



Otieno v Teachers Service Commission (Employment and Labour Relations Cause E020 of 2022) [2024] KEELRC 1630 (KLR) (24 June 2024) (Judgment)

Neutral citation: [2024] KEELRC 1630 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KERICHO
EMPLOYMENT AND LABOUR RELATIONS CAUSE E020 OF 2022**

HS WASILWA, J

JUNE 24, 2024

BETWEEN

CHRISTOPHER ODHIAMBO OTIENO CLAIMANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

JUDGMENT

1. The Claimant instituted this suit by the memorandum of claim dated 6th December, 2022, alleging to have been unfairly terminated and seeking for compensation for the said termination. The claimant sought for the following reliefs; -
 - i. A declaration that the Respondent's termination from employment of the claimant was unprocedural, unfair and wrongful.
 - ii. A declaration that the dismissal with the consequences that the claimant forfeits pensions benefits is hereby set aside and substituted with an order to reinstate the claimant and the claimant be paid the pensions benefits under the *Pensions Act* Cap 189.
 - iii. A declaration that the claimant be forthwith reinstated as an employee of the Respondent in his former position without loss of benefits.
 - iv. An Order is hereby issued directing the Respondent to pay the claimant his salary in full from the date of the interdiction until reinstatement.
 - v. A declaration that the claimant is entitled to Gratuity and Pension.
 - vi. Loss and Suffering/a compensation for pecuniary embarrassment.
 - vii. The Respondents are hereby compelled to compute and declare an account of the claimant's legal terminal (retirement) benefits and schedule thereof, payment of the claimant's legal



terminal (retirement) benefits and the claimant's commuted lump sum gratuity or such other due computation under the pension Act, within 14 days from the date of Judgement.

- viii. Costs of the suit.
- ix. Any other suitable relief.

Claimant's case

2. The claimant avers that he was first employed by the Respondent on 7th January, 1992 on temporary basis and later absorbed on permanent and pensionable terms from 20th November, 1998. That he worked as a teacher till 3rd May, 2017 when he was promoted to Job Group N to become the Principal of Monianku Secondary School a position that he held till his termination in June 2019. At the time of termination, the claimant was earning a gross salary of Kshs 119,412.
3. The circumstances leading to his termination is that sometimes on 23rd July, 2018, the students rioted leading to severe injury of one of the teacher Mr. James Omari Otweka, causing him to be admitted for two months and after being discharged, he was transferred to another school. Within the same time another teacher, Zakayo Kiriaogo, who was alcoholic disappeared from the school, creating a vacuum in the teaching personnel as the teachers were now under staffed and unable to properly teach all the learner. Due to this, the Board of the School advertised for teaching positions on 30th July, 2018 but the advertisement did not elicit any response from qualified personal with TSC numbers.
4. The Board of the school reconvened a meeting of 14th September, 2018 and agree to have the advertisement recirculated. Now to a wider range, which the claimant did but no response was received. Faced with this challenge, the school board decided to retain some of the teachers on teaching practice as the wait to fill in the said position. He stated that these teachers were not paid a salary but an honorarium.
5. The claimant states that during KCSE examination of 2018, some teachers were suspected of examination irregularities and they together with him as the principal were charged in Ogembo Court under Criminal case No. 24 of 2019 but the case was dismissed on a no case to answer.
6. During the pendency of the criminal suit, the claimant was issued with a Show cause letter dated 7th November, 2018, invited for disciplinary hearing vide the letter dated 19th November, 2018 at the TSC-County Director office in Kisii on 28th November, 2018. A day after the hearing on 29th November, 2018, he was interdicted and placed on half salary.
7. The Claimant states that on 19th March, 2019, he attended a disciplinary hearing at the Respondent headquarters in Nairobi and the decision of the hearing communicated to him on 9th May, 2019 terminating his services. On 4th August, 2019, he appealed the decision of the disciplinary committee and he was invited for appeal hearing on 29th January, 2020 for hearing scheduled for 12th March, 2020, but the same did not proceed due to Covid-19 pandemic. The hearing was postponed until 28th January, 2021 when he was heard virtually and the termination decision of the disciplinary committee was upheld.
8. He filed a second appeal on 30th December, 2021 and was invited for a record appeal hearing on 9th March, 2022 communicated by the letter of 4th February, 2022. After the second Appeal the Respondent reinstated him to the teachers' register vide the letter of 23rd March, 2022 but that the termination from the Respondent's employee was upheld, therefore that the claimant could only teach in private practice and not as an employee of the Respondent.



9. He stated that his termination from service was unfair in that he was acting on instruction of the Board of the school to advertise for the teaching position in the interim to ensure that students are taught. Further that he was only trying to breach a gap caused by the transfer and absenteeism of the teachers which caused a teaching vacuum.
10. On reliefs sought, the claimant urged this court to order for his reinstatement to service and payment of gratuity/Service pay of Kshs. 4,104,787.50 and also award him compensation for loss and suffering and pecuniary embarrassment occasioned by the interdiction and termination on allegation of causing examination malpractice. Hence he is unable to meet his financial needs and that of his family as his children were forced to discontinue school and an embarrassment from his peers and family who view him as a failed principal.

Respondent's case

11. The Respondent entered appearance and filed a response to claim and counterclaim dated 2nd February, 2023. The Respondent admitted to employing the claimant to the position of the principal and stated that as an employee of the Respondent, the claimant was always governed by the Constitution of Kenya, Teachers Service Commission Act, the Employment Act, Code of Regulations for Teachers 2015(CORT), the Code of Conduct and Ethics for Teachers, 2015(COCE), the Leadership and Integrity Act and all other legal instruments such as Administrative circulars issued by the Respondent from time to time.
12. It is averred that sometimes in November, 2018, the Respondent received allegations of KSCE Examination irregularities of KCSE and in accordance with the law the Respondent began investigations and issued the claimant with a Show cause letter dated 7th November, 2018 as to why disciplinary action should not be taken against him for engaging unregistered teacher on BOM terms, who later engaged in exam malpractice. He added that if the claimant was found guilty then he was to be found guilty of negligence of duty contrary to the Code of Regulations for Teachers 2015.
13. That the claimant responded to the Show cause letter and was invited for further inquiries at the TSC-County office, when he was interdicted as he awaits disciplinary action from the Respondent's head office.
14. It is stated the claimant was heard by the Respondent on 19th March, 2019 where he was allowed to defend himself and call witnesses. During this hearing, it is stated that the claimant admitted to charge 2 and denied charge 1 and the panel resolved to dismiss the claimant's services and his name removed from the TSC register. That the claimant appealed against the said decision and the Respondent after hearing the claimant on two occasions, reinstated his name in the register but upheld the dismissal.
15. The Respondent state that the criminal charges against the claimant were different from the disciplinary charges, as each is independent from each other. Further that the dismissal was done legally following due procedure and based on cogent reasons.
16. On the counterclaim, the Respondent stated that the claimant was paid undue amount of Kshs 300,623 for the period between 22/11/2018 to 30/6/2019 being salary and allowances earned erroneously, which has occasioned the Government damage. That despite notice and demand for refund, the Claimant has refused to refund the Respondent the said money. On that basis, the Respondent urged this Court to compel the Claimant to refund the said money and award it costs.
17. In conclusion, the Respondent prayed for dismissal of the Claim and the Counterclaim be allowed with costs.



Evidence

18. During hearing, the claimant testified as CW-1 and stated that he is the former principal of Monianku Secondary School. That he was first employed in 1992 and posted to Gituri High School as an Untrained Graduate teacher. He adopted his witness statement of 17th May, 2023 and added that in 2018 when the students were doing their KCSE, he received a call that there was a report of exam malpractice in the school. That he immediately dispatched two officers to go around the school but that they did not find anything unusual, few minutes later he received another call and this time the County director came to the school and descended on one of the teachers' house and searched, recovered several books and stationery and took them to the DCIO and then arrested a female teacher who was inside.
19. He testified that he waited for the exams to end in the evening and took the scripts to the exam centre. During the said time, the County director directed him to appoint an acting Deputy Principal as the deputy principal was also arrested. That the next day, he proceeded to the centre to pick the exams, however, he was not allowed to pick the exam and was informed that the Curriculum Support Officer (CSO) would pick the exam script for that day and he was directed to report to DCIO offices, where he was directed to record a statement, arraigned in Court and detained for 1 week then taken back to Ogembo Law Courts and charged, however that he was released under section 210 of the CPC.
20. The claimant testified that while he was in remand, he was served with a Notice to show cause, subjected to the disciplinary process and eventually terminated for negligence of duty and insubordination in July, 2019. On insubordination, he testified that he was accused of employing teachers without TSC numbers. He explained that he employed the said teachers who were former students of the school, who had completed university but were yet to graduate, to save the situation because after the riot, some teachers were transferred without replacement and another teacher who was alcoholic disappeared, therefore that he needed to urgently fill the gap as substantive teachers were being sourced.
21. He testified that the decision to employ the trainee teachers was a decision by the Board of the School, where he sits as a secretary. He then produced his documents as exhibit 1-32 respectively as his evidence. He added that the board was only saving a situation and that if teachers had been posted by the TSC, the said trainees would not need to be employed.
22. Upon cross examination, he testified that he was aware of the laws that govern his employment as a principal tasked with teaching, finance and leadership. He testified that they made an advertisement but none of the qualified teachers applied for the said position except for the teachers who were yet to graduate. He stated that he communicated to Commission, that the advertisement did not elicit any response. He testified that he was charged for employing teachers without TSC number and for aiding and abetting. He stated that he received notification of overpayment but that he did not pay back the said money. He also stated that the commission does not allow employment of unqualified teachers.
23. On re-examination, he testified that it is the BOM that employed the unqualified teachers. He told this court that he left remand and headed straight to the County office for hearing as such, there was no time to present the minutes of the recruitment. He maintained that he got his last pay in July, 2019 and that he never received any letter from TSC on purported overpayments. He also stated that at the time of termination, the TSC had not posted any teachers.
24. The respondent called two witnesses, Emmanuel Odhieri Otieno, the Respondent sub-county director who adopted his witness statement of 11/4/2023 and produced the documents filed on 2.2.2023.
25. Upon cross examination, he testified that he is the one that carried out investigation and found out that there was probability of malpractice involving 5 teachers employed on BOM terms but that the



- claimant was not among them. He testified that the claimant is out of employment on a decision made by BOM where he sits as the secretary. He avers that if TSC posted teacher to the school, there would be no short fall. He testified that there was a serious shortfall of teachers as some teachers had been transferred and another one died, without any replacement, creating serious under staffing.
26. On re-examination, he testified that the claimant was the secretary of the School Board that made a decision to employ unqualified teachers.
 27. The second Respondent's witness was Cathrene Ngetich, the Respondent Deputy Director in charge of Discipline of Teachers, who testified as RW-2. She adopted her witness statement of 12/4/2023 and upon cross examination, she testified that ordinarily when teachers are transferred then TSC should replace them, however in event that they are not replaced, the school hires teachers on BOM terms. She testified that the claimant was not terminated for hiring teachers on BOM but by hiring teachers who did not have TSC numbers. Further that the claimant was engaged in examination irregularities. She reiterated that the mistake is not for TSC for failing to employ enough teachers but of the claimant engaging teachers without TSC numbers.

Claimant's Submissions

28. The claimant submitted that the letter of 23rd March, 2023, communicated that he would lose all his benefits including gratuity and Pension when he was 55 years old at the time and due for retirement. He stated that Regulations 73 of the Teachers Service Commission Code of Regulations revised in 1986 provide for the teachers that are eligible to received pension benefits or gratuity in accordance with Pension Act as follows;

“on completion of 10 years in service and attaining 50 years, either party can initiate the retirement and on attaining 55 years, the Employer would initiate the retirement, on ill health and in public interest.”
29. It was submitted that service pay or Gratuity is a pay to compensate an employee in view of the service rendered to the employer and is a right in the nature of property or a recognized employee's right within the realm of employment law such as section 5 of the Pension Act and Section 35(5) and section 40(1)(g) of the *Employment Act*. Therefore that the employer will be in breach of Article 41 (1)&(2)(g) of *the Constitution* if an employee's crystallized or accrued pension is denied or reduced for any reason included the reasons advanced by the employer in this case. He added that to allow such withholding of pension would amount to unjust enrichment of the employer.
30. The Claimant urged this Court to find that he is entitled to social security under Article 43 (1)(c) of *the Constitution* and any provision that deny an employee pension undermines the right to social security provided under *the Constitution*. In any case that it amounts to depriving an employee of their earned property which is unconstitutional and unfair labour practices.
31. It was submitted that having worked for 27 years and leaving service at the age of 53 years, the claimant ought to have been paid his pension earned over all the years he was in service as provided for under Section 5 of the Pension Act. In support of this, the Claimant relied on the case of Director of Pensions V Abdul Majid Cocker, Civil Appeal No. 50 of 1999.
32. The Claimant submitted that Regulations 82 (2) of the Respondent's code that provides that a teacher dismissed from services forfeits all claims to pension is unconstitutional as it contravenes Articles 43(1)(c) and 43(1) & (2)(b) of *the Constitution* on fair labour practices and working conditions, Articles 40 on protection of right to property and Article 43(1)(e) on the right to social Security. In this, he relied



on the case of *George Kuria Kamanda Mwaura Vs Teachers Service Commission [2019]* eklr, where the Court of Appeal held that; -

“indeed, pension is a proprietary right as stated in the authority cited for the appellant but it must be pension lawfully arrived at. There can be no right of pension where the employee has already attained and passed the mandatory age of retirement. Thus, while we agree with the dictum of Shah, JA in the *COCKAR* case (supra) that the pension of a retiree is not a matter of fun and games, we add that it is not a matter of greed and speculative wager either.”

33. Accordingly, he argued that the claimant has been punished for mistakes done by the Board of the school where he was only acting as a mere secretary. Further that the Respondent was the one that failed to post teachers to the school and the Board was only filling a gap created by the transferred teachers, but that only the claimant has been condemned to solely bear its consequences. Therefore, that the termination of the claimant was unfair and urged this Court to find the termination unfair and order for his compensation.
34. On reliefs sought, it was submitted that the claim herein has been sufficiently justified by evidence and that it is evident that the claimant was terminated unfairly, hence he is entitled to all the reliefs sought in the claim.

Respondent's Submissions

35. The Respondent submitted on four issues; whether there existed a reasonable cause and or valid reason to terminate the claimant's employment, whether the Respondent accorded the claimant fair hearing during the disciplinary process, whether the claimant is entitled to prayers sought and whether the Respondent is entitled to prayers in the counterclaim.
36. The Respondent submitted that the employment relationship between it and the claimant is governed by several laws including; TSC Act, Code of Regulations for Teachers (CORT) and Code of Conduct and Ethics (COCE), all that enable it discharge its functions to regulate the management of the teachers' service. On that basis, it was submitted that when the claimant was employed in 1998, he was governed by these regulations.
37. It was submitted that Section 43 of the *Employment Act* provide for substantive justification for termination and provides that the reason for termination are matter that the employer at the time of termination genuinely believes to exists. To support this, they relied on the case of *Kenya Power and Lighting Limited V Aggrey Lukorito Wasike [2017]* eklr where the Court of Appeal sitting in Nyeri 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. In the present case, it seems quite clear from the evidence on record that KPLC believed, and had ample and reasonable basis for so believing, that Wasike had attempted to steal cable wire from KPLC stores which he was in charge of. That being the case, we think the learned Judge plainly erred in entering into a detailed examination of whether or not the 300 metres of cable wire were part of the 1,100 metres that were being legitimately removed from the store, as well as an examination of whether or not there was sufficient documentation in proof of the discrepancy, and the like.”



38. Accordingly, it was argued that in establishing the veracity of the allegations levelled against the Claimant, the Respondent conducted independent investigations under section 146 of CORT and conducted disciplinary hearing and confirmed the said allegations leading to the interdiction of the claimant for breach of Clause (b)(iv) and (c) (iv) of the Third Schedule of the TSC Act in employing unqualified teachers who worked closely with the claimant to plan exam malpractice. Hence, the reason for termination was justified.
39. It was also submitted that the claimant was subjected through proper procedure, a fact which all the witnesses confirmed, hence the procedure was up to the required standard as provided for under Regulations 139 and 156 of the CORT, 2015 and the provisions of the *Employment Act* as read with Article 252 (1)(a) of *the Constitution*. He elaborated on the investigations and stated that a team comprising of County Commissioner, Senior Security Team, TSC County Director, County Director of Educations, TSC Sub County Director ad three quality assurance and Standards officers, went to school upon receiving information of alleged exam malpractice and carried out investigations and compiled a report. Later on he was invited for hearing at the County office and a further hearing at the Respondent's head office, where he was heard and allowed to defend the allegations and after interrogations of all facts and evidence, the claimant was found liable and the Respondent made a decision to terminate his services.
40. The Respondent submitted that the criminal charges against the claimant that led to his arrest were distinct from the disciplinary proceedings as such the discharge from the criminal charges does not have any effect on the disciplinary proceedings. In any event that the standard of proof in the criminal charges is different from the standard of proof in civil cases, such as an employment case herein. To support this, they relied on the case of David Kemei V Energy Regulatory Commission [2013] eklr where the Court held that:-
- “The finding of not guilty in the criminal process did not tie the hands of the employer from arriving at a guilty finding in the disciplinary process. The timing and pace of the disciplinary process did not follow the criminal process.....he was not but only put through two legitimate but different processes; one private and the other public, which processes are not bound to reach the same outcome”
41. On that note, it was submitted that the termination of the claimant was justified both procedurally and substantively. To buttress its arguments, they relied on the case of Judicial Service Commission Vs Gladys Boss Shollei & Another [2014] eklr, where the Court relied on the holding in the South African case of Nampak Corrugated Wadeville v Khoza(JA14/98) [1998] ZALAC 24 that:
- “A court should, therefore not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable”
42. The Respondent also relied in n the Nigerian Supreme Court decision BA Imonikhe v Unity Bank PLC S.C 68 of 2001 which court 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 satisfies the requirement of fair hearing or natural justice. The appellant was given a fair hearing since he answered the queries before he was dismissed.”



43. He also relied on the case of Anthony Mkala Chitavi Vs Malindi Water and Sewerage Company Ltd [2013] eKLR and the case of Bett Francis Berngetuny & Another Vs Teachers Service Commissions and Another [2015] eKLR where the Court held that;-

“the general principles that should guide statutory, domestic or administrative tribunals sitting in a quasi-judicial capacity. The learned judge observed, and in our view rightly so, that all the principles enunciated in the aforesaid decision are incorporated in the Code of Regulations for Teachers... 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.... If an employer has conducted disciplinary proceedings fairly in accordance with statutory or laid down regulations, a court of law should exercise great caution before it interferes with the employer’s findings.”

44. On reliefs sought, it was submitted that the Respondent has lost confidence in the claimant as such the prayed for reinstatement should not be granted. Further that the termination of the claimant was justified in the circumstances, as such the prayer for reinstatement is not warranted. Additionally, that the claimant having been out of service for more than 3 years cannot be reinstated back to service as provided under section 49 of the Employment Act.
45. On compensation for unfair termination, the Respondent reiterated that the termination was justified and done in accordance with sections 41, 43 and 45 of the Employment Act, hence the claimant is not entitled to the compensation.
46. On payment of gratuity and Pension pay, the Respondent submitted that since the claimant was dismissed lawfully, he is not entitled to any pension as provided for under Section 5(2) and 6 of the Pensions Act as read with Regulations 160(2) and 181(2) of the Code of Regulations for Teachers (CORT), 2015. To support this, they relied on the case of Teachers Service Commission V Henry Kamau Ngari & Another [2020] eKLR, where the Court held that;-

“The case of Abdul Majid Cocker vs. Director of Pensions on which the learned Judge relied does not aid Mr. Ngari’s cause in our view. In that case the Court was clear that a “person who is eligible for pension” cannot be deprived of it. In the circumstances of the present case, and as already stated, Mr. Ngari was not eligible for pension given the circumstances under which he left teaching service. There is merit therefore in the complaint by TSC that the Judge erred in holding that Mr. Ngari was eligible for pension.”

47. Accordingly, that the claimant is bound by all laws including the law seeking for forfeiture of pension on dismissal. In any case that the claimant did not object to any laws on employment, therefore he is stopped from alleging that any section of the law is unconstitutional.
48. On the counterclaim, it was submitted that that the claimant was paid a cumulative sum of Kshs.300,623.10 from the period between 22.11.2018 till 30.6.2019, which money should be refunded to the Respondent having been erroneously given. He argued that the claimant did not object receiving



these monies as such they should be refunded. To support this, the respondent relied on the case of *Mistry Jadva Parbat & Co Limited V Kenyatta University* [2018] eKLR where the Court held that:-

“it would be unconscionable to allow the plaintiff to obtain judgement herein when it has been overpaid. It is not equitable for the plaintiff to retain the overpayments. In addition, an overpayment made from Public funds....”

49. In conclusion, the Respondent urged this Court to dismiss the claimant and allow the counterclaim with costs for both claim and counterclaim.
50. I have examined all the evidence and submissions of the parties herein. The issue for this court's determination are as follows:-
- (1) Whether there were valid reason to warrant the Claimant's termination.
 - (2) Whether the Claimant was subjected to due process before termination.
 - (3) Whether the counterclaim is proved.
 - (4) Whether the Claimant is entitled to remedies sought.

Issue No 1.

51. On the first issue, it is evident from the Claimant's letter interdicting the Claimant dated 29.11.2018, that he was interdicted on two grounds:
- (1) Negligence
 - (2) Insubordination
52. The facts of negligence were from the facts that he apparently facilitated unauthorised persons to access and photocopy an examination question paper on 5.11.2018 while the chemistry paper 1(233/1) was ongoing while he was the centre manager of Monianku Secondary School.
53. On insubordination, he is said to have engaged three persons who did not hold a certificate of registration by the Teachers Service Commission to teach in Monianku Secondary School being Edwin Maroria, Ophera Oganga Judith and Christopher Ogara.
54. The Claimant was thereafter asked to show cause why he should not be dismissed on account of these reasons and he responded denying any culpability.
55. After going through two disciplinary process he was dismissed vide a letter dated 9.5.2019 on the same reason. He appealed the termination on the two accusations but the Respondent upheld the termination vide a decision dated 28.1.2021 communicated to him on 28.2.2021. On further review of the decision of the Respondent, he was reinstated to the Register of teachers with effect from 9.3.2022.
56. It is therefore apparent that the Claimant was dismissed on the same grounds of negligence and insubordination.
57. The Claimant was also charged before court on the same issues on the examination malpractice before SRM's Court Ogembo in Criminal Case No. 24 of 2019 and was found innocent and acquitted under Section 210 of the Criminal Procedure Code.
58. During the disciplinary hearing the Claimant was questioned on the employment of teachers without TSC registration number and at page 4 of the Minutes he said the said teachers were volunteers but



on the timetable they were listed as teachers and they had no registration numbers. He accepted the charge of employing the teachers without registration certificates.

59. On issue of examination malpractices, the Claimant confirmed that some examination papers were found in the school in an unauthorised manner. The Claimant was also the examination centre manager and had a duty to ensure proper handling of examination materials which it is apparent he did not.
60. I therefore return the verdict that there were valid reasons to warrant the Claimant's termination.

Issue No. 2

61. On the process, the Claimant had admitted that he was taken through the disciplinary process – Minutes of the process were exhibited before court by the Respondents which the Claimant has not disputed.
62. The Claimant was notified of the decision of the disciplinary panel and his right to appeal which he exercised.
63. It is also clear that his appeal was heard and he was invited. He sought a review of the panel decision and the review was handled and reviewed in part.
64. The disciplinary process as envisaged under Section 41 of the *Employment Act* was therefore complied with and I return the verdict that the Claimant was subjected to a fair disciplinary process.

Issue No. 3 - Counterclaim

65. The Respondent filed a counterclaim against the claimant alleging an overpayment of Kshs.300,623 being payment between 22.1.2018 to 30.6.2019 being salary and allowances earned erroneously. The claimant denied earning this amount erroneously and the Respondents submitted no evidence to confirm those payments.
66. The counterclaim was not therefore proved and is rejected.

Issue No. 4 – Remedies

67. The Claimant sought a number of remedies including reinstatement. It is apparent that this remedy cannot lie, the Claimant having been found culpable on the charges levelled against him.
68. He also sought an order that the order that forfeits his pension benefits be set aside and he be paid the pension benefits under the Pension Act Cap 189.
69. On this issue, I wish to refer to regulation 82(2) of the Respondent which provides that a teacher dismissed from service forfeits all his pension.
70. Indeed this court has held that every employee has a right to social security and in the case of *George Kuria Vs TSC (2019) eklr*, the Court of Appeal held as follows :-

“indeed, pension is a proprietary right as stated in the authority cited for the appellant but it must be pension lawfully arrived at. There can be no right of pension where the employee has already attained and passed the mandatory age of retirement. Thus, while we agree with the dictum of Shah, JA in the *COCKAR* case (supra) that the pension of a retiree is not a matter of fun and games, we add that it is not a matter of greed and speculative wager either.”



71. It is indeed true as held herein that pension already earned is a right and cannot be taken away from an employee for whatever reason.
72. I accordingly agree with the claimant that he earned his pension and the decision to dismiss him without his pension is unconstitutional and is set aside.
73. I order that the claimant's pension be processed and be released to him accordingly.
74. The Respondent will pay costs of this suit.

JUDGMENT DELIVERED VIRTUALLY THIS 24TH DAY OF JUNE, 2024.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of: -

Ochieng for Respondents – present

Kemboi & company for claimants – Present

Court Assistant – Fred

