



REPUBLIC OF KENYA



**KENYA LAW**  
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**Maiko v Teachers Service Commission (Cause E022 of 2022)  
[2023] KEELRC 684 (KLR) (22 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 684 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
CAUSE E022 OF 2022  
S RADIDO, J  
MARCH 22, 2023**

**BETWEEN**

**ALFRED OMAIYO MAIKO ..... CLAIMANT**

**AND**

**TEACHERS SERVICE COMMISSION ..... RESPONDENT**

**JUDGMENT**

1. Between May and June 2019, the Teachers Service Commission (the Respondent) conducted an investigation on fake employment scams in Migori/Homa Bay counties. The investigations were commenced after the receipt a complaint from a whistle-blower.
2. Upon the conclusion of the investigations, the Respondent issued a show-cause notice dated 23 August 2019 to Alfred Omaiyo Maiko (the Claimant) and the notice set out 3 allegations.
3. The Claimant was requested to respond within 7 days.
4. The Claimant responded on 2 September 2019 and on 24 September 2019, he was interdicted. The interdiction letter made reference to two allegations and the Claimant was instructed to make a written response within 21 days. The Claimant responded on 22 October 2019.
5. On or around 31 July 2020, the Respondent invited the Claimant to attend a disciplinary hearing scheduled for 3 September 2020.
6. The invitation prompted the Claimant to write to the Respondent requesting to be supplied with witness statements from his accusers.
7. The hearing was deferred and the Respondent informed the Claimant accordingly through a letter dated 10 September 2020. On 16 October 2020, the Respondent wrote to the Claimant advising him that the hearing would take place on 17 November 2020.



8. The Claimant attended the hearing and the Respondent wrote to him on 10 December 2020, to notify him of dismissal from service.
9. The Claimant appealed on 2 March 2021 and a review hearing was held on 4 March 2022. The appeal was dismissed and the Claimant informed through a letter dated 9 March 2022.
10. The Claimant then sued the Respondent on 25 April 2022, alleging unfair termination of employment.
11. The Respondent filed a Memorandum of Response on 27 June 2022, and the Claimant filed a Reply on 21 July 2022. On the same day, the Claimant filed his proposed Issues.
12. The Cause was heard on 26 September 2022, 13 December 2022 and 7 February 2023.
13. The Claimant filed his submissions on 20 February 2023, and the Respondent on 3 March 2023.
14. The Court has considered the pleadings, evidence and submissions. The Court has identified the Issues for determination as examined hereunder.

### **Unfair termination of employment**

#### **Procedural fairness**

15. The Claimant challenged the procedural fairness of the termination of his employment on the primary grounds that the disciplinary hearings were composed of different Commissioners, he was not allowed an opportunity to call 9 witnesses he had lined up or to be accompanied by a colleague, differential treatment, failure to comply with the Respondent's *Code of Regulations*, failure to acquit him when evidence in support of the charges were the same and the failure to give reasons for dismissing the appeal.
16. The guiding statutory beacons on procedural fairness in the employment arena are codified in sections 35(1) and 41 of the *Employment Act*, 2007. Where an employer has internal protections, the employer should comply with its provisions.
17. In the case of teachers, there is a *Code of Regulation* for Teachers which has elaborate protections to ensure there is fair play.

#### **Code of Regulation for Teachers**

18. The Claimant asserted that the Respondent did not comply with Regulation 146(6) of the *Code of Regulation for Teachers*.
19. The Regulation is in the following terms:
  - (6) The Investigating Panel shall, upon investigation, accord the head of 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 seven days to prepare a defence;
    - (d) given an opportunity to appear in person before the Investigation Panel, unless his conduct makes it impossible for the investigation to proceed in his presence;
    - (e) present when the witnesses are being interviewed by the Investigation Panel;



- (f) warned that any incriminating evidence may be used against him during the disciplinary proceedings; and
  - (g) given an opportunity to adduce and challenge any adverse evidence.
20. The Respondent caused an investigation to be conducted from 20 May 2019 to 1 June 2019 upon receipt of the complaints against the Claimant from a whistle-blower.
  21. The investigations team interviewed several witnesses including the key witnesses against the Claimant. The Claimant was also interviewed.
  22. The Respondent's third witness who was part of the investigations team testified that the team conducted interviews and recorded statements at the County TSC offices as well as in the field (schools), but did not allow the Claimant an opportunity to challenge the evidence collected against him during the investigations.
  23. He also testified that availing a teacher an opportunity to challenge the evidence during the investigatory stage would depend on the nature of the case and that in the case of the Claimant, he was informed of the allegations in the interdiction letter.
  24. He further testified that a copy of the whistle-blower complaint was not given to the Claimant during the course of the investigations or during the disciplinary hearing.
  25. The Respondent put in place a [Code of Regulations](#) which guides its investigations against teachers. The [Code](#) and more so Regulation 146 appears to place very stringent and onerous duties upon the Respondent when conducting investigations.
  26. The [Code](#) is an internal document of the Respondent and it was not imposed on it. It is and was, therefore, under an obligation to scrupulously comply with the protections in place to ensure that the rights of Claimant (and other teachers under investigation) are assured.
  27. The Respondent failed to adhere to the protections assured teachers (Claimant). It did not request the Claimant to participate in the investigations as envisaged under the [Code](#). The Claimant was not allowed to participate in the evidence/statement recording of (potential) witnesses.
  28. On this limb, the Respondent failed the procedural fairness test.

#### **Failure to supply documents/records**

29. The Claimant further challenged the procedural propriety of the process leading to the termination of his contract on account of failure to supply him with documents to enable him defend himself.
30. Upon being served with a letter inviting him to the disciplinary hearing set for 3 September 2020, the Claimant requested the Respondent through a letter dated 18 August 2020 to provide him with witness statement(s) as contemplated by Regulation 146(4) of the [Code of Regulation for Teachers](#).
31. The Respondent replied to the request on 24 August 2020, and requested the Claimant to pay for copies of the statements. The Claimant paid and was supplied with only 2 witness statements.
32. However, during the disciplinary hearing, the Respondent presented over 2 witnesses. The statements of all these witnesses should have been supplied to the Claimant.
33. The failure to supply him with the statements tainted the process.

#### **Allowing the Claimant to call all his witnesses**



34. While responding to the interdiction letter, the Claimant had alerted the Respondent that he intended to call 10 witnesses. In the response, he listed the names of the witnesses.
35. The minutes of the disciplinary hearing do not indicate whether the Respondent allowed the Claimant to present his witnesses.
36. Apart from not allowing the Claimant's witnesses, the Respondent did not inform the Claimant of the right to be accompanied by a colleague of his own choice during the oral phase of the disciplinary process.
37. Section 41 of the *Employment Act*, 2007 which applied in the case dictated that the Claimant be allowed the opportunity to be accompanied.
38. Again, the Court finds fault with the Respondent for not according the Claimant the protections assured him of presenting witnesses and being accompanied during the hearing.

### **Two Disciplinary Panels**

39. The Claimant asserted that he was prejudiced since his disciplinary case was heard by different Committee members.
40. The records produced before the Court show that the Disciplinary Committee hearing on 3 September 2020 comprised Mr Mbarak S. Twahir and Mr Mbage Nganga as Commissioners. The Committee did not conclude its work because of the absence of key witnesses.
41. When the hearing resumed on 17 November 2020, the 2 Commissioners were present and the key witnesses testified and were cross-examined.
42. The record does not reflect that a third Commissioner participated in the proceedings. However, the Respondent's third witness admitted that a Commissioner who participated in the first hearing did not participate in the second hearing.
43. The first hearing was recorded. The second hearing was equally recorded. The transcripts were filed in Court.
44. A disciplinary hearing is not a mini-court. There was no suggestion that the additional Commissioner was not appraised of the first proceedings.
45. The Court, therefore, finds that the mere fact that there was a change in the composition of the membership of the Disciplinary Committee did not impair the Claimant's right to procedural fairness.

### **Reasons for termination of contract/rejection of appeal**

46. The show-cause notice and the interdiction letter informed the Claimant of the allegations to confront.
47. The letter notifying the Claimant of his dismissal from service set out the reason for the dismissal.
48. The Claimant then appealed against the decision and on 9 March 2022, the Respondent informed him:

### **Dismissal upheld.**

49. However, the Respondent did not give any reasons for upholding the dismissal.
50. The Respondent had given the Claimant the reasons for dismissal and in this Court's view, the failure to give reasons for upholding the dismissal would not have materially changed the facts or decision for purposes of a further appeal or court action.



51. The Court is of that view because principally, a cause of action accrues with a dismissal and not determination of an internal appeal, where the appeal is declined.

### **Substantive fairness**

52. Sections 43 and 45 of the *Employment Act*, 2007 impose a burden on an employer to prove the validity and fairness of the reasons for dismissing an employee.

53. The reason which was given for the dismissal of the Claimant was:

You were involved in fraudulent activities by selling and/or offering fake employment and appointment letters to the following among others Bivon Ombado TSC/787790 who reported to Rapogi Boys Secondary School on 22/1/2019 and Solomon Abich TSC/588670 who reported to Kadianga Primary School on 18/2/2019.

54. Bivon Ombado testified that his father who was employed in the school the Claimant was heading gave him application forms to fill after which he received an appointment letter from the father.

55. The witness stated that he resigned from the school he was teaching in and reported to Rapogi Secondary School where he worked for 2 months without payment and that soon news of an employment scam broke out.

56. Yashon Ombando, father to Bivon also testified and stated that the Claimant recruited him as an agent to facilitate employment with the Respondent in exchange for money. He also testified that the Claimant gave him forms which his son filled out before he (the Claimant) gave him an appointment letter and that later, the scam unravelled after a journalist secured the forms from him.

57. The Claimant urged the Court to disregard the testimony because Mr Ombando had a bone to pick up with him because he had compelled him to retire upon passing the retirement age.

58. He further testified that Mr Ombado was part of the local community who had resisted his transfer to the school.

59. Mr Ombando was a cook at the school headed by the Claimant. He appeared not to be a person who could have manufactured the employment forms and appointment letters. There was no evidence that he was part of the community who resisted the posting of the Claimant to the school.

60. The Court, therefore, sees no basis for concluding that he had a vendetta against the Claimant and or that his testimony was not credible.

61. The Court finds that the Respondent had valid and fair reasons to dismiss the Claimant.

### **Compensation**

62. The Claimant served the Respondent for over 30 years. The Respondent had valid and fair reasons to terminate his employment but got the process wrong.

63. The Claimant is entitled to his pension in light of the information in the public domain from the Public Service Commission.

64. In consideration of these factors, the Court is of the view that the equivalent of 6 months' gross wages as compensation rather than reinstatement would be appropriate (gross wage was Kshs 145,432/- in September 2019).

### **Conclusion and Orders**



65. The Court finds and declares that the dismissal of the Claimant though based on valid and fair reasons did not meet the threshold of procedural fairness.
66. The Claimant is awarded:
  - (i) Compensation Kshs 872,592/-
67. The compensation to attract interest at court rates from date of judgment.
68. Claimant to have costs.

**DELIVERED VIRTUALLY, DATED AND SIGNED IN KISUMU ON THIS 22<sup>ND</sup> DAY OF MARCH 2023.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

**APPEARANCES**

For Claimant Mathew Nyabena & Co. Advocates

For Respondent Allan M. Sitima Advocate, Teachers Service Commission

Court Assistant Chrispo Aura

