



**Obonyo v Teachers Service Commission (Cause E075 of 2021)
[2022] KEELRC 12956 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12956 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE E075 OF 2021
CN BAARI, J
OCTOBER 27, 2022**

BETWEEN

GREGORY ONYANGO OBONYO CLAIMANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

JUDGMENT

Introduction

1. Before court is the claimant's memorandum of claim dated November 1, 2021, and filed on November 5, 2021. The claimant seeks a declaration that his interdiction was unlawful and unfair, a declaration that his subsequent dismissal was unlawful, an order for reinstatement to his previous job designation as a Principal of a Secondary School, issuance of a certificate of service, payment of Kshs 5,612,364.00, cost of the suit and interest thereon.
2. The respondent filed a memorandum of defence dated December 6, 2021, and filed in court on December 10, 2021, wholly denying the claimant's claim and further seeking that it be dismissed.
3. The suit was first heard on the March 16, 2022, when the claimant and a second witness named James Otieno testified in support of his case. They adopted their statements and produced documents filed in support of the claimant's case.
4. On May 31, 2022, the claimant's third witness named Alex Ochieng, was heard in support of the claimant's case, and thereafter, the claimant closed his case.
5. The respondent's case was likewise heard on May 31, 2022, with the respondent presenting one Cecily Muyoki, to testify on her behalf. Ms Muyoki adopted her witness statement of March 15, 2022, and produced a bundle of documents filed in support of the respondent's case, and being the respondent's sole witness, the respondent also closed their case on the same date.



6. Both parties filed submissions in the matter.

The Claimant's Case

7. The claimant's case is that he was appointed a Principal of Kanga Onditi Mixed Secondary School in the year 2018. It is his further case that in January, 2019, he was approached by two teachers, named Mr Victor Jonyo the school's boarding master and Steoth Wekesa the senior teacher, accompanied by a student named Cynthia who complained that she was sick and had spent the whole day in the dormitory sleeping.
8. The claimant states that the school did not have a dispensary and neither did it have a resident female teacher or a matron. The claimant further states that he sent the school watchman, a Mr Alex Ochieng to buy painkillers for the student.
9. The claimant avers that since the student had not eaten, he instructed his nephew, one James Otieno, who lived with him, to give the student some food. The claimant avers that he then retired to bed as he was unwell on the day.
10. The claimant states that on February 7, 2019, the Sub County Director of Education, together with others, came to investigate allegations of carnal knowledge between the student and the claimant.
11. The claimant avers that on March 20, 2019, he was called by the Teachers Service Commission County Director for Migori, with regard to the allegations of carnal knowledge between him and the student, and was asked to write a report on the alleged incident.
12. The claimant avers that on February 13, 2019, he received a letter interdicting him from the service of the respondent. The claimant further avers that upon his interdiction, he was put on half salary.
13. It is the claimant's case that on or about September, 2019, the respondent invited him for a disciplinary hearing which took place at Kisumu's St Triza school.
14. The claimant avers that on June 25, 2019, the Teacher's Service Commission issued him with a dismissal letter thus terminating his employment.
15. The claimant avers that he appealed the decision by the respondent to terminate his service, but his appeal was dismissed.
16. It is the claimant's case that the disciplinary issue subject of this suit, is his first ever since he was employed by the Teacher's Service Commission in 1990.
17. The claimant avers that his termination from employment by the Teacher's Service Commission was unlawful, unfair and amounts to breach of the employment contract and laws.
18. The claimant states that at the time of the termination of his services with respondent, he was not paid any terminal benefits.
19. It is his prayer that his case be allowed and awarded the reliefs listed in his statement of claim.

The Respondent's Case

20. The respondent's case is that in February, 2019, she received a complaint that the claimant had indulged a female student at his residential quarters, who cooked and had a meal at his premises.



21. The respondent states that by virtue of the powers bestowed upon it under the *Teachers Service Act*, 2012, and the Code of Regulations for Teachers 2020, she instituted independent investigations on the matter.
22. It is the respondent's case that her County Director Migori, instructed three officers from the county office to visit Kanga Onditi Secondary School to establish the veracity of the allegations. The respondent further states that the officers commenced investigations by interviewing and collecting documents and statements from various witnesses.
23. The respondent states that her investigation team established that the student had been unwell the entire day on January 28, 2019, and having slept through supper she went to the claimant's residence where he offered her food, which she cooked for herself.
24. The respondent states that the team further established that the student stayed at the claimant's residence for two (2) hours and went back to the dormitory with food that she had cooked; and further that it was only after being probed by her fellow students that she confessed having been at the claimant's residence and that she had gotten the food from him.
25. The respondent avers that following the investigation report, and in line with the Code of Regulation for Teachers, it was recommended that the claimant appears before the County Disciplinary Committee in relation to the incident.
26. The respondent avers that the County Disciplinary Committee convened on February 13, 2019, and the Claimant, the student and a Mr Omondi Victor, appeared before the committee, and gave their respective statements on the allegations made against the claimant.
27. It is the respondent's case that upon examining the claimant and several other witnesses, the committee unanimously agreed that the claimant had a case to answer and disciplinary action should be taken against him. It is the respondent's further case that the claimant was subsequently issued with an interdiction letter which informed him of the allegations against him, and further asking him to submit his written response on the charges within 21 days.
28. The respondent avers that the claimant was invited for a disciplinary hearing, and was informed of his right to present any witnesses he may have. The respondent states that on June 25, 2019, the claimant appeared before the disciplinary panel and the charges were read to him as appearing in his interdiction letter and which charges he admitted to.
29. The respondent states that even after the claimant had admitted to the charges levelled against him, the disciplinary committee proceeded to call four (4) other witnesses to appear before the panel on the issue, and the claimant allowed an opportunity to cross examined each one of them.
30. It is the respondent's case that the hearing culminated in a decision to dismiss the claimant from the service of the respondent. The respondent avers that the decision was promptly communicated to the claimant.
31. It is the respondent's case that the claimant appealed against the decision to dismiss him, and that yet again, he was given an opportunity to appear before the review committee on June 15, 2021, where he admitted that he was aware of the administrative circular No:3/2010, that the student indeed entered into his quarters and had food, and that he had been given an opportunity to cross examine the student in question during the disciplinary hearing.
32. The respondent avers that upon deliberating on the matter the review committee upheld the disciplinary panel's decision to dismiss the claimant.



33. The respondent avers that the claimant had failed as a school administrator who had a duty to role model compliance with the administrative circular issued by the commission.
34. The respondent avers that in handling the allegations made against the claimant, she adhered to the requirements of the Employment Act and the Code of Regulations for Teachers.

The Claimant's Submissions

35. It is submitted that the claimant only pleaded guilty to the charge of allowing a student to visit his house contrary to the Code of Conduct and Ethics for teachers and section 22(2) (a) of the Teachers Service Commission Circular No 3/2010, and not carnal knowledge.
36. The claimant submits that the decision by the respondent was too harsh as he provided health, safety and security to the learner by providing medicine when the sick girl needed it.

The Respondent's Submissions

37. It is submitted for respondent that the claimant was bound by the Codes of Conduct and Ethics as well as the Code of Regulation for teachers, and was bound to adhere to the administrative circulars issued from time to time, hence the assertions made by the claimant during the hearing that they are not bound by the Code of Conduct and Ethics (2015) lacks any foundation.
38. The respondent submits that when carrying out its investigations on the allegations, it established that indeed the claimant did invite the student to his residence and he indeed confirmed that it was true that the student had been to his residence.
39. It is further submitted for the respondent that the claimant had contravened the Code of Conduct and Ethics and the respondent had reasonable grounds to institute disciplinary process against him.
40. The respondent submits that she has discharged the burden required under the Employment Act, and reiterates that the claimant's dismissal was based on proven facts of negligence of duty especially since great responsibility had been bestowed upon the claimant as the head of the institution.
41. It is the respondent's further submission that the claimant was accorded a fair hearing and the opportunity to be heard in compliance with the provisions of the Employment Act and the rules of natural justice.

Analysis and Determination

42. I have considered the rival pleadings, the witnesses' testimonies and the parties' written submissions. The issues for determination on are:
 - i. Whether the claimant was unfairly and unlawfully dismissed.
 - ii. Whether the claimant is entitled to the reliefs sought

Whether The Claimant Was Unfairly And Unlawfully Dismissed.

43. To determine whether or not a dismissal or termination is unfair, the court must evaluate the employer's dismissal/termination procedures coupled with the reasons that informed the dismissal/termination. These have come to be known as the procedural and substantive fairness tests.
44. On the question of procedural fairness, the employer must demonstrate that they complied with their own internal disciplinary policies and manuals, and which policies must align with the requirements of the Constitution, the Employment Act and the Fair Administrative actions Act.



45. These laws, entitle an employee to a fair hearing which includes the right to be informed in a language the employee understands the reasons the employer is considering dismissal/termination and further given an opportunity to make representation and be represented during the hearing and/or explanation.
46. Under the *Employment Act*, 2007, a dismissal/termination is unfair, if the employer's dismissal/termination process falls short of the requirements of sections 41, 43, 45 and 47(5) of the Act. In *Mary Mutanu Mwendwa v Ayuda* [2013] eKLR the court held that the *Employment Act* has made it mandatory by virtue of section 41, for an employer to notify and hear any representations an employee may wish to make whenever termination is contemplated, and is entitled to have a representative present.
47. The claimant was charged with what the respondent termed an infamous conduct, whose details are that he allowed a student into his residential quarters, and having food therein, contrary to the Code of Conduct and Ethics for teachers.
48. It is not disputed that the charges against the claimant were investigated and an interdiction letter issued, which further required that the claimant responds to the charges levelled against him. The claimant was later invited for a disciplinary hearing before the county disciplinary committee, and which he attended accompanied by his nephew (CW2), who was his choice of witness/representative notwithstanding that he was only fifteen years at the time.
49. The respondent's further case, and which was confirmed during the oral hearing by both sides, is that upon the committee arriving at a decision to dismiss the claimant, he was yet again informed and allowed to appeal against the decision to dismiss him from the service of the respondent.
50. In *Kenya Union of Commercial Food and Allied Workers v Meru North Farmers Sacco Limited* [2013] eKLR the court held that the right to be accorded a hearing and be accompanied by a fellow employee or union representative during the hearing is a sacrosanct right.
51. Further, in *Silvester Malei Kyengo v Kenya Meat Commission* (2019) eKLR the court stated as follows on termination procedure: -
- “In this case the claimant was first served with a show cause letter stating the charges against him, interdicted pending investigation, accorded an oral hearing in the company of another employee of his choice and finally served with a termination letter confirming that his defence was considered but his services terminated for reasons cited in the letter. Such procedure in my view passes the test of procedural fairness and I so hold”
52. The court in *Hosea Akunga Ombwori v Bidco Oil Refineries Limited* (2017)eKLR again expounded on the provisions of section 41 in the following words:-
- “To satisfy the requirements of section 41 of the *Employment Act*, 2007, an employer issues what is called in ordinary parlance a show cause notice/letter. Such a letter or notice should outline the allegations or charges against the employee and also request him to respond within a reasonable time.
27. The notice also ought to inform the employee that disciplinary action which might lead to termination of employment is under consideration. In other words, the notice should be set out in clear terms”.



53. In my view, the chronology of the foregone events is an illustration that the respondent made every effort, and indeed complied with the mandatory requirements of section 41 of the *Employment Act* in respect of dismissal/termination procedure.
54. I find and hold that the claimant’s dismissal met the procedural fairness test.
55. On the issue of substantive fairness, the court must test the reason(s) put across and which informed the dismissal of the claimant/employee. The question on this limb is whether the reasons for dismissal are fair, valid and justified. In *Charles Musungu Odana v Kenya Ports Authority* [2019] eKLR the court stated,
- “It is now clear that the burden placed on an employer by section 43 of the *Employment Act* is to establish a valid reason that would cause a reasonable employer to terminate employment.” The Court of Appeal affirmed this position in its decision in *Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another* [2017] eKLR by citing with approval the following excerpt from the *Halsbury’s Laws of England*, 4th Edition, Vol 16(1B) para 642:
- “In adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; 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 response to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair.”
56. Further in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR the court held:
- “..... The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47 (5), amongst other provisions.”
57. In *British Leyland v Swift* (1981) IRLR 91, Lord Denning describe the test of what a reasonable employer could or could not do in the following words:
- “The correct test is: was it reasonable for the employers to dismiss?
- If no reasonable employer would have dismissed him, then the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair.....”
58. The charges levelled against the claimant only relate to having allowed the student to his house and giving her food, and which charges the claimant admitted both at the disciplinary hearing and when giving his evidence before this court.
59. The issue of carnal knowledge was not one of the charges against the claimant and did not inform the decision to dismiss him. The claimant cannot thus rely on the fact that he was not charged, or that there was no prove of him having had carnal knowledge with the student as the basis upon which this



court should declare his dismissal unfair. The latter allegation is criminal in nature, and could only have been proved before a criminal court and not this court or the disciplinary committee.

60. The claimant being the school principal, should have led by example in ensuring compliance with the employer's Codes of Conduct and Ethics and other laws and regulations that seek to protect students from would be sexual predators.
61. To declare the respondent's decision harsh as suggested by the claimant, would amount to discouraging the respondent's effort to ensure students are safe from sexual abuse, and other forms of immoral conduct by persons they should otherwise trust the most -their teachers.
62. The respondent's Code of Conduct and Ethics expressly prohibited visits to teachers' quarter by student for obvious reasons. That the claimant admitted violating the code is in itself sufficient, valid and justified reason for his dismissal.
63. In light of the foregoing, I have no doubt in my mind that the claimant's dismissal met both the procedural and the substantive fairness tests. The dismissal is fair, and I so hold.

Whether the Claimant is entitled to the reliefs sought.

64. The claimant in his memorandum of claim, seeks a declaration that his interdiction was unlawful and unfair, a declaration that his subsequent dismissal was unlawful, an order for reinstatement to his previous job designation as a Principal of a Secondary School, issuance of a certificate of service, payment of Kshs 5,612,364.00, cost of the suit and interest thereon.
65. The court has found the claimant's dismissal fair. in the circumstances, the prayer that his interdiction and subsequent dismissal be declared unlawful and unfair fails and are dismissed, similar to the prayer for reinstatement.
66. The prayer for payment of Kshs 5,612,364.00 is particularized to include unpaid half salary for the period of interdiction, damages for wrongful dismissal, payment in lieu of notice and gratuity.
67. Having been found culpable of the charges against him, the claimant is not entitled to payment of withheld salaries for the period of interdiction. The payment would only be payable where an employee is cleared of any wrong doing, premised on the reason that an interdiction period, is a time when an employee did not render any services.
68. The claim for damages for unfair dismissal also fail on account of a finding of a fair dismissal.
69. Finally, the claimant did not prove that he was owed a gratuity which is usually only payable where it is provided as an express term of a contract of employment.
70. A certificate of service is a statutory requirement that an employee is entitled to irrespective of the reasons for his/her separation with the employer. In this regard, the respondent is ordered to issue the claimant with a certificate of service within 7 days of this judgment.
71. In conclusion, the claimant memorandum of claim is without merit and is hereby dismissed in its entirety, save for the order for issuance of a certificate of service.
72. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 27TH DAY OF OCTOBER, 2022.

CHRISTINE N. BAARI



JUDGE

Appearance:

Mr. Oduor h/b for Ms. Akinyi for the Claimant

Mr. Mulaku present for the Respondent

Christine Omollo- C/A

