



BCN v Shree Visa Oshwal Community Nakuru, Shah Lalji Nangpar Academy (Employment and Labour Relations Cause E016 of 2023) [2024] KEELRC 1314 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 1314 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
EMPLOYMENT AND LABOUR RELATIONS CAUSE E016 OF 2023**

**HS WASILWA, J
MAY 30, 2024**

BETWEEN

BCN CLAIMANT

AND

**SHREE VISA OSHWAL COMMUNITY NAKURU, SHAH LALJI NANGPAR
ACADEMY RESPONDENT**

JUDGMENT

1. This suit was instituted by a Memorandum of claim dated 16th February, 2023, in which the claimant alleged that he was unfairly terminated and sought for the following reliefs; -
 - a. A declaration that the claimant's termination of employment by the Respondent was wrongful, unfair, illegal and contrary to the provisions of the *Employment Act*, 2007.
 - b. An order that the Respondent compensate the claimant as decreed by the Court.
 - c. Cost of the claim to be borne by the Respondent.

Claimant's case

2. The claimant states that he was employed by the Respondent in the year 1996 as a teacher and in 2021 he was promoted to be the Junior School head teacher.
3. That sometime in May, 2022, there was an incident of improper conduct in which two girls aged 11 and 14 years, locked themselves in one of the washrooms, removed their skirts and kissed each other.
4. That the teacher who was made aware of the incident, followed up on the incident and took them to the staff room, where they were ordered to demonstrate before all teacher present what they were doing in the toilet. That the move to parade the said student before all teachers' present was humiliating and improper conduct.



5. It is averred that the concerned teachers called the parents of the learners, without the knowledge of the head teacher and upon the head teacher getting wind of the situation, he followed up with the concerned teacher on why the issue was never brought to his attention and in response, the teacher stated that the issue was a “girls” issue.
6. The claimant stated that he immediately took over the issue and informed the school management and the school manager directed him to take disciplinary action against the concerned teachers and request them to resign.
7. Subsequently, he issued a Notice to show cause to the said teachers and advised them to resign as directed by the Respondent’s manager. Instead of resigning, the said teachers, raised a complaint with the labour office and the management in turn took over the conduct of the matter and issued warning letter to the teacher and reinstated them to their duties three days later and the matter was let to rest.
8. On 24th June, 2022, the claimant received a letter, duped advisory, from the school management raising serious allegations against him on threatening staff, sexual harassment and unprofessionalism. He avers that he was advised verbally not to respond to the said letter.
9. On 12th July, 2022, he received a notice to show dated 5th July, 2022 accusing him of professional misconduct, that he responded to the allegation on 18th July, 2022, denying every allegation. On 18th July, 2022, he received another show Cause letter dated 18th July, 2022 raising various complaints of unprofessionalism, threats and Sexual harassment against fellow staff members.
10. He was then suspended from duty and warned against contacting any of the complainants. On 5th August, 2022, he was invited for disciplinary hearing scheduled for 20th August, 2022 in which he attended and ordered to start with his defence.
11. He stated that the committee was composed of his accusers as panel members, hence the disciplinary panel was not properly constituted. He added that during disciplinary hearing several witnesses were called without his knowledge, including by phone calls as such, he was not able to mount proper defence against allegations which were raised for the first time at the disciplinary hearing.
12. On 29th August, 2022, the claimant received communication that his services were no longer needed and he was thus summarily dismissed. He appealed the decision on the basis that the termination was effected on alleged wrongful collusion and conspiracy and not on claim of sexual harassment. Nonetheless, the Respondent upheld his earlier decision of termination.
13. He stated that the way in which the allegations were raised, defamed his character.
14. It is his case that the Respondent is the one that had advised him to take action against the three teacher and later on used the same teachers as witnesses to accuse him of gross misconduct with aim to terminating his services.
15. He stated that he once in a while engaged his colleagues in general banter and complimentary and never at any one point had serious thought to engage any one of them in a relationship. In any event that these general talks took place about 8 months before and its only after the students’ incident that the issue was raised.
16. The claimant stated that the actions of the Respondent are wrongful, unlawful, illegal and amounted to defamation of his character.
17. He then gave the particulars of defamation that; ordering the claimant to issue notice to show cause to the teachers and turning around and terminating the disciplinary process and issuing one to him,



- deviating from the issue at hand and pursuing baseless allegations against him and acting on acts of criminal nature in a disciplinary forum.
18. He stated that the said allegations were shared for all and sundry, therefore humiliating him before pupils, teachers, parents and the general public.
 19. That the uttered words mean that he is a person who was corrupt, immoral, a thief, incompetent, violent, unreasonable, a sex pervert and sexual offender. Therefore, that the perception created of him has the effect of reducing chances of his employability within the teaching profession. In fact, that the certificate of service indicate that any employer should have a personal report from the Respondent.
 20. The claimant also stated that the allegations were without basis as no report of investigation was ever served upon him.
 21. He stated that the matter was taken to the labour office and after conciliation, the Respondent proposed to pay the claimant one-month salary as compensation, when the labour office had found the termination unfair and ordered for maximum compensation of 12 months' salary and final dues to be paid in 14 days, which recommendation the Respondent declined, leading to the filling of this case.
 22. The claimant also stated that he is now 54 years and chances of him being absorbed to any other gainful employment is minimal. He thus urged this Court to allow the claim as prayed.

Respondent's case

23. The Respondent entered appearance through the firm of Sheth & Wathigo Advocates on 28th February, 2023 and filed a defence to claim and Counterclaim dated 10th April, 2023.
24. In the defence, the Respondent denied the allegations in the claim and stated that the Claimant is trying to smear the school with feminism and added that the issues of student inappropriate behaviour was handled with a lot of confidentiality by the female teachers in charge with help of the students' guardians.
25. The Respondent denied ever allowing the claimant to issue show cause to the teachers and stated that the show cause letter given to him was a sample for his personal use.
26. The Respondent admitted issuing the notice to show cause letter on the claimant and stated that they afterwards placed him on paid suspension, to allow for investigations and reduce chances of the claimant interfering with the witnesses.
27. Contrary to the allegations by the claimant, the Respondent states that the claimant was subjected to proper disciplinary hearing, in which, he was present with his witnesses and defended himself. Further that all the other witnesses whom the claimant was not informed beforehand were called in order to allow the Claimant defend himself against all allegations raised.
28. It is averred that the summary dismissal letter was necessitated by the claimant's gross misconduct of making sexual advances to his female colleagues, being tribal and threatening his junior colleagues, which acts put the Respondent's institution in jeopardy.
29. On the issue of defamation, the Respondent stated that the claimant had filed Nakuru CMCC No. E813 of 2022 raising the issue in the subordinate court as such the same is incompetent and a duplicity.
30. The Respondent denied allegations that the issue raised against the claimant was criminal in nature and maintained that the issue touched on professional conduct of the claimant, which was properly handled in the disciplinary hearing.



31. On the certificate of service, the Respondent maintained that the claimant was issued with a standard certificate of service, that is normally issued to all other staff who exit its employment.
32. On reliefs sought, it is stated that the one month's salary was not compensation but ex gratia sum.
33. In the Counterclaim, the Respondent stated that it paid the claimant all his terminal dues and nothing is owing to him.
34. It is also stated that the Respondent is counterclaiming for any sexual harassment suit that might be filed against the Institution due to his conduct. The Respondent thus prayed for the following reliefs; -
 - a. This claim be dismissed with costs to the Respondent now claimant in the counterclaim as the same is incompetent and does not disclose any triable issues.
 - b. The claimant now respondent in the counterclaim be found personally liable for any claim on sexual harassment that may be filled by the claimant now respondent's victims.
 - c. Any other relief as may appear just in the circumstances.

Rejoinder

35. In response to the defence and Counterclaim, the claimant filed a response dated 14th November, 2023, on 5th December, 2023 denying the contents of the defence and Counter Claim and reiterating his claim.
36. The claimant maintains that the Respondent's manager was the one that initiated the disciplinary action against the three teachers and only turned around and reinstated them back to their duties and in turn placed him in the dock.
37. The Claimant denied allegations of sexual harassment in the audio recording or at all and maintained that it was a friendly lunch.
38. He denied that his action amounted to gross misconduct as elaborated in the Counter claim. In any event that it is only an individual that can be sued for sexual harassment and not an institution as such the counter Claim is without any basis. He urged this Court to dismiss it with costs

Evidence

39. During hearing, the claim testified as CW-1 and stated that he is currently jobless. He confirmed that he worked for the Respondent from the year 1996 to August, 2022 when he was terminated for threatening fellow employees, unprofessionalism and sexual harassment. He adopted his statement of 7.2.2023 and produced the documents in the list of documents dated 16.2.2023 marked as Exhibit 1-42 respectively and supplementary list dated 14.11.2023 marked as exhibit 43 to 46. He narrated the incident of May, 22 involving the student and stated that the students were caught by a teacher in the toilet kissing and paraded in the staff room, which humiliated the students. That the parents of the said students were called and a case done all without his knowledge. He testified that when he learnt of the incident, he informed the manager of the school who directed him to summon the two teacher Skovia Adhiambo and Rebecca mbogo and as advised by the Respondent's manager issued the said teachers with Notice to show cause and directed them not to attend classes until the issue is resolved. Later on, he served the said teacher with notice to show cause and in response the said teachers wrote that they had been sexually harassed by the claimant. Surprised by this turn of event, the claimant having been adversely mentioned handed the matter back to the manager for further action and was surprised to



learn that the manager issued the said teachers with warning letters and reinstated them to their duties without any disciplinary action.

40. He testified that on 24.6.2022 he was issued with advisory that raised serious allegations against him and on 12.7.2022, he was served with a notice to show cause on threats to members of staff, unprofessionalism and sexual harassment, suspended for one week and advised to report back to school on 19.7.2022 with an explanation. On 15.7.2022, he was removed from all school WhatsApp group walls. On 18.7.2022, he received another show cause letter, raising further issues of the same nature. On 19th July, 2022, he received the complaint lodged against him by Rebecca and Skovia dated 5.7.2022 and another complaint dated 15.7.2022. He was invited for disciplinary meeting scheduled for 20.8.2022.
41. It is his case that the panel was made up of the chairman of the Respondent as the chairman of the panel together with two other members of the Respondent institution, while the manager was the secretary to the disciplinary committee. He testified that in the meeting he was forced to start with his defence before he could hear the case against him. He testified that several witnesses such as Vivian Akeyo, Regina Anyango, Elizabeth and Sally testified physically, while others testified through phone calls and was not given a chance to cross examine them. He was eventually terminated on 30.8.2022.
42. After dismissal he appealed but the disciplinary committee's decision was upheld. He then preferred the matter to the labour office, who found the termination unfair and awarded him maximum compensation but that the Respondent refused to pay him compensation, instead, he was paid accumulated leave days of Kshs 85,000 and issued with him a conditional certificate of service.
43. Upon cross examination, the witness testified that he is a member of TSC. He testified that he was in his office when the incident involving the student happened but that it was not brought to his attention until two days later. He testified that as much as the parents of the student did not complain, he needed to take up the matter as it was a matter of improper conduct.
44. The claimant admitted that he sent teacher Sherry Jerotich text message on various days and confirmed that it was not on the welfare of the learners. On the audio played, the witness testified that the audio was of him and Ms. Skovia during lunch time.
45. He testified that even though he was subjected to disciplinary hearing, the committee was not well constituted. That he expected members of the TSC's technical team to be in attendance as provide for under the TSC code of conduct. He admitted that he attended the hearing with a witness of his choice. He told this Court that he worked as head teacher Junior School for one year and his gross salary was Kshs 120,000. He also told this Court that he was paid Kshs 85,000 for leave days not taken. The claimant maintained that the complainants are the same ladies, the management had advised him to ask to resign.
46. The Respondent called Three witnesses in support of its case, the first witness was Skovia Adhiambo, who testified as RW-1 and stated that she wrote a complaint to the school on sexual advances towards her by the claimant. She stated that the claimant pressurised her to resign and at times threatened her, making the working environment hostile. She testified that she is the one that recorded the audio before Court and stated that she did it for security reasons. She then produced the same and the Certificate of Electronic evidence as her exhibits.
47. She testified that she handled the issue of the student professionally and handed them to the class teacher. She denied parading the minors in the staffroom.
48. Upon cross examination, she testified that she had issues with the claimant on threats and sexual harassment. She testified that the claimant had threatened to fire her after she refused his sexual advances. On the student incident, the witness testified that she did not report the issue to the head



- master because, he was not in school at the time and also because, he had made sexual advances on her. She admitted that it is the first time the issue of sexual advances was ever raised. She testified that they were issued with a warning letter on the way in which they handled the students' incident and allowed back to work.
49. On re-examination, she testified that she did not collude with the school management but that she just complained of sexual harassment by the claimant.
 50. The second Respondent's witness was Sherry Jerotich, who testified as RW-2 and told this Court that the claimant had sexually harassed her on several occasions, complimenting her behind and wrote several other messages asking to meet her which she declined. She produced the screen shot in confirmation of the allegations. She told this Court of an incident that occurred on the 11.3.2022, when the claimant had taken learners for an educational trip and the claimant asked her for a date which she refused but he kept persisting, professing his love. She also testified that the claimant was tribal and at several times, he would state how he did not like Kikuyu ladies because, they loved money. She admitted that she only raised the issue of sexual harassment after 8 months.
 51. On re-examination, she testified that she did not intend to support the termination of the claimant but that she was only giving facts as they were. She added that Vivian was her witness in the sexual harassment incident.
 52. The 3rd and last witness was Andrew Thuku, the Respondent manager, who testified as RW-3. He adopted his witness statement of 14.6.2023 and produced the Respondent's documents which were marked as exhibit 1-49 respectively. In his testimony, he told this Court that he is the one in charge of real estate, human resource and general management of the School. He denied coaching the witnesses. He stated that the claimant called the minors lesbians. He admitted that he never received any complaint from the parents of the said minors. He testified that the claimant was served with all documents before the disciplinary hearing and that after termination, he was paid his terminal dues.
 53. Upon cross examination, he testified that he does not have a degree in Education but in Political science. He stated that the TSC code of conduct is applicable and that they do not have a HR Manual for the school. He testified that the letter of 24.6.2022 was written by the school secretary and signed by the convenor and the committee members. He testified that they suspended the claimant and issued a show cause on claims of sexual harassment of Skovia Adhiambo and Rebecca Mbogo but that he was on full salary while on suspension. He stated that before hearing another complaint by Sherry Jerotich was filed, hence the complaints emanated from three female teachers.
 54. The witness testified that the claimant reported the issue of the minors to him and he advised him on how to handle it. He admitted that he is the one that advised the claimant to issue notices to show cause to the teachers who had allegedly mishandled the matter and even gave a sample of the NTSC to him to use. He testified that the issue of sexual harassment was not raised until after the three teachers were asked to resign. He admitted that all the three teachers in the reply to show cause apologised for not handling the students' matter professionally. He testified that the issue of the three teachers mishandling the student was resolved and he issued a warning letter to them and they resumed their duties.
 55. Upon further cross examination, the witness told this Court that as soon as the claimant was suspended the ladies came back to him with complaint letters and at that point he directed them to write their statement but denied ever guiding and or coaching them. He testified that the teacher did not give specific dates they were allegedly harassed by the claimant. Also that the complaint herein was never raised before. On the Audio recording, he testified that the same was done outside working hours and that the teachers are adults who were free to converse. He testifies that sexual harassment is a disciplinary matter and not a criminal matter.



56. The witness testified that he is the one that was the secretary of the committee and only took minutes but did not participate in the deliberation as the committee was made up of executive members of the Institution. He elaborated that the committee was made up of Mr. Anjil Shah, the secretary Rashmi Maldi and Bavin Shetia. He told this Court that he was only writing what was said. He added that no member of TSC was present in the meeting.
57. The witness testified that three complaints were made and the meeting was handled from 6pm till 10 pm. That he was later dismissed on the substance of the complaint filed. On termination, he was paid leave days and issued with a standard certificate of service.
58. On re-examination, he testified that the matter was taken before the labour office for conciliation and the labour officer directed them to compensate the claimant because the termination was unfair. He stated that they did not agree with the labour office and did not therefore pay the claimant any money in compensation.

Claimant's Submissions

59. The claimant submitted on six issues; whether the claimant sexually harassed the lady teachers, whether the alleged action amounts to gross misconduct, whether the Respondent followed proper procedure, whether the counterclaim has merit, whether the termination was lawful and who should bear costs of the Suit.
60. On the first issue, it was submitted that the issue that led to the termination of the claimant was on sexual harassment of four female teachers; Skovia Adhiambo, Rebecca Mbogo, Millyeve Dieto and Sherry Jerotich. It was argued that the allegations of sexual advances were made for the first by two teachers; Ms Scorvia and Rebecca on 16.5.2022, while responding to their show cause letters on the students' incident. On 18.7.2022 a third teacher Ms Sherry Jerotich filed another complaint of sexual advances but that the School manager converted the alleged advances to harassment. It was also submitted that during hearing one of the complainants Ms Sherry Jerotich, brought along a witness one Vivian Okeyo who instead of corroborating the allegations by the said Sherry introduced new allegations of sexual harassment on herself separate from what Ms Sherry Jerotich was testifying. Further that the said Ms. Sherry threw in allegations of money purposed for a school trip being squandered by the claimant and the issue was not subject of the disciplinary hearing.
61. It was submitted that the issues herein emanated from the student's incident, which some teacher were asked to show cause for their improper conduct, which they apologised and turned against the claimant by accusing him of sexual harassment in the same response to show cause letter, an indication that the sexual harassment claim were an afterthought triggered by the Notice to show cause issued to the said Teachers.
62. On whether the allegations amounted to gross misconduct, the claimant defined what gross misconduct is and stated that it is unacceptable or improper behaviour of a very serious kind especially by an employee. On that basis, it was submitted that none of the allegation levelled against him was ever proved. In any event that the said allegations were only made in self defence against the Notice to show cause of the improper conduct against the pupils.
63. On whether proper procedure was allowed, it was submitted that the claimant was first suspended for one week before he was heard and then issued with a show cause letter and advised to respond before he was served with any of the complaints and evidence thereof. He added that two days before the lapse of the time to respond, he was issued with another show cause letter and directed to make a joint



response within a day. Furthermore, that he was removed from the school WhatsApp ground before he was heard, a further indication that the final decision was pre-meditated.

64. It was submitted that the disciplinary panel was not properly constituted as it contained three representatives of the Respondent and the Respondent's manager as the secretary instead of having a technical team as provided for by the TSC Code of Conduct. Further that a fourth witness turned out to be a complaint in her own right during hearing without prior notice for the claimant to adequately prepare. Also that the panel directed him to start with his defence before hearing the case against him, which move was contrary to procedure.
65. On the counterclaim, Counsel submitted that claim of sexual harassment are normally filed against individual and not institution. Further that the claim is premature on the basis that no such complaint has been filed and thus the claim is anticipatory.
66. It was submitted that the Respondent's witnesses admitted in court that they did not carry out any investigation as such the allegations of sexual harassment was not proved to the required standard as such the termination was not justified.
67. It was argued also that the Respondent's manager admitted during hearing to having no HR Manual as such that they did not have any guide in handling the disciplinary issues. Further that since the manager is not a professional teacher, he had no power to issue Show cause to the claimant as a professional and even suspending him, when he was not the claimant's employer.
68. In conclusion, it was submitted that the termination was against the dictates of sections 41, 43, 45 and 47 of the *Employment Act* and therefore that the claimant is entitled to maximum compensation under section 49 of the *Employment Act*. In support of this, they cited the case of Maureen J *Kibet V Family Bank Ltd Nakuru Elrc Cause No. 486 of 2017* and the case of Walter Ogal Anuro V Teacher Service Commission [2013] eklr.

Respondent's Submissions.

69. The Respondent submitted on three main issues; whether the termination was summary dismissal or unfair termination, whether the dismissal was in order and whether the claimant is entitled to the reliefs sought.
70. On the first issue, it was submitted that it is not in dispute that the claimant was employed as a head teacher on a two-year contract, neither is it disputed that he acted towards his female colleagues contrary to section 6 of the *Employment Act*. It was argued that in support of the allegations, the Respondent produced 19 exhibits. Further that the claimant admitted during hearing sending the test messages produced in evidence, which were send out of the official working hours. RW-1 on the other hand was pursued severally by the Claimant including inviting her for lunch, which he attended and recorded the audio that was exhibited in evidence. These test messages and audio clearly demonstrate the claimant pursuit of his sexual desires, which was sexual harassment towards the female teachers contrary to the law. In this, the Respondent relied on the case of CMCK V Chandarana Supermarket Limited [2014] KEELRC 388 (KLR), where the Court gave particulars of sexual harassment as follows; -

“sexual advances via WhatsApp late in the night constant invitation for dinner and lunch, assignment of duties closer to the manager's office, being offered alcohol on various occasions, being offered free yoghurt from the supermarket, which was never offered to others and being given preferential treatment compared to other employees.”



71. Accordingly, that it is obvious that the claimant's conduct was unbecoming and it behoved the Respondent to take action against such serious allegations, as failure to take action amount to an offense as was held in *CNR Vs FITM & Another* [2022] KEELRC 829(KLR).
72. It was submitted that proper procedure was followed in that the claimant was given ample time to respond to the allegation, invited for a disciplinary hearing, which he attended with a representative of his choice and then heard on his defence.
73. On whether the dismissal was in order, it was submitted that the summary dismissal was in order because the respondent had established that indeed the claimant had sexually harassed some of the staff members. It was argued further that the allegations that the matter could have been reported to the police is without any justification because the harassment was done on the staff of the Respondent who needed to be protected.
74. On whether the claimant is entitled to the reliefs sought, it was submitted with regard to leave pay that the claimant had been paid all his leave due on termination as such the claim under this head is not tenable.
75. On compensation, it was argued that the claimant has not proved his case to the required standard as such compensation is not warranted. In any event that the Claimant did not pray for award of compensation as such he is bound by his pleading and the prayer cannot be granted. In support of this, the respondent relied on the case of *Malawi Railways Limited Vs Nyasulu* [1998] MWSC as cited in the case of *Samson Macharia Mwangi and Another Vs Abdifatah Mohamed Khalif* and the case of *Mumias OutGrowers Company Limited V Regina Achieng Okoth Suing as Legal Representatives of the estate of Joseph Odhiambo Jalango*.
76. Similarly, that the claim for notice pay is not payable for same reason that it was not pleaded but only raised at submissions stage.
77. In conclusion, the Respondent urged this Court to dismiss the claim herein with costs for lacking in merit.
78. I have considered all the evidence and submissions of the parties herein. The issues for this court's determination are as follows: -
 1. Whether there were any valid reason to warrant claimant's dismiss.
 2. Whether the Claimant was accorded due process before termination.
 3. Whether the Claimant is entitled to the remedies sought.

(1). Reasons

79. The Claimant was dismissed by the Respondent summarily vide a letter dated 29/8/2022 on account of gross misconduct contrary to section 6 of the *Employment Act*.
80. The letter mentioned in detail the issues considered to be gross misconduct which related to complaints of sexual harassment from 3 different complainants.
81. It is worth analysing the events leading to the dismissal which all started on 13/5/2022 when the Claimant wrote a show cause letter to one M/S Scovia Adhiambo to explain the events that occurred on 9th May 2022 in her class in which two girls aged 11 and 14 years locked themselves in the washrooms, removed their skirts and kissed one another. It was indicated that the teacher who was made aware of



- the incident took the girls to the staffroom and ordered them to demonstrate before all teachers present what they were doing in the toilet.
82. According to the Claimant the said teacher handled the incident without decorum and even called the girls parents without informing the Claimant as head teacher.
 83. The Claimant learnt of this and informed the School Management who directed the Claimant to take disciplinary action against the concerned teachers.
 84. The Claimant wrote show cause letters to the teachers and there letters are exhibited at pages 22 to 24 of the claimant's documents. In the said show cause letters the 3 teachers were asked to explain 3 issues:- Why they exposed the students by questioning them in class and later in front of some teachers, why they didn't report the matter to the head teacher, teacher on duty or school committee and why they absconded duty on 13th May 2022 and also explain why disciplinary action cannot be taken against them accordingly.
 85. These letters were addressed to Scorvia Adhiambo, Rebecca Mbogo and Milly Yeve Dieto.
 86. Instead of the 3 teachers responding to the show cause letters, they proceeded to report to the labour office Nakuru, to the School Committee and to the Head teacher indicating that they had been asked by the head teacher to resign from work.,
 87. The show cause letters as written to the 3 teachers didn't expect them to resign. In these letters to the labour office dated the 13/5/2022 the date of the show cause letters, the 3 teachers however indicated that indeed the incident of the two girls occurred in the toilet but they didn't report to the head teacher to protect the girl's self-esteem, being of female gender, the girls were safer with them and that the students felt that it would be very hash on them as they cried and pleaded.
 88. They averred that they had been asked to write resignation letters but such instruction was not exhibited before court or in their response.
 89. On 16/5/2022 the teachers wrote other letters now responding to the show cause letters and how they responded to the indiscipline by the girls on 9/5/2022. They also apologised for their unprofessional handling of the matter.
 90. On 18/5/2022 however the 3 teachers received warning letters from the school management warning them of dire consequences in future if they handle issues concerning children in an unprofessional manner. They were all asked to go back to their duties.
 91. On 24/6/2022, the Claimant received a letter from the school management raising serious allegations against him. He avers that he was asked not to respond.
 92. On 17/7/2022 he now received a Notice to Show Cause letter dated 5/7/2022 accusing him of professional misconduct and he responded on 18/7/2022 denying the same. On 18/7/2022 he received yet another show cause letter dated 18/7/2022 raising various complaints of professional threats and sexual harassment against fellow staff members.
 93. The Notice to Show Cause issued to the Claimants dated 12/7/2022 was responded to the claimant denying allegations levelled against him vide his dated 18/7/2022 indicating he couldn't respond adequately as he was not aware of when, where and to whom the said allegations were made.
 94. The Respondents wrote to the Claimant another letter on 19/7/2022 inviting him for a disciplinary hearing on 30/7/2022. In the invite, the Claimant was forwarded formal letters of complaint from teacher Scorvia Jerotich, Teacher Rebecca Wambui and text message print outs between himself and



Sherry Jerotich. He was advised that a video audio recording will also be sent to his personal phone no. 0722916245 via WhatsApp.

95. The letter from Scorvia indicated that in mid-September 2021, the Claimant made sexual advances against her which she declined. She said he asked her out for a lunch date and she also declined. He then resorted to threatening her with loss of her job and even issued her a warning letter. That his Secretary could be sent to call her from class many times and he insisted on a lunch date with her and told her he admired her and would watch her through the CCTV as she taught.
96. Mbogo Rebecca Wambui on her part also in her letter of 5/7/2022 to the Manager of the Respondent indicated that the Claimant had sexually harassed her in October 2021 by asking her out of School premises on a coffee date. She declined his advances and he had been frustrating her since.
97. Sherry Jerotich on her part indicated that the Claimant had been harassing her since September 2021 and threatened her with being sacked. She indicated that he told her he was watching her on CCTV in class just to see her behind. She said he called her from class severally to his office and only mentioned that he loves her and would want to marry her.
98. She indicated that he called her severally and one day he threatened her if she didn't go out with him and she had to go and tell Miss Regina and Vivian Okeyo of what had happened.
99. Sherry also referred to her text messages with the Claimant on WhatsApp where he sent her several messages even late in the night and out of work time.
100. From the statements of the Claimants, it is apparent that the complaints of sexual harassment by the Claimant are said to have occurred in 2021. No reports were made to the school management until almost one year later after the incident where the teachers involved with the two learners were asked to show cause why disciplinary action should not be taken against them for mishandling the case.
101. When the Claimant testified he was cross examined and he confirmed that he sent text messaged to Sherry Jerotich which didn't relate to the welfare of teachers. On the audio played in court, he also confirmed it was one taken of him and Ms. Scorvia during lunch time.
102. The Respondents called 3 witnesses during the disciplinary hearing i.e Scorvia Adhiambo who admitted that the case of sexual harassment had never been raised before. The 2nd witness Sherry Jerotich also indicated that she only raised the incidence of sexual harassment after 8 months.
103. The 3rd witness indicated that the Claimant had reported the incident of the handling of two minors and he advised him to issue the teachers with the Notice to Show Cause notice. He also admitted that the issue of sexual harassment was not raised until after the three teachers were asked to resign. He also indicated that all the three teachers in reply to show cause apologised for not handling the students matters professionally.
104. He indicated that as soon as the Claimant was suspended, the three teachers came to him with complaints of sexual harassment. He denied guiding or coaching them. He also indicated that these teachers didn't give specific dates when they were sexually harassed.
105. Several issues came up from the evidence above. First and foremost is that these complaints of sexual harassment had never been raised before despite occurring almost a year back.
106. The findings of the complaints also raise eyebrows. There complaints were only raised after the teachers were issued with show cause letters following the way they handled an incident in school involving some 2 learners. The teachers admitted in writing that they mishandled this case and didn't bring it to



the notice of the complainant who was the headteacher or the school management and even apologised accordingly.

107. All these allegations of sexual harassment need to be proved and must be valid as per Section 43 of the [Employment Act](#) states as follows: -

43.

- (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.

108. Under the law, an employee can only be dismissed if there are valid reasons. As concerns their allegation of sexual harassment by the Claimant, these allegations were only levelled against him after the culprits were issued with show cause letters following their mishandling of learners in an unprofessional manner.

109. It is not clear why their complaints were only raised after the 3 teachers were issued with show cause letters. RW3 even admitted that these were raised only after Claimant was suspended.

110. I have looked at the letter of NTSC issued to the Claimant. The same was very generalised. No details were raised. In fact the Claimant raised issues with it indicating that it didn't indicate the time, when and where the incidences were raised to have occurred. Instead of the Respondents responding to his queries they now summoned him for a disciplinary hearing.

111. As the Claimant appeared for the disciplinary hearing, it is apparent that he had no details of the allegations against him. He was issued a show cause letter on 12/7/2022 but it is clear that the complaints were raised on 15/7/2022.

112. The chronology of the events above raise doubt on validity of reasons leading to the dismissal of the Claimant which leads to the conclusion that there were no valid reasons leading to the dismissal of the Claimant.

(2). Due Process

113. After the Claimant was issued with a show cause letter of 12/7/2022, he was asked to appear for a disciplinary hearing on 30/7/2022. He wrote back to the Respondents seeking for better and further details of the allegations against him vide his letter of 19/7/2022 which now set the date for hearing to 30/7/2022 at 3 pm.

114. The disciplinary hearing finally took place on 20th August 2022 from 6 pm to 10 pm as per the evidence of RW3.

115. During the hearing the Claimant requested that his complains should state the case against him first so he responds but he was overruled and asked to rely on the letters written by the complainants.

116. The Claimant has submitted that the disciplinary process he was subjected to was flawed. From the minutes of the disciplinary hearing presented before court it is not clear who was talking first or who was giving evidence. It is like a free for all conversations. At one point the Claimant is seen taking and then one Rashmi and then Rebecca who is not even introduced in the minutes (page 2 of the minutes).



At page 3, Rebecca talks, then Rashmi and then when the Claimant wants to explain one Mis Sherry interjects and says “Mr. Benard is lying, Miss Linet was crying because the mother was in ICU”.

117. This trend continues through all minutes and several people are involved e.g Sheila, Sherry, Rebeca, Sally (page 7) who even offers to call one Mercy’s number and then Rashmi calls Mercy and asks her questions about some payment. Another Vivian interjects again at page 7 and then Rebecca. In all these minutes there is no indication which witness was in the dock and what they were testifying on or answering to.
118. In such a situation asking the Claimant to answer to accusations against him became very difficult.
119. Section 41 of the *Employment Act* states as follows: -
- 41.
- (1) Subject to section 42 (1), an employer shall, Notification and before terminating the employment of an employee, on the hearing before termination on grounds of misconduct, poor performance or physical grounds of 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. misconduct.
 - (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.
120. Under this law, tenets of a fair hearing are set out. The need to be given an opportunity to set out one’s case and also cross-examined witnesses who testify against you are obvious.
121. In this case however the Respondents failed awfully by first denying the Claimant an opportunity to hear his accusers and cross examine them. When he sought to hear accusations against him, he was told proceed as the accusations were contained in the letters.
122. Article 47 of *the Constitution* also envisages that a man should not be condemned unheard but should be given an opportunity to be heard. It is evident that this right of the Claimant was flouted.
123. The fair Administrative Actions Act Chapter 7L Laws of Kenya Section 4 (3) (4) state as follows;-
- 3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision–
 - (a) prior and adequate notice of the nature and reasons for the proposed administrative action;
 - (b) an opportunity to be heard and to make representations in that regard;
 - (c) notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - (d) a statement of reasons pursuant to section 6;
 - (e) notice of the right to legal representation, where applicable;



- (f) notice of the right to cross-examine or where applicable; or
 - (g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.
- (4) The administrator shall accord the person against whom administrative action is taken an opportunity to—
- (a) attend proceedings, in person or in the company of an expert of his choice;
 - (b) be heard;
 - (c) cross-examine persons who give adverse evidence against him; and
 - (d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing
124. In case of the Claimant against his request to hear his accusers and cross examine them was denied and therefore in answer to the question whether he was accorded due process, the answer in No.

Remedies

125. Having found s above and in view of section 45 (2) of the Employment Act which states as follows:-

45.

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

I find the dismissal of the Claimant unfair and unjustified.

126. As against the remedies sought and given the manner the Claimant was treated without due process, I find he is entitled to compensation equivalent to 10 months' salary

= 10 x 120,000 = 1.2 million.

I also award the Claimant one-month salary in lieu of notice.

= 120,000/=

Total 1, 4000,000/=

Less statutory deductions

The Claimant should be issued with a Certificate of Service. The Respondents will pay costs of this suit plus interest at court rates with effect from the date of this judgment.

JUDGMENT DELIVERED VIRTUALLY THIS 30TH DAY OF MAY, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of: -



Okeyo for Respondent – Present

Gai for Claimant – Present

Court Assistant - Edna

