



**Walembe v Teachers Service Commission (Cause 8 of 2023)
[2023] KEELRC 2533 (KLR) (18 October 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2533 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KAKAMEGA
CAUSE 8 OF 2023
JW KELI, J
OCTOBER 18, 2023**

BETWEEN

CALEB A. WALEMBA CLAIMANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

JUDGMENT

1. The Claimant upon termination of his employment by the Respondent filed a Statement of Claim dated 10th December 2021 and filed in this court on 22nd February 2022 seeking the following reliefs:-
 - I. A declaration that his dismissal was unlawful as it was contrary to Section 42 and 45 of the *Employment Act* and Article 50 of the *Constitution*.
 - II. Reinstatement to his job with full benefits.
 - III. General damages for wrongful dismissal.
 - IV. Costs of the suit.
2. In addition, on even date he filed his verifying affidavit to the claim sworn on the 10th December 2021.
3. The Claimant relied on his list of documents dated 10th December 2021 and bundle of documents filed on 22nd February 2022. He filed his undated list of witnesses on 3rd May 2023; and filed a further list of Documents dated 3rd May 2023 which was the document titled 'statement written by Brian Lutta on 20/7/2021. He on even date, filed his Witness statement; witness statements of Bonface Lutta Keya, Elphas Maero, Brian Lutta and Cyprian Chibile Omukamani all undated.
4. The claim was opposed by the Respondent who entered appearance through Flora Manyasa, Advocate on the 2nd March 2022. The Respondent filed a response to the Statement of claim dated 22nd February



2022 and filed in this court on 2nd March 2022. Contemporaneously, the Respondent's filed its list of documents dated 22nd February 2022 and its bundle of documents.

5. The Respondent on 7th March 2023 filed the witness statement of Catherine Kertich dated 6th March 2023 and produced in court during hearing the Witness statement of Daniel Kioko dated 4th July 2023 which had been filed in Bungoma.
6. By a court order dated 24th April 2023, this matter was transferred from Bungoma as E005 of 2023 to Kakamega.

Hearing

The Claimant's case

7. The Claimant's case was heard on the 13th July 2023 where Caleb A Walemba testified on oath (CW1), adopted his written witness statement filed on 3rd May 2023 as his evidence in chief, and produced his documents as exhibits C-1 to 11, as per his list of documents, dated 10th December 2021. Brian Lutta testified as CW2 and adopted his witness statement filed on 3rd May 2023. He produced his statement before the KNUT Executive Secretary Mumias Branch (C-Exhibit 12) filed on 3rd May 2023. Bonface Lutta Keya testified as CW3 and adopted his witness statement filed on 3rd May 2023. He produced his statement dated 14th September 2020 marked as C-Exhb 10). Cyprian Chibile Omukamani testified as CW4 and adopted his witness statement filed on 3rd May 2023.
8. All witnesses were cross-examined by counsel for the respondent, Mr. Musundi.

The Respondent's case

9. The Respondent's case was heard on the same day, 13th July 2023 where its witness Daniel Kioko Kiumi (DW1) testified on oath as the Respondent's first witness of fact. He adopted his written witness statement dated 4th July 2023 as his defence evidence in chief, and produced defence documents filed on 22nd February 2023 as exhibits R-1-13 as per list of documents. Catherine Kertich testified as DW2 and adopted her statement filed on 7th March 2023 as her evidence in Chief. The witnesses were cross-examined by counsel for the Claimant, Mr. Indimuli.

Claimant's case in summary

10. The Claimant was a former teacher employed by the Respondent and was at the time of his dismissal the Deputy headteacher of Khwihondwe Primary School. The claimant was interdicted on 4th October 2018 on allegations that he had administered corporal punishment to a pupil named Brian Lutta (hereinafter "Learner"), a standard six pupil in term 2, 2018, at the Head master's office.
11. The Claimant stated that he had a "frosty" relationship with the school's parents who were protesting the imposition of certain levies by the school and when the county disciplinary committee held a meeting on 4th July, 2018, they recommended his interdiction.
12. The Claimant argues that he was invited to the Respondent's disciplinary hearing through the letter of 22nd May 2019 and the disciplinary proceedings took place on 4th June 2019 which resulted in his dismissal. He appealed against his dismissal but the decision to dismiss him was upheld.
13. The Claimant argues that the charges against him as outlined in the interdiction letter were not proved as :-
 - I. The Headteacher confirmed that the claimant had not caned the Pupil in his presence;



- II. The evidence on the caning from the Pupil was contradictory;
 - III. The parent’s evidence didn’t corroborate the child’s evidence;
 - IV. The exact date of the incident was not stated;
 - V. No medical proof of the caning was presented;
 - VI. The panel failed to see the evidence of Constance Juma was laced with malice having being relieved of his duties by the Claimant;
 - VII. That the evidence of one Constance Juma, that he had witnessed caning is false as he could not have witnessed it if the same occurred in the headteacher’s office; and
 - VIII. That the Trial and his appeal were against Article 50 of the Constitution.
14. The Claimant argues that his termination was contrary to Section 42 of the Employment Act. He states that the leader of the County Disciplinary Panel testified at the disciplinary hearing and therefore he could not get a fair hearing, as the said County Disciplinary Panel Leader was the accuser, prosecutor and judge in his case.
15. The Claimant argues that the hearing fell short of fair and public hearing envisioned under Article 50 of the Constitution as there was impartiality which hampered the respondent from identifying the glaring issues that proved the issues in the interdiction letter were false.

The Respondent’s case

16. The Respondent’s case is that the relationship between the claimant and the Respondent is governed by the Teachers Service Commission Act, No 20 of 2012, the Code of Regulations, 2015 (CORT) and other Administrative circulars and guidelines issued from time to time. The respondent submits that it issued (circular No 6 of 2017 dated 21st March 2017) “Safety of Learners in Learning institutions” which prohibited the use of corporal punishment against learners.
17. The Respondent submits that sometime in June 2018, the County Director Kakamega received complaints of maladministration and use of corporal punishment at Khwihondwe Primary school ,which prompted the commencement of investigations by the respondent and the Ministry of Education.
18. That statements were recorded from several persons including learners and the claimant and the County disciplinary Panel called a meeting inviting learners and teachers.
19. That investigations indicated that the claimant had administered corporal punishment contrary to Section 36 of the Basic Education Act and the Respondent’s circular on safety of learners.
20. That the claimant’s conduct breached Clause b(vi) of the third Schedule of the TSC Act and disciplinary proceedings commenced, which culminated in the County Panel recommending the interdiction of the Claimant.
21. The Claimant was interdicted on 4th October 2018 and given 21 days to respond to the allegations and a disciplinary committee was convened on 8th May 2019 with prior notice of date, time and venue of the hearing having been communicated to the Claimant. That the claimant was advised to bring any documents necessary for his defence where other witnesses appeared before the panel.
22. The Disciplinary hearing was held on 4th June 2019 where the Claimant presented his case and he was accorded time to cross-examine the witnesses.



23. The respondent stated that its disciplinary committee interrogated all witnesses, considered the oral and written representations by the claimant and on evaluation resolved that the claimant breached the TSC Act and CORT, 2015. The claimant was dismissed on 20th June 2019.
24. The Claimant applied for review on his dismissal and was invited to the review hearing on 18th September 2020 where he was heard and his representation considered. The dismissal was upheld through the letter of 2nd October 2020.
25. The Respondent states that it exercised its power to institute disciplinary proceedings within the confines of the Constitution, the relevant statutes and principles of natural justice and its decision was fair, procedural and lawful and therefore, the Claimant was not entitled to reliefs sought.

Written submissions

26. The court gave directions for filing of written submissions after the hearing. The parties complied. The Claimant's written submissions were drawn by Walunya Indimuli Advocates and dated 6th September 2023 and filed in court on even date. The Respondent's written submissions drawn by Flora Manyasa, Advocate were dated 15th September 2023 and received in court on the 26th September 2023.

Determination

Issues for determination.

27. The Claimant did not identify issues for determination in his submissions and submitted generally on the unfairness of his termination under Section 45 of the Employment Act.
28. The Respondent in its written submissions identified the following issues for determination:-
 - a. Whether the termination of the Claimant's employment was based on valid reasons.
 - b. Whether the termination of employment of the Claimant was procedurally fair.
 - c. Whether the Claimant is entitled to the prayers sought in the Claim.
29. The Court having considered the issues addressed by the parties in their submissions and pleadings were of the considered opinion that the question of whether the Claimant was a former employee of the Respondent was not in dispute and thus the issues to be addressed in the determination of the dispute were as follows:-
 - a. Whether the termination of employment of the claimant by the respondent was lawful and fair.
 - b. Whether the claimant was entitled to the reliefs sought.

Written Submissions

Claimant's submissions

30. On the validity of the reasons for the termination of the employment, the claimant submits that the reasons for his termination outlined in the interdiction Letter (C-Exh-3) and subsequent dismissal (C-Exh-7) were not proved. The Claimant points out that during hearing the Respondent's witnesses admitted that there was no physical injuries which proved that the Learner was canned, no Police Occurrence Report on the said incident nor was there medical documentation such as P3 form or medical notes that could have proved that the Learner had been caned.



31. The Claimant argued that the learner who was a bell ringer/time keeper in school had lost a school watch and was sent home to bring his parent. That the learner on fear of been disciplined by his parent lied to his parent that he had been caned by the Claimant. The parent went to school and confirmed that the learner had not been caned but he had lied as coerced by his friends.
32. The Claimant argued that the interdiction letter stated that he had caned the learner in term two 2018, yet the incident when the student had been sent home relating to the watch and the alleged caning had occurred in term one.
33. The claimant argues no valid reasons warranting his termination were available.
34. The Claimant states that during hearing CW2 confirmed that he was forced to adopt a statement which was not true and that the claimant had been restricted on the questions to ask him.
35. The Claimant submitted that the Respondent's witness confirmed that the relationship between the school headteacher and parents was not good due to imposition of levies and that is what prompted the investigations at the school and to redirect the attention on the issue of illegal levies, the headteacher began allegations of corporal punishment against the Claimant.
36. The Claimant argues that at his appeal he presented the affidavit of CW3 (C-Exh-10) which was the evidence of the father of the learner who had alleged that his son had been caned, confirming that the learner had not been caned, but the Respondent's appeal panel refused to accept the same. He submitted that No warning letters had been issued to him previously as he had never committed the alleged offence under section 45(5)(e) of the [Employment Act](#).

Respondent's submissions

37. The respondent 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, that the Employer believed existed. The Respondent submits that Section 4(p) and 36 of the [Basic Education Act](#) prohibit corporal punishment or any inhumane treatment or torture which was fortified by the respondents Circular No 6/2017 (R-Exh-13) which allowed the Respondent to take disciplinary action in the event of its occurrence.
38. The Respondent submits that interview conducted and recorded by Several persons including the claimant, confirmed that the Claimant had administered corporal punishment on various occasions and the Learner confirmed having being caned.
39. The Respondent argued that during disciplinary hearing on 4th June 2019, during cross-examination, the learner Brian Lutta confirmed being caned by the Claimant(Pages 30, 31, 32, 36, 42 & 52 of Defence Documents)
40. The Respondent argued that allegations of caning were confirmed by pupils and teachers during investigations and the learner's father confirmed that his son had reported having been caned and that the father had conducted inquiries that confirmed that corporal punishment was being undertaken(Pages 53 of defence documents). The Respondent argued that the claimant had not denied having committed the offence of caning and had rather asked for forgiveness contending that it was not his intention (Page 54 of Defence Documents).
41. The Respondent insists it made its decision upon considering all materials before it being that; the learner was caned after losing a school watch and his father and other witnesses confirmed the same. The claimant had been cautioned by the Headteacher against corporal punishment and witnesses were consistent in their testimonies. (Pages 54 - 55 of Defence Documents).



42. The Respondent argues that under Section 43(2) of the *Employment Act*, what the court must consider is whether the respondent believed the Claimant was guilty or rather whether the Claimant is guilty of the allegations. The respondent argues all evidence pointed to the Claimant having committed the offence of caning and he failed to rebut it during hearing and the Respondent reasonably believed he committed the offence. To buttress its case the respondent relied on the decision in Nairobi ELRC Cause 1519 of 2015, *Bakery Confectionery Food Manufacturing & Allied Workers Union v Wrigley Company (CA) Limited* (2022) eKLR.
43. The Respondent argues that it had valid and genuine reasons to dismiss the claimant in the threshold required for disciplinary matters, and relied on Nairobi Civil Appeal 66A of 2017: *Kenya Revenue Authority v Reuwel Waitthaka Gitahi & 2 others*.
44. As to the change of the testimony of Brian Lutta and his father, the Respondent argues that the same is suspicious as the two testified before the disciplinary committee and the father believed that his son is trustworthy and could not lie. On the evidence of Cyprian Chibile, the Respondent argues that the alleged investigations conducted by Cyprian Chibile that led to the writing of the Statement by Brian Lutta 20/7/2021 confirming that he had not been caned, was never reported to the Respondent and was only provided at the institution of the suit and the respondent states that it fairly and justly terminated the Claimant's employment under section 43 and 45 of the *Employment Act*.

The relevant laws/provisions

Whether the termination of Caleb A Walembe was fair.

Whether the claimant was entitled to the reliefs sought.

Facts

45. Caleb A Walembe alleges that the reasons for his termination "administering corporal punishment" to a pupil in term two in the head teacher's office were not proved.
46. The respondent argues that the teachers, pupils, the learner himself and his father confirmed that he had been caned. Investigations proved that corporal punishment was being practiced in the school.

Substantive/procedural fairness

47. Section 43 of the *Employment Act*, 2007 provides that:-
1. In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.
 2. The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.
48. Section 45 (2) of the Act provides that:
- (2) A termination of employment by an employer is unfair if the employer fails to prove-
 - a. that the reason for the termination is valid;
 - b. that the reason for the termination is a fair reason -
 - i. related to the employee's conduct, capacity or compatibility; or



- ii. based on the operational requirements of the employer; and
- c that the employment was terminated in accordance with fair procedure.”

49. 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..”

Analysis

Substantive fairness

50. The Interdiction letter(C-Exhb-3) read in part as follows:-

“while you were the deputy head teacher Khwihondwe primary School, you administered corporal punishment to a pupil by the name Brian Lutta of Khwihondwe Primary school class 6(2018) in term 2 in the head teacher’s office”

- 51. During cross-examination the learner (Brian Lutta) (CW2) testified that he had lied to his father that he was caned in the classroom. CW2 on cross examination stated that he had not written the statement on page 30 (DMF1-5) during investigations and during the disciplinary hearing, he stated that he had been asked to read a paper as his statement. He testified that the said paper was not in his handwriting.
- 52. He testified that the claimant was not allowed to ask him any questions and the Respondent had not asked him any question. The Claimant confirmed during hearing that he had asked the learner questions.
- 53. CW2 argued that he lied to his father and investigators as he was a child then and had been coerced to do so by his friends for fear of being punished for losing a school watch.
- 54. The learner further testified that the allegations of caning were in term 3 (The respondent witness said term 2)while the learner had been a time keeper in term one and confirmed he had never been caned.
- 55. Bonface Lutta Keya (CW3) who was the learner’s father stated that he had established later on that his son had not been caned and wrote his affidavit of 14th September 2020 (C-EXH-10). CW4 Cyprian Chibile testified that the learner had lied and had been harassed to write his statement.
- 56. DW1 confirmed that although the learner and other pupils testified that the learner had been caned there was no medical proof of the caning or existence of injuries, a position confirmed by DW2-Catherin Kertich.
- 57. DW1 confirmed that allegations of Caning had been reported by the Headteacher who had been told by the Parent. The court noted that there was no evidence of the alleged logs of complaint by the parent as stated in the statement by the Head Teacher.
- 58. The headteacher had not seen the alleged caning which as per the interdiction letter had occurred in the head teacher’s office. As per the County Discipline Panel minutes of 4th July 2018 (p. 2 of 12) the Headteacher in whose office the alleged caning of the learner occurred stated that it had been alleged that the Claimant was administering corporal punishment.
- 59. DW1 had been in the Investigations panel that was looking into the allegations against the headteacher for alleged imposition of levies when the issue of caning also came up. He testified that the time when



- the caning incident had occurred, it was not one of the issue that had been considered, although he stated it was in the first term.
60. DW2 testified that there was no record of the dates when the learner was caned or when the issue of a lost watch had happened as they did not pursue the issue of dates and only concentrated on the issue of the “punishment administered”.
 61. DW2 testified that the student had been caned at the Class and at the Deputy Head teacher’s office; which was a contrast with the information in the interdiction letter that the caning had occurred in the Head teacher’s office and the evidence of DW1. It was clear to the court at that point that the alleged caning incident was based on hearsay as to what the headteacher had been told by the Parent and no evidence of its occurrence was available. There was no mention that caning was in the classroom.
 62. The Head teacher during cross examination at the County panel (page 8) it is recorded on corporal punishment, he said he was not aware but it was alleged that the deputy head teacher Mr. Weleba TSC /439XXX was administering it. This waters down the claim of the head teacher having received complaint earlier of corporal punishment by parent. The court noted the head teacher had bad relationship with his deputy and that his evidence was heavily relied on to interdict the teacher. At page 35 (respondent’s documents) the head teacher wrote about his deputy, the claimant, ‘ he is not fit for the post of DHT, it can do him better if he tried elsewhere.’
 63. DW2 also confirmed that when the evidence of the Learner’s father was produced during review, the Respondent’s commissioners said they would only consider the evidence of the child as compared to that of the father.
 64. DW1 confirmed that the report relating to the alleged caning had been reported by the Parent (CW3) to the headteacher. Likewise, any evidence relating to the confirmation that the said caning had not taken place would have been given by the Father. For the Respondent to have failed to consider the evidence of the father was in itself unfair, considering that the respondent relied on the father’s report that his son had been caned to institute proceedings against the Claimant. The court also noted that there was also evidence of investigations of KNUT where the boy admitted he lied corroborating the evidence at review.
 65. At the Review stage, the only evidence that was to be considered was new evidence. The Father’s (CW3) affidavit was new evidence that the Respondent ought to have considered.
 66. The Respondent had relied on the statements of several persons , it considered true, to support the allegation that corporal punishment was undertaken in the school. To allege that the evidence of the father(CW3) could not be used but that of the learner was unjustified. The reports of caning had not emanated from the learner but the father. The Respondent’s own instructions were for the Claimant to avail any document that could support his case.
 67. The Claimant supplied the document and the Respondent was obliged to consider the same but failed.
 68. If the circumstances of when facts one believed existed changed, then there was need to consider whether the change in circumstances could have a bearing in a case.
 69. The father (CW3) testified that he had not seen any evidence of caning on his son and he had not taken his son to hospital. No evidence was produced of alleged log in by the head teacher of the complaint which had happened in term one and the allegations arose in term 2.
 70. There had been no evidence that the Claimant had administered corporal punishment and the Headteacher is alleged to have stated during the County Discipline Panel Meeting (Pages. 14) that the



pupil had already been caned before going to his office. How the Headteacher knew that the learner had been caned is unknown.

71. The evidence relating to the learner having lied that he was caned was not new at the time of the hearing, the same had been availed through the affidavit of the father produced during the review stage before the respondent. The father (CW3) adopted the said affidavit as his evidence during hearing and his son(CW2) also testified that he had lied that he was caned in fear of his father and had lied as a child.
72. During the Disciplinary hearing (Page 52) the learner alleged that he was playing when he was called by the Claimant. Then alleged that he had been caned in the class then in the office. Which office, it was not stated. The Learner stated that he was taken to hospital(Page 52) but the father CW3 (Page 53) confirmed that he had not checked if his son was caned or check him.
73. It was the considered opinion of the court that taking into account the evidence available during the disciplinary hearing, the Respondent on a balance of probability could have identified the variance in the testimony given as to whether the Learner had been caned. A reasonable employer would have considered the presentations before it to have glaring inconsistencies relating to the occurrence of the alleged caning incidence. On the one hand the learner said he was taken to hospital by his father, and on another the father said he had not seen any evidence of caning as he did not examine his son and on another there was no evidence of the said caning having been reported when it allegedly occurred.
74. The Respondent's own witnesses gave contradictory evidence as to where the caning had occurred DW1- Class and Headteacher's office while DW2 stated it was in the class and the Deputy Head teacher's office and the headteacher had confirmed that the caning had not been done in his office. The parent later at review stage admitted his child had lied which position was later established independently by CW4 as true.
75. Considering all the above evidence the court finds that the claimant's termination was unfair considering that evidence availed to the respondent at the disciplinary hearing was inconsistent. The court also found evidence the boy had lied. The court noted the teacher had not been issued with prior warnings of the act even in his former school and had been promoted on merit hence a clean record. On balance of probability the court finds that the reasons for the dismissal were not valid.

Procedural fairness

76. Section 41 of the [Employment Act](#) which provides as follows:-
 - (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.”
77. The Claimant testified that the head of the County Disciplinary panel testified at his disciplinary hearing and thus he could not get a fair hearing as mandated under section 42 of the [Employment Act](#), as the Respondent was the accuser, prosecutor and judge against the provisions of Article 50 of the [Constitution](#) that guarantee a party fair and public hearing before an independent tribunal.



78. The claimant argued that he was not given a right to have a representative or a union of his choice and this disadvantaged him as he was mishandled.
79. The Respondent on its part argued that the chair of the County disciplinary panel had appeared before the Disciplinary hearing as a witness and not as a member of the Committee that decided the claimant's case. (Defence Page 4).
80. The Respondent argued that the process followed was in tandem with the Constitution and rules on natural justice and fair. That investigations were commenced under Regulation 146 (1) of the code and the claimant had an opportunity to cross-examine witnesses. That he was interdicted and given time to write a defence but failed to do so. That the claimant was invited to the disciplinary hearing of 4th June 2019 through the letter of 8th May 2019. That in accordance with Regulation 153 of the code, the claimant was informed of the charges against him and given opportunity to present his case and cross-examine witnesses.
81. That he appeared for the review of his case on 18th September 2020 having appealed as per Regulation 156(4) of the code and his dismissal was upheld from the hearing through the letter of 2nd October 2020. The Respondent affirms that the process of his termination was fair and relied on the decisions in Anthony Mkala Chitavi v Malindi Water & Sewerage Company Ltd (2013) eKLR; Bett Francis Berngetuny & another v Teachers Service Commission and another (2015) eKLR; Lydia Moraa Obara v Tusker Mattress Limited (2021) eKLR.
82. The Claimant confirmed during re-examination that he had been asked to bring any further documents or witnesses. The Interdiction letter allowed the Claimant to present any evidence in his favour as follows:- "present any other evidence including documents in support of your case". The assertion that he had not been asked to be accompanied by a representative was an afterthought not pleaded in his statement of claim but at the submission stage.
83. With the only issue raised by the claimant relating to the appearance of the Chair of the County disciplinary panel at the Disciplinary hearing which he states is against his right to fairness. Beatrice Ogwe was the Chairperson of the County Discipline Panel meeting held on 4th July 2018 when the Claimant had first appeared after investigations (Page 7 of defence documents) which panel recommended the interdiction of the claimant (Page 18 of defence documents). Beatrice Ogwe then appeared at the Disciplinary hearing on 4th June 2019 (Page 54 of defence documents) as a witness and the Claimant had no questions to ask her.
84. The court holds that there was procedural fairness but tainted for lack of valid and justified reasons for the dismissal.

Issue b). Whether the claimant was entitled to the reliefs sought.

85. Having seen that the reasons leading to the termination were not valid and justified, the next issue to determine was whether the claimant was entitled to reliefs sought.
86. The Claimant sought the following reliefs:-A declaration that his dismissal was unlawful as it was contrary to section 42 and 45 of the Employment Act and Article 50 of Constitution Reinstatement to his job with full benefits. General damages for wrongful dismissal.
- A declaration that his dismissal was unlawful as it was contrary to section 42 and 45 of the Employment Act and article 50 of Constitution
87. The court held the dismissal from employment was unlawful.



Reinstatement

88. As to the prayer relating to reinstatement, as at the date of the Judgement, four years 4 months and 14 days had lapsed since the dismissal of the claimant, which was effective from 4th June 2019.

89. Guided by the Court of Appeal's decision in *Sotik Highlands Tea Estates Limited v Kenya Plantation and Agricultural Workers Union* [2017] eKLR where G.B.M. Kariuki, Sichale & Kantai, JJA stated that:-

“The ordinary meaning of the language of Section 12 of the *Employment and Labour Relations Court Act* is that the labour Court is empowered to order reinstatement of a dismissed employee within three years of dismissal. Parliament in its wisdom capped that period at three years and there is no provision or proviso qualifying that provision to say that time stops running or is interrupted by an action filed in court. We do not accept that submission on the part of Mr. Aduda and it is telling, as pointed out by learned counsel for the appellant, that the respondent had abandoned the prayer for reinstatement in submissions made before the trial court. The learned trial Judge made no mention of this at all in the judgment and we think that it was a misdirection for the learned Judge to make an order for 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.....”

90. The Court lacks jurisdiction to order for an order of reinstatement and should stop there.

91. The court on finding unlawful dismissal may award any of the remedies under section 49 of the *Employment Act*. Section 49 of the *Employment Act*, grants various remedies which may be awarded in singular or multiple terms, and which are discretionary rather than mandatory, to be granted on the basis of the peculiar facts of each case. This is made clear by section 49 (4) which sets out some 13 considerations which the trial court must take into account before determining what remedy is appropriate in each case. Those considerations include, inter alia, the circumstances of the termination and the extent to which the employee caused or contributed to it and the practicability of reinstatement .

92. The Claimant was a teacher employed by the Respondent. He lost his livelihood as a teacher having risen to the ranks of a deputy Head Teacher. He confirmed that he was unemployed during hearing and In light of the fact that the reasons leading to his dismissal were unjustified; the court should exercise its discretion within the confines of Section 49 of the *Employment Act*. The prayer of reinstatement is not available to the claimant as the same cannot be granted beyond three years after dismissal as is the case here.

93. Considering that the Claimant would not go to work as a teacher and having lost his livelihood as a teacher, the court should award the claimant maximum compensation being equivalent of 12 month's salary at the rate of his last salary. The claimant had no prior record of disciplinary issues. He had worked well earning promotion to deputy head teacher. I find since the option of reinstatement was deserved it is fair to award him maximum compensation being equivalent of 12 month's salary at the rate of his last gross salary. The teacher was on interdiction from 4th October 2018 upto dismissal on 20th June 2019. The termination having been held unlawful the teacher is entitled to his salary during the period which is hereby awarded.



Claim for General damages for wrongful dismissal.

94. The court of Appeal in *Kenya Broadcasting Corporation v Geoffrey Wakio* [2019] eKLR (Githinji, Karanja & Warsame JJA) held that:-

“(25) We now come to the award of Kshs 3,000,000 being general damages in lieu of reinstatement. It is trite law that general damages are not awardable for wrongful termination. Previous decisions of this Court have asserted that the damages payable to the employee for unfair dismissal or termination is that which is equivalent to salary in lieu of notice. (See *Alfred Githinji v Mumias Sugar Company Ltd* Civil Appeal No 194 of 1991).

95. The court in *Alfred Githinji (supra)* had held that:-

“In view of the conclusions we have come to, above, we are of the view and so hold that, on the assumption that the respondent’s dismissal was wrongful, he was only entitled to damages equivalent to the salary he would have earned for the period of the notice, namely three months, and that the trial judge erred in awarding him more....”

96. The claimant is granted damages equivalent to the period of notice of one month in lieu of notice calculated at the rate of his last salary a remedy under section 49 of the *Employment Act*.

Conclusion and final orders

97. The court holds the dismissal of the claimant from employment of the respondent was unlawful and enters judgment for the claimant against the respondent as follows:-

- a. Award of Notice pay for one month as per last gross salary
- b. Award of Unpaid Salary for period of interdiction being from 4th October 2018 upto dismissal on 20th June 2019.
- c. Award of Compensation pay equivalent of 12 months last gross salary
- d. (awards 1,2 and 3 subject to statutory deduction of PAYE)
- e. Interest is awarded at court rate from date of judgment until payment in full.
- f. Respondent to pay the claimant costs of the suit.

98. Stay of 30 days is granted.

99. It is so ordered

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

JEMIMAH KELI

JUDGE

In the presence of:-

Court Assistant : Lucy Macheso

For Claimant : Mr. Indumuli



For Respondent: Ms. Manyasa

