



**Teachers Service Commission v Kosgei (Appeal E024 of 2022)  
[2023] KEELRC 26 (KLR) (20 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 26 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
APPEAL E024 OF 2022  
NJ ABUODHA, J  
JANUARY 20, 2023**

**BETWEEN**

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

**AND**

**ABRAHAM KOSGEI AKA JOHN KOSGEI ..... RESPONDENT**

**JUDGMENT**

1. The appellant herein being dissatisfied with the judgment of the Trial Court (Hon. Kutwa – SPM Iten) delivered on April 27, 2022 appealed to this court on grounds inter alia:
  - a. The learned Magistrate erred in law in holding that the dismissal of the Respondent violated his right to fair labour practices and right to fair administrative action as envisaged under Article 41 and 47 of the *Constitution*.
  - 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 facts set out in Section 49(4) (b), (c), (d) and (k) of the *Employment Act*.
  - c. The learned Magistrate erred in law and fact when he directed the Appellant to pay the respondent salary arrears from March 21, 2019 to date contrary to the provisions of *Employment Act* and the Common Law doctrine that salary is a reward for work done.
  - d. The learned judge erred in law and fact by ignoring the material placed on the record of the court by the Appellant and in so doing, reached unsubstantiated findings that the Appellant did not establish valid reasons to dismiss the Respondent.
  - e. The learned Magistrate erred in law and fact by ignoring the reasons for dismissal of the Respondent as presented by the Appellant in court and in so doing reached a wrong finding



that the Appellant in carrying out its investigations ought to have visited institutions schooled by the Respondent.

- f. The learned Magistrate erred in law by awarding the Respondent both compensation for wrongful termination and reinstatement contrary to binding court precedents.
2. In support of the appeal, counsel for the appellant Ms. Musundi submitted among others that the trial Magistrate erred when he held that the appellant had failed to prove valid reason for terminating the respondent's contract of employment. In making this finding the Magistrate failed to correctly consider the evidence before him and apply the relevant law so as to determine whether a reasonable employer could have decided to dismiss on those facts. According to Counsel the respondent was dismissed on established grounds which were justifiable after due process of law as envisaged in the [Employment Act](#) and Code of Regulations for Teachers, 2015.
3. Counsel submitted that the respondent was accused of presenting to the appellant a copy of forged KCPE Certificate number 4447373 belonging to one John K. Simatei while he was Simatei K. Abraham, when applying for employment on December 13, 2017. The certificate had alteration in that the name "Abraham" was hand written contrary to the norm and therefore a forgery. The author of the Certificate (KNEC) via a letter dated July 26, 2018 confirmed that the certificate was not genuine. The respondent admitted under oath that the certificate was altered. Due to the nature of the allegations the appellant had reasonable grounds to believe that the respondent had breached the mandatory provisions of the Code and hence his interdiction and subsequent dismissal was justified in the circumstance.
4. Ms. Omusundi further submitted that the foundation of the Employment contract between the appellant and the respondent was on the validity of the academic and professional certificates presented by the respondent. Once the appellant proved that the certificate was genuine, it had no choice but to dismiss the respondent. Counsel therefore submitted that the learned Magistrate erred by failing to consider these facts and instead stated that the appellant ought to have visited the former schools that the respondent attended to confirm the names the respondent used in these institutions. In doing so the learned Magistrate failed to appreciate the case that was before the Court and went off the trajectory and determined an extraneous factor and thus raising the threshold required under section 43 of the [Employment Act](#). In this regard counsel relied on the case of *KRA -V- Reuvel Waithaka Gitahi & 2 others Nairobi Civil Appeal 66A of 2017* where the court stated that it was improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as in a criminal trial before it can take appropriate action subject to the requirements of procedural fairness that are statutorily required.
5. On the issue of reinstatement Counsel submitted that the trial court in awarding reinstatement failed to appreciate that the award of reinstatement was not automatic but rather discretionary depending on the unique set of facts brought out in the case as contemplated under section 49(3) and (4) of the [Employment Act](#) and Section 12(3)(viii) of the [Employment and Labour Relations Court Act](#).
6. Counsel further submitted that the submission of forged documents to acquire employment amounted to gross violation of the code and was a ground for termination. According to counsel, throughout the disciplinary process, the respondent admitted that he had altered his certificate by changing the names. The learned Magistrate ought to have considered the conduct of the respondent vis-à-vis the professional requirement of a teacher that are in consonant with the guiding principles of integrity under chapter 6 of the [constitution](#) such as honesty, accountability and discipline.
7. On the issue of compensation for wrongful termination counsel submitted that section 50 of the Employment's Act provided that before making any award to an employee whose service has been



unfairly terminated, the Court is bound to consider and be guided by the factors set out in section 49. The Court has judicial discretion on compensation to award under section 49 however the exercise of that discretion must not be capricious or whimsical. It ought to be guided by the parameters set out in section 49(4). In this regard counsel relied on the decision of the Court of Appeal in Gladys Chelimo Bii -v- KPLC where the Court stated that the trial court ought to justify or explain the basis of their decision why the claimant is entitled to the maximum award. According to counsel an award of 12 months ought to be made where the employee has demonstrated that their rights were blatantly violated and therefore the award ought to be exceptional and justified. In this regard counsel relied on Kiambaa Dairy Farmers Cooperative Society Ltd –v- Rhoda Njeri & 3 others per Kiage JA. Counsel thus submitted that the learned trial Magistrate in awarding 12 months compensation failed to consider that the respondent had only served for a period of 10 months. That is from January 9, 2018 to November 19, 2018.

8. Ms. Omusundi further submitted that honourable trial Magistrate erred in law by awarding the respondent both reinstatement and compensation for wrongful termination. Counsel submitted that an order for reinstatement was meant to put the respondent to the position he was in before dismissal without loss of salary and benefits. Therefore, where reinstatement has been awarded, an award for compensation was untenable as the same would defeat the guiding principle for remedies under section 49, that is the remedies are awarded to compensate the claimant and not to punish the employer.
9. On the issue of payment of salary arrears from March 21, 2019 to date, counsel submitted that it was contrary to the [Employment Act](#) and common law doctrine that salary is reward for work done. The trial magistrate therefore erred in awarding the respondent salary arrears from the time of interdiction to the date of reinstatement. The respondent stopped teaching from November 19, 2018 when he was interdicted and subsequently dismissed with effect from October 2, 2020 effectively severing the employer – employee relationship between the appellant and respondent.
10. In conclusion counsel for the appellant submitted that the appeal be allowed and the judgment and decree of the trial Magistrate and all consequential orders be set aside. The appellant further sought the costs of the appeal.
11. Tunoi for the respondent on the other hand submitted that the respondent was not accorded a fair hearing before interdiction in that he was not issued with a show cause letter before and that he was given insufficient notice. Further at the disciplinary hearing the respondent was not heard but only allowed to present documents.
12. Counsel further submitted that from the evidence it turned out that the name John K. Simatei and Abraham K. Simatei belong to one and the same person, the appellant. According to Counsel the respondent registered for KCPE at Jemunada Primary School as John K. Simatie in 1996 after which he was baptized at AIC and given the name Abraham K. Simatei on December 8, 1996. The respondent was then admitted to Yemit Boys Secondary School as John K. Simiatei but later changed to Abraham K. Simatei as per the communion Card produced before the trial Court. This name appeared in all his subsequent academic certificates and identification documents.
13. Tunoi further submitted that the appellant’s witness Judith Ethuro admitted that the appellant never did a background check of the schools hence according to counsel, if proper investigation were done, the respondent’s service could not have been terminated. Counsel further submitted that it was therefore clear that the reasons for termination of the respondent’s employment and removal from the teachers register were not justifiable. The trial Court was therefore right in ordering reinstatement and twelve months salary of unlawful termination.



14. The gist of this appeal turns around the issue whether the trial court was justified in reaching a finding that the appellant had no valid or justifiable reasons for terminating the services of the respondent and eventually removing his name from the register of teacher.
15. According to the appellant the respondent presented a forged certificate number 4xxxxx3 belonging to one John K. Simatei while he was Simatei K. Abraham. While applying for employment on December 13, 2017. According to the appellant the certificate had alterations in that the name “Abraham” was handwritten contrary to the norm therefore a forgery. The author of the certificate, KNEC via a letter dated July 26, 2018 confirmed that the certificate was not genuine. The appellant further contended that the respondent admitted the foregoing facts on oath. Based on these facts the appellant faulted the trial Court for not finding that the appellant had valid and justifiable reasons for terminating the respondent’s service and removing his name from the register of teachers.
16. The respondent on its part denied that there was a forgery and that the respondent was registered for KCPE at Jemunada Primary school as John K. Simatei in 1996 but changed to Abraham K. Simatei after he was baptized. Further he was admitted to Yemit Boys Secondary School as John K. Simatei but later change to Abrahm K. Simatei as per the communion card produced before the trial Court.
17. The respondent’s further contended that the appellant never conducted a background check of the schools concerned hence had proper investigations been done, the respondent’s service could not have been terminated.
18. This being a first appeal, the role of the Court has always been stated to be that the Court re-evaluates the evidence and not bound by the findings and observations of the trial court. The Court enjoys the liberty to reach its own conclusions after evaluating the evidence before the trial Court.
19. The trial Court found that because the appellant did not visit the institutions the respondent schooled and or talk to their representatives who were on the ground, the respondent was not subjected to due process and rules of natural justice. The appellant according to the trial Magistrate, did not therefore justify the grounds for terminating the claimants service under Section 47 of the *Employment Act*.
20. The respondent in his affidavit sworn on February 28, 2019 (page 24 of the record of appeal) stated at paragraph 3 that his KCPE certificate got defaced and that he then attached his KCPE certificate and school leaving certificate showing his name as Simatei K. John. At paragraph 4 of the said affidavit, he further stated that he had applied to KNEC to have his KCPE Certificate reissued but was informed by KNEC that they will communicate to the TSC.
21. Stopping here, the Court notes that the affidavit in issue was sworn in February, 2019, almost three months after the respondent was interdicted. Further, the respondent alleges his KCPE certificate was defaced and then allegedly attached another together with his school leaving certificate showing his name as Simatei K. John. On the same breath, the respondent stated that he had applied for a re-issue of his certificate from KNEC but was informed by the letter that the same would be sent to TSC. This therefore begs the question about where the respondent obtained the one he attached with the affidavit yet he had applied for a reissue of the defaced certificate.
22. The Court has had a look at the KCPE certificate in issue (page 36 of the record) and noted that the alleged defacement seemed to have affected one sport only. That is the name “Abraham” which is clearly handwritten. The alleged defacement therefore seems not to have been accidental but deliberate and targeted to alter the name “John” to “Abraham.”



23. KNEC is the maker and custodian of certificates issued by them and once they disown a certificate as not issued by them, the validity of such a certificate ceases to exist and any action taken on the basis of the certificate becomes affected if not void.
24. The appellants exercised reasonable and sufficient due diligence when they sought to authenticate the respondent's KCPE Certificate with the issuer. It was not necessary for the appellant to investigate further what names the respondent used in which institution. In any event if both names belonged to the respondent then why attempt to alter the KCPE certificate? The respondent did not explain how or who attempted to deface his certificate hence it could only be assumed to be that he was the one responsible in order to further his mischief.
25. To this extent the Court finds and holds that the learned trial Magistrate erred in law and fact by ignoring the material placed on the record by the appellant and in so doing reached unsubstantiated finding that the appellant did not establish valid reasons for dismissing the respondent and deregistering him from the register for Teachers.
26. The Court having so found, the other consequential orders emanating from the impugned judgment are hereby similarly set aside.
27. In conclusion the appeal is hereby allowed and the Court substitutes the order of the lower Court entering judgment against the appellant in favour of the respondents with an order dismissing the suit with costs.
28. The appellant shall further have costs of the Appeal.
29. It is so ordered

**Dated and delivered at Eldoret this 20<sup>th</sup> day of January, 2023**

**Abuodha Nelson Jorum**

**Judge ELRC**

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**ELD ELRC E024 OF 2022 JUDGMENT**

