



Anyuna v Board of Management, Maasai Girls Secondary School & another (Employment and Labour Relations Cause E015 of 2022) [2024] KEELRC 135 (KLR) (6 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 135 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
EMPLOYMENT AND LABOUR RELATIONS CAUSE E015 OF 2022**

**HS WASILWA, J
FEBRUARY 6, 2024**

BETWEEN

GEOFFREY OKUMU ANYUNA CLAIMANT

AND

**BOARD OF MANAGEMENT, MAASAI GIRLS SECONDARY
SCHOOL 1ST RESPONDENT**

TEACHERS SERVICE COMMISSIONS 2ND RESPONDENT

JUDGMENT

1. The claimant herein instituted this claim by a Memorandum of claim dated 29th September, 2022 and Amended on the 30th December, 2022, against the Respondent alleging that the Respondent unfairly and wrongfully placed him on interdiction for almost two years before terminating his services. He thus sought compensation for the unfair termination and to be reinstated back to employment without any loss of benefits and status. The claimant sought for the following reliefs; -
 - i. A declaration that the interdiction process and subsequent termination of the claimant's employment was unfair, unprocedural and or unlawful.
 - ii. An order that the claimant be reinstated back to his position without loss of benefits and status.
 - iii. Twelve (12) months compensation for the unfair termination (75,000 x 12) Kshs 900,000.
 - iv. General damages for violation of the claimant's constitutional right as stipulated under Articles 47 and 50 of the *Constitution*.
 - v. Costs of this suit.
 - vi. Interest on (iii) and (iv) from the date of filing to the date of payment.



Claimant's Case

2. The claimant stated that he was employed by the 2nd Respondent on the 20th January 2014 as a teacher and posted to NEP Girls secondary school to teach Kiswahili and History. That he served the said school on probation period of 6 months with a lot of zeal and on 20th January, 2018 he was confirmed on permanent and pensionable terms, earnings gross salary of Kshs. 75,000 and transferred to Maasai Girls Secondary School, the 1st Respondent herein.
3. That on 30th October, 2019, while serving the 1st Respondent herein, he was arrested and charged in criminal case No. 70 of 2019 at Narok Chief Magistrates Court with the offense of defilement of a child contrary to section 8(1) of the Sexual Offenses Act, with an alternative count of committing an indecent act with a child contrary to section 11(1) of the Sexual Offense Act. The particulars of the offense are that on 26th October, 2019, he had sexual intercourse with a student namely VP Koipa of Maasai Secondary School, a fact which he denied.
4. While the criminal proceedings were going on, the Respondents began disciplinary proceedings and on 29th November, 2019, he was invited to a meeting of the board of management of the 1st Respondent, where he was interrogated and interdicted verbally effective immediately in violation of section 147 of the TSC Code of Regulations of Teacher (2015). Soon thereafter, the criminal case was heard and he was acquitted under section 210 of the Criminal Procedure Code.
5. The claimant continued serving his interdiction until May, 2021 when he was served with an invitation letter dated 31st May, 2021 for disciplinary hearing on 15th July, 2021, when he had not received a copy of the interdiction letter to be able to know the grounds of interdiction and mount a proper defence in the disciplinary hearing.
6. On the day for the disciplinary hearing on 15th July, 2021, he raised the lack of service of the interdiction letter and the Committee indeed concurred that he had not been served with an interdiction letter and on that basis, the meeting was adjourned until he was served.
7. Consequently, he was served with the interdiction letter dated 4th November, 2020 and on 10th September, 2021, he was invited for a disciplinary hearing scheduled for 15th October, 2021, which referred to interdiction of 29th November, 2019, which he was not served with.
8. The claimant stated that he responded to the invitation letter, raising concern of the reference made to purported interdiction letter of 29th November, 2019 and informed the Respondents that he was not served with such letter as such, he had not received any interdiction letter and thus could not give a proper response.
9. In return, the 2nd Respondent by its letter dated 1st November, 2021, informed the claimant that he had been dismissed from employment with effect from 15th November, 2021 for being of immoral behavior of having sexual intercourse with one Maasai Girls student by the name VP Koipa on the 26th October, 2019. Further that his name shall be removed from the teachers register 90 days from the date of the said letter.
10. Aggrieved by the decision of the 2nd Respondent, the claimant applied for review by his letter of 27th January, 2022. On hearing of the appeal, the claimant presented a copy of the ruling of the criminal case absolving him from any criminal charges, but the Respondent did not consider the said ruling and instead upheld the decision of the disciplinary committee and proceeded to remove his name from the register.



11. The claimant stated that the termination was unfair for the reasons; firstly that he was not accorded any hearing before interdiction, secondly that he was not served with any interdiction letter that lay basis for the interdiction to enable him mount a proper defence, thirdly, that he was not allowed to cross examine his accusers contrary to section 146 of the TSC Code of Regulations for Teachers, Fourthly terminating the services of the claimant without observing substantive and procedural fairness, Fifthly, failing to consider the evidence of the claimant including an alibi on the events of the fateful day of 26th October, 2019, when the said offense allegedly occurred and lastly violating the claimant constitutional rights under Articles 47 and 50 of the Constitution while caring out the disciplinary process and termination.
12. The claimant believes that his termination was a result of an elaborate plan by the 1st Respondent's principal who has exhibited hatred towards him to settle personal scores.
13. During hearing, the claimant testified as CW-1 and stated that he is a teacher by profession but that he is now jobless, after he was terminated by the 2nd Respondent. He adopted his witness statement of 30.12.2022 and produced documents of the same date as his exhibits 1-16 respectively.
14. The witness told this court that that he was invited by the Board of management of the 1st Respondent for meeting and after he was informed by the chairman that he was interdicted with effect from the 29.11.2019. That he stayed out of employment for 2 years and on 1.7.2021, he was invited for a disciplinary hearing, however that the hearing did not proceed because, he did not have a copy of the interdiction letter. Later on he was invited for another disciplinary hearing in November, 2021, however that he had not received a copy of the interdiction letter but that the hearing continued. He told this Court that the panel asked his whereabouts on the 26.11.2019 and he informed them that he is a Masters student at Kenyatta University and had travelled to see his supervisor between 25.11.2019 to 29.11.2019, However that the Respondent dismissed him and removed his name from the register. He urged this Court to allow his claim and reinstate him back to work without loss of benefits or status.
15. Upon cross examination by Mulaku advocate the witness testified that he is a patron and a Rastafarian, a religion of his choice as such he wears a turban since 2006 when he was in High School. He stated that as a teacher he was governed by the provisions of the Code of Regulations and various circulars issued by TSC from time to time.
16. On the termination, he testified that he appeared before the Board of Management on 29.11.2019 for the reasons that he had sexual intercourse with a student by the name Velma Koipa, and that the charges were read to him including the particulars thereof but that the statement of the victim and her mother were not read to him or served on him despite requesting for the same. He testified that he was unable to continue teaching for the main reason that he was facing criminal charges. He admitted receiving a copy of the interdiction letter during the second disciplinary hearing on 15.7.2021 which referred to interdiction letter of 29.11.2019 which had similar contents. That he did not responded to the earlier letter but responded to the one of 15.7.2021 and attended the hearing of 15.10.2021 however that he was terminated for the same reason indicated in both interdiction letters. That he appealed unsuccessfully.
17. Upon further cross examination, the witness testified that he cross examined the witnesses during the hearing of 15.10.2021. However, that he was interdicted for more than 2 years instead of 3 months. He admitted that he does not have any evidence that he was in Nairobi between 25th to 29th October, 2019, Also that he did not have any leave or permission forms for the period. He also told this Court that he was in police cells in Narok when he recorded his statement.



18. The second witness who testified was VP, who testified as CW-2. The witness told this Court that she cleared Form 4 in 2022 and adopted her witness statement dated 30.12.2022. With regard to the circumstances of this case, she testified that on 26.10.2019 they had closed school for December Holidays and she went to visit her Aunt who lives in Lenana within Narok town, stayed for some hours and left to her Cousin's house to borrow books and spend the night there however on Monday she went back to her Aunt's place, while there she was arrested by police in company of her parents and stayed in custody for a week.
19. The witness testified that while at the police station, she was asked to write a statement, which she did but the police tore claiming that she had lied in the statement and directed her to write another statement implicating her teacher and saying that she spent the night at the teacher's house. She denied spending the night at the teacher house.
20. Upon cross examination by Mulaku Advocate, the witness testified that she was not sure whether she visited the aunt on the closing day 26.10.2019 or the next day on 27.10.2019. she testified that she left her aunt's place secretly and while at a friend's house to borrow a book, she was sent a text by her aunt on a phone that she had to go back to her aunt's place. That the said phone disappeared mysteriously at my aunt's place.
21. The witness was shown her statement which she recorded at the police station and she admitted writing the said statement and that according to statement the claimant herein had told her he misses her and that he wanted to see her and even gave her his number a day before closing day. She however maintained that she went to Maggy's Birthday party after closing school.
22. On re-examination, the witness testified that she visited her aunty on Saturday and that the contents of the statement wrote at the police station should be ignored because she was forced to write the same.

2nd Respondent's case

23. The 2nd Respondent entered appearance and filed a response, to the Amended Memorandum of claim, dated 22nd March, 2023.
24. The Respondent described itself as a Commission established under Article 237(1) of the Constitution with its primary function to; - register trained teachers, recruit and employ trained teachers, assign teachers in its service to teach in various schools, promote and transfer teachers, exercise disciplinary control over teachers and terminate the employment of teachers.
25. Further that the Commission is mandated under Section 47(2) of the Teacher Service Commission Act and section 5(1) of the Public Officers Ethics Act to establish a code of conduct and Ethics to enable discharge its mandate, which the Commission developed a code that outlines the general rule and behavior governing teaching profession, the procedures and penalties to be applied in case of breach of these regulations.
26. Having laid the basis of the said office, the Respondent herein stated that the claimant herein was employed as a graduate teacher on 10th January, 2014 on permanent and pensionable basis and first posted to N.E.P Girls Secondary School, thereafter he was transferred to Maasai Girls Secondary School which he worked till his dismissal.
27. It is the Respondent's case that during the pendency of the claimant's employment, he was governed by the Teacher Service Commission Act, the Code, COCE and administrative circulars issued by the 2nd Respondent made from time to time, therefore that he was expected to uphold the highest standards of professional ethics as a teacher.



28. On the circumstances leading to the dismissal of the Claimant, the Respondent stated that around the 31st October, 2019, the commission received a report from the Principal Maasai Girls Secondary School, the 1st Respondent herein, that the claimant had been arrested by Narok Police Station on allegations of defiling a student by the name VP, a form 2 student at the school.
29. The 2nd Respondent, promptly instituted investigation panel from the Respondent's county offices to ascertain the veracity of the allegations against the claimant. That the panel headed to Narok Police station and interrogated the claimant and took his statement. The panel then interrogated the victim alongside her mother MN.
30. From the interrogations and the evidence gathered, the panel ascertained that the Claimant was seducing and coercing his student VP to fall into his trap from the time the student joined form one in 2018 and that he finally lured the girl into his house, where he had sexual intercourse with the minor.
31. The Respondent stated that in compliance with its mandate under the Code, the Board of management convened on 29th November, 2019 and invited the claimant to give his side of the story, however that the claimant did not exonerate himself and the Board recommended for the interdiction of the claimant and the amended letter served on the claimant on the 4th December, 2020.
32. After interdiction, the claimant was invited for a disciplinary hearing at the Respondent's county offices scheduled for 2nd December, 2020, however since the claimant informed the panel that he had not been served with the interdiction letter, the meeting was adjourned to enable him acquaint himself with the interdiction letter and respond to the same before hearing.
33. Accordingly, the claimant was served once again with the interdiction letter dated 4th November, 2020, but that the claimant refused to respond to the commission on the basis that 21 days had lapsed. Nevertheless, the Respondent invited the claimant for disciplinary hearing for 15th October, 2021, where he was given an opportunity to cross examine the witnesses and give his side of the story.
34. The panel considered both side of the story vis a vis the evidence produced and the panel concluded that indeed the claimant had committed an offense that amounts to professional misconduct and decided to terminate the services of the claimant and communicate the same by its letter dated 1st November, 2021 with a right to appeal within 90 days.
35. The claimant took advantage of the Appeal mechanisms and appealed the decision of the disciplinary committee, where he was invited further to appeal hearing on the 29th August, 2022, However that after hearing, the appellate committee upheld the decision of the disciplinary committee and thereafter the claimant was deregistered.
36. The Respondent maintained that it followed the law in terminating the claimant as such the termination was justified.
37. The Respondent also stated that the criminal proceedings and the outcome therefore are distinct and separate from the disciplinary proceedings conducted by the Respondent and thus the commission is not bound by the outcome of the criminal proceedings.
38. During hearing the Respondent called Solomon Lengala, the Teacher management officer based in Narok Directorate office who testified as RW-1 and adopted his witness statement dated 28.3.2023. RW-testified that he came to know the matter herein when the Claimant was at the Police station and the 2nd Respondent constituted a panel made of the three people including him who carried out investigation into the matter. He told this Court that he took the statement of the girl, her mother and the claimant herein. He maintained that the girl was not coerced in any way to give her statement as



such the first statement given was the proper statement. He stated that the teacher was subjected to due process before termination.

39. Upon cross-examination by Langat Advocate, the witness told this Court that he was involved in this matter at early stages where he was tasked with investigating the matter and that he came into contact with the teacher who was at the police station cell together with the victim. That he took the statement of the teacher at the OCS's office in presence of the victim's mother and the victim. He however stated that in the Board of Management meeting held in the school, that caused the interdiction, the teacher and the victim's mother were present and the girl was not present because they were advised against summoning the girls by the Children's Department.
40. On re-examination, the witness testified that at the police station, he was together with the OCS, the victim, the victim's mother, the County Director among others. He further stated that the mother's statement made them conclude that the victim had been defiled.
41. RW-2, was Francis Anyoro, the Assistant Director Disciplinary department of the 2nd Respondent. He adopted his statement of 22.3.2023. He stated in summary that he was informed of the Case herein on 2.12.2020 through the county directorate's office. Investigations were carried out and a report tabled in his office and the teacher was interdicted and disciplinary hearing conducted on the 15.10.2021, where the teacher claimed that he did not have a copy of the interdiction letter, which was then served on him and given time to respond before hearing was done. He told this court that he was personally present during hearing and the teacher was allowed to cross examine all witnesses and in his defence he gave an alibi, that he was in Nairobi during that period but did not produce any evidence to support the alibi. He testified that during this hearing, the victim did not say anything on the alleged coercion to implicate the claimant, as such the retraction of statement by the victim is an afterthought.
42. The witness maintained that the claimant was accorded fair hearing and the dismissal was justified in the circumstances.
43. On cross examination by Chege Advocate, the witness testified that they complied with code 147 however that they do not have evidence of service of the initial interdiction letter. The witness was referred to the document at page 71 of the bundle of documents where the victim denied having any sexual intercourse with the teacher and the witness testified that they interdicted the teacher based on the evidence taken at the Police station in Narok. He also stated that he is not a medical doctor and that TSC does not rely on medical examination before taking disciplinary action against its teachers. On being asked why disciplinary hearing took more than 2 years, he testified that there were challenges with travelling caused by Covid-19 pandemic that restricted movement.
44. On re-examination, the witness testified that the claimant was invited for disciplinary hearing of 15.10.2021 after being served with the second interdiction letter as such due procedure was followed. Further that they interdicted the teacher and eventually terminated him based on investigations carried out and the original statement of the victim.

Claimant's Submissions.

45. The claimant submitted on four issues; whether the interdiction process and the subsequent dismissal was lawful and fair, whether the 2nd Respondent violated the claimant's constitutional rights under Article 47 and 50 of the Constitution, what remedies if any is the claimant entitled to and who should bear costs and interest of the suit.
46. On the first issue, the claimant submitted that the interdiction process was not only contrary to the law but manifestly procedurally unfair because while conducting investigations, the investigating panel out



rightly contravened Section 146(6)(e) of the Code of Regulations for Teachers 2015(CORT) which is couched in mandatory terms. It was argued that the Respondent interrogated the witnesses being the victim and the mother in absence of the claimant when they were in the same vicinity. Further that the victim was not called to give evidence in the disciplinary meeting by the 1st Respondent and the allegations by the Respondent's witnesses that they were advised against bringing the victim as witness by the children department is not backed up with any evidence. therefore, that the decision to interdict the claimant was arrived at without interrogations of evidence as the victim herself denied the allegations levelled against the claimant during disciplinary hearing and in her testimony before this Court. Further that the victim's mother was only called for interrogations after the claimant had presented his case and a decision to interdict the claimant already made.

47. The claimant questions the process the respondent took in interdicting him verbally and serving him with the interdiction letter after about two years of verbal interdiction and stated that the process was marred with illegality and the Respondents thus breached section 146(6g) of the CORT 2015. To support this the claimant relied on the case of *Fredrick Saundu Amolo v Principal Namanga Mixed day secondary School and 2 others* [2014] eKLR where the Court held that; -

“Before an interdict can be found to be valid, the same must be based on fair reasons and must be implemented pursuant to fair procedure...In a case where an interdiction is the sanction, the period of the interdiction must be stated and the reasons for the same as well as what the employee is expected to do during this interdict to avoid further injury to the reputation of the employee or any stigma as a result.”

48. The claimant also relied on the case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR where the court insisted on the issuance of notice of offense in the following terms; -

“The employee must be informed through a notice as to the charges and given a chance to submit a defence followed by a hearing in due cognizance of the fair hearing principles as well as natural justice tenets.”

49. He further cited the case of *Pamela Nelima Lutta V Mumias Sugar Co Limited* [2017] eKLR where the Court held that; -

“Having already failed to comply with its own procedure by keeping the Claimant on suspension for more than 4 months during a period when she had not even been called upon to show cause, I find that the disciplinary procedure was so flawed as to make the whole of the process a sham. From the foregoing I find and hold that the disciplinary procedure was unfair and in breach of the Respondent's disciplinary policy... What constitutes fair termination is a matter that is now well settled by the wealth of Jurisprudence of this court and the Court of Appeal. There are two elements that must be satisfied by the employer, fair procedure and valid reason”

50. Accordingly, that by the fact that the claimant's interdiction was marred with procedural unfairness, the same makes the entire disciplinary proceedings unfair.

51. On substantive fairness, it was submitted that the claimant was dismissed without a valid reason because the charge of immoral behavior/ having sexual intercourse with a student was never proved by cogent evidence as required under section 45 of the *Employment Act*. In fact, that the evidence of the student in the hearing on 15th October, 2021 absolved the claimant from any offense, the same evidence



- which she gave during hearing in this case before this Court and retracted her earlier statement given at the police station indicating that she wrote the statement under coercion by the police.
52. The claimant submitted that the Respondent did not consider his alibi, that he was away in Nairobi on the 26th October, 2019 to meet his Master’s Degree supervisor who even signed his proposal on the said date as such was not in Narok and could not have committed the heinous act. In fact, that it’s on these grounds that he was acquitted of the criminal charges and also that all these facts were not controverted by the Respondent as such the remain a true reflection of what transpired on the material day.
53. To support this position, the Claimant relied on the case of *CMC Aviation Limited v Mohammed Noor* [2015] eKLR where the Court held that; -
- “Where there is a fair reason for terminating an employee’s service but the employer does it in a procedure that does not conform with the provisions of a statute, that still amounts to unfair termination.”
54. The same position was reiterated in the cases of *Walter Ogal Anuro v Teacher Service Commission* [2013] eKLR and the case of *Emmanuel Mambo Oduory v One Acre Fund* [2020] eKLR.
55. The claimant submitted that he was interdicted by the Respondent on the 29.11.2019 but heard by the disciplinary hearing on the 15.10.2021, about 2 years, which delay was contrary to Article 47 and 50 of the *Constitution* and the *Fair Administrative Actions Act* and reiterated by D. S Majanja in the case of *Grace A Omolo v Attorney General & 3 Others* [2012] eKLR. Further that the excuse by the Respondent that the delay was occasioned by COVID-19 outbreak is not true because he was interdiction in November, 2019, while Covid-19 Pandemic was declared in Kenya in March, 2020, more than three months after he was interdicted. In any event that even after the onset of Covid-19 the Respondent could have adopted ICT mechanism in disposing the disciplinary case.
56. On the prayers sought, the claimant submitted that the prayer for reinstatement is justified because it’s within the 3 years period from the time of dismissal, the claimant is still keen in working with the 2nd Respondent, that the claimant is a young man who had just began his career in teaching with bright prospect demonstrated by his pursuit in Masters Degree and finally that the claimant did not contribute in the dismissal of his employment as the reason given was never justified to warrant the dismissal.
57. In addition, the claimant prayed for an award of the maximum compensation of damages for the unfair termination together with compensation of Kshs 2,000,000 for violation of his constitutional right under Articles 47 and 50 of the *Constitution*. To support this, he relied on the case of *John Gakuo & Another v County Government of Nairobi, Governor & 2 Others* [2018] eKLR where the appellants were each awarded Kshs 1,500,000 for violation of the constitutional right to fair administrative Action. He also cited the case of *Mugure v Ministry of Defence & Another* (ELRC Petition E011 of 2021) [2023] KEELRC 1994 where the petitioner was awarded Kshs 2,000,000 for violation of his constitutional rights.

2nd Respondent’s Submissions.

58. The Respondent submitted on three issues; whether the termination of the claimant’s employment was valid, whether the termination of the claimant’s employment was in accordance with fair procedure and whether the claimant is entitled to the reliefs sought.
59. The Respondent laid the basis for taking disciplinary action against teacher and stated that they are mandated as such by Article 237(2)(e) of the *Constitution* as well as Section 47 of the *TSC Act*



and several regulations such as COURT and Regulations 140 and 141. He argued that in April 2010, there were increased sexual offenses cases between the teacher and the learners, which caused the 2nd Respondent to issue circular 3 of 2010 dated 29th April, 2020 providing comprehensive guidelines on the expected conduct between teacher and students with a view to curb the menace. That while developing these circular the best interest of the student was placed in the forefront regardless of the age.

60. Having set up the background of its role as the employer, the 2nd Respondent submitted that before an employee is terminated, the employer must demonstrate the reason for termination as is required in section 43 of the *Employment Act* and reiterated in the Court of Appeal in the case of *Kenya Power and Lighting Company Limited v Aggrey Lukorito Wasike* [2017] eKLR, where the Court held that:-

“Under Section 43 of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he “genuinely believed to exist,” causing him to terminate the employee’s services.”

61. Similarly, that in this case, the Respondent in compliance with Regulations 146 of COURT , 2015 interviewed the claimant, who was held at Narok Police station, the victim VP Koipa and her Mother MN, and based on the statements by the victim and the mother, the Board of management of the 1st Respondent found the claimant culpable in the meeting held on 29th November, 2019, interdicted the claimant by the letter of 29th November, 2019 which was amended by the letter of 4th November, 2020.

62. The Respondent submitted that even though the claimant called the victim VP as his witness to retract her earlier statement and discredit the Respondent’s witnesses, RW-1 and RW-2 all maintained that the victim was not coerced to giving wrong information at the police station as such the Respondents relied on her original statement in taking action against the claimant. He added that CW-2 is the one that should in fact be discredited because she gave contradictory statement on her whereabouts on the material day of 26th October, 2019.

63. The Respondent submitted that based on the circumstances of the case herein and the evidence presented before it, the Respondent had all reasons to believe the Claimant had committed a professional misconduct and due for disciplinary action as such it did not err. In support of this the Respondent relied on the case of *Bakery Confectionery Food Manufacturing & Allied Workers Union v Wrigley Company (Ea) Limited* [2022] eKLR, where the Court held that:-

“As stated herein, the test to be applied in assessing the respondent’s action is the reasonableness of the decision taken. In the case of *British Leyland UK Limited v Swift* [1981] IRLR 91, the court had this to say in regards the assessment of the reasonableness of the action taken by an employer “There is a band of reasonableness with which one employer may reasonably take one view; another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him.”



64. The Respondent also relied on the case of *David O. Owino v Kenya Institute Of Special Education* [2013]eKLR, which cited the case of *Kibe v Attorney General* (Civil Appeal No 164 of 2000) the Court of Appeal held that:-

“...acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer. The reason for this is straightforward; a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedural and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee, going against the outcome does not by itself render the employer’s decision wrongful or unfair.”

65. On procedural fairness, the Respondent submitted that Part XI of the Code outline the procedure to be followed in disciplining errand teachers, which they followed to the letter in that the Respondent carried out investigations into the allegation, found out the claimant had a case to answer and interdicted him then invited to disciplinary hearing which the claimant alleged that he had not received a copy of the interdiction letter, which caused the Respondent to adjourned the Hearing to enable the Respondent receive another copy of the interdiction letter and to respond to the same. Subsequently, that he was invited for a disciplinary hearing held on 15th October, 2021, where the claimant was granted an opportunity to cross examine all the witnesses present. He was however terminated because his defence did not exonerate him. He was further heard on Appeal but since no further explanation was given, the Appellate committee upheld the decision of the disciplinary committee and the claimant was removed from the Teachers register. This procedure, he argued, was done in according to the laws and regulations.

66. To support their argument, the Respondent relied on the case of *John Jaoko Othino v Intrabealth International* [2022] eKLR where the Court held that; -

“I have carefully considered the evidence that was placed before me by the parties on the process leading to the dismissal, and have no difficulty in finding that there was adherence to the procedure provided for under section 41 of the *Employment Act*. In so holding, I have considered that the Claimant was issued with a notice to show cause letter with details of the accusations that were being levelled against him; he was invited to respond to the letter, which he did; he was invited to attend the disciplinary hearing, and he attended; he was accorded an opportunity to exercise his statutory right to accompaniment; the panel considered his representations before making the decision to summarily dismiss him.”

67. With regard to delay in hearing the claimant in the disciplinary, the Respondent submitted that the same was delayed by Covid-19 Pandemic, which disrupted face to face interactions, thus the delay was beyond the control of the 2nd Respondent.

68. The Respondent also relied on the case of *Lydia Moraa Obara v Tusker Mattresses Limited* [2021] eKLR, where the Court held that;

“In sum, in considering whether the procedure was fair, the test is whether there has been substantial compliance with the overall obligation to allow an employee an opportunity to, rebut the allegations of misconduct, or offer a representation on any ground[s] that the employer has indicated to be basis for his intention to terminate the employment, and bring to the attention of the employer any relevant information before a final decision is taken.”



69. Accordingly, that the dismissal of the claimant was substantively and procedurally fair.
70. On the prayers sought, it was submitted regarding reinstatement that the 2nd Respondent has lost trust and confidence in the claimant as an employee and has thus exercised its freedom to invoke the terms and conditions of claimant's services relating to termination. In this they relied on the case of David Njoroge Kimani v Teachers Service Commission [2007] eKLR, where Justice J.G.Nyamu held that;-
- “On the facts I find no case for reinstatement of the employee applicant and even if it was necessary to invoke the court's discretion in granting judicial review remedy which is always there, I would not have invoked it in a contract of employment situation and more so in a matter affecting a teacher/pupil relationship. Surely the courts must address the possible effect of reinstatement of an employee on the teachers and the pupils and the erosion of discipline in schools. Barring any strong statutory underpinnings, pointing to a legitimate aim by the legislature to protect an office I would not intervene in an employment relationship or student/teacher relationship where the interests of discipline are likely to be compromised. Moreover, the existence of alternative remedy such as of damages for breach of contract militate against any judicial review intervention...”
71. Similarly, that since the termination of the claimant was based on reasons demonstrated before this Court and done after due procedure, the compensation sought is untenable, lacks merit and legal basis and therefore should be dismissed with costs.
72. I have examined all evidence and submissions of the parties herein.
73. The issues for this court's determination are as follows;
1. Whether there were valid reasons to terminate the services of the claimant.
 2. Whether the respondents followed due process in terminating the claimant's services.
 3. What remedies to grant in the circumstances.

Issue No.1 - Validity Of Reasons

74. The claimant was terminated vide a letter dated 1/1/21 for the reason that;-
- “you are of immoral behavior in that you had sexual intercourse with a learner by the name VP Korpa of Maasai Girls Secondary School Admission No. 4284 Form Two on 26th October, 2019 at night in your rental house at Lenana while you were a teacher at Maasai Girls Secondary School”.
75. The events before this termination have been set out in parts of this judgment but key to determining the validity of the reasons for his termination is the decision to interdict the claimant as communicated to him verbally by the Board of the 2nd respondent from 29th November 2019 amongst other issues.
76. The claimant avers that this interdiction contravened Section 147 of the TSC Code of Regulations (2015) which envisages an interdiction be in writing.
77. This Section 147 of the TSC Code of Regulations (2015) states as follows;-
- “The commission or the Board of management shall;-



1. Serve the teacher with a letter of interdiction specifying the actual allegations made against him.
2.
3. Where the Board of Management issues a letter of interdiction it shall deliver two copies of the letter to the County Director for onward transmission to the commissions headquarters....”

78. Indeed this section is couched in mandatory terms. There is no indication that the claimant was indeed served with the interdiction letter upon his interdiction until he asked for it after being invited for a disciplinary hearing.
79. He was then served with the said interdiction letter on 15/7/21, the same day the disciplinary hearing proceeded.
80. I have also looked at the statements and the evidence adduced during the disciplinary hearing.
81. The claimant denied any culpability in the accusation levelled against him.
82. The claimant had been charged before Narok Chief Magistrate’s Court Criminal Case No. 70/2019 with an offence of defilement of a child contrary to Section 8 (1) of the Sexual Offences Act and with an alternative count of committing an Indecent Act with a child contrary to Section 11 (1) of Sexual Offences Act.
83. The claimant avers that in the criminal case he was acquitted under Section 210 of the CPC on 1/4/2021.
84. The respondent avers that the criminal proceedings are independent of the disciplinary proceedings which were initiated by the respondent.
85. That indeed is the true position however during the disciplinary proceedings, the claimant denied allegations levelled against him.
86. He even indicated that he was not in Narok on the day it is alleged he committed this offence. He however had no proof of the alibi as alleged.
87. The claimant called a witness the alleged victim of the defilement VP Korpa. The girl confirmed her statement of 31/10/2019 where she had agreed she had sexual intercourse with the claimant but indicated to the panel that she had been forced by the police to write a statement implicating the claimant.
88. The claimant also averred that when he appeared before the BOM the victim Velma didn’t appear as a witness. The girl Velma appeared before the commission and indicated that she never had sexual intercourse with her teacher.
89. She was cross-examined by the claimant and she indicated that on the night it is alleged that she spent at the claimant’s house it was not true as she was at Maggy’s place.
90. Velma also told the panel that she was kept in police cells for 5 days.
91. The mother of the girl Velma also testified before the disciplinary panel and indicated that her daughter had told her she spent one night at the claimant’s house and the second night at her friend Maggy’s house.



92. I have re-evaluated this evidence to determine whether there were valid reasons that led to the termination of the claimant.
93. It is apparent that the victim of alleged defilement denied ever having any sexual intercourse with the claimant. She also denied ever sleeping in his house.
94. Without the evidence of the victim, it is not clear upon what evidence the respondents made a determination that the claimant was guilty of the accusation levelled against him.
95. Section 43 of the *Employment Act* 2007 states;-
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.”
96. It is apparent that before a decision is made against an employee, there must be valid reasons against the employee of the wrong doing levelled against him.
97. In the case of the claimants, the respondents have failed to establish the existence of valid reasons to lead to his termination.

Issue No.2 - Due Process

98. The claimant was taken through a disciplinary process before his termination.
99. He however avers that the process was flawed. He pointed out that he was verbally interdicted which fact has been established by this court to be true as he was served with the interdiction letter on the day he was invited for the disciplinary hearing.
100. The claimant had also been earlier on invited to appear before the BOM for a hearing before the interdiction but the victim of the alleged offence was not invited to give her evidence which led to the process being flawed as the claimant was not given an opportunity to cross examine his accusers.
101. Section 41 of the *Employment Act* 2007 states as follows;-
41. Notification and hearing before termination on grounds of misconduct
- (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”.

102. Indeed in terms of this provision of the law, the claimant was condemned through a flawed process.
103. The necessity to subject an employee to a fair disciplinary process cannot be over emphasized as provided for under Article 47 of the Constitution of Kenya 2010 which states as follows;-

“Fair administrative action.

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.
- (3) Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - (a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - (b) promote efficient administration. Access to justice”.

104. ILO Convention C158 Termination of Employment Convention also provides at Article 7 as follows;-

“the employment of a worker shall not be terminated for reasons related to the workers conduct or performance before he is provided an opportunity to defend himself against the allegations made unless the employer cannot reasonably be expected to provide this opportunity.”

105. Having found as above, it is my finding that the respondent failed to follow due process as per their own code of practice and the law and so the claimant was terminated without following due process.

Issue No. 3

106. The claimant sought prayers to be reinstated in his employment. I have already found that the respondent didn't establish there being valid reasons for the termination of the claimant and neither did they follow due process.
107. It is therefore my finding that the claimant's termination was unfair and unjustified as provided for under Section 45 (2) of the Employment Act 2007 which states as follows;-

“45.

- (1)



- (2) A termination of employment 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”.

- 108. As for the prayer for reinstatement, the respondents have averred that they have lost faith in the claimant and so he should not be reinstated.
- 109. The claimant on his part sought to be reinstated indicating that he is young and needs to pursue his career.
- 110. I am guided by the provision of Section 49 (3) & (4) of the [Employment Act](#) which gives parameters to be followed if reinstatement should be allowed as follows;-

- “(3) Where in the opinion of a labour officer an employee’s summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to—
 - (a) reinstate the employee and treat the employee in all respects as if the employee’s employment had not been terminated; or
 - (b) re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.
- (4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following —
 - (a) the wishes of the employee;
 - (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
 - (c) the practicability of recommending reinstatement or re-engagement;
 - (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
 - (e) the employee’s length of service with the employer;



- (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
- (g) the opportunities available to the employee for securing comparable or suitable employment with another employer;
- (h) the value of any severance payable by law;
- (i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
- (j) any expenses reasonably incurred by the employee as a consequence of the termination;
- (k) any conduct of the employee which to any extent caused or contributed to the termination;
- (l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
- (m) any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee”.

111. In considering these parameters and in particular the special circumstance of the age of claimant and the practicability of finding alternative employment, I order reinstatement in employment without loss of benefits and promotion with effect from the date of this judgment.

112. The respondents shall pay costs of this claim.

DATED AND DELIVERED IN OPEN COURT THIS 6TH DAY OF FEBRUARY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Chege for Claimant – present

Mulaku for Respondent – present

Court Assistant – Fred

