Oirere v Teacher Service Commission (Cause 878 of 2018)
[2023] KEELRC 1474 (KLR) (8 June 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 878 OF 2018

BOM MANANI, J

JUNE 8, 2023

BETWEEN

JOSPHAT NYAANGA OIRERE ..... CLAIMANT

AND

TEACHER SERVICE COMMISSION ..... RESPONDENT

JUDGMENT

Introduction

1. The claim before me relates to unfair termination of a contract of service. The Claimant, who was employed by the Respondent as a teacher, has accused the latter of unfairly terminating his contract of service. The Claimant has moved the court seeking, among others, an order reversing the aforesaid decision.

2. On its part, the Respondent does not admit liability for the claim. According to the Respondent the decision to terminate the Claimant's contract was processed fairly and was for valid reason.

Claimant's Case

3. The Claimant avers that at the material time to this action, he was serving as a Deputy Headmaster of Iringa Primary School. He had been transferred to the school in January 2016 to serve in the aforesaid position.

4. The Claimant states that on February 25, 2016, a female learner was caught with a love letter addressed to a male colleague at a nearby school. This development resulted in the girl being punished for the infraction.

5. In early July 2016 the same girl was confirmed to be expectant. According to the Claimant, this discovery triggered a series of events that eventually led to the termination of his employment.

6. The Claimant states that when the girl was asked to disclose the identity of the person responsible for the pregnancy, she pointed an accusing finger at him. The student is said to have alleged that the Claimant had lured her into a sexual relation that led to the pregnancy.

7. The Claimant denies having had a sexual relation with the girl as alleged or at all. According to him, the allegations were fueled by witch-hunt against him. The Claimant blames the accusation against him on two events that occurred immediately after he joined the school. The events can be discerned from the Claimant's own testimony and from the evidence he extracted from one Mary Bochere, a defense witness, through cross examination before me.

8. First, the Claimant avers that when his accuser was caught with the love letter in February 2016, he is the one who administered punishment on her. According to the Claimant, the girl appeared to have been incensed by this action. She allegedly vowed before two of her colleagues to hit back at the Claimant at an opportune time. In the Claimant's view, the girl's accusation of sexual misconduct against him was in fulfillment of these earlier threats.

9. Second, the Claimant sees the hand of a member of the school's former management in his tribulations. It is stated that when he joined the school in January 2016, the Claimant found the chair of the school's Board of Management embroiled in a management tussle with the school's Head teacher. It is stated that the Claimant stood with the Head teacher in the dispute, a matter which may not have augured well with the chair of the Board. The Claimant implies that the girl may have been used by the disgruntled chair or some other person to hit back at him by falsely accusing him of sexual impropriety involving her.

10. The Claimant says that following the accusation against him, he was interdicted and subjected to a flawed disciplinary process. As a result, his contract of service was terminated.

11. The Claimant states that he was denied the right to effectively urge his defense before the disciplinary committee (the DC). He avers that he was denied the opportunity to call witnesses at the hearing. At the same time, he was allegedly denied the opportunity to exhaustively cross examine his accuser and her witnesses.

12. It is the Claimant's case that the DC failed to consider material evidence which would have exculpated him from blame. For instance, he accuses the DC of failing to consider medical evidence on the accuser's pregnancy. According to the Claimant, this evidence showed that the child that the accuser was carrying was not his and the pregnancy was approximately 22 weeks old, a fact which placed the conception date close to the time that the girl admitted to having had sex with a male student from a nearby school.

13. The Claimant further accuses the DC of failure to consider his alibi which placed him away from the alleged scene of crime on the dates that the sexual encounters allegedly happened. It was his case that on the two dates that he is accused of having taken the girl to Suneka for sex, he was miles away from that town.

14. The Claimant accuses the DC of failing to consider school records whose entries disproved the accuser's assertions against him. The Claimant also contends that the DC failed to call for independent evidence from two other pupils which would have established that his accuser was on a mission to fix him.

15. The Claimant accuses the DC of failing to use allegedly self incriminating and contradictory evidence by his accuser against her. For instance, it is the Claimant's case that although the girl had admitted

engaging in sexual acts with another student, the DC ignored this evidence. Instead, the DC opted to hold the Claimant responsible for the sexual acts with the girl.

16. It is the Claimant's case that the Respondent failed to handle the disciplinary case as required by law. The Claimant accuses the Respondent of conducting shoddy and biased investigations and abdicating its responsibility to ensure adequate, diligent, just and reasonable inquiry into the allegations leveled against him.

17. According to the Claimant, these failures resulted in the DC disregarding the burden and standard of proof in the matter. As a consequence, it is the Claimant's position that the DC proceeded on the premise that the Claimant was guilty of the charge unless he proved his innocence. Further, the DC ended up applying an unusually low standard of proof for the assertions against the Claimant.

18. The Claimant states that besides the disciplinary case, he was subjected to a criminal trial based on the same set of facts. However, the criminal case was subsequently withdrawn after scientific evidence demonstrated that he was not responsible for the girl's pregnancy.

19. The Claimant contends that his appeal against the decision of the DC was handled unfairly. It is his case that the Review Committee (the RC) refused to allow him legal representation and failed to give reasons for its decision.

Respondent's Case

20. On the other hand, the Respondent's case is that after it received a report of sexual misconduct against the Claimant, it instituted investigations into the matter in accordance with its regulations. The Respondent states that the Claimant was subsequently interdicted as required under the regulations.

21. The Respondent avers that the investigations yielded adverse findings against the Claimant. As a consequence, he was subjected to a disciplinary process where his case was heard and determined.

22. It is the Respondent's case that it called a number of witnesses who testified before the DC. That the evidence of these witnesses pointed to culpable conduct on the part of the Claimant in respect of the charge that he faced. The Respondent contends that the DC relied on this evidence to reach its decision against the Claimant.

23. According to the Respondent, the Claimant was given a chance to present his case before the DC. He was also accorded an opportunity to cross examine his accusers and all the witnesses that were called by the Respondent. It is only after this exercise was completed that the DC recommended termination of the Claimant's contract for having engaged in immoral conduct contrary to the Respondent's Code of Conduct.

24. The Respondent avers that although the Claimant was cleared of the criminal charge, this did not affect the disciplinary process against him. In the Respondent's view, the issues before court and those before the Respondent's DC were distinct.

25. It is the Respondent's case that the Claimant's appeal was considered and found to be wanting in merit. Consequently, it was declined.

26. In the Respondent's view, the disciplinary process against the Claimant was conducted above board. It was conducted in a manner that was independent, fair and just for both parties.

Issues of Determination

27. After analyzing the pleadings, evidence and submissions by the parties, the following present as issues for determination: -

    a) Whether the contract of employment between the parties was unfairly terminated.

    b) Whether the parties are entitled to the reliefs that they seek in their respective pleadings.

Analysis

28. The dispute in the cause revolves around accusations of sexual misconduct by the Claimant on two dates: February 28, 2016 and either March 17, 2016 or April 17, 2016. Whilst there was no departure in the allegations against the Claimant with respect to the February 28, 2016, the Respondent and its witnesses were ambivalent about the second set of dates. In some of the records, it is suggested that the Claimant had sexual intercourse with the minor on March 17, 2016. In others, this date is indicated as April 17, 2016.

29. Whilst evaluating the propriety of an employer's decision to terminate a contract of service, it is important to keep in mind the principles that undergird adjudication of disputes of this nature. Of critical significance is the principle of the employer's managerial prerogative. By this principle, it is recognized that the employer has the general power to make management decisions at the workplace. This power covers a wide range of matters including the power to hire, discipline and dismiss employees. The only limitation to the exercise of this prerogative is that whatever decision that the employer takes, it must be within the law or the internal workplace rules or the terms of the contract between the parties.

30. The consequence of this reality is that courts are not, as a general rule, entitled to interfere with the exercise of this power unless it is demonstrated that the employer's decision contravened the law, the internal work rules, the terms of the contract between the parties or was otherwise manifestly unjust (*Timothy Odhiambo Otieno v Nairobi Hospital Interested Party Kenya Hospital Association* [2019] eKLR). As a matter of fact, the court has no power to substitute its own decision with that of the employer merely because in the judicial officer's view, he would have reached a different decision from that of the employer had he been in the shoes of the employer (*Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others* [2019] eKLR).

31. The court's role is confined to reviewing the employer's decision strictly within the limits of confirming whether it meets the parameters set by law. In this respect, the court, when reviewing the employer's decision, does not act as an appellate entity against the employer's decision.

32. Consequently, and notwithstanding the judicial officer's personal views on the matter, the court has a duty to uphold the employer's decision if it falls within the band of decisions that any other reasonable employer, faced with the same set of facts, would have made (*Mwanyale v Imarika Sacco* (Employment and Labour Relations Claim 10 of 2019) [2022] KEELRC 3972 (KLR)).

33. In underscoring this reality, the Court of Appeal in the *Kenya Revenue Authority v Reuwel Waithaka Gitahi* case (*supra*) quoted with approval the following passage from the Halsbury's Laws of England:-

> " ...In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach

> (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted . If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair."

34. The above guidelines are certainly critical in adjudicating on the dispute before me. I will bear them in mind in reaching the final pronouncement in the matter.

35. The law on termination of employment in Kenya is substantially encapsulated in the *Employment Act, 2007*. A decision to terminate an employee's contract of service must be with cause. The employer must not only have valid ground to support his decision but must also ensure that the employee's contract is closed in accordance with due procedure.

36. The law places the burden of establishing the validity of the reason to terminate the contract on the employer. The employer also bears the burden of demonstrating that he observed the procedure set out under the Act in terminating the contract. Notwithstanding this, the employee has the initial obligation to provide preliminary evidence to lay the foundation for his claim in terms of Section 47 of the *Employment Act*.

37. That the employer must establish the grounds for terminating a contract of service does not however place on him the obligation to establish the infallibility of the grounds. What is critical is for the employer to provide evidence which demonstrates that, in the circumstances of the case, he had a genuine belief that there was a valid reason to terminate the contract of service. This reality is engrained in Section 43(2) of the *Employment Act* which provides as follows:-

> ''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."

38. In reaching a determination in this respect, the standard of proof is not as prescribed for a trial in a criminal case. Rather, it is one of a balance or probabilities (*Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others* (*supra*)). In other words, if the facts placed before the employer are sufficient to raise a reasonable belief in him on a balance of probabilities that there is a valid reason to terminate an employee's contract, the employer will be entitled to terminate the contract so long as the decision to terminate falls within the band of responses that another reasonable employer, faced with the same set of facts, would probably have had.

39. I have considered the dispute before me in the context of the foregoing. The first issue for consideration is whether the Respondent had reasonable grounds to entertain the belief that the Claimant had engaged in sexual misconduct with a pupil on February 28, 2016 and either March 17, 2016 or April 17, 2016 as alleged. In determining this issue, the court is required to consider the evidence placed before the disciplinary panel without more.

40. According to the record, the pupil accused the Claimant of having had carnal knowledge of her on diverse dates between February 2016 and April 2016. When the accusation was raised, the record shows that the Respondent constituted an investigation panel comprising of three individuals to inquire into the matter. On finalization of its investigations, the panel prepared a report dated August 1, 2016 in which it arrived at a preliminary finding that indeed the Claimant had engaged in sex with the pupil on

dates in February 2016 and April 2016. This report was the basis upon which the Respondent moved to set up the DC which heard the complaint against the Claimant.

41. Following the report by the investigation panel, the pupil wrote a statement appearing at page 32 of the Respondent's list of documents. The statement was produced as defense exhibit 5. In the statement, the pupil stated that she had sex with the Claimant on February 28, 2016 and March 17, 2016.

42. The record shows that when the DC convened on September 22, 2017, the pupil gave evidence before it. She was also cross examined by the Claimant. In her evidence she reiterated the assertion that she had sex with the Claimant on February 28, 2016 and March 17, 2016.

43. The record also shows that the DC called a number of other witnesses. One of the witnesses is the pupil's mother. This witness is quoted as stating that the girl disclosed to her that she was pregnant and that she had been having sex with the Claimant on diverse dates. The witness is also quoted as stating that the girl disclosed that the sexual acts used to happen at a hotel at Suneka.

44. The other witness who gave evidence before the DC was the Head teacher of the school where the Claimant was working and the pupil studying. This witness stated that after grilling the girl about the pregnancy, the latter disclosed that she had been having sex with the Claimant at Suneka. Upon this disclosure, the school's Head teacher is quoted as having indicated to the DC that she referred the matter to the school's Board.

45. The Claimant denied the allegations against him. The minutes of the disciplinary session show that the Claimant denied sleeping with the pupil on February 28, 2016 and April 17, 2016 as alleged or at all.

46. Asked why the girl had picked on him and not anybody else, the Claimant indicated that the accusations may have been at the instance of a former chair of the school. The Claimant insinuated that there had been disagreement between the two following an altercation between the chair and the school's Head teacher in which the Claimant came to the aid of the Head teacher. In effect, the Claimant was insinuating that this purported strain between him and the chair of the former Board could be the reason why the girl's pregnancy was spinned to look like it was his.

47. Faced with this and other evidence from the rest of the witnesses, the DC arrived at the conclusion that the Claimant was guilty of the accusations against him. As the record shows, the Claimant's attempts to set aside this finding on appeal failed prompting the institution of this action to nullify the decision.

48. In determining whether to set aside the DC's decision, the court must consider whether the DC had valid grounds as inscribed in law to support its determination. This, the court must do by reviewing the record of the evidence as was placed before the DC.

49. The Claimant has challenged the Respondent's decision on various fronts. First, he states that the evidence of his witnesses was locked out by the DC. The Claimant presented before this court the evidence of the witnesses who were allegedly locked out of the DC. The evidence relates to the Claimant's alibi for 16th and 17th April 2016. It was the evidence of the witnesses whose evidence was allegedly blocked from the DC that on the two dates (16th and April 17, 2016), the Claimant was at his rural home in Riaima which is more than 50 kilometers from Suneka attending a family welfare function. Therefore, there was no chance that he could have been at Suneka on 17th April 2016 having sex with the pupil as alleged by the pupil.

50. For the record, it is important to mention that although the Claimant states that these witnesses were not allowed to testify before the DC, the record of the proceedings before the DC does not support this assertion. There is no record of the Claimant requesting to call the witnesses and the DC declining the request. Although the school's Head teacher stated that these individuals were at the reception

of the room where the disciplinary session was being conducted, there is no evidence that a request to have them testify was made and declined. By asking me to find that his witnesses were locked out of the disciplinary session, the Claimant is in effect asking me to ignore the record of the disciplinary proceedings and hazard a guess based on his oral testimony, that the said individuals were excluded from giving evidence. I do not think that this will be appropriate.

51. The foresaid notwithstanding, the evidence that was allegedly locked out as indicated above relates to the Claimant's alibi for the 16th and 17th April 2016. None of the witnesses' testimony touched on the allegation of the events of 28th February 2016. Therefore, even if I were to find that the alleged denial of the witnesses to testify before the DC affected the proceedings, this would only be in respect of the events of 16th and 17th April 2016.

52. In effect, the question whether the Claimant had sex with the pupil on February 28, 2016 was not affected by the alibi evidence that was allegedly blocked by the DC. This allegation could only have been determined on the basis of the other evidence that was tendered by the Claimant and the pupil together with her witnesses.

53. Whilst the pupil stated that she indeed had sex with the Claimant on 28th February 2016, the Claimant disputed this fact. The DC had to believe one of the two versions of the events of 28th February 2016 in order to render its decision.

54. I have considered the evidence placed before the DC by both parties as relates to the events of February 28, 2016. The pupil is recorded as stating that on this date, she took money belonging to her mother and hired a motor cycle to get to Suneka. This is after she allegedly called the Claimant to agree on the meeting. The pupil is recorded as stating that she met the Claimant at a bus stage in Suneka before the two proceeded to Wema Lodging where they had lunch and then proceeded to room number 17 where they engaged in sex.

55. The Claimant's position is that the pupil's evidence was not corroborated by evidence from the hotel's personnel. The Claimant suggests that as no evidence was tendered from the hotel to demonstrate that the two had visited the establishment, the DC ought to have disbelieved the pupil's assertion. He says that on February 28, 2016, he was in Kisii town running his family business. It is therefore untrue that he was in Suneka as alleged by the pupil.

56. The Claimant further states that the assertion by the pupil that the alleged outing was arranged at a meeting in school on a Saturday is untrue since the school does not open on weekends. The Claimant also suggests that absence of records from Safaricom to confirm that he conversed with the pupil using her mother's phone regarding the alleged outing of 28th February 2016 should have rendered the pupil's assertions in this respect unbelievable. This is particularly in view of the fact that the pupil had allegedly contradicted herself in some of her statements particularly regarding whether the two had engaged in another sexual encounter either on 17th March 2016 or 17th April 2016 and whether the pupil had been involved in sexual activities with other persons apart from the Claimant.

57. The Claimant also accuses the panel of failing to consider evidence of two other students which fortifies his belief that the girl was out to implicate him in the scandal for ulterior reasons. According to the Claimant, the pupil was on a revenge mission against him following punishment which he had meted on her after she was found with a love letter in school.

58. I have considered the issues raised by the Claimant in this respect against the record of proceedings before the DC. What I understand the Claimant to be suggesting is that the DC relied on shaky evidence and on an unusually low standard of proof of the allegations against him to return its verdict of guilt against him. With respect, I do not agree.

59. The record shows that there was explicit testimony by the pupil to the DC regarding the events of February 28, 2016. She gave details of how the meeting between the two was arranged, how she traveled to the meeting venue and how they had lunch before proceeding to have sex in a hotel room. She gave details of the hotel's name and room in which the sex is said to have taken place.

60. The record of the proceedings before the DC does not show that the Claimant questioned the issue regarding the alleged meeting venue. He is shown to have only questioned the pupil's assertion that the two had sex.

61. Further, although the Claimant seeks to rely on extracts of data from the school's register to support his claim that there was no meeting between him and the pupil at school on February 27, 2016 as it was a Saturday, the minutes of the DC do not indicate that he presented these records to the DC. Although the Claimant states that the evidence was rejected by the DC, the record does not support this assertion. There is no record that the Claimant placed a request to the DC to tender this evidence and that the request was declined. Absent proof that the catalogue of the school's daily occurrences was placed before the DC, there is no way the alleged entries would have been considered by the DC before it arrived at its decision.

62. As regards the evidence of the two other students which allegedly would have demonstrated that the learner was on a mission to fix the Claimant, the record demonstrates that the Claimant did not call the students as witnesses. Neither did he seek to place the alleged witness statement by one of them before the DC. Indeed, during his cross examination before me, the Claimant confirmed that he did not ask the DC to allow him to call the two girls as his witnesses.

63. Faced with this evidence and in view of the evidence by the parents of the pupil, the Head teacher and members of the investigation panel, there was, in my view, sufficient material before the DC to support its decision in respect of the events of 28th February 2016. To suggest that the DC ought to have sought additional evidence before arriving at the impugned verdict is to imply that it ought to have applied a higher standard of proof than that of a balance of probabilities.

64. As indicated by the Respondent, the issue against the Claimant was not one of impregnating the pupil. Rather, it was whether the two had been involved in a sexual relation contrary to the Respondent's Code of Conduct. Therefore, evidence of the DNA results regarding the biological parentage of the infant that the pupil gave birth to was of little relevance to the DC's decision. Indeed, the Claimant acknowledged in cross examination before me that coitus need not necessarily result in pregnancy.

65. With regard to the evidence of the other two pupils, if the Claimant considered their evidence to have been critical to the DC's decision, he ought to have called them to testify or produced their written statement. For some reason, he did not. Therefore, the DC had no opportunity of considering the alleged evidence in its final determination.

66. In my view and based on the evidence placed before the DC, the decision that was taken in respect of the events of 28th February 2016 fell within the band of decisions that reasonable employer, faced with the same set of facts would have made. It is possible that one employer may have considered the matter differently. Yet, it is also true that another employer would reasonably have reached the decision that the Respondent reached based on the same set of facts.

67. This was a case of two conflicting versions of the events that occurred on February 28, 2016. After analyzing the evidence placed before it by the parties and for valid reason as has been demonstrated in this decision, the DC believed the pupil's position that she had sex with the Claimant at Suneka on February 28, 2016.

68. Had I been in the employer's shoes, I may perhaps have reached a different conclusion on the matter. However, and as has been indicated in the earlier parts of this decision, absent evidence that the impugned decision falls outside the band of decisions that another employer would have reasonably made on the same set of facts, I am not entitled to disturb the decision. I am not entitled to substitute the Respondent's decision with my own.

69. With regard to the allegations of sexual impropriety on April 17, 2016, there were significant discrepancies in the evidence that was tendered by the pupil. In some instances, she referred to March 17, 2016 as the day that she had her second sexual encounter with the Claimant. Yet, in others, she alluded to April 17, 2016. It is not clear whether these inconsistencies were due to an innocent mistake or are evidence of a deliberate attempt to fix the Claimant gone wrong as suggested by him.

70. Whatever the case, it is possible that the evidence which was allegedly locked out, in so far as it removes the Claimant from the alleged scene of action on April 17, 2016, would perhaps have made a difference regarding viability of the accusation against him relating to that date. Whilst the pupil states that she had sex with the Claimant at Suneka on this date, the Claimant's witnesses state that he was at Riaima from 16th to April 17, 2016. In this context, the alleged exclusion of this evidence, if it is true that the request to present it was declined, would certainly have prejudiced the Claimant's case before the DC.

71. The other issue that the court has to address and which the Claimant has raised relates to due process. In this respect, the Claimant has raised a series of matters which insinuate that the proceedings before the DC and RC were not conducted in accordance with due process. At the outset, it is necessary to mention that whilst some of the issues that the Claimant raises in this respect are founded on his pleadings, others are not. Indeed, some of the matters are raised for the first time through the Claimant's Advocates' final submissions.

72. The Claimant has attacked the decision of the DC on the ground that he was not allowed to exhaustively cross examine his accuser. However, a perusal of the record of the proceedings before the DC does not support this assertion. The record does not show that the DC restricted the Claimant's right to cross examine the witnesses. There is no evidence that the DC restricted the number of question that the Claimant was permitted to put to the witnesses. Neither is there evidence from the record that the Claimant requested to be allowed to ask more questions than he did and that the request was turned down. For the avoidance of doubt, the record shows that the Claimant indeed cross examined his accuser and some of her witnesses.

73. Despite not raising the issue of denial of the right to cross examine witnesses in his pleadings, the Claimant made mention of it in his witness statement. In a sense, it can be said that he in this way put the defense on notice that he was flagging it as an issue for determination. However, in what appears to be departure from the initial line of attack on this aspect of the case, the Claimant's counsel introduced, through cross examination and his final submissions, a new angle to the matter which had neither been pleaded nor alluded to in the Claimant's witness statement.

74. In cross examination of the first defense witness and subsequently through his submissions, counsel suggests that the manner in which the evidence of some of the witnesses was taken by the DC compromised the Claimant's right to cross examine them. He argues that the witnesses were jointly examined in chief making it difficult to cross examine them.

75. In response, the defense witness states that since the individuals who investigated the case prepared a joint report, they were presented jointly to the DC to testify on the report. She states that as a quasi judicial body, the Respondent's DC proceeds informally. It is her case that the DC does not conduct

its business in the same manner as a court of law. In support of this argument, the defense has relied on Section 12 (2) (d) of the *Teachers Service Commission Act* which provides as follows:-

> ''In the performance of its functions and in the exercise of its powers, the Commission shall not be bound by the strict rules of evidence.''

76. I have considered the issue raised by the Claimant in this respect. I note that the Claimant was in attendance at the DC when the witnesses testified. Because the witnesses testified jointly, the Claimant was able to get the gist of their evidence and elect to field questions to them either singularly or jointly. Therefore, the suggestion by counsel that the Claimant could not cross examine the witnesses is farfetched. In any event, the record does not show that the Claimant objected to this form of evidence taking by the DC.

77. I reach this conclusion appreciating that as an informal administrative process, the DC was not bound by the strict rules of evidence. Indeed, this reality is underscored by Section 12 (2) (d) of the *Teachers Service Commission Act*.

78. The Claimant has also attacked the decisions of the DC and RC on the ground that they do not contain the reasoning that led to the panels' findings. It is argued that the panels did not evaluate the evidence that was presented to them before arriving at their respective decisions.

79. Again, this accusation does not find support from the record of proceedings before the two panels. The record shows that the minutes of the proceedings before the DC are divided into three sections to wit: the proceedings; the findings; and the verdict. Although most of the information in the ''findings section'' contains a restatement of the evidence that was tendered before the DC, a scrutiny of the section demonstrates that the DC analyzed the evidence. It is in this section that the DC's reasoning in support of its decision is located. Indeed, it is in this section that the DC was, for instance, able to make conclusions as to which evidence corroborated the other.

80. The ''verdict section'' in the minutes is premised on the DC's reasoning as can be discerned from the ''findings section''. Thus, the contention by the Claimant that the DC's decision is bereft of the reasons that informed it is without sound merit.

81. The same thing can be said of the decision by the RC. Again, the minutes show that proceedings before the RC were recorded under three subheadings: the proceedings; the findings; and the decision. The section containing the RC's finding gives the reasons why the Claimant's appeal was declined. In my view, this explanation addresses the Claimant's concern that the RC did not provide a basis for its finding.

82. In his final submissions, the Claimant has challenged constitution of the RC. He contends that one of the individuals who sat in the DC also sat in the RC. This is a matter of valid concern. However, a perusal of the Claimant's Statement of Claim demonstrates that the issue, grave as it appears, was not taken up in his pleadings. Further, the matter was neither raised in the Claimant's witness statement nor his oral testimony in court. The only time the Claimant came close to raising an issue on constitution of the panels is when his lawyers cross examined the first defense witness regarding who sat in the DC. However, there was no issue raised about the composition of the RC.

83. This brings me to the question whether it is permissible for a party to ask the court to pronounce itself on a matter that was not raised in the party's pleadings as an issue for determination. I agree with the submissions by the defense that parties are bound by their pleadings and they cannot invite the court to pronounce itself on a matter that was not pleaded or made the subject of trial at the evidence

taking stage. Indeed, this is the position expressed by the Court of Appeal in *David Sironga Ole Tukai v Francis Arap Muge & 2 others* [2014] eKLR when the court observed as follows:-

> ''It is well established in our jurisdiction that the court will not grant a remedy, which has not been applied for, and that it will not determine issues, which the parties have not pleaded. In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other's case is as pleaded.''

84. I not only agree with this observation. I am bound by it. Accordingly, I will not pronounce myself on the question regarding whether the RC was properly constituted.

85. The Claimant has also stated, mainly in his submissions, that the Respondent did not adhere to regulation 146 of the *Teachers Service Commission Code of Regulations for Teachers, 2015*. In part, the *Code* stipulates as follows on the procedure to be adopted during investigations: -

i. The Commission shall upon receiving an allegation touching on a teacher's professional misconduct institute investigations either directly or through its agents.

ii. An investigation under this regulation shall where the allegation is made against a teacher other than a Head of the Institution be instituted by the Board of Management of the respective educational institution, acting as an agent of the Commission.

iii. The Investigating Panel shall, upon investigation, accord the head of institution or a teacher a fair hearing during the investigation process which shall include being:-

a. presumed innocent until proven that he has a case to answer;

b. informed of the allegation, with sufficient details to answer it;

c. given at least seven days to prepare a defense;

d. given an opportunity to appear in person before the Investigation Panel, unless his conduct makes it impossible for the investigation to proceed in his presence;

e. present when the witnesses are being interviewed by the Investigation Panel;

f. warned that any incriminating evidence may be used against him during the disciplinary proceedings; and

g. given an opportunity to adduce and challenge any adverse evidence.

86. From the evidence that was tendered by the school's Head teacher, she indicated that when she confirmed that the pupil was expectant and after the pupil indicated that it is the Claimant who was responsible for the pregnancy, the Head teacher reported the matter to the Curriculum Support Officer, the Sub County Director and the chair of the Board of Management of the school. This evidence appears in the written witness statement which the Head teacher adopted as her testimony in chief. In my view, the evidence confirms that the issue relating to reporting of the Claimant's case was directed to the appropriate office in line with the applicable regulation. There is evidence that a report was made to, among others, the chair of the Board of the school in line with the regulation.

87. The Head teacher confirms that a meeting of the Board was convened on July 27, 2016. According to the witness, the purpose of the meeting was to investigate the allegations against the Claimant. After the meeting, the committee prepared its report dated August 1, 2016. This was produced as Claimant's exhibit fifteen (15) and defense exhibit two (2).

88. Although the Head teacher states that the Claimant was not called into the meeting and that he was only asked to write a witness statement, the report by the Investigation Panel suggests otherwise. At page two of the Report the following is stated:-

> After introduction, the head teacher asked the accused teacher who had been confirmed to be present to join us."

89. Although the Claimant does not raise the issue of non attendance at the meeting of July 27, 2016 in his Statement of Claim or written witness statement, the issue is flagged by his lawyers in their final submissions. It is noteworthy that most of the time that the Claimant has questioned the conduct of investigations either in his Statement of Claim or witness statement, this has been in the context of the investigations team having failed and or ignored to consider material evidence. The matter of the Claimant's exclusion from the investigations meeting of July 27, 2016 was never raised. The only time that the Claimant suggests that he was excluded from the investigation trail is when he avers in his written statement that the investigation team visited the alleged hotel at Suneka in his absence. In effect, the question whether the Claimant attended the investigation session of July 27, 2016 was only raised during cross examination of the Head teacher and in the final submissions by the Claimant.

90. I have considered this matter in the context of the evidence that is on record. I note that the investigation was conducted by persons who were not working with the Claimant on a day to day basis. The Claimant does not suggest that the investigators had a personal grudge against him that would perhaps have motivated them to act in a manner that would wickedly strengthen the Respondent's case as they weakened the Claimant's defense. In short, it has not been suggested or demonstrated that there was motive for the investigators to lie on whether the Claimant attended the session of July 27, 2016.

91. On the other hand, I note that the evidence by both the Head teacher and the Claimant suggests that they were both victims of unfair targeting by some former members of the school's Board. The impression I get from the two is that they had somewhat resolved, either consciously or subconsciously, to work together in combating the unwarranted attacks against them. Whilst I do not state for a fact that the Head teacher's evidence may have been impacted by these factors, these circumstances nevertheless provide a plausible explanation for the nature of evidence that she gave.

92. In the premises, I am inclined to believe the investigators' report (as opposed to the Head teacher's evidence) that the Claimant attended the session of July 27, 2016. This conviction is further supported by the fact that in his Statement of Claim and witness statement, the Claimant does not contest attending this meeting.

93. The investigation report shows that the victim's statement and that of her mother were taken during the session of 27th July 2016. In view of my observations above, I am convinced that these statements were taken in the presence of the Claimant as required under regulation 146 aforesaid. At the same time, the Claimant did not suggest in his Statement of Claim or witness statement that the procedure set out under the regulation 146(6) of Teachers Service Commission Code of Regulations for Teachers, 2015 as relates to the investigation stage was not complied with on July 27, 2016 when the investigations panel met and come up with its report that formed the basis of the decision to subject the Claimant to the DC.

94. The only reference to the Code by the Claimant was in respect of regulation 146(2) which deals with who has the mandate to institute investigations on behalf of the Respondent. However, and as has been demonstrated, the investigations were triggered by a report to the school's Board of Management through its chair in compliance with regulation 146(2) aforesaid.

95. The upshot is that I am convinced that the requirements of regulation 146 of *Teachers Service Commission Code of Regulations for Teachers, 2015* were substantially complied with in this case. In any event, if there were any breaches of procedure at this stage, it has not been demonstrated that they were of such magnitude that would impede the fair and just processing of the case against the Claimant. I say this because I acknowledge that the disciplinary process provided for in the Code is multilayered. It begins at the investigation stage before moving to the disciplinary hearing stage which is complemented with a provision for review. The investigation stage is predominantly a preliminary fact finding stage before a decision is taken whether a matter should go to hearing. In my view, if there is anything that may have been overlooked at the investigation stage, the parties have the opportunity to address the matter at the hearing stage. Therefore, unless it is demonstrated that a party has suffered grave prejudice as a result of a procedural breach at the investigations stage which has the effect of irredeemably prejudicing his case, I will be reluctant to overturn a decision of the disciplinary panel (*Barawa Riziki Sanga v Teachers Service Commission & another* [2022] eKLR).

96. The Claimant has also attacked the disciplinary panel's decision on account of the Respondent's failure to notify him of his right to call witnesses in his own defense in terms of section 41 of the *Employment Act*. This is notwithstanding that his case in this respect and as can be discerned from the Statement of Claim was that he was prevented from calling his witnesses who were present with him at the disciplinary session and that the Respondent deliberately failed to call crucial witnesses to the session. This again raises the question whether a party is entitled to re-characterize his case at the stage of hearing with the consequence that there is a significant difference between what was pleaded and what is eventually sought to be proved.

97. Section 41 of the *Employment Act* provides as follows:-

> 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.
>
> Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.

98. The employer's obligation under this provision, in my humble view, is a follows:-

a) To explain to the employee, in a language that the employee understands, the reasons for which the employer proposes to terminate the employment contract.

b) This explanation must be in the presence of a co-employee, if the employee so elects.

c) The employer shall before terminating the services of the employee hear the representations of the employee plus his witnesses, if the employee opts for one.

99. Clearly, the obligation of the employer is not to inform the employee of the right to avail witnesses. Rather, it is to explain to the employee, in the presence of a witness, if the employee elects, why the employer proposes to terminate the employee and to hear the employee on the matter together with his selected witnesses, if any. The suggestion by the Claimant that the Respondent was under obligation to advise him of the right to avail witnesses is therefore not well founded. At any rate and as I have indicated above, this was not the Claimant's case as presented to court if his pleadings are anything to go by.

100. The Claimant also raises the issue of not having been issued with a letter inviting him for the disciplinary session. This is despite the record showing that he attended the session on the date it was held. Curiously again, the question of non issuance of the letter of invitation to the disciplinary session was not raised as a point of attack either in the Claimant's Statement of Claim or Witness Statement. It only came up at the stage of cross examination of the defense witness undoubtedly impeding the right of the defense to effectively respond to the matter.

101. Indeed, the Statement of Claim and Claimant's witness statement show that he readily concedes that the Respondent convened a disciplinary session which he attended. In the two instruments, there is no suggestion by the Claimant that the letter of invite was not issued. At the time of giving his testimony in court, the Claimant did not suggest that he was not issued with a letter of invite. As mentioned earlier, the issue was raised for the first time at the stage of cross examination of the defense witness.

102. The issue having not featured anywhere in the pleadings and evidence by the Claimant, the defense was entitled to assume that there was no challenge regarding whether a letter of invite for the disciplinary session issued. Until the close of the Claimant's case, it was not a contested issue for determination by the court. It appears unfair to suddenly take up the matter at the stage of cross examination of defense witnesses and invite the court to make an adverse finding, based on it, against the defense. To entertain this is in my humble view to countenance trial by ambush.

103. Regarding the accusation of bias against the Respondent, it is again not supported by the record of the disciplinary case before the DC and RC. Contrary to what he states, the record does not show that the Claimant was denied the opportunity to: call his witnesses; cross examine his accuser and her witnesses; call the two pupils he says would have provided evidence to demonstrate that his accuser was on a mission to fix him. The record does not show that the DC and RC rendered arbitrary decisions without providing a basis for them. In effect, there is no evidence of biased treatment of the Claimant during the sessions.

104. It may be true that the pupil in question may be of questionable morals. As the school Head suggests, the girl appeared to know more than what is expected of her age. She appeared to have been involved in sexual adventure notwithstanding that she was still a minor.

105. However, her reckless conduct is not a reason to suggest that her allegations against the Claimant particularly in respect of 28th February 2016 were entirely unbelievable. The evidence placed before the DC provided a reasonable basis for entertaining the probability that there was sexual contact between the Claimant and the girl. Hence the finding that the Respondent had a reasonable basis to entertain a genuine belief in terms of section 43(2) of the *Employment Act* as read with *Teachers Service Commission Code of Regulations for Teachers, 2015* that the Claimant had engaged in conduct that contravened the Respondent's Code of Conduct.

106. For the avoidance of doubt, I am convinced that the procedure followed in arriving at the decision to terminate the contract of service between the parties was in accordance with the law. The Claimant was informed of the charge that he faced. He was given an opportunity to respond to the charge. He

was notified of the decision of the disciplinary panel that dismissed him from employment. He was given the opportunity to appeal. The appeal was heard, determined and the decision communicated to the Claimant.

Determination

107 The upshot is that I find that there was reasonable basis for the Respondent to reasonably believe that the Claimant had engaged in improper sexual conduct with the pupil at least in respect of the charge relating to February 28, 2016.

108. There is also evidence that the Claimant was subjected to a disciplinary process where due process was observed before the decision to terminate his contract was arrived at.

109. In the premises, I reach the inevitable conclusion that the Claimant's contract of service was terminated in accordance with the applicable law.

110. I therefore dismiss the claim with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 8TH DAY OF JUNE, 2023

B. O. M. MANANI

JUDGE

ORDER

In light of the directions issued on July 12, 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI