



**Shianzwi v Teachers Service Commission (Cause E018 of 2023)  
[2024] KEELRC 1695 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1695 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
CAUSE E018 OF 2023**

**JW KELI, J  
JUNE 27, 2024**

**BETWEEN**

**JAMES ATEKU SHIANZWI ..... CLAIMANT**

**AND**

**TEACHERS SERVICE COMMISSION ..... RESPONDENT**

**JUDGMENT**

1. The Claimant instituted this suit on 31<sup>st</sup> October 2023 by filing the Memorandum of Claim dated 24/10/2023 supported by his verifying affidavit of even date. The suit had been triggered by the decision to deregister him as a teacher from the Respondent's register of teachers following his dismissal from service. Vide the said Memorandum of claim, the Claimant prayed for the following reliefs: -
  - a. A declaration that the actions by the respondent are arbitrary and have had the effect of denying the claimant an opportunity to be employed as a teacher and the said action by the respondent should be declared null and void.
  - b. The claimant be reinstated by an order of this court as a teacher in the teacher's register which is in the custody of the Respondent.
  - c. Costs of the claim.
2. Also filed in this suit are the claimant's combined list of witnesses and list of documents dated 24/10/2023, the claimant's witness statement dated 24/10/2023, and the Claimant's bundle of documents. On 4<sup>th</sup> March 2024, the claimant filed the witness statement of Thomas Mushiya dated 16<sup>th</sup> February 2024.
3. The claim was opposed. The Respondent entered an appearance on 19<sup>th</sup> December 2023 and filed its Memorandum of Response dated 13/12/2023 and its bundle of documents. On 6<sup>th</sup> March 2024, the Respondent filed the witness statement of Daniel Kioko dated 4<sup>th</sup> March 2024. The Witness of Dorcas



Shiundu of 4<sup>th</sup> March 2024 filed on the same day was expunged as it was filed after the witness had died years back.

### **Hearing and Evidence**

4. The claimant's case was first heard orally on the 4<sup>th</sup> of March 2024 when the Claimant testified on oath as the first witness of fact in his case, produced his evidence as the claim filed, the claimant's list of documents dated 24<sup>th</sup> October 2023 (comprising of 3 documents that were eventually adopted by the court as the Claimant's Exhibits 1- 6) and the Claimant's witness statement dated on 24<sup>th</sup> October 2023.
5. The hearing proceedings resumed on the 13<sup>th</sup> of March 2024, when Thomas Mboya Mushiri (CW2) testified on oath as the 2<sup>nd</sup> Witness of fact and adopted his witness statement dated 16<sup>th</sup> February 2024. The Claimant and CW 2 were cross-examined by the counsel for the respondent, Ms. Ngere.
6. The respondent's case was heard on 13<sup>th</sup> March 2024 with one witness of fact, Daniel Kioko Kiumu (DW) who testified on oath, relied on the response to the claim dated 13/12/2023, his witness statement dated 4/3/2024 and the respondent's bundle of documents paginated 6- 102. The counsel for the Claimant, Chitwah cross-examined DW.

### **Claimant's case in summary**

#### **James Ateku(CW1)**

7. The claimant testified that he was employed by the respondent as a teacher for 20 years, and was removed from the register of teachers upon the malicious intent orchestrated by a colleague.
8. The Claimant urged that he cannot be employed as a teacher and this has exposed him to financial problems. He states that he is not aware that he can be reinstated in the register of teachers.
9. The Claimant stated that he became aware of Regulation 36 of the Code of Teachers much later contending he was under psychological torment thus he did not seek reinstatement. That he knew the pupil EM approached the counseling teacher responsible for girls, Pamela and not Dorcas.
10. The Claimant testified that he attended different hearings before panels and that the pupil EM confirmed by signing her statement about their love relationship. He testified that in the panels leading to the disciplinary hearing process he did not cross-examine any witnesses.
11. He was referred to Page 62 of the Respondent's bundle where on Page 10 of the said minutes, was the statement of Janet, and his question to her had been: "Why did you write Janet" and the Pupil had confirmed that it was also her name. He remained silent when this fact was confirmed that the pupil EM had signed two statements as EM and Janet and confirmed that her name was also Janet.
12. The Claimant testified that the school had several male colleagues. He testified that he went to EM's home because the pupil was her uncle's daughter and EM had informed him there was a plot against him and the school had asked her not to tell her parents. He testified that he did not go to convince EM to change her statement and although he told Ochieng the same he rubbished him
13. The Claimant contended that he had differences with teacher Dorcas which he had reported to the Head Teacher before his interdiction, which was regarded as a Loan Default, which had never been settled.
14. The Claimant stated that he seeks to be reinstated and registered. He could not be involved in a love affair with EM which would be incest and he was not given an opportunity, as on Page 32 of the



Respondent's bundle there was no evidence of any sexual relations. He testified that Dorcas was not in charge of Counseling and she was mentioned in the proceedings.

### **Thomas Mboya Mushiri(CW2)**

15. CW2 testified that the Claimant was fixed by Dorcas Shiundu because of a Sacco Loan the Claimant had guaranteed her. He testified that the Pupil EM was his cousin's daughter and the Claimant was his nephew.
16. He testified that the Pupil EM was staying with her grandmother. He confirmed that the BOM sat on the matter and during the investigations EM's grandmother was asked if the Claimant and the pupil were related to which she replied she was not aware but there could have been some relations.
17. He confirmed that the claimant was charged in 2019 and dismissed on 1<sup>st</sup> December 2020 which process is long, despite his allegations that Dorcas was having big shots at TSC.
18. He testified that EM denied having any affair with the claimant, but confirmed that the claimant was invited for a hearing and taken through proceedings. He testified that the Claimant was issued with an interdiction letter with the accusations. He testified that there was no evidence that the claimant had asked for documents relating to his accusations.
19. He testified that he was ignored although he did not write any letter requesting to be heard. He testified that he attended the hearing and only saw Dorcas at Kakamega.
20. He testified that the discord between Dorcas and the claimant was raised at the disciplinary hearing (Pg. 17 of Respondent's bundle of documents) which led to the issue at present, he states that the case was about bad blood and the Head Teacher commented that the girl was insincere and recommended more investigations (Page 17 of respondent's Case).
21. He testified that the Head Teacher required that the parents of EM shed light on the case(Pg.18) and he confirmed that the Claimant and the Pupil EM were blood relatives. He testified that he met the girl only at the Kakamega hearing and does not know her whereabouts therefrom.

### **Defence case in summary**

22. The defence case was summarized from the testimony of Daniel Kioko Kiumu (DW) witness statement dated 4-03-2024 to the effect that he had been in the discipline directorate as the Assistant Director in charge of Discipline in the Respondent for the previous 7 years and he conducted the main hearing and it came out of the said hearing that, the claimant had been flirting with the pupil EM, who confided in Dorcas, that the teacher had told her he loved her and had bought her goodies.
23. DW testified that the victim EM read and confirmed her statement (Pg.60 of the Respondent's bundle of documents), and the witnesses were required to confirm the issues at play and they adopted the BOM Minutes and statements record.
24. DW confirmed that the last decision of the respondent was that the dismissal was upheld and the removal from the Teacher's register. He testified that the claimant cannot apply for a job as a teacher and when referred to section 6 of the Teachers CORT he confirmed that the regulations do refer to any other law including the Public Ethics Act.
25. DW confirmed that in exercising disciplinary actions against employees the respondent was exercising administrative action that requires compliance with Article 47 of *the Constitution*.



26. DW testified that the BOM is not a disciplinary panel and the minutes of Emalindi Primary School held on 3<sup>rd</sup> March 2020(pg. 19 of the Respondent's bundle of documents) indicated that the meeting was a special one summoned by the Ministry of Education and TSC Khwisero which gave the Board the role to discipline the claimant(pg.20). He testified that the said minutes (Minute 3) designated the claimant as accused.
27. DW confirmed that the BOM minutes did not show whether the claimant was accorded any moment to cross-examine any witness. That the BOM meeting came up with the finding that there was no tangible evidence of sexual intercourse and the girl was not telling the truth and that there was evidence of flirtation; proof of immorality by the claimant having gone to the girl's home and evidence of key source unavailable. DW testified that the recommendation by the BOM was that the Claimant be interdicted for immoral conduct and the girl's parents be heard(pg.32).
28. DW confirmed that the Claimant was not accorded an opportunity to cross-examine any witnesses before BOM and the said recommendations were adverse to the claimant and were made on 3<sup>rd</sup> March 2020.
29. DW confirmed that Fr Kinyanjui who made opening prayers at the BOM Hearing gave a verbal presentation at the BOM (pg.31 of the Respondent's bundle of documents), but the said verbal presentation was not captured in the minutes and though Fr. Kinyanjui had promised to do a write-up, the same was not availed to the Claimant since the claimant heard the verbal presentation.
30. DW confirmed that the interdiction letter was issued on 29<sup>th</sup> September 2020 and the same was not based on the BOM Meeting. He testified that the BOM conference meeting is set for preliminary investigation. DW testified that the claimant was subjected to a county disciplinary hearing prior to the interdiction.
31. DW testified that TSC has no mandate to engage other agencies and confirmed they followed all the procedures in the proceedings against the claimant.
32. DW asserted that the Pupil EM confirmed that she had not been given any money by the Claimant and the issue of bad blood between the Claimant and Dorcas was raised and the said Dorcas confirmed that the Claimant had guaranteed her loan.
33. DW confirmed that there was a member of Parliament(MP) representative at the BOM hearing who confirmed that he had been sent by the MP but he could not remember what the said representative said, although on reading (Page 26 of the Respondent's bundle of documents) he confirmed that the person who sent the MP a text about the case was Dorcas. He confirmed that they did not call the parents of the Pupil despite the recommendation by the BOM Panel.
34. DW testified that the complaint at review by the claimant was that he was removed unfairly.
35. DW testified that he is not aware of figures of the number of teachers with complaints based on immorality reinstated by TSC and confirmed that the chances of a person being reinstated after review by TSC depended on the circumstances of each case. He stated that there is a procedure for reinstatement to the teacher's register but there is no evidence the claimant applied for reinstatement.
36. DW testified that the claimant was taken through a hearing at the county level at the County Director's office before his interdiction and the BOM meeting was only for preliminary investigations, and it was not a final meeting.
37. DW stated that the BOM minutes were signed by the Chairperson and Secretary, and Fr. Kinyanjui later issued his written statement (Pg. 12, 13,14 of the Respondent's bundle of documents). He



testified that all witnesses recorded testimonies and the claimant was supplied with them after the hearing as he requested.

38. DW testified that the girl denied the allegations at the TSC hearing but she wrote the statement to Madam Dorcas Shiundu. He testified that although the girl refused that she had not taken any money from the claimant, her first witness statement which she affirmed the allegations is normally taken as the raw evidence by TSC which is not tainted with undue influence.
39. DW testified that the TSC main hearing was chaired by TSC commissioners (pg.50 of the Respondent's bundle of documents) and other officers based at TSC headquarters and none of them participated in the hearings at Kakamega. That at the review, the panel was made of 3 commissioners (pg.90 of the Respondent's bundle of documents) and a representative of the commission's Secretary, which was a different team from the main hearing as per the Code. He testified that all panels are different at all stages.

## **WRITTEN SUBMISSIONS**

40. The court after the close of the defence hearing directed parties to file written submissions. The Parties complied. The Claimant's written submissions drawn by D.C. Chitwah & Co. Advocates were dated 17<sup>th</sup> March 2024 and received in court on 17<sup>th</sup> April 2024. The Respondent's written submissions drawn by Sylvia Ngere, Advocate were dated 27<sup>th</sup> May 2024 and received in court on an even date.

## **DETERMINATION**

### **Issue for determination**

41. The Claimant submitted globally in his submissions on the unfairness of his dismissal stating that the same was unlawful and unprocedurally unfair.
42. The Respondent addressed the following issues for determination in the claim:-
  - a. Whether the respondent had a justifiable reason to dismiss the claimant and whether he was accorded a fair and just disciplinary hearing.
  - b. Whether the Claimant is entitled to the prayers sought.
43. The court having heard the case and perused the submissions was of the considered opinion that the issues placed before the court by the parties for determination were as follows: -
  - a. Whether the termination of employment of the claimant was lawful and fair.
  - b. Whether the claimant was entitled to reliefs sought.

### **a). Whether the termination of employment of the claimant was lawful and fair**

44. The claimant led evidence to challenge the reasons for the termination and asserted the process was not fair. It is trite that for termination to meet the fairness test it must be both substantively fair in terms of valid reasons and procedurally fair as held in *Walter Ogal Anuro V Teachers Service Commission (2013) e KLR*.
45. The court bifurcated the issue into two namely: - procedural fairness and substantive fairness.



## Procedural Fairness

46. Procedural fairness during the termination of employment is as provided for under section 41 of the Employment Act which states:- ‘41(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.’”
47. The claimant contended violation of his constitutional rights under Articles 47 and 50 of the Constitution.
48. Article 47 states: -
- ‘47. Fair administrative action
- (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.’”
49. Article 50 provides for fair hearing to wit:-
- “(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.
- (2) Every accused person has the right to a fair trial, which includes the right—
- (a) to be presumed innocent until the contrary is proved;
  - (b) to be informed of the charge, with sufficient detail to answer it;
  - (c) to have adequate time and facilities to prepare a defence;
  - (d) to a public trial before a court established under this Constitution;
  - (e) to have the trial begin and conclude without unreasonable delay;
  - (f) to be present when being tried, unless the conduct of the accused person makes it impossible for the trial to proceed;
  - (g) to choose, and be represented by, an advocate, and to be informed of this right promptly;
  - (h) to have an advocate assigned to the accused person by the State and at State expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
  - (i) to remain silent, and not to testify during the proceedings;
  - (j) to be informed in advance of the evidence the prosecution intends to rely on, and to have reasonable access to that evidence;
  - (k) to adduce and challenge evidence;



- (l) to refuse to give self-incriminating evidence;
  - (m) to have the assistance of an interpreter without payment if the accused person cannot understand the language used at the trial;
  - (n) not to be convicted for an act or omission that at the time it was committed or omitted was not—
    - (i) an offence in Kenya; or
    - SUBPARA (ii) a crime under international law;
  - (o) not to be tried for an offence in respect of an act or omission for which the accused person has previously been either acquitted or convicted;
  - (p) to the benefit of the least severe of the prescribed punishments for an offence, if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
  - (q) if convicted, to appeal to, or apply for review by, a higher court as prescribed by law.
- (3) If this Article requires information to be given to a person, the information shall be given in language that the person understands.
- (4) Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.
- (5) An accused person—
- (a) charged with an offence, other than an offence that the court may try by summary procedures, is entitled during the trial to a copy of the record of the proceedings of the trial on request; and
  - (b) has the right to a copy of the record of the proceedings within a reasonable period after they are concluded, in return for a reasonable fee as prescribed by law.
- (6) A person who is convicted of a criminal offence may petition the High Court for a new trial if—
- (a) the person's appeal, if any, has been dismissed by the highest court to which the person is entitled to appeal, or the person did not appeal within the time allowed for appeal; and
  - (b) new and compelling evidence has become available.
- (7) In the interest of justice, a court may allow an intermediary to assist a complainant or an accused person to communicate with the court.
- (8) This Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.”

50. The claimant contended that the decision of the respondent of his dismissal and deregistration from the teachers' register was irrational, improper and illegal for want of violation of the claimant's right to fair administrative action, fair hearing, and permanent denial of his constitutional economic rights.



51. The claimant in his witness statement narrated the steps in the hearing before the former employer and the only issue he raised was having not been supplied with the proceedings of the review having requested severally. A claimant must plead violations in a manner to elicit a response from the employer as envisaged in Section 47(5) of the *Employment Act* which provides for the burden of proof as follows:-

‘47

(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.” In his claim, the claimant in his statement only challenged the failure to be supplied with the proceedings in review. The review occurred after the dismissal.

52. During the trial, the claimant raised an issue with the proceedings before BOM, that they were disciplinary proceedings as he was referred to as accused, witnesses were called and he was not allowed to cross-examine them and the decision led to his interdiction. He further raised the issue of Madam Dorcas's conduct (the court was informed she was deceased despite the respondent filing her witness statement) as being conflicted and malicious because of a grievance of unpaid loan guaranteed by the Claimant. All these issues raised at trial were not pleaded. Parties are bound by their pleadings. However, the Respondent did not object and informed the court through DW (Daniel Kioko) that the BOM meeting was a preliminary investigation sanctioned by TSC and the Ministry of Education. At re-examination, DW stated that the BOM was a preliminary investigation and not the final meeting that led to interdiction. The claimant was subjected to a hearing at the county level before the issuance of a letter of interdiction. The claimant was further heard by the Respondent's disciplinary panel where witnesses were called, he gave his evidence and was allowed to cross-examine the witnesses as well as call his witnesses.

53. The claimant submits that there was a violation of Article 47 of *the Constitution* in that it was evident from the testimony of the respondent's witness that the claimant was only afforded relevant material to his disciplinary action including witness statement after the review of his case and not before the commencement of proceedings. To buttress these submissions the claimant relied on the decision in *James Willy Kingori v Chairman Extra Ordinary Meeting of Michimikuru Factory Ltd & 2 others; Maurice Kobia Dickson (Interested party)* [2022] eKLR where the court cited a passage of the decision in *Dry Associates Ltd v Capital Markets Authority and Another* where the Court observed:-

“ Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the *Law Reform Act* (Cap 26 of the Laws of Kenya) but is to be measured against the standards established by *the Constitution*.

1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
2. Every person has the right to be given written reasons for any administrative action that is taken against him.
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; Administrative action to be taken expeditiously, efficiently, lawfully etc.
    - 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.
  5. Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.
  6. Where the administrator is empowered by any written law to follow a procedure that conforms to the principles set out in Article 47 of *the Constitution*, the administrator may act in accordance with that different procedure.”

54. During the trial, CW2 told the court that the claimant had told him he had asked for the statements but he had no evidence of the request. DW told the court that the claimant was supplied with the statements after the hearing when he requested. The claimant placed no evidence before the court of having requested the statements during the hearing. The court then has no basis to find the statements were denied. The claimant confirmed that the statements were supplied when he made the request.

55. The right to fair hearing under Article 50 of *the Constitution* is met when the accused is granted an opportunity to be heard. In employment matters that opportunity to be heard is as stated in section 41 of the *Employment Act*. The Court of Appeal interpreted fair hearing before dismissal from employment in *Bett Francis Berngetuny & another v Teachers Service Commission and another* (Coram: Musinga, Gatembu & Murgor, JJA.) as follows:-



‘38. Each of the appellants appeared in person before the disciplinary panel and defended themselves. Their evidence was considered before a decision was arrived at. It cannot therefore be argued that the appellants were denied an opportunity to defend themselves. In the Nigerian Supreme Court decision, *B. A. IMONIKHE V UNITY BANK PLC S. C. 68 of 2001* that was cited by this Court in *JUDICIAL SERVICE COMMISSION V GLADYS BOSS SHOLLEI & ANOTHER (supra)*, it was held that: “Accusing an employee of misconduct, etc by way of a query and allowing the employee to answer the query, and the employee answers it before a decision is taken satisfied the requirement of fair hearing or natural justice. The appellant was given a fair hearing since he answered the queries before he was dismissed.” 39. Under regulation 66 (4) (b), the commission in its conduct of disciplinary proceedings is required to act on general evidence or statements relating to the character and conduct of a teacher and is not bound to receive and consider only evidence admissible in a court of law. We are satisfied that substantively TSC conducted the disciplinary proceedings in accordance with the rules of natural justice and as prescribed under the Code of Regulations for Teachers.” I uphold the decision and hold that the Claimant was heard by the Respondent by answering questions by the employer and being allowed to make his representations as evidenced in the minutes of the disciplinary hearing before the dismissal under the *CORT*. The court was satisfied, on a balance of probabilities, that the Respondent complied with the provisions of section 41 of the *Employment Act* on procedural fairness.

### **Substantive fairness**

56. Substantive fairness is about the validity of the reasons for termination of employment. It is the burden of the employer to prove the reason for the termination. Section 43 provides for proof of reasons for termination as follows: -

‘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.”

57. The standard of proof of lawful termination of employment is as per section 45 of the *Employment Act* to wit: - (1) No employer shall terminate the employment of an employee unfairly.

- (2) A termination of employment by an employer is unfair if the employer fails to prove—
  - a. that the reason for the termination is valid;
  - (b) that the reason for the termination is a fair reason—
    - (i) related to the employee’s conduct, capacity or compatibility; orSUBPARA (ii)  
based on the operational requirements of the employer; and
  - (c) that the employment was terminated in accordance with fair procedure.
- 4) A termination of employment shall be unfair for the purposes of this Part where—



- (b) it is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.
- (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider—
- a. the procedure adopted by the employer in reaching the decision to dismiss the employee,
  - b. the communication of that decision to the employee and the handling of any appeal against the decision;
  - c. the conduct and capability of the employee up to the date of termination;
  - d. the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41;
  - e. the previous practice of the employer in dealing with the type of circumstances which led to the termination; and the existence of any previous warning letters issued to the employee.”
58. The claimant was issued with a letter of dismissal dated 10<sup>th</sup> December 2020 in which the reasons for dismissal were stated as follows: -
- ‘1. telling her that you loved her on an unspecified date in Term II, 2019 during lunch hour between 1.00 pm and 2.00 pm. 2. Giving her a total of Kshs. 2400 on different occasions in the Year 2019. Taking her for an outing at Yala market where you bought her soda on two occasions on unspecified dates in the year 2019.’(page 81 of the Respondent’s bundle of documents).
59. The Respondent relied on the evidence at the disciplinary proceedings and records of the Claimant, pupil EM, Pupil Head Teacher, Deputy Head Teacher, the Grandmother of pupil EM, the BOM Chair, William, Fr. Kinyanjui and Madam Dorcas, and another Pupil testimonies. During the hearing, the teacher called his witnesses Thomas Mboya (CW2) and Wilson Abukusa a colleague teacher.
60. During the trial, the Respondent had filed two written statements only for evidence to emerge that Dorcas Shiundu was deceased way before the alleged date of the statement. How did that happen? The court expunged the said witness statement. The respondent then relied on evidence of DW as outlined above in the decision to effect that they relied on the raw statement of Pupil EM before undue influence as the claimant after the initial statement visited the pupil at her home to discuss the case.
61. The Claimant testified that the school had several male colleagues. He said the pupil EM confided to him and not the other male teachers as he was the class teacher. He testified that he went to EM’s home because she was her uncle’s daughter and EM had informed him there was a plot against him and the school had asked her not to tell her parents. He testified that he did not go to convince EM to change her statement.
62. The Court established from the disciplinary proceedings that pupil EM in her statement of 1<sup>st</sup> December 2020 stated the teacher told her he loved her and gave her Kshs. 100/-. Teacher Dorcas, the Deputy Head Teacher and the Head Teacher also recorded statements. The Head Teacher appeared not to be persuaded by the allegations and called for more information from the parents of the girl. Before the BOM, the pupil confirmed she wrote the letter, denied she had a love affair with the teacher,



stated she had gone to Yala market twice with the teacher using a motorbike where they took soda from a hotel, and that the teacher had visited their home to discuss the love rumours(at page 22-23 of the Respondent's bundle was the BOM minutes).

63. Before the BOM, the grandmother of the pupil appeared and told the BOM that the pupil EM was her grandchild. That the parents were separated. That the pupil stayed with her. On whether the Pupil EM was related to the teacher, the grandmother told the BOM that she did not know but there could be some relation (pages 28-29 of the respondent's bundle).
64. At the hearing before the TSC disciplinary Committee meeting held on the 1<sup>st</sup> December 2020 chaired by Commissioner Kinoti Imanyara, the claimant was faced with charges of flirting with the pupil EM Adm. No. 6405, class 8, Year 2019 with specific allegations of:- '1. telling her that you loved her on an unspecified date in Term 11 2029 during lunch hour between 1.00 pm and 2.00 pm. 2. Giving her a total of Kshs. 2400 on different occasions in the year 2019. Taking her for an outing at Yala market where you bought her soda on two occasions on unspecified dates in the year 2019.'
65. During that hearing, the Claimant told the TSC disciplinary hearing panel he was the class teacher of EM, he normally visited the girl's home, that he was a victim of Madam Dorcas who fixed him as they had issues, he denied having given the pupil money or visited Yala Market with her (page 55-59 of the Respondent's bundle).
66. The pupil EM was called as a witness and confirmed she wrote two statements, that the claimant had visited their home and talked to her father. She denied having been to Yala market with the teacher but admitted she wrote the two statements. The claimant cross-examined her and she confirmed Janet was also her name, they had not taken photos nor had he given her money. There were other witnesses called. In the end, the teacher asked to be given another opportunity and be reinstated.
67. During the hearing, the claimant insisted that he was framed by Madam Dorcas due to the loan he had guaranteed for her and that the pupil was his relative hence they could not have an affair as that was incest. He also said he did not apply for reinstatement to the register as he was under psychological trauma. The claimant further called CW2 Thomas Mboya Mushiri who said the claimant and the pupil were relatives. That the student was his cousin's daughter and the claimant his nephew. He was referred to the evidence of the grandmother of the pupil. He did not controvert that position. In re-exam, he told the Court he met the girl at the Kakamega County hearing and did not know of her whereabouts.
68. The court's finding was that the claimant did not prove he was a relative of the pupil. If he was a relative how could the grandmother of the pupil, the immediate caregiver, not know about the alleged blood relations? The court holds it was reasonable for the respondent to find he was flirting with the pupil contrary to the operational requirements of teachers under the CORT. The court upholds to apply in the instant decision the test for reasonable employer in *British Leyland UK Ltd v Swift* [1981] IRLR 91 where Lord Denning held:-

“When considering the decision of an employer's disciplinary panel, it was not for the Tribunal to consider whether a lesser sanction would have been reasonable; but whether the dismissal itself was within the band of reasonable responses. The correct test is to ask whether it was reasonable to dismiss the employee? If no reasonable employer would have dismissed him, then the dismissal is unfair. If a reasonable employer might reasonably have dismissed him, then the dismissal is fair. There is a band of reasonableness within which one employer might reasonably dismiss the employee whilst another would quite reasonably keep him on. It depends entirely on the circumstances of the case whether dismissal is one of the penalties that a reasonable employer would impose. If it was reasonable to dismiss,



the dismissal must be upheld as fair even though some other employers might not have dismissed.” The court further agreed with the respondent, that the visit of the teacher to the pupil’s home was to influence her testimony as demonstrated in the proceedings at various levels.

69. In the upshot the court finds there was substantive fairness in the dismissal of the claimant from employment of the Respondent.

**b). Whether the claimant was entitled to reliefs sought**

70. The claimant has sought the following reliefs: -

- a. A declaration that the actions by the respondent are arbitrary and have had the effect of denying the claimant an opportunity to be employed as a teacher and the said action by the respondent should be declared null and void.
- b. The claimant be reinstated by an order of this court as a teacher in the teacher's register which is in the custody of the Respondent.
- c. Costs of the claim.

**a). A declaration that the actions by the respondent are arbitrary and have had the effect of denying the claimant an opportunity to be employed as a teacher and the said action by the respondent should be declared null and void.**

71. The Court having held that the dismissal of the Claimant from employment of the respondent met the procedural and substantive fairness test, it flows consequently that this prayer is disallowed.

**b).The claimant be reinstated by an order of this court as a teacher in the teacher’s register which is in the custody of the Respondent.**

72. On this issue, the claimant pleaded that the decision to de-register him as a teacher had permanently denied him as opportunity to serve as a teacher anywhere in the Republic of Kenya or elsewhere having been expunged as a teacher. He asserted that his constitutional economic rights were denied by the acts of the Respondent.

73. In response to paragraph 10 of the claim, the respondent contended that section 31 of the TSC Act No. 20 of 2012 provides for reinstatement to the register of teachers upon expiry of 18 months from the date of removal.

74. During cross-exam, the claimant told the court he was not aware he could apply for reinstatement and confirmed he had not applied. He also confirmed he was aware he had to apply in 18 months but had psychological trauma.

75. DW told the Court he had had no figures of the teachers reinstated whose complaints were on morality.

76. The Court finds that there exists a clear procedure for reinstatement to the register of teachers which the claimant had not invoked contrary to the doctrine of exhaustion as espoused in Speaker of the National Assembly v James Njenga Karume [1992] eKLR that, “where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.” The claimant could still apply even late and raise the defence of the alleged psychological trauma for the respondent to consider. He could further appeal to the tribunal if dissatisfied as stated in Bett Francis Barngetuny & another v Teachers Service Commission & another [2015] eKLR (supra) that:- ‘ 40. As regards the jurisdiction of the Tribunal,



regulation 66 (7) (b) (i) states as follows: “In accordance with section 10 of the Act, where the Commission has determined not to register a teacher or that the name of a teacher be removed from the register (i) a teacher aggrieved by the commission’s refusal to register or to remove him/her from the Register may within twenty-eight days of that notice, appeal to the Teachers Service Appeals Tribunal, established under section 11 of the Act. A copy of such notice of appeal must be served to the Commission.” (emphasis given) The prayer is disallowed.

77. In conclusion and in disposition of the claim the Court holds that the claim fails in totality and is dismissed. The Court taking into account the employer-employee relationship and the circumstances of the case makes no order as to costs.

78. Right of appeal.

79. It is so Ordered.

**DATED, SIGNED & DELIVERED IN OPEN COURT AT KAKAMEGA THIS 27<sup>TH</sup> DAY OF JUNE 2024.**

**J.W. KELI,**

**JUDGE.**

IN THE PRESENCE OF: -

Court Assistant: Macheso

For Claimant: In person

For Respondent: - Ms. Ngere

