



Munanga v Teachers Service Commission & another (Employment and Labour Relations Cause 60 of 2018) [2023] KEELRC 1602 (KLR) (29 June 2023) (Judgment)

Neutral citation: [2023] KEELRC 1602 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS CAUSE 60 OF 2018**

**JW KELI, J
JUNE 29, 2023**

BETWEEN

GIBSON IKUMU MUNANGA CLAIMANT

AND

TEACHERS SERVICE COMMISSION 1ST RESPONDENT

RAPHAEL TARUS 2ND RESPONDENT

JUDGMENT

1. The Claimant, a former teacher / employee of the 1st Respondent brought the instant claim dated and further amended on 11th May 2022, with leave of the court, upon dismissal from employment seeking judgment against the defendants for :-
 - A. A declaration as per paragraph 11(a) to wit:-
 - i. a declaration that the process leading his dismissal was flawed and against the principles of natural justice enshrined in Article 50 of the *Constitution* and the *Employment Act*.
 - ii. General damages for wrongful dismissal reinstatement and payment of his dues since the wrongful interdiction
 - B. reinstatement
 - C. Costs of the suit.
2. The claimant filed list of documents dated 27th December 2017 and his witness statement, witness statements of Jacqueline Shichenje Rulimo and of Simon Wittika Mianah all of even date and filed same date. The claimant further filed his further witness statement dated 24th March 2022 and received in court on the 30th March 2022 together with further list of documents of even date.



3. The claim was opposed. The defendants filed statement of defence dated 11th March 2019 received in court on the 19th March 2019 together with bundle of documents and witness statements of Raphael Tarus and Mugambi E.J. Upon further amendment of the claim the defendants filed amended defence dated 2nd June 2022, defendant's supplementary list of documents dated 6th June 2022, and further witness statement of Dorren Munene. On the 29th November 2022 the defence filed further supplementary list of documents dated 28th November 2022 together with the bundle of documents.

Hearing

4. The court took over the proceedings on 21st October 2021 when the claimant filed an application to amend the claim on the basis of the employment relationship having changed as he had since been dismissed from employment. From the record the claimant's case was part heard. The application was heard following which the claimant was granted leave to amend his claim and the case started afresh.

The Claimant's Witnesses and evidence

5. The claimant's case was heard on the 5th October 2022 with three witnesses of fact giving testimony on oath as follows:-

CW1 was the claimant Gibson Ikumu Munanga

CW2 was Simon Witika Mainah the school Board of Management (BOM) Chairman

CW3 was Jacqueline Shichenje Rulimo who stated she was BOM member and the treasurer at the school.

The witnesses were cross-examined by counsel for the defence Mr. Mulavu h/b Ms. Ngere

The Claimant's Evidence

6. The claimant's witnesses' statements adopted by CW1, CW2 AND CW3 as his Evidence in chief and the following exhibits produced:-

C- exhibit 1 interdiction letter dated 13th December 2017

C- exhibit 2 invitation letter dated 16th October 2017

C- exhibit 3-8 (documents in further list of documents dated 24 March 2022 being order of stay of interdiction dated 28th December 2017, advocate's letter dated 23rd December 2020, invitation for hearing letter dated 23rd April 2021, letter inviting for disciplinary proceedings, medical/treatment documents and letter of dismissal dated 4th June 2021)

The Defence Witnesses and Evidence

7. The defence case was heard on the 29th November 2022 and 24th January 2023 with the following witnesses of facts:-

- a. DWI Enock Mugambi Jumba (on oath) – auditor with Ministry of Education who adopted his undated witness statement filed in court on the 19th March 2019 with correction to read in part the single sourcing was by the claimant and not the defendant and last paragraph to read claimant. DW1 produced the investigation report (appendix 1) as D- exhibit 1 and was cross-examined by the claimant's counsel Ms. Masakhwe h/b Mr. Shikule



- b. DW2 was Raphael Tarus (on oath) retired former TSC County Director Kakamega who adopted his undated statement filed in court 19th March 2019 . He produced the following documents:-

D-Exhibit 2 the Teachers code of regulations at page 5-10 of the original statement of defence,

D- exhibit 3 being the show cause letter to the claimant,

D-Exhibit 4 being response to the show cause by the claimant dated 14th August 2017 (page 18-20 of the original defence)

D- exhibit 5 being the County disciplinary meeting minutes (page 21-24), D- exhibit 6 being the interdiction letter dated 13th December 2017 (page 25 of original defence)

D- exhibit 7 letter dated 30th November 2018 reporting withdraw of funds after the teacher was interdicted ,

D-exhibit 8a,b and c being bank statements of the school confirming the withdraws(pages 28-30),

D- exhibit 9 – 2nd letter of interdiction dated 30th November 2018 raising issue of the withdrawals.

DW2 was cross examined by the claimant’s counsel Ms. Masakhwe h/b Mr. Shikule

- c. DW3- Doreen Njagi Munene testified on the 24th January 2013 . She chaired the Disciplinary hearing of the claimant and produced:-

D- exhibit 10 being the audit report under defence bundle filed in court on the 28th November 2022 ,

D- exhibit 11 receipts under defence bundle filed in court on the 28th November 2022,

D- exhibit 12 invitation letter of 23rd January 2019 (page 13 of the amended defence) ,

D- exhibit 13 disciplinary proceedings ,

D- exhibit 14 invitation letter dated 14th august 2020,

D- exhibit 15 invitation letter dated 23rd April 2021,

D- exhibit 16 disciplinary proceedings of 26th May 2022, D- exhibit 17 letter of dismissal of 4th June 2021 (page 37 of amended defence)

DW3 was cross examined by the claimant’s counsel Ms. Masakhwe h/b Mr. Shikule.

Claimant’s Case in Summary

8. The Claimant’s case in Summary, further to evidence outlined above, was that he was dismissed unfairly as the process leading to the dismissal was unfair, that he was issued with 1st letter of interdiction dated 13th December 2017 which had 2 grounds being misappropriation of Kshs. 190,594.80 of Kakamega school for the Deaf (the School)for period of 2016 as head teacher and that he flouted procurement procedures by forged minutes of SIMSC committee dated 8th January 2016 and 12th January 2016 for single sourcing while the head teacher of Kakamega school for the deaf. That he proceeded to file case in Kakamega CMCC No 385 of 2017 where he obtained temporary injunction restraining the respondent from interdicting, harassing and or intimidating the claimant vis-a- vis the



interdiction letter dated 13th December 2017 till hearing and determination of the application. That armed with the letter the claimant resumed his duties as head teacher of Kakamega school for the deaf. That on the 30th November 2018 he received another letter of interdiction for misappropriation of Kshs. 300,034/- in the 2016 period of the of Kakamega school for the deaf, flouting procurement procedures, withdraw of funds while on interdiction, breach of clause b(b)(vi) of the 3rd schedule of the Act, insubordination of TSC Sub-County Director for refusing to handover on 28th December 2017 following interdiction on the 13th December 2017. The original suit was subject of interdiction and amended after dismissal. The dismissal was per terms of the 2nd interdiction letter(supra). The claimant faults the process for non disclosure of complaints, non-compliance with regulation 145 on taking reports from 3rd parties, contradiction in misappropriated funds with audit report stating Kshs. 190,594.80 and 2nd interdiction letter and dismissal letter stating Kshs. 300,034/- which was not supported by the audit report and unexplained by the DW2. That the alleged forged minutes were not produced, that on the withdraws and insubordination the claimant was protected by court order of 28th November 2017 hence all transactions were valid. That all the grounds of dismissal despite the claimant not having been given opportunity to be heard were not valid.

Defence case in summary

9. In addition to evidence produced and outlined above the respondents submit that the gist of their case was that the claimant violated the terms and conditions of his employment by breaching the provisions of Regulation 140(e) of the *CORT* which provides that:- ‘The commission may take disciplinary action against a teacher who commits any of the following offence -mismanagement and embezzlement of public funds’. That the claimant was subjected to disciplinary process as envisaged by the law and on established, reasonable and compelling grounds for misappropriation of public funds.

Written Submissions.

10. After the closure of defence the court issued directions for filing of written submissions. The parties complied. The Claimant’s written submissions drawn by Oscar Wachilonga and Associates Advocates were dated 7th March 2023 and filed in court on the 9th March 2023. The Respondents’ written submissions were drawn by Sylvia Ngere Advocate and dated 11th April 2023 and filed in court on the 18th April 2023.

Determination

Issues for Determination.

11. The Claimant in his written submissions addressed the validity of the grounds of dismissal and the process leading to the dismissal
12. The Respondents identified the following issues for Determination:-
 - A. Whether the Respondent had justifiable reason to dismiss the claimant
 - b. Whether the claimant was subjected to due disciplinary process
 - c. Whether the claimant is entitled to prayers sought
13. The court having heard the case and received evidence from the parties was of the considered opinion that the issues placed before the court for determination of the dispute by the parties were as follows:
 - a. Whether there were valid reasons for dismissal.



- b. Whether there was procedural fairness before the dismissal .
- c. Whether the Claimant was entitled to reliefs sought.

Claimant's Submissions

14. The Claimant submits that the Respondent on its part has maintained that the procedure leading to the dismissal was fair and based on proven facts and therefore the dismissal of the Claimant was merited. The Claimant equally filed reply to Respondent's defense countering the contentions in the statement of defense. The 1st letter of interdiction was dated 13/12/2017 and it contained 2 grounds as follows:
 - a. You misappropriated Kshs. 190,594.80 of Kakamega School for the deaf for the period of 2016 while the head teacher Kakamega school for the deaf.
 - b. You flouted procurement procedures by presenting forged minutes of SIMSC committee dated 8th January, 2016 and 12th January, 2016 for single sourcing while the head of Kakamega school for the deaf.
15. The claimant submits that on receiving the letter of interdiction the Claimant filed Kakamega CMCC No 385 of 2017 and obtained orders in the following terms:-
 1. The Respondents, their agents, assignees and/or whosoever acts through them be and are hereby restrained by way of a temporary injunction from interdicting, harassing and/or intimidating the applicant herein in any manner whatsoever visa-vis- interdiction letter dated 13/12/2017 till hearing and determination of this application.
16. The claimant submits that armed with the said court order, the Claimant went on with his duties as the head teacher of Kakamega school for the deaf. That , on 30/11/2018, the Claimant received another interdiction letter which read in part that:
 - a. You misappropriated Kshs. 300,034/- of Kakamega school for the deaf for the period of 2016 while the head of Kakamega school for the deaf.
 - b. You flouted procurement procedures by presenting forged minutes of the SIMSC committee dated 5th January, 2016 and 12th January, 2016 for single sourcing while the head teacher, Kakamega school for the deaf.
 - c. You withdrew Kshs. 35,500/- on 20/01/2018 from account II of Kakamega school for the deaf, Kshs. 600,000/- on 1/2/2018 and Kshs. 510,000 on 2/2/2018 from the grants account of Kakamega school for the deaf meant for F P E while on interdiction.
 - d. You breached clause (b)(vi) of the 3rd Schedule of the Act in that, you unsubordinated the TSC sub county Director by refusing to hand over the school on 28/12/2017 following your interdiction on 13/12/2017.
17. The claimant submits that his interdiction was the first subject of this suit before the suit was amended. That the dismissal of the Claimant was done during the hearing of this case in the following terms:
 1. You misappropriated Kshs. 300,034/- at Kakamega school for the deaf for the period of 2016 while the head of Kakamega school for the deaf.
 2. You flouted procurement procedures by presenting forged minutes of the SIMSC committee dated 5th January, 2016 and 12th January, 2016 for single sourcing while the head teacher, Kakamega school for the deaf.



3. You withdrew Kshs. 35,500/- on 20/1/2018 from account II of Kakamega school for the deaf, Kshs. 600,000/- on 1/2/2018 and Kshs. 510,000/- on 2/2/2018 from the grants account of Kakamega school for the deaf meant for F P E while on interdiction.
 4. You breached clause (b) (iv) of the 3rd Schedule of the Act in that, you unsubordinated the TSC sub county Director Kakamega central by refusing to hand over the school on 28/12/2017 following your interdiction on 13/11/2017 as per the provision of regulation 156(4) of the code of regulation for teachers.
18. The claimant submits that PW2 and PW3 who were chair and treasurer of the BOM respectively from their testimony, the disciplinary process against the Claimant was initiated by the Respondents. They were summoned to the 2nd Respondent's office and informed of issues concerning the school. That it would appear the personnel from the Ministry of Education was then roped in at this stage. That the accountant in his testimony attempted to say in cross examination that they acted on complaints from the public but no such complaint was filed with the report or list of documents by the Respondents. That this was also the evidence of the 2nd Respondent wherein he alleged that he initiated the investigations against the Claimant pursuant to the complaints from the public. That Regulation 145 of the code of regulation for teacher provides thus.

“ 45

- (1) Any person with information that a teacher has engaged in professional misconduct or any conduct contravening these regulations may lodge a complaint in writing, clearly indicating the nature of the complaint.
- (2) Where the person making allegations lodges a verbal complaint, the person to whom the report is made shall cause the complainant to record and sign a statement of the complaint.”

While Regulation 146(3) provides thus:

‘Where an allegation is made against a head of an institution-

- a. The county director shall institute investigation in liaison with the Board of Management.
- b. The county director or his representative shall constitute a team of not less than three technical officers to institute investigations where there is no board of management or in the case of primary educational institution.”

19. The claimant submits that RW2 was the then director of education of Kakamega County. In his evidence in chief and recorded statement said:- ‘On or about May, 2017, I received information that the plaintiff whilst the head of the Kakamega school for the deaf had-
- a. Misappropriated Kshs. 300,034/- in the year 2016
 - b. Flouted procurement procedures by presenting forged minutes of the SIMSC committee dated 8th and 12th January, 2016 for single sourcing.”



20. That the Director did not disclose the source of the complaint and even failed to comply with regulation 145 of the code of regulation for teachers on taking of reports from 3rd parties. That this lend credence to the Claimant's position or assertion that it is the agents of the 1st respondent including the 2nd respondent who initiated the alleged information and no report was ever made by 3rd party alleged. That it is equally not clear whether the persons appointed by the RW2 were technical officers under the regulation as he did not in his statement give the names of the officers involved and their ranks. That the Director, RW2, in this case equally authored the letter dated 1/8/2017 in which it was alleged that the Claimant had misappropriated Kshs. 190,94.50/-. That however, the 2nd interdiction letter and the dismissal letter indicated a figure of Kshs 300,034/- and the director in his testimony had not bothered to explain the discrepancy or whether he received two reports in respect of the same issue. That the investigative audit report was prepared by RW1 and was filed in court. It contained a figure of Kshs. 190,594.50. The report was adopted by the court with specific amendments. That even the report by RW1 did not categorically state that the Claimant took the money in question. That, the Director made allegations over the loss of Kshs. 300,034/- without any supporting documents and even the investigation report by RW1 did not mention of these figures.
21. Was the ground of dismissal based on the loss of Kshs. 300,034/- proved. The claimant submits that that the same was not proved as no evidence was laid before the disciplinary committee and the Court regarding the same. The investigation report and the statement of RW2 are contradicting on the amount allegedly lost on account of the claimant. The claimant relied on the case of [Macoha Isunde v Lavington Security Guards Ltd](#) [2017] eKLR, the court of Appeal stated-
- “ There can be no doubt that the Act which was enacted in 2007 places a heavy obligation on the employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (Sec 43) prove that the grounds are justified section 47(5) among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”
22. That the 2nd ground for dismissal was that the Claimant forged the minutes dated 8th and 12th January, 2016. The list of documents of the respondent does not contain these minutes or a report/forensic showing the minutes were forged. That, forgery is a serious criminal offence. That the minutes and such reports were not part of the evidence to the 1st respondent's disciplinary committee and to this court. This allegation thus fails the test in section 43 of [Employment Act](#). That RW3 confirmed during cross examination that they did not see the minutes and none were produced before court.
23. That the 3rd ground was that Kshs. 35,500/-, Kshs. 510,000/- and Kshs. 660,000 were withdrawn by the claimant while on interdiction. That there is on record a court order that stayed the interdiction of the Claimant during the period. The order was made on 28th November, 2017. That, the Claimant then remained in office legally. All the transactions by him were legal and valid during the subsistence of the order. That this applies to the issue of handing over. There is no way the Claimant would have handed over in the face of the court order.
24. The claimant submits that the rule of law is part of the national values and principles of governance set out in Article 10 of the [Constitution](#). These values and principles bind all state organs, state officers and all persons whenever any of the interprets or applies the [Constitution](#), enacts, applies or interprets any law. The respondents are bound by them and cannot therefore allege that the Claimant was in insubordination for not handing over the office to the Sub-County Director when he was protected by the court order. The claimant submits that that all the grounds for dismissal despite the Claimant not



having been given opportunity to be heard before the disciplinary committee were not proved. That the respondent proceeded with the disciplinary proceedings while aware that the Claimant was unwell as evidenced by the medical documents herein this was contrary to section 41 of the *Employment Act* and article 50 of the *Constitution*. That upon the interdiction, the Claimant as stated in his evidence in chief did not earn anything from the Respondent and this is the case to date. That PW2 and PW3 were and are still chair and treasurer respectively of the institution. If they were culpable and aided the Claimant to plunder school resources as alleged the respondent through the report would have recommended for their removal. Their being in school to date is a clear demonstration that the Respondent had an agenda to end the Claimant's employment at all costs. The claimant urged to find that the termination was procedurally and substantively flawed and grant the prayers sought in the claim statement.

Respondents' Submissions

On Whether the Respondents had justified reasons to dismiss the Claimant:-

25. The 1st Respondent submits that it is established under Article 237(1) of the *Constitution* with the mandate to among other functions, exercise disciplinary control over teachers and terminate the employment of teachers. That it was testified that on or about May, 2017 the 1st Respondent through its agent the 2nd Respondent herein, the county director, Kakamega County, received information that the Claimant whilst as head teacher Kakamega School for the deaf had:
 - a. Misappropriated Kshs. 300,0344.00 in the year 2016;
 - b. Flouted procurement procedures by presenting forged minutes of the SIMSC Committee dated 8th January 2016 and 12th January 2016 for single sourcing of instructional materials.
26. That RW-1 was a Ministry of Education official deployed as an auditor in the Western region of the country including Kakamega was candid in his evidence that he had investigated the case and found that the Claimant had failed to comply with procurement procedures as the AIE holder of Kakamega School for the deaf. RW1 further testified and produced exhibits that the claimant withdrew Kshs. 35,000/- on 25th January, 2018, Kshs. 600,000/- on 1st February, 2018 and Kshs. 510,000 on 2nd February, 2018 whilst he was on interdiction. The said withdrawals were illegal as there was no budget supporting the expenditure more so because the claimant had technically been suspended from work through the interdiction. RW-1 also testified that upon conducting investigations which revealed malpractices, the claimant was invited to respond to the audit queries raised.
27. Consequently, the Respondents submit that there was substantial reason to subject the claimant through a disciplinary process on allegation of breach of provisions of the *CORT*. The RW-2 who was also the 2nd Respondent Raphael Tarus who was the Kakamega County Director at the time testified that he received an investigation report which implicated the Claimant for offences under the *CORT*. That the investigation report D-Exhibit1 revealed that the Claimant had failed to prepare the school's budget as expected of him as the AIE holder and in line with the Public Financial Management Act and in order to cover his tracks, he falsified procurement minutes. The report also indicated that he had misappropriated Kshs. 300,000/- of Kakamega school for the deaf.
28. The Respondent submits that these charges levelled against the Claimant were investigated and proved at a hearing by an impartial, independent and professional panel and the decision to dismiss him was fair, just and appropriate based on the merits and evidence adduced. The respondent further submits that the Respondent discharged its obligation under section 43(1) of the *Employment Act* as at the time the claimant was dismissed from employment, it was genuinely convinced that he had breached the terms of employment on account of having misappropriated and embezzled public funds.



29. The respondents relied on the Court of Appeal decision in *Kenya power & lighting Company Limited v Aggrey Lukorito Wasike* (2017) eKLR where the court pronounced itself as follows:-

“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.”

30. The respondents submit that in this case, it was quite clear from the evidence on record that the 1st Respondent genuinely believed that the Claimant had misappropriated public funds in addition to presenting falsified procurement documents. That the 1st Respondent had a justifiable reason to interdict and eventually dismiss the claimant. That in addition, upon interdiction which was with effect from 13th December, 2017 the claimant hurriedly and illegally withdrew Kshs. 35,500/- on 25th January, 2018, Kshs. 600,000/- on 1st February, 2018 and Ksh. 510,000/- on 2nd February, 2018 as a retaliation to the administrative action by the Respondents. The respondents invited the Honorable court to take note that the Claimant did not demonstrate to this court how these monies were expended nor the budget of the same.

On Whether the Claimant was subjected to due disciplinary process;

30. The respondents submit that the code of Regulations for Teachers broadly outlines the procedures to be followed in exercising disciplinary powers under the Act. Specifically, Regulations 146 to 156 outline the specific steps to be followed. The Respondent submits that it meticulously followed the procedures and adhered to the principles of Natural Justice.

On Investigations

31. The respondents submit that upon receiving information that the Claimant herein had breached the provisions of the code of Regulations for Teachers by misappropriating public funds and falsifying procurement documents, investigations led by the Ministry of Education were commenced to verify the allegations. At the onset, the Ministry of Education auditors conducted investigations on 24th May, 2017. At the end, an investigative audit report (DE-2) was generated and it implicated the Claimant and recommended necessary action against him. Indeed, the investigations revealed several gaps both managerial and administrative. The investigative report was forwarded to the Commission for further action as per its recommendations. That subsequently, the County Director issued the Claimant with a show cause letter (DE-3) and invited him to respond to the findings of the report. The Claimant duly responded vide his letter dated 14th August, 2017 (DE-4). The respondents submit that the Claimant was subjected to a fair and procedural investigation process as he was granted ample opportunity to present his case to the Respondent prior to his interdiction. On the manner in which Boards and Committees should conduct investigations to satisfy the requirement of fairness, the respondents relied on Court of Appeal decision in *Judicial Service Commission v Gladys Boss Shollei & another* (2014) eKLR where Kiage JA was persuaded by the English Court of Appeal in *Selvara Jan v Race Relations Board* (1976) 1 ALL ER 12 where the Court held as follows:-

“What the duty to act fairly requires depends on the body is of the investigation and the consequence which it may have on the person affected by it. The fundamental rule is that, if a person may be adversely affected by the investigation and report, he should be informed of the substance of the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure.”



On the Interdiction:

32. The Respondents submit that pursuant to Regulation of 147 the Cort(Code Of Regulations For Teachers), the Claimant was duly served with a letter of interdiction specifying the actual allegations made against him. In the said letter of interdiction of 13th December, 2017, the Claimant was further advised to prepare a defense statement in writing to the Respondent within 21 days where after, he would be accorded the opportunity to be heard in person. That immediately upon interdiction the Claimant moved to Court seeking injunctive orders against the Respondents which orders were erroneously granted at the interim stage on 28th December, 2017. The respondents submit that the orders were erroneous because at the time they were being granted, the interdiction had already taken effect and thus they were overtaken by events.
33. That whilst still on interdiction, the Claimant hastily and arbitrarily withdrew the school's funds meant for Free Primary Education without the consent of the school board. He specifically withdrew Kshs. 35,500/- on 20th January, 2018 from Account II; Kshs. 600,000/- on 1st February, 2018 from the Grants Account and a further Kshs. 510,000/- on 2nd February, 2018 from the Grants Accounts (DE-8a, 8b & 8c). This was a further Professional offence that necessitated amendment of the initial interdiction letter.
34. That pursuant to Regulation 147(5) of the CORT which provides that the commission reserves the right to amend an interdiction letter, the interdiction letter was amended by a letter dated 30th November, 2018 (DE-9) and the Claimant was once again granted the opportunity to respond. He was further advised to present any other evidence including documents in support of this case. This could have included witness statements if any.

On Disciplinary Hearing:

35. The Respondents submit that pursuant to Regulation 149 of the CORT, the Claimant was invited to a disciplinary hearing through a letter dated 23rd January, 2019 (DE-12). In the said letter, that he was duly informed that he could present any documents that may be useful in his defense, appear in person and present witnesses if any. The Claimant did not turn up for the hearing necessitating the panel to defer the meeting to a later date. That the Claimant was invited for a third time vide letter dated 14th August, 2020 to be heard on 16th September, 2020. He again did not appear compelling the panel to defer the disciplinary hearing yet again to a later date. The Claimant was invited for a third time vide letter dated 23rd April, 2021 to be heard on 26th May, 2021. In his true fashion, he did show up for the discipline hearing. The Respondents invited the court to appreciate the disciplinary minutes (DE-16) attached to the Respondent's bundle of documents. Additionally, the claimant neither presented any documents in his justification nor did he write a defense despite the invite by the interdiction letters.
36. The respondents submit that the Claimant's assertion that he could not attend the disciplinary hearing owing to being unwell is peculiar given that he has actively pursued litigation and the court record can bear the commission witness that he has never missed any proceedings. The respondent submits that the Claimant was duly accorded ample time to respond to the allegations of misappropriation of funds. He was equally invited for the hearing of his discipline case in consonance with the Employment Act and tenet of Natural Justice. However, he chose not to participate at all.

On the Dismissal

37. The respondents submits that upon careful consideration and evaluation of the documentary evidence and oral evidence and all statements made by all witnesses present both written and oral, and given the



grievous nature of the Claimant's conduct, the disciplinary panel arrived at a considered decision to dismiss him. That the Respondent has justified reason/grounds to subject the Claimant to disciplinary procedure and the procedure adopted was beyond reproach. The respondents further submit that the threshold of administrative hearing envisaged under the *Employment Act* and the TSC was strictly adhered to and the Claimant's disciplinary process is therefore a product of a clinical adherence to the spirit and tenor of the law and ought to be upheld. The respondent submits that the court to note that there was no orders barring the Commission from proceeding with the disciplinary hearing during the pendency of this suit.

Decision

38. Section 43 of the *Employment Act* provides for proof of reasons for the termination of employment as follows:- '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.'(emphasis given)
39. Section 45(2) of the *Employment Act* further clarifies on the criteria for fair termination as follows:-
'2) A termination of employment by an employer is unfair if the employer fails to prove— (a) that the reason for the termination is 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 operational requirements of the employer; and(3) An employee who has been continuously employed by his employer for a period not less than thirteen months immediately before the date of termination shall have the right to complain that he has been unfairly terminated.
- (4) A termination of employment shall be unfair for the purposes of this Part where— (a) the termination is for one of the reasons specified in section 46; or (b) 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. (5) In deciding whether it was just and equitable for an employer to terminate the employment of an employee, for the purposes of this section, a labour officer, or the Industrial Court shall consider— (a) the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision; (b) the conduct and capability of the employee up to the date of termination; (c) the extent to which the employer has complied with any statutory requirements connected with the termination, including the issuing of a certificate under section 51 and the procedural requirements set out in section 41; (d) the previous practice of the employer in dealing with the type of circumstances which led to the termination; and (e) the existence of any previous warning letters issued to the employee.'
40. The court applying the foregoing legal provisions having heard the case made the following findings:-
41. The 1st letter of interdiction was dated 13/12/2017 and it contained 2 grounds as follows:
- a. You misappropriated Kshs. 190,594.80 of Kakamega School for the deaf for the period of 2016 while the head teacher Kakamega school for the deaf.



- b. You flouted procurement procedures by presenting forged minutes of SIMSC committee dated 8th January, 2016 and 12th January, 2016 for single sourcing while the head of Kakamega school for the deaf.

42. The claimant on receiving the letter of interdiction dated 13/12/2017 filed Kakamega CMCC No 385 of 2017 and he obtained orders in the following terms:-

‘The Respondents, their agents, assignees and/or whosoever acts through them be and are hereby restrained by way of a temporary injunction from interdicting, harassing and/or intimidating the applicant herein in any manner whatsoever visa-vis- interdiction letter dated 13/12/2017 till hearing and determination of this application.’

43. The claimant relied on the said court order issued on the 28th December 2017 not to handover and make withdraws from the school account on basis that he was legally in office. DW2 during the hearing informed the court that the claimant was always interdicted and the 1st respondent never returned him to office hence the withdraws and refusal to handover was still a valid reason for dismissal. The court found the Court Order of the lower court did not lift the interdiction and that the 1st respondent never lifted the interdiction in the entire period hence the claimant had no authority to transact on behalf of the school following the 1st interdiction. The claimant further failed to comply with the interdiction letter to vacate office and response in 21 days upto 28th December 2017 when he obtained the said court order which did not even lift the interdiction.(see D exhibit 6 being interdiction letter dated 13th December 2017) The court holds that the claimant was guilty of insubordination of the employer.

44. There was no evidence that the claimant was ever returned to office after the 1st interdiction by the employer. Consequently the court holds that the reasons of refusal to handover and the withdraws from the school bank account where he was a mandatory signatory in particular were illegal as the same was done by the claimant while not regularly in office. The court find that the lower court Order of 28th December 2017 did not set aside the interdiction order and that only the employer can reinstate an employee to office upon receipt of a court order by lifting the interdiction order. The claimant was illegally in office and operated the bank accounts by withdraws. The burden then shifted to the claimant to produce the budget for the withdrawn money. The court did not believe the documents were in the office as stated by the claimant. The court found that the witnesses of the claimant who had custody of the said documents could have produced the same in court if indeed they existed. The court finds that the applicable standard of proof of balance of probability in employment claims was met by the respondents in justification of reasons for the dismissal and upholds the court of appeal decision in Court of Appeal decision in *Kenya power & lighting Company Limited v Aggrey Lukorito Wasike* (2017) eKLR where the court pronounced itself as follows:-

“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.” The court in the instant case was satisfied on a balance of probability the employer genuinely believed the reasons stated in the dismissal letter existed based on the investigation report, the conduct of the claimant of failing to respond to allegations in the interdiction letters, failing to vacate office and handover and of making withdraws while on interdiction.

45. The court did not dwell on the source of complaints as the investigating agency was government and the alleged misappropriated funds belonged to the government. The government had right to investigate



even on its own motion. The court upholds the authority cited on autonomy of the investigator as held by Justice Kiage JA in *Judicial Service Commission v Gladys Boss Shollei & another* (2014) eKLR where Kiage JA was persuaded by the English Court of Appeal in *Selvara Jan v Race Relations Board* (1976) 1 ALL ER 12 where the Court held as follows:-

“What the duty to act fairly requires depends on the body is of the investigation and the consequence which it may have on the person affected by it. The fundamental rule is that, if a person may be adversely affected by the investigation and report, he should be informed of the substance of the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure.”

46. The court holds that the standard of proof being of balance of probabilities the conduct of the claimant portrayed him as a dishonest person and any reasonable employer would have terminated his services. In the upshot the court found there was a detailed investigation report which was produced, there was prove of failure to handover by the claimant who stated at hearing the reason he did not handover was because the Board was not aware of the interdiction yet he knew he ought to have handed over and vacated office within 48 hours to the Board. The Board was in place at all the material time as confirmed by CW2 and CW3. The lower court did not reinstate the claimant or lift the interdiction which was already in place as the time the order was issued, 48 hours having lapsed the claimant was illegally in office and any action taken thereafter at the school by the claimant was without authority and the said Court order could not save him. The reasons for the termination were related to the operational requirements of the employer which the court found the claimant was aware of.
47. In the upshot the court finds the reasons for termination were justified and related to operational requirements of the employer under the *CORT*. The claimant did not produce any evidence to controvert the allegations on the forged minutes or even produce budgets to support the withdraws despite having been in the office at the time of the 2nd letter of interdiction hence access to the documents. The claimant further did not respond to the issues raised in the interdiction letters as per the notice of 21 days. CW2 and CW3 his witnesses in the court had access to the records but did not produce evidence to controvert the allegations. The court drew conclusion on balance of probabilities that the allegations on the misappropriation of fund had basis.

Procedural fairness

48. The claimant submits that that all the grounds for dismissal despite the Claimant not having been given opportunity to be heard before the disciplinary committee were not proved. That the respondent proceeded with the disciplinary proceedings while aware that the Claimant was unwell as evidenced by the medical documents herein this was contrary to section 41 of the *Employment Act* and article 50 of the *Constitution*. The claimant relied on the case of *Macocha Isunde v Lavington Security Guards Ltd* 2017 eKLR, the court of Appeal stated-

“There can be no doubt that the Act which was enacted in 2007 places a heavy obligation on the employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (Sec 43) prove that the grounds are justified section 47(5) among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

49. The Respondents submit that pursuant to Regulation 149 of the *CORT*, the Claimant was invited to a disciplinary hearing through a letter dated 23rd January, 2019 (DE-12). In the said letter, that he was



duly informed that he could present any documents that may be useful in his defense, appear in person and present witnesses if any. 49. That the Claimant did not turn up for the hearing necessitating the panel to defer the meeting to a later date. That the Claimant was invited for a third time vide letter dated 14th August, 2020 to be heard on 16th September, 2020. He again did not appear compelling the panel to defer the disciplinary hearing yet again to a later date. The Claimant was invited for a third time vide letter dated 23rd April, 2021 to be heard on 26th May, 2021. In his true fashion, he did show up for the discipline hearing. The Respondents invited the court to appreciate the disciplinary minutes (DE-16) attached to the Respondent's bundle of documents. Additionally, the claimant neither presented any documents in his justification nor did he write a defense despite the invite by the interdiction letters.

50. The respondents submit that the Claimant's assertion that he could not attend the disciplinary hearing owing to being unwell is peculiar given that he has actively pursued litigation and the court record can bear the commission witness that he has never missed any proceedings. The respondent submits that the Claimant was duly accorded ample time to respond to the allegations of misappropriation of funds. He was equally invited for the hearing of his discipline case in consonance with the Employment Act and tenet of Natural Justice. However, he chose not to participate at all.

Decision

51. The court found evidence the claimant was invited for the disciplinary processes, attended at county level but failed to turn up for the disciplinary hearing of the 1st respondent despite being invited three times. His defence was he was unwell. The respondent refutes that stating the was active in court at the material period. The claimant during cross examination confirmed he instructed Oscar Wachilonga Advocate to write to TSC letter dated 23rd December 2019 where the advocate referred to WhatsApp message received by Claimant on the disciplinary hearing dates. (C- exhibit 4). The court found there was no mention of sickness in the said letter by the claimant's counsel. The letter raised concern of invitation to disciplinary hearing when the case was in court. The claimant confirmed to court he had no sick leave to be absent at hearing of 26th may 2021 under his Exhibit 7 being treatment documents. The claimant agreed the treatment documents had not been received by TSC. The court upholds the decision cited by the claimant on procedural fairness in Macoha Isunde v Lavington Security Guards Ltd 2017 eKLR, where the court of Appeal stated-

“There can be no doubt that the Act which was enacted in 2007 places a heavy obligation on the employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for terminating (Sec 43) prove that the grounds are justified section 47(5) among other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”

52. The court finds and determines the 1st respondent complied with the procedural fairness envisaged under section 41 of the Employment Act by inviting the claimant to respond to the allegations and affording him opportunity to be heard before the dismissal. The employer discharged obligation under section 41 of the Employment Act by giving claimant opportunity to be heard before the dismissal which the claimant failed to take up.

Whether the Claimant is entitled to the Reliefs Sought

53. The court holds that the termination of the employment of the claimant was lawful and fair.
54. The court in the circumstances finds the remedies for unfair termination were not available to the claimant. The 1st respondent led evidence that the teacher was not entitled to payment of ½ salary



where they faced charge of misappropriation of funds. The claimant did not provide evidence to the contrary. In the circumstances the court finds the claimant was not entitled to any of the reliefs sought.

55. The entire claim is dismissed with costs to the 1st respondent.

56. It is so ordered.

DATED SIGNED AND DELIVERED IN OPEN COURT THIS 29TH DAY OF JUNE 2023 AT KAKAMEGA

JEMIMAH KELI

JUDGE

