Mugwe v Teachers Service Commission (Employment and Labour Relations Cause E1062 of 2021) [2024] KEELRC 13630 (KLR) (19 September 2024) (Judgment)

Neutral citation: [2024] KEELRC 13630 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE E1062 OF 2021

JK GAKERI, J

SEPTEMBER 19, 2024

BETWEEN

JOYCE MWIHAKI MUGWE ..... CLAIMANT

AND

TEACHERS SERVICE COMMISSION ..... RESPONDENT

JUDGMENT

1. The Claimant commenced this suit by a Statement of Claim filed on 22nd December, 2022 alleging that termination of her employment by the Respondent on 15th September, 2020 was unfair and wrongful.

2. The Claimant avers that she was employed by the Respondent in 1995 as a teacher and rose to become the Principal at Malek Girls Secondary School and served diligently.

3. It is the Claimant's case that she was interdicted vide letter dated 28th December, 2018 for having received and expended excess FDSE funds amounting to Kshs.1,712,133.00 without authority, was subsequently invited for a disciplinary hearing and attended on 3rd June, 2019, received another interdiction letter dated 26th June, 2019 on similar allegations with an additional charge that she inflated student enrolment numbers in 2017 and 2018 from 97 to 185 so as to secure more FSDE from the Ministry of Education and was subsequently dismissed, appealed to the Teachers Service Appeal Tribunal in December 2020 and was heard on 17th September, 2021.

4. The Claimant prays for;

    i. A declaration that termination of employment was unfair and wrongful.

    ii. Reinstatement without loss of status or benefits.

    iii. Consolidated unpaid salary and allowances from 28th December, 2018 to date of reinstatement.

iv. Compensation for unfair termination Kshs.18,974,736/= plus hardship allowance Kshs.5,692,420/= plus house allowance Kshs.2,640,000/= and commuter allowance Kshs.1,056,000/=.

v. General and aggravated damages for inhumane and harsh treatment and denial of medical benefits.

vi. Salary underpayment from 2008 to 2018 Kshs.960,000.00.

vii. An order that the Respondent issues the Claimant with a certificate of service.

viii. Costs of this suit and interest.

Respondent's case

5. By a statement of defence dated 14th January, 2022, the Respondent admits that it employed the Claimant in 1995, initially posted to Ngenia Secondary School and later as Head Teacher Malek Secondary School.

6. That in 2018, a team from the Ministry of Education and the World Bank visited Malek Secondary School for an assessment owing to a decline in enrolment and subsequently, the Regional Coordinator of Education, Rift Valley Region directed the auditor office to conduct an investigation on enrolment and a team visited the school on 14th May, 2018 and prepared a report showing variations in enrolment in all classes other than Form IV and recommended disciplinary action.

7. That a notice to show cause dated 29th March, 2018 was issued and the Claimant responded.

8. That the School's Board of Management in consultation with the County Director of Education investigated the allegations and reported that the school had received capitation for 187 students against a head count of 97 and interdiction followed.

9. It is the Respondent's case that the Claimant was informed of the charges for a response within 21 days and the Respondent received the same on 23rd January, 2019.

10. That after several postponements, the Claimant was virtually heard on 15th September, 2020; and was dismissed vide letter dated 2nd October, 2020, sought review and was heard and the decision affirmed.

11. The Respondent denies that the Claimant was not accorded a fair hearing.

12. The Respondent prays for dismissal of the Claimant's case with costs.

Claimant's evidence

13. On cross-examination, the Claimant confirmed that she was the Principal of Malek Girls Secondary School and was dismissed from employment for infamous conduct, namely; inflating student enrolment in 2017 and 2018 from 97 to 185.

14. The witness denied that auditors of the Ministry of Education visited the school.

15. That she attended two hearings in June and September and had no witness and was not accorded an opportunity to present her case on 15th September, 2020.

16. The witness testified that the handwritten record of the hearing were not a true record but had no alternative record or evidence of what transpired.

17. CWI testified that after dismissal, she appealed the decision and appeared before the appeal committee and presented evidence but the committee upheld the dismissal.

18. That no investigation was conducted at the school.

19. It was her testimony that because the name of the Head Teacher of the school was Joyce Murage and not Joyce Mwaniki, it did not refer to her, though she admitted having been posted to the school as Head Teacher.

20. The witness admitted that she was the Principal of Malek Girls Secondary School.

21. That she was not given any document at the hearing or prior to the hearing even after having written to the employer on the same but could not recall having paid for the documents yet aware that she was supposed to pay.

22. The witness admitted that the letter of dismissal indicated the reason for dismissal.

23. On re-examination, the witness testified that auditors visited the school on 4th May, 2020 and did not investigate the number of students.

24. That during the physical hearing of the disciplinary committee, the Claimant cross-examined witnesses but the second meeting was virtual 1[1]/2 years later.

25. It was her testimony that her name does not appear on page 66 of the Respondent's bundle of documents as the title used is "Principal".

26. That no Quality Assurance Officer visited the school or investigate enrolment and did not see those who visited the school as she is not the Joyce Murage mentioned and was the Principal of male school but also acting at Malek Secondary School.

27. That during the virtual hearing, she could neither see nor hear witnesses and the venue was changed, the committee was in a hurry and the hearing was not fair.

Respondent's evidence

28. RWI, Doreen Munene confirmed that she was an Assistant Deputy Director – Discipline and had met the Claimant at the hearing on 15th September, 2020.

29. That the Claimant was accused of mismanagement of funds and inflating the number of students.

30. The witness confirmed that the Investigation Report by the Ministry of Education dated 15th February, 2018 was prepared by Mr. Joseph Kimani Muriuki and 2 other persons and one of the auditors was a witness in the case.

31. That the auditors sought to confirm whether the student numbers given by the Principal were real although no complaint had been made against the Claimant on enrolment.

32. The witness confirmed that the disciplinary committee relied on the reports on record to convict the Claimant.

33. That the Quality Assurance Officers are from the Ministry of Education and whenever the Ministry carried out an audit or investigation, the report would be availed to the Respondent for action, if any, and student enrolment is part of Quality Assurance.

34. That although the name of the Head Teacher reads Joyce Murage, the TSC No. 352861 is that of the Claimant and the Respondent relied on the report.

35. That the conclusion stated that a total of 88 students could not been accounted for and the report recommended an audit of the school and disciplinary action against the Principal.

36. That Gediel K. Kiringo did not sign the report.

37. The witness confirmed that no final audit was done.

38. That the Board of Management cannot discipline a Principal of a school and the meeting of the Board of Management of Malek Girls Secondary School was not a disciplinary hearing although the issue of inflation of numbers was discussed at the meeting.

39. That the amended interdiction letter dated 26th June, 2020 clarified the charge as there was misconduct in the process.

40. The witness admitted that she was not present for the meeting held on 3rd June, 2019 though members of the commission and others were present.

41. That although the charge was read out, hearing did not proceed and the case was deferred and proceeded later owing to the COVID-19 pandemic.

42. The witness testified that the meeting held on 15th September, 2020 was virtual and had at least one Commissioner and Florence Kamama did not sign attendance.

43. That the charges were read out to the Claimant who pleaded not guilty and cross-examined witnesses as evidenced by the proceedings of the meeting and the Committee recommended dismissal of the Claimant after having found her guilty of inflating student enrolment.

44. That the review hearing was by 3 Commissioners and Prosecuting Officers.

45. The witness confirmed that the Claimant was a Principal of the school and had been untruthful.

46. On re-examination, RWI testified that the amended notice to show cause merely included inflating of student numbers and the Claimant responded and the delay was occasioned by backlog and the COVID-19 Pandemic and the teacher had liberty to bring witnesses and cross-examine witnesses.

47. That the Committee was persuaded that the 1st charge could not stand in light of the explanation given by the Claimant.

48. RWII, Mr. James Muriuki confirmed that he was the School Auditor, Laikipa County and was part of the team of auditors that visited the school on 4th May, 2018 under Mr. Joseph Kimani as Team Leader and the audit was triggered by the report by the Quality Assurance Office which does not deal with finance matters.

49. The witness was certain that visit was not on the school opening day and they were received by the Principal, one Joyce Mwaniki, the Deputy Principal and students and met the Principal in her office as per the procedure but could not recall whether a notice had been given.

50. That they requested for school documents and some class registers were not provided (2017 and 2018) and fee register for 2017.

51. Also provided were Bank statements, B.O.M minutes for 2 meetings, Trial balance and Ministry of Education Qualification Circulars.

52. That the letter dated 18th April, 2018 from the Regional Co-ordinator of Education set out the terms of reference.

53. That although school audits are typically conducted annually, the instant audit was investigative not an ordinary one as the school was last audited in 2016.

54. That the scope of the Audit was defined from 1st January, 2017 to 30th April, 2018 and the team conducted a head count of the students present who availed information about those who were absent.

55. That the bank account number belonged to Malek Girls Secondary School and recommended disciplinary action against the Principal.

56. That the Ministry of Education had not carried out a physical verification of student numbers.

57. On re-examination, the witness testified that the Director Field Services had recommended a visit by the Quality Assurance Officer and the audit was conducted later.

58. The witness maintained that on the material day, learning was taking place and the Claimant was aware of the visit.

59. That the audit team examined financial records such as receipts, payments, minutes, registers, class fees, cheques, all maintained by the school but not all registers were availed.

60. That the Principal is the accounting officer of the school and is designated as such.

61. That the number of students in the register and in class did not tally.

62. Finally, the witness testified that the Claimant was acquitted of the 1st charge as although she spent monies without authority, she did not misappropriate it.

Claimant's submissions

63. Counsel submitted on reasons for termination of employment, procedural fairness and entitlement to reliefs.

64. On the 1st issue, counsel for the Claimant cited the provisions of the Section 43 and 45 of the *Employment Act* and sentiments of the Court in Frederick Saundu V Principal Namanga Mixed Secondary School & 2 others to urge that the interdiction letter dated 28th December, 2018 contained a single charge which the Claimant denied and contested the visit by the County Auditor on 4th May, 2018 and was chased from the meeting held on 20th September, 2018 and minutes were taken by the District Education Officer and had not been interdicted by then.

65. Counsel submitted that the disciplinary hearing held on 3rd June, 2019 was chaotic and the proceedings were terminated owing to the unavailability of the auditor and no step was taken from June 2019 to 26th June, 2020 when another letter of interdiction was served on the Claimant on the charge of inflating student enrolment from 97 to 185.

66. Counsel urges that under the Code of Regulation for Teachers (herein after CORT), the investigation ought to have been instituted by the County Director of Education but the audit was directed by the Regional Coordinator of Education, Rift Valley and was thus unlawful as it was contrary to the Regulations.

67. Counsel urges that the Audit Report was unreliable because the Claimant denied that the Ministry of Education and World Bank visited the school on 15th February, 2018, the scope of the audit was not aligned to the financial year, enrolment cannot be determined by head count on a single day, fee registers are not the valid documentation of enrolment, class registers had been carried by the Ministry of Education and appendices were not filed and as a consequence the report is unreliable.

68. That no report of misconduct or complaint against the Claimant was filed and was not given any opportunity to adduce evidence.

69. Strangely, counsel for the Claimant cites the provisions of Section 214 of the *Criminal Procedure Code* to counter the provisions of Regulation 147(5) of the CORT to argue that the CORT does not contemplate the introduction of a new charge and the addition has no justification. See Section A of the *Interpretation and General Provisions Act*, Cap 2 on "amend".

70. That RWI and RWII could not explain how the Claimant would benefit by inflating student enrolment.

71. That no final audit was conducted and the Respondent had no valid reason to terminate the Claimant's employment.

72. As regards procedural fairness, reliance was made on the sentiments of the court in Alfred Nyungu Kimungui V Bomas of Kenya (2013) eKLR cited in Rebecca Ann Maina & 2 others V Jomo Kenyatta University of Science and Technology (2014) eKLR to urge that the procedure employed by the Respondent in terminating the Claimant's employment was unfair as some members of the disciplinary committee did not sign attendance and one Doreen Munene was "squeezed" in the proceedings.

73. Counsel faults the recording of the proceedings, questions asked, evidence of one Mr. John Horsey, minutes of the meeting, Mr. Gediel Kiringo did not sign the report, it was a standard assessment and recommended an audit of the school and refers to Joyce Murage who is not the Claimant.

74. That the appeal was unfair because the grounds of appeal were not addressed, documents requested for were not availed and the membership of the review committee was not as per Regulation 156(1) of the CORT and the word shall means command or mandate.

75. Counsel submitted that the review was void ab initio.

76. On reliefs, counsel submitted that the Claimant is entitled to all the reliefs as prayed for.

Respondent's submissions

77. As to whether the Respondent had reasonable cause and/or valid reason(s) to terminate the Claimant's employment, counsel relies on the Court of Appeal decision in Kenya Power & Lighting Co. Ltd V Agrey Lukorito Wasike and Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 others (2019) eKLR to submit that the test under Section 43(2) of the *Employment Act* is to some extent subjective.

78. That a visit to Malek Girls Secondary School raised the issue of enrolment and the Claimant was the Accounting Officer under the Basic Education Regulations, 2015, answerable to the Ministry of Education and the Free Day Secondary School (FDSE) disbursement is based on the number of students an institution has.

79. That in Term I of 2018, the school had received funds for more students than it enrolled as confirmed by the audit team in May 2018.

80. That the audit report was discussed during a meeting on 20th September, 2018 and it emerged that excess funds received by the school were used without authority of the Principal Secretary, Ministry of Education.

81. That the Claimant was interdicted, was heard on 15th September, 2020 and attended the meeting alone and the Committee found the Claimant guilty of infamous conduct by inflating student enrolment numbers in 2017 and 2018 from 97 to 185 to secure more funds.

82. Counsel urges that at the time of dismissal, there existed a genuine reason to dismiss the Claimant from employment in consonance with the provisions of Section 45 of the *Employment Act*.

83. The decision in Simba Corporation t/a Accacia Premier Hotel V Omondi (2024) eKLR was cited to reinforce the submission.

84. On procedural fairness, counsel submitted that the Claimant was granted an opportunity to defend herself as she was issued with a notice to show cause dated 29th March, 2018 and responded, an investigation was conducted by the County Director of Education and the Board of Management (B.O.M) as evidenced by the meeting held on 20th September, 2018 as confirmed by the Chairman of the B.O.M, Mr. John Horsey during the hearing.

85. That the Claimant was interdicted thereafter vide letter dated 28th December 2018 for receiving and using excess (FDSE) funds amounting to Kshs.1,712,133.00 and admitted receiving the funds but denied having mismanaged the funds and admitted that the meeting of 20th September, 2018 took place.

86. Counsel submitted that the Claimant was invited for a hearing and was eventually heard and cross-examined witnesses and tendered exculpatory evidence and a decision to dismiss the Claimant was arrived at.

87. Reliance was made on Regulation 139(1)(d) of the Code of Regulations for Teachers, Section 12(2)(d) of the *Teachers Service Commission Act* and the Nigerian decision in BA Imonikhe V Unity Bank PLC SC 68 of 2001 cited by the Court of Appeal in Bett Francis Barngetuny & another V Teachers Service Commission & another (2015) eKLR to urge that the Claimant was afforded a fair hearing.

88. Reliance was also made on the sentiments of the court in the South African case of Nampak Corrugated Wadeville V Khoza (JA14) (19981 ZALAC 24) cited in Judicial Service Commission V Gladys Boss Shollei & another (2014) eKLR.

89. Counsel submitted that the disciplinary panel was properly constituted as confirmed by Doreen Munene and the proceedings were online and the delay was occasioned by the COVID-19 Pandemic.

90. That the decision was communicated, the Claimant applied for a review and the dismissal was upheld.

91. Finally on the reliefs sought, counsel submits that as the Claimant's dismissal was justifiable and due process was complied with, none of the reliefs sought is merited.

92. Reliance was made on the sentiments of Nyamu J. in David N. Kimani V TSC Misc Civil App *No. 171 of 2006* and the Court of Appeal in Sotik Highlands Tea Estates Ltd V Kenya Plantation & Agricultural Workers Union (2017) eKLR to urge that reinstatement is unavailable in this instance.

Analysis and determination

93. It is common ground that the Claimant was employed by the Respondent on 12th June, 1995 as a teacher and posted at Ngenia Secondary School and rose through the ranks to become the Principal of Malek Girls Secondary School in Laikipia County which was registered on 24th January, 2017 and simultaneously the Claimant was the Principal of Male mixed secondary school as evidenced by her letter dated 8th May, 2018 and the Respondent's letter dated 28th December, 2018.

94. Evidence on record reveals that the Respondent was persuaded that the Claimant had inflated student enrolment and thus received and used excess FDSE funds without authority and was thus dishonest and was taken through the processes till termination of employment.

95. The Respondent maintains that the termination of employment was justifiable and procedurally fair.

96. Both the provisions of the *Employment Act*, 2007 and case law are consistent that for a termination of employment to pass muster, it must be shown that the employer had a substantive justification to terminate the employee's employment and did so in accordance with a fair procedure.

97. In other words, there must have been a reason(s) for the termination of employment and the procedure employed must have been fair as held in Naima Khamis V Oxford University Press (EA) Ltd (2017) eKLR.

98. The reason must relate to the conduct, capacity or compatibility of the employee or operational requirements of the employer.

99. By letter dated 29th March, 2018, the Laikipia County Director of Education, an agent of the Respondent required the Claimant to show cause why disciplinary action should not be taken against her for providing falsified information to the Ministry of Education Headquarters by inflating school enrolment by 88 students and withholding of class registers for 2018.

100. A response was required by 10th April, 2018 and by a response dated 4th April, 2018, the Claimant admitted that two teams visited the school on 15th and 16th March, 2018 and the earlier one raised the issue of T.I.G and anomaly in enrolment while the second came to investigate and were given the registers and the Claimant and her team co-operated with them.

101. The Claimant stated that the 2018 enrolment register was under the custody of the Deputy Principal and students had moved to neighbouring schools since September 2017.

102. The Claimant denied having falsified information and asked for a hearing.

103. Documents availed by the Respondent reveal that on 16th March, 2018, the Ministry of Education Directorate of Quality Assurance (herein after MoEDQAS) visited the school for an investigation, the Claimant admits it was indeed an investigation but contested her name on page one (1) of the report but did not contest the fact that she was the Principal of the school or the TSC No. xxxx and telephone No. 0728xxxxx.

104. In any case, she admitted that the team came to her school and she co-operated with it.

105. The team comprising Dr. Amadi Mugasia, Kagwiria Rutere, Catherine Muthee and Gediel K. Kiringo (the latter did not sign the report) found that the FDSE disbursement for Term I 2018 had an inflated population of 88 students who could not be accounted for and observed traces of sub-standard work on the newly constructed T.I.G classroom which had cracks on the floor and walls.

106. The team recommended inter alia an audit of the school and disciplinary action against the Principal for loss of class register, as those of form 2, 3 and 4 were not available.

107. Strangely, although the Claimant admitted that the class registers were under the custody of the Deputy Principal, she did not attach copies or promise to make them available, if need be. She did not explain why the Deputy Principal's office could not be accessed on a working day.

108. The team found that the school had received FDSE funds for 185 students during the 1st term of 2018 and a total of 88 students could not be accounted for as it had a population of 97 students.

109. Evidence on record reveals that Mr. Joseph Kimani, James Muriuki and Paul Kantai conducted an investigative audit on 4th May, 2018 which the Claimant faulted on many grounds including scope, day of audit, methodology, timing and basis among others.

110. Counsel urged that there was no evidence of a visit to the school by a team from the Ministry of Education and World Bank which is true.

111. However, the MoEDQAS visited the school on 15th March, 2018 for an investigation and made findings consistent with paragraph (a) of the Investigative Audit Report.

112. The purpose of the audit was to confirm whether the Claimant falsified student enrolment so as to receive excess FDSE funds and establish the cause of the cracks in the newly completed T.I.G classroom as found by the team from the Ministry of Education, the Parent Ministry of the Teachers Service Commission.

113. The Claimant admitted that the audit took place on that day and was present and received the team.

114. The report is explicit that the class registers for 2017 and 2018 were unavailable as were the fees registers for 2017.

115. Contrary to the Claimant's submission that the Scope of the Audit was 1st January, 2017 to 23rd April, 2018 but the audit captured transactions for the period 1st January, 2017 to 30th April, 2018 would not in the court's view affect the finding in any significant way.

116. The team relied on a head count, the fees register for 2018 (which according to the team) appeared to have been doctored, had an enrolment of 174 comprising 29 in Form I, 75 in Form II, 40 in Form III and 30 in Form IV.

117. However, a physical head count showed that the school had 97 students only including those absent on that day (14 students), a figure the report states was corroborated by photocopies of class register obtained by the MoEDQA.

118. Equally, RWII confirmed on cross-examination that they obtained information about those that were absent from the students who were in the classes during the head count.

119. According to the three auditors and the Ministry of Education Directorate of Quality Assurance, the school had a lesser student population than reported by the Claimant.

120. Although it was alleged that 4th May was the school opening day, no evidence to that effect was availed as inter alia the audit report ought to have captured that critical fact as it would have informed the dynamics of the audit.

121. In 2018, schools were scheduled to re-open for the 2nd term on 30th April, 2018 and as 1st May was a public holiday, they opened thereafter.

122. It is unclear why the school opened on a Friday 4th May, 2018, if indeed that was the opening day.

123. Even assuming that it was the opening day, being second term, the number of the students per class is easily ascertainable from the class fee registers and a physical head count bearing in mind that some students may not report on that day as the audit report reveals.

124. In the court's view, whether 4th May, 2018 was the reopening date or not would not significantly affect the number of students in the school.

125. The audit team found that other than form 4, the number of students in the other classes had been inflated with Form II with an excess of 35 students.

126. The team found that on account of the inflated enrolment, the school had received excess funding and the sum of Kshs.163,000/= was transferred to the operations account without authority of the B.O.M.

127. Similarly, tuition funds were used for operations and infrastructure expenses contrary to the Ministry of Education Circular Ref. HQS/3/13/3 dated 19th October, 2017 and the Claimant did not report the excess FDSE funds to the Board of Management.

128. The team was informed that student enrolment had been declining from the conversion of the school to a boarding school as the neighbouring population preferred day schools such as Kihato and Lechugu which were undeniably less expensive.

129. The audit team found that the Claimant, as the accounting officer of Malek Girls Secondary School had deliberately concealed information on student enrolment as she did not avail class registers for 2017 and 2018 and fee registers for 2017 for purposes of the audit, a fact RWII confirmed on cross-examination.

130. That the Claimant did not declare excess FDSE funding to the Principal Secretary, Ministry of Education and spent it without authority contrary to the provisions of the *Public Finance Management Act*, 2012 and Article 201(a) of *the Constitution*.

131. The audit team did not find the Claimant culpable for the cracks in the new T.I.G classroom as the Ministry of Public Works was involved in professional guidance, expenditure, had supportive documents and delivery notes and a certificate of project completion had been given.

132. The audit team recommended disciplinary action against the Claimant for misrepresentation of facts to the Ministry of Education which resulted in excess FDSE funding of Kshs.1,712,133.00.

133. All the auditors signed the report.

134. Contrary to the Claimant's submission that the audit was shoddy and was not aligned to the financial year, a cursory reading of the cover page reveals that it was an Investigative Audit and purpose of the audit captured at the bottom of the cover page is unambiguous that it was an Investigative Audit not an ordinary or annual audit, a fact RWII confirmed on cross-examination.

135. Needless to belabour, investigative audits are need based and are never planned for analogous to annual audits which are regular. This explains the timing, scope and the outcome.

136. It is common ground that the BOM of Malek Girls Secondary School met on 20th September, 2018 and the TSC County Director had been invited and the Claimant attended as BOM Secretary but the County Director of Education took the minutes, a fact the Claimant contested yet her conduct would be discussed at the meeting and was requested to leave at one point and the Deputy Principal was unavailable to take minutes.

137. Although counsel for the Respondent submitted that the investigation under Regulation 146(4) was conducted by the TSC County Director and the BOM meeting of 20th September, 2018, the minutes of the meeting do not reflect any investigation as neither a copy of the Auditor's Report nor any other document was produced at the meeting and no witnesses were called and only the TSC County Director and the Chairman of the BOM spoke to the issue raised by the TSC County Director, Mr. Francis Ngware.

138. Finally, the Claimant's conduct was discussed in her absence yet she may have had exculpative evidence neither was a copy of the auditor report given to her or other members of the BOM.

139. It was more of a monologue as opposed to a meeting.

140. Finally, the TSC County Director did not constitute an investigation panel as required by Regulation 146(3)(b) nor was the Claimant granted a fair hearing contrary to Regulation 146(6) nor was a written report made to the County Director and the Secretary TSC.

141. Be that as it may, by letter dated 28th December, 2018, the Respondent interdicted the Claimant immediately for receiving and spending excess FDSE funds, Kshs.1,712,133.00 without authority between 1st January, 2017 to 23rd April, 2018 as Principal of Malek Girls Secondary School.

142. In her response dated 10th January, 2019, the Claimant admitted having received the money as alleged but denied having mismanaged it and had used the funds on school activities with relevant approval.

143. The Claimant admitted that the audit took place on 4th May, 2018 and a BOM meeting had taken place on 20th September, 2018.

144. Strangely, the Claimant alleged that the auditors carried away several files of accounting documents for 2017 – 2018 and they had not been returned and could not thus provide sufficient documents and did not peruse the audit report yet she had already accepted having received and expended the cash.

145. As adverted to elsewhere in this judgment, a hearing scheduled for 3rd June, 2019 was terminated owing to unavailability of witnesses.

146. Records further reveal that by letter dated 26th June, 2020, the Respondent amended the interdiction letter dated 28th December, 2018 by introducing a second charge of infamous conduct that the Claimant;

> " inflated student enrolment numbers in 2017 and 2018 from 97 to 185 with a view to secure more FDSE funds from the Ministry of Education".

147. The Claimant responded vide letter dated 16th July, 2020 and denied the charge.

148. According to the Claimant, the school which on conversion from day to boarding was now double stream could not have been converted from single stream which required a maximum of 360 students and the Ministry of Education had used 185 students.

149. The Claimant does not disclose what number the Ministry of Education ought to have used but uses a figure of 305 students allegedly for 2018 without disclosing the term or month.

150. Strangely, the Claimant states that the auditors did not interact with the students as 4th May was the school opening day.

151. That the school could not have converted to double stream if it had only 97 students and the charge was an afterthought.

152. In sum, the Claimant's response is reticent of the number of students the school had in 2016, 2017 or indeed 2018 or at any given time.

153. The Claimant's counsel faulted the new charge on the premise that the Code of Regulations does not contemplate the introduction of a new charge.

154. Regulation 147(5) is explicit that the Commission reserves the right to amend the letter of interdiction constituting the charge.

155. Counsel faults the amendment as it is the introduction of a new charge.

156. However, Section 2 of the *Interpretation and General Provisions Act* Cap 2 is clear that the term "Amend" includes repeal, revoke, rescind, cancel, replace, add to or vary and the doing of any two or more of those things simultaneously or in the same written law or instrument.

157. Since the Respondent had the right to amend the interdiction letter, it had the right to replace, vary, revoke or add to as it did.

158. By letters dated 30th September, 2019 and 3rd February, 2020, the Claimant complained about the inordinate delay in concluding her disciplinary hearing.

159. Finally, by letter dated 2nd October, 2020, the Respondent dismissed the Claimant from employment on the ground of inflating student enrolment in 2017 and 2018 from 97 to 185 so as to secure more FDSE funds from the Ministry of Education.

160. The charge on receipt and expending excess FDSE funds was dropped on account that the funds were expended on school activities and projects.

161. During the hearing on 15th September, 2020, two commissioners and 5 other officers of the Respondent constituted the panel.

162. The charges were read out and the Claimant pleaded not guilty.

163. The Claimant admitted having been aware of discrepancies in enrolment and had reported the under enrolment to the Ministry of Education.

164. Intriguingly, the Claimant testified that the school was registered as a three streamed school and had 305 students in early 2017.

165. The Respondent's witnesses, School's Auditor, Mr. John Horsey (Chair BOM) and Gediel Kiringo testified that the Claimant had lied about student enrolment and 185 students had been reported via NEMIS yet the number in school was 97 students.

166. The disciplinary committee found that the Claimant did not declare excess FDSE capitation to the Principal Secretary, Ministry of Education and did not avail class registers to the investigative teams.

167. Finally, the committee found that the Claimant did not disclose the inflated number of students to the Chairman of the BOM or the excess funds.

168. Was the termination of the Claimant's employment justified?

169. In determining this issue, the court is guided by the provisions of Section 43(2) of the *Employment Act* and case law as follows.

170. Section 43(2) of the *Employment Act*, 2007 provides that;

> The reason or reasons for termination of a contract are the matters that the employer at the time of the termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.

171. In Galgalo Jarso Jillo V Agricultural Finance Corporation (2021) eKLR, B.O. Manani J. stated as follows;

> " In other words, it is not a requirement of the law that the substantive ground informing the decision to terminate must be in existence. All that is required is for the employer to have a reasonable basis for genuinely believing that the ground exists.

172. The foregoing sentiments are consistent with the band of reasonable approaches test used by Lord Denning MR in British Leyland (UK) Ltd V Swift (1981) I.R.L. R 91 as follows;

> " The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer would have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness within which an employer might reasonably take one view".

173. These sentiments are consistent with those of Baari J. in Simba Corporation t/a Accacia Premier Hotel V Omondi (Supra).

174. It must also be recalled that as held by the Court of Appeal in Kenya Revenue Authority V Reuwel Waithaka Gitahi & 2 others (Supra);

> " The standard of proof is on a balance of probability not beyond reasonable doubt and all the employer is required to prove are the reasons that it genuinely believed to exist causing it to terminate the employee's services. That is a partly subjective test."

175. From the foregoing analysis and the provisions and propositions of law cited above, the Court is satisfied that the Respondent has demonstrated that it had reasonable grounds to genuinely believe that the Claimant inflated student enrolment at Malek Girls Secondary School between January 2017 and April 2018.

Procedure

176. As held in Pius Machafu Isindu V Lavington Security Guards Ltd (2017) eKLR, Section 41 of the *Employment Act* prescribes an elaborate mandatory process which an employer must comply with before terminating the services of an employee.

177. Needless to belabour, the specific tenets of procedural fairness have been articulated in legions of decisions including Postal Corporation of Kenya V Andrew K. Tanui (2017) eKLR and include; explanation of the charge in a language understood by the employee, reasons for which termination of employment is being considered, entitlement of the employee to the presence of another employee of his choice or a shop floor representative when the explanation is made and hearing and considering the representations made by the employee and the person chosen by the employee.

178. It is common ground that after the investigative audit in May 2018, a BOM was summoned and the Claimant attended as Secretary but was requested to leave by the TSC County Director of Education when the meeting was discussing the misappropriation of Kshs.1,712,133.00.

179. Evidently, the meeting was relying on the Investigative Audit Report the CDE had ordered though a copy of the report had not been availed to the Claimant.

180. Since the meeting had only one agenda namely, misappropriation of funds by the Claimant and or the school, and the Claimant was the Principal, it would have been consistent with the precepts of natural justice to avail a copy of the audit report to the Claimant as it was the basis of the discussion and the meeting.

181. Puzzlingly, the CDE directed the Claimant to leave yet she had essential information about the school which not even the chair of the BOM, Mr. John Harsley had and the Deputy Principal was not present.

182. In essence, the school management was excluded from the meeting.

183. The Claimant's right to fair hearing was violated by the non-availment of the Audit Report and exclusion from the meeting and coincidentally the Letter of Interdiction was issued less than 10 days later and the charge is traceable to the Investigative Audit Report dated 4th May, 2018.

184. Regulation 146(6) of the Code of Regulation for Teachers provides that;

The Investigating Panel shall, upon investigation, accord the head of the institution or a teacher a fair hearing during the investigation process which shall include being –

a. presumed innocent until proven that he has a case to answer.

b. informed of the allegation, with sufficient details to answer it.

c. given at least 7 days to prepare a defence.

d. given an opportunity to appear in person before the investigating panel . . .

e. present when the witnesses are being interviewed by the investigation panel.

f. . . .

g. given an opportunity to adduce and challenge any adverse evidence.

185. Neither the three auditors or the BOM nor the County Director of Education accorded the Claimant the rights under Regulation 146(6) above.

186. During the hearing, the Claimant confirmed that the auditors neither called her nor visited the school thereafter and did not give her a copy of the investigative audit report and no other meeting or hearing took place during interdiction.

187. Similarly, Regulation 146(8) provides that;

The Investigation Panel shall, upon completing the investigation compile a written report in regard to the teacher's disciplinary status and shall present the report to the Board, County Director and the Secretary.

188. Other than the two reports by the Ministry of Education Directorate of Quality Assurance and Standards and the Investigative Audit Report dated 16th March, 2018 and 4th May, 2018, there is no report on the disciplinary status of the Claimant prior to the interdiction.

189. In sum, the Respondent did not prefer any charge against the Claimant prior to the interdiction as envisioned by the Regulations nor accord her the entitlements provided by the Regulations.

190. During the hearing, the auditor affirmed that the audit team did not invite the Claimant to answer any question as they were conducting an investigative audit and no other forum was provided to the Claimant.

191. It is not in contest that the Claimant was interdicted vide letter dated 28th December, 2018 which was subsequently modified on 26th June, 2020, more than one (1) year after the 1st hearing slated for 3rd June, 2019 was terminated prematurely.

192. Finally, by letter dated 14th August, 2020, the Claimant was invited for a disciplinary hearing scheduled for 15th September, 2020 and the meeting would be virtual at the TSC Director Office, Laikipia but was later changed to Nakuru. The letter informed the Claimant of his right to attend in person and be accompanied by witnesses and documents useful for her defence.

193. Although counsel for the Claimant faulted the Disciplinary Committee, there is no evidence to prove that *the constitution* of the committee or disciplinary panel was not in accordance with the Code of Regulations for Teachers.

194. The totality of the evidence before the court is that the termination of the Claimant's employment was grounded on the Investigative Audit Report of the audit conducted on 4th May, 2018 as no other audit report was provided as alluded to by a letter dated 15th August, 20 (the year is unclear).

195. From the evidence on record, it is clear that the County Director of Education based his discussion on the audit report during the meeting held on 20th September, 2018 and the interdiction.

196. In the court's view, the report is sufficiently comprehensive and shows what transpired, findings and recommendations.

197. Strangely, a copy of the report was not availed to the Claimant at any stage including the review hearing on 17th September, 2021, a fact the Claimant raised at the review hearing.

198. In the court's view, the County Director of Education ought to have forwarded a copy of the Audit Report with the interdiction letter in December 2018.

199. During the review hearing, the Claimant confirmed that she had applied for the document officially but had no supportive evidence.

200. Even though the Claimant may not have made a formal application for the auditor report to be provided, it was the basis of the charge and it was incumbent upon the Respondent to supply the document to ensure fair hearing.

201. Needless to underline, the right to fair hearing is a constitutional imperative and is not based on request or payment of charges unless the documents are expensive to avail copies.

202. Faced with a similar situation in Postal Corporation of Kenya V Andrew K. Tanui (Supra), the Court of Appeal stated as follows;

> " The Board had in its possession the very document that formed the basis of the charges framed against the Respondent but kept it away from him. Even in criminal trials, which are more serious in nature, the accused is entitled to the statements that support the charges laid against him. That is the essence of fairness even outside a judicial setting. The Respondent faced serious indictment which could torpedo his entire career and destroy his future . . .
>
> For all those reasons, we agree with the trial court that the procedure adopted by the appellant was short of a fair one. We so find."

203. These sentiments apply on all fours to the circumstances of the instant suit.

204. Similarly, in Regent Management Ltd V Wilberforce Ojiambo Oundo (2018) eKLR, the Court of Appeal stated as follows;

> "... Nimrod admitted that during the investigations, the Respondent was not interviewed because of shortage of time. In light of the gravity of the allegations against the Respondent coupled with the fact that the forensic report indicated that one of the methods employed by the auditor was interviewing relevant parties, we find that the Respondent was not heard prior to the findings and recommendations made in the said report.
>
> We are at a loss at as why the appellant refused to grant the Respondent certified copies of the documents requested even at his own expense. In our view, these documents were integral to the Respondent preparing his defence. By only availing the documents for his perusal at its premise for a number of hours was not adequate ..."

205. In this case, the auditors did not interview the Claimant during the audit. The retort that it was because they were conducting an investigative audit cannot avail the Respondent as the auditors recommended inter alia disciplinary action against the Claimant and no other investigation was conducted.

206. In sum, the Claimant was not heard before the recommendations were made.

207. Finally, it is important for the court to consider the timelines within which the Claimant's disciplinary process was conducted.

208. As adverted to elsewhere in this judgment, the Claimant wrote two letters complaining about the inordinate delay in concluding her disciplinary proceedings.

209. It is common ground that the Claimant was interdicted vide letter dated 28th December, 2018 and remained on interdiction until 2nd October, 2020, almost 2 years. The Respondent cited backlog and the COVID-19 Pandemic.

210. It requires no gainsaying that the COVID-19 Pandemic affected people and institutions adversely from March 2020 as physical interactions were prohibited and it took time before virtual meetings and interactions resumed.

211. Evidently, the Respondent had more than 1 year and 2 months to conclude the Claimant's disciplinary process but did not.

212. The COVID-19 Pandemic cannot avail the Respondent as it was first reported in the Country in March 2020 and it is clear no other investigation was taking place or took place between 28th December, 2018 and March 2020.

213. The Respondent failed to observe the time lines prescribed in its Code of Regulations for Teachers and not even the Claimant's letters dated September 2019 and February 2020 could unlock the process after the hearing slated for 23rd June, 2019 was deferred.

214. The Respondent owed the Claimant an explanation for the inordinate delay but did not honour her letters with a reply to assuage her anxieties.

215. Juxtaposing the foregoing to the provisions of Section 45(5) of the *Employment Act*, 2007, the court is satisfied that the termination of the Claimant's employment by the Respondent was not procedurally fair and I so find.

216. As regards the reliefs sought, the court proceeds as follows;

a. Declaration

217. Having found that termination of the Claimant's employment by the Respondent was procedurally flawed and thus unfair, a declaration to that effect is merited.

b. Reinstatement

218. The remedy of reinstatement is provided under Section 12(3)(vii) of the *Employment and Labour Relations Court Act*, 2011 read with Section 49(3)(a) of the *Employment Act* and may be decreed within 3 years from the date of termination of employment or dismissal if circumstances of the case permit having regard to the parameters under Section 49(4) of the *Employment Act*.

219. However, as held by Maraga JA (as he then was) in Kenya Airways Ltd V Aviation & Allied Workers Union & 3 others (2014) eKLR;

> " Reinstatement is however not an automatic right of the 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 known principles to be applied. For instance, the additional common law position is that courts will not force parties in a personal relationship or continue in such relationship against the will of one of them. That will engender friction, which is not healthy . . ."

220. In determining whether or not to decree reinstatement or any other relief under the *Employment Act*, 2007, the court is enjoined to consider the relevant parameters under Section 49(4) of the *Employment Act* such as wishes of the employee, circumstances in which termination of employment took place, including the extent, if any, to which the employee contributed to the termination, practicability of reinstatement, length of service, exceptional nature of the circumstances, expectation of the employee's length of service, opportunities available to the employee in comparable or suitable employment value of any severance pay, right to press other claims, reasonable expenses incurred by the employee as a result of the termination, conduct of the employee, mitigation of loss and any compensation paid or received by the employee on account of termination of employment.

221. In this case, it is clear that the Claimant substantially contributed to the termination of employment as she was found culpable for inflating student enrolment at Malek Girls Secondary School and had received and used excess FDSE funds without authority of the Principal Secretary, Ministry of Education.

222. Although the 2nd charge appear to have been ignored by the Respondent, it is inseparable from the other charge as one led to the other.

223. Relatedly, the Claimant filed the instant suit more than one (1) year after termination of employment and did not seek reinstatement pending the hearing and determination of the suit, adduced no evidence of how she mitigated loss.

224. To her credit, the Claimant had served the Respondent for a long time since 1995, more than 26 years and had no recorded instance of misconduct and wished to remain in employment, perhaps till retirement.

225. Whether or not to decree reinstatement involves the balancing of interests of the employer and employee and their entitlement to justice.

226. More significantly, reinstatement must be practicable as it involves the re-imposition of a relationship which is contested by one of the parties.

227. In this case, the Respondent argues that the relief is unavailable owing to the 3 years limit.

228. The remedy is unavailable and the court so finds.

c. Consolidated salaries and allowances from 28th December, 2018

229. Having found that termination of the Claimant's employment was substantively justifiable, the prayer for unpaid salary and allowance is unsustainable and the prayer is declined.

d. Compensation for unfair termination

230. Having found that termination of the Claimant's employment by the Respondent was unfair for want of procedural fairness, the Claimant is entitled to the relief of compensation under Section 49(4)(c) of the *Employment Act* subject to the provisions of Section 49(4) of the Act.

231. The court have taken into consideration the fact that;

i. The Claimant was an employee of the Respondent for a long time, over 25 years.

ii. The Claimant wished to remain in employment.

iii. The Claimant had no previously recommended case of misconduct.

iv. The Claimant substantially contributed to the termination of employment and has not demonstrated how loss was mitigated.

232. In the circumstances, the equivalent of three (3) months gross salary is fair (Kshs.146,712.00 x 3) = Kshs.440,136.00.

e. General and aggravated damages for inhumane, derogatory and harsh treatment and denial of medical benefits

233. Other than the inordinate delay in concluding the disciplinary process, the Claimant has neither in the written statement dated 6th December, 2021 nor orally demonstrated or tabulated or explained the alleged inhumane, derogatory and harsh treatment and what provisions of law the Respondent violated or the ensuing loss.

234. In the absence of proof of loss or damages, the prayer is declined.

f. Salary underpayment 2008 to 2018 Kshs.960,000.00

235. Neither the written statement on record nor the oral evidence adduced in court make reference to any underpayment and how it took place and perhaps why.

236. No case of underpayment has been made nor is it clear how the sum of Kshs.960,000.00 was arrived at.

237. The prayer lacks particulars and is declined.

g. Certificate of service

238. The Claimant is entitled to a certificate of service by dint of Section 51 of the *Employment Act*.

239. In the upshot, judgment is entered in favour of the Claimant against the Respondent in the following terms;

a. Declaration that termination of the Claimant's employment was unfair.

b. Equivalent of three (3) months gross salary Kshs.440,136.00.

c. Certificate of service.

240. Parties shall bear own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 19TH DAY OF SEPTEMBER 2024

DR. JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE