



REPUBLIC OF KENYA



**KENYA LAW**  
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**Teachers Service Commission v Kobe (Appeal E003 of 2024)  
[2024] KEELRC 2658 (KLR) (30 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2658 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
APPEAL E003 OF 2024  
NZIOKI WA MAKAU, J  
OCTOBER 30, 2024**

**BETWEEN**

**TEACHERS SERVICE COMMISSION ..... APPELLANT**

**AND**

**INNOCENT OGEKA KOBE ..... RESPONDENT**

*(Being an appeal from the Judgment, Decision and Decree of Hon. Calestous Sindani (PM) delivered on 8<sup>th</sup> February 2024 in the Chief Magistrate's Court of Kenya at Ogembo in Employment and Labour Relations Court Cause No. 5 of 2022)*

**JUDGMENT**

1. The appeal before me relates to the case that was before the Senior Resident Magistrates Court at Ogembo. Dissatisfied with the outcome in the case before the Hon. C. Sindani (PM) the Appellant lodged a memorandum of appeal dated 13<sup>th</sup> May 2024 setting out the following grounds that:-
  - a. The Learned Magistrate erred in law and acted beyond his jurisdiction when he issued orders of reinstatement of the Respondent to employment after lapse of three (3) years from the date of dismissal contrary to the provisions of section 12(3)(vii) of the Employment and [Labour Relations Act](#), Cap 8E thereby arriving at an erroneous conclusion of law.
  - b. The Learned Magistrate erred in Law when he granted orders of reinstatement of the Respondent to employment without due regard and consideration of the factors set out in Section 49(4)(b), (c), (d), (k) of the [Employment Act](#), 2007.
  - c. The Learned Magistrate grossly erred in law and fact when he directed the Appellant to pay the Respondent the salary arrears from the date of dismissal to the date of judgement contrary to the provisions of section 49(3)(a) of the [Employment Act](#), 2007 and the common law doctrine that salary is a reward for work done.



- d. By holding that the process leading to Respondent's termination was un-procedural, unfair and unlawful, the learned Magistrate failed to consider the Appellant's evidence adduced by its witnesses and presented through documents which raised substantial issues of law.
  - e. The Learned Magistrate erred in law when he only considered the testimony of the Appellant's one (1) witness and ignored the evidence tendered by the Appellant's other two (2) witnesses thereby failing to give a fair judgment.
  - f. The Learned Magistrate erred in law and fact when he failed to appreciate the Applicant's role in the protection of children as provided for Under Article 53(1)(d) of *the Constitution* which provides that every child has a right to be protected from abuse.
  - g. By finding that the Appellant did not carry out other investigations as to the allegations made against the Claimant by use of other agencies, the Learned Magistrate failed to appreciate the Constitutional, statutory and contractual mandate of the Appellant to exercise disciplinary control over its employees.
  - h. By holding that the Appellant did not indicate to the Respondent of his right of legal representation, the Learned Magistrate unfairly and unlawfully raised the threshold with regards to the principle of fair hearing beyond statutory limitations contrary to provisions of section 41(1) of the *Employment Act*, 2007.
    - i. The Learned Magistrate acted in excess of his jurisdiction and grossly erred in law relying on grounds not pleaded in the body of the Statement of Claim nor argued by the Respondent during trial and in so doing condemned the Appellant unheard contrary to Article 50 of *the Constitution*.
  - j. The learned Magistrate misconstrued the nature of proceedings process undertaken by the Appellant and the standard of proof required to be met under the CORT and *Employment Act* while discharging its disciplinary mandate.
  - k. The Learned Magistrate failed to appreciate that it is trite law that the criminal law regime/ standards has no application in employment contracts.
  - l. The Learned Magistrate erred in law in arriving at a decision which was contrary to the evidence tendered by the Appellant, law, facts, submissions and authorities and binding judicial precedents tendered before court.
  - m. The Learned Magistrate has not provided legal and/or reasoned justification on the awards made in favour of the Respondent.
  - n. The Learned Magistrate grossly misinterpreted and misapplied the relevant law and arrived at an erroneous conclusion of law.
2. The Appellant thus prays that the Appeal be allowed and the judgment of 8<sup>th</sup> February 2024 be set aside and substituted with an order dismissing the claim with costs.
  3. By way of brief background, the Respondent herein (Claimant in the lower Court) had sued the Appellant before the Senior Resident Magistrates Court at Ogembo seeking the following reliefs:
    - i. A declaration that his termination or dismissal was unlawful.
    - ii. Reinstatement for the remainder of his term.
    - iii. Payment of his salary from the time of interdiction until reinstatement.



- iv. An order for removal of his name from the gazette notice of deregistration of teachers dated October 11, 2022.
  - v. An order to maintain his name as a registered teacher in the register until the case is heard and determined.
  - vi. A directive for the TSC to publish a gazette notice informing the public that the he remains a registered teacher until the case is resolved.
  - vii. An award of costs for the claim.
  - viii. An order for interest on the above amounts at court rates.
4. In response the Appellant (Respondent before the lower Court) averred that the Respondent was lawfully dismissed for gross violation of its code of conduct. In a judgment delivered on 8<sup>th</sup> February 2024 the learned Magistrate found that Respondent's termination of employment was unlawful and ordered for: his reinstatement, payment of his salary from the time of interdiction to the time of reinstatement, reversion of his registration status to the time before interdiction and an award of costs of the suit.
  5. Via directions of the Court issued on 18<sup>th</sup> July 2024, parties agreed to dispose the appeal by way of written submissions.

#### **Appellant's submissions**

6. In its submissions filed on 4<sup>th</sup> September 2024 the Appellant condensed the 14 grounds of appeal into 7 grounds outlined as follows:
  1. The Learned Magistrate erred in law and acted beyond his jurisdiction when he issued orders of reinstatement of the Respondent to employment after lapse of three (3) years from the date of dismissal contrary to the provisions of section 12(3)(vii) of the Employment and [Labour Relations Act](#), Cap 8E thereby arriving at an erroneous conclusion of law.
  2. The Learned Magistrate erred in Law when he granted orders of reinstatement of the Respondent to employment without due regard and consideration of the factors set out in section 49(4)(b), (c), (d), (k) of the [Employment Act](#), 2007
  3. The Learned Magistrate grossly erred in law and fact when he directed the Appellant to pay the Respondent the salary arrears from the date of dismissal to the date of judgement contrary to the provisions of section 49(3)(a) of the [Employment Act](#), 2007 and the common law doctrine that salary is a reward for work done.
  4. By holding that the process leading to Respondent's termination was unprocedural, unfair and unlawful, the Learned Magistrate failed to consider the Appellant's evidence adduced by its witnesses and presented through documents which raised substantial issues of law.
  5. The Learned Magistrate erred in law and fact when he failed to appreciate the Applicant's role in the protection of children as provided for under Article 53(1)(d) of [the Constitution](#) which provides that every child has a right to be protected from abuse.
  6. The Learned Magistrate acted in excess of his jurisdiction and grossly erred in law relying on grounds not pleaded in the body of the Statement of Claim nor argued by the Respondent during trial and in so doing condemned the Appellant unheard contrary to Article 50 of [the Constitution](#).



7. The Learned Magistrate failed to appreciate that it is trite law that the criminal law regime/ standards has no application in employment contracts.
7. On the first ground the Appellant submits that section 12(3)(vii) of the Employment and [Labour Relations Act](#) prohibits the court from ordering reinstatement after expiry of three years from the date of dismissal. It highlights that the Respondent was dismissed on 1<sup>st</sup> February 2021 and references the case of *Sotik Highlands Tea Estates Limited v Kenya Plantation and Agricultural Workers Union* [2017] eKLR where the court stated that courts have no power to reinstate after expiry of 3 years from dismissal as outlined in section 12(3)(vii) of the Employment and [Labour Relations Act](#). Additionally, the Appellant submits that its relations with the Respondent have irretrievably broken-down rendering reinstatement unviable. The Appellant asserts that reinstatement is not automatic and would be akin to imposition of a contract on another, necessitating careful consideration. To support this position the Appellant cites *Teachers Service Commission v Timothy Onyango Olale* [2022] eKLR where the court indicated that reinstatement is not automatic and requires a balancing of interests. The Appellant also cites the cases of *Dalmas B. Ogoye v KNTC Ltd* [1996] eKLR and *Okongo v AG & another* [1988] KLR 748, where the common thread was that reinstatement was analogous to imposition of a contract on another which is not the function of courts especially where relations had broken down. In conclusion the Appellant asserts that the Respondent's gross professional misconduct involving carnal knowledge of a student has resulted in a complete breakdown of trust thus making reinstatement unjustifiable even under the test of section 49(4) of the [Employment Act](#).
8. Regarding the Magistrate's order for payment of salary from the date of dismissal to the date of judgment, the Appellant submits that it is unjustifiable. It avers that having been dismissed on 1<sup>st</sup> February 2021 the Respondent did not render any services entitling him to a salary. In affirming the fundamental principle that salary is earned through performance of work the Appellant cites the case of *Kenya National Union of Nurses v Permanent Secretary Ministry of Health & 2 others* [2020] eKLR, where the court held that payment of salary for work not done is unjustified in law and contrary to public policy. In further urging reversal of the Magistrate's order, the Appellant argues that no rationale was provided for the award of salary, stressing that judicial officers must account for their decisions, as was held in *Kridha Ltd v Peter Salai Kituri* [2020] eKLR. In respect of the Magistrate's failure to appreciate its role in child protection under Article 53(1)(d), the Appellant reiterates the crucial role played by teachers and submits that the Respondent's actions are contrary to the protective responsibilities of teachers and violate the established code of conduct and ethics. Specifically, the Appellant cites section 22(1) of the Code of Conduct and Ethics for Teachers (2015) – COURT, which prohibits any sexual activity, including flirting, and references section 7 of the [Teachers Service Commission Act](#), which mandates good moral character for teacher registration. Additionally, the Appellant cites the case of *Teachers Service Commission v WJ & 5 others* [2020] eKLR, which highlights the TSC's obligation to ensure a safe learning environment and to protect the dignity of children.
9. Regarding the Magistrate's failure to consider its evidence the Appellant submits that the Learned Magistrate ignored evidence on the investigation by the Ministry of Education and the TSC. The Appellant asserts that it followed the correct procedure as stipulated on the Code of Regulation for Teachers and avers that the Magistrate was wrong in confusing criminal proceedings with internal disciplinary proceedings. The Appellant cites the case of *Kenya Revenue Authority v Menginya Salim Murgani* [2010] eKLR where the court stated that decision making bodies with statutorily laid down procedures have a carte blanche provided they achieve a reasonable degree of fairness. The Appellant submits that it subjected its employee to fair procedure and relies on the cases of Lydia Moraa Obara



v Tusker Mattresses Ltd [2020] eKLR, Simon Gakuo v Kenyatta University & 2 others Misc. Civil Application No. 34 of 2009 (unreported) and Anthony Mkala v Malindi Water & Sewerage Company Ltd [2013] eKLR where the courts emphasized on the employee being granted a chance to present his or her case, for there to be a semblance of procedural fairness. Additional reliance was placed on Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR where the court held that any person adversely affected by an investigation report should be informed of the case made out against him or her and be afforded a fair opportunity to answer to the charges. With respect to the Magistrate placing a high standard of proof, the Appellant submits that it was erroneous. It maintains that the standard in internal disciplinary proceedings is lower than in criminal cases and asserts it was not required to wait for the conclusion of the criminal proceedings.

10. The Appellant underscores that it is not bound by strict rules of evidence; rather, general evidence and statements regarding conduct and character suffice, as outlined in section 12(2)(d) of the TSC Act and Regulation 139(1)(d) of the Code of Regulation for Teachers. Moreover, the Appellant cites the case of Attorney General & another v Andrew Maina Githinji & another [2016] eKLR where the Court of Appeal in distinguishing between internal disciplinary proceedings and criminal proceedings stated as follows:

“Finally, may refer to two decisions where a distinction between internal disciplinary proceedings of an employer and criminal proceedings was upheld for the reasons that the internal disciplinary proceedings are anchored on a contract of employment and the burden of proof is on a balance of probability, while in criminal proceedings, proof beyond reasonable doubt is required.”

11. The Appellant submits that it is not bound by the outcome of criminal proceedings and cites the case of David Kemei v Energy Regulatory Commission [2013] eKLR in which the court stated that the employment disciplinary process is private as opposed to the criminal process which is public, and that a guilty finding in the criminal process does not bind the employer in any way. Consequently, the Appellant urges the setting aside of the Magistrate's judgment and dismissal of the claim with costs.

### **Respondent's submissions**

12. The Respondent submits that the duty of a first appellate court to evaluate the evidence and reach its own conclusion and identifies the following issues for determination:
  - i. Whether the Magistrate erred in law and fact in arriving at the conclusion that the Appellant did not meet the procedural threshold to terminate the Respondent's employment.
  - ii. Whether the Magistrate erred in law and in fact in arriving at the conclusion that the Respondent was deserving of the reliefs that he had sought in his statement of claim.
  - iii. Who should bear the costs of the suit
13. On the first issue, the Respondent submits that the Magistrate was right in impugning the procedural fairness of his dismissal. He argues that there was a communication breakdown, particularly since his dismissal occurred at the peak of the COVID-19 pandemic. Additionally, he asserts that he was disadvantaged by a lack of representation and was not informed of his right to representation at the disciplinary hearing. He contends that the investigation relied solely on the minor's testimony and that further evidence should have been sought to corroborate this testimony, as required by section 45(2) of the *Employment Act*. The Respondent cites the case of Walter Ogal Anuro v Teachers Service Commission [2013] eKLR on substantive justification and procedural fairness being prerequisites for fair termination of employment.



14. With respect to the second issue the Respondent submits that he is entitled to the reliefs sought having demonstrated procedural gaps in the disciplinary process. He asserts that where there is a wrong, there ought to be a remedy and draws attention to the provisions of section 49 of the Employment Act. He urges the court to uphold the finding of the trial court on the basis of *Mbogo & anor v Shah* [1968] EA 93 where the court held that an appellate court should only interfere with the discretion of an inferior court only if it is clear that the decision is wrong and that the court acted on matters it should not have, leading to an erroneous conclusion. Finally, on the issue of costs the Respondent submits that it is discretionary as outlined in section 27 of the Civil Procedure Act.
15. The Court being the first appellate court is bound to review the testimony adduced, the facts in the case, the law cited and come to its own conclusion bearing in mind that it neither saw nor heard the witnesses before the trial court. In the case before me, the Respondent was an employee of the Appellant and he was terminated sometime in February 2021. The Appellant submits and asserts it had cause to terminate while the Respondent asserts and submits that he was terminated unprocedurally and that therefore the finding by the Learned Senior Magistrate was one that should be upheld by this Court.
16. When reviewed, the evidence adduced before the trial Magistrate shows that the Respondent was the Appellant's employee. He was accused of unlawful carnal knowledge of a minor. The Respondent was taken through a disciplinary process by the Appellant's officials. It was noted that the minor FMO, who was 15 years at the time indicates she was sexually assaulted by the Respondent herein. Her elaborate statement which is handwritten indicates the man who called her and had sexual intercourse with her against her will. He gave her cash. She went home and on being questioned about where she had been, she indicted that the Respondent had assaulted her. She was tested at a medical facility and spermatozoa was seen oozing out from her private parts. She was confirmed to have had a sexual encounter. The statement she made at the Police Station was damning of the Respondent. She stated his name and only during the criminal trial did she waver in her testimony.
17. The disciplinary process the Respondent undertook was in compliance with the Code of Regulation for Teachers (CORT) of the Appellant. A disciplinary process is not like a criminal trial. At a criminal trial, the standard is beyond any reasonable doubt. At the disciplinary hearing, the standard is lower and does not need to meet the high threshold in a criminal trial. The Employment Act provides at section 44(4)(g) as follows: -
  - (4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-
    - (g) An employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property. [Emphasis supplied]
18. It is amply clear. If an employee commits, or on reasonable and sufficient grounds is suspected of having committed a criminal offence against or to the substantial detriment of his employer, the employer would be justified to issue a termination. The record before the Learned Magistrate revealed that the Respondent was subjected to a process where the Respondent was asked to give an explanation to the charges. The Respondent seemed to misapprehend that an acquittal from the criminal charges did not absolve him from the disciplinary charges. From the record before the appellate court, he was given a fair hearing and subsequently was dismissed. As such, the Respondent did not deserve the



remedies he received from the Magistrates Court. The Court finds and returns that the Learned Senior Magistrate fell into error by issuing orders of reinstatement of the Respondent to employment with the Appellant after lapse of three (3) years from the date of dismissal contrary to the provisions of section 12(3)(vii) of the Employment and *Labour Relations Act*. On the issue of morality, prohibition of sexual activity by teachers with learners, the Court takes comfort in the provisions of section 22(1) of the Code of Conduct and Ethics for Teachers (2015) – COURT, which expressly prohibits any sexual activity, including flirting. In addition, section 7 of the *Teachers Service Commission Act* mandates good moral character for teacher registration, meaning that anyone who breaches the tenets of good moral character loses the right to seek registration or even re-registration.

19. The finding of the Court is that the Appellant was correct in impugning the decision of the Learned Magistrate. The grounds of appeal, which ought to have been clustered instead of being repetitive, are proved in terms of grounds 1, 3, 6, 7, 10, 11 and 14 of the Memorandum of Appeal herein with the result that the Court has no option but to interfere with the judgment and decree in Ogembo Chief Magistrate's Court of Kenya Employment and Labour Relations Court Cause No. 5 of 2022 – Innocent Ogega Kobe v Teachers Service Commission by setting aside the entire judgment in its entirety. Having regard to the fact that the Respondent lost his livelihood, albeit on account of his own wrong doing, the Court is reluctant to mulct him in costs. Appeal allowed, each party will bear their own costs for the suit below and on this appeal.

It is so ordered.

**DATED AND DELIVERED AT KISUMU THIS 30<sup>TH</sup> DAY OF OCTOBER 2024**

**NZIOKI WA MAKAU, MCIARB.**

**JUDGE**

