



**M'ithinji v Teachers Service Commission (Cause E042 of 2021)  
[2022] KEELRC 13086 (KLR) (31 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13086 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
CAUSE E042 OF 2021  
DKN MARETE, J  
OCTOBER 31, 2022**

**BETWEEN**

**DAVID KIMATHI M'ITHINJI ..... CLAIMANT**

**AND**

**TEACHERS SERVICE COMMISSION ..... RESPONDENT**

**JUDGMENT**

1. This matter was originated by way of a statement of claim dated July 27, 2021. It does not disclose any issue in dispute on its face.
2. The respondent in a respondents memorandum of defence dated August 26, 2021 denies the claim and prays that this be dismissed with costs.
3. The respondent in a claimant's reply to the memorandum of defence dated September 2, 2021 which upholds the claim and prays that the defence be thrown out.
4. The claimant's case is that at he was employed by the respondent as a duly registered High School Teacher No 388329 in the year 1998 and has been posted to various schools during which period he rose in ranks to the position of the Deputy Principal at Gitare Secondary School and later transferred to Kiambere Complex School.
5. It is his further case that as Deputy Principal, he was in charge of students discipline at the school and earned Kshs 82,650.00.
6. The claimant's other case is as follows; On the morning of March 9, 2019 he found several students sleeping during morning preps. The culprits included one Peter Njoroge Adm No 2501. He attended to the respective disciplinary issues of the boys but Peter Njoroge resisted and caused a commotion in his office. Peter Njoroge in this commotion was slightly hurt on his shoulders. As a consequence of this, the



respondent instituted discipline proceedings leading to his interdiction and subsequent dismissal. His interdiction and dismissal was unfair and unlawful for the following reasons;

- a) It failed to appreciate the role of the claimant as the discipline master at the school.
- b) It failed to recognize that master Peter Njoroge was summoned together with other students for disciplinary action at the Deputy Principal's Office where he resisted creating a commotion and attracting other students to team up with him against the claimant.
- c) It failed to appreciate that master Peter Njoroge was not injured while receiving corporal punishment but in the commotion which ensued at the Deputy Principal's Office as the claimant attempted to flush him and 2 others students out of the office.
- d) The respondent failed to appreciate that the punishment meted on master Peter Njoroge was not in any manner unlawful, cruel, degrading and/or inhuman to warrant dismissal of the claimant.

The disciplinary process and dismissal was harsh in view of the fact that the claimant was a first offender and the purported offence was committed in the course of discharging his lawful duties.

7. He prays as follows;

- a) Reinstatement of the claimant back into employment.
- b) Payment of all the accrued salary since the date of interdiction on the March 28, 2019.
- c) Costs of this claim.
- d) Interest on (b) and (c) at court rate.

8. The respondents case is an admission that the claimant was at all material times its employee and that the claimant's contract of employment was governed by *inter alia*, the Teachers Service Commission Act (herein after referred to as the "the Act"); the Employment Act; the Basic Education Act; the Code of Regulation for Teachers (2015) (hereinafter referred to as the "Code"); the respondent's Code of Conduct and Ethics and other legal instruments that include administrative circulars issued by the respondent from time to time.

9. It is her further case that in March, 2019, she received information on the episode of corporal punishment on the part of the claimant. Investigations were conducted and the claimant taken through and this was established in that;

- a) That claimant did admit to have administered the corporal punishment to the student Peter Njoroge;
- b) That two other students had witnessed the claimant administering the corporal punishment to Peter Njoroge;
- c) That the scars from the injuries inflicted by the claimant were still visible on his body; and
- d) The claimant had taken the student to a dispensary for purposes of tending to the injuries inflicted when administering the corporal punishment.



10. The matter was heard by the County Disciplinary Committee where he was found culpable and a recommendation for disciplinary action against him made.
11. He was issued with a letter of interdiction indicating the charges against him. Later, he was invited to a disciplinary hearing on September 16, 2019 where he admitted the charges and a decision for dismissal of the claimant arrived at.
12. He was granted an opportunity to appear before the Review Committee on January 26, 2021. The dismissal was upheld.
13. Further, the respondent avers that as a statutory body it is mandated to uphold high standards of professionalism and realize high standards of integrity and honesty in the teaching service, which it fully discharged in the present case.
14. Again, the respondent avers that the Republic of Kenya being a member state and a signatory to the following conventions is bound to the following:
  - A. *United Nations Convention on the Rights of the Child:*
    - "Article 19
      - a. States parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian (s) or any other person who has the care of the child.
    - Article 28
      - (2) States parties shall take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present convention.'
  - B. *General comment No 8 of 2006*
    - b. "Para 11. The United Nations Committee on the Rights of the child defines corporal punishment to mean "...any punishment in which physical force is used and intended to cause some degree of pain or discomfort, however light. Most involves hitting ("smacking", "slapping", "spanking") children, with the hand or with an implement – a whip, stick, belt, shoe, wooden spoon, etc..."
  - C. *Abidjan Principles-* which forms as a reference point for Governments, educators and education providers when debating the respective roles and duties of states and private actors in education.
    - a. "Para 55...The minimum standards (applicable to private instructional educational institutions) should address the following dimensions... (h) discipline and the prohibition of corporal punishment..."
15. The issues for determination therefore are;



1. Whether the termination of the claimant by the respondent was wrongful, unfair and unlawful.
  2. Whether the claimant is entitled to the relief sought.
  3. Who bears the costs of this cause.
16. The 1st issue for determination is whether the termination of the claimant by the respondent was wrongful, unfair and unlawful. The claimant in his written submissions submits a case of unlawful termination of employment. It is his case that his dismissal from employment was draconian and not in tandem with the offence committed. It was also not cognisant of the circumstances belying the event of discipline relating to master Peter Njoroge.
  17. The claimant further submit that various disciplinary action is available and these are applied dependent on the circumstance of the case. These are;
    - a) Oral warning,
    - b) Written warning/notice
    - c) Suspension
    - d) Demotion.
    - e) Pay cut
    - f) Dismissal/discharge
  18. It is his further submission that dismissal is the ultimate disciplinary action and is imposed in cases of most serious offences particularly on integrity.
  19. The claimant's further submits that he had had her blemish free stint of service from 1998 and rose through the ranks to the position of Deputy Principal in the respondent's establishment. This unfortunate incident was a one off case and the respondent was always duty bound to balance the interest of the student and school disciplinary processes against that of a faithful servant.
  20. The claimant submits and reiterates his case that a finding of culpability in the circumstances is unfair and unlawful. His sentence was excessive, harsh and draconian bearing in mind all the circumstances of his case.
  21. The respondent's written submission reiterates her case that the claimant was found culpable of having administered corporal punishment thereby injuring the student.
  22. She further recites her reliance on, *inter alia*, various international conventions to wit; [\*United Nations Convention on the Right of the Child. General Comment No 8 of 2006 Abidjan Principles\*](#) on duties of state and private actors in education, paragraph 65. Article 53 (1) of the [\*Constitution of Kenya, 2010\*](#). Section 13 (1) of the [\*Children Act\*](#) Section 36 of the [\*Basic Education Act\*](#)
  23. I find that the respondent has a case in support of the rights of the child against corporal punishment in the education sector and education institutions. However, the claimant's case and submissions makes larger sense. His plea and submission that the punishment meted out on him was not proportionate to the offence committed holds water.
  24. It is on record that the student involved always had disciplinary issues overshadowing his school life. This was not the first incident involving his misconduct. Of the many boys found sleeping during prep time, the others partook the disciplinary process and continued their lives as students. It was only



Peter Njoroge who decided to carry this a notch higher thereby creating all this saga and melodrama. It would be utterly wrong to short circuit a long and well-guarded career because of this one off incidence. I agree with the claimant that the punishment was excessive in the circumstance. Other alternative punishments, or even parole were available and applicable. I therefore find a case of unlawful termination of the employment of the claimant by the respondent and hold as such.

25. The 2nd issue for determination is whether the claimant is entitled to the relief sought. He is. Having won a case of unlawful termination of employment, he becomes entitled to the relief sought.
26. While on this, the next issue would be the relief available to the claimant in the circumstances. His prayer is that he be reinstated to employment. So, is this feasible in the circumstances? I think it is. The respondent is a massive institution and is able to relocate the claimant to any other school nationally without any prejudice to its operations. The claimant on the other hand has a right to pursue his career which had only lasted about a decade before this unfortunate incidence. It would only be fair if he is allowed to pursue his career and life into the future.
27. Again, this would not in any way prejudice the respondent, or at all. She has space galore to implement this. She is a national enterprise. This also propels the public good of secure employment anticipated by all for social security.
28. I am therefore inclined to allow the claim and order relief as follows;
  - i. That the termination of the employment of the claimant by the respondent was wrongful, unfair and unlawful.
  - ii. That the claimant be and is hereby reinstated to employment.
  - iii. That the claimant be and is hereby ordered to report back to work on November 1, 2022 at 800hrs.
  - iv. Eight (8) months compensation for unlawful termination of employment Kshs 82,650.00 x 8 =..... Kshs 661,200.00  
Total of claim.....Kshs 661,200.00
  - v. The costs of this cause to be borne by the respondent.

**DATED AND DELIVERED AT NYERI THIS 31<sup>ST</sup> DAY OF OCTOBER 2022.**

**D.K.NJAGI MARETE**

**JUDGE**

**Appearances**

- 1. Mr. Kiama instructed by Kinyua Kiama & Co.Advocates for the claimant.**
- 2. Miss Kaluai Advocate for the Respondent.**

