



Kihuha v Teachers Service Commission & another (Employment and Labour Relations Cause E032 of 2023) [2025] KEELRC 1370 (KLR) (9 May 2025) (Judgment)

Neutral citation: [2025] KEELRC 1370 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E032 OF 2023**

ON MAKAU, J

MAY 9, 2025

BETWEEN

PETER GATHURA KIHUHA CLAIMANT

AND

TEACHERS SERVICE COMMISSION 1ST RESPONDENT

**BOARD OF MANAGEMENT GAKUYU MAHIGA SECONDARY
SCHOOL 2ND RESPONDENT**

JUDGMENT

Introduction

1. This suit is about unfair dismissal of the claimant by the respondent on 19th May 2022 and it seeks the following reliefs: -
 - a. A declaration that the respondent unfairly dismissed the claimant.
 - b. Compensation for unfair termination $Kshs.88,031 \times 12 \text{ months} = Kshs.1,056,372.00$
 - c. Unpaid salary from 09.07.2021 to 19.05.2022 @ $Kshs.88,031.00 = Kshs.880,310.00$
 - d. An order that the respondent issues the claimant with a certificate of service in accordance with section 51 of the *Employment Act*.
 - e. Costs of the suit.
 - f. Interest on b and c at court rates.
2. The respondent has denied the alleged unfair dismissal and averred that it lawfully dismissed the claimant for gross misconduct and after following a fair procedure. Therefore, it prayed for the suit to be dismissed with costs as the claimant is not meriting the reliefs sought.



Facts of the case

3. The claimant was employed by the 1st respondent as a teacher earning a monthly salary of Kshs.88,031. At all material times to this case, he was based at Gakuyu Mahiga Secondary School.
4. On 9th May 2021, the claimant was interdicted for alleged immoral behavior namely flirtation with his student, Cecilia Wambui Wagechi, form 2, aged 19 years. He was served with another interdiction letter dated 4th November 2021 giving further particulars of the immoral behavior as having sexual intercourse with the said student on diverse dates since February 2020 in various places including the school staffroom, laboratory, in his car within the school compound and in a shamba near Mukurweini.
5. He also received a similar letter of even date but indicating the date of the offence as from February 2021. The two letters backdated the effective date of the interdiction to 9th July 2021 and they invited him to make a written defence within 21 days. He made his response on 22nd July 2021 and another one on 8th December 2021.
6. On 10th May 2022, he was accorded disciplinary hearing which culminated in his dismissal from service and removal from the register of Teachers on 19th May 2022. He was also given right of appeal within 90 days of the date of the verdict and he appealed vide letter dated 17th August 2022. However, the appeal did not comply with the regulation as the requisite fee was not paid.
7. During the hearing, the claimant testified as CW1 and called no witness while the respondent called three witnesses. The claimant's evidence was that the disciplinary hearing was not fair because he was not allowed to cross examine the complainant and call his witnesses during the first hearing by the Board in July 2021. He contended that he was told that his witnesses were doing exams yet the witnesses for the complainant were called to give evidence.
8. He further stated that the complainant relied on his written statement which she refused to read and then walked out of the meeting. He wanted to cross examine her but he was stopped by the person presiding over the proceedings. A TSC officer struggled to read the complainant's written statement but she could not.
9. Despite denial of the alleged offence and also writing a defence, he was served with the said interdiction letter dated 9th July 2021 and had others dated 4th November 2021. On 10th December 2021, he received invitation to attend disciplinary hearing before the TSC at Nyeri. The hearing was adjourned after his concern about the discrepancy on the date of the offence.
10. Subsequently, he was served with another interdiction letter dated 21st December 2021 indicating the date of the offence from February 2020. He denied ever interacting with the complainant in February 2020 or thereafter as the school was closed down due to covid-19. He clarified that he only interacted with the student in February 2021 after schools reopened.
11. He contended that the confusion as to the date of the offence affected his ability to prepare his defence. Besides, his witness was again not called during the hearing by TSC on 10th May 2022 despite having given her name in his defence letter dated 8th December 2021. He was also denied copy of the complainant's written statement during the hearing by the Board and also by the TSC.
12. He further testified that he appealed against the dismissal from service but the same was never determined despite paying the requisite fees (Exh.13).



13. He denied that he cross examined witnesses as alleged in the defence. He contended that the minutes were done in his absence and disowned the “final remarks” in the minutes attributed to him. He contended that there is no relationship between the said minutes and his defence.
14. On cross examination, he confirmed that he worked for more than 20 years and he was aware that he was bound by the CORT which prohibits immoral behavior against students. He admitted that he was informed of the alleged immoral behavior by the principal and he recorded a statement dated 10th June 2021.
15. He denied that he took the student to a house in a photo produced as exhibit. He contended that the photo was never produced during the disciplinary hearing. He denied that he gave her any pills and maintained that he never knew what happened to the student since he never took her anywhere. However, he contended that the student had been married and when reported back to school she started having attacks and falling down.
16. He contended that other students used to take the complainant to the hospital but on one occasion he was requested by her brother and another teacher to drop them and the sick girl at Othaya on his way home.
17. He reiterated that he was informed of his offence and defended himself before the Board but the complainant refused to read her written statement. He admitted that a letter dated 30th December 2021 amended the interdiction letter dated 4th November 2021.
18. The 1st Respondent’s Assistant Director Teacher Discipline Management Directorate, Mr.Lawrence Kigen testified as RW1. He stated that the offence by the claimant occurred in February 2020 which date was given by witnesses during the investigations. He confirmed that no further investigations were done after the interdiction of the claimant. He admitted that the preliminary report by the principal indicated the date of the offence as February 2021, but clarified that such was the case before the investigations and interview of witnesses.
19. He confirmed that he sat in the disciplinary panel and the claimant never requested for any statements or documents during the hearing. He contended that if he needed any of them, Regulation 147 of the CORT required him to write to the TSC and pay for the same.
20. He admitted that the claimant filed an appeal after the dismissal but clarified that he never brought the receipt to the TSC as required for verification.
21. He further clarified that investigation was done and the Board met on 9th July 2021 and made a finding that the complainant had sexual relationship with the claimant from February 2020. He also clarified the error of date of the offence was corrected by the letter dated 30th December 2021 from February 2021 to February 2020 which was the date used during the disciplinary hearing.
22. Finally, he admitted that the claimant deposited fees for his appeal but then he failed to bring the pay slip to the TSC office for stamping and processing of the appeal.
23. The school’s Principal Mr.Kanja Njau testified as RW2. He testified that the allegations against the claimant was reported to him in March 2021. The complainant was collapsing in class and then be taken to hospital and when it became serious, he called her aunt on 12th March 2021 to take her to a big hospital.
24. On 15th March 2021, the girl reported back to school and her two aunties, brother and mother came later in the day. They recorded statements about immoral behavior by the claimant towards the sick girl. The girl also complained and recorded a statement about the claimant’s offence since February



2021. He then called the claimant to the office and explained to him the allegation and he denied the offence.
25. After the interviews, he presented the report and the statements to the TSC County Director as required. On 9th July 2021, the school Board met and TSC officer attended. The claimant was called and cross examined the complainant. He was also shown the statements by the witnesses and the complainant read her statement in Kiswahili. The girl said that the relationship started in February 2021. He confirmed that there was covid-19 in 2020 and the students were not in school.
 26. He testified that the complainant's mother had mental lapse which he learned from the complainant's aunt that it resulted from an operation. He further testified that he visited the complainant's grandfather with two TSC officers during the investigations. He admitted that Stanley Wachira Wangechi wrote in his statement that the mother suffers from mental illness. RW2 also admitted that he received a medical report indicating that the complainant had mental illness. After the hearing, the Board recommended for the claimant's interdiction for sexual activities.
 27. During re-examination, RW2 stated that the complainant read her statement during the Board hearing in Kiswahili and it was translated to English that "She had a relationship with physics teacher from February 2020."
 28. Martha Wanjiru Gichangi, TSC HR Officer testified as RW3. She also adopted her written statement as her evidence in chief. She then produced the investigation as exhibit. In brief she testified that she received report of the allegation against the claimant in June 2021 from RW2 and then people interviewed the principal, complainant and her aunties. She was in a team which recommended interdiction.
 29. According to her, the girl was key witness. The relationship started in 2020 and continued to 2021 when she started collapsing. The girl said that the claimant had sex with her in the school. School prefect was calling her to remain behind while others went home. The prefect, Nahashon Muchiri also stated in his statement (page 44) that the claimant used to send him to call the complainant to the laboratory.
 30. RW3 further testified that they met the claimant during the investigations and read to him the statements by the witnesses but he denied any relationship with the girl. She contended that the offence was not one event but a continuing occurrence from 2020 to 2021. Finally, she confirmed that he never attended the Board hearing which recommended interdiction on 9th July 2021.

Submissions

31. It was submitted for the claimant that his dismissal was both substantively and procedurally unfair. It was argued that the termination process was marred by procedural irregularities that contravened the principles of natural justice, by denying the claimant fair hearing and opportunity to present an adequate defence.
32. It was submitted that the claimant's right to fair hearing, right to fair administrative action and the right to fair hearing in dismissal both under *the Constitution* and *Employment Act* were violated as he was denied written statements to enable him mount an effective defence. Despite his repeated request for that crucial information, the respondent withheld the same and thereby contravened the requirements of procedural fairness. Besides, the employer failed to explain to the claimant the procedure for accessing evidence and denied him the rights to cross examine witnesses leading to an unfair hearing.
33. For emphasis reliance was placed on Alphonse Maghanga Mwachanya v Operation 680 Limited (2013) eKLR and Kenfreight (EA) Limited v Benson K.Nguti (2016) eKLR where the Court of Appeal held



- that procedural fairness includes the right to be informed of the specific charges, to have access to evidence, and to cross examine witnesses.
34. It was further submitted that the claimant was served with multiple interdiction letters citing different years in which the alleged offence occurred, that is, February 2020 versus February 2021. It was submitted that such inconsistencies impeded the claimant's ability to prepare a coherent defence.
 35. It was submitted that the claimant maintained that he only interacted with the complainant in 2021 as the school was closed in 2020 due to covid-19 pandemic, a fact confirmed by the Principal (RW2) in his testimony. It was submitted that the girl should have been called as a witness to clarify the date. It was argued that the shifting of allegations caused confusion and violated the principles of fairness set out in *Judicial Service Commission v Mbalu Mutava & Another (2015) eKLR*, where the court held that fairness in disciplinary actions requires that charges be clearly stated to allow the respondent to prepare a proper defence.
 36. It was submitted that failure to call Mirriam Nyakio, a classmate of the complainant and who was one of her witnesses deprived the claimant a critical element of his defence and contravened his right to fair hearing. Reliance was placed on *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & Another (2001) eKLR* where the Court of Appeal underscored the principles of natural justice including right to fair hearing and importance of allowing parties to fully present their case.
 37. It was further submitted that the testimony of RW3 was riddled with contradictions. First, she stated that she did not attend the Board hearing on 9th July 2021 yet she was listed as an attendee in the minutes. Secondly, she stated that the complainant was summoned by the claimant during the covid-19 lockdown which contradictions is proof that her evidence was a fabricated as was observed in *Kapa Oil Refineries Ltd v Kenya Revenue Authority & 4 others (2018) eKLR*.
 38. Finally, it was submitted that the respondent failed to provide adequate and precise reasons for dismissing the claimant as required under section 43 of the *Employment Act*. It was argued that the varied and unsubstantiated allegations fall below the legal threshold of a just cause and amounts to constructive dismissal.
 39. For emphasis, *Kenya Revenue Authority v Menginya Salim Murgani (2010) eKLR*, was cited, where the court underscored the duty to substantiate grounds for dismissal. Consequently, and for the submissions summarized above, the court was urged to find that the reliefs sought are merited and award the same to the claimant.
 40. On the other hand, it was submitted for the respondent that the claimant was dismissed for a valid reason because he breached Regulation 140 and 141 of the CORT by engaging in immoral behavior with or towards a learner by having sexual intercourse with the complainant.
 41. It was submitted that the complainant disclosed the said offence to her aunt which information was corroborated by evidence from class prefect who was being sent by the claimant to call the complainant to secluded areas of the school such as the laboratory, staffroom, and sports field where other teachers were absent. The claimant also took the complainant privately to an isolated location such a remote farm house outside of the school.
 42. It was further submitted that the complainant's brother that the claimant repeatedly visited the complainant when she was admitted in hospital room and further visited her at home severally including one day when he removed her shoes and socks and laid her down. It was argued that the claimant breached the trust bestowed upon him under loco-parentis, to ensure safety and well-being of all the students under his care.



43. Reliance was placed on *W.J & Another v Astarikoh Henry Amkoah & 9 others* (2015) eKLR where the Court of Appeal held that the TSC among other respondents had a duty to safeguard students from sexual abuse by teachers. It was argued that the claimant actions constituted a serious violation of professional ethics which was incompatible with duties and responsibilities of a teacher.
44. Further reliance was placed on *Bamburi Cement Limited v William Kilonzi* (2016) eKLR where the court held that dismissal is justified where the misconduct by the employee led to a breakdown in the employment relationship, or where the misconduct is fundamentally or directly inconsistent with the employee's obligations to his or her employer.
45. In the instant case, it was submitted that the dismissal was justified as the claimant's actions constituted immoral behavior towards a student breaching both the ethical standards expected of a teacher, and also the terms of the contract governing his employment. Accordingly, it was submitted that the legal threshold of a valid reason under section 45 (2) (b) of the *Employment Act* has been met.
46. As regards procedural fairness, it was submitted that the dismissal was compliant with Regulation 139, 146, 147, 149, 150, 151, 153, 154 and 156 of the CORT which deals with the disciplinary process. It was submitted that the offence was investigated by a panel where the claimant was invited as the witnesses heard and he also responded to the allegations. Thereafter he was formally served with the allegations he was facing through the interdiction letter dated 30th December 2021, that amended the previous interdiction letters. He then responded by his letter of defence dated 25th January 2022 denying the allegations.
47. It was further submitted that, the claimant was invited to a disciplinary hearing on 10th May 2022 in strict compliance with Regulation 139(c) of the CORT and he attended. He was then given opportunity to cross examine the complainant and the other witnesses, and also to present his case. However, after evaluating the evidence the panel arrived at the decision that the claimant be dismissed and removed from the register of teachers.
48. It was further submitted that the claimant applied for review vide his letter 23rd November 2022 but failed to comply with provision 156 (5) of the CORT which requires every application for review to be accompanied by confirmation of remittance of the prescribed fees.
49. In view of the above submissions on the reason for the dismissal and the procedure followed, it was submitted that the dismissal was fair and lawful and the claimant is not entitled to the reliefs sought. Consequently, the court was urged to dismiss the suit with costs.

Determination

50. There is no dispute that the claimant was employed by the 1st Respondent as a teacher at Gakuyu Mahiga Secondary School and Cecilia Wambui Wangechi was a student at the school. There is further no dispute that the claimant was dismissed from service on 19th May 2022 for gross misconduct. The issues for determination are: -
 - a. Whether the dismissal was unfair and unlawful.
 - b. Whether the reliefs sought are merited.

Unfair and unlawful dismissal

51. Section 45 (1) and (2) of the *Employment Act* provides that: -

“ 45. . Unfair termination



- (1) No employer shall terminate the employment of an employee unfairly.
- (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.”

52. It follows that once an employee alleges that termination of employment by the employer was unfair, the employer must prove that the termination was justified by a valid reason and that a fair procedure was followed. In the instant case, the claimant denied the alleged immoral behavior with his student and further averred that he was not accorded a fair hearing before his dismissal.
53. However, the respondent called three witnesses who testified about the validity of the alleged misconduct, the investigation process and finally the disciplinary hearing.
54. I have considered the evidence on record and it is clear that a student in Gakuyu Mahiga Secondary School by the name Cecilia Wambui Wangechi revealed to her aunt that she was in asexual relationship with the claimant from February 2020. The revelation came on 13th March 2021 during a counselling session. She repeated the statement before the principal and wrote a statement dated 15th March 2021 detailing the claimant’s immoral behavior towards her.
55. She narrated how in February 2020 he called her to the staffroom caressed her breast and her private part, removed her clothes and had sexual intercourse with her. She further stated that the claimant repeated the same acts towards her in the laboratory and in his car. She also narrated how they had sexual intercourse also outside the school in the claimant’s car and in a farm house near Gakindu Shopping Centre where he gave her tablets to take.
56. She stated that after taking one tablet as instructed, she started experiencing stomach pains followed by heavy bleeding and then she passed out. When she gained consciousness, she found herself in the claimant’s car where he served her with meat and yoghurt. Since then she started collapsing repeatedly and being taken to the hospital. She explained that when the claimant entered the class she would remember what he had done to her and pass out.
57. The allegation by the complainant was corroborated by the Form 2 prefect, Nahashon Muchiri who was sent many times by the claimant to call the complainant from class to go and meet the claimant at the laboratory. Further corroboration came from a Form 3 student Moses Ndegwa Thuita who was severally called by the claimant through his phone to go to the complainant’s home to enable him speak to the complainant through the phone and some times to pass information to her while at home.
58. In addition, the complainant’s brother confirmed that the claimant frequently visited the complainant at home and in hospital and that he had an immoral relationship with the sister. He contended that the claimant had taken advantage of his sister’s vulnerability.



59. Having considered all the foregoing evidence, and especially the narration by Cecilia Wambui Wangechi, I find that, the employer herein had a just cause for dismissing the claimant from service, namely immoral behavior by severally having sexual intercourse with his student contrary to Regulation 141(a)(1) of the CORT. The employer had a legal duty to protect students from sexual abuse by their teachers which also amounts to a fundamental breach of the teachers' essential condition of the employment contract.
60. As regards procedural fairness, section 41 of the *Employment Act* provides that: -
- “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”
61. I have considered the whole process from the time of the report, preliminary enquiry by the principal (RW2), investigation by a team of County Ministry of Education and the TSC officers, then hearing before the school Board, interdiction and the disciplinary hearing by TSC panel, and I am satisfied that the claimant was afforded a fair opportunity to defend himself.
62. He was informed of the allegations against him and he responded in writing and thereafter appeared before the Board. Again, the TSC accorded him disciplinary hearing where he made his representations and cross examined the witnesses lined up by the employer against him. The disciplinary panel considered his representation and found him guilty of the alleged immoral behavior, and recommended for his dismissal from service.
63. The claimant alleged that the various interdiction letters served on him where inconsistent about date of the offence. However, the said error was corrected before the disciplinary hearing. In any case the offence was not one event but a repeated one.
64. As regards the failure to determine the application for review, I find that the claimant was to blame for the same since he failed to comply with the regulations about the receipt payment of fees.
65. Having found that there was a valid reason for dismissal the claimant and that a fair procedure was followed, I am satisfied that the dismissal was fair and lawful within the meaning of section 45 of the *Employment Act*. I gather support from *Walter Ogal Anuro v Teachers Service Commission (2013) KEELR 386 (KLR)* where the court held that: -
- “... for a termination to pass the fairness test, it must be shown that there was not only substantive justification but also procedural fairness.”



Reliefs sought

66. In view of the foregoing conclusion, I find that the claimant is not entitled to the declaration that his dismissal was unfair. He is further not entitled to compensation for unfair termination under section 49 of the *Employment Act*.
67. As regards the claim for the unpaid salary during the interdiction period, RW1 stated in his written statement that a teacher who is interdicted for immoral behavior is not entitled to payment of half salary. Regulation 148 (1) of the CORT provides that: -
- “A teacher shall be paid half salary during the period of interdiction except in the following cases-
- a. ...
- h. Immoral behavior.”
68. In addition to the foregoing, I agree with the respondent’s submission that, the claimant is not entitled for payment for doing nothing. It is obvious that from July 2021 to 19th May 2022 when he was dismissed from service, he was not rendering any services. Consequently, the claim for salary during the interdiction is declined.

Conclusion

69. I have found that the dismissal of the claimant from service was fair and within the law. For that reason, I have found that the claimant is not entitled to the reliefs sought except a certificate of service. Consequently, save for the order for issuance of certificate of service, the claimant’s suit is dismissed with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 9TH DAY OF MAY, 2025.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

