



**Masaba v Board of Management, Eshibanze Muslim Secondary School
& another (Employment and Labour Relations Cause E020 of 2023)
[2024] KEELRC 2232 (KLR) (20 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2232 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
EMPLOYMENT AND LABOUR RELATIONS CAUSE E020 OF 2023**

**JW KELL, J
SEPTEMBER 20, 2024**

BETWEEN

AKALI GIBSON MASABA CLAIMANT

AND

**BOARD OF MANAGEMENT, ESHIBANZE MUSLIM SECONDARY
SCHOOL 1ST RESPONDENT**

THE TEACHERS SERVICE COMMISSION 2ND RESPONDENT

JUDGMENT

Claimant – Mukhooli & Associates Advocates

For Respondents – Flora Manyasa, Advocate

1. The Claimant on 9th November 2023 filed the Memorandum of Claim of even date supported by his verifying affidavit sworn on even date, alleging that he was unprocedurally and unfairly terminated seeking the following orders: -
 - a. An order compelling the 2nd respondent to reinstate the claimant back to employment but to another school.
 - b. The Respondent's payment of the sum claimed in paragraph 12(twelve) of the claim.
 - c. Costs of the suit.
 - d. Interest at court rates.
 - e. Any further or other relief that this Honourable court may deem just and fit to grant.



2. The Claim was accompanied by the Claimant's list of witnesses dated 9th November 2023 and the List of Documents of an even date.
3. The Claimant on 17th November 2023 filed his witness statement dated 16th November 2023. Subsequently on 8th January 2024, the Claimant filed a further list of documents dated on an even date, accompanied by his bundle of documents (comprising of 14 documents that were produced and marked as C-Exh-1 to 14).
4. The Respondents in objection to the Claim on 6th March 2024 filed a Defence Statement dated 1st March 2024, accompanied by the list of witnesses dated on even date, witness statement of Kenneth Marangu dated 5th March 2024, witness statement of Emelda Otieno dated on even date, witness statement of Nicholas K. Afuma dated on even date, the list of documents dated 1st March 2024 and the Respondents' bundle of documents (comprising 20 documents that were adopted as D-Exh 1-20).

Hearing and Evidence

5. The claimant testified on oath on 28th May 2024 as CW1 in his case, produced his evidence as the claim filed, the claimant's list of documents dated 9th January 2024 (comprising of 14 documents adopted by the court as the CW 1- 14) and his witness statement dated 15th November 2023. He was cross-examined by Mr. Ochieng Holding Brief for Manyasa.
6. The defense case proceeded Exparte on 2nd July 2024, when Imelda Otieno testified on oath as DW1, adopted her statement dated 5th March 2024 as her evidence in chief, and produced Defence Exhibits 1 to 9. Kenneth Maranga testified on oath as DW2 and adopted his statement dated 5th March 2024 as his evidence in chief, and produced the Defence Exhibits 10 to 20. Nicholas Ajuma testified on oath as DW3 and adopted his statement dated 5th March 2024 as his evidence in chief. The defence case was closed in the absence of cross-examination.
7. Through an application by way of a Notice of Motion dated 8th July 2023(sic) and filed on 8th July 2024, the Claimant applied to re-open the defence case to recall the Respondent's witnesses for cross-examination and to stay further proceedings.
8. The application came up for interpartes hearing on 22nd July 2024, where the claimant was a no-show. The application was thus dismissed for non-attendance with costs in the cause and the parties' cases were marked as closed.

The Claimant's case

9. The claimant was a teacher employed by the 2nd respondent at Eshibanze Muslim Secondary School and rose through the ranks to the position of head of department.
10. The Claimant received a demotion letter on 16th November 2021, although the said letter acknowledged that he had done an exceptional job, accusing him of sabotaging school programs and also stating that he was guilty of professional misconduct for allegedly having committed a sexual offence against a student S.O.
11. That the 1st Respondent caused the Claimant to be interdicted, had him dismissed from service and his name removed from the register of teachers by the 2nd Respondent.
12. The Claimant requested for review of his case vide letter of 30/05/2022 and requested the minutes of his disciplinary hearing which he has never received.



13. The Claimant testified that he was unfairly dismissed and prayed that he be reinstated, but posted to a different school.
14. On cross-examination, the Claimant testified that he was not aware of the reports on the accusations against him for sexual offences.
15. The Claimant was referred by Counsel for defence to the letter signed by the victim S.O.(pg.20 of defence Docs.); the report by the class teacher (pg.8 of defence); report by the guidance and counselling teacher (pg. 17 of defence); and the report by the BOM(Pg.19). On whether he was informed of the allegations levelled against him, the Claimant confirmed he was aware.
16. The Claimant testified that he was called by the School Principal before he was issued with the show cause letter. He appeared before the Board of Management where the Principal, the Chair of the BOM, the Class teacher, the victim S.O. were present and they testified in the claimant's presence.
17. The Claimant confirmed that he was interdicted on 16th December 2021 through the letter dated 14th December 2021(pg.31 of defence documents) after the hearing by the BOM. He confirmed that he was invited to write a defence in the interdiction letter which had given him 21 days to respond and he was invited for hearing by the 2nd Respondent. He confirmed he appeared in person before Teachers Service Commission , where the principal, BOM Chair, the Victim S.O. and others were also present. He confirmed that he asked questions to the class teacher and did not ask questions to the principal. He confirmed that the principal mentioned before the Teachers Service Commission panel that the claimant had asked for forgiveness.
18. The Claimant testified that the class teacher and guidance and counselling teacher attended the BOM meeting as witnesses. He testified that the persons listed at Page 24 of Defence documents, sat in the internal disciplinary meeting as members and later appeared before the Board as witnesses.
19. The Claimant testified that the student denied having had a relationship with the Claimant before the panel. He testified that he did not ask for forgiveness from the Principal though he was aware there was a printed document. He testified that he had been appointed as head of the department by the school and not the 2nd Respondent.
20. The Claimant produced his appointment letter dated 29th October 2021.He testified that as regards Prayer (b) his claim is as per paragraph 12 of the claim and that the Board did not listen to the student's story.

Respondents' Case.

21. The Claimant was absent during the hearing of defence case. The respondents proceeded ex parte when Imelda Otieno (DW1) testified as the Principal of the school where the Claimant was working. Kenneth Maranga (DW2) testified that he works for Teachers Service Commission as the Deputy Director of Administration services and he chaired the Disciplinary Panel. Nicholas Ajuma (DW3) testified that he was the class teacher of Eshibanze Secondary School. The respondents' case was that on 15th December 2021, the commission received information that the claimant was involved in a love affair with one of his students, S.O. a form three student which was in breach of the [Teachers Service Commission Act](#), the Code and COCE.
22. That statements were obtained from the claimant, S.O., Nicholas Ajuma and the Board chairman and preliminary investigations revealed the claimant had a sexual relationship with S.O. and the matter was referred to the 1st Respondent.



23. The 1st Respondent convened a meeting on 16th December 2021 and the claimant, S.O., S.O.'s Mother and other witnesses were invited and the claimant was accorded an opportunity to respond to the allegations and the 1st Respondent unanimously resolved that the claimant be interdicted for immoral behaviour.
24. The claimant was issued with the interdiction letter dated 17/12/2021 and the claimant was given 21 days to respond. Vide a letter dated 4/01/2022, the claimant responded to the interdiction letter denying the allegations. Vide letter dated 4/4/2022, the claimant was invited to a disciplinary hearing. The other 8 witnesses were summoned also to appear for the hearing. The hearing was conducted on 11/5/2022 and the claimant presented his case and cross-examined the Respondents' witnesses.
25. That the disciplinary committee interrogated witnesses and evaluated all evidence and determined that the claimant was in breach of [Teachers Service Commission Act](#) and Code, in that S.O. confessed a sexual relationship with the claimant. That the S.O. voluntarily and willingly wrote her first statement. That the claimant apologized to the School Principal for having sexual relations with S.O. and the Board resolved to interdict the claimant.
26. The claimant was thus dismissed from the service and his name removed from the Register of Teachers, which was notified to the Claimant vide letters dated 19/05/2022.
27. That the claimant sought for review and a review committee considered the claimant's application for review. The claimant appeared for review hearing on 9/11/2023 and he was accorded an opportunity to make his representations. The decision to dismiss him and removal from the register of teachers was upheld and the decision communicated to the claimant. That the 2nd respondent has power to discipline its employees who violate terms of service and to ultimately terminate the services after following due procedure.
28. The respondents stated that they acted fairly, procedurally, and lawfully and that they arrived at the proper decision, and conformed to due process as per the [Employment Act](#), [Teachers Service Commission Act](#), the Code and the Rules of Natural Justice.
29. That the claimant's claim against the respondents was based on the wrong premise and misconceived and ought to be dismissed.

Written Submissions

30. The Court directed parties to file written submissions after the close of defence case. The parties complied. The Claimant's written submissions dated 26th July 2024 were filed by Mukhooli & Associates Advocates on 30th July 2024. The Respondents' written submissions dated 22nd July 2024 were filed by Flora Manyasa Advocate on the 24th July 2024.

The Claimant's submissions

31. The claimant submits that he worked for the respondents diligently, with professionalism, utmost loyalty, and diligence, until he was unfairly and unlawfully dismissed from employment without due process, unfairly, maliciously, and without evidence to prove the grounds for dismissal.
32. The claimant set out various provisions of the law namely Article 41 of [the Constitution](#) on the right to Fair Labour Practices, & Article 47 of [the Constitution](#) on the right to fair administrative action. Order 2, Rule of the Civil Procedure Rules on who may be enjoined as a defendant in a suit. Section 107 and 109 of the [Evidence Act](#) on the burden of proof, and Section 9 of the [Employment Act](#) on the general provisions of a contract of service; Section 17 of the [Employment Act](#) on payment, disposal,



- and recovery of wages, and allowances; section 18 of the *Employment Act* on wages or salaries due, section 20 of the *Employment Act* on the itemized pay statement, section 28 of the *Employment Act* on annual leave, section 43 of the *Employment Act* on the proof of reason or termination; section 51 on Certificate of Service; and section 74 of the *Employment Act* on records to be kept by an employer.
33. The claimant submits that no report was ever made to the police to prove the allegations that he committed a sexual offence with a minor (S.O.).
 34. The said S.O. was not called by the respondents to testify in court, as she had already recanted her statement as per the statement of Kenneth Marangu (Para.14(pg.4)).
 35. That no doctor was called to testify or produce a medical examination report, or P3 in evidence of the fact of rape and or defilement.
 36. The respondents submit that the claimant was never charged with the offence of defilement or rape, and there is no evidence that there was any child born out of wedlock.
 37. The Claimant submit that the statements by Emelda Otieno, a respondent's witness in her witness statement, are hearsay (para. 5 and 8). He submits that there was no proof from any mobile provider of the alleged communication as alleged by Emelda in paragraphs 11 B and 112D of her statement.
 38. The Claimant submits that he is entitled to salary arrears and other benefits as the employer who is obligated to produce payment records for the services of the Claimant did not produce the records and the respondents having not rebutted his evidence, he is entitled to unpaid wages relying on the decision in Bungoma High Court ELRC No. 4 of 2019; Michael Otieno Ouma Bonito Hotels Limited T/A Tourist Hotel Bungoma.

The Respondents' submissions

39. The respondents submit that the claimant was dismissed on properly established and compelling grounds of being of immoral behaviour after a rigorous process as per the Code of Regulation for Teachers, 2015(the Code).
40. The Respondents submit that the statements, investigation report and the claimant's responses raised substantial evidence to show that the conduct of the claimant amounted to a breach of the *Teachers Service Commission Act* and the Code of Conduct and Ethics for Teachers which called for disciplinary action against him.
41. The respondents submit that after receipt of the allegations against the Claimant, interviews were conducted and statements recorded from several persons including the claimant and S.O, the minor, which interviews revealed that the claimant had a sexual relationship with S.O.
42. That the 1st Respondent convened a meeting to interrogate the matter before which the claimant, S.O., and S. O's mother were invited and thereafter the respondents concluded that circumstantial evidence pointed to a love affair between the claimant and the Minor, S.O. That S.O. confirmed that she had sexual intercourse with the Claimant on several occasions, and the claimant was in breach of the *Teachers Service Commission Act* by dating and having sexual intercourse with a student (Pg.35-336 of the Respondents' Documents).
43. The Respondents submit that the Claimant was interdicted by the 1st Respondent, the claimant was invited to appear before the 2nd Respondent's Disciplinary panel on 11/5/2022 together with other witnesses.



44. That the 2nd Respondent's panel heard and considered testimonies and statements of facts, oral and written statements as well as the investigation Report, the disciplinary panel made the finding (PG.51-53 of the Respondents' Documents) that the claimant did not challenge the principal testimony and that S.O. voluntarily and willingly wrote her first statement and was only asked to write a second one to add the date.
45. That S. O.'s class teacher One Nicholas Afuma testified that S.O. had confessed she had a sexual affair with the claimant, and the principal testified and presented a text message from the Claimant wherein he sought forgiveness for his conduct with a student, which the claimant did not challenge.
46. The Respondents submit that based on the above findings, the panel was convinced that the claimant was culpable and arrived at the decision to dismiss him and to have his name removed from the Register of Teachers for breach of the provisions of the Teachers Service Commission Act and the Code of Conduct and Ethics governing the teaching service.
47. The respondents submit that despite the minor S.O. recanting her evidence alleging coercion, there were reasonable and sufficient grounds to believe that the claimant was culpable of committing the immoral behaviour with a learner.
48. The respondents submit that based on a balance of probabilities, the statement and testimonies presented, there was reasonable ground to believe that the allegations against the Claimant were true and thus a valid and a compelling reason for the Respondent to terminate the Claimant's employment.
49. The respondents submit that the claimant's conduct and character was against his position as a teacher and thus his dismissal was justified, despite the claimant's assertion that the same was malicious, without evidence, reason or any justifications.
50. The respondents submit that they have discharged the necessary burden under Section 43 of the Employment Act and reiterate that the reason for the Claimant's dismissal was sound, sufficient, and lawful and ought to be upheld, relying on the decision in Charles Musungu Odama V Kenya Ports Authority (2019) eKLR.
51. On procedural fairness, the Respondents submit that the claimant was accorded a fair hearing and the opportunity to be heard in compliance with the provisions of the Constitution, the Employment Act and the Rules of Natural Justice.
52. They submit that in the Preliminary Investigations instituted at the onset, the claimant, and other witnesses were interrogated and the Claimant was granted the opportunity to respond to the allegations, which he did.
53. That the 1st Respondent convened a meeting on 16 December 2021 wherein the claimant was invited and he duly attended. They submit that S.O and her Mother also attended and the Claimant was given time to cross-examine the witness to prevent any exculpatory evidence consideration.
54. That upon hearing the claimant and the other witnesses and upon evaluating the statements, investigation report, and the Claimant's response, it was unanimously resolved that the claimant be interdicted. That the interdiction was issued to the claimant, who was directed to submit his written defence or present any evidence to the 2nd respondent within 21 days.
55. The claimant did write his defence dated 4th January 2022. The claimant acknowledged that he received a copy of the investigation report and the witness statements to enable him prepare his defence.



56. The respondents submit that the claimant's disciplinary case was heard on 11/5/2022, with the claimant having been invited vide the letter dated 4/4/2022, which invitation specified the time, and place where the hearing would take place; and that the claimant was accorded ample time to organise his defence and to attend the hearing.
57. The respondents submit that the Claimant during hearing duly admitted that he was invited to the disciplinary hearing and he was present at the hearing conducted on 11/5/2022. That the Respondents' witnesses testified in the presence of the Claimant who was also accorded an opportunity to cross-examine them and to present and tender his case.
58. The respondents submit that the Claimant did not raise any objection as to how the proceedings were being conducted and he actively participated in the said proceedings and was not a stranger to the decision that followed.
59. The respondents submit that the 2nd Respondent's panel considered the oral and written testimony, circumstances of the case and arrived at the decision to dismiss the claimant and to have his name removed from the register of teachers, which decision was promptly communicated to the Claimant.
60. The respondents submit that the procedure leading to the Claimant's dismissal and removal from the Register of Teachers adhered to the procedural fairness test set out in *Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd* (2013) eKLR.
61. They submit that pursuant to Regulation 156(4) of the Code, the Claimant applied for a review of the decision to dismiss him and his name removed from the Register of Teachers, and he was invited for a review of his case on 9/11/2023(pg.81 of Respondents' documents).
62. The respondents submit that the Claimant duly appeared for the review of his case and he was given an opportunity to state his case, the review panel held that there was no new evidence and resolved to uphold the decision of the Disciplinary Panel.
63. The respondents submit that the Review Panel's decision was communicated to the claimant vide the letter dated 16/11/2023(pg. 61 of the Respondents' Defence).
64. The respondents submit that the claimant was taken through a fair process that conformed to the tenets of fair hearing., the claimant was informed the nature of the allegations against him, he was given an opportunity to present his written and oral defence at the hearing of his disciplinary case and he was timeously informed of the 2nd respondent's decision.
65. The respondents thus submit that the Claimant was subjected to a fair, procedural and lawful disciplinary process from the time an inquiry was instituted up to the time of dismissal. That his dismissal and removal from the Register of teachers was hence justified, procedural and lawful.
66. As to the reliefs sought, the respondents submit that Section 41(2) of the *Employment Act*, imposes the obligation on an employer to give an employee a fair hearing and Section 43 of the said Act, obliges the employer to prove the reasons for termination, which the Respondents submit that they duly offered a valid reason for termination, and the claimant was accorded an opportunity to be heard, but he was found culpable.
67. The respondents submit that they discharged the burden imposed under section 41, 43 and 43 of the *Employment Act* and thus the claimant's dismissal was justified and due process was followed in line with *the Constitution*, the *Employment Act*, the Code and thus the prayer for unlawful termination should fail.



68. The Respondents submit that they have lost trust and confidence in the Claimant as the employees and the relationship that existed previously is irretrievably broken down and cannot be salvaged for the Claimant to be reinstated.
69. The Respondents submit that the relationship between a teacher and his learners demands that a teacher's conduct and character should be beyond reproach and it would be against public policy and the best interests of a child to reinstate the Claimant who failed to act in loco parentis and to allow him in the company of learners against whom he had been found to be predatory.
70. The respondents submit that the courts have held that reinstatement in employment contracts is an untenable remedy in an employee/employer relationship, as the same is not automatic as the courts cannot force parties in a personal relationship against the will of one of them relying on the decision in *Kenya Power & Lightning Company Limited V Aggrey Lukorito Wasike (2017)eKLR* where the Court of Appeal decision in the case of *Kenya Airways Limited V Aviation & Allied Workers Union Kenya & 3 Others (2014) eKLR* was quoted with approval and *Walter Ogal Anuro V Teachers Service Commission (2013)eKLR*.
71. The respondents submit that the prayer for reinstatement is untenable as the respondents have lost trust with the claimant.
72. The Respondents submit that, on the prayer for salary until reinstatement, the Claimant stopped teaching from 17/12/2021 when he was interdicted and he was not entitled to any salary from the date he stopped teaching pursuant to Regulation 148(1)(h) of the Code.
73. The Respondents submit that under Section 49(b) of the *Employment Act*, "where dismissal terminated the contract before the completion of any service upon which the employee's wages became due, the proportion of the wage due for the period of time for which the employee has worked payment of salary is compensation for services rendered by an employee and salary only accrues for rendered quantifiable service and prays the claim be dismissed with costs to the Respondents."

Determination

Issues for determination

74. The claimant identified the following issues for determination in the claim: -
 - a. Whether or not the claimant committed the offence of defilement to warrant the disciplinary action visited upon him.
 - b. Whether or not the claim has merit so that the orders sought are granted.
 - c. Who should bear the costs of the claim.
75. The Respondents identified the following issues for determination in the claim: -
 - a. Whether the claimant was dismissed on reasonable and ground(sic)
 - b. Whether the claimant's termination was procedurally unfair.
 - c. Whether the Claimant is entitled to the reliefs sought.
76. The court having perused pleadings by the parties and their submissions was of the considered opinion that the issues placed before the court by the parties for determination were as follows: -
 - a. Whether there was substantive and procedural fairness before the claimant's dismissal.



- b. Whether the Claimant was entitled to the reliefs sought.

Brief facts

77. The Claimant was a teacher at Eshibanze Muslim Secondary School where he held the position of Head of Department in the senior management level(C-Exh-6). He was demoted on 16/11/2021(C-Exh-4) from the position of Head of Department for sabotaging school programs. He was interdicted through letter dated 17/12/2021(D-Exh-9) which letter reads in part that “You are of immoral Behavior in that while a teacher at Eshibanze Muslim Secondary School, you had sexual intercourse with your form three student (F 3E S.O(Anon). Admn. No. 612, on 12/102021 & 24/10/2021 at your house in Harambee market) consequently, you are hereby interdicted with effect from 17th /12/2021.”
78. The Claimant was later dismissed and his name removed from the Register of Teachers following which he filed the present suit asserting that he was unprocedurally and unfairly terminated and sought reliefs that: -
- a. An order compelling the 2nd respondent to reinstate the claimant back to employment but to another school.
- b. The Respondent’s payment of the sum claimed in paragraph 12(twelve) of the claim.
- c. Costs of the suit.
- d. Interest at court rates.
- e. Any further or other relief that this Honourable court may deem just and fit to grant.
79. The Respondents on their part assert that the reasons for the claimant’s dismissal were valid and due process was followed before the Claimant was dismissed and his name removed from the Register of Teachers.
- a). Whether there was substantive and procedural fairness before the claimant’s dismissal.
80. For termination of employment to pass the fairness test there must be both procedural and substantive fairness.

The standard of proof

81. The employment claims are civil in nature and thus the standard of proof is on a balance of probabilities. The test of reasonableness also applies as envisaged under section 45(4)b of the Employment Act, to extent that the termination is unfair if ‘(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’.
82. The Standard of proof in employment matters is distinct from that in Criminal case, that requires proof beyond reasonable doubt. An employer in a disciplinary proceeding is mandated to provide proof on a balance of probabilities.
83. Section 43 of the Employment Act, 2007 provides that: -
- (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.

Section 45 (2) of the Act provides that:

- (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; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.”

84. As rightly held in *Josephine M. Ndungu & others v Plan International Inc (2019)* eKLR observed: ‘68. Under section 47(5) of the *Employment Act*, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the fall corners of the legal threshold set out by section 45 of the Act. The said provision bars employer from terminating employee’s contract of employment except for a valid and fair reason and through a fair procedure. A reason is valid and fair if it relates to the employee’s conduct, capacity and compatibility or based on the employer’s operational requirements....”

85. The reasons for the Claimant’s dismissal were clearly set out in the Dismissal letter dated 19/05/2022(D-Exh-13, pg. 76) which were identical as per the Interdiction letter of 17/11/2021(D-Exh-9, pg.37) which were that: -

“You are of immoral behavior in that while a teacher at Eshibanze Muslim Secondary School, you had sexual intercourse with your form thee student (F 3E S.O(Anon). Admn. No. 612, on 12/10/2021 & 24/10/2021 at your house in Harambee market) consequently, you are hereby interdicted with effect from 17th /12/2021.”

86. The Claimant was a teacher employed to work by the respondents on 20th February 2019(C-Ex-2) and confirmed as such through confirmation letter of 27th May 2021(C-Exh-3. The Student minor (S.O) was a student under the Claimant’s tutelage as the Biology Teacher in the claimant’s performance of his duty and they related to the Claimant’s service as Teacher, under the operational confines of the Respondents. As per Section 45(2) of the *Employment Act* the reasons for his termination of employment related to his conduct, capacity or compatibility; and was also based on the operational requirements of the employer.

87. What the court is called to do is to consider what a reasonable employer would have done in the circumstances as per the test defined by Lord Denning in *British Leyland UK LTD V Swift (1981)* I.R.L.R 91 where the reasonableness test was defined to wit: - ‘the correct test is: ‘was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if the reasonable employer might reasonably have dismissed him, the dismissal was fair.’”

88. As per the reasonableness test in *British Leyland (Supra)*, the employer reasonably believed that the Claimant was involved in sexual relations with a student. When the student appeared before the 2nd Respondent’s panel on 11th May 2022, she recanted her statements in the letters dated 16th November 2021 (pg. 20 and 21 of Respondent’s documents) which indicated that she had admitted that she had been in a relationship with the Claimant and had gotten pregnant.



89. During the Disciplinary hearing as evidenced by the Minutes of the said date of 11th May 2022(D-exh-12) before the 2nd Respondent's Panel, the Student, S.O, testified that she had been forced to write her statement by the Deputy Principal (pg.62). The Teacher did not have any questions for the Student as relates the said allegations. (pg. 63). The Student testified that she was no longer pregnant as she had been given injections and stopped bleeding. (pg.63).
90. The evidence of the student's mother, Asha, was at variance with that of the student, in that she testified that her daughter had typhoid despite her daughter stating that she had been pregnant. The claimant had no questions for the mother of S.O. either.
91. Emelda Akinyi Otieno, who was a principal at the school where the Claimant was a teacher testified before the 2nd Respondent's panel that the student S.O. had written a first statement which she had not signed and when asked to sign she wrote the second statement.
92. The principal testified that the Claimant asked for forgiveness in her office and when asked to put it in writing he did not but later sent to the principal a text message(pg.22 of the Respondent's docs) apologizing and there was no other case at the said time against the Claimant that he would have been apologizing for, apart from the accusations about the minor, S.O. The Claimant did not ask the Principal any questions in cross-examination(D-Exh-12, pg. 68).
93. As rightly held in Josephine M. Ndungu & others v Plan International Inc (2019) eKLR observed: '68. Under section 47(5) of the *Employment Act*, the burden of proving unfair termination lies with the employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the fall corners of the legal threshold set out by section 45 of the Act. The said provision bars employer from terminating employee's contract of employment except for a valid and fair reason and through a fair procedure. A reason is valid and fair if it relates to the employee's conduct, capacity, and compatibility or based on the employer's operational requirements....'
94. The Claimant during the disciplinary hearing before the 2nd Respondent's panel, did not ask any questions to the minor, her mother or even the principal to refute the allegations against him. The Claimant had responded to a show cause letter dated 29th November 2021(pg.27) through his letter of 6th December 2021(pg.28) asserting that he had not had any sexual relations with the student., which sentiments he repeated in his response to the interdiction letter dated 4th January 2021(sic) (pg. 38). Before the Full Board, the minutes of the said meeting held on 16th December 2021, indicated that the claimant(D-Exh-8) pg. 32) was unable to explain why he had sent to the Principal a text message apologising right after the allegations of sexual relations with S.O. were levelled against him.
95. The Claimant in his submissions asserts that no doctor was called to verify defilement occurred, he was not charged, no child was born, and that the text message by the principal had no communication transcript from a mobile provider.
96. There was no objection by the Claimant to the Respondents' documents and all were admitted as evidence in court. As stated above, the burden of proving an immoral conduct as per the interdiction letter was not based on the burden of proof available in criminal cases that the proof must be beyond reasonable doubt, but rather the burden of proof in disciplinary cases is on a balance of probability.
97. The burden of proving that the allegations of immoral conduct was on the claimant to establish that he was not culpable of the charges against him. The claimant did not ask the victim, S.O. any questions nor ask the Principal who appeared at the Disciplinary hearing so as to exculpate himself of the allegation.



98. The employer was only required to prove that they reasonably believed that the Claimant had committed an immoral act with a student considering that the student, S.O. had confirmed in her first statement that she had had sexual relations with the Claimant, despite later recanting the evidence.
99. The allegations of sexual relations against the Claimant related to his responsibility as a teacher and loco parentis and by the 2nd Respondent's circulars (D-exh-20(pg. 109-115), the Respondents mandated the claimant to ensure the safety of students and to avoid any immoral conduct. On a balance of probabilities, the 2nd Respondent had basis to believe the existence of the sexual relations taking into account the initial statement of the student minor and testimony of the school principal on apology by the claimant over the allegations and were justified for terminating the claimant based on the reasonableness test in *British Leyland*(supra) that:-‘was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair, but if the reasonable employer might reasonably have dismissed him, the dismissal was fair.’”

Procedural Fairness

100. For a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness.
101. In *Josephine M. Ndungu & others v Plan International Inc* (2019) eKLR (supra) the court observed that_- “Fair procedure, on the other hand, refers to, but not limited to, affording the employee an opportunity of being heard before the termination. Upon discharge of the said burden on a balance of probability, the employer assumes the burden of proof, under section 43(1), 45(2) and 47(5) of the Act, to justify the reason for the termination and prove that a fair procedure was followed.” The court holds that the 4 corners of legal threshold referred to in the foregoing decision are stated in section 45)2(b) of the *Employment Act* namely: - (i) related to the employees conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer;”
102. Section 41 of the *Employment Act* which provides as follows: -
- “(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 the explanation.
- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”
103. The Claimant submits that his termination was unprocedural. It is not disputed that the Claimant was taken through a Disciplinary process.
104. Written statements were collected (marked as D-Exh-2 at pg.8-22 of the respondent's bundle of documents) on the alleged misconduct by the Claimant from the Class teacher, Nicholas Ajuma, the Deputy Principal Ongoro, the Head of Guidance and Counselling Department, the BOM Chairman, Hassan Muchelule, and the victim S.O.



105. The Claimant was invited to an internal disciplinary committee vide letter dated 23rd November 2021(D-Exh- 3- pg.23). The Internal disciplinary committee meeting was held on 25th November 2021 as evidenced by the minutes of the said date (D-Exh-4-Pg. 24 to 26) before which the claimant appeared.
106. The claimant was served with a show cause letter dated 29th November 2021(D-Exh-5-pg. 27) which he acknowledged. He responded to the show cause letter vide letter dated 6th December 2021(D-Exh-6pg.28). He was then invited to appear before the Full Board vide letter dated 8th December 2018(D-Exh-7-pg.29).The Full Board Meeting was held on 16th December 2021 as evidenced by the minutes of the said day (D-exh-8-Pg. 30 to 36) which culminated in him being issued with the Interdiction letter dated 17th December 2021(D-Exh-9, pg. 37).
107. He responded to the interdiction letter vide his letter dated 4th January 2021(sic) (D-Exh-10, pg. 38). He was invited for Disciplinary hearing through the letter dated 4th April 2022(D-Exh-11, Pg. 39). He attended the hearing as per the attendance sheet (Pg. 40), before the 2nd Respondent's Panel (Pg. 41). The minutes of the Disciplinary proceedings (D-Exhi-12, pg. 42 to 74) indicate that the Claimant was found guilty as charged and the decision was that he was dismissed, to be removed from the Register of teachers and a follow up on salary overpayment (Pg. 74).
108. The Claimant was dismissed on 11/05/2022 vide the letter Ref: C/NO. 0262/02/2021/2022/15 and Removed on even date from the Register of teachers vide letter Ref: Teachers Service Commission /794827/22, all dated 19/05/2022(C-Exh-9, D-Exh-13, pg. 76 and 78).
109. Vide a letter dated 30th May 2022, the Claimant requested for review of his case (D-Exh-14, pg. 79), and by a letter dated 2nd October 2023, the 2nd Respondent invited the Claimant for hearing of his review case (D-Exh-15, pg. 75, 80).
110. The review hearing was held on 9th November 2023, before whom the Claimant appeared as per attendance sheet (pg. 82) and the minutes of the Review proceedings (D-Exhi-16, pg. 83 to 96). The decision of the review proceedings was communicated vide letter dated 16th November 2023, upholding the Disciplinary Panel's decision to dismiss the claimant and to remove him from the Register of teachers, (D-Exh-17, pg. 97).
111. Under Section 41, the employer once he has given the reasons he is considering terminating an employee, is to "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."
112. Appearing before the full Board of Eshibanze Muslim Secondary school on 16th December 2021 before his interdiction, the Claimant was accompanied by official of KUPPET, Mr. Johnstone Wabuti, the Chairman KUPPET Kakamega County and Mr. Hamisi Panyako, a KUPPET Representative.
113. The said minutes indicate that KUPPET made remarks that the child be given opportunity to explain her statements as her evidence had a lot of weight which could affect the teacher and his dependents and requested to leave (D-Exh-8, pg. 35).
114. The claimant during hearing testified that he appeared for the disciplinary hearing and only asked questions to the class teacher and did not ask questions to the principal.
115. The claimant testified that the attendees of the internal disciplinary committee meeting held on 25th November 2021 appeared as panel members in that meeting and later appeared as witnesses before the Board. The resolutions made on the said meeting were that the Claimant's conduct touched on his



integrity and he was demoted from his duties as a Head of Department- Science and DOS in charge of exams and his case was to be forwarded to the full Board to deliberate on his conduct. (D-Exh-4-Pg. 25 -26).

116. The said meeting did not make a decision as to the claimant's accusations relating to the immoral conduct which was the reason for his interdiction and subsequent dismissal, but rather, arrived at the decision to relieve the claimant of the additional internal duties within the school he had been given (Head of Department) but did not make a decision as to the Claimant's alleged immoral conduct but referred it to the Full Board, which later interdicted the claimant.
117. The claimant having confirmed that he was accorded an opportunity to ask questions his assertion that the termination was unprocedural therefore is not supported.

Whether the Claimant was entitled to the reliefs sought.

118. The Claimant sought the following reliefs: -
 - a. An order compelling the 2nd respondent to reinstate the claimant back to employment but to another school.
 - b. The Respondent's payment of the sum claimed in paragraph 12 (twelve) of the claim.
 - c. Costs of the suit.
 - d. Interest at court rates.
 - e. Any further or other relief that this Honourable court may deem just and fit to grant.

On the Reinstatement.

119. An order for reinstatement is not automatic and the same is allowed only in very exceptional circumstances depending on the facts and circumstances of each case. The claimant in the present suit was accused of engaging in an immoral conduct with a student, by having sexual relations with the said student.
120. The relationship between the claimant and the respondents involved the teaching of students, and there is no other service that the claimant can render within the respondent's employ. The claimant was accused of an immoral act with the very student he was mandated to teach. the prayer for reinstatement is thus untenable. In *Kenya Airways Limited V Aviation & Allied Workers Union Kenya & 3 others* [2014] eKLR, Maraga J (as he then was) stated thus:-

“As I have said, in Kenya, reinstatement is one of the remedies provided for in Section 49(3) as read with Section 50 of the *Employment Act* and Section 12 (3) (vii) of the Industrial Court Act that the court can grant. Reinstatement is, however, not an automatic right of an employee. It is discretionary and each case has to be considered on its own merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication. In this regard, there are fairly well settled principles to be applied. For instance, the traditional common law position is that courts will not force parties in a personal relationship to continue in such relationship against the will of one of them. That will engender friction, which is not healthy for businesses, unless the employment relationship is capable of withstanding friction like where the employer is a large organization in which personal contact between the affected employee and the officer who took action against him will be minimal. (Emphasis supplied).



Under the Kenyan *Employment Act*, the factors to be taken into account when considering reinstatement are enumerated in Section 49(4) of the *Employment Act*. Those relevant to this appeal include the wishes and expectations of the employee; the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances; the practicability of reinstatement; any compensation paid by the employer; and chances of the employee securing alternative employment. I would like, in particular, say something about the practicability factor”.

121. As the reason for the claimant’s termination was valid, an order for reinstatement cannot issue in the circumstances of this case. The court declines to issue order of reinstatement.

On the claim for compensation

122. The Claimant prayed for payment of the sum claimed in paragraph 12(twelve) of the memorandum of claim. Paragraph 12 of the Claim stated that, “There would be travesty of justice and the Claimant shall suffer irreparable loss if the application is denied’.
123. During re-examination, the claimant pointed out that there was an error in the typing of the said prayer b and that the same referred to paragraph 14 of the claim which states that: - ‘The Claimant claim against the Respondents is for the Respondents’ payment to the claimant a grand total sum from 17/12/2021 to the date of reinstatement PLUS costs and interest of this claim aside from reinstatement to another school.”
124. In the submissions, the claimant seeks for salary arrears from the date of his interdiction on 17th December 2021 until he is reinstated. Having found that the claimant was validly terminated and considering that the prayer for reinstatement is untenable, the claimant’s prayer for salary arrears cannot stand as his dismissal was upheld.

Costs of the suit & Interest at court rates.

125. The claimant’s dismissal having been valid, the claimant is not entitled to the grant of cost and interest.

Conclusion

126. In the upshot the Court holds that the termination of the claimant’s employment by the Respondent was based on valid reasons which the Court found the employer reasonably believed to exist and the process was procedurally fair. The Memorandum of Claim dated 9th November 2023 is held to be without merit and the suit dismissed.
127. To temper justice with mercy the Court makes no order as to costs.
128. It is so Ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 20TH DAY OF SEPTEMBER 2024.

J.W. KELI,

JUDGE.

In the presence of: -

Court Assistant: - Macheso

For Claimant: - Olonyi



For Respondents: - Absent

