



Khisa v Teachers Service Commission (Employment and Labour Relations Cause E006 of 2022) [2023] KEELRC 1437 (KLR) (30 May 2023) (Judgment)

Neutral citation: [2023] KEELRC 1437 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CAUSE E006 OF 2022**

JW KELI, J

MAY 30, 2023

BETWEEN

HENRY FESTO KHISA CLAIMANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

JUDGMENT

1. The claimant following dismissal from service of the Respondent and on deregistration as a teacher filed statement of claim dated February 23, 2022 seeking against the respondent the following reliefs:-
 - a. Reinstatement to employment
 - b. Reinstatement to the Roll of Teachers in Kenya
 - c. General damages for unlawful termination of the Claimant
 - d. Compensation in terms of salary lost while out of employment in the sum of Kshs 1,969,029/- (28 months salary)
 - e. Costs and Interests on (a)(b) and(c) above
 - f. Any other relief this Honourable Court shall deem fit to grant.
2. The claim was opposed by the Respondent who entered appearance and filed response.

The Claimant's case

3. The claimant called one witness(CW1) as witness of fact and he also testified on oath. The claimant and CW1 were cross-examined by counsel for the respondent. The claimant produced as his evidence exhibits 1 to 15.



The respondent's case

4. The respondent called 3 witnesses of fact who testified on oath and were cross examined by counsel for the claimant. Respondent produced as its evidence exhibits 1 to 15.

Written submissions

5. The parties filed written submissions after close of defence. The claimant's written submissions drawn by Akenga Kimutai & Associates were dated March 6, 2023 and received in court on even date. The Respondent's written submissions drawn by Flora Manyasa Advocate were dated April 5, 2023 and received in court on the April 18, 2023.

Claimant's evidence

6. The claimant (CW2) adopted his written witness statement dated February 23, 2022 as his evidence in chief and produced his documents as exhibits C-1 to 15 with exhibit 13 being marked for production by CW1. The claimant told the court he was not issued with show cause letter or charged with a criminal case. He asked to be reinstated as a teacher.
7. On cross-examination the Claimant told the court he knew student N. M. She was his student for geography. He visited her home on invitation by the mother. He was a teacher 2008 to 2019. He had been invited by many parents to their home during his years of teaching. He did not understand why the parents alleged he was having an affair with their daughter. He appeared before the investigator and was informed of allegations that the student was present and gave her statement before the investigation team. That he appeared at investigation held on August 9, 2019. He was at Board of Management (BOM) meeting on September 2, 2019 and the student was present. He appeared on September 13, 2019 before the disciplinary panel at Transzoia and the student was present. On July 14, 2021 he appeared before the Respondent's disciplinary panel and the student was present. He received death threats and reported to the police. The threats related to sleeping with N. M (the student). The threats were in September, 2019. The threats were by Ken Yasin in July, 2019 and he reported in September, 2019 to the police and this was after appearing before the School Board of Management. He had no evidence of the statements taken by the police. The claimant admitted in his witness statement he used to finance the student through the mother (page 12 of the Response) and that was part of his role as a teacher in quality assurance. The claimant told the court he did not appeal against letter of dismissal dated July 22, 2021 [D- exhibit 7 (a)]. The claimant admitted the Respondent had power to carry out disciplinary proceedings against him.
8. On re-exam the Claimant confirmed that the death threats were in relation to NN (the student) and were issued by Ken Yasin who claimed to be her boyfriend. That he also received threats from the student's parents and other parents. He was 46 years old.
9. The Claimant called CW1 who was CPL N 51657 John Imbayi Machakusi who told the court he was stationed at DCI Transzoia as an investigator. That on September 25, 2019 he was in office when the Claimant reported threats and he asked the Claimant to report to the police. It was alleged the complainant had an affair with a student at hotel. He went to the hotel and met Wafula, the hotel manager, who told him he did not know the Claimant. CW1 told the court that the Teachers Service Commission was uncooperative in the investigations.
10. On cross-examination CW1 told the court he was investigating death threats reported by the Claimant. That the threats were by Yasin used by a lady called Lucy according to the complainant. CW1 told the court he did not get a statement from Yasin. The Teachers Service Commission was informed as



complainant was a teacher and Lucy was mother of the student. That Teachers Service Commission told him they were investigating defilement. CW1 told the court the case did not proceed to court hence did not report to his in-charge.

Defense Case.

11. Beatrice Dagaye (DW1) was staffing officer at the Teachers Service Commission headquarters. She adopted her witness statement dated August 23, 2022 as her evidence in chief. DW1 stated told the court she investigated the teacher. That she visited St. Patrick Makunga School which as a day school where the Claimant was a teacher.
12. On cross-examination by counsel for the Claimant DW1 told the court she had worked with the claimant for 4 years at Kwanza. That according to the Claimant's file there was no prior complaint before the instant disciplinary proceedings. On investigations DW1 stated the mother and child reported the case. They went to the hotel which refused to avail information. The Claimant was invited for Board of Management for investigation. DW1 confirmed she interviewed the student, mother and the Principal. The Principal indicated he had heard nothing of the relationship between the student and the Claimant. The student had stated it was dark and could not recall the hotel but she took them there. There was no evidence the teacher booked the hotel. She had no evidence to support her statement. The child was treated at Elgon hospital. DW1 had no report or P3 form from police station of the student. The teacher was not charged with any criminal case. DW1 stated they terminated the teacher/ Claimant based on evidence of the student and which she repeated before the teacher that they had sex. The evidence of the child testimony was in their report. DW1 did not know if it was offence for teacher to receive money on behalf of the student.
13. On re-exam, DW1 told the court there was no finding the student visited hospital. That the school was a day school where the child goes home daily and hence no basis for sending the money to the teacher.
14. DW2 was Doreen Munene who stated she handles disciplinary matters before the Teachers Service Commission. DW2 adopted her witness statement dated August 23, 2023 as her evidence in chief and produced documents under the list of documents for the respondent dated August 10, 2022 as D-Exhibits 1-15.
15. On cross-examination by the counsel for the Claimant, DW2 stated she had worked with Teachers Service Commission for 20 years. That before the current case the Claimant had no prior disciplinary record at the head quarters. DW2 told the court the Board of Management indicated there was no tangible evidence against the teacher and referred case to county for investigation. DW2 told the court they found the Claimant had a case to answer as the child indicated they had sex in a hotel. DW2 stated the investigators did not follow through to visit the hotel. DW2 on the report indicating the child was treated at hospital stated they did not follow up they followed the love relationship between teacher and student. On how they ascertained the relationship DW2 stated their guidelines prohibit student teacher relationship. DW2 was not aware whether the BOM made report to the police.
16. In re-exam DW2 told the court she was not part of the investigation. That on charge of immorality it is not limited to carnal knowledge.
17. DW3 was Sammy Loitakol. He chaired the disciplinary panel at Tranzoia on the September 13, 2019 when the BOM referred the matter to the county for investigations. DW3 adopted his witness statement dated August 23, 2022 as his evidence in chief.
18. On cross-examination by counsel for the Claimant DW3 told the court he interacted with the Claimant as a teacher. He had no evidence to support his statement the Claimant was in constant relationship



with the Claimant's student, mother and sister, had no evidence of alleged SMS text exchange between the student and the Claimant. DW3 told the court the fact of the Claimant had knowledge of location of hotel meant they had been there. There was no evidence the Claimant visited the Hotel. There was no medical check up of the student and Claimant on the immoral behavior, no report to the police and no evidence to show the child was morally disturbed.

19. On re-exam, DW3 told the court that the Claimant did not dispute he had been in communication with the student and that there was no requirement to report to the police of their such investigations on the teacher.

Determination.

20. The claimant in his written submissions identified the following issues for determination in the suit:-
- a. Whether the dismissal was lawful?
 - b. Whether the Honourable court should reinstate the claimant
 - c. Whether the Honourable court should order for payment of damages/ benefits.
21. The respondent in it's written submissions identified the following issues for determination in the suit:-
- a. Whether the claimant's dismissal was unlawful and unfair
 - b. Whether the claimant is entitled to the reliefs sought.
22. The court having heard the case and read the issues raised by the parties in their written submissions was of the considered opinion that the issues placed by the parties before it for determination of the dispute were as follows:-
- a. Whether the termination was unlawful.
 - b. Whether the termination was procedurally unfair
 - c. Whether the Claimant was entitled to reliefs sought.

Issue a. Whether the termination was unlawful.

Claimant's submissions

23. The Claimant submits the termination was unlawful applying the provisions of section 45 (1) of the *Employment Act* that prohibits unfair termination and that the termination is unfair if the employer fails to prove:-
- a. that the reason for the determination was valid
 - b. that the reason for the termination is a fair reason
 - i). related to the employee's conduct, capacity or compatibility or
 - ii). Based on the operations requirement of the employer.
24. That further, section 45 (4) (b) of the *Employment Act*, a termination of employment is unfair where:-
- a) It is found out that in all the circumstances of the case, the employer did not act in accordance with justice and equity in terminating the employment of the employee.



25. The Claimant submits the allegations against him were not proved to justify why he was interdicted, removed from the register and dismissed from employment of the respondent. That the allegations of having had an affair with NN (student) at a lodging and communication by text(SMS) with NN was not corroborated by evidence. That CW1 confirmed NN had a relationship with Yasin who sent threats to the Claimant.

Respondent's submissions

26. The respondent submits that section 45(2) of the *Employment Act* requires the employer to prove that the termination was grounded on a valid and fair reason based on the employee's conduct and the termination was in accordance with fair procedure hence two components of the due process namely:- whether the dismissal was based on valid and reasonable grounds and whether due process was followed.
27. On the validity of the reasons the respondent submits that the learner's testimony in the proceedings was not controverted by the claimant in his statement dated August 9, 2019 and in his defence of October 8, 2019 and save for mere denials that he did not have a relationship with N.N the claimant did admit that:-
- a. he occasionally sent N.N money
 - b. he had visited the learner's house on invitation from the mother;
 - c. he gave N.N's mother the cellphone number through which the mother called N.N.
 - D. He received a call from one Ken Yasin threatening him for being in a relationship with N.N.
28. The respondent submits that one of the key findings of by the BOM was that the teacher did not sufficiently challenge the student's allegations and this led to the recommendations for further investigations. The respondent submits that it was not presented with the statement produced by the claimant in court for consideration. The threats to the claimant were alleged to have been in July 2019 but only reported to the police in September 2019 upon interdiction by the respondent. The respondent submits that upon evaluation of the facts, witness statement and investigation report, the disciplinary panel arrived at the conclusion that there were reasonable and sufficient grounds to believe the claimant as culpable of the allegations of immoral behavior against his student leading to its decisions on dismissal and deregistration. That in making its decisions the Respondent was guided by public policy and responsibility bestowed on it to protect learners in *Pet. N 331 of 2011 W.J& another v Astarikob Henry Amkoah & 9 others* (2015) eKLR.
29. The respondent submits that in construing the legal meaning of section 43 of the *Employment Act* is was stated by , the court of Appeal in Nyeri Civil Appeal N 79 of 2016 *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* (2017)eKLR that :-

‘Under Section 43 of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he “genuinely believed to exist,” causing him to terminate the employee's services.... Wasike was unable to explain that anomaly to the satisfaction of his superiors or the disciplinary committee. That provided KPLC with a reasonable basis to act as it did and it is 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 he can take appropriate action subject to the requirements of procedural fairness that are



statutorily required. The learned Judge was wrong to find that the termination was unfair for want of valid reasons.”

Decision

30. It is the finding of the court that during cross-examination it was established that the claimant had a relationship outside school with the student NN through her mother based on evidence of money sent to the student who was a day scholar, visit to the student’s home on invitation of the mother and gave the mother a cellphone number to call N.N. when N.N he was missing from the school. The student NN gave her testimony before the Board of Management and panel on sex escapade at the hotel unga and before the Board. At the hearing before Teachers service commission, the teacher on cross-examination of NN the student recounted the same sex escapade account.
31. On his cross-examination by Teachers Service Commission, the Claimant confirmed he knew where N.N resided near the school, that the mother of the child was his friend and he had visited their home twice, the Claimant denied having communicated with the girl vide chat stating he only communicated with the mother. The court did not find evidence of such text communication.
32. The court examined the Board of Management minutes of the proceeding 2nd September, 2019 and found that the Board of Management findings were that the student could not identify the exact guest house/ lodge despite being resident of Kitale, that the teacher did not sufficiently challenge the allegations and NN failed to show medical records and the Board members observed there was a connection between the student’s absenteeism case and her current sexual allegations with the teacher.
33. CW1 was investigating officer who recorded a statement following death threats to the Claimant by one Yasin. CW1 admitted he did not record statement of Yasin but stated he visited the alleged lodge and spoke to the manager one Wafula who denied knowledge of having seen the Claimant in the premises as alleged. CW1 stated the matter of the threats never reached the court. The respondent on cross-examination established the claim of threat was made after the disciplinary hearing.
34. Doreen Munene (DW3) stated they were pursuing immoral behavior not necessarily carnal knowledge. DW1, DW2 and DW3 all confirmed they had not investigated the issue of the lodge/guest house and had no evidence of the Claimant having been in the hotel nor had the student been tested or treated at the alleged hospital for sexually transmitted disease. The letter of dismissal dated July 22, 2021 gave reason for termination as

“you are of immoral behavior at St Patrick’s Mahinga Secondary school. You had a sexual intercourse with your student NN of from four west, Admission No xxx on unspecified date in March 2019 in Kitale town at Unga guest house along Laini moja street”.

The court noted at first instance before the Board of Management NN was unable to name the alleged lodge. That created doubts on the allegations of the escapade at the hotel. CW1, the investigating officer evidence was that he investigated and found no such evidence and was unshaken on cross-examination, the investigators of Teachers Service Commission did not carry out investigations on the lodge as per DW1, DW2 and DW3 despite having had opportunity to do so. The student NN was not tested for immorality violation by the Claimant. The Claimant explained and the mother to NN admitted they were friends. The court finds and holds the reason given for the dismissal was not evidenced by investigations or any proof. At the first instance hearing by the Board of Management the student who they found was exposed to sex vide Brian (a boyfriend) and Yasin a boyfriend too, could not establish the name or location of the lodge. The court found in the circumstances there was no prove of the reason as provided for under section 43 of the *Employment Act*:



‘43. Proof of reason for termination (1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45. (2) 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.’ The reason given must be valid as basis of the termination. The court agreed with the interpretation of the Court of Appeal on the legal meaning of section 43 in Nyeri Civil Appeal N 79 of 2016 *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* (2017) eKLR where the court observed:-

‘Under Section 43 of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he “genuinely believed to exist,” causing him to terminate the employee’s services.... Wasike was unable to explain that anomaly to the satisfaction of his superiors or the disciplinary committee. That provided KPLC with a reasonable basis to act as it did and it is 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 he can take appropriate action subject to the requirements of procedural fairness that are statutorily required. The learned Judge was wrong to find that the termination was unfair for want of valid reasons.’

The court finds that the instant case is distinguished as the respondent gave particulars of the reason of immoral behavior which it was unable to prove and admitted to having not investigated being: ,

"you are of immoral behavior at St Patrick’s Mahinga Secondary school. You had a sexual intercourse with your student NN of from four west, Admission N xxx on unspecified date in March 2019 in Kitale town at Unga guest house along Laini moja street."(emphasis given)

CW1 did investigations at the alleged guest house and confirmed the reasons not to be true. At the hearing DW3 admitted there was no investigation on the hotel or immorality violation on NN but there was romantic relationship and that was the basis of termination. The court holds that there was prove from the foregoing the claimant was dismissed for invalid reason stated by employer in writing. The termination is held to have been unlawful.

Procedural Hearing

35. The court found that though the hearing was substantially fair the lack of investigation on reason of the dismissal rendered the process unfair under section 41 which states: -

“(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”

The reason for which the employer contemplated to terminate the employment having been invalid then the process became tainted by unfairness. The process includes investigations or evidence of existence of facts relied on to reach the reason.



c). Whether the claimant was entitled to reliefs sought.

36. The claimant sought various reliefs namely:-

- a. Reinstatement to employment
- b. Reinstatement to the Roll of Teachers in Kenya
- c. General damages for unlawful termination of the Claimant
- d. Compensation in terms of salary lost while out of employment in the sum of Kshs 1,969,029/- (28 months salary)
- e. Costs and Interests on (a)(b) and(c) above
- f. Any other relief this Honourable Court shall deem fit to grant.

37. The claimant submits that 3 years had not lapsed since his dismissal from employment and that he demonstrated that his dismissal was actuated by malice and unfair uncorroborated evidence hence unfair dismissal. That the Respondent did not demonstrate the dismissal was fair as required under section 47(5) of the *Employment Act* to wit:-

“(5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.”

The claimant submits he deserved to be reinstated to employment and relied on several decisions on reinstatement being decisions of Murgor JA and Maraga JA (as he then was in) in *Kenya Airways limited v Aviation & Allied Workers Union Kenya & 3 others* (2014)eKLR, The claimant inter alia, relied on paragraph 68 by Maraga JA where he observed:-

“Reinstatement is, however, not an automatic right of an employee. It is discretionary and each case has to be considered on its own merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication. In this regard, there are fairly well settled principles to be applied. For instance the traditional common law position is that courts will not force parties in a personal relationship to continue in such relationship against the will of one of them. That will engender friction, which is not healthy for businesses, unless the employment relationship is capable of withstanding friction like where the employer is a large organization in which personal contact between the affected employee and the officer who took action against him will be minimal”

and paragraph 71 where Maraga JA further observed:-

“71. Practicability in these circumstances includes reasonableness, which invokes a broad inquiry into the equities of the parties’ cases so far as the prospective consideration of reinstatement is concerned. This includes consideration of the prospective effects of the order of reinstatement, not only upon the individual employer and employee in the case but also upon the other affected employees of the same employer and perhaps upon third parties.”



The court found no need to reiterate what justice Murgor, JA observed in the same decision as it was within the same effect as with justice Maraga, JA (as he then was).

38. The claimant further relied on decision of Rika J in *Lawrence Onyango Oduori v Kenya Commercial Bank* (2014)eKLR to the effect that employment relationship is dynamic and based on mutual trust and confidence. Further the claimant relied on the decision in *Kenya Chemical and Allied Workers Union v National Cement Company Limited* (2014)eKLR where the court declined to order reinstatement after lapse of 3 years observing that the long lapse of time since termination made it difficult for the employee and employer to rebuilt a stable employment relationship after 3 years of disengagement. The court took note of the fact that the law caps reinstatement to less than 3 years after dismissal under section 12(3) of the Employment and *Labour Relations Act* which states:-

‘12(3)(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; ‘

39. On the claim for damages the claimant submits that having been dismissed without probable cause or even a warning letter or cautionary letter to prove his disciplinary record warranted his dismissal, he deserved the reliefs sought the termination having been unfair and relied on the decision in *Kenfreight (E.A) Limited v Benson K. Nguti*(2019)eKLR on remedies for wrongful dismissal which the Supreme Court of Kenya highlighted at paragraph 31 as follows:-

‘[31] In that context, the *Employment Act*, 2007 makes provisions for appropriate remedies for wrongful dismissal or unfair termination as follows:

“ [49]. (1) Where in the opinion of a labour officer summary dismissal or termination of a contract of an employee is unjustified, the labour officer may recommend to the employer to pay to the employee any or all of the following—

- (a) the wages which the employee would have earned had the employee been given the period of notice to which he was entitled under this Act or his contract of service;
 - (b) where dismissal terminates the contract before the completion of any service upon which the employee’s wages became due, the proportion of the wage due for the period of time for which the employee has worked; and any other loss consequent upon the dismissal and arising between the date of dismissal and the date of expiry of the period of notice referred to in paragraph (a) which the employee would have been entitled to by virtue of the contract;
 - (c) or (c) the equivalent of a number of months wages or salary not exceeding twelve months based on the gross monthly wage or salary of the employee at the time of dismissal.
- (2) Any payments made by the employer under this section shall be subject to statutory deductions.
 - (3) Where in the opinion of a labour officer an employee’s summary dismissal or termination of employment was unfair, the labour officer may recommend to the employer to—



- (a) reinstate the employee and treat the employee in all respects as if the employee's employment had not been terminated; or
 - (b) re-engage the employee in work comparable to that in which the employee was employed prior to his dismissal, or other reasonably suitable work, at the same wage.
- (4) A labour officer shall, in deciding whether to recommend the remedies specified in subsections (1) and (3), take into account any or all of the following—
- (a) the wishes of the employee;
 - (b) the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and
 - (c) the practicability of recommending reinstatement or re-engagement;
 - (d) the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances;
 - (e) the employee's length of service with the employer;
 - (f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination;
 - (g) the opportunities available to the employee for securing comparable or suitable employment with another employer;
 - (h) the value of any severance payable by law;
 - (i) the right to press claims or any unpaid wages, expenses or other claims owing to the employee;
 - (j) any expenses reasonably incurred by the employee as a consequence of the termination;
 - (k) any conduct of the employee which to any extent caused or contributed to the termination;
 - (l) any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and
 - (m) any compensation, including ex gratia payment, in respect of termination of employment paid by the employer and received by the employee.”

40. The claimant further submits on prayer (c) that he be awarded Kshs 5,000,000/- considering he was hired on permanent and pensionable terms and had gone 3 three years without salary.



Respondent's submissions

41. The respondent submits on the reliefs as follows:-
42. On reinstatement to employment the respondent relied on the principle of law that an employment contract being of mutuality of obligations and not servitude, that it had lost trust and confidence in the claimant as an employee and the relationship had irretrievably broken down thus incapable of being salvaged. The respondent submits that in Lukorito case (supra) the court of Appeal while citing *Kenya Airways Limited v Aviation & Allied workers Union Kenya & 3 others* (2014)eKLR held that whereas reinstatement is one of the remedies provided under the *Employment Act, 2007* it is not automatic right and the common law position is that courts will not force parties in a personal relationships to continue in such a relationship against their will. The respondent further relied on decision by Nyamu J (rtd) in *David Njoroge Kimani v Teachers Service Commission* (2007) eKLR where the court held:-
- ".. surely the courts must address the effects of reinstatement of an employee on the teachers and pupils and the erosion of discipline in schools.. I would not intervene in an employment relationship of a teacher/student relations where the interest of discipline are likely to be compromised."
43. On reinstatement to the register of teachers, the respondent submits that it is mandated to regulate the teaching profession and that includes mandate to register and regulate all teachers. That the registration is pegged on qualifications outlined under section 26 of the *TSC Act* and key among the qualifications is that only those of good moral character are eligible for registration. That the teacher was found guilty of immoral character / professional misconduct hence unfit to serve as a teacher and was removed from the register pursuant to provisions of section 30(1) of the *TSC Act*. That reinstatement to the register of teachers would give the claimant opportunity to teach and that was against public policy and the best interest of the child. That the claimant betrayed the trust and confidence placed on him as loco parentis to be reinstated. The respondent submits that the claimant may apply for reinstatement to the register of teachers pursuant to the provisions of section 31 of the *TSC Act*.

Decision

44. The court already held that the dismissal of the claimant from employment of the respondent was unlawful and unfair and hence the next step is to consider the remedies available to the claimant.

Prayer a-Reinstatement to employment.

45. The respondent submits the trust and confidence of employer employee and teacher student relationship was broken and could not be salvaged and submitted this was not a proper case for reinstatement and relied on various authorities cited above. The claimant on other hand submitted he deserved to be reinstated having been dismissed unfairly based uncorroborated allegations. The Claimant led evidence that he was threatened by the parents of NN and other parents. The court finds the teacher student relationship is one of trust. The trust between the Claimant and student /parent is broken down. There were some innuendos drawn for the conduct of the Claimant like having sent money to NN which he said was because they were friends with the mother which the court believed as NN stated so and her mother admitted that. The court found it to be an issue of lapse of discipline fact that the claimant joined mother of NN to look for the missing child(N.N) without permission of the school principal. With these innuendos which can be also attributed to overzealous teacher the court finds that the student teacher trust had broken down and applying the principal of best interest of the child it was not a proper remedy to reinstate the claimant as a teacher. The court upholds the



court of Appeal decision in *Kenya Airways limited v Aviation & Allied Workers Union Kneya & 3 others* (2014)eKLR, by Justice Maraga as he then was where he observed:-

“71. Practicability in these circumstances includes reasonableness, which invokes a broad inquiry into the equities of the parties’ cases so far as the prospective consideration of reinstatement is concerned. This includes consideration of the prospective effects of the order of reinstatement, not only upon the individual employer and employee in the case but also upon the other affected employees of the same employer and perhaps upon third parties.”

I find that where that parents and students are third parties whose trust matters in the employment of the teacher. It was obvious to the court that the trust and confidence had broken down. The court while stating it may in appropriate cases where trust relationship between the teacher and student/parent is not disturbed reinstate a teacher to employment, in the instant case the relationship was disturbed and the court to that extend upholds decision on Nyamu J as he then was in *David Njoroge Kimani v Teachers Service Commission* (2007) eKLR where the court held:-

‘.. surely the courts must address the effects of reinstatement of an employee on the teachers and pupils and the erosion of discipline in schools. I would not intervene in an employment relationship of a teacher/student relations where the interests of discipline are likely to be compromised.’”

The court declines to allow the reinstatement of the claimant to employment for the foregoing reasons.

46. On reinstatement to the register of teachers, the court noted there is alternative procedure available on the appeal for reinstatement to the register under section 31 of the *TSC Act* which provides:-

‘31. Reinstatement of name in the register

- (1) Where the name of any person has been removed from the register, the Commission may, either of its own motion or on the application of the concerned teacher made in the prescribed manner, and in either case after observing due process, direct that—
 - (a) the removal of that teacher’s name from the register be confirmed; or
 - (b) the name of the teacher be restored in the register.
- (2) An application under subsection (1) may only be made after the expiry of a period of eighteen months from the date of removal of the name from the register.”

The court upholds the doctrine of exhaustion of alternative available remedies to the claimant and declines to make a finding on the prayer so as not to compromise the said statutory process. The prayer is declined for that reason.

47. On compensation for salary lost, the respondent submits that the claim for Kshs 1,969,029 being 28 months salary as compensation had no basis in law or fact as the claimant did not work during period of interdiction. That the claimant stopped teaching on the September 18, 2019 on interdiction. That regulation 148(h) of the *Code of Regulation for Teachers*(CORT) excludes teachers interdicted on ground of immoral behavior from being paid salary during he period of interdiction. That the claimant was dismissed from employment with effect from July 14, 2021 severing the employer employee relation hence caNt be compensated after dismissal. The respondent submits that the only remedies the claimant is entitled to are under section 49 of the *Employment Act* if any and not payment of salary for services not rendered.



Decision on reliefs sought

48. The court held the instant dismissal was unlawful and unfair. The court found the teacher student / parent/employee /employer trust and confidence had broken down hence it was not practical to reinstate the claimant to the employment with the respondent. The court finds that the alternative remedies available are under section 49 of the *Employment Act* as outlined by the Supreme Court in *Kenfreight* case (*supra*). Defense evidence was the teacher had no disciplinary record before the instant one. He had served as employee teacher of Teachers Service Commission from 2008 to 2019. The court finds that having been struck off the register the claimant's known source of livelihood was extinguished for good. The court finds that the claimant is entitled to full compensation of 12 months' salary under 49 (1) (c) for the reasons given to compensate for the unfair termination as well as notice pay of one month under section 49 (1) (a) as per September, 2019 pay slip (c – exhibits 6b) indicated he was earning gross salary of Ksh. 70,927.00. The court finds that it had no basis to grant the prayer for compensation in terms of salary lost while out of employment in the sum of Kshs 1,969,029/-(28 months salary) as the same was not supported by law or terms of employment. The claimant could not also be awarded salary for period after dismissal as he was no longer an employee.
49. In the upshot the court having found unlawful and unfair dismissal, awards the claimant one month notice pay and compensation for the unlawful and unfair termination under section 49(1)(c) of the *Employment Act* equivalent of 12 months last salary. On costs the principle of cost follow the event applies hence costs are awarded to the claimant and interest at court rates from date of judgment.

Conclusion And Disposition

50. The court having found the dismissal of the claimant was unfair enters judgment for the claimant against the respondent as follows:-
- a. Award of Notice pay in lieu of Kshs 70,927.00
 - b. Compensatory award the equivalent of 12 months last salary total award sum of Ksh 851,124/
=
 - c. Costs of the suit.
 - d. Interest at court rates from the date of Judgment.

It is so ordered.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 30TH DAY OF MAY 2023.

JEMIMAH KELI

JUDGE

In The Presence Of :-

Court Assistant: Lucy Macheso

Claimant :- Komora holding brief for Akenga

Respondent: absent

