



**Mutinda v Teachers Service Commission (Petition E008 of 2023)
[2023] KEELRC 2279 (KLR) (21 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2279 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA
PETITION E008 OF 2023
M MBARÚ, J
SEPTEMBER 21, 2023**

BETWEEN

JAMES NZAMBA MUTINDA CLAIMANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

JUDGMENT

1. The petitioner is a registered teacher with the respondent, a constitutional commission under the provisions of Article 237 of *the Constitution* and regulated under the provisions of the *Teachers Service Commission Act*.
2. On 10 September 2005 the petitioner was registered as a teacher by the respondent. The petitioner worked as a teacher and was promoted to the position of acting deputy principal until 25 November 2021 when the respondent, through the school principal of Migundini Secondary School directed him to attend on 26 November 2021 before the school board of management disciplinary panel to respond to allegations of immoral behaviour. The petitioner attended as summoned despite the short notice where he was accused of sexually harassing two female students by pulling, hugging and touching their private parts and buttocks which constituted sexual offences.
3. Despite attendance, the petitioner was not given a hearing and the panel he was to appear before was divided on how to proceed with the matter. The board informed the petitioner to wait for its decision within two weeks.
4. On 8 December 2021 the petitioner was served with summons to attend before the board to respond to allegations of immoral behaviour against a student called CJW a form one student of admission No.XXX.
5. The petition is that despite being accused of a similar matter before on 26 November 2021 the petitioner was subjected to similar charges which was in breach of natural justice after the second



- appearance before the Board, the petitioner was interdicted on 15 December 2021 and was required to file his response within 21 days. That the interdiction was in contravention of Regulation 139(1) of the Teachers Service Commission Code of Regulations for Teachers, 2015 (Code for Teachers). That the interdiction was illegal and in violation of Regulations 146, 147, 149 and 150 of the Code for Teachers because, upon receipt of the complaint, there were no investigations carried out by the respondent in terms of Regulation 146(3)(a) and the disciplinary panel did not give the petitioner a fair hearing. There was no report compiled by the board and there were two spat trials on 26 November and 15 December 2021 with conflicting outcomes. The alleged complaint was not done in writing and the evidence and proceedings relied upon was inconsistent leading to an unfair outcome against the petitioner.
6. The petition is that as a result of the interdiction, the petitioner was placed on zero salary on the grounds that he was facing disciplinary action grounded on immoral behaviour of sexual harassment contrary to Regulation 148(1)(h). This Regulation is in conflict with Regulation 139 and Articles 10, 27, 47 and 50 of *the Constitution* and such is discriminative, illegal and contradicts the right to fair hearing and is thus unconstitutional.
 7. On 18 January 2022 the respondent issued the petitioner with letter dated 4 January 2022 inviting him for a disciplinary hearing on 10 February 2022 at the Kilifi County Offices. This notice was in breach of Regulation 149(1) which requires a one-month notice before a hearing date but being faced with serious accusations the petitioner involuntarily attended before the respondent's County Director disciplinary panel in Kilifi on 18 January 2022 where the Kilifi County disciplinary panel in breach of Regulations 150 and 153 failed to consider the evidence submitted by the petitioner. Despite protests for a hearing, the petitioner's rights were violated.
 8. On 18 February 2022 the petitioner was served with a letter and notice of removal from the Register of Teachers with effect from 10 February 2022 and dismissal from employment. The date the de-registration and dismissal were backdated to the date of the disciplinary hearing which was unfair and unlawful and without any justified reasons. The petitioner filed an application for review of the decision to dismiss him from employment and his de-registration as a teacher.
 9. On 6 October 2022 the respondent wrote to the petitioner with regard to the review application and invited him for a hearing on 9 November 2022 and upon hearing of his case, on 21 November 2022 the petitioner received a decision upholding his dismissal from employment but with a reinstatement into the Register of Teachers. The petition is that such decision was contradictory and unconstitutional and infringed on the petitioners right to fair labour practices. The respondent failed to take into consideration that similar reasons for his dismissal and de-registration were proffered by the disciplinary committee in their impugned decision.
 10. The petition is that for the reasons of his petition, he has been denied a salary for the year 2022 at Kshs. 76,604 x 12 all at Kshs. 919,248. As a result of the actions taken against him by the respondent, the petitioner will not be able to proceed with his teaching career and progression and has hence suffered irreparable loss and damage and is seeking for a declaration that his constitutional rights have been violated, an order of reinstatement be issued, payment of Kshs. 919,248 withheld by the respondent for one year, compensation for damages suffered both general and exemplary and payment of costs.
 11. The petition is supported by the Affidavit of the petitioner and on the grounds that while serving as a teacher at Migundini Secondary school, he was served with summons to attend before the board on 26 November 2021 over alleged immoral behaviour where he was accused of sexually harassing two female students by pulling and touching their private parts and touching their buttocks. When he appeared before the board, he was not given a hearing and the panel could not agree on how to



undertake the disciplinary hearing and they sent the petitioner away. But on 8 December 2021 the petitioner was again issued with summons to attend before the board on 15 December 2021 over the same allegations despite having been previously accused of similar matters which was double jeopardy. The petitioner was then served with notice of interdiction and directed to respond within 21 days and the interdiction was on zero salary on the basis that he was faced with a serious offence. This was contrary to the respondent's own regulations which required due process and the fact that similar allegations had been levelled against him on 26 November 2021.

12. The petitioner testified in support of his case that on 18 January 2022 he was served with a disciplinary notice to attend hearing on 10 February 2022 at the Kilifi County Officer over the same allegations that had already been addressed on two previous occasions. The petitioner attended but was not allowed a fair hearing, he was intimidated and could not cross-examine the witnesses called.
13. The petitioner testified that on 18 February 2022 he was served with two notices, one a dismissal from his employment with the respondent and the second, a de-registration as a teacher with effect from 10 February 2022 the same date he was attending the disciplinary hearing. The action by the respondent were unlawful, unconstitutional and contrary to natural justice and for these reasons, the petitioner applied for a review of the two decisions and on 6 October 2022 he was invited for a hearing on 9 November 2022 in Nairobi and after the hearing he was served with notice and decision that the dismissal was upheld but was reinstated back to the Register of Teachers which was not logical since he has been unable to secure employment, had not been paid during the interdiction and the orders sought in the petition should issue.
14. The petitioner testified that as the acting deputy principal, he was also the games teacher and the subject student reported to form one while having a leg problem. While doing his duties in the school and after games in the school field, he notices the student limping and upon checking her leg, he noticed that the student had a wound and upon further enquiry, he offered her first aid and then referred her to another female teacher and matron to attend to her. He was later accused of touching the student in her private parts and buttocks which was not true, he only checked the leg and the wound to ascertain the severity of the situation and referred the student accordingly. He had been in the school performing very well and this was the first time he heard of such matters of sexual harassment of a student which allegations were not true.
15. In support of his case, the petitioner called Raymond Kazungu previously a board member of Migundini Secondary School where the petitioner was a teacher and testified that he was the parents' association chairperson and hence a member of the board when the chair summoned the board to the disciplinary hearing of the petitioner on 26 November 2021. The human resource officer, Kaloleni TSC branch was presiding over the meeting and he said that he did not need the petitioner at the meeting and instead he briefed the board on the case, that the petitioner had sexually abused a student and instead of allowing the nurse to treat the student, the petitioner had opted to touch the student. The board considered the matter facing the petitioner and there was no agreement as to what should be done. There was no agreement by the board on what decision to be taken. It was a mere briefing of the case. The matter assessed and the evidence presented, the board members could not agree. As the parents' chairperson he did not sign any minutes or a decision to dismiss the petitioner.
16. In response to the petition, the respondent filed the Replying Affidavit and called Evaleen Mitei the acting director field services directorate at the TSC on the evidence that the respondent as a constitutional commission has mandate to register, recruit and exercise discipline over teachers in the public service and in this regard has mandate under the TSC Act, Code of Regulations and Code of Conduct and Ethics which outline the general rules of behaviour governing the teaching profession and the procedures therefore. As the regulator of the teaching profession, the respondent upholds



the rights of the child under Article 53 of *the Constitution* and to this end, due to widespread sexual harassment against learners by teachers, with a view to deter such vice, on 26 April 2010 the respondent issued Administrative Circular No.3 of 2010 Protection of Pupils/Students from Sexual abuse. The objective was to issue Guidelines on the relationship between teachers and learners and to compliment Code of Regulation and the Code of Ethics for teachers.

17. The petitioner was employed as a teacher in the year 2005 and his letter of appointment referred to his employment as being subject to the TSC Act, the Code of Regulations and other policies amended from time to time.
18. While the petitioner was a teacher at Migundini Secondary School in the year 2021 he sexually harassed his student by the name CJW, a form one student on different occasions in his office and between 6.00am – 6.20am and 6.00pm to 6.45pm.
19. Investigations were conducted and statements recorded and various students including CJW confirmed the sexual harassment. A report was submitted to the board and pursuant to Regulation 146(2) of the Code of Conduct, the petitioner was invited to appear before the board through letter dated 8 December 2021 for hearing on 15 December 2021 and where he was allowed the opportunity to present his representations and was able to ask questions to the witnesses called. The panel made finding that the petitioner had assumed the matron's duties by nursing CJW who had a wound, the petitioner confessed to calling the subject student to his office on several occasions when the principal was not around during morning and evenings and the petitioner would allow the student to use his mobile phone to call her parents which was against the school rules and an indication of an illicit relationship between the petitioner and the learner. The petitioner the CJW confirmed that they had come into contact at the lab corridor even though the petitioner had earlier stated that he had only pulled her hand for assist her to climb a raised corridor but the learner stated that the petitioner had pulled and hugged her. The learner stated that she would hide in the toilet during agriculture classes as she was uncomfortable with the petitioner which in her class after he had sexually harassed her and all witnesses called and their statements were consistent with CJW evidence.
20. Ms Mitei testified that the board considered the evidence and on 15 December 2021 interdicted the petitioner. Under Regulation 147(5) of the Code for Teachers, the respondent is allowed to amend the letter of interdiction and through letter dated 4 January 2022 the petitioner was served with notice and informed of allegations against him and allowed to respond within 21 days. The petitioner was then invited to a disciplinary hearing on 10 February 2022 where he attended and was allowed to question the witnesses and make his representations. The disciplinary panel made findings that the CJW had a wound when she reported to school in form one which the petitioner would nurse in his office and he would be in School before 6.30am and CJW was called as a witness and confirmed that she was sexually harassed by the petitioner on various occasions and which evidence was not challenged by the petitioner. Despite being directed to file his response within 21 days, the petitioner declined to do so.
21. Ms Mitei testified that upon the hearing, the panel made a decision that the petitioner be dismissed from service and de-registration as a teacher through notices dated 18 February 2022.
22. Aggrieved by the decision, the petitioner applied for a review which is allowed through Regulation 156(4) and he was invited for a disciplinary review through letter dated 27 July 2022 and the petitioner attended the hearing and through notice dated 21 November 2022 the respondent communicated its decision confirming the dismissal and waived the de-registration as a teacher. The petitioner was found to have violated the basic tenets of the teaching profession and in its constitutional mandate, the respondent discharged its duties and disciplinary the petitioner which was lawful.



23. Ms Mitei also testified that the petition is not proper, it does not meet the threshold outlined in the case of Anarita Karimi Njeru v Republic [1979]. The orders sought in the petition should be dismissed with costs.
24. The respondent also filed the Relying Affidavit and called Lawrence Kigen the assistant director field services directorate and who testified that upon receipt of the allegations against the petitioner he evaluated and verified with investigations and various statements were taken including that of the learner and contrary to the petition that the allegations were an afterthought is not correct.
25. Mr Kigen testified that pursuant to Section 20 of the TSC Act, the respondent is allowed to either generally or in a particular case delegate to any committee or to any member, officer or agent to exercise its functions and in this case in accordance with Regulation 151 (4) of the Code of Regulations for Teachers, the County Discipline panel at the County was mandated to address the allegations made against the petitioner and in this regard, the petitioner was heard by the Kilifi County disciplinary panel. The petitioner's employment was at all material times regulated under his employment contract and Code of Regulations for Teachers and during his disciplinary hearing he was accorded all opportunities to make his representations and a decision was taken to dismiss him from the service and a de-registration as a teacher.
26. The board meeting held on 15 December 2021 was investigatory and meant to grant the petitioner a chance to present his case. The report dated 24 January 2021 challenged by the witness called by the claimant Mr Kazungu arose out of oral statements collected from the witnesses especially CJW following recommendations of the board on 26 November and 15 December 2021. The purpose of the board meeting on 26 November 2021 was merely investigatory and no resolution on the matter was taken and the petitioner cannot allege that there was double jeopardy.
27. In evidence, the respondent also called Janet Mkaburi Mshai a teacher and in charge of girl's welfare and school boarding mistress and testified that on 12 November 2021 CJW approached her with an issue that was bothering her and reported that when she joined form one she had a fresh wound on her toe and the petitioner offered to massage it with warm water and dress it between 6.00am to 6.30am for almost a week. The petitioner would often call her to his office and switch off lights and caress her against her will and in one occasion, as she was passing through the laboratory corridor which was poorly lighted, he grabbed her by the hand and hugged her, lifted her skirt and touched her private parts. She protested and ran to class.
28. Ms Mukaburi testified that CJW also reported to her that after the incident, the next day, the petitioner called her and asked why she had run away from him and offered to take her out for a drink but she declined. That after these incidents she tried to hide in the toilet when the petitioner was in her class because his presence traumatised her and was filled with fear.
29. The witness testified that she forwarded the matter to the deputy principal and she sought further guidance. Later she was called by the board during investigations and reported that he had been reported to her and then appeared in person during the disciplinary hearing and the petitioner questioned her leading to his interdiction and later she learnt that he was dismissed from service. The petitioner had violated the Code of Regulations for Teachers through his conduct with the learner.
30. David Muteti Waema the principal Migundini Secondary School was called as a witness and testified that teachers at the school are required to maintain professionalism and adhere to the TSC Act and Code of Regulations for Teachers. In November 2021 he received information that the petitioner had on several occasions sexually abused CJW, a learner at the school and for this he convened the board to investigate these allegations. The petitioner was summoned through letter dated 8 December 2021 and



was informed of these allegations and when he attended he was allowed to make his representations and he confirmed that he had been nursing the girl's wound hence assuming the duties of the matron and boarding mistress. He also confirmed that he had called the learner to his office on several occasions in the absence of the principal on the grounds that he wanted to check on the wound. The board established that the petitioner was of immoral conduct and was hence interdicted and allowed 21 days to respond but he failed to do so and on 10 February 2022 he was invited to the County Disciplinary hearing and a decision taken to dismiss him from service as a teacher.

31. At the close of the hearing, both parties filed detailed written submissions and upon analysis, the emerging issues for determination can be summarised as follows;
 1. Whether there are constitutional violations which justify an award of general and exemplary damages;
 2. Whether termination of employment was lawful and procedural;
 3. Whether the remedies sought should issue; and
 4. Who should pay costs.
32. The petition is premised on the facts that the respondent violated the constitutional, legal and employment rights of the petitioner by denying him the right to fair administrative action and violated his right to a fair hearing and double jeopardy in a matter that was prosecuted severally and for these reasons, his petition should be allowed with an order of reinstatement and payment of his unpaid salaries unpaid during interdiction.
33. The respondent's case is that the petitioner engaged in immoral conduct by sexually harassing a learner, the matter was reported by the learner and investigated and various statements and witnesses called and questioned by the petitioner and a decision was taken to interdict him to allow for his response within 21 days which he failed to address. The matter was placed with the respondent's Kilifi County disciplinary panel which heard the matter and found the petitioner culpable and decided on his dismissal and de-registration as a teacher.
34. The petitioner opted to file a petition. Whether to file a petition or a memorandum of case is a matter that has now gathered notoriety and the court in the case of *Jane Angila Obando v Teachers Service Commission & 2 others* [2020] eKLR the court held that the practice and procedure of filing disputes before the court, whether this be for a claim of constitutional violations or legal rights, if any, such can be well addressed in terms of Rule 7(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016. The Rule envisages a party raising disputes regarding the enforcement of any constitutional rights and freedoms or any constitutional provision through a Statement of Claim.
35. This matter is also addressed by the Court of Appeal in the case of *Sumayya Athmani Hassan v Paul Masinde Simidi & another* [2019] eKLR where the court held that;

Where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or the Act of Parliament, that procedure should be strictly followed
36. Unless a petitioner is raising and challenging the constitutionality of a statute, 'the principle of avoidance'; also known as 'constitutional avoidance' ought to apply. The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis.
37. In this regard, the Rules of the Court allowed the petitioner to agitate his case for alleged constitutional violation through a memorandum of claim which he failed to address and for this reasons, without



any objections by the respondent save to rely on the principles of *Anarita Karimi Njeru v Republic* without delving into why the court should address, costs are not due.

38. On the claims made, through notice dated 18 February 2022 the respondent dismissed the petitioner from his employment as a teacher on the grounds of sexually harassing a learner, CJW a form one pupil at Migundini Secondary School following various events in November 2021. The petitioner was also de-registered as a teacher through notice of equal date and both sanctions were to take effect from 10 February 2022. The petitioner lodged his appeal seeking for a review, the dismissal was upheld and the he was reinstated back to the Register of teacher's.
39. An employer is allowed to organise its business and formulate policy to regulate terms and conditions of employment and a disciplinary policy in terms of Section 12 of the *Employment Act*, 2007 (the Act) and particularly under Section 12(1)(a) requires that;
 - (a) specify the disciplinary rules applicable to the employee or refer the employee to the provisions of a document which is reasonably accessible to the employee which specifies the rules;
40. In this regard, the respondent has the Code of Regulations for Teachers and the Code of Conduct and Ethics which were part of the petitioner's employment and service while serving as a teacher at Migundini Secondary School. The respondent also issued TSC/Circular No.3/2010 – Protection of Pupils/Students from Sexual Abuse pursuant to the enactment of the *Sexual Offences Act* (2006). This was out of concerns with the increased cases of violence against pupils and sexual abuse in learning institutions that affected the learning process.
41. To harness its learner's support, the management of Migundini Secondary School had put in place other processes of ensuring a matron taking charge of the welfare of learners and a welfare teacher and a boarding mistress. All meant to ensure the safety and security of learners at the school.
42. CJW made a report to the boarding mistress and welfare teacher of various incidents of sexual harassment by the petitioner. Ms Mshai, took up the matter with the deputy principal and the principal and who convened a board meeting held on 26 November 2021. Prior to the board convening, on 25 November 2021 the claimant was issued with summon to attend before the board to respond to allegation on immoral behaviour reported to the office.
43. The petitioner's case was that this summon and his attendance resulted in a stalemate of the board which failed to agree on the course of action to take.
44. This was just but a summon for him to respond to the matters made against him, that there were allegations of immoral behaviour reported to the office of the principal.
45. Another meeting of the board was called for the 15 December 2021 and the petitioner was invited through notice dated 8 December 2021. The petitioner was required to attend before the Board of management of Migundini Secondary School... to respond to allegations of Immoral Behaviour (sexual harassment) to CJW Adm/XXX reported to the office.
46. The petitioner testified that he attended before the Board and various witnesses called and he was able to question them. At the end, he was issued with notice of interdiction dated the same date, 15 December 2021. He was given 21 days to respond to the allegations made against him.
47. First, the employer is allowed under Section 41 of the Act to summon an employee alleged to be of misconduct or of gross misconduct. such is to allow the employee the opportunity to make his representations and where the employer seeks for further investigations to assess the evidence, further investigations may be called for. The allegations by the petitioner that he suffered double jeopardy does not apply where the employer applied all due diligence to ascertain the veracity of the matters at hand



and hence engages the employee in this regard. The initial meeting held with the petitioner on 26 November 2021 was not a disciplinary hearing. It was just but preliminary. Equally, the hearing held on 15 December 2021 helped to gather more information. The end, the petitioner was interdicted to allow him 21 days.

48. An employee cannot gag an employer with regard to how to conduct investigations, an inquiry into his misconduct or gross misconduct and the only conditions that the employer must secure are the legal protections under Section 41 of the Act. Issue the employee with requisite notice to allow him to attend to make his representations.
49. And secondly, an employee who is allowed to file responses by the respondent with regard to any allegations of misconduct or gross misconduct only has himself to blame if such a chance is not utilised as held in the case of *Paul Wanyangah v Market Development Trust t/a Kenya Markets Trust* [2017] eKLR. The petitioner was given a fair chance to defend himself but he testified that after the second invitation to attend before the board, he felt unfairly victimised and treated since the initial attendance before the same board on 26 November 2021 did not arrive at an agreement. Indeed, he called Mr Kazungu to support such an assertion. However, as the employee, once invited to attend and defend himself on the allegations made, the petitioner had a duty to give his best response and defend himself accordingly.
50. The implications of failing to attend and file a response is aptly captured in the case of *Jennifer Osodo v Teachers Service Commission* [2013] eKLR where the court held as follows;

...an employee facing disciplinary action cannot be allowed to hold their employer to ransom by taking the position that they will only attend disciplinary proceedings at their convenience. I have examined the facts and circumstances of this case and I am satisfied that the respondent afforded adequate opportunity to the claimant to defend herself but she threw away the opportunity. She stretched her luck to the wire prompting the respondent to dismiss her for desertion of duty. I find both the respondent's action and the attendant procedure justifiable. The claimant's claim for unfair termination of employment therefore fails.
51. The outcome of the disciplinary process was well investigated and the disciplinary panel relied on the witnesses called and cross-examined by the petitioner. The outcome decision cannot be faulted. The due process of Section 41 of the Act were adhered to.
52. The petitioner as the acting deputy principal and a senior teacher for many years was aware of teacher's protocols and particularly in dealing with learners. He was aware of the employer's code of conduct and particularly the Code of Regulation for Teachers and which required him to handle learners with decorum. Being an acting deputy teacher at Migundini Secondary School, the petitioner was aware of procedures in handling a learner who was unwell, sick and in need of medical assistance and that such matter was to be reported to the school matron or nurse and the teacher responsible for welfare and boarding mistress. In this case, the petitioner was neither the nurse, matron or the teacher responsible for CJW with regard to treating her condition, the wound to her leg. But the petitioner went ahead and offered to massage the learner's leg, offered to allow her the use of his phone to communicate with her parents contrary to school regulations and while in class, gave her preferential treatment. Such cumulatively went outside the mandate of the petitioner in his duties as a teacher, as the acting deputy principal and the alleged matter of sexual harassment of the learner due to the massage of the leg, offers to use his phone and preferential treatment in class cannot extricate him from the accusations made. Armed with the Code of Regulations for Teachers which forbade him from engaging with his learners in



such conduct, the petitioner was well forewarned. He went ahead and conducted himself in a manner already addressed by the employer as constituting sexual harassment.

53. Indeed, during the disciplinary hearing on 15 December 2021, the petitioner was questioned about his conduct and he stated that;

... question to Mr Mutinda on if he was aware he went against procedures by handling girls in that manner and he says he was sorry and he didn't know that his kindness will give him a life lesson. He swears not to handle again even on boys.

...

Mr Mutinda apologised to the Board of Management, TSC office, Parents and to everyone who was at one point he went against their wish. Mr Mutinda said that all accusation against him were because of his clean heart and good intentions to the learners. ...

54. The Circular of the respondent issued TSC/Circular No.3/2010 – Protection of Pupils/Students from Sexual Abuse was meant to forestall such conduct as committed by the petitioner. He does not challenge the matters at hand save that he was taken through several disciplinary processes, which in this case were permissible to ascertain the allegations made against the petitioner.
55. The sanction of dismissal from service is hereby found justified and the due process was adhered to.
56. With regard to the remedies sought, the dismissal of the petitioner addressed as above, damages, compensation for exemplary damages cannot issue.
57. The order sought for reinstatement by the petitioner is also lost. Save, with the appeal allowing his reinstatement into the Register of Teachers, the petitioner was given a fresh lifeline to secure new employment as a teacher.
58. On the claim for payment of unpaid salaries during the period interdiction at ksh. 919,248 is sought on the basis that the refusal to pay the petitioner was unlawful. The interdiction on zero salary is an unfair labour practices. The response is that under Regulation 148(h) of the respondent's Code of Regulation for Teachers excludes teachers interdicted on the ground of immoral behaviour from payment of half salary during interdiction, hence the Respondent was not entitled to salary arrears for the period of interdiction.
59. Through notice dated 18 February 2022 the respondent dismissed the petitioner from service. The notice indicated that such sanction would take effect from 10 February 2022.
60. However, employment terminated through the notice addressed above and dated 18 February 2022. During the period of interdiction running from 15 December 2021 to 18 February 2022 the petitioner was on zero salary.
61. The gist of Section 41 of the Act is to allow the employer to hear the employee on any case of misconduct. The subject employee retains his employment while this process is ongoing. The practice of the respondent in terms of Regulation 148(h) of the Code of Regulation for Teachers provides that the respondent shall withhold salary of the teacher accused of immoral conduct. Upon the sanction imposed, the withheld salary is due and payable to the employee teacher up and until the last date of service on the issued notice.
62. In this case, employment terminated through notice dated 18 February 2022 and to backdate such notice to 10 February 2022 is unfair labour practice. The petitioner had no control of the disciplinary process from the date of his interdiction. Whatever matters he faced and leading to his dismissal, for the



entire period he remained an employee of the respondent, the salary due ought to be paid in full at the end of employment as held in the case of *Kenyatta University & another v Fred Obare* [2017] eKLR.

63. The petitioner was last earning Kshs. 76,604 per month. from 15 December 2021 to 18 February 2022 there are two (2) full months and the sum of Kshs. 153,208 is due in unpaid salaries.
64. As outlined above, having moved the court under a petition instead of a memorandum of claim, costs shall not be awarded.
65. Accordingly, judgment is hereby entered for the petitioner for payment of two months' salary unpaid during the period of interdiction all at Kshs. 153,208. Each party to bear own costs.

DELIVERED IN OPEN COURT AT MOMBASA THIS 21ST DAY OF SEPTEMBER 2023.

M. MBARŪ

JUDGE

