



**Teachers Service Commission v Makokha (Employment and Labour Relations Appeal E004 of 2023) [2023] KEELRC 2518 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2518 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA  
EMPLOYMENT AND LABOUR RELATIONS APPEAL E004 OF 2023**

**JW KELI, J**

**OCTOBER 18, 2023**

**BETWEEN**

**TEACHERS SERVICE COMMISSION ..... APPELLANT**

**AND**

**JULIUS MUTINYE MAKOKHA ..... RESPONDENT**

*(Appeal against the Judgement and Order of Hon. D.Alego (SPM) delivered on the 23rd January 2023 at Kakamega CMELRC No. 2 of 2020)*

**JUDGMENT**

Before Hon. Lady Justice Jemimah Keli

**CC: Lucy Macheso**

For Appellant:- Flora Manyasa, Advocate

For Respondent:- Elung'ata & Company Advocates

1. The Appellant being dissatisfied with the Judgement and order of D.Alego (SPM) delivered on the 23<sup>rd</sup> January 2023 at Kakamega CMELRC No. 2 of 2020 between Julius Mutinye Makokha v Teachers Service Commission filed the Memorandum of Appeal dated 6<sup>th</sup> February 2023 and amended on 5<sup>th</sup> June 2023 seeking the following orders:-
  - i. The Appeal be allowed with costs.
  - ii. The Judgement of Hon . D.Alego in Kakamega CMEL No. 2 of 2020 delivered on 23<sup>rd</sup> January 2023 and all consequent orders be set aside and substituted with an order upholding the Appellant's decision to dismiss the Respondent from teaching service and dismiss the claim dated 9<sup>th</sup> January 2020.
2. The Appeal was premised on the following grounds:-



- i. The learned magistrate erred in law and fact in finding that the respondent's dismissal was unlawful;
- ii. The learned magistrate erred in law by failing to appreciate that the process leading to the Respondent's dismissal was fair, lawful and constitutional;
- iii. The learned magistrate erred in law and fact by failing to consider the material placed on record of the Court by the Appellant and in so doing, reached unsubstantiated findings specifically that the respondent's dismissal was unlawful;
- iv. The learned magistrate erred in law in arriving at a decision that did not flow from the evidence tendered by the appellant, law, facts, submissions, authorities and binding precedents tendered before the court;
- v. The learned magistrate erred in law by relying on the finding in Criminal Case no. 15 of 2018 R v Julius Makokha Mutinye in finding that the Appellant wrongfully dismissed the Respondent;
- vi. The learned Magistrate erred in law by finding that the decision of a criminal court impacted on the Appellant's disciplinary process
- vii. The learned magistrate erred in law and fact by ordering the unconditional reinstatement of the Respondent thereby going against the provisions of Section 12(3)(vii) of the Employment and *Labour Relations Act* and the well settled principle of mutuality of obligations in a contract of employment.
- viii. The learned Magistrate erred in law and fact by entering judgement that was ambiguous and imprecise.
- ix. The Learned Magistrate erred in law and fact in failing /declining to consider the Appellant's submissions and authorities on the Preliminary Objection which raised substantial issues of law.

### **Written submissions on the appeal**

3. The court directed that the Appeal be canvassed by way of written submissions. The Appellant's written submissions drawn by Flora Manyasa, Advocate instructed by Teachers Service Commission were dated 11<sup>th</sup> July 2023 and received in court on the 17<sup>th</sup> July 2023. The Respondent's submissions drawn by Elung'ata & Company Advocates were dated 29<sup>th</sup> August 2023 and received in court on the 30<sup>th</sup> August 2023.

### **Background to the appeal**

4. The Respondent/Claimant vide a Statement of Claim dated 9<sup>th</sup> January 2020 sought before the trial magistrate court the following reliefs:-
  - a. That the honourable court be pleased to find that the termination of the claimant from employment was unlawful and therefore wrong.
  - b. That the decision by the Respondent to have the names of the claimant struck off the roll and or register of teachers hasty, without cause and therefore illegal and order for his Reinstatement to the roll and or register of teachers.



- c. that the Honourable court be pleased to order the Claimant reinstated to his previous position and or employment as a P1 teacher.
- d. That the Respondent pays the Claimant his full salary from the time of his wrongful termination till his reinstatement.
- e. Costs of this case.

#### Alternative Prayers

In the alternative and without prejudice to the foregoing, the Claimant Prays for.

- a. General Damages for wrongful dismissal.
  - b. Severance pay.
  - c. Terminal benefits.
  - d. Pay in lieu of notice.
  - e. Gratuity.
  - f. Twelve months gross pay as fill compensation for unlawful termination.
  - g. Service pay.
  - h. Costs of the case.
    - i. other reliefs this Honourable court shall deem reasonable to award.
5. The Claimant in addition filed his verifying affidavit which doubled as his witness statement dated 9<sup>th</sup> January 2020 annexing his bundle of documents (Page 5 – 103 of the record are all pleadings by the Claimant before the lower court ).
  6. The claim was opposed. The Respondent entered appearance and on the 4<sup>th</sup> March 2020 filed a Reply to the Memorandum of Claim dated 28<sup>th</sup> February 2020(Pg-105-110) which was accompanied by the list of documents and the bundle of documents (Pg 111-169). The Respondent filed a list of witnesses and witness statements of David Kioko and Jackson Mutai (Pg-170- 176); the Respondent's Supplementary list of documents dated 22<sup>nd</sup> January 2021 and filed on 27<sup>th</sup> January 2021 and the Supplementary documents(Pg-177-182).
  7. The matter proceeded by way of viva voce evidence with parties calling their witnesses (Page 204 -210). The parties filed written submissions after the hearing(Pg 183-200) and judgement was delivered on 23<sup>rd</sup> January 2023(Pg 211-220).

#### **Written Submissions At Appeal**

8. The court directed that the appeal be canvassed by way of written submissions. The Appellant's written submissions drawn by Flora Manyasa instructed by the Appellant were dated 11<sup>th</sup> July 2023 and received in court on the 17<sup>th</sup> July 2023. The Respondent's written submissions drawn by Elung'ata & Company Advocates were dated 29<sup>th</sup> August 2023 and filed on 30<sup>th</sup> August 2023.



## Determination

9. The principles which guide this court in an appeal from a trial court are now well settled. In *Selle And Another v Associated Motor Boat Company Ltd & Others*, [1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows:-

“An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

## Issues for determination

10. The Appellant in his submissions identified the following issues for determination in the appeal:-
- i. Whether the Learned magistrate erred in law and fact in finding that the Respondent’s dismissal from employment was wrongful.
  - ii. Whether the learned Magistrate erred in law by relying on the decision of the criminal court in finding that the respondent was wrongfully dismissed.
  - iii. Whether the learned trial magistrate erred in law and fact by entering judgement that was ambiguous and vague and awarding reliefs that were not tenable in law.
11. The Respondent did not identify issues for determination and submitted generally affirming the Learned Magistrate’s decision that his employment was unlawfully terminated and his prayers for reinstatement to the register of teachers and reinstatement as a P1 teacher be upheld.
12. The court finds that the issues placed by the parties for determination in the appeal are with regard to both substantive and procedural fairness before the termination of employment and framed the issues as follows:-
- a. Whether the trial learned Magistrate arrived at the wrong conclusion on substantive and procedural fairness.
  - b. Whether the judgment was ambiguous and imprecise.
  - c. Whether the appellant was entitled to reliefs sought.

## **Issue a. Whether the trial learned Magistrate arrived at the wrong conclusion on substantive and procedural fairness and reliefs sought .**

### Appellant’s submissions

13. The Appellant submits that Section 43 of the *Employment Act* requires an employer to prove that there existed reasonable grounds at the time of terminating an employee and relied on the decision in *Nyeri Civil Appeal 29 of 2016 Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike*(2017) eKLR.



14. The appellant submits that based on the facts and information that was before the Appellant at that time, the Appellant conducted impartial investigations which pointed to the culpability of the Respondent who had been accused of having had carnal knowledge with a learner which was in breach of his terms of employment, and on a balance of probability dismissed the Respondent.
15. The Appellant submits that the appellant was dismissed for reasons of immoral misconduct for having had carnal knowledge with a minor. The Appellant argues that the disciplinary proceedings before the Appellant was not about the impregnation of the Minor learner (NA), but the fact that he had had carnal knowledge with a pupil, which amounted to a Professional Misconduct as per the Appellant's code of Regulation, and independent from any resulting pregnancy.
16. It was submitted for the appellant that the disciplinary process of the appellant was distinct from a criminal proceeding even where the said proceedings emanate from the same set of circumstances and that an employer was not barred from commencing disciplinary proceedings whose objective is to deal with delinquency within internal mechanism, unlike the criminal process which is meant to inflict appropriate punishment on an offender. The Appellant relied on the decisions in Nyeri Civil Case no. 1 of 2007 Joseph Wambugu Kimenju v Attorney General [2013] eKLR and Nyeri Civil Appeal 53 of 2014 Teachers Service Commission v Joseph Wambugu Nderitu [20160] eKLR.
17. The Appellant argues that the charges against the Respondent were outlined in the interdiction letter and the respondent taken through an elaborate process to hear his case; from the Appellant's County Disciplinary Committee; to the Appellant's National disciplinary hearing and subsequent appeal Hearing. The Appellant submits that the Minor Learner(NA) was steadfast in her testimony and confirmed that she had slept with the Respondent severally and the respondent was accorded an opportunity to cross-examine her.
18. The Appellant submits that the reasons and evidence applied in dismissing the Respondent met the required standard to dismiss the Respondent as the oral evidence of the Minor(NA) and the Testimony of the other witnesses on his interactions with the Minor pointed to his culpability to immoral conduct which violated the duty of trust placed on him by his contract, and the disciplinary panel in arriving at the decision to dismiss and strike off his name from the register of teachers, had considered all responses from all parties.
19. The Appellant submits that the respondent was taken through an elaborate process based on the provisions of the Employment Act, principles of natural justice and the code of Regulations for Teachers , 2015(the Code) and the outcome of the Criminal proceedings against the respondent had no bearing on the Respondent's disciplinary proceedings before the Appellant. That there was fairness and the Appellant justified the reasons for the termination.
20. The Appellant submits that the Respondent was informed at a preliminary stage of the charges leveled against him through a show cause letter dated 16.01.2018 (C- exhibit 4) from the Headmaster of [Particulars Withheld] Primary school which invited him to a meeting at the County Director's office at Kakamega. That the Respondent failed to appear on that date and the victim and her parents gave their written submissions (R-exhibit -1). The Respondent however appeared on 22<sup>nd</sup> January 2018 and he was given an opportunity to give his written response considering the gravity of the allegations.
21. The Appellant submits that the County Disciplinary Committee Panel formed to look into the allegations against the Respondent, heard the respondent and the Minor, his parents, sister and another student and resolved through the minutes of 8<sup>th</sup> February 2018(R-Exhibit-2) that disciplinary action be taken against the Respondent and he was issued with an Interdiction Letter dated 8<sup>th</sup> February 2018(R-Exhibit 3).



22. The Respondent filed response on 21<sup>st</sup> February 2018(R-exhibit- 4) and was invited for disciplinary hearing through the invitation letter dated 11<sup>th</sup> June 2018(R-Exhibit 5). The disciplinary hearing minutes dated 10<sup>th</sup> July 2018(R- exhibit 6) confirm that the Respondent, the Minor learner(NA), her parents, sister and another student appeared. The appellant was dismissed and removed from the register of teachers vide a letter dated 27<sup>th</sup> July 2018 effective 10<sup>th</sup> July 2018(R-Exhibit- 7). The Respondent appealed through the letter of 6<sup>th</sup> October 2018 (R-exhibit- 8)) and he was invited to an appeal hearing vide the letter dated 7<sup>th</sup> May 2019(R-Exhibit- 9). The appeal was heard by a different panel as per the minutes of 17<sup>th</sup> June 2019 which upheld the Respondent's dismissal and the removal from the register of teachers(R-Exhibit-11).
23. The Appellant submits that the process was fair even from the appellant's evidence before the trial court as the Disciplinary proceedings were in tandem with the TSC Act and Regulation 139(3) and (4) of the Code of Regulations, 2015 which allowed the Appellant to conduct disciplinary proceedings on an employee who had a pending Criminal proceedings, or even one who was acquitted from the Criminal case.

### **Respondent's submissions**

24. On substantive fairness the Respondent submits that the Appellant failed to conduct investigations that could have established if at all, whether the complaint made against the respondent by one Mr. Daniel Lakitari, the supposed father to the Minor Learner(NA) were true.
25. The Respondent submits that the he was accused of having had carnal knowledge of a pupil and in the absence of investigations by the Appellant, the Respondent was framed on unsubstantiated grounds.
26. The Respondent submits that the Complainant took advantage of the Minor Learner who was a child in need of care and protection, to settle old family wrangles, which in turn led to his dismissal and his name being struck off the register of teachers; with the complainant's having taken advantage of the loopholes in the TSC disciplinary process which allowed the exploitation of minor and victims. (Pg 44-45 of the Record).
27. The Respondent submits that he should be reinstated to work as the disciplinary process by the appellant was not based on true facts and there is need for the disciplinary process of the Appellant to be improved to prevent instances of parties being charged on false allegations.
28. The Respondent submits that the complaint against him was malicious and driven by malice and the same was based on un-substantiated grounds. The Respondent argues that the complainants against him used the loopholes within the TSC Code of regulations which allowed the sacking of the Respondent after the nature of complaints levelled against him without further basis. He submits that the assertion by the appellant that the minor was his direct student is wrong as the said Minor was a student at [Particulars Withheld] School in Mumias, within East Wanga East Sub county while the Respondent was a teacher at [Particulars Withheld] primary school in Navakholo sub-county.
29. The Respondent submits that the outcome of the criminal case, clearly showed that what the complainants had stated at the Appellant's Disciplinary hearing was totally different from what they said in the criminal case and the Appellant was misled by the complainants; who also lied to the police who charged the Respondent without conducting proper investigations.
30. The Respondent submits that his termination was based on a purely wrong set of information and he should not be wrongly punished.



31. The Respondent submits that the appellant having participated in his arrest before he was charged in the criminal Proceedings, should not distance itself from the outcome of the Criminal proceedings and should be bound by the outcome thereof where the Respondent was found not guilty.
32. The Respondent submits that he was arrested for the criminal proceedings at the appellants offices and it is clear that he was lured to the appellant's offices before his arrest on framed up allegations. The Respondent argues that he was not accorded a fair hearing as on 8<sup>th</sup> February 2018, he was served with the complaint from Mr. Daniel Lakitari and the Minor Learner(NA) and he was not given an opportunity to respond in written but was arrested on the same day and disciplinary proceedings against him commenced.
33. On the substantive fairness, the Respondent submits that his termination was based on an isolated act of sexual intercourse with the said Minor Learner(NA) that had allegedly occurred on 30<sup>th</sup> August 2017 at [Particulars Withheld] River bridge, which he argues was proved to be untrue during the criminal proceedings, as the Minor learner gave conflicting evidence and the said allegations were deemed false, therefore the Respondent ought not to have suffered due to the lies against him(Pg- 53).
34. The Respondent further submits that it was his sworn testimony that on 30<sup>th</sup> August 2018 he was not near the said Lusumu river but in Busia when the alleged incident involving him and the minor learner(NA) was said to have occurred. That the allegations that he had sexual relations with the learner on several occasions as from July 2017 to 30/08/2018 were found to be a lie as alleged by the Police Constable in the Criminal proceedings(pg-77 of Record ).
35. On the procedural fairness, the respondent submitted that apart from him having been accused falsely, the disciplinary process was marred by irregularities, as one Daniel Kioko appeared on all disciplinary proceedings from the sub- County level at Navakholo, the county Level at Kakamega and at the national Level where the final decision to dismiss him was made and thus the decision to dismiss him was influenced by Mr. David Kioko who was the convenor of the national disciplinary committee and who had already heard the respondent on the previous proceedings.
36. The Respondent submitted that Mr. Kioko was identified as the Navakholo Sub-County Officer, Kakamega County Officer, Kakamega county Disciplinary Officer and at the national level, assistant director in the appellant's discipline department. That having sat on all proceedings, the Respondent case could not be decided any differently and one Madam Beatrice who chaired the County Level Proceedings at Kakamega, could not have made an independent decision as she was a junior officer to Mr. Kioko who had chaired the Navakholo Sub-County Disciplinary proceedings.
37. The Respondent submitted that no disciplinary proceedings were initiated at the sub-county level as was required but the same were initiated at the county level at Kakamega and thus the due process was not followed. He submits that no BOM Meeting was held and the headteacher of [Particulars Withheld] primary school Mr. Abdalla Wanyama produced minutes of a meeting that had not taken place.
38. The Respondent therefore submits that he was not accorded a fair hearing.

## **Decision**

39. The court understood the appeal to be against both the procedural and substantive fairness. I wish to first deal with the burden of proof and standard of proof in employment claims of unfair termination.
40. The court in Josephine M. Ndungu & others v Plan International Inc (2019)e KLR observed : '68. Under section 47(5) of the [Employment Act](#), the burden of proving unfair termination lies with the



employee. The said burden is discharged once he establishes a prima facie case that, the termination did not fall within the fall corners of the legal threshold set out by section 45 of the Act. The said provision bars employer from terminating employee's contract of employment except for a valid and fair reason and through a fair procedure. A reason is valid and fair if it relates to the employee's conduct, capacity and compatibility or based on the employer's operational requirements. Fair procedure, on the other hand refers to, but not limited to, affording the employee an opportunity of being heard before the termination. Upon discharge of the said burden on a balance of probability, the employer assumes the burden of proof, under section 43(1), 45(2) and 47(5) of the Act, to justify the reason for the termination and prove that a fair procedure was followed." The court holds that the 4 corners of legal threshold referred to in the foregoing decision are stated in section 45)2(b) of the Employment Act namely:- (i) related to the employees conduct, capacity or compatibility; or (ii) based on the operational requirements of the employer;" Section 47(5) states:-'47)5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer.."

41. Thus in the first instance the burden of proof is on the employee to prove occurrence of unfair termination or wrongful dismissal. It is upon discharge of that burden that the burden shifts to the employer to justify the reasons of the dismissal.

### **The standard of proof**

42. Employment claims are civil in nature and thus the standard of proof is on balance of probabilities. The test of reasonableness also applies as envisaged under section 45(4)b to extent the termination is unfair if '(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". The court holds that the Appellant and the lower court dealing with an employment misconduct of immorality was not sitting as a criminal court to apply the standard of beyond reasonable doubt.
43. The appellant submits that they discharged their burden to prove prima facie case as required and relied on the interpretation of section 43 of the Employment Act in Nyeri Civil Appeal 29 OF 2016 Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike[2017] eKLR to submit that the appellant established a prima facie case on a balance of probability based of the facts that were before the appellant to warrant the dismissal of the Respondent.
44. The Appellant argues that the acquittal in the criminal case did not have a bearing in the Disciplinary proceedings before the Appellant and the outcome of the criminal case should not have a bearing on the decision of disciplinary proceeding by an employer.
45. The Respondent argued that he was unfairly dismissed on unsubstantiated and false allegations which was proved by the fact that he was acquitted in the criminal proceedings. The respondent urged that the evidence produced during the disciplinary hearing and at the criminal proceedings differed and it was a clear picture that the allegations against him were false.
46. The respondent argued that his dismissal was based on immoral conduct from an alleged incident of him having had sexual intercourse with the Minor near river Lusumu on 30<sup>th</sup> July 2017, while he argues he was not near the said area on that material date.
47. The trial court in its judgement held, 'I have heard evidence in defence of the claim here and the internal mechanisms by his employer and how they dismissed him after his "immoral behaviour" In the code of conduct by the terminologies used TSC dismissed him because he allegedly had engaged in immoral behavior with the pupil. He was arrested as per his evidence and charged before a court of law here in



Kakamega and the upshot is that my brother colleague found him not guilty and acquitted him. It is not for this court to analyse my colleagues evidence in the criminal court since this is not an appeal court. This court having perused the documents and submissions herein finds that the claimant was dismissed wrongfully even after the criminal court found him not guilty”.

48. The trial court found that the Appellant had been unlawfully terminated basing its argument on the outcome of the criminal proceedings. I find fault in that the learned magistrate based her finding on the Substantive fairness of the termination of the Respondent based on the outcome of the criminal proceedings which bear a different level of proof that of beyond reasonable doubt, which is not applicable in disciplinary proceedings that require the reasonableness of the decision to be on a balance of probability which is envisaged under section 47(5) of the *Employment Act* thus:- ‘5) For any complaint of unfair termination of employment or wrongful dismissal the burden of proving that an unfair termination of employment or wrongful dismissal has occurred shall rest on the employee, while the burden of justifying the grounds for the termination of employment or wrongful dismissal shall rest on the employer”(emphasis provided).
49. I have to cautioned myself sitting at appeal that I have not seen the witnesses and give allowance for that guided by the holding in *Selle And Another v Associated Motor Boat Company Ltd & Others*, [1968] EA 123(supra).
50. The lower court found that the termination was unlawful since the Respondent was acquitted in the criminal proceedings. This reasoning by the learned magistrate did not consider what a reasonable employer would have done in the circumstances as per the test defined by Lord Denning in *British Leland UK LTD v Swift* [1981] I.R.L.R 91 where the reasonableness test was defined to wit:- ‘ the correct test is: ‘ was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him , then the dismissal was unfair, but if the reasonable employer might reasonably have dismissed him, the dismissal was fair..” This finding invites the court to consider the claim on merit.
51. Section 43 of the *Employment Act*, 2007 provides that:
  - i. 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.
52. Section 45 (2) of the Act provides that:-
  - (2) A termination of employment by an employer is unfair if the employer fails to prove-
    1. 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
    - (c)that the employment was terminated in accordance with fair procedure.



53. The Appellant dismissed the Respondent based on the oral hearing of the Respondent, the learner Minor and other witnesses. The Respondent was required pursuant to the operational requirements of the Appellant in particular the Circular No. 14/2018(pg-166-167 of the record) to act Loco Parentis, that was to take responsibility as a parent to protect pupils or students from any station or duty station.
54. The burden of proof required for the dismissal from the disciplinary proceedings was on a balance of probability and the employer was not required to prove the same beyond reasonable doubt. On perusing the statement of claim, the Respondent required the trial court to consider the Appellant's decision to dismiss him on a burden of proof that was beyond reasonable doubt which is not required in disciplinary proceedings.
55. It is not enough to state that the Minor's pregnancy was not from the appellant, The issue before the disciplinary proceedings before the appellant was that the Respondent had sexual relations with the Minor and not whether the DNA results proved that the respondent had not fathered the child.
56. The letter of interdiction against the Respondent indicated that he was of immoral behaviour. The Black's Law Dictionary (10<sup>th</sup> Edition) - Bryan A. Garner. defines the word "immoral" to mean inconsistent with what is right, honest, and commendable; contrary to standards of ethical rightness; .....Not following accepted standards of sexual behaviour; habitually engaged in lewd or licentious practices(immoral sex"). From this definition, the Appellant was only required to prove that the Respondent's behaviour was contrary to the set standards that require a teacher to ensure that they protect pupils and students as was required of them by the appellant.
57. The Respondent appealed to the Appellant in his letter of 6<sup>th</sup> October 2018(pg. 24 of the record) citing that he had been acquitted of the criminal proceeding with the DNA test results that showed that he was not the father(Pg 43 of the Record). He attended the Appeal Hearing on 17<sup>th</sup> June 2019 but the appeal was dismissed and his dismissal and striking from the register of teachers upheld( Pg 165 of the Record).
58. The lower court failed to consider the burden of proof that was required of the employer that it was on a balance of probability and not on the burden of proof in the criminal proceedings that is beyond reasonable doubt. The Learned magistrate erred in basing her finding on the outcome of the criminal proceedings and this court differently constituted in Margaret Auma Ingwe v Kenya Power and Lighting Co. Ltd [2015] eKLR(Justice Linnet Ndolo) considering the circumstances similar to the present held, " 26. In the final submissions filed on behalf of the Claimant, it was submitted that because the Claimant was acquitted of the criminal charges instituted on account of the loss, then she could not possibly be culpable under the internal disciplinary process. There was also the suggestion that where an employee facing internal disciplinary proceedings is charged with a criminal offence, the internal disciplinary proceedings should be held in abeyance until conclusion of the criminal case.
27. I hold a divergent opinion on this matter. First, as held by Majanja J in Republic v Public Service Commission of Kenya Ex Parte James Nene Gachoka [2013] eKLR and by the Court of Appeal in Kibe v Attorney General (Civil Appeal No 164 of 2000) an acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer.
28. Second, a criminal trial and internal disciplinary proceedings at the work place are two distinct processes with different procedural and standard of proof requirements. It follows therefore that while an employer may rely on the outcome of a criminal trial to make its decision on an employee, going against the outcome does not by itself render the employer's decision wrongful or unfair.



29. Third, an employer cannot rely on the pendency of a criminal trial to hold an employee under discipline ad infinitum. An employer who commences internal disciplinary proceedings against an employee must have the ammunition to push the process to its logical conclusion and this responsibility cannot be abdicated to the investigator or the prosecutor in a criminal case facing the employee...”
59. The foregoing position has been upheld in the decision quoted by the Appellant Nyeri Civil Appeal 53 of 2014 Teachers Service Commission V Joseph Wambugu Nderitu(2016)eKLR (Waki, Nambuye & Kiage, JJ.A))where the court held:- “...The above being the position, it is our view that this Court has made itself clear on the issue as to whether a successful outcome of a criminal process against an employee has primacy over an internal disciplinary process against such an employee arising from the same set of circumstances. The two processes are distinct from each other. ....”
60. Additionally In Kibe versus Attorney General Civil Appeal No. 164 of 2000 approved by Waki JA in the Hon. The Attorney General and another v Maina Githinji & Another Nyeri Court of Appeal No. 21 of 2015 (UR) , the Court was categorical that:-
- “an acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer for the reason that a criminal trial and an internal disciplinary proceeding initiated by an employer against an employee are two distinct processes with different procedures and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee going against the outcome does not by itself render the employer’s decision wrongful or unfair”.
61. In light of the foregoing I hold the trial court erred in law in failing to consider the reasons for dismissal by the employer applying the civil case standard of proof of balance of probabilities. The entire decision of the Learned Magistrate is set aside for application of wrong standard of proof and the court proceeds to evaluate the evidence on merit to reach its own conclusion.

### **Decision on procedural fairness.**

62. For a termination of employment to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness. I will therefore proceed to examine the disciplinary procedure adopted by the Appellant against the beams of Section 41 of the *Employment Act* which provides as follows:-
- “41(1) Subject to Section 42(1) an employer shall, before terminating the employment of an employee on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during the explanation.
- (2) 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.
63. The respondent’s case is that the disciplinary process was marred by irregularities, as one Daniel Kioko appeared on all disciplinary proceedings from the sub- County level at Navakholo, the county Level at Kakamega and at the national Level where the final decision to dismiss him was made and thus



- the decision to dismiss was influenced by Mr. David Kioko who was the convener of the national disciplinary committee and which had already heard the respondent in the previous proceedings.
64. It is alleged by the Respondent that Mr. Kioko was identified as the Navakholo Sub-County Officer, Kakamega County Officer, Kakamega county Disciplinary Officer and at the national level, assistant director in the appellant's discipline department. That having sat on all proceedings, the Respondent case could not be decided any differently and one Madam Beatrice who chaired the County Level Proceedings at Kakamega, could not have made an independent decision as she was a junior officer to Mr. Kioko who had chaired the Navakholo Sub County Disciplinary proceedings.
  65. The Respondent alleged that Mr. Kioko sat on appeal of the decisions that he made and thus the Respondent was aggrieved as the decisions at the different levels were already predetermined against him, as the same committees could not make different decision than what Mr. Kioko had already stated in the previous hearings.
  66. The Respondent submitted that no disciplinary proceedings were initiated at the sub-county level as was required but the same were initiated at the county level at Kakamega and thus the due process was not followed. He submits that no BOM Meeting was held and the headteacher of [Particulars Withheld] primary school Mr. Abdalla Wanyama produced minutes of a meeting that had not taken place. he argues that The Respondent alleges that when he was issued with a complaint letter by the Headteacher he was not given an opportunity to respond to the same and therefore submits that he was not accorded a fair hearing.
  67. The appellant on the other hand affirms that the process was fair as the Disciplinary proceedings were in tandem with the TSC Act and Regulation 139(3) and (4) of the Code of Regulations, 2015 which allowed the Appellant to conduct disciplinary proceedings on an employee who had a pending Criminal proceeding, or even one who was acquitted from the Criminal case.
  68. On this issue I proceed to consider the evidence before the lower court considering the principles to guide the court sitting at appeal as stated in Sella case(supra).
  69. The court has perused the statement of claim and there is no allegation that the disciplinary process was flawed. (pg. 6-7 of the Record). The issue regarding the procedural fairness is an afterthought that was raised by the Respondent in the appeal and was not an issue pleaded in the statement of claim and the trial court did not have an opportunity to hear any submissions on the same. The court sitting at appeal cannot consider issues not pleaded or contested at the trial court.

### **Substantive fairness.**

70. The Respondent argues that he was vindicated of the charges against him after he was acquitted of criminal proceedings. He argued that the evidence submitted by the Complainants in the disciplinary proceedings and the Criminal Proceedings were different and it showed that he was falsely accused and that on the date of 30<sup>th</sup> July 2017 when the alleged incident when he had sexual intercourse with a student named NA. is said to have occurred he was in another town, Busia. As at the time of his dismissal effective 10<sup>th</sup> July 2018, the criminal proceedings against the respondent were ongoing. The Appellant issued the Respondent with a show cause letter dated 17<sup>th</sup> January 2018(C-Exhibit -3). In his response to the show cause letter through the letter dated 22<sup>nd</sup> January 2018( Pg 116 of the Record), the Respondent confirmed he knew the Minor Learner (NA)and indicated that "I completely deny ever having an affair that could otherwise have led to her conceiving.". The Respondent appeared before the County Disciplinary Panel on 8<sup>th</sup> February 2018 and this was after he had submitted his reply of 22<sup>nd</sup> January 2018. At the said hearing the respondent did not ask the Minor Learner relating to the



allegation that he met her on 30<sup>th</sup> July 2017 at River Lusumu. But rather on details relating to a phone the minor had used to call the respondent and the pregnancy ( what model of the phone I gave you?.. was it new or used?)(Pg125 of the Record ).

71. The Respondent was interdicted on the same day on the ground that “you are of immoral behaviour in that you had sexual intercourse with a student by the name Nichole Awino of [Particulars Withheld] Secondary school Mumias Adm. No.xxxx Form IV 2018 on 30/07/2017 at around 3.00 p.m. in the back seat of your car reg. No. KBA xxxE beside river Lusumu while you were a teacher at [Particulars Withheld] Primary school.”
72. The respondent attended the disciplinary hearing on 10th July 2017 and at the said meeting the Minor confirmed that she had had sexual relations with the respondent severally.(Pg 140 of the Record). It turned out the pregnancy was not caused by the teacher after DNA test and this is where the respondent sought refuge. The court opines that defilement and immoral behavior need not lead to pregnancy and that the DNA test did not clear the teacher of immoral behavior with the student. Evidence was established that the minor was not a student of the respondent but had a close relationship, was a sexually active child and a promiscuous one at that (page 57 paragraph 2), the respondent and the minor were remotely related and neighbours. Evidence before the trial court was that the alleged phone was given to the minor by the respondent in the presence of the respondent’s wife. The respondent admitted to having been in the car alone with the minor at one time, given her lift several times from church, the minor knew his number and car details, at the disciplinary committee the respondent cross examined the minor who stated they had slept together severally. The respondent cross examined Warren Amumbwe who had recorded a statement and who confirmed to have seen the respondent pick and drop the minor severally. There was also the sister to the Minor Jewel Musavi, who had recorded statement with details of the affair but the respondent had no questions for her. There were also other witnesses(pages 135 -148). The respondent admitted he was put on his defence at the criminal court trial. The employer must prove existence of reasons for the termination on balance of probability. The letter of dismissal indicated the reason for dismissal as immoral behavior.
73. I do find on balance of probability that the respondent had immoral conduct with the minor who was a student. Indeed this is more true as he alleged to being enemies with the father of the minor hence the closeness was not because of being relatives. The wife stayed in Busia. There was opportunity and the respondent exploited the same to have affair with the minor as demonstrated by giving her a phone gadget, giving her lift in his car alone and on several times from church and as per the witness testimonies which the court did not find basis to fault. The teacher holds a position of trust and the same was obviously broke down. I do find the facts before the court would have led any reasonable employer of teachers to dismiss the respondent as per test of reasonableness set out by Lord Denning in British Leland UK LTD v Swift (1981) I.R.L.R 91 where the reasonableness test was defined to wit:- ‘ the correct test is: ‘ was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him , then the dismissal was unfair, but if the reasonable employer might reasonably have dismissed him, the dismissal was fair..” I will have to interfere with the finding on substantive fairness by the learned trial magistrate.
74. In the upshot the court finds that the learned magistrate erred for not considering the case on merit and for failure to apply the relevant standard of proof in civil cases of balance of probabilities hence reaching the wrong conclusion of unfair termination. I do find on a balance of probabilities the reason for the dismissal was valid and the procedure was fair. The appeal is allowed on that ground.



## Whether the judgment was Ambiguous and imprecise

75. The appellant on the last substantive limb of the appeal stated that the learned magistrate entered a judgment that was ambiguous and imprecise. They submit that the decision did not clearly indicate the reliefs granted thus incapable of being executed. That it was uncertain whether the Learned magistrate granted the main or the alternative relief or both reliefs. That the decision amounted to unfair enrichment. That the court ought to have made a choice between the main and alternative reliefs and relied on the decision of the court of Appeal in Nairobi Civil Appeal 297 of 2014 Alex Wainaina t/a John Commercial Agencies v Janson Mwangi Wanjihia [2015]e KLR.
76. The respondent submits that there was no ambiguity in the decision and that he clearly prayed for reinstatement. The learned magistrate held, ‘ in view of the forgoing this court finds that the claimant was wrongfully dismissed and enters judgment in his favour as prayed and or alternative prayers.’ I do agree with the appellant that this was an ambiguous order and hold the same as erroneous. I do uphold the decision of the court of Appeal in Alex Wainaina t/a John Commercial Agencies v Janson Mwangi Wanjihia (2015) where the court observed :-‘ on the first issue , we think it is trite law that where relief is prayed for in the alternative, a court of law has to choose , on the facts , whether to grant the main relief or the alternative and give reasons either way. Both ought not be granted in a blanket form. On this the trial court was in error.’ Enough said.
77. The other limb of the appeal was that the magistrate erred in ordering unconditional reinstatement of the respondent in contravention of section 12(3)(vii) of the Employment and [Labour Relations Act](#) and submits that the trial court did not take into consideration the provisions of section 49(4)(b)(c) (d) and (K) of the [Employment Act](#). That reinstatement was not tenable in the instant circumstances where the appellant lost trust in the respondent to act as loco parentis to the learners in his case. That further as at the time of delivery of the judgment 5 years had lapsed since the respondent’s dismissal which took effect on 10<sup>th</sup> July 2018.
78. Section 12(3) vii) of the Employment and [Labour Relations Act](#) states:- ‘ an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; ‘ This is a mandatory requirement. The Appellant issued the respondent with letter of dismissal dated 27<sup>th</sup> July 2018 which stated the dismissal was effective 10<sup>th</sup> July 2018 (page 154). The review decision was dated 16<sup>th</sup> July 2019 (page 165). The judgment by the lower court was delivered on the 23<sup>rd</sup> January 2023 which the court finds was way outside the limitation of 3 years post dismissal The respondent submits that the appellant caused delay at the trial to trap him into the three years. The claim was filed on 9<sup>th</sup> January 2020. I perused the lower court proceedings and found it was not true the appellant caused the delays. There were several instances the respondent was absent(204-205). The respondent also asked the court to take judicial notice of the COVID period and its impact on the court processes.
79. The court finds that reinstatement was ordered outside the 3 years hence an illegal order. The court has no discretion to extent the said period. See section 12(3)(vii) of the Employment and [Labour Relations Act](#) to wit:-‘ an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law;’. The ground of appeal on the reinstatement being illegal is upheld for being outside the three years. The court upholds the decision of the court of Appeal in Sotik Highlands Tea Estates Limited v Kenya Plantation and Agricultural Workers Union( 2017)e KLR to hold that the Learned Magistrate in ordering reinstatement of the respondent after 3 years of dismissal acted without jurisdiction. The court of Appeal stated: ‘... we think it was a misdirection for the Learned Judge to make an order of reinstatement when the effect would be to order the appellant to reinstate Siro to employment when



the period of three years allowed in law had long passed. To that extent the learned Judge acted without jurisdiction.” In the upshot the court agreed with the appellant the Learned Magistrate erred in the reinstatement and further the orders were ambiguous.

### **Whether the appellant was entitled to reliefs sought**

80. Having held that the dismissal of the respondent from service of the Appellant was procedurally and substantially fair, the court finds in favour of the appellant and upholds the appeal. The entire decision of the Learned Magistrate is set aside.

### **Conclusion**

81. The appeal is upheld. The judgment of Hon. D. Alego in Kakamega CMELRC No. 2 of 2020 Julius Mutinye Makhokha v Teachers Service Commission delivered on 23<sup>rd</sup> January 2023 and all consequential orders is hereby set aside and substituted with judgment that the Claim dated 9<sup>th</sup> January 2020 is dismissed with no order as to costs.

82. To temper justice with mercy I order no costs in the appeal too.

83. It is so ordered.

**JUDGMENT DATED, DELIVERED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 18TH DAY OF OCTOBER, 2023.**

**JEMIMAH KELI**

**JUDGE**

**IN THE PRESENCE OF**

Court Assistant:- Lucy Macheso

For Appellant:- Flora Manyasa

For Respondent:- In person

