



**Mwito v Teachers Service Commission & another (Petition E098 of 2022)
[2023] KEELRC 3086 (KLR) (28 November 2023) (Judgment)**

Neutral citation: [2023] KEELRC 3086 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E098 OF 2022
JK GAKERI, J
NOVEMBER 28, 2023**

BETWEEN

FANICE MWITO PETITIONER

AND

TEACHERS SERVICE COMMISSION 1ST RESPONDENT

**CHIEF EXECUTIVE OFFICER/COMMISSION SECRETARY TEACHERS
SERVICE COMMISSION 2ND RESPONDENT**

JUDGMENT

1. The Petitioner filed this Petition on 16th June, 2022 alleging that her constitutional and other rights had been violated by the Respondent.
2. The Petition is expressed under Articles 2, 10, 22, 23, 41, 47, 50, 162 and 258 of the Constitution of Kenya, 2010.
3. The Petitioner avers that the Respondent violated Article 10 on due process, 41 on the right to fair labour practices, 50 on the right to fair hearing and 47 of the Constitution of Kenya, 2010 on notice before hearing.
4. The Petitioner prays for;
 - i. A declaration that the procedure employed by the Respondent to interdict the Petitioner was illegal, irregular and unfair.
 - ii. The Honourable court grants an order quashing the orders issued by the 1st Respondent interdicting the Petitioner from her employment with zero-pay.
 - iii. An order compelling the Respondents to unconditionally reinstate the Petitioner to her employment position with full pay.



- iv. An order for payment of full salary for the period under interdiction.
- v. A declaration that the Petitioner be compensated the amount of money that this Honourable Court deems sufficient and/or appropriate for the violations of the Petitioner's rights and fundamental freedoms under Articles 41, 47 and 50(1) of the Constitution of Kenya.
- vi. Costs of this Petition.
- vii. Any other relief the court deems fit to grant.

The petitioner's case is pleaded as follows;

5. The Petitioner avers that she was offered a 5 year contract by the Respondent as Deputy Director (Teacher Management) TSC Scale 12 effective 21st December, 2018 and was confirmed by letter dated 26th May, 2020 after a 6 months probationary period. That before then, the Petitioner had served the Respondent as a teacher for 11 years and as a Staffing Officer for another 11 years.
6. The Petitioner avers that she was the Deputy County Director-Machakos and Sub-County Director-Machakos Sub-county and served diligently.
7. It is the Petitioner's Case that by letter dated 4th February, 2022, she was invited to appear before an Investigation Committee of the 1st Respondent on 14th February, 2022 to answer to allegations of unprocedural transfers, neglect of duty and infamous conduct and appeared.
8. According to the Petitioner, the preliminary investigation committee consisted of officers of similar or lower ranking than her contrary to the Respondent's Human Resource Policies and Procedures Manual for Secretariat Staff, 2018 (herein after TSC HR Manual).
9. That while Antonina Lentoijioni and Jane Irambu were Deputy Directors, Daniel Kioko was an Assistant Director Staffing.
10. That the statements of Mr Richard Kitheka, Derrick Mutunga and Dr Benjamin Kyalo were neither disclosed nor read out to the Petitioner when she appeared before the Investigation Committee.
11. That only the allegations were read out and her request for documentation was ignored as she was informed that she could ask questions at the next stage.
12. The Petitioner further avers that she was not present when the witnesses gave their evidence and thus could not challenge it as required by the TSC HR Manual.
13. That she received a notice to show Cause dated 17th February, 2022 together with an investigation report setting out the allegations and her written request for the complaint and witness statements for purposes of the defence was not responded to until 1st April, 2022, but responded to the notice to show cause on 23rd February, 2022.
14. That the Petitioner received the interdiction letter on 23rd March, 2022 but the interdiction was effective 25th March, 2022 at zero salary and a defense was required within 21 days.
15. According to the Petitioner, the response to the notice to show cause was never read as the Investigation Committee report was signed on 16th February, 2022 and the notice to show cause was dated 17th February, 2022.
16. The Petitioner questions the decisions made by the Respondent as the interdiction was effective before the Investigation Committee had finalized its report.



17. That stoppage of salary violated the Petitioner's right to fair remuneration.
18. The Petitioner avers that she responded to the interdiction pointing out the procedural flaws and other substantive issues and requested the Respondent to reconsider the interdiction.
19. That the interdiction exposed her to pecuniary embarrassment.
20. That the Investigation Committee did not explain to the Petitioner the consequences of the proceedings and did not declare any interest.
21. According to the Claimant, a hearing took place thereafter and witness were heard and she had no chance to cross-examine them.
22. The Petitioner filed the instant suit after 3 months of being on interdiction and prayed for reconsideration of the evidence and in particular the zero pay.

Respondents' Case

23. In its Replying Affidavit sworn by Dr Julius O. Olayo, the Respondent's Director Human Resource Management and Development sworn on 29th June, 2022, who deposes that the Respondent had a wide mandate under Article 237(1) of the Constitution of Kenya, 2010 and the provisions of the Teachers Service Act including registration of trained teachers, recruitment, promotion, teachers disciplinary, control over teachers and termination of teachers in the public service.
24. The Respondent admits that the Petitioner was part of its Secretariat Officers designated as Deputy County Director, Machakos County and who was bound by the Code of Ethics for TSC Employees, 2003 TSC HR Manual, Code of Regulations for Teachers and administrative circulars issued by the Respondent from time to time.
25. The affiant deposes that sometime in November 2021, the Respondent received complaints against the Petitioner alleging financial impropriety, poor performance and misconduct in the management of the teachers in Machakos County.
26. That as a consequence, the Petitioner's Supervisor, Rita Wahome tasked a team of officers to conduct preliminary enquiries to ascertain the veracity of the issues and Antonina Lentoijoni, Jane Irambu and Daniel Kioko were appointed and on the basis of the teams report, the Commission Secretary constituted an Investigations Committee to conduct investigations on the allegations and the members of the committee were Ibrahim Mumin, Dr Reuben Nithamburi, both Directors, and one Evaleen Mitei Senior Deputy Director Field Services, as Secretary.
27. That the membership of the committee consisted of officers above the rank of the Petitioner S and R as the Petitioner was in Job Group R.
28. The affiant deposes that the Committee invited the Petitioner to appear before it to respond to the allegations which she did and the Committee found that she had a case to answer pursuant to which a notice to show cause was issued dated 17th February, 2022 together with the investigation report.
29. That based on the evidence gathered and the Petitioner's response, the Commission found that the Petitioner had a case to answer and an interdiction letter was issued on 15th March, 2022 to which the Petitioner responded.
30. That according to the Respondent, the Petitioner had breached the TSC HR Manual and the Code of Conduct and Ethics for the Teachers Service Commission, 2003 by being insubordinate, negligence and infamous conduct and disciplinary action was justified.



31. The affiant avers that the Petitioner was accorded due process as the Respondent constituted an investigative panel (clause 115(1)(x)), notified the Petitioner of the allegations and invited her for a hearing, (clause 116(2)) granted her 10 days to respond which she did and appeared before it and made representations (clause 116(5) and (6)) and a show cause letter followed.
32. That since the Petitioner was accused of infamous conduct, she was not entitled to half salary.
33. That the Petitioner's hearing was scheduled for 29th July, 2022.
34. In its Further Affidavit sworn by Dr Julius O. Olayo on 16th March, 2022, the affiant reiterated that the Investigation Panelist were of a rank above the Petitioner as Ms Evaleen Mitei was a Senior Deputy Director and has since been promoted to Acting Director.
35. The affiant further states that the Petitioner was issued with the witness statements and the investigation report but intimidated witnesses.
36. That the Investigation Committee did not call witnesses but relied on the statements on record which formed part of the complaint against the Petitioner and she was accorded an opportunity to respond to the allegations.
37. According to the affiant, the Petitioner misconstrued clause 116(6c) of the TSC HR Manual.
38. The affiant further states that the allegations facing the Petitioner were communicated by letter dated 14th February, 2022 and the Investigation Committee investigated the same and the notice to show cause had similar allegations and the Petitioner was thus aware of the allegations.
39. The affiant states that pending the proceedings, the Respondent continued with the disciplinary process and Petitioner was accorded ample opportunity to defend herself and cross-examine witnesses who had written statements.
40. That the Respondent came to the conclusion that the Petitioner was guilty and she was dismissed from employment vide letter dated 5th August, 2022 and the Petitioner appealed the dismissal but the Respondent was not convinced that the Petitioner had raised any new issue and the dismissal was upheld.
41. The affiant maintains that the process adopted by the Respondent was not only fair but legal and the provisions of Article 41, 47 and 51(1) of the Constitution of Kenya, 2010 were complied with.
42. The affiant urges the court to dismiss the petition with costs.

Petitioner's Submissions

43. Counsel identified four issues for determination, namely;
 - i. Whether termination of the Petitioner's employment was unfair.
 - ii. Whether the Respondent violated the Petitioner's right to fair administration action under Article 47 of the Constitution.
 - iii. Whether the disciplinary panel held at the TSC Headquarter on 14th February, 2022 was properly constituted.
 - iv. Whether the Respondent should be ordered to reinstate the Petitioner.



44. As regards termination, counsel relied on the provisions of Section 41 and 45(2) of the *Employment Act* to submit that termination of the Petitioner's employment was unfair as the meeting held on 14th February, 2022 had no witnesses for cross-examination.
45. That the Petitioner was only given the witness statements of Derrick Mutunga, KEPSHA Chair, Kalama Sub-County and that of Dr Benjamin Kyalo and was not present when they testified. Counsel cited paragraphs 116(6)(c) and (d) and 121(2) of the TSC HR Manual to buttress the submission.
46. It was further submitted that the interdiction was unfair as the Petitioner's defence had not been heard and was not allowed to appear with her counsel.
47. That the Petitioner was not accorded sufficient time to prepare her defense.
48. Reliance was made on the provisions of Article 50 of the *Constitution* of Kenya, 2010 and the sentiments of the Court of Appeal in *County Assembly of Kisumu & 2 others v Kisumu County Assembly Service Board & 6 others* (2015) eKLR and *National Cereals and Produce Board v John Kirui Tongorei* (2017) eKLR on the essence of the right to be heard and urge that the Respondent failed to issue a timely notice before conducting the hearing.
49. On the *Constitution* of the disciplinary panel, counsel submitted that it was not properly constituted as none of the 4 members was a member of the Commission who was supposed to act as the Chair under paragraph 119(2) of the TSC HR Manual.
50. Counsel relied on the sentiments of Ongaya J in *Mutisya v Teachers Service Commission & another* (2023) to urge that since the panel was improperly constituted, its decisions were null and void.
51. As regards reinstatement, counsel submitted that since the Petitioner had proved her case for unfair termination as she was not heard, and was not accorded the opportunity to cross-examine witnesses, she was entitled to reinstatement.
52. Counsel cited the sentiments of the court in *Kipkebe Ltd v Peterson Ondieki Tai* (2016) eKLR on the burden of proof as well as Section 47(5) of the *Employment Act*, 2007 to reinforce the submission.
53. Finally, counsel submitted that since the employer did not comply with the procedural precepts prescribed by law, termination of the Petitioner's employment was unfair.

Respondent's Submissions

54. Counsel isolated five issues for determination touching on whether the petition meets the threshold of a constitutional petition, cause of action against the 2nd Respondent, reason for disciplinary process, whether the termination of employment was in accordance with fair procedure and the reliefs sought.
55. As regards the 1st issue, counsel urged that the Petitioner had improperly invoked the constitutional jurisdiction of the court as the relationship between the parties was an employment contract.
56. Reliance was made on the sentiments of the court in *Joseph Mutuura Mberia & another v Council of JKUAT* (2013) and *Uburu Kenyatta v Star Publication Ltd* Petition No 187 of 2012 to urge that the rights allegedly violated by the Respondent were statutory and there was no need to invoke the *Constitution* and the Petitioner did not satisfy the test in *Anarita Karimi Njeri v Republic* (1979) eKLR and as required by Rule 10(2)(d) of the *Mutunga Rules, 2013*.
57. The decision in *Mumo Matemvu v Trusted Society of Human Rights & 5 others* (2013) eKLR was also cited to buttress the submission that although the Petitioner cited Articles 2, 10, 22, 23, 41, 47, 50 and



258 of the Constitution of Kenya, 2010, particulars of the allegations and the manner of the alleged violations were not disclosed.

58. As to whether the Petitioner had any cause of action against the 2nd Respondent, counsel submitted that since the 1st Respondent is a Constitutional Commission and a body corporate, with inter alia capacity to enter into contracts and sue or be sued in its name and no allegation was made against the 2nd Respondent or relief sought against her, she was not a necessary party in this case as held in Werrot and Company Ltd & others v Andrew Douglas Gregory & others (1998) eKLR.
59. Reliance was also made on Section 22 of Teachers Service Commission Act, 2012 to submit that the 2nd Respondent was an unnecessary party to the suit.
60. On whether the Respondent had a reason to subject the Petitioner to a disciplinary process, counsel cited Section 43(1) of the Employment Act and the sentiments of the Court of Appeal in Kenya Power & Lighting Co. Ltd v Aggrey Lukorito Wasike (2017) eKLR to urge that the Respondent had a reason to act as it had received a complaint against the Petitioner which raised several serious allegations, carried out an independent investigation under paragraph 115 of the TSC HR Manual, collected evidence on the veracity of the allegations and determined it had reason to believe that violations of its manual had taken place as guided by paragraph 112 of the Manual.
61. It was submitted that the Disciplinary Panel hearing on 29th July, 2022 had witnesses who testified and were cross-examined by the Petitioner and the Committee found her culpable for having transferred teachers without approval of the County Director or County Staffing Committee as provided by the Code of Regulations for Teachers, negligence of duty and infamous conduct as per the letter of interdiction.
62. That the Respondent had discharged its burden under Section 43 of the Employment Act, 2007.
63. On the procedure used by the Respondent, counsel submitted that the same was fair as the complaint was investigated at the instance of the County Director, Rita Wahome who escalated the same to the Commission which constituted a Investigation Panel under paragraph 115 of the Manual, Petitioner was notified of the allegations by letter dated 4th February, 2022 under paragraph 116(2) and accorded 10 days to respond and did so and was thereafter interdicted but given 21 days to defend herself.
64. That the Petitioner was subsequently invited for a hearing on 29th July, 2022 and was heard by a panel constituted in accordance with paragraphs 118 and 119 of the TSC HR Manual.
65. That paragraph 116 of the TSC Manual had no provision for cross-examination of witnesses at that stage and Section 20 of the Teachers Service Commission Act empowered the Respondent to delegate powers to its staff or agent hence the panel was properly constituted under paragraph 119 of the Manual.
66. Counsel relied on the sentiments of the court in Nampak Corrugated Wadeville v Khoza (JA 98) ZALAC 24 cited by the Court of Appeal in Judicial Service Commission v Gladys Boss Shollei (2014) eKLR, Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd (2013) eKLR and Bett Francis Bergatuny & another v Teachers Service Commission & another (2015) eKLR to urge that the Petitioner was accorded a fair disciplinary process.
67. On the reliefs sought, counsel urged that the interdiction was justifiable as a disciplinary process and prayed for the dismissal of the Petition.



68. On reinstatement, counsel submitted that it was essential to maintain public morality and integrity in public service and since the Petitioner had been found guilty of certain offences, it would be impractical for the Respondent to retain such an officer in its employment.
69. Reliance was made on the sentiments of the court in *David N. Kimani v Teachers Service Commission* (2007) eKLR as well as *Kenya Airways Ltd v Aviation and Allied Workers Union Kenya & 3 others* (2014) eKLR to urge that reinstatement was impracticable in this case.
70. On salary from date of interdiction, counsel cited the provisions of Section 49(1)(b) of the *Employment Act* to urge that the only sum payable was for work done.
71. Finally, the decision in *Maureen K. Imbiakha & another v Teachers Service Commission & 2 others* (2019) eKLR was cited to urge that it was not the duty of the court to take over the disciplinary role of the employer unless the internal disciplinary process was mismanaged.

Determination

72. The issues for determination are;
 - i. Whether the Petition meets the threshold of a Constitutional Petition.
 - ii. Whether the Investigation Committee was properly constituted.
 - iii. Whether termination of the Petitioner's employment was unfair.
 - iv. Whether the Petitioner is entitled to the reliefs sought.
73. Before delving into the issues isolated above, it is essential to dispose of the peripheral issue of whether the 2nd Respondent was a necessary party in this suit raised by the Respondent's counsel.
74. The Petitioner's counsel did not address the issue.
75. It is trite that joining a party to a suit or action must be informed by an appreciation that the person is a necessary party for effective determination of the particular suit and parties are free to enjoin any person if they deem the person a necessary party.
76. In this case, although the Petitioner identified the 2nd Respondent as the Chief Executive Officer of the 1st Respondent, an office established under Article 250(12) of the *Constitution* of Kenya, 2010 and Section 16 of the *Teachers Service Commission Act*, 2012, no specific allegations were made against the 2nd Respondent specifically and no relief has been prayed against the officer personally.
77. Equally, no allegation has been made that the 2nd Respondent acted in excess or abused her powers or functions or breached any law or policy or code for personal liability to be attributable to her as a person.
78. The court is in agreement with the test in *Werrot & Co. Ltd & another v Andrew Douglas Gregory & others* (1998) eKLR cited by the Respondent's counsel that;
 - i. There must be a right to some relief against such a party in respect of the matter involved in the proceeding in question.
 - ii. It should not be possible to pass an effective decree in the absence of such a party.
79. Clearly, the Petitioner has not demonstrated why it made the 2nd Respondent party to this suit.



80. Needless to belabour and as counsel correctly submitted, the 1st Respondent is a legal person, a body corporate, distinct and separate from its Managers and employees and with various capacities as granted by law, including right to sue and be sued.
81. The principle of legal personality in company law enunciated by the House of Lords more than a century ago in the famous decision in *Salomon v Salomon & Co. Ltd* (1897) AC 22 applies to all legal persons.
82. Finally, even if the Petitioner had prayed for a particular relief against the 2nd Respondent, the Petitioner would have to contend with the provisions of Section 22 of the *Teachers Service Commission Act, 2012* which protects members of the Commission, any officer, staff or agent of the Commission from personal liability for anything done in good faith in the execution of functions, powers or duties of the Commission.
83. As no such allegation has been made against the 2nd Respondent, no personal liability could possibly attach in this case.
84. Having found that the Petitioner has not demonstrated the necessity of joining the 2nd Respondent in this case, the court is persuaded that the 2nd Respondent was improperly enjoined in this suit as the Petitioner had no cause of action against her.
85. As to whether the Petition herein meets the threshold of the Constitutional Commission, the court is guided by the sentiments of Trevelyn and Hancox JJ in *Anarita Karimi Njeru v Republic* (*supra*), as follows;
- “We would, however, again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the *Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.”
86. Similar sentiments were expressed in *Kiambu County Tenants Welfare Association v Attorney General & another* (2017) eKLR.
87. The court is guided by the foregoing sentiments which represent the law.
88. The Petitioner herein cites Articles 2, 10, 22, 23(3), 41, 47, 50(1) and 162(2) of the *Constitution* of Kenya, 2010 to urge that they were violated without setting out particulars of the alleged violations.
89. The right to fair hearing which the Petitioner alleges to have been violated is a statutory as well as a constitutional imperative and in clear acknowledgment of that position, counsel for the Petitioner cited the provisions of Section 41 of the *Employment Act, 2007* as the anchor provision and made reference to the provisions of Section 4 of the *Fair Administrative Action Act, 2015*.
90. It requires no gainsaying that all the reliefs sought are statutory.
91. The court is in agreement with the sentiments of the court in *Joseph Mutuura Mberia v Council Jomo Kenyatta University of Agriculture & Technology (JKUAT)* (*supra*) cited by the Respondent’s counsel where Mbaru J States inter alia;
- “Direct reliance of fundamental rights as contained in the *Constitution* is impermissible when the right in issue is regulated by legislation as is actually the case with the *Employment Act* which directly regulates fair labour practices which includes suspension, termination and



dismissal when a legislation is enacted to give effect to a constitutional right, a litigant cannot pass the legislation and rely directly on the Constitution without challenging that legislation as falling short of the constitutional standard.”

92. The foregoing sentiments have been expressed in legions of decisions including those of the Supreme Court and the Court of Appeal.
93. (See the sentiments of Muriithi J in Joseph Koli Nanok & another v Ethics and Anti-Corruption Commission (2018) eKLR.)
94. Granted that the relationship between the Petitioner and the Respondent was that of employer/employee and no constitutional issues have been isolated and demonstrated, the court is satisfied that the Petitioner has failed to demonstrate that the Petition herein meets the threshold in Anarita Karimi Njeru v Republic (supra).
95. As regards interdiction, parties have adopted contrasting positions with the Petitioner stating that it was illegal as she was not accorded a fair hearing before the decision was taken. The Respondent maintains that it was lawful.
96. The 1st Respondent’s Human Resource Policies and Procedures Manual for Secretariat Staff (herein TSC HR Manual) have express provisions for interdiction on half salary for offences such as desertion, chronic absenteeism, immoral behaviour, fraudulent claims and receipt of funds, use of false certificates among others.
97. Under paragraph 114 of the TSC HR Manual, allegations of misconduct against an officer may be reported to the Secretary, County Director, a Director at the Commission’s Headquarters, the Officer in charge of integrity services or any relevant government agency and the complaint may be lodged in writing setting out the nature of the complaint.
98. Under paragraph 115 of the Manual on receipt of the complaint, the Commission must constitute an investigation committee of at least 3 officers to investigate the allegations and members of the committee must be of a higher rank than the officer being investigated.
99. The Investigation Committee is free to incorporate any other officer to offer technical assistance or advisory depending on the nature of the allegations.
100. Under paragraph 116, the purpose of the Committee is to assemble evidence regarding the allegations and prepare an investigation report and make recommendations to the Secretary or Director Incharge of Human Resource Management.
101. After the Committee is constituted, the Secretary or Director as the case may be must notify the officer of the nature of allegations and invite him/her to Respondent in writing within a period of at least seven (7) days and the Committee may invite the officer for a formal interview to further interrogate the allegations and it may invite witnesses as it may deem necessary.
102. Under paragraph 116(5), The Investigation Committee shall during the investigations accord the accused officer a fair hearing which may include;
 - (6) being presumed innocent until proven that he has a case to answer.
 - a. be informed of the allegation with sufficient details to enable him respond to it;
 - b. where necessary, given an opportunity to appear in person before the committee, unless his conduct make it impossible for the hearing to proceed in his presence;



- c. being present when witnesses are being interviewed by the committee; and
 - d. given an opportunity to challenge any adverse evidence.
103. Finally, the Investigating Committee must, on completing investigation report compile a report with its recommendations to the Secretary or the Director.
104. Under paragraph 117(1) of the TSC HR Manual, upon receiving the Investigation Report, the Secretary may –
- a. where the officer has a case to answer, serve the officer with a letter of interdiction specifying the actual allegations.
105. Did the Respondent comply with its HR Manual as envisaged?
106. It is common ground that sometime in November 2021, the Respondent’s Secretary received an undated anonymous complaint against the Petitioner alleging several forms of misconduct including infamous conduct.
107. It is equally not in contest that a team comprising Jane Irambu, Antonina Lentoinjuni and Daniel Kioko were appointed by the County Director to establish the veracity of the allegations.
108. The panel interviewed and recorded statements from Derrick Mutunga, Richard Kitheka, Rael Serem, Head Teacher of Ianzoni, Machakos Primary, Muthini Primary Schools, Damaris Nzoka, Dr Benjamin Kyalo and Kitungi A. Munyao, Principals of Kathiani Girls Secondary School, Machakos Baptist Secondary School and Kwanthanze Secondary School.
109. The panel made several findings including that some school in Kalama zone were overstaffed such as Muthini and Kitonyini Primary Schools and Principals of Machakos Baptist Secondary School and Kwanthanze Secondary had not been assessed for TPAD/PC and the County Director had not approved transfers in July and November 2021.
110. It was also found that the Petitioner asked for “appreciation” whenever she transferred a teacher to a school, the Petitioner also harassed teachers, threatened one Head teacher among others.
111. The panel found the Petitioner negligent, insubordinate and guilty of infamous conduct and recommended disciplinary action.
112. Although the Petitioner faulted the *Constitution* of the panel, no specific part of the TSC HR Manual was cited as having been violated in the *Constitution* of the panel which was an enquiries panel.
113. It is also common ground that on receipt of the report, the Commission Secretary appointed Mr Ibrahim Gedi Mumin, Director (Administration Services), Dr Reuben Nthamburi, Director (QAS) and Evaleen Mitei Deputy Director (Discipline) as members of the Investigation Committee to investigate and come up with a final conclusive report with recommendations on the allegations against the Petitioner and another Deputy Director.
114. Mr Ibrahim Gedi Mumin was the Chair and Evaleen Mitei as Secretary.
115. The Petitioner deponed and submitted that the Committee was improperly constituted as Ms Evaleen Mitei was a Deputy Director contrary to the requirements of paragraph 115(1) that “members of the investigating committee shall be of a higher rank than the officer being investigated.”
116. This paragraph is also emphatic that the Committee must consist of at least 3 officers.



117. In his Further Affidavit sworn on 16th March, 2023, Dr Julius O. Olayo deponed that Evaleen Mitei was a Senior Deputy Director (Field Services), thus one rank above the Petitioner and was in Job Group S while the Petitioner was in Job Group R, and provided documentary evidence.
118. A letter of offer of employment of M/s Evaleen Mitei on contract as a Senior Deputy Director dated 27th August, 2018 shows that the Respondent offered M/s Evaleen Mitei a 5 year contract renewable for one more terms or upto the attainment of the age of 60 whichever comes first and M/s Evaleen Mitei accepted the offer on 31st August, 2018 and was thus a Senior Deputy Director (Discipline) on 24th January, 2022 TSC Scale 13.
119. A copy of the Deployment dated 3rd September, 2018 was also enclosed as further evidence of M/s Evaleen Mitei's appointment.
120. From the documentary evidence provided by the Respondent, it is evident that M/s Evaleen Mitei was a Senior Deputy Director (Discipline) and thus a Job Group higher than the Petitioner.
121. In sum, to the question as to whether the Investigation Committee was properly constituted, the court is satisfied and finds that the Respondent has on a preponderance of probabilities demonstrated that the Committee was properly constituted as it consisted of two members of the rank of Director and one Senior Assistant Director.
122. As to whether interdiction and termination of the Petitioner's employment was unfair or unprocedural, the Court proceeds as follows;
123. On this issue, parties have adopted opposing stand points as is typically the case, with the Petitioner maintaining that it was unfair as she was not accorded the right to defend herself.
124. The Respondent on the other hand submitted and deponed that all requirements of a fair hearing were fulfilled.
125. It requires no belabouring that for a termination of employment to pass muster, it must be conducted in conformity with the provisions of the *Employment Act*, 2007 in terms of notice or pay in lieu, reason (s) for termination and justification, proof of reason, reason must be valid and fair and the procedure employed must be fair. Section 45 of the Act is the bedrock of fair termination of an employment contract.
126. The foregoing statutory architecture on termination of employment was highlighted and emphasized by the Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Ltd* (2017) eKLR.
127. These provisions are unambiguous that for a termination of employment to pass the fairness test, it must be substantively justifiable and procedurally fair as exquisitely captured by the Court of Appeal in *Naima Khamis v Oxford University Press (EA) Ltd* (2017) eKLR and Ndolo J in *Walter Ogal Anuro v Teachers Service Commission*.
128. In the words of Ndolo J,

“ . . . For a fair termination to pass the fairness test, it must be shown that there was not only substantive justification for the termination but also procedural fairness. . . ”
129. The court is guided accordingly.



Reason For Termination

130. In *Barclays Bank of Kenya Ltd & another v Gladys Muthoni & 20 others* (2018) eKLR, the Court of Appeal held as follows;

“The rationale is that any termination of employment must be based on genuine valid and fair reasons. Such reasons must be proved by the employer otherwise termination is unfair. Where such reasons do not exist, the termination by whatever reasons stated by the employer without proof, this amounts to unfair termination of employment in terms of Section 45 of the *Employment Act*. . .”

131. The court is bound by these sentiments.

132. I now proceed to apply the foregoing provisions and propositions of law to the facts of the instant suit.

133. Although the Petitioner’s counsel relied on Section 45 of the *Employment Act*, 2007 in his submissions, he neither submitted substantively on the reason for termination of employment nor the provisions of Section 43, but relied on Section 47(5) of the Act on burden of proof.

134. It is common ground that after the Investigation Committee was appointed on 24th January, 2022, by letter dated 4th February, 2022, the Chair of the Committee wrote to the Petitioner informing her to appear before it on 14th February, 2022 at 8.30 am in Boardroom 1A on First Floor TSC House.

135. The letter detailed the four allegations the Petitioner was facing on irregular transfer of teachers, neglect of duty, infamous conduct as well as arrogance, intimidation, abuse and threats to Principals, Head teachers and teachers.

136. The specific details were also outlined with names of persons and schools in certain instances.

137. The Petitioner attended the meeting and admitted that the charges were read out to her but the request for documents was not honoured at this stage.

138. A copy of the investigation report availed by the Respondent reveal that the Committee carried out a detailed investigation on the allegations but did not interview witness. It relied on data provided by the Preliminary Investigation Panel but took the Petitioner through each allegation and sought her responses.

139. The report reveals that the Petitioner admitted that she did not consider available vacancies as per Regulation 66(2) of the CORT in transferring teachers from one school to another. That balancing in Primary School (2019) and Secondary Schools in 2021 had been approved by the County Director.

140. That some transfers were approved while others were not and admitted her mistake of doing so without approval.

141. That transfer letters were not forwarded to the County Director and the Petitioner took responsibility.

142. That the only CSOs in the Sub-County were old and one had an incapacity and thus lacked staff to undertake lesson observation, admitted not doing PC evaluation due to staff shortage, denied having charged Kshs 250,000/= or Kshs 10,000/= for transfers from Machakos to Nairobi or for facilitating CBC and ICT training or Kshs 10,000/= from Rael Serem but admitted having received Kshs 2,000/= from her as contribution to her mother’s hospital bill or expenses, denied demanding lunch of Kshs 1,000/= from Head teachers, admitted having withdrawn a teachers loan application claiming that the



teacher was sick and denied having sent an sms to and calling the Head Teacher of Machakos Primary School and threatening him among others.

143. The Committee found that the Petitioner had a case to answer in relation to irregular transfers of teachers and lack of balance in schools, failure to carry out PC evaluations for Head teachers and Principals in Machakos and Kalama Sub-Counties, receipt of Kshs 1,000/= from schools in both Sub-Counties and Kshs 17,000/= from Serem, demanding lunch from Head teachers and that the Petitioner was arrogant and harassed, intimidated, abused and threatened Head teachers and teachers.
144. According to the Petitioner, that the many MPESA transactions was money from ‘chamas’.
145. The Committee’s report dated 16th February, 2022 recommended disciplinary action against the Petitioner.
146. It is not in dispute that after the investigation report, the Respondent interdicted the Petitioner with zero pay citing paragraph 117(1)(c) of the TSC HR Manual on those not entitled to ½ salary if interdicted, namely;

“Fraudulent claims and receipt of funds.”
147. Puzzlingly, the TSC HR Manual has no definition of the foregoing phrase and it is difficult to characterise the claims referred to or receipt of funds, or from whom?
148. As none of the parties provided the definition pages of the Manual and soliciting and receiving bribes could arguably be construed on immoral behaviour as defined in Black’s Law Dictionary, 10th Edition and the Respondent did not rely on it, it arguably did not justify its decision to deny the Petitioner half pay.
149. During the hearing on 27th July, 2022, the charges and the relevant particulars were read out to the Petitioner who responded to each item specifically and witnesses gave evidence and were cross-examined by the Petitioner.
150. On cross-examination, the Petitioner confirmed that she did not have to be notified of the preliminary investigations.
151. That the investigation panel had demanded documents from her but could not avail them as she was not prepared and that she received the interdiction letter after the show cause letter.
152. From the Petitioner’s explanation of the transfer process, only three transfers had been approved by the Staffing Panel namely; Anthony Ndunga from Kamuthanga to Keaa, Alex Kavidyo from Ngelani to Kamuthanga and Anastacia Joshua from Keaa to Ngunyumu. Whereas the first two cases were justified on overstay, the last had no reason assigned. Approval by the County Director is not indicated.
153. Relatedly, the transfer proposals prepared by the Petitioner record lack authentication as to who approved the proposals.
154. Only one list is marked “Approved” and signed by an unidentified person on 6th May, 2021. Other proposals dated variously between 22nd April, 2022 and 18th October, 2021 lack approval signatures and the Petitioner admitted that the transfer matrices for August to October 2021 were not approved by the County Director owing to an oversight.
155. She admitted that she had no power to transfer teachers unless delegated by the County Director.
156. Relatedly, the letters of transfer for August and October were not submitted to the County Director’s office. The Petitioner blamed a member of the support staff under her supervision for the failure.



157. The Petitioner admitted that when a parent complained to her about corporal punishment at Muthini Primary School, she summoned the Head Teacher as opposed to visiting the school and took no action on the issue and had no report on the issue for records.
158. She admitted having received Kshs 2,000/= from Rael Serem as her mother was in hospital but had no evidence of the mother's sickness.
159. The Petitioner admitted that she was a signatory to bank loan applications by teachers but denied having recalled Dr Kyalo's application form.
160. The Claimant cross-examined Derrick Mutunga Matilu, Richard Kitheka, Rael Serem, Dr Benjamin Kyalo, Anthony Munyao, Ann Nyawira Wachira and Dr Reuben Nthamburi, a total of 7 witnesses.
161. When confronted with the sms she had sent to the Head Teacher of Machakos Primary School, Mr Richard Makau Kitheka, threatening him if he did not do as directed, the Petitioner admitted having sent the message although she had denied it earlier.
162. Leah Serem admitted having given the Petitioner Kshs 5,000/= in cash and Kshs 10,000/= for Virginia Mutiso as appreciation for staffing the school.
163. Dr Benjamin Kyalo testified that his loan application form was withdrawn at the instance of the Petitioner, who sent one Mr Malinda to collect it. He also confirmed that the Petitioner told him that he was mentally challenged and had asked his wife personal questions on finances.
164. The Principal of Kwanthanze Secondary School testified that in the 5 years he had been at the school, the Petitioner had not observed TPAD and the Petitioner had no question for him.
165. The County Director testified that the Petitioner could not provide copies of transfer letters yet the teachers concerned had their copies.
166. Dr Reuben Nthamburi confirmed that the Investigation Committee did not call any witnesses and relied on the report of the Preliminary Panel. He also confirmed the membership of the Investigation Panel as himself, Mr Mumin and M/s Evaleen Mitei.
167. The Petitioner had a witness, one Mr Jackson Kioko Nzyoki who testified that the Petitioner did not receive any monies during the CBC training for Karama Sub-County but was unaware of the situation in Machakos Sub-County and finally testified that he learnt of the allegations against the Petitioner from the Petitioner himself.
168. In her final submissions, the Petitioner regretted her errors and prayed for leniency.
169. The Disciplinary Committee found that there was overwhelming evidence to show that the Petitioner harassed, intimidated and threatened Principals and Head teachers and used abusive and unprofessional language on them, transferred teachers without approval of the County Director or County Staff Committee, failed to ensure equitable distribution of teachers within Kalama and Machakos Sub-County, did not consider availability of vacancies in school before transfer, failed to submit copies of the transfer letters to the County Director Office for the months of August and October and failed to supervise Teacher Performance Appraisal and Development (TPAD) and evaluation and performance contract for Principals and Head teachers between 2019 and 2020.
170. Similarly, the Petitioner recalled the duly completed Loan Application form for one Dr Benjamin Kyalo of Machakos Baptist Secondary School from KCB (Machakos Branch) claiming he was mentally challenged.



171. The Committee found the Petitioner culpable and recommended dismissal from employment which the employer did by letter dated 5th August, 2022 effective 29th July, 2022. The letter set out detailed reasons for the dismissal as found by the Disciplinary Committee and decipherable from the evidence on record.
172. The Petitioner applied for review on the grounds of procedural flaws in the process that she was not given a fair hearing, could not cross-examine on 14th February, 2022, was not given the opportunity to present her defense among other grounds and was cross-examined by the 4 member committee and confirmed having been heard by two panels without witnesses.
173. The witness told the Committee that she had provided evidence of the mother's sickness which was untrue as she had none and admitted that indeed the Loan Application Form of Dr Benjamin Kyalo was withdrawn.
174. Finally, she admitted that she cross-examined witnesses and was restricted to 3 questions only.
175. The record reveals otherwise and had no question for at least one witness.
176. The Review Committee dismissed the Petitioner's application for review and she was notified by letter dated 21st November, 2022.
177. Section 43(2) of the *Employment Act*, 2007 provides that;
- “The reason or reasons for termination of a contract are the matters that the employer at the time of the termination of the contract genuinely believed to exist and which caused the employer to terminate the services of the employee.”
178. In *Kenya Revenue Authority v Reuel Waitbaka Gitabi & others*, the Court of Appeal stated as follows;
- “. . . It is improper for a court to expect that an employer would have to undertake a near forensic examination of the facts and seek proof beyond reasonable doubt as is in a criminal trial before it can take appropriate action subject to the requirements of procedural fairness that are statutorily required. The standard of proof is on a balance of probability not beyond reasonable doubt, and all the employer is required to prove are the reasons that it genuinely believed to exist causing it to terminate the employee's services. That is a partly subjective test.”
179. The court further cited *Halsbury's Law of England* 4th Edition Vol. 16 (B) paragraph 642 on the “band or range of reasonableness test” that;
- “. . . It must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another . . .”
180. The court is in agreement with these sentiments.
181. The foregoing would appear to mean that as long as the employer had a reasonable foundation for the genuine believe that certain circumstances existed, the termination would be deemed fair.



182. The foregoing analysis shows that the Petitioner appeared before 3 panels differently constituted and all concluded that based on the materials before them, the Petitioner was culpable for some of the allegations made against her.
183. Whereas the Preliminary Penal found the Petitioner was liable for negligence of duty, insubordination and infamous conduct, the Investigation Panel found that she had a case to answer for various breaches and recommended disciplinary action and the Disciplinary Committee found the Petitioner liable for dismissal on less grounds than the notice to show cause had tabulated.
184. Based on the above stated reasons, it is the finding of the court that the Respondent has on a balance of probabilities demonstrated that it had valid and fair reasons to terminate the Petitioner's employment as it did.

Procedure

185. As held by the Court of Appeal in *Pius Machafu Isindu v Lavington Security Guards Ltd (supra)*, the procedure for termination of employment prescribed by Section 41 of the *Employment Act, 2007* is mandatory.
186. Both this court and the Court of Appeal have enunciated the elements of procedural fairness under Section 41 above as follows;
 - i. an explanation of the grounds of termination in a language understood by the employee;
 - ii. the reasons for which the employer is considering termination;
 - iii. entitlement of an employee to the presence of another employee of his choice when the explanation of grounds of termination is made;
 - iv. hearing and considering any representations made by the employee and the person chosen by the employee.”
187. (See *Postal Corporation of Kenya v Andrew K. Tanui* (2019) eKLR (2019) eKLR).
188. Whereas the Petitioner faults the procedure employed by the Respondent in several respects, the Respondent submitted that the procedure employed met the legal threshold.
189. On presence of the Petitioner when the witness were interviewed, the witness recorded statements before the Preliminary Panel which compiled a report which the Investigation Committee relied on.
190. The Investigation Committee did not invite witnesses but invited the Petitioner who defended herself.
191. Under paragraph 116(4) of the TSC HR Manual, the Investigation Committee is not obligated to invite any witness but may do so if it deems it necessary.
192. The Chair of the Committee invited the Petitioner for a hearing and the notice detailed the allegations she faced and she was taken through each of them and the report which the Petitioner did not controvert evidentiary state that she was given an opportunity to respond to each of the issues raised by way of interview.
193. The argument that the Petitioner was not present when witness were interviewed and/or did not challenge adverse evidence is unsustainable.
194. On the details provided by the Respondent, the letter inviting the Petitioner to appear before the Investigation Committee identified four allegations with specific details to exemplify each allegation.



195. The notice to show cause dated 17th February, 2022 identified similar details as did the letter of interdiction dated 15th February, 2022.
196. The Petitioner's defence statements dated 1st April, 2022 and 11th April, 2022 responded to the allegations and no request for additional detail was made.
197. It is common ground that when the 1st Respondent received the anonymous complaint, the County Director, Machakos County appointed a team of three persons for purposes of a preliminary inquiry.
198. Although the Respondent did not avail copies of appointment letters, the appointment was not contested.
199. The Petitioner contested the Constitution of the panel in terms of the rank of one of the members.
200. However, since this panel was not the Investigating Committee as envisaged paragraph 45 of the TSC HR Manual, the court was not persuaded that panel was improperly constituted.
201. The panel gave the Petitioner an opportunity to respond to the allegations by word of mouth and recorded her responses which she did not contest.
202. Equally and as adverted to elsewhere in this judgement, after the Investigation Committee was appointed by the Secretary to the 1st Respondent on 24th January, 2022, the Chair of the Committee, Mr Ibrahim G. Mumin invited the Petitioner for the hearing scheduled for 14th February, 2022.
203. The letter is dated 4th February, 2022. The letter catalogued the allegations against the Petitioner and was explicit that she would be required to defend herself against each allegation and was informed of her right to produce any documentary evidence to support her defence.
204. Since the Petitioner was still in office and serving the Respondent, she had sufficient time (10 days) to assemble any documentary evidence she wished to rely on or request for the same by writing to the Chair of the Investigation Committee or avail a witness, if she had one.
205. The Committee's report dated 14th February, 2022 sets out the Petitioner's responses to the specific allegations and the finding.
206. Based on the report, it is clear that the Petitioner responded to all the allegations.
207. It is unclear to the court as to what other evidence the Petitioner wished to ventilate to the Committee as she did not make any request for time or facilitation.
208. Subsequently, a notice to show cause dated 17th February, 2022 was issued by the Secretary of the 1st Respondent, but signed by the County Director on her behalf.
209. The letter rehashed the contents of the letter dated 4th February, 2022 by Mr Ibrahim Mumin, Chair of the Investigation Committee.
210. A response was required by Friday 25th February, 2022.
211. The Petitioner was accorded eight (8) days to respond to the allegations, which in the court's view was sufficient.
212. Similarly, the interdiction letter dated 15th February, 2022 accorded the Petitioner 21 days to make a defence statement. The statement is dated 1st April, 2022 and another dated 11th April, 2022.



213. There is no evidence that the 1st Respondent rejected the 2nd statement forwarded on email. Both reports were submitted more than one and half months (after 44 days), twice the number of days the letter had given.
214. While the first defense statement faulted the process on the basis of paragraphs 114, 115, 116 and 117 of the TSC HR Manual, the addendum dated 11th April, 2022 partly rehashed the contents of the earlier statement but includes details on the witness statements which demonstrates that the Petitioner's request for documentation was honoured by the 1st Respondent.
215. It requires no belabouring that by letter dated 28th June, 2022, the 1st Respondent invited the Petitioner for a disciplinary hearing scheduled for 29th July, 2022 and hearing took place as envisioned.
216. The Committee comprised Mr C. Ayabei as Panel Chair, J Njage, Director's representative, C. Gichira (member), Directors Representative, Lucy Nyamwange, presenting officer as well as Susan Mwangi and Miriam Kosgei as Technical Officers.
217. The Petitioner submitted that the Disciplinary Panel was not properly constituted as it had no member of the Commission.
218. Paragraph 119(2) of the TSC HR Manual provides inter alia that;
The Discipline Panel shall comprise –
- a. at least one member of the Commission as Chair of the panel.
 - b. two directors or their representatives appointed by the Secretary and in attendance.
 - c. an officer representing the division dealing with matters touching on discipline who shall prosecute the case.
 - d. an officer representing the Commission Secretary who shall record the proceedings of the hearing and
 - e. any other technical officer whose attendance shall be deemed necessary.
219. Needless to emphasize, paragraph 119(2) of the 1st Respondent's Human Resource Manual is couched in mandatory terms in so far as the Constitution of the disciplinary committee is concerned.
220. On the face of it, it is unclear to the court as to whether Mr C. Ayabei was a member of the Commission.
221. The 1st Respondent's Further Affidavit sworn on 16th March, 2023, long after the meeting provided no evidence to that effect.
222. Equally, the panel must comprise at least 5 members excluding the technical staff.
223. In the instant suit, the Committee had 4 members and 2 technical staff.
224. Although the Respondents urged that the Section 20 of the Teachers Service Commission Act, 2012 empowered it to delegate to any member, committee officer, staff or agent of the Commission generally or in a particular case, no evidence of delegation was adduced to justify the absence of a member of the Commission and why the panel had less than the minimum number of members.
225. The absence of an officer representing the Secretary and who would have recorded the proceedings necessitated one of the Directors representatives to record the proceedings.



226. In sum, it is the finding of the court that the Disciplinary Panel constituted by the 1st Respondent was improperly constituted and as a consequence its proceedings, findings and recommendations were a nullity.
227. It therefore follows that termination of the Petitioner’s employment by the Respondent was unfair for want of procedural propriety.
228. As regards the reliefs sought, the court proceeds as follows;

Declaration

229. Having found that the Preliminary Investigation Panel and the Investigation Committee appointed by the Respondent were properly constituted, the declaration that interdiction of the Petitioner was illegal, irregular and unfair and null and void is unmerited and is declined.

Zero Pay

230. Having found that the Respondent denied the Petitioner half salary during interdiction on the ground of “fraudulent claims and receipt of funds” in paragraph 117(c)(iv) of the TSC HR Manual and the letter made no reference to the funds the Petitioner had received or the fraudulent claims she had made and from who and to whom respectively, which in the court’s view did not encompass soliciting and receipt of bribes, the court is satisfied that the decision was unjustified and the Petitioner was entitled to half-salary during interdiction.

The court is persuaded that the prayer for half salary is merited and it is accordingly granted.

Payment of full salary during interdiction

231. Having found that the Respondent had a reasonable basis to interdict the Petitioner and having further found that the prayer for half salary during interdiction was merited, the court is not persuaded that the prayer for full pay during interdiction would be justified as inter alia, the Petitioner did not render any service to the Respondent.

The prayer is declined.

Declaration for compensation for violation of the petitioner’s rights and fundamental freedoms under articles 41, 47 and 50(1) of the Constitution of Kenya, 2010

232. Having found that the suit herein failed to meet the threshold of a Constitutional Petition as enunciated in *Anarita Karimi Njeru v Republic* (*supra*), the prayer for compensation for the alleged violations is unsustainable for want of proof.

The prayer is declined.

Reinstatement

233. This is one of the reliefs provided under Section 12(3)(vii) of the Employment and Labour Relations Court Act, 2011 read with Section 49(3)(a) of the Employment Act, 2007.
234. Section 49(3) of the Act underlines the essence of the reinstatement as follows;

“Where in the opinion of a labour officer an employee’s summary or termination of employment was unfair, the labour officer may recommend to the employer to reinstate the



employee and treat the employee in all respects as if the employee's employment had not been terminated . . .”

235. It is trite law that analogous to other reliefs under Section 49(1) of the *Employment Act*, the remedy of reinstatement is discretionary.
236. In other words of Maraga JA (as he then was) in *Kenya Airways Ltd v Aviation & Allied Workers Union Kenya & 3 others* (2014) eKLR;
- “Reinstatement is, however, not an automatic right of the employee. It is discretionary and each case has to be considered on its own merits based on the spirit of fairness and justice in keeping with the objectives of industrial adjudication. In this regard, there are fairly well known settled principles to be applied. For instance, the traditional common law position is that courts will not force parties in a personal relationship to continue in such relationship against the will of one of them. That will engender friction, which is not healthy . . .”
237. In determining whether or not to award any of the reliefs under Section 49 of the *Employment Act*, 2007, the court is enjoined to take into consideration all the relevant factors in Section 49(4) of the Act, such as wishes of the employee, circumstances in which termination of employment took place including the extent, if any, to which the employee contributed, practicability of reinstatement, length of service, exceptional nature of the circumstances, expectations of the employee's length of service, opportunities available to the employee for securing comparable or suitable employment, value of any severance pay, right to press other claims, reasonable expenses incurred by the employee as a result of the termination, conduct of the employee which may have caused or contributed to the termination, mitigation of loss and any compensation paid or received by the employee on account of the termination of employment.
238. In the instant suit, it is evident that the Petitioner substantially contributed to the termination as the anonymous complaint to the Respondent reveals. The anonymous writers of the complaint were unhappy with the Petitioner's conduct otherwise they would not have complained and anonymously.
239. Relatedly, these anonymous complainants were the Petitioner's Supervisees as the County Deputy Director and were invariably many.
240. The alleged rude and harsh treatment of teachers and issuing of directions to at least one Head teacher implicated her conduct.
241. It is evident that the Petitioner transferred teachers without approval, had no office letters for some of the transfers, treated teachers and Head teachers harshly, rudely, threatened them and failed to balance teachers in schools in her jurisdiction.
242. Secondly, the Petitioner adduced no evidence as to how she has mitigated her loss or attempted to do so.
243. Third, the Petitioner expected to be in the Respondent's employment for the entire 5 year period of the contract and perhaps secure a renewal for the final term of 5 years and had already served more than 3 years.
244. Fourth, to her credit, the Petitioner had been an employee of the Respondent as a teacher for over 20 years and had no record of misconduct.
245. Fifth, the Petitioner wished to remain in the employment of the Respondent as evidenced by the appeal against the termination of employment and prayer for reinstatement.



246. Sixth, as regards practicability, the court is guided by the sentiments of the Court of Appeal in *Kenya Airways Ltd v Aviation & Allied Workers Union Kenya & 3 others* (supra), where the court cited with approval the sentiments of the New Zealand Court of Appeal in *New Zealand Educational Institute v Board of Trustees of Auckland Normal Intermediate School* (1994) 2 ERNZ 414 (CA) as follows;

“Whether . . . it would not be practicable to reinstate (the employee) involves a balancing of the interests of the parties and the justices of their cases with regard not only to the past but more particularly to the future. It is not uncommon for this court or its predecessor, having found a dismissal to have been unjustified, to nevertheless conclude on the evidence that it would be inappropriate, in the sense of being impracticable to reinstate the employment relationship, practicability is capability of being carried out in action, feasibility or the potential for the re-imposition of the employment relationship to be done or carried out successfully. Practicability cannot be narrowly construed in the sense of being simply possible irrespective of consequences.”

247. The court is in agreement with these sentiments.

248. Guided by the interests of the parties and the justices of their cases in the instant case, both present and future, the court is not persuaded that the reinstatement is the most appropriate remedy in the circumstances and the same is declined.

Compensation

249. Having found that termination of the Petitioner’s employment by the Respondent was unfair, the Petitioner is entitled to the relief provided by Section 49(1)(c) of the *Employment Act*, 2007 and having taken into consideration the provisions of Section 49(4) above, the court is satisfied that the equivalent of 3 months’ salary is fair.

250. In the upshot, judgement is entered in favour of the Petitioner against the Respondent in the following terms;

- a. Half salary for the interdiction period.
- b. Equivalent of 3 months gross salary.
- c. Costs of this suit.
- d. Interest at court rates from the date hereof till payment in full.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 28TH DAY OF NOVEMBER 2023

Dr JACOB GAKERI

JUDGE

Order

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article



159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

