



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mutiso v Teachers Service Commission (Cause 570 of 2019)  
[2023] KEELRC 610 (KLR) (13 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 610 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 570 OF 2019  
JK GAKERI, J  
MARCH 13, 2023**

**BETWEEN**

**VICTOR SAMMY MUTISO ..... CLAIMANT**

**AND**

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

**JUDGMENT**

1. The Claimant commenced this suit by a Memorandum of Claim filed on 28<sup>th</sup> August, 2019 alleging unlawful and unfair dismissal from employment, non-payment of terminal dues and damages.
2. The Claimant avers that he was employed by the Respondent in 1994 as a teacher earning a total of Kshs.85,641.00 until dismissal on 28<sup>th</sup> February, 2018, served diligently and rose to the rank of School Principal.
3. The Claimant further avers that he was dismissed from employment on untrue allegations of immorality by one Pauline Kamene who had teamed up with her husband and a teacher at the school against him. That he was not accorded proper hearing and was interdicted by letter dated 23<sup>rd</sup> November, 2015 and his salary was reduced by half.
4. It is the Claimant's case that his statement was disregarded and his witnesses were never accorded audience by the Respondent and it relied on hearsay as evidence.
5. The Claimant prays for;
  - a. Reinstatement to his former employment as School Principal.
  - b. In the alternative, a declaration that the Respondent's dismissal of the Claimant was illegal, unlawful, wrongful and unfair.
  - c. Damages for wrongful dismissal.



- d. Terminal benefits of Kshs.4,710,255.00 comprising:
    - i. One month's salary in lieu of notice Kshs.85,641.00
    - ii. Unpaid salary for November 2015 to February 2018 Kshs.2,397,948.00.
    - iii. 12 months compensation for unfair dismissal Kshs.1,027,692.00.
    - iv. Service pay at the rate of 15 days for every completed year of service Kshs.1,198,974.00.
  - e. Costs of the suit.
  - f. Interest on (c) and (d) above.
  - g. Any other or further award this court may deem fit to grant.
6. In its response to the claim filed on 18<sup>th</sup> December, 2019, the Respondent avers that the Claimant was its employee and was not dismissed from service in March 2019 but 28<sup>th</sup> February, 2018.
  7. That before the allegations facing the Claimant were brought to the limelight, the Respondent held the Claimant's trust high and had entrusted him leadership as the Principal, Syomikuku Secondary School from 10<sup>th</sup> August, 2018.
  8. It is the Respondent's case that the Claimant was afforded a fair hearing as the charges were read out to him, accorded an opportunity to write a statement in response, appeared before the County Investigation Panel as a preliminary safeguard, cross-examined witnesses, appeared before the Respondent's Disciplinary Panel and cross-examined witnesses, the decision was communicated on time and was afforded an opportunity to appeal and a decision was communicated.
  9. That the Claimant's interdiction was fair, lawful and procedural as it was founded on the findings of the Board of Management (BOM) and a County Disciplinary Panel.
  10. That the Respondent acted in accordance with the Code of Regulations for Teachers.
  11. That the Respondent dismissed the Claimant only once on or about 28<sup>th</sup> February, 2018 and the salary stoppage was in conformity with the Code of Regulations for Teachers.
  12. The Respondent denies that the Claimant availed his witnesses and they were denied audience at the county level or by the Respondent.
  13. That the Respondent relied on fast hand oral and written evidence to arrive at its decision to dismiss the Claimant from employment.
  14. It is the Respondent's case that the Claimant was interdicted on or about 23<sup>rd</sup> November, 2015 to pave way for investigation and the hearing was delayed on account of the Claimant's Applications in ELRCC No. 950 of 2016 whose ruling was delivered on 16<sup>th</sup> March, 2017.
  15. The Respondent denies that the Claimant is entitled to the reliefs sought in particular, notice pay and salary during interdiction as he had sufficient notice since 20<sup>th</sup> November, 2015 and was not rendering services during interdiction.
  16. Finally, the Respondent avers that it had a valid and fair reason for terminating the Claimant's employment, based on his conduct and employed a fair procedure as prescribed by the Code of Regulations for Teachers and prays for dismissal of the suit with costs.



## **Claimant's evidence**

17. The Claimant's written statement which he adopted in court rehashes the contents of the Memorandum of Claim.
18. On cross-examination, the Claimant confirmed that allegations of immoral behaviour had been made against him and he was bound by the Code of Regulations for Teachers and other circulars issued from time to time and that the Code barred him from sitting in the BOM Panel hearing the allegations facing him.
19. The witness confirmed that he was not supposed to sit in the meeting. He admitted having acted as the secretary and signed the minutes.
20. The Claimant testified that there was no conflict of interest as he only presented the allegations to the board.
21. The witness further confirmed that the Kitui County Disciplinary Panel sat on 4<sup>th</sup> November, 2015 and he was present and defended himself and witnesses gave evidence against him in his absence and was not informed of the evidence adduced and was subsequently interdicted.
22. CWI further confirmed that he was invited for a hearing before the Commission and met witnesses who had given evidence previously and cross-examined them as evidence at page 145 of the Respondent's Bundle of documents reveals.
23. That he had no witness on 5<sup>th</sup> February, 2018 and was notified of the outcome and a dismissal letter dated 28<sup>th</sup> February, 2018 issued.
24. That he was notified of the right to appeal and applied for review, participated in the review and was notified of the outcome upholding the dismissal from employment.
25. The witness confirmed that the letter dated 24<sup>th</sup> April, 2015 from Ilako Mututa Secondary School was addressed to the Chairman of the BOM and had no receipt stamp or acknowledgment as was the letter of even date from Kyamboo Secondary School addressed to the Claimant. The letters had conflicting dates.
26. The witness further confirmed that the letter from Kyulungwa Secondary School dated 22<sup>nd</sup> April, 2015 had no addressee or dates when the complainant, Pauline Kamene was admitted or left. The Claimant denied having procured the letters to salvage his case.
27. The Claimant testified that he was aware of the Code of Regulations which prescribed payment of half salary during interdiction for immoral behaviour but was unaware of forfeiture of gratuity.
28. Finally, the witness confirmed that allegations had been made against him, he was taken through a disciplinary process and informed the outcome.
29. On re-examination, the witness testified that he only appeared with witnesses at the appellate stage as the letter dated 23<sup>rd</sup> August, intimated so and he could not trace them before the hearing.
30. That he did not examine witnesses at the County level as the main witness was not present but cross-examined her during the hearing by the Respondent.
31. Strangely, the witness testified that he was not given a letter of termination yet he has one on record.



## Respondent's evidence

32. RWI, CM Kertich the Deputy Director Discipline Division testified that in its attempt to reign on sexual harassment of learners by teachers, the Respondent issued Circular No. 3 of 2010 entitled "Protection of Pupils/Students from Sexual Abuse" to provide guidelines on the relationship between teachers and learners.
33. That the Respondent's County Director In-charge of Kitui County received a complaint from Centre for Human Rights and Civic Education dated 9<sup>th</sup> March, 2015 on allegation of sexual molestation made against the Claimant by one Pauline Kamene, a student at Syomikuku Secondary School.
34. RWI testified that, the Director of Education caused the Mwingi Central Sub-County Education Officer to summon the Claimant and directed him to hold a Board of Management (BOM) to deliberate the issues raised and the BOM held a meeting on 22<sup>nd</sup> March, 2015 with the Claimant as secretary and Pauline Kamene testified after the Claimant had been requested to leave the room. The BOM directed further investigations on the matter.
35. That the Claimant called a Student Assembly and informed the students that he would discontinue Saturday remedial classes and three (3) days later, the students walked out of the school waving placards stating that Kamene should look for another school and they needed their Principal back. By then the Claimant had not reported to work even after being notified by the teacher on duty.
36. The BOM meeting of 29<sup>th</sup> April, 2015 questioned those deemed must culpable for the walkout including Pauline Kamene.
37. The witness further testified that an investigatory assessment of the Claimant's school by the Kitui County Education Office established that, Pauline Kamene was supplying ripe bananas to the school upto 3<sup>rd</sup> term 2014, Pauline Kamene had agreed to have a sexual relationship with the Claimant as he had threatened to withdraw the tender and the two had sexual encounters at Flamingo and Syongombe Guest Houses in Mwingi Town over weekends and holidays. Pauline Kamene opted to terminate her relationship with the Claimant when she discovered that the Claimant had sent a romantic message to a fellow student named Christine Kalungu and the Claimant had attempted to settle the issue but Pauline Kamene declined.
38. That the investigatory assessment recommended disciplinary action against the Claimant and after granting the Claimant a hearing, the County Disciplinary Panel recommended interdiction of the Claimant and the County Director, Kitui County issued an interdiction letter on 23<sup>rd</sup> November, 2015 for incitement of students and immoral behaviour and was accorded 21 days to file his statement of defence.
39. The Claimant responded by letter dated 24<sup>th</sup> December, 2015.
40. The witness testified that the BOM's mandate was investigatory and intended to kick-start due process as the disciplinary case was heard and determined by an independent and impartial committee of the Commission.
41. The witness testified that the interdiction was based on preliminary evidence which raised substantial and reasonable grounds that the Claimant was involved in professional misconduct and he was accorded a fair hearing and was dismissed on 28<sup>th</sup> February, 2018.



42. It was RWI's testimony that the Claimant was not summarily dismissed from service but was taken through a disciplinary process and accorded notice vide the letter of interdiction dated 23<sup>rd</sup> November, 2015.
43. On cross-examination, RWI confirmed that although she had not participated in the disciplinary hearing directly, it was processed by her division and her duties included supervision of investigations at the county level and issuing interdiction letters.
44. The witness confirmed that interdiction was not tantamount to termination of employment. That the misconduct allegedly committed by the Claimant attracted zero salary during interdiction.
45. Finally, the witness confirmed that the Claimant was employed on 17<sup>th</sup> March, 1994 and had risen to the level of School Principal and had no blemish before appointment as head teacher.

### **Claimant's submissions**

46. The issues for determination according to the Claimant's counsel are;
  - i. Whether termination of the Claimant's employment was unlawful and unfair and
  - ii. Whether the Claimant is entailed to the prayers sought.
47. As regards the 1<sup>st</sup> issue, counsel relied on the provisions of Section 45 of the [Employment Act](#) to urge that for a termination to pass as lawful, it must be substantively and procedurally fair.
48. It was argued that the Respondent had no valid reason to terminate the Claimant's employment as the specific dates on which the alleged sexual intercourse took place were not identified for the Claimant to respond and only two witnesses testified on the issue, Pauline Kamene and her husband and no evidence of a message or call history was adduced.
49. That Pauline and her husband had a vendetta against the Claimant arising from termination of the latter's employment at Syomikuku Secondary School.
50. Reliance was made on the decision in Samuel Kamau Kariuki V Teachers Service Commission (2020) eKLR to urge that the Claimant's dismissal was unlawful and unfair.
51. On incitement, it was submitted that no witness testified on the issue and the walkout happened in the Claimant's absence and the teacher on duty did not notify him early enough for his intervention.
52. Counsel further submitted that the claim was not afforded an opportunity to call witnesses and no evidence was adduced to show that he was asked if he had a witness or notified of his right to call one.
53. On the reliefs sought, counsel submitted that Section 49(3)(a) of the [Employment Act](#), 2007 gave the court power to order reinstatement of the Claimant as termination was unfair, he could not practice his profession having been removed from the register and the Respondent was a big organization.
54. Reliance was made on the decision in Kennedy Ondigo Dero V Teachers Service Commission (2019) eKLR to buttress the submission.
55. On notice pay, it was submitted that although the dismissal letter was dated 28<sup>th</sup> February, 2018, the dismissal took effect on 5<sup>th</sup> February, 2018 and the Claimant was entitled to the unpaid salary, 12 months compensation and service pay under Section 35(5) of the [Employment Act](#), 2007.



## Respondent's submissions

56. Counsel for the Respondent identified three issues for determination, namely;
  - i. Whether the Claimant was dismissed on valid ground.
  - ii. Whether or not due process was followed.
  - iii. Whether the Claimant is entitled to the reliefs sought.
57. Counsel submitted that by the letter of appoint, the Claimant became bound by the *Teachers Service Commission Act*, Teachers Service Commission Code of Conduct and Ethics, the Code of Regulations for Teachers and other circulars issued by the Respondent from time to time and was bound to uphold professional ethics of the profession.
58. Counsel relied on the provisions of Section 43(2) of the *Employment Act* to urge that the Respondent had valid and reasonable grounds to terminate the Claimant's employment as demonstrated by the evidence on record, from the complaint by the Centre for Human Rights and Civic Education to the investigations by the BOM, the County Education Office and disciplinary panel and the Commission.
59. Counsel submitted that Pauline Kamene, the Claimant's pupil confessed to having had a romantic relationship with the Claimant.
60. Counsel further submitted that the BOM Minutes of 29<sup>th</sup> April, 2015 revealed that there was a mass walkout by students from the school after the Claimant had addressed them though he feigned ignorance of the strike.
61. On the character of evidence relied upon by the Respondent, counsel relied on the sentiments of Rika J. in *Tom Ochako V Teachers Service Commission (2022) eKLR*.
62. The court was urged to take into consideration the values and principles of public service and betrayal of trust by the Claimant.
63. As to the procedure employed by the Respondent, counsel urged that Article 237(2) of *the Constitution* of Kenya, 2010 gave the Respondent power to terminate the employment of teachers. That Section 12(2) of the *Teachers Service Commission Act* gave the Commission power to receive written or oral statements from the public and require attendance of a person before it.
64. Regulation 139 of the Code of Regulations for Teachers was relied upon to urge that the Claimant was accorded a fair hearing in compliance with the Code and the *Employment Act* in that after the complaint was received, the Respondent conducted investigations through its agents, the BOM Syomikuku Secondary School and the Ministry of Education.
65. That at the BOM meeting, the Claimant acted as Secretary in contravention of Regulation 146(5), a fact he was aware of and had to be requested to step out for the complainant to testify.
66. It was urged that the Claimant wrote a statement in defence, and was invited for a hearing before the County Disciplinary Panel which recommended interdiction and he was accorded time to respond, invited for a hearing which took place on various dates, 26<sup>th</sup> May, 2017, 18<sup>th</sup> September, 2017 and 5<sup>th</sup> February, 2018 by a panel constituted in accordance with the Regulations and the panel recommended dismissal of the Claimant from employment.
67. That the Claimant appealed and the Appellate panel upheld the decision of the disciplinary panel.



68. Reliance was made on the decisions in *Nampak Corrugated Wadeville V Khoza* (JA 14/98 (1998) ZALAC 24 cited by the Court of Appeal in *Judicial Service Commission V Gladys Boss Sholei* (2014) eKLR, *Anthony Mkala Chitavi V Malindi Water & Sewerage Co. Ltd* (2013) eKLR, *Betty Francis Barngetuny & another V Teachers Service Commission & another* (2015) eKLR and *Andrew Nthiwa Mutuku V The Court of Appeal & 4 others* to urge that the Respondent accorded the Claimant a fair hearing and thus upheld his right to fair hearing.
69. It was submitted that Respondent had met the threshold of procedural fairness.
70. As regards the reliefs sought, it was submitted that the remedy of reinstatement was unavailable owing to lapse of time. The decision in *Sotik Highlands Tea Estates Ltd V Kenya Plantation & Agriculture Workers Union* (2017) eKLR was relied upon.
71. On the declaration, the provisions of Section 47(2) and 48 of the *Teachers Service Commission Act* and Section 47(5) were cited to urge that the Respondent discharged its burden of proof.
72. Finally, counsel urged that the Claimant was not entitled to damages for wrongful dismissal, terminal benefits or costs of the suit.

### **Determination**

73. After careful consideration of the pleadings, evidence before the court and rival submissions by counsel, the issues for determination are;
  - i. Whether termination of the Claimant's employment by the Respondent was unfair.
  - ii. Whether the Claimant is entitled to the reliefs sought.
74. As regards the dismissal, the starting point is a summary of the relevant provisions and principles of law in the *Employment Act* and case law.
75. In a nutshell, the provisions of the *Employment Act*, 2007 prescribe the law on termination of employment in its various forms and employers are obligated to apply them. These include, notice (Section 35); reason(s) for termination (Section 45); burden of proof (Section 43); justification (Section 47 (5)) and procedure (Section 41), among other provisions.
76. The Court of Appeal highlighted some of these provisions in its decision in *Pius Machafu Isindu V Lavington Security Guards Ltd* (2017) eKLR.
77. These provisions are to the effect that for a termination of employment to pass muster, it must be substantively justifiable and procedurally fair, as aptly captured by Ndolo J. in *Walter Ogal Anuro V Teachers Service Commission* (2013) eKLR as follows;

“For a termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness . . .”
78. Similar sentiments were expressed by the Court of Appeal in its decision in *Naima Khamis V Oxford University Press (E.A) Ltd* (2017) eKLR.
79. The foregoing provisions and sentiments leave no doubt that for any termination of employment to pass as lawful, the employer must prove that it had a valid and fair reason for the termination and effected the termination in accordance with a fair procedure encapsulated by the provisions of Section 41 of the *Employment Act*, 2007.



80. These provisions impose an onerous burden on employers on matters germane to termination of employment.
81. Having delineated the framework for analysis, I will now proceed to examine whether in the instance case the Respondent complied with the foregoing provisions and propositions and its internal regulations.

### **Reason for termination**

82. It is not in dispute that the Claimant was employed by the Respondent as a teacher on 17<sup>th</sup> March, 1994 and confirmed as permanent and pensionable on 13<sup>th</sup> September, 1996 and rose to the position of Head Teacher.
83. It is also not in dispute that the Claimant was Head Teacher of Syomikuku Secondary School from 2010 until dismissal in 2018.
84. It is common ground that by letter dated 9<sup>th</sup> November, 2015, the Centre for Human Rights and Civic Education lodged a complaint against the Claimant on behalf of one Pauline Kamene, a pupil in form 4 at Syomikuku Secondary School accusing the Claimant of threats, abuse and assault among others.
85. The Complaint was made to the Claimant directly and the County Director of Education, Kitui. The latter requested the Claimant to convene a BOM to investigate the issue and a meeting took place on 27<sup>th</sup> March, 2015. Minutes of the meeting revealed that Pauline Kamene was admitted to the school in 2014 and testified before the BOM.
86. Noteworthy, the Claimant sat in the meeting as Secretary contrary to the Respondent's Code of Conduct for Teachers, a fact he was aware of.
87. The minutes captured nothing of the alleged sexual harassment and threats.
88. The minutes are also silent on whether and who took minutes when the Claimant was directed to leave the room and when he returned to the meeting. Handwritten minutes would have been more reliable as evidence of what Pauline Kamene actually stated.
89. From the reactions to the allegations, the minutes state that the BOM was suspicious since Pauline Kamene was a married woman and her husband Mr. Mutunga had been a BOM teacher at the school until 2014. In totality, the reactions reveal a family conspiracy to punish the Claimant.
90. Puzzlingly, the BOM members did not find it necessary to hear the Claimant's rebuttal of Pauline Kamene's allegations either on 27<sup>th</sup> March, 2015 or 29<sup>th</sup> April, 2015 yet the issue was considered on both meetings. Similarly, the BOM did not question the Claimant on the student walkout on 30<sup>th</sup> March, 2015. The evidence of the Claimant was central in ascertaining the circumstances.
91. Since the Claimant's employment was terminated on two grounds, it is essential to examine them separately.
92. As regards the sexual relationship between the Claimant and Pauline Kamene, Pauline Kamene stated that the Claimant was against her because she had terminated their relationship when she discovered that the Claimant had other girlfriends. She did not provide the specifics which were disclosed in her statement to the County Disciplinary Panel and the Commission dated 4<sup>th</sup> November, 2015.
93. The two and half page handwritten statement details the intimate relationship between the Claimant and his pupil from June 2014, after admission to the school in May.



94. Instructively, before her admission to the school, Pauline Kamene was supplying bananas to the school, a fact the Claimant confirmed before the Commission.
95. Relatedly, the Claimant had given a bond in a matter Pauline Kamene's husband was involved. It was Kamene's admission that as she accepted the request for a relationship with the Claimant, the Claimant was threatening to withdraw the bond and supply of bananas and they met at Syongome and Flamingo Guest houses on weekends and holidays for sex. The Claimant admitted having been to the former guest house.
96. Pauline Kamene disclosed that she ended the relationship when she saw a romantic message on Christine Kalungu's phone, from the Claimant Christine was a fellow pupil at the school.
97. Pauline Kamene confirmed on cross-examination by the Claimant that she knew the Claimant's phone number off-head. Pauline Kamene confessed that she had to visit Mwingi General Hospital to confirm her health status and was late for studies the following Saturday and the Claimant purported to discipline her but she refused as she had gotten used to reporting to school late as a favour from the Principal. The Claimant was sent away and it was then that she resolved to confess the story to her guardian Mr. Mutunga and reported to the Centre for Human Rights and Civic Education and took the letter to the County Director of Education. That she did not report to school until Government Officials instructed her to do so but on the day she was due to report, the school was on strike and she feared for her life.
98. It was her testimony that although she had been advised to report to school, she feared that the environment would be uncondusive and opted to take the examination at the end of the year.
99. During the Respondent's Discipline Committee meeting held on 5<sup>th</sup> February, 2018, Pauline Kamene adopted the statement dated 4<sup>th</sup> November, 2015.
100. During the hearing, the Claimant admitted that Pauline Kamene and Rhoda Queen had fought over a message attributed to him which Pauline Kamene had noticed in Rhoda Queen's phone.
101. The Claimant admitted having heard that Pauline Kamene had indicated that she had contracted aids and had attempted to commit suicide.
102. Pauline Kamene admitted that she had spent the night in Guest houses with the Claimant severally and only terminated the relationship because she learnt that other students were also friends of the Head teacher.
103. Pauline Kamene stood by her statement.
104. On cross-examination by the Claimant regarding the alleged relationship, Pauline Kamene stated as follows;

“You know Mwalimu. I cannot just sit and fix you. You used to call me using your number 07\*\*\*\*\* and 07\*\*\*\*\*. You even recently called me and I recorded the conversation (audio recording played to the panel).”
105. The fact that Pauline Kamene had the Claimant's telephone numbers off-head would appear to suggest that the two knew each other more than Head Teacher and pupil as was required by the Respondent's Code of Regulations for Teachers and circulars.
106. Similarly, Pauline Kamene's guardian Mr. John Mutunga testified that he and the Claimant attended the same primary school and were colleagues at Syomikuku Secondary School from 2010 until he left



- in 2014. He confirmed that Pauline Kamene had attempted to commit suicide and had to be rushed to Mwingi District Hospital.
107. John Mutunga confirmed on cross-examination that the Claimant and Pauline Kamene had a relationship in that on one occasion he had called the Claimant and Pauline received the call, which suggested that the two had exchanged sim cards for unexplained reasons.
  108. Intriguingly, the Report on the Syomikuku Secondary School student walkout on Monday 30<sup>th</sup> March, 2015 confirmed that Pauline Kamene, Rhoda Queen and Christine Kalungu had been boasting of a special relationship with the Claimant. Coincidentally, Pauline Kamene had fought with both Christine and Rhoda allegedly on messages from the Claimant. The report was prepared on 21<sup>st</sup> April, 2015.
  109. In his final submission to the Disciplinary Panel, the Claimant stated that he had a family, had suffered and sought reinstatement.
  110. In the court's view, the Claimant failed or was unable to puncture or controvert the testimony by Pauline Kamene on their relationship.
  111. Although the Claimant did not avail specifics on when the two were at the Syongome and Flamingo Guest houses, as the Claimant's counsel submitted, these were real places she had been allegedly with the Claimant on weekends or holidays. The Claimant had no response other than denial.
  112. He did not deny that the telephone numbers given by Pauline Kamene at the hearing were his or he did not call when the audio was played or offer an explanation as to how Pauline Kamene had accessed her numbers and retained them off-head and perhaps what they used to talk about.
  113. Evidence on record also suggests that the Claimant had approached Pauline Kamene's father with a view to having the complaint withdrawn or the matter resolved, an allegation the Claimant did not deny.
  114. In his statement dated 4<sup>th</sup> November, 2015, the Claimant denied the allegations by Pauline Kamene. It was his testimony that Pauline Kamene was malicious as he had acted bonafide in admitting Pauline to the school for the sake of her education. That on a certain Saturday, he decided to punish late comers and asked Kamene to leave for lateness. Kamene confirmed as much. That a concerned parent had disclosed to him that Kamene and her husband had made allegations of an affair between him and Kamene and two other students. The concerned parent was unknown and did not record statement.
  115. Finally and significantly, Investigatory Assessment for Syomikuku Secondary School dated 27<sup>th</sup> July, 2015 by Nazarina Wanja N. (DQASO) and Grace Mwangi (DSQ) of the State Department of Education lay it bare that the Claimant was implicated in unprofessional conduct by befriending a pupil under his care and at the conclusion of the assessment the Claimant had disappeared from the school and was untraceable and the officers had to handover the office to one Mr. Daniel Musyoka.
  116. The team ascertained that Pauline Kamene's indiscipline had caused disturbances at the school.
  117. The report is explicit that the Claimant admitted during an oral interview that he had a romantic relationship with Pauline Kamene. That Pauline Kamene was morally rotten and out to tarnish his name. He denied the allegations by Pauline Kamene.
  118. Needless to emphasize, the report by the two officers painted a horror picture of the school, the Claimant was the Head teacher, for instance. Mr. Daniel Musyoka Wambua and Lilian Kimanzi, both TSC teachers at the school admitted that there were several cases of sexual relationships between teachers and students including the principal, the Claimant.



119. That Christine and Rhoda had been sent away on that day purposely to avoid interrogation by the officers.
120. Both teachers refused to write statements for fear of reprisals by the Principal.
121. Secondly, student Adm. No. 168/13, Daniel Mwangangi acknowledged that he was aware of the relationship between Pauline Kamene and the Claimant. He also recalled that Pauline Kamene and Christine had fought over the Claimant. The statement recorded from Pauline resembles the written statement on record dated 4<sup>th</sup> November, 2015.
122. Bearing in mind that the investigatory assessment took place on 27<sup>th</sup> July, 2015, Pauline Kamene would appear to have been truthful and as confessed by other students interviewed by the officers.
123. The fact that other teachers knew of sexual relationships between teachers and students including the Head Teacher is nauseating.
124. Be that as it may, the Claimant averred and counsel submitted that there was a conspiracy between Pauline Kamene, her guardian, Mr. Mutunga and Mr. Musyoki, a teacher to fix him.
125. The investigatory assessment found that the Claimant and Mr. Musyoki had a strained relationship. On the day of the assessment, the Claimant is reported to have stated that Mr. Musyoki was last seen in school on 20<sup>th</sup> July, 2015, seven days earlier.
126. The Claimant adduced no cogent evidence to establish the trigonous conspiracy or demonstrate that the three were acting in concert. Similarly, the three letters dated 24<sup>th</sup> April, 2015, 24<sup>th</sup> April, 2015 and 22<sup>nd</sup> April, 2015 from Ilako Mututa Secondary School, Kyambo Secondary School and Kyulungwa Secondary School respectively, attesting to Pauline Kamene's indiscipline, relationship and gossiping cannot controvert the allegations made by Pauline Kamene against the Claimant. Cogent evidence in rebuttal was necessary.
127. Guided by the evidence on record and the sentiments of the Rika J. in *Tom Ochako V Teachers Service Commission* (Supra), the court is satisfied that the Respondent has on a balance of probabilities demonstrated that it had a valid and fair reason to terminate the Claimant's employment.
128. In that case, the learned judge stated as follows;

“Luckily, the Code of Regulations (66) does not require that medical proof is given, to establish that a predator has abused his student. The respondent is permitted to rely on general evidence. There were statements from other witnesses to corroborate what Jennifer Cheroni initially told the board. The Respondent correctly relied on general evidence. It was not necessary that a teacher is caught *flagrante delicto* to sustain a charge of sexual abuse of his student. It was not necessary to have the evidence of the watchman who allegedly found Teacher Ochako doing the unaccepted. The Claimant was not under trial for a criminal act.
129. Relatedly, in *Teacher Service Commission V Joseph Okoth Opiyo Civil Appeal No. 8 of 2014*, the Judges of Appeal stated as follows;

“That in matters of sexual immorality, it is not easy to get eye witnesses evidence as such acts are committed behind closed doors and that such cases are in most cases proved by circumstantial evidence of opportunity to commit the same.”



130. Similarly, Section 43(2) of the *Employment Act* provide that;
- The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.
131. As regards the charge of incitement, parties adopted contrasting positions.
132. It is common ground that on 30<sup>th</sup> March, 2015, the students of Syomikuku Secondary School staged a walkout from around 6.30 am.
133. During the hearing, the Claimant denied having been aware that the students were planning a strike. He testified that he reported to the school at 9.30 am but had been notified of the walkout by Teacher Boniface at 8.30 am.
134. In the statement dated 4<sup>th</sup> November, 2015, the Claimant stated that after the Board of Management Meeting on 27<sup>th</sup> March, 2015 where Pauline Kamene had testified (in the Claimant's absence), the Claimant's statement include what she told the meeting which was not captured in the minutes, he called a Student Assembly and informed them he would discontinue the Saturday remedial classes, which was a shock to the students.
135. That on Monday 30<sup>th</sup> March, 2015 (incorrectly cited as 31<sup>st</sup> March, 2015), the Teacher on duty Mr. Musyoki called him at 8.30 am to inform him about the walkout by students. That had he been called earlier, he would have contained the students.
136. The Claimant denied having incited the students.
137. The investigation by Nicodemus Kiliku, Benedict Ngumu and Patrick Mulyungi found that the students staged the walkout at 6.30 am and left the compound at 7.00 am. That Mr. Mutunga informed Mr. Musyoki about the walkout at 6.55 am and his attempt to contain them failed and they threw stones at him.
138. Mr. Musyoki called the OCPD for protection and Mr. Phillip Maazo reported at 8.30 am and Mr. Mutunga and a teacher from Itendeu Secondary School came to the compound.
139. The committee found that the immediate causes of walkout were the;
- i. Immediate transfer of the Claimant
  - ii. Threat by Kamene to burn the school
  - iii. Kamene's re-admission to the school
  - iv. Insults by Boniface Musyoki (Chemistry and Physics teacher)
  - v. Principal's address to students on 27<sup>th</sup> March, 2015 and
  - vi. Communication from Mr. Kathuru about the Principal's transfer.
140. The remote causes were poor teaching by some teachers, poor facilities, poor diet, hostile teacher student relationship and favouritism by the administration.
141. The leaders of the walkout were identified as Christine Kalungu, Isaac Munyoki and Shedrack Mutinda.



142. The Committee recommended further investigation and action on Pauline Kamene, Christine Kalungu and Mr. Kithuru. Strangely, the Committee found that Rhoda Queen, Christine Kalungu and Pauline Kamene had been boasting of a special relationship with the Claimant, the Principal. The report did not implicate the Claimant in any way, his late reporting to school despite notice of the walkout at 8.30 am, timing of the Student Assembly on 27<sup>th</sup> March, 2015, the placards the students were waving and feigning ignorance of the event notwithstanding. The court is not persuaded that the Claimant was clueless about what would happen on that day.
143. The report of the Committee was adopted by the BOM meeting held on 29<sup>th</sup> April, 2015.
144. Relatedly, the Respondent tendered no cogent evidence of the Claimant's active involvement in the planning or execution of the walkout by students on 30<sup>th</sup> March, 2015.
145. It is the finding of the court that the allegation of incitement of students on 27<sup>th</sup> March, 2015 has not been established.
146. In view of the foregoing, it is the finding of the court that termination of the Claimant's employment by the Respondent on 28<sup>th</sup> February, 2018 was substantively justifiable. The Respondent had a valid and fair reason within the meaning of Section 45 of the *Employment Act*, 2007.

### Procedure

147. As regards the termination procedure employed by the Respondent, parties have contrasting positions. While the Respondent insists that the termination was in conformity with the provisions of the *Employment Act* and the Respondent's Code of Regulation for Teachers and consequently the Claimant was accorded fair hearing, the Claimant on the other hand submitted that the termination was unfair as he was not afforded the opportunity to call witnesses and record of the disciplinary proceeding were reticent on whether the Claimant was asked if he had witnesses or notice of right to call witnesses.
148. Section 41 of the *Employment Act* prescribes the procedural steps to be complied with in the termination of employment. Section 41 of the Act is formulated in mandatory terms, a fact elaborated in Pius Machafu Isindu V Lavington Security Guards Ltd (Supra), where the Court of Appeal held;
- “ . . . A mandatory and elaborate process is then set up under Section 41 requiring notification and hearing before termination . . . Those provisions are a mirror image of their constitutional underpinning in Article 41 which governs rights and fairness in labour relations.”
149. In Postal Corporation of Kenya V Andrew K. Tanui (Supra), the Court of Appeal isolated the specific requirements of Section 41 of the *Employment Act* as follows;
- “ Four elements must thus be discernible for the procedure to pass muster:-
- i. an explanation of the grounds of termination in a language understood by the employee;
  - ii. the reason for which the employer is considering termination;
  - iii. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination are made;



- iv. hearing and considering any representations made by the employee and the person chosen by the employee.”

150. In the instant case, the Claimant urged that termination of his employment was procedurally unfair in that he was not notified of his right to be accompanied by a witness.
151. Instructively, during the County Disciplinary Panel Meeting held on 4<sup>th</sup> November, 2015 at Mwingi Central DEO’s Office which the Claimant attended, he had no witness and the Respondent tendered no evidence that it had informed him of this entitlement. Relatedly, he was not accorded the opportunity to cross-examine any of the six (6) witnesses who testified. The list included two teachers, Boniface Musyoki Kimwele TSC No. 39\*\*\* **and Lilian Kimanzi TSC No. 5\*\*\***.
152. The meeting culminated in the interdiction letter dated 23<sup>rd</sup> November, 2015 which ushered in the hearing by the Commission.
153. The letter accorded the Claimant 21 days to make a written statement to the Commission and promised an oral hearing.
154. Subsequently, the Claimant filed Civic Suit No. 950 of 2016 dated 21<sup>st</sup> May, 2016 seeking withdrawal of the interdiction letter dated 23<sup>rd</sup> November, 2015, reinstatement and injunction to restrain the Respondent from terminating his employment pending the hearing and determination of the suit. The court grant a stay of hearing of the disciplinary cause against the Claimant but declined the applications by its ruling dated 16<sup>th</sup> March, 2017.
155. Strangely, none of the invitation letters dated 16<sup>th</sup> August, 2016, 8<sup>th</sup> May, 2017 or 2<sup>nd</sup> May, 2017 or 23<sup>rd</sup> August, 2017 intimated to the Claimant that he had the right to be accompanied by a colleague of his choice.
156. It requires no belabouring that an employee is entitled to be accompanied by a colleague or union official, for members of a union and call witnesses.
157. In this case, the grave nature of the allegations dictated that the Claimant be made aware of all his entitlements so as to take advantage of them or knowingly not do so.
158. The right to be heard encompasses the right to call witnesses to testify on behalf of the person facing charges.
159. The fact that the Claimant was not informed of his entitlement to be accompanied by a witnesses, who was free to make representations was a serious omission on the part of the Respondent as it implicated the Claimant’s right to be heard and denied an otherwise procedural process the final mark of fairness.
160. This reasoning is supported by the holding of the Court of Appeal in *Postal Corporation of Kenya V Andrew K. Tanui* (Supra) as follows;

“In this case, the letter inviting the Respondent to appear before the board was only two lines containing the date and venue. It said nothing about the reasons for such invitation. It said nothing about the Respondent appearing with another employee of his choice. The retort that an employer has no obligation to ask the employee to be accompanied does not avail the appellant because the law requires that such other person be present to hear the grounds of termination and if so inclined, make representations thereon. A hearing not so conducted is irregular . . . The Respondent faced serious indictments which could torpedo his entire career and destroy his future . . .”



161. In the instant case, the Claimant was not notified of the entitlement to be accompanied and had none when the grounds of termination were explained to him. This was an irregularity on the part of the Respondent.
162. The Commission’s Disciplinary Committee Meeting held on 5<sup>th</sup> February, 2018 recommended dismissal of the Claimant from employment and the Respondent did so by letter dated 23<sup>rd</sup> February, 2018. The dismissal was effective 5<sup>th</sup> February, 2018.
163. Although the letter was silent on the right of Appeal/review, or timelines, the Claimant appealed the dismissal pursuant to Regulation 66(7) of the Code of Regulations and was invited for a hearing which proceeded on 22<sup>nd</sup> February, 2019.
164. The Claimant faulted the Respondent’s Disciplinary Committee on the ground that it did not take into consideration the view of the BOM and Pauline Kamene’s evidence was not reliable on account of her character and the Claimant and had affidavits from the proprietors of the two lodgings mentioned by Pauline Kamene.
165. Asked about how many people were in the BOM, the Claimant stated 3 including the Chairman and he was part of the three.
166. The appellate panel found that;
- i. The BOM Meeting was not properly constituted as the accused was the Principal of the school and sat as the secretary. The Claimant confirmed on cross-examination that it was improper for him to sit at the meeting which discussed allegations made against him.
  - ii. Although the Claimant testified that Pauline Kamene was not of good morals, it was ascertained that she had dropped out of school due to pregnancy and had been re-admitted. Similarly, she was supplying bananas and groceries to the school.
167. The appellate panel was not persuaded that the Claimant had made a case to interfere with the findings of the Disciplinary Panel. The appellate panel upheld the decision of dismissal and the Claimant was notified vide letter dated 21<sup>st</sup> March, 2019 and the decision was final.
168. For the foregoing reasons, it is the finding of the court that termination of the Claimant’s employment by the Respondent was procedurally unfair and having so found, I will proceed to the reliefs available to the Claimant.

#### **a. Reinstatement**

169. In determining whether or not the Claimant is entitled to reinstatement, the court is guided by the sentiments of Maraga JA (as he then was) in *Kenya Airways Ltd V Aviation and Allied Workers Union Kenya & 3 others* (2014) eKLR;
- “As I have said, in Kenya, reinstatement is one of the remedies provided for in Section 49(3) as read with Section 50 of the *Employment Act* and Section 12(3)(vii) of the Industrial Court Act that the court can grant. Reinstatement, is however not an automatic right of an employee. It is discretionary and each case has to be considered on its merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication . . .”
170. Section 12 (3)(vii) of the *Employment and Labour Relations Court Act*, 2011 provides that an order of reinstatement of an employee can only be made within three years of dismissal.



171. In this case, the Claimant's employment was terminated on 5<sup>th</sup> February, 2018, almost 4 years ago.
172. The court is in agreement with the Respondent's submission that it has no jurisdiction to order reinstatement in this instance. The relief is unavailable.

**b. Having found that termination of the Claimant's employment was unfair for want of procedural propriety, a declaration to that effect is hereby issued.**

**c. Damages for wrongful dismissal**

173. The Claimant led no evidence of the particulars of this relief including the quantum sought.
174. Equally, the provisions of Section 49 of the Employment Act do not recognize the remedy of damages for wrongful dismissal.
- The relief is disallowed.

**d. Unpaid salary from November 2015 to February 2018**

175. The Claimant was interdicted by letter dated 23<sup>rd</sup> November, 2015 following the County Disciplinary hearing on 4<sup>th</sup> November, 2015.
176. The Respondent urged that because of the charges the Claimant was facing, he was not entitled to any pay though still in its employment as averred in paragraph 13 (f) of the response to the claim that "during the period of interdiction, the Respondent did not terminate the Claimant's employment but only temporarily prohibited him from exercising the powers and functions of his office pending determination of his disciplinary case."
177. It cannot be gainsaid that interdiction is typically resulted to facilitate investigations within prescribed timelines, typically 6 months.
178. Significantly, whether salary unpaid during interdiction is payable depends on whether termination is found to have been unlawful or not.
179. In this case, it is not in contest that the Claimant remained on interdiction from 23<sup>rd</sup> November, 2015 to 5<sup>th</sup> February, 2018 when he was finally dismissed from employment. Puzzlingly, the interdiction letter had neither a commencement date or conditions of the interdiction nor duration which would suggest that it was indefinite and lasted for 2 years and 2<sup>1</sup>/<sub>2</sub> months, unduly long. It requires no emphasis that keeping an employee on tenterhooks for that long is an unfair labour practice.
180. Having found that termination of the Claimant's employment was procedurally unfair, the Claimant is entitled to the unpaid salary from the date of interdiction to the date of termination.
181. Noteworthy, part of the delay was occasioned by the Claimant's applications dated 21<sup>st</sup> and 29<sup>th</sup> August, 2016 and interim orders granted on 29<sup>th</sup> August, 2016 and remained in force until 17<sup>th</sup> March, 2017.

**e. 12 months compensation for unfair termination**

182. Having found that termination of the Claimant's employment was unfair for want of procedural propriety, the Claimant is entitled to the remedy prescribed by Section 49(1)(c) of the Employment Act subject to the provisions of Section 49(4) of the Act.
183. In determining the quantum of compensation, the court has considered the following;



- i. The Respondent had a valid and fair reason to terminate the Claimant's employment.
- ii. The Claimant, a public officer breached the trust the Respondent and society had placed on him.
- iii. The Claimant had no warning letter before the complaint raised by Pauline Kamene was made and received a congratulatory letter for the good performance of his subject in 2004 KCSE.
- iv. From the evidence on record, it would appear that the Claimant's stewardship of the school was irresolute and lacked cohesiveness.
- v. The Claimant had been an employee of the Respondent since 1994 and had risen to the level of principal and wished to continue.

For these reasons, the court is satisfied that the equivalent of 2 month's salary is fair.

**f. One month's salary in lieu of notice**

184. Having found that the Respondent had justifiable reason to terminate the Claimant's employment but did so unfairly, and did not accord the Claimant the requisite notice contrary to the Respondent's averments that the interdiction letter dated 23<sup>rd</sup> November, 2015 was sufficient notice, the Claimant is awarded Kshs.85,641.00 as pay in lieu of notice.

**g. Service pay at 15 days salary for every completed year of service**

185. The Claimant adduced no evidence of entitlement to service pay as a relief. The relevant particulars were neither canvassed in the written statement nor the oral testimony adduced in court.

The prayer is disallowed.

186. In conclusion, judgement is entered for the Claimant against the Respondent as follows;

- a. Declaration that termination of the Claimant's employment was unfair.
- b. Unpaid salary from November 2015 to February 2018.
- c. Equivalent of Two months salary.
- d. One month's salary in lieu of notice.
- e. Costs of this suit.
- f. Interest at court rates from date of judgement till payment in full.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 13<sup>TH</sup> DAY OF MARCH 2023**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> 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**

