissions, and the applicable law, the following issues arise for determination: -

- a) Whether the trial Court erred in holding that the Respondent was justified in dismissing the Appellant;*
- b) Whether the trial Court erred in finding that the Appellant was accorded a fair hearing prior to dismissal from employment; and*
- c) Whether the Appellant is entitled to the reliefs sought before the trial Court.*

Justifiable reason for dismissal?

22. The Appellant has taken issue with the learned trial Magistrate's finding that the Respondent had a justifiable reason to dismiss him from employment.

23. A re-examination of the record reveals that the Appellant's dismissal was premised on allegations that he engaged in sexual relations with his student, BW, a Form 4L student, on diverse dates, namely 7th, 14th, and 21st February 2021, at his residence in Kabeti village while serving as a teacher at Rwambiti Secondary School.

24. The Appellant consistently denied the allegations leveled against him and maintained that BW had been coerced by the school principal, **David Mugo Rugendo (DW1)**, into implicating him.

25. The record further shows that, at the trial Court, BW testified in support of the Appellant's case, asserting that she had been compelled by Mr. Rugendo to record a statement alleging a sexual relationship with the Appellant. She claimed that she had been threatened with the denial of an opportunity to sit for her Kenya Certificate of Secondary Education examination if she failed to comply.

26. The learned trial Magistrate, however, found that BW had not formally retracted the statement she had initially recorded, which statement had been considered by the Respondent's disciplinary panel alongside other evidence prior to the Appellant's dismissal.

27. In support of its case at the trial Court, the Respondent produced, as part of its evidence, a handwritten statement by BW detailing how the Appellant initiated contact with her through Facebook and subsequently engaged in sexual relations with her on several occasions. In that statement, BW further alleged that the Appellant would give her money after the encounters and, at times, record the acts on video.

28. The Respondent also tendered in evidence a handwritten statement by GW, described as BW's close friend, in which she stated that BW had confided in her about being romantically involved with the Appellant and having had sexual relations with him on multiple occasions. GW further indicated in her statement that she had advised BW against the relationship.

29. In light of GW's statement, which corroborates BW's earlier account, the Appellant's contention that BW was coerced into implicating him is considerably weakened.

30. It is also noteworthy that, during cross-examination, BW conceded that her testimony before the trial Court was intended to assist the Appellant in regaining his employment.

31. In the circumstances, it is more than probable that BW altered her account during the trial with a view to supporting the Appellant's reinstatement to employment. Indeed, it is questionable why BW did not repudiate her initial statement prior to the Appellant's dismissal from employment.

32. Upon a re-evaluation of the evidence presented before the trial Court, it is evident that the Appellant's conduct towards BW, who was his student at the

material time, was improper and amounted to a clear violation of the professional boundaries inherent in the teacher–student relationship.

33.As a teacher, the Appellant was under a strict duty to uphold professionalism in all interactions with students and to refrain from any conduct of a sexual nature, whether verbal or physical.

34.The conduct attributed to the Appellant in the statements of BW and GW was manifestly improper and fell short of the standards expected of a teacher.

35.As an employer of teachers within learning institutions, the Respondent owed a duty of care to the learners by ensuring a safe learning environment, both physically and emotionally. This obligation necessitated the investigation of allegations of sexual misconduct and the taking of appropriate disciplinary action where such allegations were substantiated.

36.Indeed, a failure by the Respondent to act on the allegations of sexual misconduct against the Appellant would have exposed it to potential vicarious liability for the wrongful acts of its employee, particularly where such acts were committed in the course of employment, as was the case herein. A pertinent illustration is found in the case of *Teachers Service Commission v WJ & 5 others [2020] KECA 741 (KLR)*, where the Court of Appeal affirmed the High

Court's finding that the employer, the State, and the learning institution were jointly and vicariously liable for the wrongful acts of sexual misconduct perpetrated by a teacher against learners.

37. In that decision, the Court of Appeal further held that an act may be regarded as having been committed in the course of employment where a close connection exists between the employee's unauthorized conduct and the duties of their employment.

38. It should also be appreciated that the Respondent was not required to prove the alleged sexual misconduct beyond reasonable doubt. The applicable standard of proof in this case was on a balance of probabilities.

39. Under **Section 43(2) of the Employment Act**, the reason or reasons for termination are those which the employer, at the time of termination, genuinely believed to exist and which formed the basis for the decision to terminate the employee's services. This position is supported by the decision in ***Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR***, where the Court of Appeal held that the standard of proof in employment disputes is on a balance of probabilities and not beyond reasonable doubt, and that an employer is only required to demonstrate the reasons it genuinely believed to

exist. The Court further emphasized that it is not for the Court to substitute its own view of reasonable grounds for that of the employer.

40.Guided by the foregoing authority, the Court finds that the Respondent was only required to demonstrate that, at the time of termination, it held a genuine belief in the existence of the reasons for the Appellant's dismissal from employment.

41.In the present case, and on the basis of the written statements of BW and GW, this Court finds that the Respondent had reasonable and sufficient grounds to initiate disciplinary action against the Appellant.

42.Consequently, this Court is of the view that the learned trial Magistrate did not err in finding that the Respondent was justified in dismissing the Appellant from employment.

Fair hearing?

43.The Appellant has challenged the learned trial Magistrate's finding that he was accorded a fair hearing prior to the Respondent's decision to dismiss him from employment.

44.Pursuant to **Section 45(2)(c) of the Employment Act**, an employer is required to demonstrate that termination of employment was effected in accordance with

fair procedure. **Section 41 of the Act** sets out the procedural safeguards to ensure a fair hearing, including informing the employee of the allegations levelled against them and affording them an opportunity to respond, with the assistance of a fellow employee or a shop floor union representative of their choice.

45. It is not in dispute that in the present case, the Appellant was first issued with a Notice to Show Cause detailing the allegations against him and which he duly responded to. Thereafter, the Respondent was invited to appear before the Board of Management of Rwambiti Secondary School on 24th March 2021, where, after hearing him and other witnesses, the Board found that he had a case to answer and consequently issued him with a letter of interdiction.

46. The letter of interdiction dated 25th March 2021 particularised the allegations against the Appellant and granted him 21 days within which to respond.

47. The record bears that the Appellant responded to the letter of interdiction through his response dated 19th April 2021. Alongside his response, he also submitted witness statements from his wife, pastor, and landlord. Subsequently, by a letter dated 5th November 2021, he was invited to appear before a disciplinary panel convened by the Respondent on 6th December 2021.

48. At the trial Court, the Respondent produced minutes of the disciplinary committee meeting held on 6th December 2021. From those minutes, it is evident that the Appellant fully participated in the proceedings, presented his defence, and his wife testified in support of his case.

49. In addressing the import of Section 41 of the Employment Act, the Court of Appeal in *Postal Corporation of Kenya v Andrew K. Tanui [2019] eKLR* stated 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.”

50. Applying the foregoing binding precedent to the facts of the present case, this Court is persuaded that the Respondent, in terminating the Appellant’s employment, complied with the minimum procedural requirements of a fair

hearing under **Section 41 of the Employment Act**. This is supported by the fact that the Appellant was duly notified of the allegations against him through the interdiction letter and was afforded an opportunity to attend a disciplinary hearing and make both written and oral representations in response to the charges.

51. In the circumstances, this Court finds no basis to disturb the trial Court's finding that the Respondent substantially complied with the requirements of procedural fairness prior to dismissing the Appellant from employment.

Reliefs?

52. In the absence of a finding of unfair termination, the reliefs sought by the Appellant before the trial Court do not lie.

Orders

53. Ultimately, I find no basis upon which to interfere with the decision of the learned trial Magistrate. Accordingly, the instant Appeal fails and is dismissed in its entirety with costs to the Respondent.

DATED, SIGNED and DELIVERED at **NYERI** this **17th** day of **April** 2026.

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STELLA RUTTO

JUDGE

In the presence of:

For the Appellant

Ms. Muthoni

For the Respondent

Mr. Jusa instructed by Ms. Njau

Court Assistant

Ndati

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 had 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.

STELLA RUTTO

JUDGE