



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NUMBER 2532 OF 2016

BETWEEN

TOM OCHAKO.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION....RESPONDENT

Rika J

Court Assistant: Emmanuel Kiprono

Eric N. Amati Advocates for the Claimant

Faith Kaluai, Advocate for the Respondent

JUDGMENT

1. The Claimant filed his Statement of Claim on 8th December 2016.
2. He avers, he was employed by the Respondent Commission as a Teacher in 1989 or thereabouts.
3. He lastly worked at Moi Teachers' College, in Baringo as a Tutor, earning a monthly salary of Kshs. 31,088.
4. He was interdicted on 7th July 2011 on the allegation that he was of immoral behaviour and had carnal knowledge of his student, Jennifer Cheronono, on 5th July 2010.
5. The interdiction letter was later amended, to state that the Claimant had a love relationship with the student Jennifer Cheronono, and had carnal knowledge of the student, on the night of 27th October 2010.
6. The Claimant was dismissed on 5th April 2012.
7. He appealed against the decision and was heard on Appeal, on 25th August 2016. His Appeal was dismissed on 14th September 2016.
8. He filed this Claim faulting both the procedure leading to, and decision to terminate his services as a Teacher.
9. He prays for Judgment against the Respondent as follows: -
 - a. Reinstatement.
 - b. Payment of all outstanding monthly salary from the date of interdiction to the date of reinstatement.
 - c. Substantial compensation for wrongful dismissal as this Court shall deem fit and just.

d. Costs.

e. Interest.

10. The Respondent filed its Statement of Response on 3rd August 2017.

11. It is conceded that the Claimant was employed by the Respondent as a Teacher in 1989, and that he was interdicted and eventually dismissed, on account of having a love relationship with a student, Jennifer Cheronono; and on account of having carnal knowledge of the student.

12. The student is physically- challenged. Her right-hand is amputated; her left hand has only a thumb; and her face is disfigured. The Claimant enticed her into a sexual relationship on the promise that he would assist her in accessing plastic surgery.

13. The Claimant was heard before the full Board of Governors on 28th June 2011. Preliminary Investigations had prior to this been carried out, which included recording of witness statements from the Victim, the Claimant, Teachers and Tutors Barketer Kiptoo, Joshua Nge'no and John Kipkebut. At the hearing, allegations against the Claimant, who was present throughout, were confirmed. He was interdicted.

14. He was again heard by the Disciplinary Panel at the District Education Office, Keiyo. Evidence was taken from the witnesses above and the same guilty verdict recorded.

15. He lodged an Appeal with the Respondent dated 16th May 2012. He was invited for hearing on 4th September 2012. He did not show up. He was re-invited and eventually heard on 22nd August 2016. His Appeal was declined.

16. The Respondent states that it acted in accordance with the Code of Regulations governing teaching, and the Employment Act. It prays for dismissal of the Claim with costs.

17. The Claimant gave evidence, and closed his case on 27th November 2020. Jennifer Cheronono, the student, gave evidence for the Respondent on the same date. Claimant's former colleague Barketer Phillip and Respondent's Discipline Officer Judith Wandarwa, gave evidence on 19th February 2021. Wandarwa continued giving her evidence on 29th September 2021 when the hearing closed.

18. The Claimant restated in his evidence, the contents of his Pleadings. He registered good performances as a Teacher, and had received commendation. He did not see Jennifer Cheronono during the disciplinary hearing. The Claimant was not given time to familiarize with the fresh allegations in the amended letter of interdiction.

19. No medical report was produced to show that the Claimant has sexual intercourse with Jennifer Cheronono. A watchman alleged to have caught the Claimant in the act, at a lodging, did not give evidence.

20. Jennifer Cheronono swore an Affidavit, exonerating the Claimant.

21. She had a medical problem. The Claimant had visited her home, in the company of 2 other Teachers. He had a teacher-student relationship with Jennifer Cheronono.

22. The Claimant read malice in termination of his service. He had previously been threatened by the Respondent with interdiction, for failing to pay rent.

23. Cross-examined, the Claimant told the Court that allegations against him were not detailed. He is not related to Jennifer Cheronono by blood. The Claimant visited her home to familiarize himself with her family. He and his colleagues intended to assist Jennifer Cheronono, to have plastic surgery. It was the Teachers' own initiative. The School was not involved. They did not find it necessary to have the company of a female Teacher to Jennifer Cheronono's home. The Claimant intended to find sponsors. Dr. Ombito would facilitate surgery. The Claimant was not sure who would finance plastic surgery.

24. He did not reply to the interdiction letter. His Pleadings refer to such a reply. The Claimant wrote, agreeing to go ahead with the disciplinary hearing. He was allowed the opportunity to cross-examine and to mitigate. Even before he appeared before the Board, he had the opportunity to respond.

25. The Claimant conceded that he paid for Jennifer Cheronono's fare to Nakuru. He gave her money as a Teacher. It is okay for a Teacher to give money to his student. He did not know if there was a circular forbidding this.

26. He did not sleep with Jennifer Cheronono. He was not aware that she threatened to commit suicide. He was not aware that she called him [Claimant], threatening to commit suicide, because he had impregnated her.

27. Jennifer Cheronono swore an Affidavit exonerating the Claimant. The Affidavit was procured through Mrs. Morara, wife one of the Claimant's colleagues.

28. The Respondent ought to have produced medical evidence showing that the Claimant had sexual intercourse with Jennifer Cheronono. The Claimant conceded he is aware about Regulation 66[4] [b] of the Code of Regulations, which allows the Respondent to rely on general evidence.

29. Barketer and Ng'eno went with the Claimant to Jennifer Cheronon's home. The 2 were not there, when the Claimant took Jennifer Cheronon to Nakuru.
30. The Claimant told the Court, he was dismissed in 2012, and filed the Claim on 8th December 2016, 4 years later.
31. Redirected, he told the Court that he was a Teacher for long, and did not have other disciplinary complaints. It would not have made a difference if the Teachers were accompanied by a female Teacher, to their student's home. The Code requires a Teacher is given adequate time to defend. The Claimant was denied this. He expected the Claimant to appear at the hearing. He was not aware that it was forbidden for a Teacher to give money to a student. He did not have ill-intention, in his engagement with Jennifer Cheronon.
32. Jennifer Cheronon told the Court she is currently a Teacher at St. Peters School, in Nandi County. She is employed by the Respondent. She was employed in 2015. She was trained at Moi Teachers' College, from 2008. She endures a lifelong physical disability.
33. The College did not seek to assist her for her disability. There was another student with a similar condition. The Claimant taught her craft.
34. He approached her. He enquired into her disability. He promised he could secure her plastic surgery. He said he had a friend who was a Doctor. Jennifer Cheronon told the Claimant to consult her parents.
35. He therefore visited her parents' home, accompanied by Barketer and Ng'eno. These other 2 gentlemen, were from the same community as Jennifer Cheronon, and were there to assist the Claimant overcome the lingual barrier. Her parents were persuaded to let her undergo the procedure. The Claimant said he would know where finances would come from.
36. The group returned to the College. The Claimant suggested that Jennifer Cheronon consults the Doctor at Nakuru. He paid for her fare to Nakuru. She was examined by the Doctor, but was not advised what would follow. It was late and she did not go back to College. The Claimant booked a room in Nakuru, which had 2 beds. He took one bed, while she took the other. It was not allowed to have this sleeping arrangement, even at the College.
37. Later, the Claimant asked her to travel in advance and wait for him in Eldoret. He again paid her fare. He called her and told her he was busy, and that she should look for accommodation at Kabarnet. He said he had secured a room at Kabarnet. He joined her at the room in Kabarnet.
38. He knocked persistently, asking to be let in, and saying that he wished to charge his phone. She resisted and said she wished to be left alone to sleep. He insisted he wanted to be let in. She caved in and opened. He insisted he wished to spend the night there.
39. Jennifer Cheronon told the Court tearfully, that the Claimant slept with her. He had sex with her. In the morning, he said he did not have money for plastic surgery. She felt ashamed. The pursuit of plastic surgery ended there. She had been duped.
40. She later found out that she was pregnant.
41. She fled from her home in shame. The Claimant said they should have a talk. He abandoned her. She was still a student.
42. She wrote to the Board complaining and seeking help. She was advised to write a statement which she did, resulting in the process leading to the Claimant's dismissal.
43. The Claimant implored her to withdraw the complaint. She thought he would assist her, and wrote a letter absolving him of blame. She signed an Affidavit which was brought to her by Mrs. Morara. She was told by Mrs. Morara that she would receive Claimant's help, once she signed the Affidavit.
44. Jennifer Cheronon told the Court she did not know if the Claimant took advantage of her. All she had done was to tell the truth to the Court. The Claimant took her as a daughter. He shocked her by sleeping with her. She had respected him as a father.
45. Cross-examined, she stated that she is a Teacher. She interacts with students. She assists students of all gender. It is not bad to assist a student in need. The Claimant is the father of her child. He had in the past, assisted her financially and morally. Barketer assisted her as well.
46. She did not sign her statement at the Education Board. She was frustrated. She did not think of approaching the Principal first. The Claimant spent the night with her in Nakuru, in the same room. She did not know why he took an interest in her. The Claimant gave her money, and told her to avoid giving evidence. She was duped into swearing the Affidavit exonerating the Claimant. She undertook a test to confirm pregnancy.
47. Redirected, she told the Court that she was allowed to assist students of both genders, but was not allowed to spend nights with them in lodgings. She took the Claimant as a father. It never crossed her mind that he would prey on her.
48. She was mortified and had difficulty recalling the abuse, in various statements she was required to record. She never wanted to sleep with the Claimant. She was brought a bare Affidavit by Mrs. Morara to sign. She never appeared before a Commissioner for Oaths. The Claimant said he would assist her, when his Child was born. He did not do so. He vanished.
49. Barketer told the Court that the Claimant was his colleague, while Jennifer Cheronon was their student. She confided in him that the

Claimant had been pestering her, wanting to know the history of her disability, and that he had a Doctor friend, who could assist with plastic surgery.

50. Barketer restated the evidence of Jennifer Cheronon, on subsequent excursion to meet her parents at their home. He was asked to record a statement by the Principal and later gave evidence at the disciplinary hearing. He described the Claimant as his friend, and Jennifer Cheronon as a very honest lady.

51. On cross-examination, Barketer told the Court that initially, the Claimant had a teacher –student relationship with Jennifer Cheronon. Barketer and the Claimant would assist her with fare when she requested to be assisted. The visit to her home was informal. They did not discuss a love affair at the home.

52. Jennifer Cheronon told Barketer that the Claimant spent the night with him in a guesthouse. He did not know if the Claimant impregnated her. She advised her to pursue child-support. She was desperate. Barketer intended to have the matter go before the right authorities. Barketer was not privy to the intimacy between the Claimant and Jennifer Cheronon.

53. Redirected, he told the Court that intimate relationship is private, not public. The dispute is about Claimant’s professionalism. The letter of dismissal referred to immoral behaviour. The incident took place 11 years ago, and there would be challenges in recalling all the details.

54. Disputes Officer Wandarwa confirmed that the Claimant was advised on the charges against him. He was invited before the Board. His evidence was taken. He was given the opportunity to cross-examine. He was interdicted. There was no fundamental change in the 2 letters of interdiction.

55. Jennifer did not attend the hearing. The Respondent relied on witness statements.

56. Other witnesses were presented one by one. The Claimant was allowed to cross-examine each of them.

57. The Respondent does not go into medical evidence in disciplinary cases. The threshold is not the same as in criminal proceedings. The Respondent acts on general evidence under Regulation 66 of the Code of Regulations. It is about character and conduct of Teachers. There are several circulars on protection of students from sexual abuse.

58. Cross-examined, Wandarwa told the Court that the complaint letter by Jennifer Cheronon is undated and unsigned. The Respondent is allowed to receive complaints even from anonymous sources.

59. The complaint was investigated and the Claimant found culpable. The Board is an agency of the Respondent. The Complainant’s letter and affidavit absolving the Claimant, were signs of compromise. There was no significant difference between the 2 letters of interdiction.

60. Regulation 67 requires that the complaint must have date and is signed. The Respondent receives even anonymous complaints. It is not fatal that a complaint is undated and unsigned. Jennifer Cheronon was summoned by the Board and confirmed her attendance, but did not appear. She was compromised. The Claimant was not ambushed at the hearing. He said he was ready with the hearing.

61. Redirected, Wandarwa told the Court that the Statement by Jennifer Cheronon was never recanted. The Respondent carries out its own investigations. Substantive charges remained the same. Jennifer Cheronon’s statement was not the only evidence. All other witness statements and minutes of the Board were considered. The Respondent is allowed to pursue all complaints, including the anonymous ones.

62. Judgment in the Cause was reserved for 24th March 2022, but is ready for delivery on the date indicated at the end of the Judgment.

63. The issues as understood by the Court, are whether the Claimant’s service was terminated on valid ground; whether procedure was fair; and whether he is entitled to the remedies sought.

The Court Finds: -

64. It is common ground that the Claimant was employed by the Respondent as a Teacher, around 1989.

65. It is agreed that he was dismissed from service by the Respondent, upon finding that he had sexually abused his student, Jennifer Cheronon.

66. He was dismissed on 5th April 2012.

67. He appealed against the decision. His Appeal was declined on 14th September 2016.

68. He filed this Claim on 8th December 2016.

69. There was a Notice of Preliminary Objection filed by the Respondent under Section 90 of the Employment Act 2007. It was stated that the Claim is time-barred, dismissal having taken place in April 2012, over 4 years before the Claimant came to Court.

70. There is a Ruling on record, dated 18th July 2017, which overruled the Objection, on the ground that the Claimant, having appealed, and

Appeal having been dismissed on 22nd August 2016, the cause of action arose on this date, and the Claim therefore was filed well within the stipulated period of 3 years.

71. The Respondent appears not to have been contented with the Ruling, as the question on time-limit was posed to the Claimant on cross-examination.

72. This Court would like to disagree with the Ruling on record. Decisions of the Court of Appeal such as **Rift Valley Railways [Kenya] Limited v. Hawkins Wagonza Musonye & Another [2016] e-KLR**, have established that internal grievance, disciplinary, and dispute settlement mechanisms, such as an internal appeals or negotiations, do not stop time from running, from the date of dismissal. In this case the Appeal lodged by the Claimant, did not have an effect on the date he was dismissed, in 2012, and the Claim would have been time barred by the time he filed it, in 2016.

73. However, the Ruling resolved the issue in favour of the Claimant, and this Court must abide by it, and resolve the dispute on merit, having heard the Parties as was ordered in the Ruling on preliminary objection.

74. There is adequate evidence from the 3 witnesses for the Respondent, to establish that the Claimant was dismissed on valid ground.

75. Section 43 of the Employment Act, like the Code of Regulation for Teachers, does not require the Employer to establish valid reason or reasons, beyond reasonable doubt.

76. The evidence by Wandarwa is correct. In issue was not a criminal charge, where the Claimant was an accused person, and the Respondent a prosecutor, required to show medically that the Claimant had carnal knowledge of Jennifer Cheronono.

77. Section 43 of the Employment Act, only requires the Employer to have reasonable ground, a genuine belief, that the Employee was engaged in the conduct alleged against him, which belief leads the Employer to terminate the contract of employment.

78. In this case, the evidence against the Claimant was overwhelming and even self-incriminating. The Respondent had more than mere reasonable ground and genuine belief, in bringing to an end the Claimant's teaching service.

79. Outside his own evidence, there is evidence from his colleague Barketer on how the Claimant pursued Jennifer Cheronono, developing an unlikely urge to assist her procure plastic surgery. He organized to see her parents, and paid for her fare to Nakuru to see a Doctor. Barketer was Claimant's friend. They even shared residence at the College. He knew the Claimant. He described the Claimant as his friend even at the time Barketer gave evidence before the Court. There is no likelihood of Barketer telling a falsehood about his friend to the Court, and to other proceedings preceding this litigation. This evidence tallied with the Claimant's own evidence.

80. Jennifer Cheronono filled the evidential gaps, when freed from her guilt and shame, years after tragedy of kabarnet, she appeared in Court and testified.

81. She, choking of emotion, tearfully persuaded the Court that the Claimant did not have an innocent association with her. He was far from the father-figure, the teacher, he posed to be. He was a brutal predator, taking advantage of her physical disability, and taking her to a lodging, imposing himself on her, on the pretext that he wished to charge his phone at night, in her room. She resisted, saying she was asleep and wished to continue sleeping unperturbed. He insisted he wished to charge his phone.

82. He had tested her trust at Nakuru, booking a lodging room with 2 beds and sleeping on one bed while he slept on the other. He did not see anything morally wrong in this. He was preparing himself to take her away from the plain sight of Nakuru, to the backstreets of Kabarnet, away from the vicinity of his College.

83. He played with her trust, by organizing a Teachers' home visit, where he introduced himself to unsuspecting parents.

84. He lied all the time that he was going to assist her remedy her physical imperfections. He would take her to a Doctor who was his friend. He took her from Nakuru, to Eldoret and fatefully to Kabarnet where he deflowered her.

85. She became pregnant and in mortification, fled from her parents' home. She was still a student. Her predator offered to discuss the pregnancy with her. He offered to assist. He fled from his responsibility. She had no support. She was ashamed of herself. She contemplated suicide, as the Claimant went on with his teaching career.

86. She then lodged a complaint with the Education Board, seeking some form of assistance from the Claimant. This is how the matter came to the attention of the Respondent.

87. There is no doubt in the mind of the Court that the Claimant sexually abused Jennifer Cheronono, his student, who suffers lifelong physical challenges. He used his position as her Teacher, posing as a father-figure as well, and ravaged her, leaving her psychologically wrecked, and with an unsupported child. He compounded her physical impairment.

88. To add insult to injury, he made every attempt to protect his own position, by compromising her with unfulfilled promises of material aid. He conspired with his friends, the Moraras, to procure an Affidavit from Jennifer Cheronono, absolving him from sexual abuse. He prevailed upon his victim not to appear at his disciplinary hearing.

89. An even in Court, he was not done with Jennifer Cheronono. He posed questions which were markedly annoying, and only intended to

harm his victim. He demanded medical proof of sexual abuse. He wished to have proof of pregnancy test. He asked her if she had assisted her students, the way he assisted her. He indulged in ignoble frivolities, asking Jennifer Cheronno why he took an interest in her. What manner of a man does what the Claimant did to Jennifer Cheronno, and years later, after she has gathered courage to speak out, poses these sort of questions?

90. Luckily, the Code of Regulations [66], does not require that medical proof is given, to establish that a predator has abused his student. The Respondent, is permitted to rely on general evidence. There were Statements from other witnesses, to corroborate what Jennifer Cheronno initially told the Board. The Respondent correctly relied on general evidence. It is not necessary that a Teacher is caught in *flagrante delicto*, to sustain a charge of sexual abuse of his student. It was not necessary to have the evidence of the watchman who allegedly found Teacher Ochako doing the unacceptable. The Claimant was not under trial for a criminal act.

91. Jennifer Cheronno told the Court that if she appeared inconsistent, the wounds she suffered from the assault by the Claimant, made it hard for her to revisit the events, with a cold clarity of mind. The Court upholds her explanation and does not place much probative value on the Affidavit or letter she may have been compromised by the Claimant to write, allegedly exonerating him of sexual abuse. The Claimant had a hand in these exculpatory documents. He preyed on Jennifer Cheronno's vulnerabilities as he had always done, from the time he taught her art. The Claimant did not allude to any reason why Jennifer Cheronno would pick on him, and allege that he sexually abused her, and impregnated her. Her demeanour in Court, was as stated by Barketer in his evidence; very honest.

92. Procedure may have had minor flaws, but procedural fairness was sustained. The Claimant was advised on the charges. There may have been minor amendment in the second letter of interdiction from the first. There was no substantive change in the charges. There was no significant prejudice suffered by the Claimant. The core charge, was that he sexually abused his student, Jennifer Cheronno.

93. He was heard and allowed to cross-examine Respondent's witnesses. He wrote before the hearing, agreeing to go on with the hearing. He was given an opportunity to call his own witnesses.

94. He was allowed to exercise his right of appeal. He was heard on appeal. The decision to dismiss him was upheld.

95. The Court is satisfied that the Respondent acted in accordance with its constitutional and statutory mandate. The Respondent is to be commended, for ridding the profession of a predator. Teaching must be rid of rogue and predatory Teachers. Nobility of the teaching profession must be protected. Gullible students must be protected. The dictates of the Employment Act, 2007 and the Code of Regulations for Teachers, were observed. There was no significant departure from fair procedure. Termination was fair on all fours.

IT IS ORDERED: -

a. The Claim is rejected.

b. Costs to the Respondent.

DATED, SIGNED AND RELEASED TO THE PARTIES ELECTRONICALLY, AT NAIROBI UNDER THE MINISTRY OF HEALTH AND JUDICIARY COVID-19 GUIDELINES, THIS 25TH FEBRUARY, 2022

JAMES RIKA

JUDGE