



**Teachers Service Commission v Ndung’u (Civil Appeal E191 of 2022)
[2024] KEELRC 2499 (KLR) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2499 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CIVIL APPEAL E191 OF 2022
L NDOLO, J
OCTOBER 17, 2024**

BETWEEN

TEACHERS SERVICE COMMISSION APPELLANT

AND

ALLAN KARANJA NDUNG’U RESPONDENT

(Appeal and Cross Appeal from the judgment delivered on 30th September 2022 by Hon. S.N Muchungi, SRM in Nairobi CMELRC No 763 of 2019)

JUDGMENT

1. This judgment disposes of both the Appellant’s appeal and the Respondent’s cross appeal, arising from the judgment of Hon. S.N Muchungi, SRM delivered on 30th September 2022 in Nairobi CMELRC No 763 of 2019.
2. For purposes of coherence, I will adopt the title of the parties as contained in the Memorandum of Appeal. Throughout this judgment therefore, the Teachers Service Commission will be referred to as the Appellant and Allan Karanja Ndung’u will be referred to as the Respondent.
3. In its Memorandum of Appeal dated 30th October 2022, the Appellant raises the following grounds of appeal:
 - a. The learned Magistrate erred in law and fact when she failed to appreciate the Appellant’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;
 - b. The learned Magistrate failed to appreciate the constitutional, statutory and contractual mandate of the Appellant to exercise disciplinary control over its employees;



- c. The learned Magistrate misconstrued the nature of proceedings undertaken by the Appellant, while discharging its disciplinary mandate and the standard of proof required to be met under the Code of Regulations for Teachers and the *Employment Act*;
 - d. In holding that the Appellant did not take the initiative to have the minors medically examined during investigations, the learned Magistrate irregularly and unfairly imposed an unknown procedure on the Appellant and failed to take into consideration the Appellant's evidence on the issue;
 - e. The learned Magistrate failed to appreciate that it is trite law that the criminal law regime/standard has no application in employment contracts;
 - f. By holding that the Respondent's termination came about as a result of malicious and unproved allegations made against him, and that there was no evidence to prove that the Respondent was of immoral conduct, the learned Magistrate failed to consider the Appellant's evidence adduced by its witnesses and presented through documents which raised substantial issues of law;
 - g. The learned Magistrate ignored the evidence tendered by the Appellant's witnesses and instead believed the recanted statement by the victim, to the exclusion of the evidence by others. The court appears to have believed that renouncing of evidence by a victim and/or complainant constitutes or should establish innocence on the part of the Respondent;
 - h. The learned Magistrate erred in law by holding that the Appellant tarnished the Respondent's name by gazetting his name in accordance with Section 30 of the *Teachers Service Commission Act*, having been removed from the register of teachers;
 - i. The learned Magistrate erred in law in arriving at a decision which was contrary to the evidence tendered by the Appellant, law, facts, submissions, authorities and binding judicial precedents tendered before the court;
 - j. The learned Magistrate grossly misinterpreted and misapplied the relevant law and arrived at an erroneous conclusion of law when she awarded the Respondent the amount of Kshs. 225,648 and costs.
4. In his Memorandum of Cross Appeal dated 1st February 2023, the Respondent raises the following grounds:
- a. That the learned trial Magistrate erred in law and in fact in failing to find that the Respondent is entitled to be reinstated to the register of teachers;
 - b. That the learned trial Magistrate erred in law and in fact in failing to find that the Respondent had wholly proved his case against the Appellant on a balance of probability and that he was entitled to all the prayers sought in his pleadings;
 - c. That the learned trial Magistrate misdirected herself by awarding the Respondent Kshs. 255,648 only considering the fact that the Respondent had worked for the Appellant for nine (9) years and that there are thin possibilities that he will get a similar appointment elsewhere, the Appellant having tarnished his name through media advertisement;
 - d. That the learned trial Magistrate erred in law and in fact in failing to find that the Respondent is entitled to aggravated damages in the circumstances;



- e. That the learned trial Magistrate erred in law and in fact in failing to order the Appellant to reinstate the Respondent and to pay all salary dues from the date of termination to the date of reinstatement;
 - f. That the learned trial Magistrate erred in law and fact by failing to consider the Respondent's submissions holistically;
 - g. That the learned trial Magistrate erred in law and in fact by failing to determine the case on the basis of the law and the evidence on record.
5. This being a first appeal, I am under a duty to reconsider and evaluate the evidence on record, so as to draw my own conclusions, while bearing in mind that I did not have the opportunity to encounter the witnesses first hand (see *Selle v Associated Motor Boat Company Ltd* [1968] E.A 123)
6. The Appellant raises eleven (11) grounds appeal, which may be categorised in two broad segments namely; first, whether there was justification for the Appellant's dismissal and removal from the register of teachers and second, whether due process was followed.
7. The reason for the Claimant's dismissal is contained in letter dated 27th March 2017, stating as follows:

“DISMISSAL

I am directed by the Teachers Service commission to say that the Commission has carefully considered your case and has determined you should be dismissed from the teaching service with effect from 13.3.2017 for the following reasons: -

You are of immoral behaviour in that you had sexual intercourse with your former pupil by the name Anne Njeri of Mai-a-ihii Secondary School Form 1 Admission No 749 on 5.2.2015 at 3.00 pm and on 6.4.2015 at 4.00 pm in a room at Mai-a-ihii Primary School while you were a teacher at Mai-a-ihii Primary School

(signed)

J.ETHURO (MRS)

FOR: SECRETARY

TEACHERS SERVICE COMMISSION”

8. In her judgment dated 30th September 2022, the learned trial Magistrate reached the following conclusion, on the question of the Respondent's culpability:

“As to whether the respondent proved the reasons for dismissing the claimant from employment. The answer is in the negative. As per the dismissal letter, the reasons is of immoral behaviour in that he had sexual intercourse with his former pupil by the name Anne Njeri on 5/2/2015 at 3.00 p.m and on 6/4/2015 at 4.00 p.m. in a room at Mai-a-ihii Primary School while he was a teacher there.

There is no evidence placed before this court, neither was there evidence placed before all the panels that heard the case that sufficiently proves that the claimant had sexual intercourse with Anne Njeri.

There was never a complaint made by the said Anne Njeri about the allegation to any person or any authority to start with. The case arose from rumours that were being spread about the claimant by neighbours to the school and in particular Simon.”



9. After evaluating the evidence adduced before her, the learned trial Magistrate found that:

“Allegations of a sexual offence especially involving minors no doubt are serious but the respondent’s witnesses confirmed that no report was made to the police about the matter and no charges were preferred against the claimant.

No one took up the initiative of having the minors examined by the doctors to confirm whether indeed they had been defiled or not.”
10. The foregoing findings are in sync with the evidence on record. The question then is whether the conclusion drawn by the learned trial Magistrate that the Appellant had failed to establish a valid reason for dismissing the Respondent and removing him from the register of teachers, was sound.
11. In faulting the finding in this regard, the Appellant states that the trial court applied the wrong standard of proof. The Respondent points out that while the standard of proof in criminal cases is beyond reasonable doubt, the applicable standard in internal disciplinary proceedings is on a balance of probability. In its written submissions, the Appellant cites the decision in *Mobile Link (K) Limited v Tabitha Masege* [2017] eKLR where the principle that internal disciplinary proceedings are distinct from criminal proceedings emanating from the same set of circumstances was reiterated.
12. The Respondent further relies on the decision in *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others* [2019] eKLR where the Court of Appeal stated as follows:

“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.”
13. The Respondent was accused of having sexual intercourse with his former pupil. It is however on record that neither the pupil nor her parents/guardians made any formal complaint. Instead, the Appellant’s agents, acting on rumours, procured a statement from the pupil, which she later recanted. The pupil told the trial court and it was corroborated by CW3, Brian Kaigai Moroko that the Head Teacher, Peter Kariuki Hinga, had coerced them to implicate the Respondent.
14. The Respondent adduced medical evidence to the effect that at the time the allegations against him were being peddled, the pupil had not had sexual intercourse at all. The Appellant did not avail any evidence to the contrary and this Court has no reason to discredit the medical report produced on behalf of the Respondent.
15. Throughout the disciplinary processes and in the proceedings before the trial court, the Respondent raised the issue of bad blood between him and the Head Teacher, who was evidently a prime mover in the disciplinary case against the Respondent. There was no evidence of any attempt by the Appellant to investigate the Respondent’s complaint against the Head Teacher.
16. The stance taken by the Respondent reflected the conduct of an employer who had already taken sides against the Respondent. This further confirms that the Respondent’s fate had been sealed and the disciplinary processes adopted were at best, a camouflage to sanitise a fait accompli against the Respondent.
17. In its decision in *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR this Court held that for a termination of employment to pass the fairness test, there must be both substantive justification and procedural fairness. I hasten to add that once the employer fails to establish a valid reason for



termination of employment as required under Section 43 of the *Employment Act*, any attempt to comply with the procedural fairness dictates of Section 41 of the Act is an exercise in futility.

18. Having agreed with the trial court that there was no valid reason for the drastic action taken by the Appellant against the Respondent, I hold that the disciplinary processes conducted by the Respondent amounted to nought. I therefore have no reason to cause me to overturn the finding that the termination of the Respondent's employment was unlawful and unfair.
19. In his cross appeal, the Respondent faults the trial court for failing to grant his prayer for reinstatement. In her judgment, the learned trial Magistrate gave the reason for her decision as the lapse of the three (3) year period set by Section 12(3)(vii) of the *Employment and Labour Relations Court Act*.
20. While reinstatement may have been barred by the lapse of 3 years after dismissal, the trial court ought to have considered the alternative remedy of re-engagement, provided under Section 49 (3)(b) of the *Employment Act*.
21. The Respondent had a budding career in the specialised teaching profession and having been removed from the register of teachers, he has no chance of securing comparable employment. Coupling this with the finding that the Respondent did not in way contribute to his dismissal, I disallow the Appellant's appeal and allow the Respondent's cross appeal in the following terms:
 - a. The award of 12 months' salary in compensation is replaced with an order directing the Appellant (Teachers Service Commission) to re-engage the Respondent as a teacher;
 - b. The Appellant is further directed to restore the Respondent to the register of teachers.
22. The Appellant will pay the costs of the appeal and of the proceedings in the court below.

DELIVERED VIRTUALLY AT NAIROBI THIS 17TH DAY OF OCTOBER 2024

LINNET NDOLO

JUDGE

Appearance:

Ms. Njau for the Appellant

Mr. Ongegu for the Respondent

