



**Teacher Service Commission v Adhiambo (Civil Appeal
427 of 2017) [2024] KECA 620 (KLR) (24 May 2024) (Judgment)**

Neutral citation: [2024] KECA 620 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 427 OF 2017
SG KAIRU, P NYAMWEYA & GWN MACHARIA, JJA
MAY 24, 2024**

BETWEEN

TEACHER SERVICE COMMISSION APPELLANT

AND

JANE CONSOLATA ADHIAMBO RESPONDENT

*(An appeal from the Judgment of the Employment and Labour
Relations Court of Kenya at Nairobi (Mathews Nderi Nduma J.)
delivered on 21st July 2017 in Nairobi ELRC Cause No .459 of 2014))*

JUDGMENT

1. The Teachers Service Commission, the Appellant herein, has appealed a judgment delivered on 21st July 2017 by the Employment and Labour Relations Court at Nairobi (Nderi Nduma J.) in ELRC Cause No. 459 of 2014, in which Jane Consolata Odhiambo, the Respondent herein, was awarded a total sum of Kshs 1,593,696/=. The said award was made up of compensation of twelve (12) months' salary for wrongful and unfair dismissal in the sum of Kshs 122,592/- and Kshs 1,471,104/= as salary arrears. The Respondent had filed a claim in the Employment and Labour Relations Court at Nairobi (hereinafter "ELRC") seeking exemplary damages of Kshs 11,716,288/=-, special damages of Kshs 153,240/=-, interest thereon, costs, and a certificate of service, arising from the termination of her service by the Appellant on 1st December 1999, which she claimed was without justifiable cause, provocation, lawful notice, reason or explanation.
2. The Respondent's case was that she was employed by the Appellant on 1st May 1989 on permanent and pensionable terms, and it was a general term of the employment that she was entitled to leave, and various allowances and dues. Further, that termination of service was upon issuance of not less than thirty (30) days' notice. On 22nd August 1999, the Respondent applied for personal unpaid leave for two (2) years to commence from January, 2000, whereupon there was no communication



- to her from the Appellant, and instead was shocked that the Appellant terminated her service on 1st December 1999. She stated that from January 2000, “she moved from office to office” seeking answers, an explanation, and right of appeal in accordance with statute but to no avail, and that after 12 years of waiting, the Respondent received a letter of interdiction/ dismissal from service dated 20th September 2012. She stated that as at 1st December 1999 due to exemplary service in the teaching fraternity, she had been promoted to a head teacher based in Wiobiero Primary School, Homa Bay County, and was earning a gross salary of Kshs 10,216/-.
3. The Respondent averred that the dismissal was unlawful, unfair, unjustifiable and unprocedural as she was not offered any notice, right of audience, right of appeal or warning letter as prescribe by the Employment Act or the Teachers Service Act, nor was she given one (1) month salary in lieu of Notice nor payment for work done in the months of November & December, 1999. Additionally, the grounds alleged for dismissal were malicious, fabricated, couched in deceit, lacking in merit and did not in any way directly touch or relate to her employment with the Appellant. Y7She concluded that if the Appellant had wished to terminate the Respondent’s employment, they should have issued a one (1) month notice and paid her salary for November and December 1999 and officially communicated the dismissal and termination of employment as at 1st December 1999 and not 20th September 2012.
 4. The Respondent annexed various letters from the Appellant in response to her queries, namely, one dated 25th March 2000 informing her that no unpaid leave existed and that her resignation from 1st January 2000 was accepted subject to clearance; one dated 31st July 2000, noting that the Code of Regulations for teachers did not have unpaid leave and she was deemed to have resigned; and one dated 17th September 2002 referencing the Respondent’s letter on reinstatement, and advising her to apply for employment when vacancies were advertised. She also annexed a letter dated 19th March 2004 by the Kenya National Union of Teachers to the Appellant, seeking to have the Respondent reinstated. In terms of process, the Respondent averred that on 13th August 2012, she received an invitation to a disciplinary hearing after having received a letter of interdiction dated 6th January 2012, and later received a letter of dismissal dated 20th September 2012 with effect from 12th September 2012. The reason for the dismissal was deserting duty from 3rd January 2000 while a teacher at Wiobiero primary School. The Respondent in response wrote a letter dated 8th October 2012, urging the Appellant to reconsider her dismissal.
 5. In response, the Appellant filed a reply dated 25th April 2014 in opposition to the claim, in which it confirmed that the Respondent was employed on permanent and pensionable terms, and that by a letter dated 22nd August 1998 she applied for unpaid leave for two years with effect from 1st January 2000. However, that there was no provision for unpaid leave in the Code of Regulations for Teachers (CORT) in force then, and that before the Respondent could get proper communication, she left her work station with effect from 1st March 2000 without formal approval or authority. The Appellant claimed that the Respondent’s action was in breach of CORT and amounted to desertion, thus rendering the Respondent liable for disciplinary action. The Respondent was subsequently issued with a letter of interdiction on 6th January 2012 and responded by a statement dated 12th January 2012, which was considered during the disciplinary hearing. That after careful deliberations, consideration and evaluation of the evidence, the Respondent was duly informed of the Appellant’s decision to dismiss her through the letter dated 20th September 2012. The Appellant stated that it was their mandate to ensure that the members of the teaching profession adhere to the CORT as well as the relevant legal instruments guiding the professional conduct, and that the dismissal of the Respondent was lawfully effected pursuant to the spirit and provisions of the law specifically the Teachers Service Commission Act, the principles of natural justice and the public interest.



6. The Respondent gave sworn testimony during the hearing reiterating the averments in her claim, and produced the various letters she relied on as exhibits. The Appellant called Reuben Nyasiri, its assistant deputy director for human resource management as its sole witness, whose testimony was that the Respondent left the station of work without permission and her whereabouts was unknown for 2 years, and that this amounted to desertion. In his determination, the learned trial Judge (Nderi Nduma J.) found that the letters dated 25th March 2000 on 31st July 2000 by the Appellant were inconsistent with its allegations that the Respondent deserted work, and that it was clear that her employment was terminated for reasons of “resignation” effective 1st January 2000. Further, that the purported interdiction by a letter dated 6th January 2012 was a sham and a nullity since the employment of the claimant had been long terminated, and the purported disciplinary hearing was also a sham and a nullity, the employment of the claimant having been terminated with effect from 1st November 2000.
7. The learned trial Judge therefore held that the claim that the Respondent deserted work was not supported by any tangible evidence, the disciplinary process was unfair and contrary to the TSC Code and rules of natural justice, coming after twelve (12) years from the date of purported desertion on 3rd January 2000, and that the Respondent had proved on a balance of probability that the dismissal was not for a valid reason and was not effected in terms of a fair procedure contrary to sections 41, 43 and 45 of the *Employment Act*, 2007.
8. On the remedies sought, the learned Judge found that the Appellant was not entitled to a refund of the salary payments made to the Respondent from the date of purported resignation on 1st January 2000 and in any event no counterclaim was made. That to the contrary, the Respondent was entitled to payment of the arrears of her monthly salary of Kshs.10,216/= for the period from 1st January 2000 up to the date she was issued with a letter of dismissal dated 20th September 2012, since as a matter of fact and law, the claimant did not desert her work and is entitled to the payment in the sum of Kshs.1,471,104 less the salary paid and received by the Respondent with interest at court rates from the date of dismissal on 20th September 2012 till payment in full. In addition, that the Respondent was entitled to compensation for wrongful and unfair dismissal from employment on 20th September 2012, and that in terms of section 49(1)(c) as read with section 49(4) of the *Employment Act*, this was a proper case for the court to award the maximum damages of the equivalent of twelve (12) months’ salary.
9. The reasons proffered by the trial Judge for this position were that the Respondent was unlawfully prevented from doing her work for over twelve years; she suffered pain, mental anguish and embarrassment in her own work due to the purported resignation which was non-existent and hence was denied the right to work by the Appellant for a prolonged period; she was not paid any terminal dues upon dismissal; and that she lost almost all her youthful years to do the work she had been trained to do. The learned trial Judge therefore awarded the Respondent twelve (12) months’ salary for wrongful and unfair dismissal in the sum of Kshs.122,592/=, with interest at court rates from date of judgment till payment in full. Lastly, the learned trial Judge noted that an order for reinstatement would have been appropriate in the circumstances but due to passage of time, the court could not award it.
10. The Appellant being aggrieved by the decision of the ELRC filed a Memorandum of Appeal in this Court dated 4th December 2017 and lodged on 29th December 2017, in which eight (8) grounds of appeal have been raised, namely:
 1. The learned Judge erred in law when he awarded the Respondent maximum compensation provided under the *Employment Act* without any justifiable reason and/or explanation,



thereby denying the Appellant equal protection and benefit of the law contrary to the provision of Article 27 (1) of the Constitution.

2. The learned Judge erred in law by awarding the Respondent 12 years' salary arrears in addition to the maximum compensation of 12 months' salary contrary to the provisions of section 49 (1) (c) of the Employment Act
 3. The learned Judge erred in law by awarding the Respondent excessive compensation which is over and beyond what is stipulated under Section 49 (1) (c) of the Employment Act.
 4. The learned Judge erred in law and fact by failing to take into action that the Respondent was subjected to a fair disciplinary process with due regard to the rules of natural justice and the relevant provisions of the Employment Act
 5. The learned Judge erred in law and in fact by holding that the disciplinary action against the Respondent was unlawful thereby disregarding the Appellant's evidence on record.
 6. The learned Judge erred in law and fact when he ordered the Appellant to pay the Respondent salary arrears of Kshs 1,471,104/- notwithstanding the fact that she had not rendered any service during the said period.
 7. The learned Judge erred in law by granting the Respondent orders which were not pleaded in the Claim.
 8. The learned Judge erred in law by failing to consider the documentary and oral evidence tendered during trial, law, facts, submissions and authorities in arriving at his decision thereby causing injustice to the Appellant.
11. We heard the Appeal on this Court's virtual Platform on 5th December 2023. Learned counsel Mr. Patrick Mulaku appeared for the Appellant, while learned counsel Mr. Ogwe, appeared for the Respondent. The two counsel highlighted their respective written submissions dated 9th December 2020 and 20th December 2022. As we commence our determination of the appeal, we are mindful of the duty of this Court as set out in the decision of *Selle & another v Associated Motor Boats Co. Ltd & others* (1968) EA 123, which is to reconsider the evidence adduced in the trial court, evaluate it and draw our own conclusions of the fact and law. We will in this regard depart from the findings by the trial court only where they were not based on evidence on record; where the said court is shown to have acted on wrong principles of law as held in *Jabane v Olenja* (1968) KLR 661, or where its discretion was exercised injudiciously as was held in *Mbogo & Another v Shah* (1968) EA 93.
12. The grounds of appeal and submissions thereon are on two main issues, namely whether the process of termination of the Respondent's service was lawful and procedurally fair, and whether the award of maximum compensation and salary arrears for a period of 12 years' was justified. On the first issue, counsel for the Appellant submitted that there were sufficient reasons to institute disciplinary action against the Respondent in that she breached the Code governing the teaching profession by deserting duty and her whereabouts were unknown for a long time; that the Respondent's conduct fell short of the professional standards expected for her as a teacher and it was incumbent upon the Appellant to take disciplinary action against her; that the Respondent by her own evidence, and the then District Education Officer vide a letter dated 30th September 2012, confirmed that the Respondent had proceeded on unpaid leave, however, there was no accompanying permission by the Respondent supporting the said leave.
13. On procedural fairness, the counsel submitted that the Respondent was accorded procedural fairness as demanded by section 45(2)(c) of the Employment Act, which was accomplished in two instances,



firstly through written form of the Respondent's written defence after being issued with the letter of interdiction, and secondly through physical appearance when she appeared in person before the Appellant's disciplinary panel; the Appellant convened a disciplinary panel to hear the Respondent's disciplinary case where she was invited to appear in person on 12th September 2012; the laid down procedure as stipulated under regulation 70 of the Code of Regulations was strictly followed; and that the Respondent did not submit any evidence to controvert this fact before the trial Judge. The Appellant placed reliance on the case of *Bett Francis Bargetuny & another v Teachers Service Commission & another* [2015] eKLR where the Court held that the requirement of fair hearing or natural justice is satisfied where an employee is allowed to respond to allegations of misconduct before a decision is taken.

14. The Respondent's counsel on his part submitted that the Respondent did not desert and that she applied for a leave without pay for a period of two (2) years in order to attend to her family issues. Reference was made to the Black's Law Dictionary (9th Edition) for the definition of desertion as 'the wilful and unjustified abandonment of a person's duties or obligations,' and the decision in the case of *Stanley Omwoyo Onchwari v Board of Management, Nakuru YMCA Secondary School* [2015] eKLR where the Judge held that an employer asserting that an employee has deserted duty must demonstrate efforts made to establish the whereabouts of the employee. The counsel submitted that the Appellant did not attempt to find the Respondent's whereabouts; instead the Appellant hurriedly terminated her duties without lawful justification. It was his submissions that the Appellant terminated the Respondent's service on the grounds that she had resigned vide their letter dated 25th March 2000, stating that the Respondent resigned effective 1st January 2000, which was reiterated in the Appellant's letter dated 31st July 2000. Further, that it was therefore not clear why the Appellant would proceed to terminate the Respondent's services on a different ground of desertion as opposed to the purported resignation they had referred to in their previous letters. On whether the dismissal of the Respondent was justified, the counsel referenced Section 47 (5) of the *Employment Act*, and submitted that the Respondent reiterated that she was willing to resume her duties but was stopped by the Appellant through their letter which stated that she had resigned effective 1st January 2000.
15. Additionally, that the Appellant failed to follow the laid down procedures of law before terminating the employment of the Respondent. Reliance was placed on this Court's decision in *Ayub Kombe Ziro v Umoja Rubber Products Limited* [2002] eKLR where it was held that it must be demonstrated that the employer had a justified ground to terminate the employee and accorded the employee the procedural safeguards guaranteed under the law in the process leading to the termination. Also cited was the decision by the Court in *Wilfred Kipbirchir Rotich v Metkei Multipurpose Company Limited*, Eldoret Civil Appeal No. 94 of 2017, that the employer is enjoined in mandatory terms under section 41 of the Act to ensure that before terminating an employee on grounds of misconduct, poor performance or physical incapacity, it explains the reasons for the termination to the employee in a language he or she understands.
16. It was urged that the Respondent's termination did not pass the test of substantive justification and procedural fairness. since the Respondent was subjected to extreme psychological torture by keeping her in suspense for about 12 years and was only to write a letter to her dated 6th January 2012 stating that she had been interdicted for desertion of duties. She urged that the Appellant's letter dated 6th January 2012, interdicting the Respondent for desertion of duties was unfair as the Respondent had already been illegally terminated from her duties by the Appellant as at 1st January 2000.



17. Section 45 (2) of the *Employment Act* in this respect specifically provides for the following requirements for fair termination of employment, with respect to the reasons and procedure for termination:

- “(2) A termination of employment by an employer is unfair if the employer fails to prove—
- a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason—
 - i. related to the 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.”

18. An express procedure and requirement of notification of the reason for which the employer is considering termination of employment, and of a hearing and consideration of any representations from an employee before termination of employment on grounds of misconduct is set out in section 41 of the *Employment Act*. It was held by this Court in *Kenya Revenue Authority v Reuvel Waitihaka Gitabi & 2 others* [2019] eKLR that section 41 provided the minimum standards of a fair procedure that an employer ought to comply with when terminating the employment of an employee, and that the four elements that had to be discernible for termination to pass muster were:

- a. an explanation of the grounds of termination in a language understood by the employee,
- b. the reason for which the employer was considering termination,
- c. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination was made; and
- d. hearing and considering any representations made by the employee and the person chosen by the employee.

19. In the present appeal, the record shows that the Appellant had, by its letter dated 25th March 2000 deemed the Respondent to have resigned effective from 1st January 2000. On 6th January 2012, the Appellant interdicted the Respondent on the ground of desertion, and eventually after holding a hearing dismissed her from service on 12th September 2012 for the reason that she deserted duty with effect from 3rd January 2000. We find that the procedure followed in the termination of the Respondent’s employment to have been unfair and unlawful in material respects. Firstly, there is no record that the Appellant afforded the Respondent notice or an opportunity to make representations on the decision that she had resigned on 1st January 2000, and there was no evidence of such resignation provided by the Appellant. Secondly, having already made a decision that the Respondent had resigned, there was no explanation for the decision to terminate her employment twelve years later. Thirdly, no evidence was provided by the Appellant to demonstrate that the Respondent had deserted, which was the reason given for the said termination, on the contrary the Respondent presented evidence of several requests to be reinstated to employment. Lastly, the delay in action between 3rd January 2000 when the Respondent is alleged to have deserted duty, and her interdiction and dismissal twelve years later has not been explained by the Appellant. In essence, there was no valid, fair, nor



justifiable basis and reason for the decisions by the Appellant of the Respondent's alleged resignation and subsequent termination of her employment.

20. We accordingly find that the learned trial Judge did not err in finding the termination to be a sham, unfair and unlawful. Section 45(4) and (5) of the [Employment Act](#) in this respect provides that a termination of employment shall be unfair where in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee, and in deciding whether it was just and equitable for an employer to terminate the employment of an employee, the Court shall consider among other factors the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision.
21. On the second issue on the award of compensation and salary arrears, the Appellant's counsel submitted that the maximum compensation constituting 12 months' salary and salary arrears for a period of 12 years' with interest at Court rates from the date of her dismissal till payment in full constituted an excessive award in view of the provisions of section 49 of the [Employment Act](#). Secondly, that the award of salary arrears was not one of the remedies provided under the said section save where due on account of work performed by the employee. Lastly, that the trial Court erred in awarding the Respondent salary arrears which she did not plead nor pray for. The decision in the case of [Kenya Broadcasting Corporation v Geoffrey Wakio](#), Nairobi Civil Appeal No. 352 of 2017, where this Court held that the award of damages of maximum compensation under section 49 (1)(c) of the [Employment Act](#) was sufficient and there was no legal justification for award of a further sum in the form of damages, was cited for the submission that arising from the principles set by this Court, the trial Court's award of salary arrears for 12 years to the Respondent in the instant case, amounted to excessive compensation.
22. Also cited was the case of [Caltex Oil \(Kenya\) limited v Rono Limited](#), Nairobi Civil Appeal No. 97 of 2008, for the submission that if a party wished the Court to determine or grant a prayer, such prayer must be specifically pleaded and proved. It was submitted by counsel, that as a result, the Appellant was denied an opportunity to respond to the award of salary arrears and lead evidence accordingly, and was therefore denied a fair hearing in that regard. The Appellant's counsel submitted that the trial Judge acted in excess of jurisdiction by awarding a prayer that was not pleaded for by the Respondent either generally or specifically. It was also submitted that any award of salary arrears ought to be in tandem with section 17 of the [Employment Act](#) which provided for payment of salary for work done, and that it was not contested that the Respondent did not render any service during the period she was awarded salary arrears, as she was absent from her work station at the time. Reference was also made to section 49 (1) (b) of the [Employment Act](#) which contemplated an award of salary for the period worked by an employee whose services were terminated.
23. The Respondent's counsel in reply submitted that the Respondent had in her claim sought a prayer for any other relief that the Court deemed fit, and the Court in this respect saw it fit to grant the salary arrears. Section 49 (1) of the [Employment Act](#) provides as follows as regards the remedies that can be awarded in a case of unfair termination of employment:
 - “(1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—
 - a. the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;



- b. where dismissal terminates the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract; or
- c. the equivalent of a number of months' wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal."

24. In this respect, the award of compensation of twelve months' gross salary was justified and reasonable, given the circumstances of the Respondent's termination, particularly that no valid basis or reason was demonstrated, and she was kept waiting for twelve years for the decision to be made. In all fairness the Respondent deserved to be reinstated to service, were it not for the statutory limitation in section 12 (3) (vii) of the *Employment and Labour Relations Court Act* that any order of reinstatement be made within three years of dismissal.

25. Having been kept away from work for no valid reason, the Respondent was entitled to her wages for the period when she was in limbo and willing to work, and in this respect, the Respondent did seek exemplary damages for among other losses, the withholding of her dues, and the award of salary arrears was therefore specifically pleaded. It is also notable that wages that are due are an allowable remedy under section 49 (1) cited hereinabove. In addition, the considerations and factors that a Court is required to take into account in awarding this remedy come into play in this appeal, particularly those stated in section 49(4) (f)-(i) of the *Employment Act* namely:

- “(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
- g. the opportunities available to the employee for securing comparable or suitable employment with another employer;
- h. the value of any severance payable by law;
- i. the right to press claims or any unpaid wages, expenses or other claims owing to the employee...”

26. The decision dated 21st July 2017 by the Employment and Labour Relations Court at Nairobi (Nderi Nduma J.) in ELRC Cause No. 459 of 2014 is therefore upheld in its entirety, and this appeal is accordingly dismissed with costs to the Respondent.

27. Orders accordingly.

Dated and Delivered at Nairobi this 24th day of May, 2024

S. GATEMBU KAIRU FCIArb

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JUDGE OF APPEAL



P. NYAMWEYA

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JUDGE OF APPEAL

G. W. NGENYE- MACHARIA

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

