



**Simiyu v Teachers Service Commission (Petition 2 of 2023)
[2024] KEELRC 53 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 53 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
PETITION 2 OF 2023**

JW KELI, J

JANUARY 25, 2024

**IN THE MATTER OF INFRINGEMENT OF NATIONAL VALUES AND PRINCIPLES OF
GOVERNANCE AND FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES
10(1)(B), 22(1), 23(1), 43, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF TEACHERS' SERVICE COMMISSION
ACT NO. 2 OF 2012 LAWS OF KENYA AND REGULATIONS**

AND

IN THE MATTER OF THE EMPLOYMENT AND LABOUR RELATIONS ACT, 2007

BETWEEN

MOSES JUMA SIMIYU PETITIONER

AND

TEACHERS SERVICE COMMISSION RESPONDENT

JUDGMENT

1. The Petitioner was a former primary school teacher employed by the Respondent. While in employment he was involved in a sexual relationship with a young girl GKW(the victim) who turned out to be a student at Kaptanai S.S.A Secondary School. The girl had allegedly told the teacher she was a teacher trainee when he asked what she did for a living.
2. The Petitioner, a colleague of the girl's sister, had earlier sometime in August 2019 chaired a fundraising for the girl's late father's funeral, a common Kenyan practice. The girl, thereafter allegedly tracked the Petitioner on Facebook and he accepted the invite leading to the sex action at a hotel within the jurisdiction of Bungoma County.



3. Sometimes in January 2020, a nude photo image of the teacher and the girl circulated in the Petitioner's village WhatsApp platform catching the attention of the Respondent and leading to a disciplinary process that found the Petitioner to be of immoral behaviour and infamous conduct.
4. The Petitioner was consequently issued with a dismissal letter and removed from the Register of Teachers. His appeal to the Respondent for review of the decision was not successful. Aggrieved by the decision of the Respondent, the Petitioner filed the instant Petition dated 16th January 2023 and received in Court on 18th January 2023 seeking the following reliefs:-
 - a. A declaration that the unprocedural handling of the complaint from inception in flagrant disregard of rules of natural justice, fairness, and equality has led to a violation of the Applicant's constitutional rights.
 - b. A declaration that the applicant's legitimate expectation to fair administrative action guaranteed under Article 47 of the Constitution of Kenya have been violated/breached by the Respondent.
 - c. A declaration under Article 23(a) of the Constitution of Kenya that dismissal of the Applicant and his de-registration as a teacher is without basis, unlawful, null and void and the Respondent do reinstate the Applicant forthwith
 - d. Alternatively, and/or in addition, damages under Article 23(3) of the Constitution of Kenya, 2010 for unlawful dismissal with all accrued benefits and opportunities for promotion.
 - e. That the Respondent do also pay costs of this petition together with interest.
5. The Petitioner in addition filed his statement, verifying affidavit, and his affidavit in support of the petition and annexed the documents he relied on.
6. The Petition was opposed. The Respondent on 22nd March 2023, through Edwiiq Musundi Advocate, filed a Notice of Appointment dated 21st March 2023. The Respondent filed a Replying Affidavit sworn on the 24th of April 2023 by Dr. Julius O. Olayo, its Director of Human Resources, and received in court on the 2nd May 2023, annexing the documents relied on. The Respondent on the 19th September 2023 filed the affidavit of Joseph Kariuki sworn on the 6th July 2023, annexed further documents and witness statements of Melan Waliaula and Kennedy Otieno, all received by the court on an even date.
7. The Petitioner filed his reply to the response vide his affidavit sworn on the 17th May 2023 and received in court on the 22nd May 2023.

Hearing And Evidence

8. The Petitioner's case was heard on the 19th of September 2023 when the Petitioner testified on Oath(PW1), he adopted his Petition dated 16th January 2023; his Written Statement dated 16th January 2023 and affidavit in support of the petition of even date; the affidavit of G.K.W(the girl); and his reply to the Respondent's Replying affidavit through the affidavit sworn on 17th May 2023 as his evidence in chief, and produced his documents as P-Exhibit 1, 2, 3, 4(a) & 4(b), 5,6 & 7 filed on 18th January 2023. The Petitioner was cross-examined by counsel for the Respondent Counsel, Ms. Musundi.
9. PW2 was G.K.W who testified on oath and adopted her affidavit sworn on 16th January 2023 as her evidence. She was cross-examined by the Respondent's counsel Ms. Musundi.



10. The Respondent's case was heard on the same day the 19th of September 2023, where its witness Melan Nanjala Waliaula(DW1) testified on oath as the Respondent's first witness of fact and adopted her statement filed on 7th July 2023 as her evidence in chief. She was cross-examined by the Petitioner's counsel, Mr. Wasilwa. DW2 was Joseph Kariuki who testified on oath. He adopted his affidavit sworn on 6th July 2023 as his evidence in chief. He was cross-examined by the Petitioner's counsel, Mr. Wasilwa. DW3 was Kennedy Otieno who testified on oath. He adopted his affidavit sworn on 6th July 2023 as his evidence in chief and produced the Respondent's documents as D-Exhibits 1 to 10. He was cross-examined by the Petitioner's counsel, Mr. Wasilwa.

Petitioner's Case In Summary

(The case as per affidavit in support of petition sworn on 16th January 2023 and the affidavit sworn on 17th May 2023)

11. The Petitioner was a teacher employed by the Respondent and as at the time of his dismissal he was a Deputy Head Teacher at Namutokholo DEB Primary School. On 8th January 2020, he was verbally summoned to appear before an investigation team by the Respondent through one Mrs. Mary Ombisi.
12. On his appearance before the team, which had not given him any prior warning, he was asked about a photo image of a naked man and woman in a compromising sexual pose. That the man resembled himself, and he told the Investigation Panel that he had received a similar photo that had been shared by one Harrison whom he shared a WhatsApp platform and who had demanded Kshs. 5,000/- and in default he could broadcast the image as per their conversation(MSJ1).
13. The Petitioner states that he informed the panel that the naked photo had been photoshopped by his enemies as an extortion scheme and he had not participated in the authorship or circulation of the naked photo.
14. The Petitioner states that he had met one G.K.W through Facebook in December 2019 and that G.K.W had approached him. That G.K.W informed him that she was a student at Sikusi Teachers Training College and it was evident that G.K.W knew him. Their encounter ended in consensual sex with the said G.K.W. on 19th December 2019 at a hotel in Bungoma. He states that he was not aware that G.K.W was a Secondary School student and this information was only disclosed during the TSC Panel interview on 8th January 2020.
15. The Petitioner states that he was served with an Interdiction letter(MSJ2) on 22nd February 2021 and states that the same was laden with unfairness as he was to be placed on a half salary during the interdiction.
16. He states that vide a letter of 5th July 2021(MSJ3); he was invited to attend his disciplinary hearing at the Respondent's County Director's offices in Bungoma on 10th August 2021.
17. That he attended the hearing and G.K.W categorically informed the panel that she was an adult of 18 years when she met the Petitioner and that she had knowingly seduced the Petitioner and lied she was a college student.
18. That the Panel warned Ms. G.K.W of giving evidence that tended to exonerate the Petitioner which the petitioner states was a form of bias that the disciplinary panel harboured against him.
19. The Petitioner states that on 25th August 2021, he received his dismissal letter (MSJ 4(a)) and a letter of Removal from the Teachers' Register(MSJ 4(b)). He states that the allegations against him had not attained the threshold for his dismissal as the alleged victim was not known to him as a student, she



- had enticed him into the relationship as per her admission before the disciplinary panel, and she had been an adult and lied that she was a teacher in training college.
20. That the Petitioner filed for review on 24th October 2021(MSJ-5)and the same was dismissed.
 21. The Petitioner states that he has visited the Bungoma County Director's offices on numerous occasions seeking a copy of the decision made during the disciplinary hearing which was fruitless.
 22. The Petitioner states that the only document he could access was the standard investigative assessment report (MSJ7) which he states bore the curious conclusion that from the witness testimonies, he was guilty of the offense against him and that appropriate action be taken against him, which he states depicted a predetermined verdict.
 23. The Petitioner states that his letter of 6/1/2023(MSJ8) before the petition bore no response from the Respondent.

Affidavit by Petitioner sworn on 17th May 2023

24. The Petitioner states that his petition as drawn prescribes with reasonable exactitude the Articles of the Constitution that are deemed to have been violated to wit Articles 43, 47, and 50 related to his right to social security and due process and that his petition is explicit in the statement of the manner the rights are violated.
25. The Petitioner states that he could not have been responsible for the publishing of the complicit nude photograph as he could not in his sane mind expose himself.
26. The Petitioner states that the investigative panel failed to appreciate that he was not responsible for circulating the implicit photo, that the alleged victim testified to have knowingly approached the Petitioner and lied that she was an adult and a student at the Sikusi Teachers College and the Petitioner could not have known that she was a Secondary School student. The Petitioner states that the panel failed to consider that the alleged victim, had proposed they have sex at Simba Hotel so that the Petitioner could help her family.
27. The Petitioner states that the allegations against him were not that strict as balanced with his right to Social Security and right to employment as there is proof that he could not have knowingly engaged in immoral conduct with a school girl and actively condoned the publication of offending images and the Panel's conclusion at paragraph 22 of their replying affidavit is repulsive.
28. The Petitioner states that the evidence submitted to the Respondent at the panel meeting on 10th April 2021 could not have found him guilty of immoral conduct as it was clear that the alleged victim portrayed herself as an adult and had consensual sex with the Petitioner.
29. The Petitioner states that the Review Committee did not reconsider the evidence and only mimicked the decision of the disciplinary panel and if they had reconsidered it, they could have found him blameless.
30. The Petitioner submits that he was lured by an evil manipulative schemer on the internet. He states that there was no due process as no formal allegations were drawn and presented to him within 7 days before his appearance before the panel and that he was only summoned to appear while he was at school and asked to defend himself. The Petitioner states that he was never asked to appear before the panel with a union shop officer or friend as per the dictates of fair process.



31. The Petitioner states that the Respondent dismissed him through a flawed process, by failing to present the charge against him seven days before, for him to prepare his defence, and appear at the hearing with a friend or union official.
32. The Petitioner states that the Respondent having failed to follow due process violated Articles 10,21,23,43,47 and 50 of the Constitution.
33. The Petitioner states that there was no cogent evidence for his dismissal, as the alleged victim confirmed she was 21 years of age, she had failed to disclose that she was a student at Kaptanai Secondary School, that she had been married in February 2018 for eight months and that she had dropped out of school at Form Three class and later returned back to school. That if the alleged victim had not lied that she was a trainee teacher and that she was a student he could not have accepted the relationship.
34. The Petitioner states that a reasonable tribunal properly exercising its mind on evidence of this confessed manipulative witness would not have arrived at the verdict the Respondent's tribunal did.
35. The Petitioner states that the court has jurisdiction to determine the petition.

The Respondent's Case In Summary

(The case as per the Replying affidavit of Dr. Julius O. Olayo (the Director in charge of Human Resource Management and Development of the Respondent) sworn on 24th April 2023)

36. Respondent gave notice of a Preliminary Objection on the principle of Constitutional avoidance for the petition to be struck out.
37. The Respondent's case is that the Petition does not meet the Constitutional threshold set out in Anarita Karimi v Republic and in Matemu v Trusted Society of Human Rights Alliance, Civil Appeal No. 290 of 2012.
38. The Respondent states that the Petitioner's contract of employment is governed by the provisions of the Teacher's Service Commission Act, No. 20 of 2012, *Code of Conduct and Ethics for Teachers (COCE)*, *Code of Regulations for Teachers (CORT)* and circulars circulated by the Respondent from time to time.
39. The Respondent states that on 4th January 2020, the TSC Sub County Director Bungoma West received a post on her WhatsApp wall shared by a counterpart in the Ministry of Education Sub-county Director Education. The said post was of two naked persons, a man and woman, sleeping together and the post had an accompanying message that the girl was a Form Three student at Kaptanai Secondary School and the man was the Deputy Headteacher of Namukhotolo DEB Primary School in Bungoma County.
40. The Respondent states that as is procedure under Regulation 146(2)(a) of CORT, the Board of Management of Namutokholo Primary School, held a meeting before with the Petitioner who appeared on 14th January 2020 to deliberate on allegations against him.
41. The Respondent submits that the Petitioner admitted to being the person in the circulated photo with a lady, that he had met the lady at Simba Hotel on 14th December 2019 at around 2.00 pm for about an hour; that he had given the Lady fare of Kshs. 300 as fare to travel home and indicated that he had earlier attended a funeral of her late father in August 2019. (JO-1- Minutes of BOM Disciplinary Hearing).
42. The Respondent states that after deliberations and from the evidence adduced the Board resolved that the Petitioner had a case to answer for having sexual relations with the victim.



43. On 8th January 2020, an investigation panel comprising their officers visited Namutokholo Primary School and conducted oral interviews, analysed written statements, reports, observations, and analysis of the photographic evidence. The investigations by the panel concluded that the relations between the victim(girl) had led to sexual relations, the victim was aware of the location and time of the sexual relations and that she was a student while the Petitioner was a Teacher and they were identified in the photo circulated as per the minutes of the Disciplinary Panel (JO-2).
44. The Respondent states that it is from evidence collected by the foregoing investigation panel that the Petitioner was found guilty of the allegations levelled against him and it recommended appropriate action. That by Regulation 147 of the CORT on 22nd February 2021, the Petitioner was interdicted(JO-3-Interdiction letter) for immoral behaviour for having sexual intercourse with a Form Three student and of the infamous conduct in any professional aspect, his nude picture was circulated on social media platform (Facebook and WhatsApp).
45. The Respondent states that the Petitioner responded to the Interdiction letter on 6th March 2021(JO4-Statement of Defence) denying the allegations but clearly showing he was aware of the complaints against him.
46. That under Regulation 149 of CORT, the Petitioner was invited to a hearing at the Respondent's County offices at Bungoma through a letter of 5th July 2021(JO5) and the Petitioner attended the disciplinary hearing on 10th August 2021 wherein he admitted having had sexual intercourse with the victim and was allowed to cross-examine the witnesses and stated his case as per the minutes of the Disciplinary Hearing(JO-6).
47. That after the Disciplinary hearing, the disciplinary panel evaluated the evidence and the conduct of the Petitioner and decided to dismiss him and remove his name from the Register of Teachers.
48. That through a letter dated 25th August 2021, the Petitioner was informed of the outcome of the disciplinary hearing and he was informed of his right to appeal within ninety days(JO 7 (a) and JO7(b).
49. That the Petitioner lodged an appeal on 29th August 2022 and he was invited to the review hearing and he appeared before the Review Committee(JO-7).
50. That the review committee resolved to uphold the determination of the Disciplinary Panel and communicated its decision to the Petitioner through the letter dated 9th September 2022 (JO-8).
51. That given the foregoing the disciplinary action against the Petitioner was lawful and in line with the provisions of the *Teachers Service Commission Act*, no. 20 of 2012, the Code of Regulations for Teachers (CORT) and that he was given a fair hearing and due process was followed.
52. That the Petitioner has failed to adduce sufficient, compelling, and reasonable grounds to bring this matter within the realm of Articles 10,21, 23,43,47, and 50 of the *Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules and/or any other Provision of the *Constitution* relating to the contravention of the Fundamental Rights and Freedoms.
53. The Respondent states that Part IX of the Code of Regulations of Teachers (CORT) outlines offences by teachers that attract disciplinary procedures exercised by the Respondent.
54. That under Regulation 21(1) (a) of CORT teachers are prohibited from engaging in sexual activity with learners.



55. Under Regulation 259 of CORT, teachers are prohibited from making, producing, or having in their possession any pornographic book, pamphlet, paper, drawing, painting, art, representation, figure, or any obscene object.
56. That by Regulation 140(a) of CORT, immoral behaviour is enumerated as sexual intercourse which is subject to disciplinary action by the Respondent against the accused teacher.
57. That the Petitioner admitted to having had sexual intercourse with the victim and identified himself as the person in the nude photo.
58. That it is not in dispute that the Petitioner had sexual intercourse, but only alleges having not known that the victim was a student at Kaptanai Secondary School, despite having attended her father's funeral.
59. That it is a lie that the Petitioner did not know the learning status of the victim and the same is misleading.
60. That the Respondent had a valid reason to subject the Petitioner to disciplinary procedures.
61. The Respondent stated that the veracity and accuracy of the allegations against the Petitioner were determined before an independent and statutorily constituted disciplinary panel that afforded the Petitioner a fair and impartial hearing and hence prayers a, b, and c in the petition are untenable.
62. The Respondent states that if the prayers in the petition are granted it will amount to usurpation of the mandate of the respondent contrary to the law.
63. The Respondent submits that the Petition does not raise any cause of action anchored in the Constitution as the subject matter pertains to contractual grievances within the ambit of the statutory law, the Employment Act, albeit draped as a Constitutional drapery.
64. The Respondent submits that the Petition and prayers therein are against public policy as the Petitioner is not immune to disciplinary action when serious allegations touching on his integrity and professional standing are raised.
65. The Respondent states that the Petitioner is not entitled to the prayers sought as he was dismissed on cogent evidence under the law; he is culpable of immoral behaviour and the Respondent had a valid reason to terminate his services; and that he was dismissed following a fair and procedural process.
66. That the Petition is vexatious, an abuse of the court process and should be dismissed.

Written submissions

67. After the hearing the court directed the parties to file their submissions. The parties complied. The petitioner's written submissions were drawn by BS Advocates LLP and were dated 23rd October 2023 and received in court on 24th October 2023. The Respondent's written submissions drawn by Edwiqu Musundi, Advocate were dated 31st October 2023 and received in court on 8th November 2023.

Determination

Issues for determination.

68. The Petitioner did not identify any issues for determination and submitted generally on the substantive and procedural fairness before his termination.
69. The Respondent in its submissions addressed the following issues:-



- a. Whether the termination of the Petitioner’s employment was valid.
 - b. Whether the termination of the Petitioner’s employment was in accordance with fair procedure
 - c. Whether the Petitioner is entitled to the reliefs sought.
70. The court discerned that the issues for determination under the Petition are as follows:-
- a. Whether the doctrine of constitutional avoidance is applicable in this case.
 - b. Whether the dismissal of the Petitioner by the Respondent was lawful and fair.
 - c. Whether the Petitioner is entitled to reliefs sought.

Issue a). Whether the doctrine of constitutional avoidance is applicable in this case.

71. The Respondent addressed a preliminary issue of the Petition being no more than an employment claim invoking the doctrine of constitutional avoidance. The Respondent submits that the rights of the Petitioner are governed by the Employment Act namely; right to fair administrative action and fair hearing. That the petitioner should not be allowed to avoid the Employment Act by merely quoting Constitutional provisions. To buttress this submission, the Respondent relied on the decision of the Court of Appeal in *Gabriel Mutava & 2 Others v Managing Director Ports Authority & another* (2016 Eklr where it held;- “Time and again it has been said that where there exists other sufficient and adequate avenue to resolve a dispute, a party ought not to trivialize the jurisdiction of the Constitutional Court by bringing actions that could very well and effectively be dealt with in that other forum. Such party ought to seek redress under such other legal regime rather than trivialize constitutional litigation.”
72. The Respondent further submits that the Petitioner was obliged to plead the alleged constitutional violations with reasonable precision relying on the celebrated decision in *Anarita Karimi Njeru v R* (1976-1980) and *Mumo Matemu v Trusted Society of Human Rights Alliance and 2 others* (2013).
73. The Respondent submits that the Petitioner quoted an array of constitutional provisions but failed to produce evidence in form of pleadings to demonstrate the violations and to buttress the submissions and relied on the decision of the High Court in *Leonard Otieno v Airtel Kenya Limited* where Justice Mativo in dismissing the Petition held:- “It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the Constitution and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.”
74. The Petitioner in his petition pleaded Article 10 of the Constitution of Kenya on National values and principles of governance and states that Section 4 of the Teachers Service Commission Act directs TSC in the performance of its functions to be guided by national values and principles of governance under Article 10 and the principles and values of public service under Article 233.
75. The Petitioner cites as the contravened constitutional provisions Article 47 on the right to fair administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair and Article 50(1) on the right to a fair hearing. On the violations, the Petitioner pleaded that there was failure to frame charges against the applicant with sufficient details, and ignoring of the principle of presumption



of innocence until proven guilty, on the finding made by the investigation panel that he was guilty of the offence levelled against him and appropriate disciplinary action be taken against him before the report was submitted to the hearing panel. The Petitioner alleged failure to avail him adequate facilities including witness statements, investigation report and adequate time for preparation in breach of the maxim for fairness.

Decision

76. Looking at the alleged violations outlined above under the petition, it is my opinion the real issue for determination was whether there was unfair dismissal and this was an issue fit for litigation under the *Employment Act* specifically Sections 43, 41, and 45 for consideration of remedies under Section 49 of the *Employment Act*, this being a claim of unfair termination. The position of the court is validated in the terms of the alternative prayer being:- ‘Alternatively, and/or in addition, damages under Article 23(3) of the *Constitution* of Kenya, 2010 for unlawful dismissal with all accrued benefits and opportunities for promotion.’ The court finds that its powers to grant damages under the *Constitution* is limited to finding constitutional violations and the award of damages will be under Section 12 of the ELRC Act. On unfair dismissal, the relevant law is under section 49 of the *Employment Act*.
77. In so holding, I am persuaded by the decision of the court in *Josephat Ndirangu v Henken Chemicals (EA) Limited* 2013 e KLR where the court held:- ‘In my view a litigant should not avoid the provisions of the *Employment Act* regarding unfair termination or wrongful dismissal by going behind the statute and seeking to rely directly on Article 41 of the *Constitution* on the right to fair labour practices. The purpose of the *Constitution* is that the right to fair labour practices is given effect in various statutes of which the *Employment Act* and the *Labour Relations Act* are primary. The primary legislation should not be circumvented by seeking to rely directly on a constitutional provision. Both the *Employment Act* and the *Labour Relations Act* give effect to constitutional rights.’ (emphasis mine) This was a case falling under the doctrine of constitutional avoidance. The court is minded to pursue substantive justice as guided by the Court of Appeal in *Gabriel Mutava & 2 Others v Managing Director Ports Authority & another* (2016 Eklr where having found a case of constitutional avoidance stated:- ‘Lastly, to do justice to the parties, could the trial court having found that the appellants’ termination of employment ran foul of the regulations, have converted the Petitions into a plaint and or statement of claim? Of course, such approach was available to the trial court.’
78. The Petitioner prayed for damages for unlawful dismissal. The court will proceed to look into the merit of the Petition as though it is a claim. The Supreme Court found that the rights under Article 41 are provided for under the *Employment Act* and for a party in a Constitutional petition was obliged not only to plead but prove the constitutional violations in Petition No. E008 Of 2023 Between Kenya Ports Authority And Joseph Makau Munyao (delivered on 28-12-2023) and stated “[56] Whereas the *Employment Act* is expressive of the rights under Article 41, we find that damages under the head of Article 41, as a constitutional provision, ought to be specifically pleaded and proved. Any other constitutional provisions that would have been infringed can equally be canvassed, alongside, and, under this head. This is different and distinguishable from the provisions under Section 49 as read with Section 50 of the *Employment Act* which are limited to the provisions under the *Employment Act*. The wording of the *Employment Act* under section 49 only relate to an instance where an employee has been terminated. This court determined in *Kenfreight (E.A) Limited v Benson K. Nguti* (supra) that section 49 of the *Employment Act* is applicable upon the finding that a person has been unlawfully terminated.” I do find that the instant case was best placed under a claim and not a petition and amounted to constitutional avoidance.

Issue b). Whether the dismissal of the Petitioner by the Respondent was in violation of the fair hearing or fair labour practices under Articles 47 and 51 as cited in the petition.



79. The court found that whereas this was not a Constitutional Petition, the Petitioner led evidence under the COURT and section 41 of the *Employment Act*.
80. The issue of lawfulness relates to the validity of the reasons of the termination under section 43 of the *Employment Act* as read together with section 45(2) and fairness relates to the procedural fairness as provided for under section 41 all of the *Employment Act*.
81. The Petition was hinged on the substantive provisions of the *Constitution* namely Article 43 (1) ‘every person has a right to social security; Article 47 (1) ‘Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action’ and Article 50 1) ‘Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. (2) Every accused person has the right to a fair trial, which includes the right— (a) to be presumed innocent until the contrary is proved; (b) to be informed of the charge, with sufficient detail to answer it; (c) to have adequate time and facilities to prepare a defence; (d) to a public trial before a court established under this Constitution; (e) to have the trial begin and conclude without unreasonable delay; (f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed; (g) to choose, and be represented by, an advocate, and to be informed of this right promptly; (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly; (i) to remain silent, and not to testify during the proceedings; (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence; (k) to adduce and challenge evidence; (l) to refuse to give self-incriminating evidence. m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial; (n) not to be convicted for an act or omission that at the time it was committed or omitted was not— (i) an offence in Kenya; or (ii) a crime under international law; (o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted; (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law. (3) If this Article requires information to be given to a person, the information shall be given in language that the person understands. (4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.’

The Petitioner’s case

82. On the violations, the Petitioner pleaded that there was failure to frame charges against the applicant with sufficient details, ignoring the principle of presumption of innocence until proven guilty due to the finding by the investigation panel that he was guilty of offence levelled against him and appropriate disciplinary action be taken against him before the report was submitted to the hearing panel.
83. He opined that there was a predetermined verdict. The petitioner alleged failure to avail him adequate facilities including witness statements, Investigation Report and adequate time for preparation, in breach of the maxim for fairness. It was the Petitioner’s case that allegations against him had not attained the threshold for his dismissal as the alleged victim was not known to him as a student; she had enticed him into the relationship per her admission before the disciplinary panel; and she had been an adult and lied that she was a teacher in training college.



84. The Petitioner denied having circulated the photo and stated he was not given 7 days' notice, or informed of the right to bring witnesses. The Petitioner produced a WhatsApp message communication with one Harrison who asked for money not to circulate the nude photos, letter of interdiction, invitation for hearing of discipline case, dismissal decisions, Notice of Removal from the Register, application for review, investigative report and demand letter. The Petitioner testified and called the victim GKW as his witness and both were cross-examined.

The Respondent's case

85. The Respondent states that the petitioner's contract of employment is governed by the provisions of the Teacher's Service Commission Act, No. 20 of 2012, Code of Conduct and Ethics for Teachers (COCE), Code of Regulations for Teachers(CORT)and circulars circulated by the respondent from time to time.

86. The respondent states that on 4th January 2020, the TSC Sub-County Director Bungoma West received a post on her WhatsApp wall shared by a counterpart in the Ministry of Education Sub-county Director Education. That the said post was of two naked persons, a man and woman, sleeping together and the post had an accompanying message that the girl was a form three student at Kaptanai Secondary School and the man was the Deputy Headteacher of Namukhotolo DEB Primary school in Bungoma County.

87. The Respondent states that as is procedure under Regulation 146(2)(a) of CORT, the Board of Management of Namutokholo Primary School, held a meeting before which the Petitioner appeared on 14th January 2020 to deliberate on allegations against him.

88. The Respondent submits that the petitioner admitted to being the person in the circulated photo with a lady, that he had met the lady at Simba Hotel on 14th December 2019 at around 2.00 pm for about an hour; that he had given the victim fare of Kshs. 300 as fare to travel home and indicated that he had earlier attended a funeral of the victim's father in August 2019 (JO-1- Minutes of BOM Disciplinary Hearing).

89. The Respondent states that after deliberations and the evidence adduced the Board resolved that the Petitioner had a case to answer for having sexual relations with the victim.

90. That on 8th January 2020, an investigation panel comprising their officers visited Namutokholo Primary School conducted oral interviews, and analysed written statements, reports, observations, and analysis of the photographic evidence. That the investigations by the panel concluded that the relations between the victim had led to sexual relations, the victim was aware of the location and time of the sexual relations and that she was a student while the petitioner was a Teacher and they were identified in the photo circulated as per the Minutes of the Disciplinary panel(JO-2).

91. That it is from evidence collected by the foregoing investigation panel that the panel was found guilty of the allegations levelled against him and it recommended appropriate action against him.

92. That by Regulation 147 of CORT, on 22nd February 2021, the Petitioner was interdicted(JO-3- Interdiction letter) for immoral behaviour for having sexual intercourse with a form three student and that in the infamous conduct in any professional aspect, his nude picture was circulated on social media platform (Facebook and WhatsApp).

93. The Respondent states that the Petitioner responded to the Interdiction letter on 6th March 2021(JO4- Statemnt of Defence) denying the allegations but clearly showing he was aware of the complaints against him.



94. That under Regulation 149 of CORT, the Petitioner was invited to a hearing at the respondent's County offices at Bungoma through a letter of 5th July 2021(JO5) and the Petitioner attended the disciplinary hearing on 10th August 2021 wherein he admitted having had sexual intercourse with the alleged victim and was allowed to cross-examine the witnesses and states that his case as per the minutes of the Disciplinary Hearing. (JO-6).
95. That after the Disciplinary hearing, the disciplinary panel evaluated the evidence and the conduct of the petitioner and decided to dismiss him and remove his name from the Register of Teachers.
96. That through a letter dated 25th August 2021, the Petitioner was informed of the outcome of the disciplinary hearing and he was informed of his right to appeal within ninety days(JO 7 (a) and JO7(b).
97. That the Petitioner lodged an appeal on 29th August 2022 and he was invited to the review hearing and he appeared before the Review Committee(JO-7).
98. That the Review Committee resolved to uphold the determination of the Disciplinary Panel and communicated its decision to the Petitioner through the letter dated 9th September 2022 (JO-8).
99. That given the foregoing the disciplinary action against the petitioner was lawful and in line with the provisions of the *Teachers Service Commission Act*, No. 20 of 2012, the Code of Regulations for Teachers (CORT) and that he was given a fair hearing and due process was followed.
100. In support of its case, after the production of documents relied on, the Respondents called 3 witnesses who testified on oath and were cross-examined.

Decision

101. I will bifurcate the issue into two. Procedural fairness and substantive fairness.

Procedural fairness

102. The Petitioner challenged the procedural fairness at the stage of investigation for reasons that he was not given 7 days' notice, he was not informed to bring a witness, and that he was presumed guilty before the disciplinary hearing, for the investigation panel concluded he was guilty of the offence levelled against him and recommended disciplinary action.
103. According to the Respondent, as is procedure under Regulation 146(2)(a) of CORT, the Board of Management of Namutokholo Primary School, held a meeting before which the Petitioner appeared on 14th January 2020 to deliberate on allegations against him(JO-1). That on 8th January 2020, an investigation panel comprising their officers visited Namutokholo Primary School, conducted oral interviews, and analysed written statements, reports, observations, and analysis of the photographic evidence. That the investigations by the panel concluded that the relations between the victim had led to sexual relations, the victim was aware of the location and time of the sexual relations and that she was a student while the petitioner was a Teacher and they were identified in the photo circulated as per the minutes of the Disciplinary panel(JO-2).
104. During cross-examination, the Petitioner admitted he attended the Preliminary investigation session at the County level. He admitted he was asked a few questions and he answered(pages 46-47 of the Replying affidavits are the questions asked). The Petitioner admitted he attended the disciplinary hearing at the County level and was accorded adequate time to defend himself. He was informed the charges under the Interdiction letter issued before the hearing. He was invited to make a defence statement. He was asked to bring evidence in support of his case. He was invited to a disciplinary hearing and he attended, the charges were read and he responded. He asked the witnesses questions.



- He made a final statement after the hearing wherein he apologised and stated he did not know the girl was a student. He apologised as he found himself in a situation he did not wish. He applied for review and appeared before the Review Panel and was heard. He was issued with the decision of the review.
105. During the re-exam, the Petitioner told the court that he was summoned from class by the investigative team without prior notice. That by the end of the investigations he found his image had been tainted and his job was at stake and that is why he apologised. The situation was not of his making as he knew the girl from Facebook.
106. During the cross-examination of Joseph Kariuki (RW2) when asked if he had a detailed statement of the allegation and to appear before the preliminary panel with witnesses, the answer was ‘ we do not have that.’ RW2 admitted there was no statement in the minutes “JK1” summoning the Petitioner. When asked if he began the accused’s case instead of the complainant’s case, RW2 told the court that there was already an assessment of the case, hence the petitioner was aware of the case. That the allegations were read to the Petitioner which he confirmed. RW2 confirmed they began by interrogating the Petitioner, then the girl, and lastly the deputy principal.
107. During the re-exam, RW2 told the court that the Preliminary investigation was not a trial but an investigation.
108. RW3 was Kennedy Otieno. He participated in the disciplinary hearing. During cross-examination, RW3 confirmed he was not part of the investigation team of RW2. RW3 confirmed the investigation team had the power to discharge the Petitioner. RW3 told the court that there was a first assessment of the case and then an investigation report. RW3 stated that the investigation can reach a verdict of guilty and interdict a teacher so that TSC can take necessary action. RW3 stated that by appearance before the investigation panel, there was communication. RW3 stated there was nothing wrong with the investigation.
109. During the Re-exam, RW3 stated that allegations are received, investigations (interview of persons involved), and victims are required to record statements at the county level. Persons are then given the opportunity to present their own case and call witnesses and thereafter disciplinary proceedings. The investigation panel has no power to acquit only the disciplinary committee.
110. In submissions, the Petitioner submits that Regulation 39 of the TSC Code of Regulations for Teachers 2015 provides that in the determination of each disciplinary case shall(a)presume a teacher innocent until proven guilty(b). inform the teacher concerned on the nature of allegations made against the teacher and afford him reasonable time to present his defence. Further regulation 146(6) of the Code provides for the investigation process as follows:-
- ‘(6) The Investigating Panel shall, upon investigation, accord the head of institution or a teacher a fair hearing during the investigation process which shall include being-
- (a) presumed innocent until proven that he has a case to answer;
 - (b) informed of the allegation, with sufficient details to answer it; Investigation of allegations.
 - (c) given at least seven days to prepare a defence;
 - (d) given an opportunity to appear in person before the Investigation Panel, unless his conduct makes it impossible for the investigation to proceed in his presence;
 - (e) present when the witnesses are being interviewed by the Investigation Panel;



- (f) warned that any incriminating evidence may be used against him during the disciplinary proceedings; and
 - (g) given an opportunity to adduce and challenge any adverse evidence.
- (7) Where a minor is involved in the investigation, the panel shall take precaution to protect the rights of the minor.
 - (8) The Investigation Panel shall, upon completing the investigation compile a written report in regard to the teacher's disciplinary status and shall present the report to the Board, the County Director, and the Secretary.
 - (9) The Board of Management or head of institution or any other agent shall, in conducting the investigations liaise with the county director's office for the purpose of offering technical advice. (10) Where the report of the investigation panel discloses that an offence has been committed, the Board of Management or the county director or the Secretary shall- (a) where necessary, issue an administrative warning in writing; (b) where a teacher's misconduct is as result of a medical condition, recommend to the Commission Secretary for approval of any leave or further direction as the case may be; or (c) interdict the teacher using the Letter of Interdiction set out in the Thirty-Fourth Schedule”
111. The Petitioner submits that he was not given the 7 days or informed to bring witnesses or shop floor representatives at the investigation stage as per Regulation 146(6) (supra). This was not in dispute. Compliance with the other regulations was also not in dispute.
 112. I find the process leading to the dismissal was in three stages. First was the assessment by the Board of Management whether he had a case to answer, secondly the investigation panel, and third the disciplinary hearing.
 113. It is my finding that the procedure at the investigation stage was not compliant with the process under regulation 146 of the TSC Code of Regulations for Teachers(CORT) in that there was no notice as required, the teacher was called to the panel from class. He gave his statement and so did other witnesses. On the presumption of innocence, the CORT provided for the investigation panel to find out whether an offence was committed. I find the statement by the Panel of the Petitioner having been guilty of having committed the offence was consistent with the CORT.
 114. On the notice requirement . In my opinion, section 41 of the *Employment Act* applies at the disciplinary hearing and not the prior steps. In the prior steps, the CORT applied. The court noted there were some infractions in the investigation stage for lack of compliance with the CORT(146) specifically as relates to notice of 7 days. However, the court finds that there was no significant injustice or prejudice suffered by the Petitioner as he was heard and witnesses recorded statements in his presence during the investigations. The main issues at the investigations were all matters already within his knowledge following the Board meeting and as per his statement at the investigation being the accusation of having had sex with a learner and a photo of the act having been circulated.
 115. The Petitioner had ample opportunity to participate before the investigation panel and the issue was within his knowledge. I find that the Petitioner, before the dismissal, was heard by the disciplinary panel in compliance with the provisions of section 41 of the *Employment Act* which provides for procedural fairness before termination of employment consistent with Article 41 of the *Constitution* and Article 47 as well as well as Article 50 of the *Constitution*.
 116. The infractions at the investigation stage of lack of notice and notice of calling witnesses as per the CODE was corrected fully at the disciplinary hearing.



117. Before the hearing, the Interdiction letter dated 22nd February 2022 was issued to the Petitioner disclosing the allegations he was facing and calling for his defence. He was given hearing notice vide letter dated 5th July 2021(P-Exhibit- 3)referring to the Interdiction letter) and informed of his right to witnesses. At cross-examination, the Petitioner confirmed all the foregoing.
118. It is my finding and determination that there was substantial compliance with procedural fairness as the Petitioner before the disciplinary hearing was informed of accusations, given adequate notice to appear and provide defence and call witnesses which he did before the decision on dismissal. Section 41 of the Employment Act which deals with termination (see Supreme Court Kenfreight case(supra)reads:-‘(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.’” The minutes of the disciplinary proceedings were produced by the Respondent as D-exhibit-6. I agree with the decisions cited by the Petitioner on the procedural fairness Naima Khamis versus Oxford University Press (EA) Ltd- Civil Appeal No. 15 of 2014 and Gladys Boss Shollei versus Judicial Service Commission (202)eKLR. I find the process leading to termination met that criteria.
119. I do uphold the position taken by the Court of Appeal In Bett Barngetuny& another v TSC & Another (2015) eKLR at paragraph 38:- ‘each of the appellants appeared in person before the disciplinary panel and defended themselves and their evidence was considered before a decision was arrived at.’”
120. The Court in assessing the procedural fairness leading to the termination of the employment of the Petitioner is further guided by Recommendation No. 166 on Termination of Employment Convention which identifies procedures that may be followed prior to, or at the time of, termination. For example, it provides that the employer should notify a worker in writing of a decision to terminate employment and that the worker should, on request, be entitled to receive a written statement from the employer of the reason or reasons for termination (paras. 12 and 13). The Recommendation envisages the possibility of employers consulting workers’ representatives before a final decision is taken on individual cases of termination of employment (para. 11). These provisions are adopted under section 41 of the Employment Act. I do find the process adopted by the Respondent was compliant.
121. In the upshot, I hold that the infractions at the investigations stage did not prejudice the Petitioner who was heard and his statement recorded at that stage and he was heard at the disciplinary hearing in compliance with the provisions of section 41 of the Employment Act before the dismissal. The Petitioner even apologised for the accusations.
122. I do hold there was substantial procedural fairness which meets the requirements of Article 50 of the Constitution and Section 41 of the Employment Act as well as the ILO recommendation 166 - Termination of Employment Convention No. 158(Convention No. 58 of which though not ratified by Kenya, the State is a member of ILO).

On substantive fairness.

123. The Petitioner relied on article 47 of the Constitution which reads:- ‘1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. (2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action’” The burden of proof of valid reasons for the dismissal lay with the employer as per section 43 of the Employment Act to wit:- ‘43. Proof of reason for termination (1) In any claim arising out of termination of a contract, the



employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45. (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.’

124. The reasons for the dismissal to be fair ought to be related to the employee’s conduct, capacity, or compatibility; or based on the operational requirements of the employer (section 45(2)(b) [Employment Act](#)).

The Petitioner’s case

125. It was the Petitioner’s case that the allegation against him had not attained the threshold for his dismissal as the alleged victim was not known to him as a student, she had enticed him into the relationship as per her admission before the disciplinary panel, and she had been an adult and lied that she was a teacher in training college. The Petitioner denied having circulated the photo and stated he was not given 7 days’ notice or informed of the right to bring a witness. The petitioner produced a WhatsApp message of communication with one Harrison who asked for money not to circulate the nude photos, letter of interdiction, invitation for hearing of discipline case, dismissal decisions, Notice of Removal from the Register, application for Review, investigative report and demand letter. The petitioner testified and called the victim GKW as his witness and both were cross-examined.
126. During cross-examination, the Petitioner admitted he was a teacher at Namutokholo Primary School. That at time of employment he signed the employment contract which was governed by the CODE on regulation of teachers and circulars of TSC. He admitted he had sex with the girl, GKW, whom he met on Facebook. He admitted the girl told him she was a teacher trainee student at Sikusi Training School. He admitted he saw the photo on Facebook and it was him in the photo (page 15 of the Replying affidavit). He admitted after the hearing he apologised and that he did know the girl was a student. At re-exam, the Petitioner stated he apologised as he found his image had been tainted and his job was at stake. It was the position that the photo was circulated by one Harrison who exhorted money from him.
127. PW2 was the girl, GKW. On cross-examination, PW2 told the court that she met the petitioner in 2019 and was in school at Kaptanai Secondary School, Form 3. She testified that the Petitioner attended her father’s funeral. That she came to know him from the crowd. That there were introductions of the family at the funeral. That she introduced herself. That the Petitioner asked her what she was doing at the time to which she stated she was a teacher trainee at Sikusi ECDE. That the Petitioner realised she was not a teacher during the investigations. The girl denied having sex with the Petitioner and being the one on the photo but stated their relationship was intimate. On re-exam, the girl stated she approached the petitioner for the relationship. That she had told the teacher she was a teacher trainee.

Respondent’s case

128. The Respondent produced minutes of the disciplinary proceedings as D-exhibit 6 and pleaded that the reasons were valid and further relied on the nude photo image. The Respondent at the hearing called witnesses to buttress its case. At cross-examination, DW1 a sister of the girl GKW, stated the photo image looked like GKW and the Petitioner. DW2, Joseph Karanja at cross-examination testified that the prohibition of relationships with learners was to protect the learners. DW2 confirmed that the victim was a learner and she had stated she was 21 years of age. DW2 stated that for the Respondent what mattered was the victim was a learner (whether in primary, secondary, or tertiary level) as per TSC Circular No. 3 of 2020. That it did not matter whether it was consensual sex. That the victim stated



she was a teacher trainee and that was a learner for the purposes of the Respondent. On Re-exam, DW2 told the court that the victim was present at the investigation and they did not talk about her age. That she presented herself as a form three student and told them she lied to the petitioner that she was a teacher trainee at Sikusi Training College. DW3 was Kennedy Otieno and was cross-examined on the process.

129. Both Parties filed submissions which I read.

Decision on substantive fairness

130. The threshold for substantive fairness is per section 43 and 45(2) of the *Employment Act*(*supra*). The employer must believe that there exists valid reasons for the dismissal(section 43) and the reasons are related to the employee's conduct, capacity, or compatibility; or based on the operational requirements of the employer (section 45(2)(b) *Employment Act*.

131. The Respondent issued the Petitioner with a letter of dismissal dated 25th August 2021 which disclosed two reasons for the dismissal stated as follows:- 'i) you are of immoral behaviour in that on the afternoon of 14/12/2019 you had sexual intercourse with Grace Kweyu Waliaula, a Form 3 student at Kaptanui S.S.A Secondary school admission No. 1445 at Simba Hotel in Bungoma town while you were the Deputy Headteacher Namukhotolo DEB Primary School.

ii) You are of infamous conduct in any professional respect in that in December 2019, a nude picture of you and a girl in compromising situation were circulated on social media platforms(Facebook and WhatsApp)"

132. The facts before the court established that the teacher had sex with a learner in form 3 student at Kaptanui S.S.A Secondary school admission No. 1445 at Simba Hotel in Bungoma town while you were the Deputy Headteacher Namukhotolo DEB Primary School and that December 2019, a nude picture of you and a girl in compromising situation was circulated on social media platforms(Facebook and WhatsApp).

133. The Petitioner in defence denied having circulated the photo and even produced evidence of one Harrison having threatened to circulate the nude photo. The petitioner in further defence stated the girl informed her she was a teacher trainee Sikusi ECDE and that she was 21 years old hence the sex was consensual. It was the Petitioner's position that it was the girl who approached him on Facebook and that theirs was consensual sex.

134. The Respondent, on the other hand, led evidence to establish the reasons for dismissal as summarised above. Most importantly, the Respondent believed that the Petitioner having attended the funeral of the girl where she was introduced knew she was a student and further that even if she was a teacher trainee, who was a learner, and relied on TSC Circular No. 3 of 2020 disallowing sex between teachers and learners. The Respondent blamed the teacher for causing the photo to be circulated which was denied by the teacher.

135. The Petitioner submits that the TSC Code of Conduct and Ethics for Teachers (Regulations) 2015 defines a learner as a person undergoing instruction in an educational institution.

136. The Petitioner submits that this definition is an affront to what is rational in the eyes of a reasonable man. It was his case that the provision should be taken in the context of fiduciary/ parental responsibility bestowed on teachers for nurturing and training vulnerable children under the age of majority, and not capable of making rational decisions in matters of sexual relationships. That the alleged victim was an adult aged 21 years and was the one who hunted and lured the petitioner into



- a relationship via Facebook having seen him at her late father's funeral. The Petitioner submitted on defilement which in my opinion was irrelevant to his case on an employment dispute.
137. The petitioner submits that the reasons that led to his dismissal should be viewed through the prism of a reasonable man and to buttress this relied on the decision of Madam JA in Stanley Munga Githunguri v Republic on pages 11 and 13 'we also speak knowing that it is our duty to ask ourselves what is the use of having a Constitution if it is not honoured and respected by the people. The people will lose faith in the Constitution if it fails to give effective protection to their fundamental rights. The people know and believe that destroy the rule of law and you destroy justice thereby destroying the society. Justice of any other kind will be as shocking as the crime itself. The ideals of justice keep the people buoyant; the courts of justice must reflect the opinion of the people.' In this famous case, the Court of Appeal bench of 3 judges ordered prohibition against the AG from prosecution of the Applicant 6 years after the previous AG had declined to have him prosecuted on serious offences of contravening foreign exchange regulations. It is the submission of the petitioner that though he had a sex escapade with the girl that did not betray his fiduciary responsibility to a learner. That the guilty mind was missing. That he denied circulation of the nude photo and alleged extortion (MJS1B).
 138. The Respondent submits that under Section 43 all that the employer is required to prove was reasons that he genuinely believed to exist causing him to terminate the employee's services as held by the Court of Appeal on Nyeri Civil appeal No. 79 of 2016 Kenya Power and Lighting Company Limited v Aggrey Lukorito Wasike.
 139. The Respondent reiterated the evidence as summarised above under the respondent's case at trial. The Respondent relied on the test of reasonableness as stated in British Leyland UK Limited v Swift (1981)1RLR 91 and as cited by Justice Rutto in Nairobi ELRC Cause 1519 of 2015 -Bakery Confectionery Food Manufacturing & Allied Workers Union v Wrigley Company (EA)Limited.
 140. Having analysed the evidence, I find the reasons for the dismissal to have been proved and to have existed at the time the Petitioner was dismissed from employment. The requirement of the employment under TSC Code of Regulations 2015 which the Petitioner appeared to the court to have been familiar with prohibited sex with a learner. The girl was a learner as established during the disciplinary proceedings and even at the time the Petitioner booked a hotel to have sex with her under his admission, he knew she was a learner. It is not open to the court to decide on the reasonableness of the provision which covers all learners even those of the age of majority. The test of reasonableness is as stated in British Leyland UK Limited v Swift (1981)1RLR 91 being that 'if it was reasonable for another employer in same situation to dismiss the employer'. Then of course there is the question of section 45(2) 'based on the operational requirements of the employer'. The court found that the conduct of the Petitioner was made worse by taking a nude photo with the girl. On a closer look at the photo, the court was of the opinion that this was a "selfie" and there was no evidence that the photo was taken by a third party outside their love nest room. The court finds that the act of taking and circulating the photo was an infamous conduct contrary to the COURT.
 141. The court already held this was a normal employment claim hence the decision in Stanley Githunguri was irrelevant.
 142. In the upshot, the Court finds that the Respondent discharged his burden of proof of the validity of reasons for the dismissal as required under section 43 and 45(2) of the Employment Act and that there was compliance with the provisions of Article 47 of the Constitution.
 143. In Conclusion, the Petition is found to have been a case of constitutional avoidance and without merit.
 144. The court to temper justice with mercy Orders each party to bear own costs.



145. It is so Ordered.

**DATED, SIGNED, AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 25TH DAY OF
JANUARY 2024**

JEMIMAH KELI

JUDGE

In The Presence of:

For Petitioner: Kapten Holding Brief for Wasilwa

For Respondent: Manyasa holding Brief for Musundi.

