



**Teachers Service Commission v WJ & 5 others (Civil Appeal
309 of 2015) [2020] KECA 741 (KLR) (24 April 2020) (Judgment)**

Teachers Service Commission v WJ & 5 others [2020] eKLR

Neutral citation: [2020] KECA 741 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 309 OF 2015

RN NAMBUYE, MK KOOME & F SICHALE, JJA

APRIL 24, 2020

BETWEEN

TEACHERS SERVICE COMMISSION APPELLANT

AND

WJ 1ST RESPONDENT

LN 2ND RESPONDENT

ASTORIKOH HENRY AMKOAH 3RD RESPONDENT

J PRIMARY SCHOOL 4TH RESPONDENT

THE ATTORNEY GENERAL 5TH RESPONDENT

CENTER FOR REPRODUCTIVE RIGHTS 6TH RESPONDENT

*(An appeal from the judgment and decree of the High Court of Kenya at
Nairobi (Mumbi Ngugi, J) dated 19th May 2015 in H.C Pet. No. 331 of 2011)*

Teachers Service Commission is vicariously liable for the sexual misconduct of its employees in the course of employment

The 1st and 2nd respondents filed a claim at the High Court against the appellant, the Teachers Service Commission (TSC) alleging that the 3rd respondent, who was the deputy head teacher and their Kiswahili teacher, had violated them. It was claimed that TSC had failed to discharge its constitutional and statutory mandate which included the exercise of disciplinary power over teachers. The instant court held that bearing in mind the prevalence of the problem of sexual abuse by teachers, the State and TSC had a higher duty to exercise reasonable care so as not to expose children to dangerous elements within the school. The court further held that TSC was vicariously liable for the sexual misconduct of its employees in the course of employment.

Reported by Kakai Toili



Labour Law – employment – employer-employee relationship – vicarious liability of an employer for the acts of an employee - where a teacher committed sexual misconduct in the course of employment - whether the Teachers Service Commission could be vicariously liable for the sexual misconduct of its employee - Teachers Service Commission Act (repealed), section 7(2)(c).

Constitutional Law – constitutional commissions – Teachers Service Commission (TSC) – role – where there were claims of sexual misconduct by its employee – where TSC issued circulars prohibiting sexual conduct between teachers and students – where the circulars were only issued to the teachers - whether it was necessary to issue the circulars to both students and teachers - Teachers Service Commission Act (repealed) section 4(2).

Constitutional Law – fundamental rights and freedoms – enforcement of fundamental rights and freedoms – rights of children – right to education – provision of a safe learning environment - what did the provision of a safe learning environment for children entail.

Jurisdiction – jurisdiction of the Court of Appeal – jurisdiction to interfere with the High Court’s exercise of discretion to award damages - what were the circumstances in which the Court of Appeal could interfere with the High Court’s exercise of discretion.

Brief facts

The 1st and 2nd respondents (minors) filed a claim at the High Court against the appellant (TSC) and alleged that the 3rd respondent, who was the deputy head teacher and the minors’ Kiswahili teacher, had violated the minors. It was claimed that TSC had failed to discharge its constitutional and statutory mandate which included the exercise of disciplinary power over teachers who breached the provisions of the Code of Regulations for teachers. TSC claimed that it received information that the 3rd respondent had breached the provisions of the Code of Regulations for Teachers by sexually abusing the minors on various occasions and that it carried out disciplinary proceedings against the 3rd respondent, and as a result of the proceedings, it dismissed the 3rd respondent.

The High Court held that the allegations of sexual abuse had been proved on a balance of probabilities and that the minors had suffered a violation of their rights to dignity, health and education. The High Court also held that there was insufficient enforcement of the TSC circular prohibiting sexual contact between teachers and students, and the Code of Ethics and the policies were not properly disseminated in schools. The High Court further held that there was failure by the State to provide legal remedies and support for children who were victims of sexual abuse by teachers and that the TSC, the State and 4th respondents were vicariously liable for the wrongful acts of the 3rd respondent. Aggrieved by that decision, the appellant filed the instant appeal.

Issues

- i. Whether the Teachers Service Commission could be held vicariously liable for the sexual misconduct of its employee in the course of employment.
- ii. Whether it was necessary to issue circulars prohibiting sexual conduct between teachers and students to both students and teachers.
- iii. What did the provision of a safe learning environment for children entail?
- iv. What was the role of the Teachers Service Commission where there were claims of sexual misconduct by a teacher?
- v. What were the circumstances in which the Court of Appeal could interfere with the High Court’s exercise of discretion to award damages?

Relevant provisions of the Law

Teachers Service Commission Act (repealed)

Section 4(2)

It shall also be the duty of the Commission to keep under review the standards of education, training and fitness to teach appropriate to persons entering the teachers service, and the supply of teachers, and to tender advice to the



Minister from time to time on the aforesaid matters and on such other matters as may be referred to it by the Minister.

Section 7(2(c))

A person shall be entitled to be registered as a teacher if— in the case of a person whom the Commission wishes to employ...his education, fitness to teach and experience are such as, in the opinion of the Commission, to warrant his registration.

Held

1. As the first appellate court, it was the court's duty to re-evaluate the evidence before the High Court, and ascertain if the trial court came to the correct conclusion in respect to both facts and the law. Even though the 3rd respondent had been acquitted of the criminal charges by the Magistrate's Court, the minors' statements and those of their guardians, with respect to the events that took place on July 4, 2010 in the 3rd respondents' house, and in the classroom on July 30, 2010 were consistent enough to draw a conclusion of culpability based on the test of balance of probabilities. Furthermore, the TSC's disciplinary action involving interdiction, investigation, dismissal and deregistration sufficiently showed that the 3rd respondent, a deputy head teacher in charge of the minors at the time, committed acts amounting to sexual assault against the minors, or conducted himself inappropriately as a teacher, so much so that his employer found it justifiable to not only dismiss him from employment but also to deregister him as a teacher. The 3rd respondent did not challenge either his dismissal or his deregistration.
2. Many teachers were serial offenders who abused students in one school and were often transferred to other schools, where the abuse continued. That meant that;
 1. there was insufficient enforcement of the circular and the code of ethics and the steps taken by the State and TSC were in many respects limited and ineffectual; and,
 2. there was a failure in providing support and remedies for children who could be subjected to sexual violence by their teachers.
3. The minors were vulnerable victims who were under the authority and power of the 3rd respondent. TSC as the employer of the 3rd respondent did not adduce evidence to show how the regulations were cascaded and taught to the students who needed the information even much more than the teachers. It was not enough to issue circulars to teachers or schools while leaving out students. Students were the potential victims who needed the information more than even the teachers.
4. Bearing in mind the prevalence of the problem of sexual abuse by teachers, the State and TSC had a higher duty to exercise reasonable care so as not to expose children to dangerous elements within the school. Providing a safe learning environment did not only refer to infrastructure, but also ensuring the dignity of the child was not violated more so by their caregivers. By parity of reasoning, if the minors for example had sustained physical injuries, say by an accident and while in the school premises, which accident was caused by failure of the school, the school and the State would also be vicariously liable.
5. There were circulars and policies that prohibited sexual interaction between a teacher and a child, but that did not mean the mere existence of policy in itself empowered the child victims to question the legitimacy of the teacher's sexual requests, nor did it show how a child could make a report of the incidences of sexual abuse. For example, TSC had a duty to ensure that the policy was put in the notice board of every classroom and for the head teacher to sign a form confirming that both teachers and students had been explained the content of the policy.
6. There had to be present, a reporting procedure such that if a student was sexually abused, the matter could be reported to an impartial office where the privacy of the child was observed and the matter was followed through the justice system. The 3rd respondent was in charge of the school's discipline and counseling and one wondered where the minors were to report. The measures employed by the TSC



- and the State to provide a safe learning environment for children were insufficient and ineffective and the High Court's judgment should have been used to strengthen and operationalize the policies.
7. The primary function of the 'course of employment' requirement was to ensure that the employee's tort was sufficiently linked to the employer's enterprise, so as to justify the imposition of liability on the employer. It thus limited the responsibility of the employer to acts committed by the employee, acting in their employment capacity, and excluded those related to personal or private life. Although the incidences that took place on July 4, 2010 took place in the 3rd respondent's house, the opportunity to lure the minors to his house occurred in school where he exercised power and authority over them. The minors were students who were supposed to obey their teacher. The abusive acts continued from the house as they were followed by other instances of the sexual abuse, such as the one that occurred on July 30, 2010, which happened in a classroom.
 8. A teacher's work was to offer protection to his students and not to take advantage of their tender age and abuse them. An act would be deemed to have been committed during the course of employment if there was a close connection between the unauthorized conduct and the employment. There was a close connection between the conduct of the 3rd respondent as a teacher when he abused his position as a teacher and abused his students.
 9. The level of risk faced by the minors in the instant appeal was elevated due to the prevalence of sexual abuse in Kenyan schools which was a matter of public notoriety as conceded by TSC itself worthy of judicial notice. The minors' case was not an isolated incident and TSC was well aware that a real danger existed where innocent school children were routinely subjected to abuse by their teachers who stood in a position of *loca parentis* with the children. The appellant's submission that there were claims that the 3rd respondent had a history of sexual misconduct which led to his transfer to the school where the alleged acts occurred did not help matters. As a matter of public policy, TSC had a duty to investigate such allegations before transferring the 3rd respondent so as not to endanger the minors as it came to pass. Once the employee had been hired, TSC had a legal duty to supervise the employee and his conduct while at work in order to shelter 3rd parties more so children from risk. That was a statutory duty under section 4(2) of the repealed Teachers Service Commission Act.
 10. Under the theory of negligent retention (also known as negligent supervision), an employer was held liable for retaining an employee who it knew or should have known was not fit for the employment position. The theory placed an affirmative investigative duty on the employer to remedy improper activity when they knew or ought to have known of its existence within the workplace. When applying negligent retention theory, courts focused on whether the employer had notice concerning past sexual improprieties and/or what measures, if any, the employer took to reprimand or dismiss the abusing employee. Notice could be in the form of actual notice or constructive notice of facts which should have suggested that the employee posed a special threat. Actual notice was that which was given directly and personally while constructive notice was information or knowledge of a fact imputed to a person who had a duty to inquire into it.
 11. Through a report by a child therapist who documented how when the school community learnt of the sexual abuse of the minors, some teachers repeatedly mocked the minors while defending the 3rd respondent, suggested that there was an existing culture of tolerance to sexual abuse of students which thrived in that school. The report also went further to show that TSC's Code of Regulations was not in use in that school; there was failure to ensure the teachers were properly instructed not to sexually abuse children and likewise children were not empowered on how to report their teachers when subjected to abuse.
 12. Liability in tort depended on reasonable foreseeability of loss and not merely on the directness or otherwise of the consequences. TSC took on the risk that its employee would commit a legal wrong especially when he was transferred to the school, and failure to warn the school and students of the 3rd respondent's weakness. TSC was accordingly liable for the creation of such risk as there were no



credible mechanisms that were put in place to mitigate the wrong. The main function of vicarious liability was to provide compensation to those vulnerable persons who, through no fault of their own, were exposed to the inherent risks of the employer's business.

13. As innocent victims, the minors were entitled to compensation for having been subjected to such humiliation, shame and pain that could have a lifelong effect on them. It was inconceivable how the minors in their tender years were made to carry that kind of burden of shame due to selfishness of a caregiver. Compensation and award of damages was an exercise of discretion by the High Court and could be interfered with if the Court of Appeal was convinced that the High Court acted upon some wrong principles of law, or that the amount awarded was extremely high or low. The appellant did not demonstrate that the award was too high. The minors were traumatized and stigmatized perhaps for the rest of their lives. The award of damages could not be interfered with.
14. The argument that it was TSC's duty to implement its own policies and guidelines to curb sexual misconduct by its employees and that in the circumstances, the unlawful acts were in no way linked to the State could not pass the test of the 5th respondent's mandate under article 156(6) of the Constitution which included to promote, protect and uphold the rule of law and defend the public interest. The instant case raised very serious matters of public interest and protection and promotion of the rule of law. Moreover, international law obligated states to take all appropriate legislative, administrative, social and educational measures to protect children from all forms of physical, mental abuse including sexual abuse.
15. The African Charter on the Rights and Welfare of the Child and of which Kenya was a signatory urged member states to take specific measures including exercising due diligence and increasing awareness about sexual abuse. The Committee on the Rights of the Child recognized the prevention of violence against children to be of paramount importance. That was a non-delegable duty and could not be delegated to any agency including the TSC. An absolute duty, as opposed to duties of reasonable care, gave rise to an obligation on the defendant to ensure that reasonable care was taken. By contrast to the doctrine of vicarious liability, it was the direct relationship between the State and the children, as citizens that established the duty in that context, and then the conduct of the TSC that was used to establish its breach. A finding of failure by the TSC to exercise reasonable care, of itself, lead to a finding of breach of the State's duty.
16. The appellant had a statutory duty to ensure the minors had a safe learning environment which it failed to do. The absence of provisions for remedy for breach of that statutory duty was no bar to stop the minors from filing a claim of damages under the tort of negligence and the Constitution.

Appeal and cross-appeal dismissed with costs to the 1st and 2nd respondents.

Citations

Statutes

1. Children Act
2. Constitution of Kenya, 2010
3. Sexual Offences Act
4. Teachers Service Commission Act

Advocates

None mentioned

JUDGMENT

1. This appeal raises novel questions of law on whether vicarious liability can be attributed to the appellant, the Teachers Service Commission (TSC) who at the material time had employed Astorikoh



Henry Amkoah, (3rd respondent hereinafter referred to as “teacher”) for alleged acts of sexual abuse against the students hereinafter referred to as “WJ” and “LN”). It also raises constitutional matters of whether failures or lapses in regard to implementation of child safety policy that resulted in child abuse by a teacher who was charged with the responsibility of protecting the children can be visited upon TSC on account of failure of duty of care to promote the best interest of the child and whether TSC failed in its constitutional and statutory duty to protect WJ and LN as well as other school children from sexual abuse (a violation of rights) by a teacher employed by TSC.

2. A brief outline of the matter is that a claim was filed against TSC by WJ and LN both minors aged 12 and 13 years old respectively as at the material time. This was by way of a petition filed before the High Court through the minors’ guardians JKM and SCM Several declaratory orders were sought among them being that:

acts of sexual and gender based violence against the minors and all other students amounted to; violence against their health as provided for under Article 43 (1) of the Constitution and Section 7 of the Children Act; inhuman and degrading treatment as guaranteed under Article 28 and 29 (c) of the Constitution; that all schools and teachers are under a legal capacity as guardians (*loca parentis*) to protect all students from sexual and gender based violence by rogue teachers; and compensation for the aforesaid violations.

3. The petition was supported by the affidavits of JKM, a guardian, as well as the two minors who gave a blow by blow account of how they were violated by the 3rd respondent. That the minors were class six pupils at J Primary School at the material time and that the 3rd respondent joined the school in July 2010 as the new Deputy Head Teacher and was a Kiswahili teacher of class 6 in addition to other responsibilities the teacher held in the school. The minors stated that in the same month, the teacher invited them to his house under the guise that he wanted them to do some housework for him, including cleaning his house, ironing his shirts and cooking. That is when the teacher took the opportunity to defile the 2nd respondent.
4. Once again on 30th July 2010, the teacher attempted to defile WJ, while in a classroom at the school, by forcing her to lie on a desk inside a classroom but the attempt was thwarted by curiosity of other children who peeped through a window. The guardian and parent stated that they noticed a drastic change in behavior of two minors and after questioning them, the girls revealed the details of the sexual abuse by their teacher. The guardian and parent confronted, the teacher who tried to have the matter resolved informally but this failed when it was escalated to the area Chief in August, 2010. The parent and guardian also recorded statements at the Solai Police Station in September 2010, following which the teacher was arraigned before the Chief Magistrate’s Court in Nakuru where he was charged with the offences of defilement in Criminal Case No 224 of 2010, although he was acquitted of the charges.
5. The suit was opposed by the TSC *vide* a replying affidavit sworn by Mr. Simon Musyimi Kavisi. It was generally denied that the TSC had failed to discharge its constitutional and statutory mandate which includes the exercise of disciplinary power over teachers who breach, *inter alia*, the provisions of the Code of Regulations for teachers. The appellant stated that on or about 1st November, 2010, it received information through its agents that the 3rd respondent, while teaching at J Primary School, had breached the provisions of the Code of Regulations for Teachers by sexually abusing the minors on various occasions; that it carried out disciplinary proceedings against the 3rd respondent, and as a result of the proceedings, it dismissed the teacher and struck him off the register of teachers.
6. Not to be the one taking matters lying down, the Teacher also filed a replying affidavit where he denied all the allegations of sexual abuse and termed the criminal charges leveled against him as malicious,



merely meant to besmirch his reputation. He challenged the medical evidence that was attached in support of the petition to show that LN had been defiled by stating that the information contained in the P3 form was inconsistent with the minors' statements and swore that his transfer was not precipitated by disciplinary action but rather a normal one under TSC Regulations. Although he conceded that he was aware of the TSC Circular prohibiting sexual contact between teachers and student, he nonetheless argued that it was not sent to him in relation to the instant matter but as a matter of general information. He contended that the petition had violated his right to dignity and right to fair trial under various provisions of the Constitution and the Universal Declaration of Human rights and urged the trial court to dismiss the petition with costs and order the petitioners to compensate him for irreparable damage that has been caused to his person, dignity, reputation and self-esteem.

6. The petition was also opposed by the Attorney General (AG) (5th respondent) whose position was that the TSC had discharged its duty to investigate and discipline the Teacher for the alleged misconduct; that the government had put in place mechanisms to ensure all children have access to education and various policies to ensure their protection while in school. The petition was faulted for failing to demonstrate the connection of the alleged acts by the Teacher and how they denied the minors their constitutional right to education. Finally it was claimed by the AG that the petition was a claim for negligence and not violations of constitutional rights and therefore, the petitioners should have sought redress under private law.
7. The matter fell for hearing before Mumbi Ngugi, J. who fastidiously went through the evidence and isolated the following issues for determination being;
 - i. Whether the court had jurisdiction to entertain the petition and grant reliefs sought;
 - ii. Whether the petitioners had established a violation of their constitutional rights by the respondents;
 - iii. Whether the appellant, 4th and 5th respondents were vicariously liable for the violation of the petitioner's rights by the 3rd respondent;
 - iv. Whether the petitioners had violated the 3rd respondent's rights; and
 - v. What remedies (if any) were to be granted to the petitioners and/or the 3rd respondent?
8. The learned trial Judge made findings, inter alia, that the petition was properly before the court as Articles 23(1) and 165(3) of the Constitution granted the High Court jurisdiction to hear and determine applications for redress of violations of constitutional rights; that the allegations of sexual abuse contained in the petition had been proved on a balance of probabilities; that the minors had suffered a violation of their rights to dignity, health and education; that there is insufficient enforcement of the TSC circular and the Code of Ethics and the policies were not properly disseminated in schools; that there was no evidence of monitoring their adherence by the schools; that there was failure by the state to provide legal remedies and support for children who are victims of sexual abuse by teachers; and that the TSC, the State and 4th respondents were vicariously liable for the wrongful acts of the 3rd respondent.
9. Dissatisfied with the above judgment, the appellant filed a memorandum of appeal raising some 10 grounds which we think can be narrowed down to some four thematic areas. This is in the same way the appeal was argued namely; whether the appellant neglected its mandate as provided for under the Constitution to promote the best interest of children by offering them protection from harm while in school; whether the appellant connived/colluded by failing to remedy the situation after the case



was reported; whether the trial Judge misdirected herself on the law relating to vicarious liability by holding that the appellant was vicariously liable for the unlawful acts of the Teacher and lastly whether the Judge departed from the agreed issues.

10. During the plenary hearing Mr. Sitima learned counsel for the appellant relied on a supplementary record of appeal, written submissions and a list of authorities. In brief, counsel submitted that the TSC's constitutional mandate was to act as a regulator of the teaching service and that it had discharged that mandate, in regard to the complaint made against the 3rd respondent. That TSC investigated the allegations of sexual abuse and subsequently dismissed the Teacher from employment and de-registered him; that the measures and procedures employed by the appellant were geared towards protecting school children and they met the reasonableness test; that the alleged incidences of sexual abuse happened at the 3rd respondent's house where the TSC had no control, and furthermore the unlawful acts were unauthorized so there was no grounds attaching vicarious liability to the appellant for criminal acts by an employee.
11. Moreover, counsel went on to state that there was no evidence that the appellant knew or suspected that the 3rd respondent was a serial sexual offender when he was deployed to J Primary School; that neither the *Sexual Offences Act* nor the *Teachers Service Commission Act* provided for victim compensation; and that, therefore, the minors were not entitled to the reliefs granted as against the appellant which compensation is punitive. To augment the case for the appellant, counsel relied on the authorities in *Trotman v North Yorkshire County Council* [1999] LGR 584 and *Bazley v Curry* [1990] 2 S.C.R. 534 which provide the principles to be applied when determining whether unauthorized acts committed in the course of an employee's duties can be attributed to the employer. In this case counsel submitted that TSC had undertaken reasonable steps expected of a prudent body to have the minors counseled. Since TSC did not condone the acts by the Teacher, the court was faulted for finding the appellant liable for an employee's criminal activities. Moreover, TSC has over 350,000 teachers and beyond. It has also put in administrative circulars and code of regulations towards the protection of children. The court did not state how these were inadequate measures to warrant condemnation of TSC to pay damages to the minors. For this counsel urged us to allow the appeal.
12. Arguing along similar lines, and in support of the appeal, the AG filed a cross-appeal on the grounds that the learned Judge had failed to appreciate the State's mandate and misapplied the principle of vicarious liability in her decision. Ms. Kamande, learned counsel for the State submitted that the petition had failed to demonstrate how the State had violated the minor's rights; that the 3rd respondent's unlawful acts did not fall within the scope of his authorized duties as required under the doctrine of vicarious liability; that the 3rd respondent was on a frolic of his own. Reference was made to the case of *Catholic Child Welfare Society & others v Various Claimants & The Institute of the Brothers of the Christian Schools and Others* [2012] UKSC 56, in support of the argument that an employer is not liable for an employee's intentional criminal acts done outside of the scope of his employment.
13. Opposing the appeal was Mr. Chigiti, learned counsel for the two minors. Counsel submitted that TSC had a statutory and constitutional mandate not only to establish policies and guidelines for the conduct of teachers, but also to put preventive measures to ensure that violations do not occur; that TSC was liable to pay compensation to victims of abuse when their policies fail to prevent a violation of a child's rights. Regarding the finding of vicarious liability, counsel submitted that the 3rd respondent's unlawful acts were committed inside a classroom, during school hours; and that the abuse happened within the scope of the 3rd respondent's position of authority as deputy head teacher in charge of teaching the minors Kiswahili subject as well as discipline and counselling. Thus the case met the threshold necessary to attach vicarious liability to the TSC. Reference was made to the cases of *Lister v Hesley* (*supra*) and *Bazley v Curry* (*supra*) in support of the argument that where the employee's actions are closely



connected with actions which he is authorized to do, they may be regarded as having been committed within the scope of his employment.

14. The appeal was also supported by the Centre for Reproductive Rights, (Interested Party) who were represented by Mr. Onyango, learned counsel. He associated himself with the submissions made on behalf of the minors and went on to state that the TSC had a duty of care of vulnerable children who are under the care and control of the teachers. In this regard both the TSC and the State are mandated under the provisions of Article 237 of the Constitution to advise the government on matters relating to teachers; to protect and fulfil the fundamental rights of children and when the rights are violated, there are remedies provided for under Article 23. Counsel further submitted that the State and its agencies are legally obligated under the Constitution, statute and international law, to take all appropriate measures to protect children from all forms of sexual abuse; that the TSC's regulatory mandate includes preventing and protecting children from sexual abuse by teachers; that the appellant was correctly made jointly liable for the awarded damages as there was a direct link between its employee and the unlawful acts.
15. By way of a brief rejoinder, Mr. Sitima reiterated that the learned Judge did not interrogate the correct facts as required by the principle of vicarious liability; that the unlawful acts were done outside the scope of employment since they were especially prohibited by the TSC Code of Conduct. Counsel urged that under the principles of vicarious liability an employer is not held responsible for acts of an employee that are not done within the scope of employment, thus in his view the Judge shifted the law.
16. Both the Teacher and the school being the 3rd and 4th respondents respectively, neither filed nor appeared at the hearing.
17. As the first appellate court, it is our duty to re-evaluate the evidence before the High Court, and ascertain if the learned Judge came to the correct conclusion in respect to both facts and the law. On the important question of whether the petitioners had established on a balance of probability that it was the 3rd respondent who sexually abused them, the trial court examined the evidence of the minors which included, inter alia, their affidavits and those sworn by their guardians JKM and WCM, the OB entry detailing the alleged offenses, the P3 form describing the medical condition of the minors, the charge sheet and the letter of interdiction with particulars of the allegations of sexual misconduct. In her judgment, the learned Judge noted that even though the 3rd respondent had been acquitted of the criminal charges by the Magistrate's court, the minors' statements and those of their guardians, with respect to the events that took place on 4th July, 2010 in the 3rd respondents' house, and in the classroom on 30th July, 2010 were consistent enough to draw a conclusion of culpability based on the test of balance of probabilities. Furthermore, the TSC's disciplinary action involving interdiction, investigation, dismissal and de-registration sufficiently convinced the learned Judge that the 3rd respondent, a deputy head teacher in charge of the minors at the time, committed acts amounting to sexual assault against the minors, or conducted himself inappropriately as a teacher, so much so that his employer found it justifiable to not only dismiss him from employment but also to deregister him as a teacher. The court also noted that the 3rd respondent did not challenge either his dismissal or his deregistration. To us those are findings of facts from which we find no reason to depart and we uphold the same.
18. On the issue of whether TSC had discharged its mandate as provided for under Article 237(2) of the Constitution; TSC insists that it had put in place policies and regulations which expressly prohibit sexual relations between teachers and students.



Acknowledging that it was keenly aware of the alarming number of sexual abuse incidences in schools, the TSC points to Circular No. 30/2010 on Protection of Pupils/students from Sexual Abuse which states in part as follows: -

“Pursuant to the enactment of the *Sexual Offences Act* (2006), and in accordance with the professional ethics espoused in the TSC Code of Regulations, the Commission hereby wishes to bring the following to your attention: The Commission is concerned with the increasing cases of violence (physical, psychological and sexual) against pupils/students and recognizes that it is a violation of their human rights wherever it occurs, in their homes, educational institutions, communities and places of care.”

TSC therefore insists that the dissemination of the circular, together with establishing an online database of de-registered teachers, was sufficient to discharge its duty to protect school children from sexual abuse, thus absolving it from any liability that arose from any claims such as that filed by the minors.

19. The trial court noted the fact that, many teachers are serial offenders, who abuse students in one school and are often transferred to other schools, where the abuse continues. This means that, firstly, there is insufficient enforcement of the circular and the Code of Ethics and the steps taken by the State and TSC are in many respects limited and ineffectual; and, secondly, there is a failure in providing support and remedies for children who may be subjected to sexual violence by their teachers. We are aware that the minors were vulnerable victims who were under the authority and power of their Kiswahili teacher who also doubled up as the Deputy Head teacher of the school. In this regard, TSC as the employer of the Teacher did not adduce evidence to show how the regulations were cascaded and taught to the students who needed the information even much more than the teachers. It is not enough to issue circulars to teachers or schools while leaving out students. Students are the potential victims who needed the information more than even the teachers. Bearing in mind the prevalence of the problem of sexual abuse by teachers, we agree with the learned Judge that the State and TSC have a higher duty to exercise reasonable care so as not to expose children to dangerous elements within the school. Providing a safe learning environment does not only refer to infrastructure, but also ensuring the dignity of the child is not violated more so by their caregivers. By parity of reasoning, we venture to say that if the minors for example had sustained physical injuries, say by an accident and while in the school premises, which accident was caused by failure of the school, we dare say the school and the state would also be vicariously liable.
20. Just like the learned Judge, we recognize that there were circulars and policies that prohibit sexual interaction between a teacher and a child, but this does not mean the mere existence of policy in itself empowers the child victims to question the legitimacy of the teacher’s sexual requests, nor does it show how a child can make a report of the incidences of sexual abuse. For example, TSC has a duty to ensure that the policy is put in the notice board of every classroom and for the Head teacher to sign a form confirming that both teachers and students have been explained the content of the policy. Much the same way organizations regularly display their service charters. Further, that there must be present, a reporting procedure such that if a student is sexually abused, the matter can be reported to an impartial office where the privacy of the child is observed and the matter is followed through the justice system. In this case the teacher who allegedly committed the acts, was in charge of the school’s discipline and counselling and one wonders where the minors were to report. We therefore, agree with the learned Judge, that the measures employed by the TSC and the State to provide a safe learning environment for children were insufficient and ineffective and this judgment should have been used to strengthen and operationalize the policies.



21. We now turn to the main issue under contention, whether the TSC was vicariously liable for the unlawful acts by the Teacher. The appellant's argument is that the learned Judge misapplied the Salmon Test which has prevailed for almost a century as the yardstick for determining acts committed in the 'course of employment'. *Salmond on Torts*, 1st ed. Pg 83 states:

“A master is not responsible for a wrongful act done by his servant unless it is done in the course of his employment. It is deemed to be so done if it is either (a) a wrongful act authorized by the master, or (b) a wrongful and unauthorized mode of doing some act authorized by the master.”

The primary function of the 'course of employment' requirement is to ensure that the employee's tort is sufficiently linked to the employer's enterprise, so as to justify the imposition of liability on the employer. It thus limits the responsibility of the employer to acts committed by the employee, acting in their employment capacity, and excludes those related to personal or private life.

22. In their submission, both counsel for TSC and AG were emphatic that the Teacher's unlawful acts did not fall within the scope of his employment; that the acts were committed purely for his personal gain, not in the course of official duties as an employee. Further, that the unlawful acts were committed at the 3rd respondent's house which was outside the school premises and at times when the school period was over. We nonetheless find this argument unconvincing as the evidence shows that although the incidences that took place on 4th July, 2010 took place in the Teacher's house, the opportunity to lure the minors to his house occurred in school where he exercised power and authority over them. The minors were students who were supposed to obey their teacher. Moreover, the abusive acts continued from the house as they were followed by other instances of the sexual abuse, such as the one that occurred on 30th July, 2010, which happened in a classroom but was fortunately thwarted by the curiosity of other students within the school premises who peeped through a window.

23. What is more, in the instant case, a Teacher's work was to offer protection to his students and not to take advantage of their tender age and abuse them. We have compared this case with *Lister v Hesley Hall Ltd* (above), where both the Court of Appeal and the House of Lords unanimously held that the intentional torts committed by the warden against a claimant who was charged with the responsibility of providing care, could be regarded as falling within the course of his employment, so that vicarious liability arose. That holding therefore tends to discard the Salmon test for determining the 'course of employment', as their Lordships crafted a new test that was capable of covering the warden's independent and deliberate wrongdoing. That an act will be deemed to have been committed during the 'course of employment' if there was a 'close connection' between the unauthorized conduct and the employment. Similarly in the instant appeal there was a 'close connection' between the conduct of the 3rd respondent as a teacher when he abused his position as a teacher and abused his students.

24. The level of risk faced by the minors in the present appeal was already elevated due to the prevalence of sexual abuse in Kenyan schools which is a matter of public notoriety as conceded by TSC itself worthy of judicial notice. The minors' case was not an isolated incident and TSC was well aware that a real and present danger existed where innocent school children were routinely subjected to abuse by their teachers who stood in a position of *loca parentis* with the children. The appellant's submission that there were claims that the 3rd respondent had a history of sexual misconduct which led to his transfer to this school where the alleged acts occurred did not help matters. As a matter of public policy, TSC had a duty to investigate such allegations before transferring the Teacher so as not to endanger the minors as it came to pass in this case. Once the employee has been hired, TSC has a legal duty to supervise the



employee and his conduct while at work in order to shelter 3rd parties more so children from risk. This is a statutory duty under TSC Act Section 4(2) which provides as follows;

“(2) 2) It shall also be the duty of the Commission to keep under review the standards of education, training and fitness to teach appropriate to persons entering the teachers service, and the supply of teachers, and to tender advice to the Minister from time to time on the aforesaid matters and on such other matters as may be referred to it by the Minister.”

And further states in section 7(2(c) that;

“A person shall be entitled to be registered as a teacher if— in the case of a person whom the Commission wishes to employ....his education, fitness to teach and experience are such as, in the opinion of the Commission, to warrant his registration.”

25. Under the theory of negligent retention (also known as negligent supervision), an employer is held liable for retaining an employee who it knows or should have known is not fit for the employment position. The theory places an affirmative investigative duty on the employer to remedy improper activity when they know or ought to know of its existence within the workplace. When applying negligent retention theory, courts focus on whether the employer had notice concerning past sexual improprieties and OR what measures, if any, the employer took to reprimand or dismiss the abusing employee. Notice can be in the form of actual notice or constructive notice of facts which should have suggested that the employee posed a special threat. Actual notice is that which is given directly and personally while constructive notice is information or knowledge of a fact imputed to a person who has a duty to inquire into it.
26. It is also borne from the record, through a report by Ms. Mary Karanja a child therapist who documented how when the school community learnt of the sexual abuse of the minors, some teachers repeatedly mocked the minors while defending the deputy head teacher, suggesting that there was an existing culture of tolerance to sexual abuse of students which thrived in this school. It also went further to show that TSC’s Code of Regulations was not in use in this school; there was failure to ensure the teachers were properly instructed not to sexually abuse children and likewise children were not empowered on how to report their teachers when subjected to abuse. We have also applied the test of reasonable foresight, inherent in the common law duty in negligence, for the purpose of determining whether the injury suffered by the minors was, at the time of the 3rd respondent’s was in employment, reasonably foreseeable as likely to result from the TSC’s failure to monitor his conduct which is confirmed by the facts.
27. We have in answering the above, taken into consideration the dicta albeit persuasive in Overseas Tankship Ltd v Morts Dock Ltd [1967] 1 AC 617, where it was held that liability in tort depended on reasonable foreseeability of loss and not merely on the directness or otherwise of the consequences. Applying the test, and following the principles set down by the House of Lords in Lister, we find that TSC took on the risk that its employee would commit a legal wrong especially when he was transferred to this school, and failure to warn the school and students of the teacher’s weakness. TSC is accordingly liable for the creation of such risk as there were no credible mechanism that were put in place to mitigate the wrong. The main function of vicarious liability is to provide compensation to those vulnerable persons who, through no fault of their own, are exposed to the inherent risks of the employer’s business.
28. We find the fact that TSC had entrusted the 3rd respondent with the education of young children, and that it had placed him in a special position which he abused by violating the minors who were under his



care were squarely to be blamed on TSC, the school, the Teacher and the State. As innocent victims, the minors are entitled to compensation for having been subjected to such humiliation, shame and pain that may have a lifelong effect on them. It is inconceivable how the minors in their tender years are made to carry that kind of burden of shame due to selfishness of a caregiver. Compensation and award of damages is an exercise of discretion by the trial Judge and can be interfered with if the Court of Appeal is convinced that the Judge acted upon some wrong principles of law, or that the amount awarded is extremely high or low. The appellant did not demonstrate that the award was too high. To us, these are minors who were traumatized and stigmatized perhaps for the rest of their lives. We are not persuaded the award of damages can be interfered with.

28. We now turn to the cross- appeal filed by the AG which is predicated on the grounds that the learned Judge failed to appreciate its mandate as the State’s representative and erred by finding it vicariously liable ‘on the basis of mere existence of a master/servant relationship’. It was the AG’s submission that it is TSC’s duty to implement its own policies and guidelines to curb sexual misconduct by its employees and that in the circumstances, the unlawful acts are in no way linked to the State. We respectfully disagree with this argument which cannot pass the test of the AG’s mandate under Article 156 (6) of the *Constitution* which includes to ‘promote, protect and uphold the rule of law and defend the public interest’. This case raised very serious matters of public interest and protection and promotion of the rule of law. Moreover, International Law obligates states to take all appropriate legislative, administrative, social and educational measures to protect children from all forms of physical, mental abuse including sexual abuse. The *African Charter on the Rights and Welfare of the Child* and of which Kenya is a signatory urges member states to take ‘specific’ measures including exercising ‘due diligence’ and increasing awareness about sexual abuse. The Committee on the Rights of the Child recognized the prevention of violence against children to be ‘of paramount importance’. This is a non-delegable duty and cannot be delegated to any agency including the TSC. An absolute duty, as opposed to duties of reasonable care, give rise to an obligation on the defendant to ensure that reasonable care is taken. By contrast to the doctrine of vicarious liability, it is the direct relationship between the State and the children, as citizens that establishes the duty in this context, and then the conduct of the TSC that is used to establish its breach. The upshot of this is that a finding of failure by the TSC to exercise reasonable care, of itself, leads to a finding of breach of the State’s duty, which is apparent in this matter.
29. In the final analysis, we find the appellant had a statutory duty to ensure the minors had a safe learning environment which it failed to do. The absence of provisions for remedy for breach of that statutory duty was no bar to stop the minors from filing a claim of damages under the tort of negligence and the *Constitution*. Thus the learned trial Judge arrived at the correct finding that the 1st and 2nd respondents were entitled to payment of damages of Kshs. 2,000,000 and Kshs. 3,000,000 respectively.
30. We accordingly find no merit in both the appeal and cross- appeal which we dismiss with costs to the 1st and 2nd respondents.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF APRIL, 2020.

R. N. NAMBUYE

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JUDGE OF APPEAL

M. K. KOOME

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JUDGE OF APPEAL



F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

SIGNED

DEPUTY REGISTRAR

