



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT MOMBASA

CAUSE NO. 39 OF 2020

HARUN KIBUI THUO.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 18th March, 2022)

JUDGMENT

The claimant filed the memorandum of claim on 17.08.2020 through John Bwire & Associates Advocates. The claimant is at all material times teacher deployed at Timbila Primary Day and Boarding School in Taita Taveta County. The respondent is a constitutional commission established per Article 237 of the Constitution of Kenya, 2010 and whose functions include to register trained teachers; to recruit and employ registered teachers; to assign teachers it employs for service in public schools or institutions; to promote and transfer teachers; and to determine the employment of teachers.

The claimant was employed by the respondent on permanent and pensionable terms as a P1 teacher on 02.05.1991. The employment was subject to the Teachers Service Commission Code of Regulations (hereafter “**the COR**”). On 26.11.1998 he was promoted and appointed as the head teacher for Timbila Primary Day and Boarding School. The claimant’s monthly pay as at dismissal was Kshs.105, 146.00.

The claimant’s case as pleaded is as follows. On 22.04.2018 it was during the April school holidays and he received rumours of alleged sexual misconduct involving one of the school’s teacher one Mr. Peter Juma and a girl at the school one Marselina Mughuwa Muthoki (MM). The claimant assigned the school watchman on 23.04.2018 to go to the alleged scene of the alleged misconduct being at Darajani Centre and at the river stream. The purpose was for the watchman to collect all relevant information about the allegations. On the evening of 23.04.2020 the watchman reported back to the respondent that there were uncorroborated rumours going round that Mr. Juma had attempted to sexually abuse MM. On 24.04.2018, the claimant summoned MM, her mother and Mr. Juma to appear before the claimant and the deputy head teacher Ms. Mary Sabatia (Ms. Sabatia) with a view of officially making a report in writing as required under regulation 145 (1) and (2) of the COR. The regulation provides as follows:

- 1) Any person with information that a teacher has engaged in professional misconduct or any conduct contravening these regulations may lodge a complaint in writing, clearly indicating the nature of the complaint.**
- 2) Where the person making the allegation lodges a verbal complaint, the person to whom the report is made shall cause the complainant to record and sign a statement of the complaint.**

On 25.04.2018 the claimant in presence of Ms. Sabatia asked MM and her mother whether the rumours going round about sexual abuse by Mr. Juma were true and MM and her mother denied the allegations and declined to make any report in that regard. MM and her mother openly dismissed the allegations and asked the claimant and Ms. Sabatia to dismiss the allegations as rumours and untrue. Thus the claimant could not prepare a written complaint per regulation 145(2) of the COR. The claimant asked Ms. Sabatia to prepare the minutes of that meeting and to file them, as he has pleaded, for further communication from the Board of Management (BOM) of the School.

The claimant has exhibited the minutes of the meeting of 25.04.2018 where the claimant, Ms. Sabatia and MM’s mother were present. The minutes show that the claimant introduced the subject of the meeting being to investigate an alleged rumour between Mr. Juma and MM and after brainstorming, MM was invited in the meeting and she denied the allegations and explained the episode in issue as follows:

- a) She was with her two sisters, SM of class 2E and Mm of standard 4W and the three met Mr. Juma at the river bank.
- b) The place was slippery as it was during the rainy season and that the teacher, Mr. Juma could not wrestle her.
- c) The teacher wanted to give them thirty shillings to go and buy Maandazi and unfortunately the teacher fell who was a person on crutches slipped and fell.

d) As the teacher was falling he stepped on MM and MM also fell, stood up and walked away.

e) The sisters laughed at her and followed her.

The minutes continue to state that later Mr. Juma was called in the meeting and he repeated the same account as that by MM. Further, MM's mother roared to the claimant and Ms. Sabatia saying as follows:

a) The claimant and Ms. Sabatia should not listen to Darajani rumours.

b) Wanted her child not to pass.

c) She had full control of her family.

d) Was there anyone who wanted to take the role of the father?

e) What other interest did the claimant and Ms. Sabatia have if the daughter said nothing?

f) If it were true she could have gone to the elder, assistant chief or even the school BOM chairman who are her neighbours.

The minutes signed by the claimant and Ms. Sabatia then stated the conclusion thus, **“The matter was left pending as we needed to do further investigation especially starting with the younger sisters who were with her.”**

The claimant's further case is that on 26.04.2018 he proceeded to attend an EGM training for lower primary teachers and head teachers which had been organised by the respondent. Upon return, the claimant received a letter of transfer to Taveta Primary School with effect from 30.04.2018. The claimant was also aware that on the basis of the minutes of the meeting held on 25.04.2018 that were availed after his transfer, the school's BOM initiated investigation of the alleged sexual abuse by Mr. Juma and on 24.10.2018 he was summoned before the BOM to give evidence. Further, per the minutes of the BOM meeting held on 24.10.2018 and signed on 28.10.2018, the BOM found that Mr. Juma had no case to answer because the evidence had gaps and was not exhaustive to accuse the teacher.

The claimant received the letter to show cause dated 30.10.2018 on account of professional misconduct in that the claimant failed to report a case of sexual abuse against a pupil by the name MM standard 8N admission No. 303694 of Timbila Primary School in April 2018. The letter to show cause stated that the pupil was allegedly sexually assaulted by a teacher of Timbila Primary School Mr. Peter Juma TSC/319339 on one Saturdays during April 2018 school holidays and the matter reported to the claimant by one of his teachers and MM's mother. He was required to reply in 14 days and which he did by his letter dated 01.11.2018.

He explained that a teacher by the name Owala from Timbila Boys High School made an incomplete call to the claimant asking whether he had heard anything from Darajani concerning Mr. Peter Juma commonly known as PARA, who moves on crutches. Further, prior to answering the call Owala's phone went off and the claimant tried to call back but in vain. Further Owala never called him back and his phone could not go through. The claimant then repeats the account per steps taken and as earlier pleaded in his case already set out in this judgment. He categorically denied that the matter was reported to him by MM's mother but he was the one who had summoned MM's mother. Further a teacher from his Timbila Primary called him on phone about the rumours after he had already concluded his preliminary investigations per the minutes he had signed with Ms. Sabatia. His further case was that he could not have moved to report the case to a higher office without tangible evidence from a reliable source and not mere hearsay. After his preliminary investigation he had gone for EGM training and thereafter transferred so that he had no chance to establish the authenticity of the rumour. The matter remained pending as he took up the transfer from Timbila Primary School to Taveta Primary School. He concluded, **“That; it is now in public domain that Mr. Owala Oola of Timbila High School had the clips which he also shared with the BOM members of Timbila Primary School during the hearing of 24th October, 2018 which to the best of my knowledge I strongly believe that the clips could have given us the fundamental base to this matter. It is to my feeling that such clips could have been manipulated and stage managed in order to suit his malicious motive and settle personal vendetta. At this juncture I beg to notify your office to refer to my case against a teacher from Timbila High School who is a very good friend to Mr. Owala, as these two have a smouldering plot against me, so they have stage managed the case.**

That notwithstanding, I therefore humbly state that I did what was at my disposal to establish the truth though I did not succeed and therefore could not have reported a rumour to the commission.”

Upon the same allegations, the respondent interdicted the claimant effective 28.11.2018 per the letter dated 28.11.2018 signed by Ngugi B.G, the respondent's Deputy County Director, Taita Taveta. The claimant's case is that as required by the letter of interdiction he wrote and submitted his defence statement dated 01.01.2019 detailing the steps taken in the case even after his transfer from Timbila Primary School.

By the letter dated 29.05.2019 the respondent invited the claimant for a disciplinary hearing fixed for 28.06.2019 at the TSC County Director's Office, Taita Taveta at 8.30am. The letter advised the claimant to bring along any documents in his defence and that if the outcome of the hearing was not communicated within 28 days from the date of the hearing, then he had to contact the respondent.

The claimant received another interdiction letter dated 04.06.2019 interdicting him effective 28.11.2018 and upon the same grounds and signed by the same Ngugi B.G, the respondent's Deputy County Director, Taita Taveta. That 2nd letter of interdiction further stated, **“NB: This is an amendment of our letter REF.TSC/T.TVT/1.2/VOL.5/114 dated 28th November, 2018 which still stands.”** The earlier interdiction letter had stated that the claimant had breached clause (d) of the Third Schedule of the TSC Act by failing to report to relevant authorities an offence of sexual abuse to a pupil namely MM while, the 2nd interdiction letter changed the clause to (b) (i) of the same schedule. The claimant's case is that the 2nd interdiction letter required him to file a defence in 21 days yet the hearing had been fixed for

28.06.2019.

The claimant appeared before the disciplinary panel with his witnesses as instructed but his case is that he was not allowed to cross-examine the witnesses who testified and his witnesses were not allowed to give evidence. On 08.09.2019 the claimant received a letter dated 16.07.2019 from the respondent dismissing him from employment effective 28.06.2019 and he was given a chance to appeal per regulation 156(4) of the COR. The claimant appealed by his letter dated 23.09.2019 stating the steps he had taken in light of the rumours of sexual abuse of MM by Mr. Juma. In his appeal, the claimant stated that he had done all he needed to do through the preliminary investigations and he was transferred and therefore he could not have concluded the investigations. Further, he stated that he believed that his predicament was malicious because he had been a witness in another case of sexual abuse of a student by another teacher one Mr. Nyamai who was a close friend of Mr. Owala so that the instant case had served a golden opportunity for Mr. Owala to fix him and revenge whereas it was for Mr. Owala to report the incident to relevant authorities but he had not done so. He annexed two statements of witnesses who had come up to testify and to say the truth in his case. The appeal was rejected by the letter dated 05.06.2020 stating that the review case was heard on 19.02.2020 and determined that the dismissal was upheld and further that the decision was final per regulation 156 (9) of the COR.

It is pleaded and submitted for the claimant as follows:

a) The alleged misconduct did not amount to negligence of duty. The interdiction letter as amended referred to clause b(i) which provides for the disciplinary offence of negligence of duty which is also listed as an offence that may lead to disciplinary action under regulation 140 (b) (i) of the COR. Further regulation 3 of the COR defines negligence of duty to mean instances where a teacher wilfully neglects to perform any work which was his duty to have performed or if he carelessly or improperly performs any work for which from its nature it was his duty to have performed carefully and properly. In the instant case no complaint was made to the claimant as envisaged in regulation 145 of COR and further upon hearing about the rumours of sexual abuse of MM by Mr. Juma, he was unable to record a formal complaint under regulation 145 of COR once MM and MM's mother dismissed the allegations as rumours. Further, the claimant caused the record of minutes of his meeting with MM and MM's mother to be prepared for consideration by BOM. It was during holidays and shortly thereafter the claimant was transferred to another school.

b) There was no written complaint against Mr. Juma per regulation 145 (1) of COR and similarly there was no verbal complaint against Mr. Juma that the claimant could record as envisaged in regulation 145(2). The claimant received no written complaint and upon receiving the rumours he met MM and MM's mother but who said they had no verbal complaint to be recorded.

c) Regulation 146 (1) and (2) of COR provides that investigations against a teacher other than a head of the institution shall be instituted by the BOM or County Director where there is no functional BOM. In alleged rumours and case against Mr. Juma, there was a functional BOM which investigated the case, the claimant attended as a witness on 24.10.2018 and the BOM found on 28.10.2018 that Mr. Juma had no case to answer. It was not open for the County Director to act ultra vires the BOM findings and to interdict the claimant in that regard.

d) Under regulation 146(3) investigations against a head of institution are by the County Director in liaison with the BOM. Under regulation 146(4), the claimant having been transferred, both schools' BOM (previous and present) were to be involved in initiating the investigations in consultation with the County Director in whose jurisdiction the teacher in question is stationed. The notice to show cause was received on 30.10.2018 when the claimant had moved to Taveta Primary School from Timbila Primary School but the two BOMs were not involved at all. In particular, on 28.11.2018 the respondent's County Director one Joyce Kikuri summoned the claimant who was interviewed by Joyce Kariuki the TSC County Director; Boniface Gitau Ngugi the Deputy County Director; Francis Kyalo TSC County Human Resource Officer; Hassan Abdullatif Sub-County Education Director; and Irene Kadenge, TSC Sub-County Director. It is the claimant's case that the persons who were present were not authorised to conduct the investigation and the investigation panel was improperly constituted as there was no BOM representation from either of two schools. The investigations were illegal, null and void.

e) Regulation 146(6) of COR required that the investigation panel to accord the claimant fair hearing during the investigation including being presumed innocent until proven guilty that he has a case to answer; informed the allegations with sufficient details to answer; given at least seven days to prepare a defence; present when the witnesses are being interviewed by investigation panel; warned that any incriminating evidence may be used against him during disciplinary proceedings; and given an opportunity to adduce and challenge any adverse evidence. It is the claimant's case that during the hearing by the investigation panel on 28.11.2018 the claimant was never given adequate time to prepare his defence; was not present when the panel interrogated witnesses; was not warned that any incriminating evidence may be used against him during the hearing; and was not given an opportunity to adduce and challenge adverse evidence against him. It is pleaded that regulation 146(6) was not fully complied with, the hearing before the investigating panel and the subsequent report on the finding were unlawful, and, cannot be validly relied upon as a basis for the dismissal.

f) Regulation 151(3) of COR provides for composition of the disciplinary panel at the headquarters and regulation 151(4) of COR provides for composition of disciplinary panel at county level to include a member of the commission; county director; an officer appointed by county director; county director of education or a representative; an officer designated by the county director to deal with matters touching on discipline; and any other technical officer or person whose attendance shall be deemed necessary. Further, the claimant's case is that regulation 146(12) of the COR provides that an officer who undertakes or participates in an investigation of an offence shall neither preside nor sit as a member of the disciplinary panel determining the same. It is his case that on 28.06.2019 at the TSC County headquarters at Mwatate the claimant appeared before a panel comprising one Twahir Mbarak the TSC Deputy Chairperson; Joyce Kikuri the County Director; and four other persons who are unknown to him and not being officers as provided in regulation 151(4) of the COR. Further Joyce Kakuri who presided at the investigation panel was present contrary to regulation 146(12) of the COR.

g) Regulation 146(8) provides that the investigation panel shall, upon completing investigation compile a written report in regard to the teacher disciplinary status and shall present the report to the Board, the County Director and the Secretary. It is the claimant's case that the BOM for Taveta Primary School or Timbila Primary School received no such report and the claimant saw no such

report at the disciplinary hearing or during the appeal. Thus he was not given full material to exculpate himself and that was contrary to the Employment Act, 2007.

h) Regulation 153(2) provides that where a teacher denies allegations the discipline panel shall examine the commission's witnesses and allow the teacher to cross-examine the witnesses but in the instant case the claimant was not allowed by the panel to examine witnesses and prior to the disciplinary hearing he was not given the investigation report.

i) The claimant received on 29.05.2019 an invitation to attend the disciplinary hearing on 28.06.2019 but again received an amended interdiction letter of 04.06.2019 giving him 21 days to submit a defence. It is his case that the effect of the 2nd interdiction letter was to cancel the hearing fixed for 28.06.2019 but which proceeded in total breach of rules of natural justice, right to fair trial per COR, the Employment Act and the Constitution.

j) Regulation 154(2) of the COR provides for punishments being warning letter in writing; surcharge; suspension for six months; retirement in public interest; retirement under the ten-fifty-year rule; dismissal from the service; referral for medical evaluation; and any other action considered appropriate in the circumstances. The claimant undertook preliminary investigations about the rumours, he summoned Mr. Juma for interrogation, he prepared minutes of his meeting with Mr. Juma, MM, and MM's mother, he directed his deputy Ms. Sabatia to prepare and file the minutes for further action by the BOM; and he attended disciplinary hearing against Mr. Juma and testified as respondent's witness. He had worked for 29 years out of which 23 years as a head teacher and he otherwise had a clean record of service. Thus the punishment imposed was severest and excessive and a warning or suspension should have been sufficient in the circumstances.

The claimant prayed for judgment against the respondent for:

- a) A declaration that the actions of the claimant leading to his dismissal did not amount to negligence of duty within the meaning of regulation 3 and 140 of the Code of Regulations as read together with clause (b) (i) of the Third Scheduler of the Teachers Service Commission Act.
- b) A declaration that the claimant's dismissal from employment was unfair and wrongful.
- c) Reinstatement to service as a head teacher with full salary and benefits.
- d) Unpaid salaries and benefits from 28.06.2019 to the date of judgment.
- e) Damages amounting to 12 months' salary for wrongful dismissal.
- f) Costs of the suit.
- g) Such further and other relief as the Honourable Court deems just.

The respondent filed the memorandum of response on 22.09.2020 through Faith K. Kaluai Advocate. The respondent admitted that the claimant was at all material times its employee deployed as a head teacher. The respondent's further case as pleaded is as follows:

a) In September 2018 the County Director, Taita Taveta received information through social media that a teacher at Timbila Day and Boarding Primary School one Mr. Peter Juma was of immoral behaviour. The respondent undertook independent investigation and the County Director instructed officers to visit the school and investigations commenced and various witnesses recorded statements. The investigating team found that the victim had sought assistance in reporting the incident to the school head teacher through Madam Monicah Kizia, a teacher in the same Timbila Primary School; Madam Monicah Kizia informed the head teacher what had transpired through telephone conversation; Mr. Peter Owala a teacher at Timbila Secondary School called the head teacher inquiring about the events at Darajani; and the accused teacher confirmed that indeed he had been invited by the head teacher and appeared before him together with the victim and her mother at the school premises where he apologised and the matter was concluded at that point.

b) On the basis of that investigation the decision to interdict the claimant was reached. Investigations revealed that the claimant was fully aware of the incident but had failed to report the same to his employer or take preliminary administrative action in accordance with the COR. The claimant as head of institution had failed to report the incident to the respondent per Circular No. 3/2010 and No. 6/2017. He was given a letter to show cause for failing to report the incident despite him having been informed of the same. He replied the letter to show cause. He was invited before the respondent's County Disciplinary Committee for preliminary investigations to establish if indeed he was aware of the incident and if he had taken action per COR and other guidelines.

c) On 27.11.2018 the Committee convened and witnesses present included the victim MM, MM's mother, a teacher Monica Kizia, deputy head teacher Mary Saleri, a teacher Owalla, security guard at Timilia Primary School Jackson Metinyoki, and the claimant. Further the witnesses were examined and the Committee unanimously agreed that the claimant had a case to answer as disciplinary action had to be taken against him. He was interdicted and given an opportunity to submit his defence within 21 days but he did not do so. He was invited for the disciplinary hearing on 28.06.2019 and informed to bring witnesses. He attended the hearing and admitted the charges and in particular that he had been informed on the allegations of immoral behaviour against Mr. Juma by both Mr. Peter Owala and Madam Monica Kezia; he summoned the mother of the victim and confirmed that the incident had occurred and was unhappy about it; he was aware of a video clip that had recorded Mr. Juma being caught lying on top of his student, the victim; and that he did not report the incident to any of his superiors. The disciplinary panel considered the claimant's admission and decided that he be dismissed from the service. The claimant appealed against the decision. The review Committee on 19.02.2019 heard the case on 19.02.2020 and the claimant admitted that he did not take the statement of the pupil when she and the mother

appeared before him, he did not inform the incoming head teacher about the allegation or reports allegedly made, and that he made a report which he placed in the institution's discipline file but never brought the same to the attention of the officer involved in handling or taking over the process. Despite having been transferred, the claimant knew he had a duty to record and report the incident in the institution's log book and handing and taking over report. As demonstrated in those documents the claimant failed to record and report the incidence.

d) The BOM did not carry out investigations as the respondent as the respondent expected of the principal – agent relationship between the respondent and the BOM. The claimant as secretary and technical advisor to the BOM failed to write and convene a special BOM to investigate the allegations. The BOM meeting of 24.10.2018 was an afterthought following the independent investigations initiated by the respondent in September 2018. The respondent's officer who appeared before the BOM reported in writing her reservations how the complaint and investigations report were ignored by the BOM. The respondent established that the allegations against Mr. Juma were true and culminated in his dismissal from the respondent's teaching service.

e) The COR entitled the respondent to institute independent investigations.

f) The amended interdiction letter did not alter the substance of the interdiction letter but amended the relevant clause from (d) – forgery, to, (b) (i) – negligence of duty which was the basis of the interdiction per the Third Schedule of the TSC Act. The 2nd interdiction letter gave him 21 days to submit the defence which was 25 days to the scheduled hearing date.

g) When the claimant appeared before the disciplinary panel the charges were read to him and he pleaded guilty to the same. By that admission, he thereby waived the appearance of witnesses before the panel to be examined and cross-examined by the claimant.

h) The claimant was negligent of his duty because as the school administrator he had a duty to report to his superiors the incident that was widely publicised and was within his knowledge; as the head teacher he neglected to record the incident in the institution's log book for purposes of accountability and follow up by the incoming administrator; he failed to indicate in the handing and taking over report of the incident and his interaction with both the victim and the victim's mother to the incoming administrator for purposes of follow up with the BOM, and as secretary of the BOM the claimant had the responsibility to inform them of the allegations that had been raised against Mr. Peter Juma. At the disciplinary hearing the claimant admitted to have failed to take the mentioned actions as would be expected of him as the school administrator.

i) Regulation 145(1) of the COR does not bar a complaint from being raised and being investigated by the respondent's agents. Regulation 146(11) mandates the respondent to carry out independent investigations. During the investigations the claimant confirmed he had been notified about the teacher's misconduct by several witnesses and had seen the video clip with the teacher.

j) The claimant was presumed innocent until 28.06.2019 at the disciplinary hearing when he was found guilty. He had replied the letter to show cause, appeared before the county disciplinary committee where he was at liberty to cross-examine witnesses, he was not denied chance to produce evidence, the county discipline committee conducted the investigations in accordance with the law and it proceeded in accordance with the rules of natural justice. The disciplinary panel was constituted per regulation 151 (3) of the COR and could sit at any venue in the country. The County Director was not a member of the disciplinary committee sitting on 28.06.2019 and as per the record of proceedings of that date.

k) The respondent was mindful to its need to uphold the rights of the Child guaranteed under Article 53 of the Constitution.

The respondent urged that the claimant was not entitled to any of the reliefs sought in the claim and prayed that the claim be dismissed and the respondent be awarded costs of defending the suit.

The claimant testified to support his case as claimant's witness No. 1 (CW1). The claimant's witness No. 2 was the BOM chairperson for Timbila Primary School one Daniel Mbaso (CW2); the claimant witness No. 3 was Lemakwani Sajiroi also known as Jitu (CW3); claimant witness No. 3 was MM's mother (CW4); claimant witness No. 5 was MM (CW5) aged 20 years as at the hearing date but aged 17 years as at the time of the alleged sexual abuse. The respondent's witness No. 1 (RW1) was Irene Kadenge, the Sub-County Director, Taveta at the material time; and the respondent's witness No. 2 (RW2) was Helen Chimme, Assistant Deputy Director, Discipline. Final submissions were filed for the parties. The Court has considered all the material on record and returns as follows.

To answer the **1st issue**, the Court returns that there is no dispute that parties were in a contract of service and at the material time leading to the summary dismissal the claimant was serving as the head teacher at Timbila Primary Boarding and Day School and as transferred to Taveta Primary School.

To answer the **2nd issue** for determination, there is no dispute that the claimant was dismissed from employment by the letter dated 16.07.2019 and with effect from 28.06.2019 on account of failure to report to relevant authorities an offence of sexual abuse to a pupil by the name MM standard 8N of Timbila Primary School committed by Mr. Peter Juma being a teacher in the same school and which took place on one of the Saturdays during April 2018 school holidays while the claimant was the head teacher at Timbila Boarding and Day Primary School. The claimant appealed the dismissal decision but upon review of the case, the respondent upheld the dismissal by the letter dated 05.06.2020.

The **3rd issue** for determination is whether the reason for termination has been established to have been genuine and fair as at the time of termination as envisaged in sections 43 and 45 of the Employment Act, 2007.

As per the claimant's evidence, paragraph 22 of the Code of Conduct for Teachers, 2015 prohibits sexual relations between teachers and learners. Subparagraph 22(2) (c) provides that a teacher shall not facilitate non-disclosure or cover up of cases of sexual harassment. Paragraph 23 (2) thereof on sexual harassment provides that it shall be the duty of the person alleging sexual harassment to report the same to

the relevant authority. The claimant then confirmed that he was familiar with respondent's Circular No. 3 of 2010 Ref. No. TSC/ ADM/ 192A/VOL.VII/151 dated 29.04.2010 which provides at clause 2 thus, **"2. Any teacher who at any given time has reasonable grounds to believe that sexual abuse has been committed against a pupil/student in their school, in any other school, or outside the school, must report such a case or suspicion to the head teacher, education officials, School Management Committees, Boards of Governors, Police or any organisation working with Child Protection issues in the area AND the Teachers Service Commission within 24 hours."** Further, clause 4 thereof stated, **"4. Any teacher, TSC employee or TSC agent who fails to report a case of sexual abuse, actual or alleged shall face disciplinary action."** Further, clause 11 thereof stated, **"11. Cases of sexual abuse of pupils/students involving public servants should be reported to the Children's Department, Teachers Service Commission and any of the following authorities including: the area chief, police as well as other organisations working with child protection issues."** The claimant was also aware of Circular No. 6/2017 Ref. No. TSC/ADM/192A/VOL.IX/8 dated 21.03.2017 where at clause VII on sexual abuse it is stated thus, **"Cases of sexual abuse, whether within or outside the school, should be thoroughly investigated, documented and action taken with expediency. Where the offence is of both criminal and professional in nature, police and other security agencies should be involved in investigations. It is emphasised that Heads of Institution and teachers should be in the forefront in protecting learners against sexual abuse."** The Court finds that those cited provisions were the operational requirements instituted by the respondent and the claimant's conduct capacity or compatibility is to be assessed against those requirements towards establishing the validity and fairness of the reason for termination in the instant case and as envisaged in sections 43 and 45 of the Employment Act, 2007.

While making that finding the Court has considered submissions for the claimant about regulation 145 of the COR. The regulation is under Part XI of the COR on discipline and the Court holds that it is a procedural provision in the respondent's disciplinary procedure. Thus regulation 144 provides that a misconduct against a teacher may be reported to the Secretary, County Director, Head of Institution, Secretary of BOM, or any government law enforcement agency. Regulation 145 then provides that a complaint against a teacher can be in writing or if verbal, the person receiving the complaint being the verbal report, shall cause the complainant to record and sign a statement of the complaint.

In the instant case the claimant's testimony is that Mr. Owala called him on the phone about the incident at Darajani but he never recorded a statement in that regard or was not available when the claimant followed up on phone. The evidence was that after the phone call Mr. Owala never came to reduce his verbal complaint in writing or did not submit such written complaint. The claimant further testified that later Madam Monica called him on phone about the same incident but as at that time, he had already heard about the rumours of Mr. Juma allegedly sexually abusing MM, he had met MM and MM's mother in presence of his deputy and prepared the minutes of 25.04.2018 and concluding that the matter remains pending as further investigations were needed starting with the younger sisters that were with MM at the time of the alleged incident.

The Court has considered the evidence. The Court finds that within the established operational requirements per statutory circular provisions already cited and quoted earlier in this judgment, the claimant received information about alleged sexual abuse of MM by Mr. Peter Juma. The information was from Mr. Owala and later from Madam Monica Kizia and appears to have been widely publicised around the school community. The Court further finds that the claimant was under an obligation (as per the prescribed respondent's operational requirements in the cited statutes and policy circulars) to report the same to the respondent's Secretary, BOM of Timbila Primary School, the County Director or any government law enforcement agency such as the area Chief, Police Station and others. The Court finds that it was immaterial that Mr. Owala had not made a written report and it was immaterial that Madam Monica had brought the alleged incident to the claimant's attention after the meeting of 25.04.2018. Of particular interest is that Circular No. 3 of 2010 Ref. No. TSC/ ADM/ 192A/VOL.VII/151 dated 29.04.2010 at clause 2 specifically required the claimant to report the suspected or alleged sexual abuse of MM to the designated authorities or any of them within 24 hours but there was no evidence that he did make such report. In consideration of that strict time line, the Court finds that the case and submissions for the claimant that he went for training and was shortly thereafter transferred to another school did not offer exculpatory explanation. The Court further finds that minutes of 25.04.2018 for the meeting the claimant held with MM, MM's mother, his deputy and Mr. Juma did not explore and accelerate the matter towards a reporting progression as was prescribed in the cited circulars and statutory provisions - such as the matter be submitted to the BOM or County Director or respondent's Secretary or law enforcement agency. It was unfortunate that meeting's conclusion was a dead end that the matter was pending as further investigations were necessary starting with minors being MM sisters allegedly with MM at the time of the alleged incident. The Court has carefully assessed the flow of events and finds that the claimant misdirected himself by purporting to be the conclusive investigator of the allegations and thereby missed and did not act as required by the respondent's operational requirement as was required of him, namely, having received information about the alleged sexual abuse of MM by Mr. Peter Juma, his duty as a teacher and head teacher was to report the to any of the prescribed authorities. The Court finds that it was misconceived for the claimant to expect MM and MM's mother as alleged victims or Mr. Peter Juma as the alleged perpetrator to be the makers of a report, verbal or written in terms of regulation 145. Not so! Instead the Court finds that seized with the information, rumours or otherwise, of alleged sexual abuse of MM by Mr. Peter Juma, the claimant's contractual role per operational requirements, was indeed to make a written or oral report as envisaged in regulation 145 of the COR to any of the persons or authorities mentioned in regulation 144 of the COR or as prescribed in the cited policy circulars. The Court finds that he failed to make the report and he admitted as much before the respondent's disciplinary panel.

The Court has revisited the evidence. To confirm the already established negligence of duty by the claimant in failing to report the incident, the claimant for unexplained reasons failed to explain why he had not recorded the incident in the school's log book for important daily occurrences; he did not record and mention the issue in the handing or taking over notes to the incoming head teacher and, while stating that he spoke to the school BOM chairperson prior to the meeting of 25.04.2018 at which he met MM, MM's mother and in presence of his deputy, there was no official report to the BOM members or convening them to a special meeting to consider that important and serious allegation that affected the Timbila Primary School and its community. The BOM chairperson (CW2) testified that the claimant telephoned him about the incident sometimes in April 2018 and later the claimant was transferred to another school. The telephone conversation is not mentioned any other place during the investigation proceedings and it appears to be CW2's afterthought or that it was a mere casual chat on phone about the incident especially that the claimant confirmed to the disciplinary panel that he never reported the incident to his superiors and that he never took the matter to BOM. CW2 testified that his home was 50 metres from the scene of the incident and he heard about the investigations but in his view there was no warrant for emergency. The Court finds that if indeed the claimant telephoned CW2 it was a mere personal chat and the telephone conversation must have been part of what the claimant considered as baseless rumours not necessary for his official action as a head teacher and per prevailing operational requirements per relevant provisions of statute and policy circulars. The Court finds such to have been serious omissions on the part of the claimant and which demonstrated the alleged negligence of duty leading to his termination.

The Court has considered the record of the disciplinary committee meeting of 28.06.2019. The claimant confirmed to the committee that he did not report the matter to the BOM; he knew Mr. Juma told lies a lot; he confirmed Mr. Owala had called him on 22.04.2018 about the incident and after Madam Kizia (Monicah) had called him after the meeting of 25.04.2018; he confirmed the mother of MM had at some point called him but he was in a funeral; he had seen the video clip that had been circulating about the sexual abuse and it showed Mr. Juma and MM and it was bad; and, the claimant admitted that the video showed Mr. Juma lying on top of the girl with intention to have sex with her. The record shows that the claimant admitted the charge during the hearing as had been read to him so that there was no need to hear the witnesses. The claimant's final remarks at the disciplinary committee hearing were thus, **"I ask for forgiveness for what happened. I have had it very hard since I was interdicted"**. The Court finds that there is no reason to fault that record. The claimant admitted the allegations of negligence of duty as had been levelled against him and the respondent dismissed him accordingly.

The Court returns that the respondent has established that as at termination, the reason for termination was valid and fair as per sections 43 and 45 of the Employment Act, 2007. The Court returns that the respondent has discharged the burden of justifying the ground for the termination of the claimant's employment as required in section 47(5) of the Act.

To answer **the 4th issue** for determination, there is no established procedural unfairness in the instant case. The evidence is that the school BOM appears not to have promptly or at all taken up the matter for investigation. The respondent's officials took up the matter as pleaded for the respondent and which by evidence has been established to have been the appropriate steps to take. In particular, the Court has considered the respondent's circulars and the already cited provisions thereof and it is apparent that issues of sexual abuse of learners could be investigated by any relevant person or authority. The Court finds that the claimant's alleged defects in the investigative process is found invalid especially that he eventually admitted the allegations before the disciplinary committee. As submitted for the respondent, regulation 146(1) of COR states that the respondent shall upon receiving an allegation touching on a teacher's professional misconduct institute investigations either directly or through its agents. Further, paragraph 38 of the respondent's Code of Conduct and Ethics provides that the respondent may investigate or cause to be investigated any allegation of breach of the Code so as to determine the veracity and such investigations can be upon the respondent's own initiative or pursuant to a complaint by any person. Thus and as submitted for the respondent, the claimant was misconceived in submitting and urging that the investigation report dated 26.09.2018 had been illegal, null and void. The Court finds that while RW1 initiated the disciplinary proceedings against the claimant without a reported complaint against the claimant, nothing in law made such initiation illegal. The Court considers that regulations 144 and 145 of the COR on reporting complaints against a teacher apply as much as sub regulation 146(11) thereof which provides that the respondent or an officer acting under the respondent's direction may undertake direct investigation into any allegation and may recommend the interdiction of a teacher in accordance with the provisions of the COR. The Court has also considered that while the investigation and other safeguards in the COR during the disciplinary process are crucial and should be adhered to as pleaded and urged for the claimant, in the instant case the claimant admitted the allegations thereby rendering any failure to strictly adhere to the prescribe safeguards (such as composition of investigation panel per regulations 146(6) to include BOM members and 146(3) by the County director investigating whereas there was a valid BOM, or not cross-examining witnesses at investigation hearing) is found to have been inconsequential in the sense that the safeguards are for due processes towards establishing validity and fairness of the reason for termination.

The Court also considers that as submitted for the respondent, the claimant still had the prescribed 21 days to prepare and submit his defence prior to the date of the disciplinary panel hearing and after service of the amended letter of interdiction which, in any event, stated that other than for the amendment therein, the earlier letter still applied or stood. In the circumstances of the case and looking at the respondent's disciplinary procedures as urged for the respondent, no breach of due process or rules of natural justice has been established in the instant case as to render the decision to dismiss the claimant to have been unfair.

To answer the **5th issue** for determination, the Court therefore returns that the dismissal was not unfair both in substance and in procedure.

In the circumstances the Court returns that the claimant is not entitled to any of the remedies as prayed for. The Court has considered the claimant's otherwise long clean record of service with the respondent and each party will bear own costs of the suit.

While making that finding the Court has also considered the submission for the claimant that the punishment was excessive and not proportionate. The Court finds that even if another employer may have imposed a different punishment that was lesser than dismissal, nothing in the instant case has been established as eroding the manner the respondent exercised its prerogative in imposing the maximum dismissal punishment. Section 3 of the Employment and Labour Relations Court Act, 2011 provides that the principal objective of the Act is to enable the Court to facilitate the just, expeditious, efficient and proportionate resolution of disputes governed by the Act. While alleging and urging that the punishment imposed was not proportionate to the transgression, the claimant has not urged and established circumstances that would invite the Court to return as much.

The principle of proportionality obligates the Court to find a balance between the employee's established transgression and the lawfully imposed punishment as weighed against the prevailing circumstances of the case. In this case the claimant failed to report the alleged sexual abuse of his pupil, the respondent found the same to have amounted to gross negligence of duty, and, imposed a dismissal with loss of all benefits under the contract of service. It is not said that the respondent had imposed lesser or lenient punishments in similar circumstances. No deficiencies in the respondent's processes or proceedings have been established as to invoke a benefit or shadow of leniency in favour of the claimant. No graduated and prescribed scales of punishment attached to the transgression in issue has been shown to have been disregarded. Instead the evidence was that MM was a good pupil in academics topping her class 8N and appears her academic prowess was thereby ruined because when she testified at the hearing she was not in school and her academic development appeared ruined. She testified thus, **"Today am 20 years old and I have Kenya national I.D card. I do not have it in Court. I do not recall the I.D number. I was 17 years when I sat for KCPE. I scored 243 marks because of the disruption. I went to secondary school. Today am married."** The further evidence was that Mr. Peter Juma had been found culpable of sexually abusing MM as had been rumoured and had since been dismissed from the respondent's teaching service. The Court finds that in the circumstances, it does not begin to emerge that by imposing the ultimate dismissal sanction, the respondent had acted arbitrarily, capriciously or excessively. The Court will therefore not disturb but rest the punishment as was imposed.

In conclusion the claimant's suit is hereby determined with orders:

1) The suit is dismissed.

2) Each party to bear own costs of the suit.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT MOMBASA THIS FRIDAY 18TH MARCH, 2022.

BYRAM ONGAYA

JUDGE