



**Teachers Service Commission v Ali (Civil Appeal E059 of 2020)
[2022] KEELRC 12964 (KLR) (27 October 2022) (Judgment)**

Neutral citation: [2022] KEELRC 12964 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CIVIL APPEAL E059 OF 2020
MN NDUMA, J
OCTOBER 27, 2022**

BETWEEN

TEACHERS SERVICE COMMISSION APPELLANT

AND

ALI ABDULLAHI ALI RESPONDENT

*(Being an Appeal against the Judgment and consequent orders of
Hon G Mmasi, Senior Principal Magistrate, Milimani in Nairobi
in CMEL Cause No 490 of 2018 delivered on 18th September, 2020)*

JUDGMENT

1. The appellant, Teachers, Service Commissions (TSC) being dissatisfied with a judgment of Hon G M Masi, Senior Principal Magistrate delivered on September 18, 2020 filed this appeal. The grounds of appeal are set out in the Memorandum of appeal dated October 6, 2020 as follows: -
 1. That the learned Magistrate erred in law and in fact in finding that the Respondent's termination was unjustified, unlawful and unprocedural;
 2. The learned Magistrate erred in law and fact when she failed to take into consideration the Appellant's evidence tendered through material on record, its witnesses and submissions which were all before the Honourable Court and in so doing reached an irregular and unlawful finding.
 3. The learned Magistrate erred in law by failing to appreciate that the standard of proof in quasi-judicial proceedings is not the same as those before a Court of law, thereby placing a higher evidential burden on an internal disciplinary process for professional misconduct.



4. the learned Magistrate erred in law by awarding the Respondent general damages thus going against the principles of granting an award of compensation as set out under Section 49 and 50 of the Employment Act;
 5. The learned Magistrate erred by awarding the Respondent twelve (12) months' salary as damages for unfair termination without giving any legal or reasoned justification and/or explanation.
 6. The learned Magistrate erred in law by awarding the Respondent Salary from the date of dismissal to the date of judgment, when the employer-employee relationship had terminated, contrary to the provisions of the Employment Act, 2007.
 7. The learned Magistrate erred in law and in fact by awarding the Respondent salary for the period of interdiction when no service had been rendered by the Respondent during the said period.
 8. The learned Magistrate erred in law by ordering reinstatement of the Respondent thereby going against the well settled principle of mutuality of obligations in a contract of employment and the provisions of the Employment and Labour Relations Act specifically the proviso under Section 12(3) (vii);
 9. The learned Magistrate erred by issuing contradictory reliefs in awarding the Respondent compensation for unfair termination as well as ordering his reinstatement; and
 10. The learned Magistrate erred by giving an alternative, award of payment of anticipated salary until retirement in lieu of reinstatement, which award is not contemplated in law and neither was it pleaded.
2. As guided by the decision of the Court of Appeal in *Selle v Associated Motor Boat Company Limited* [1968] EA 123 where Sir Clement De Lestang stated: -

“This Court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it has neither seen nor heard witnesses and should make due allowance in this respect.

However, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances on probabilities materially to estimate the evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally,”

This Court proceeds to evaluate the evidence adduced before the Court aquo minded that this Court did not have the advantage of listening to the witness directly and therefore could not fully assess the credibility of the witnesses thereof and further aware that the Court of Appeal should not vary or set aside the judgment of the trial Court merely because it would have arrived at a different conclusion.

3. The decision may only be interfered with if the trial Court gravely misconceived the facts and the law applicable and also failed to consider material facts and law applicable leading to miscarriage of justice.
4. The facts of the case are that the respondent was a P1 teacher TSC No 343XXX employed in the year 1994. He worked in different primary schools until he was dismissed from service on August 3, 2009 on allegations of having carnal knowledge with a child. Soon after dismissal, the respondent suffered from a mood disorder known as Schizoaffective from 2010 to December 19, 2017. The respondent



was granted leave to file the suit out of time pursuant to a ruling of the Court delivered on September 29, 2018 in Miscellaneous Application No 36 of 2016 by Hon Lady Justice Maureen Onyango.

5. The respondent alleged that the dismissal from service was unlawful and unfair in that there was no valid reason to dismiss him from service and that the appellant did not follow a fair procedure in effecting the dismissal.
6. The Appellant on the other hand contends that it had a valid reason to dismiss the respondent from employment and that it followed a fair procedure in dismissing the respondent.
7. During trial, the respondent testified in support of his case whereas the appellant called two witnesses. The claimant relies on a witness statement dated October 16, 2018 as his evidence -in- chief.
8. From the record, the respondent testified under oath that in 2006, he was transferred to Rhamu DEB School. That a student (SHA) made an allegation against him that he had defiled her on several occasions and that she had become pregnant as a result of the sexual assault. That he was taken through various disciplinary sessions where the complainant and her guardian failed to attend. That the respondent requested Teachers Service Commission to await the complainant to give birth and a DNA test to be conducted. The respondent denied that he had any canal knowledge of the pupil stating that on the dates he is alleged to have defiled her being 14th, 15th and 16th November 2017, he was invigilating Kenya School of Primary Education (KCPE) at Alfrizan Primary School which was 5 kilometers from his station.
9. The respondent testified that the child was born but the Teachers Service Commission proceeded with the disciplinary hearing without requesting a DNA test to be conducted on the complainant. That the child who was born was at the time of the hearing of the case is in class 3 at Rhamu DEB Primary School.
10. The respondent testified that the Head teacher of Alfrizan Primary School was called at the disciplinary hearing and he confirmed that the respondent was invigilating exams at the school on the days he is alleged to have defiled the complainant.
11. The respondent stated that he was found guilty of the misconduct, without any tangible basis having been denied opportunity to exonerate himself vide a DNA test. The respondent testified that at the time of dismissal he was a teacher and earned Kshs 23,304. That no report of defilement was made to the police and no Occurrence Book (OB) number was produced before Court. The respondent testified that he was married with six (6) children as at the time of allegation and could not have taken the complainant to his house as she had alleged since his children and wife were at home.
12. DW 1, Ahmed Hassan testified for the Appellant. From the record, DW 1 relied on a witness statement earlier recorded. DW 1 stated that he was the Head Teacher of Rhamu Primary School. DW 1 testified that he was informed that the respondent had a relationship with the complainant. That the respondent was her class teacher. DW 1 stated that he was informed by the Education Officer who had received the information from the guardian of the girl. DW 1 stated that he spoke to the girl's mother who confirmed that the pupil was pregnant. That he questioned the respondent who denied the allegations. DW 1 said he questioned the girl in the presence of the Deputy Head Teacher and she stated that the respondent induced her to have sex with her on the promise that he would give her better marks and exam materials. DW 1 stated that investigations were conducted by the District Education Officer (D.E.O) and a team of investigators. That they all wrote statements. That the respondent was interdicted after the investigation. DW 1 stated that two Management Board meetings were convened by himself for that purpose. That the complainant did not attend the meetings but the respondent



- attended the second meeting. The Board did not discuss the matter. DW 1 stated that he attended the disciplinary meeting convened by Teachers Service Commission and the respondent was present.
13. Under cross-examination, DW 1 stated that he became Head Teacher of Rhamu DEB in 2005. That the offence was committed in 2007 but came to light in 2008. That the defilement took place on 15th, 16th and 17th November, 2007.
 14. DW 1 stated that the respondent was invigilating examinations at Alfrizan primary school which was 3 kilometers from Rhamu DEB Primary School between 12th and 15th November, 2007. That investigators walk or ride to the school. DW 1 stated that he reported the matter to the police but the respondent was not arrested. DW 1 did not have any Occurrence Book (OB) report. DW 1 stated that he did not know if the pregnancy was carried to full term. DW 1 stated that the complainant and the guardian did not attend the disciplinary hearing at the Teachers Service Commission. DW 1 stated that proper investigations were not conducted. DW 1 stated that he was termed unreliable witness by the disciplinary Committee. DW 1 said he had no personal vendetta against the respondent.
 15. DW 2 was Lily Oriema an Assistant Deputy Director of Teachers Service Commission. She relied on a witness statement dated 30th August, 2019 as her evidence in chief. DW 2 told the Court, the respondent appeared before them accused of having immoral case with a pupil and the committee decided to dismiss the respondent. That the pupil did not appear before them. Other witnesses appeared before them and were asked questions by the respondent. That the Committee considered a statement of the pupil and that of other witnesses in arriving at the decision. DW 2 said they also relied on an investigation report by the District Education Officer and his investigation team. DW 2 said they did not have the report of the investigation team. DW 2 stated District Education Officer made decision to interdict the teacher. DW 2 stated that they gave the pupil and the guardian two chances to appear before them but they did not turn up.
 16. DW 2 stated that evidence of the pregnancy was not tendered before them. DW 2 stated that District Education Officer did not appear before the disciplinary committee also as a witness. DW 2 said the respondent did not wish to call any witness. DW 2 stated that the Disciplinary Committee did not order for a DNA test and it was not a requirement that an accuser be present.
 17. In his judgment, the trial magistrate, upon an analysis of the testimony by PW 1, DW 1 and DW 2 stated as follows: -

“To this Court’s mind, the District Education Officer’s report and that of school’s management Committee was in the respondent’s own statement inconclusive. DW 2 was also categorical that no proof of the pregnancy was presented before it which leads the Court to wonder what the basis of the termination of the employment was seeing that the complainant was not present before it to present her case.”
 18. It is evident that through out the investigation, at the school Board of Management level, at the level of the District Education Officer’s investigation Committee and at the Disciplinary Committee before Teachers Service Commission, the respondent was never given an opportunity to face his accuser. He was instead faced with hearsay and double hearsay testimony of third parties despite the demand by the respondent to be given opportunity to face his accuser and for a DNA test to be conducted to provide conclusive evidence whether he was the father of the child born by his accuser or not.
 19. There is no witness except the pupil who had direct evidence against the respondent. Failure to have that evidence adduced in the presence of the respondent at every stage of the process left the Court with no evidence other than that provided by the respondent that he did not defile the pupil; that he had



- no opportunity to defile the pupil; having been invigilating Kenya Certificate of Primary Education (KCPE) examination in another school on the dates it was alleged he had defiled the pupil . The Court believes that failure by the authorities and the Guardian of the pupil to allow a DNA test to be conducted to exonerate or incriminate the respondent was fatal to the case of the Appellant.
20. The Court arrives at the conclusion that had the DNA test been conducted, it probably would have exonerated the respondent.
 21. The Court finds just like the trial magistrate did, that Teachers Service Commission had no valid reason in terms of Section 43(1) and (2) read with 45(1) and (2) of the *Employment Act*, 2007 to dismiss the respondent from his employment. The Teachers Service Commission squandered the opportunity to follow a fair process in terms of Section 41 of the *Employment Act*, by failing to utilize the best evidence available by subjecting the respondent to a DNA test, despite his insistence as against the child born by his accuser who had through 3rd parties testified that the respondent was the father of her child and that she had no sexual intercourse with any other person, other than the respondent.
 22. The omission by the respondent led to a grave failure of justice as was correctly found by the trial Magistrate. Following the decision in *J.S.M. v E.N.B.* [2015] eKLR, the Court finds no reason to differ with the decision of the trial magistrate. Applying the yardstick of the burden and standard of proof, as the Court of Appeal stated in *Kamweru v Kamweru* [2000] eKLR the Teachers Service Commission failed to discharge the *onus* placed on it.
 23. Accordingly, the Court finds the dismissal of the respondent by the Appellant was unlawful and unfair and dismisses the appeal on the issue of liability.

Relief

24. In the final orders of the trial Court, the Court granted the following reliefs to the respondent: -
 - (1) A declaration be and is hereby made that the claimant's termination was unlawful.
 - (2) General damages in the amount of Kshs 2,000,000.
 - (3) I month salary in lieu of notice in the sum of Kshs 23,363.
 - (4) Damages for unfair termination in the sum of Kshs 280,356.
 - (5) Salary from 3/8/2009 to-date in the sum of Kshs 3,107,279.
 - (6) Salary during interdiction from 2013/2008 to 3rd August, 2009 (17 months in the sum of Kshs 397,371.
 - (7) An Order for the immediate reinstatement of the claimant to his employment.
 - (8) In the alternative to re-instatement, the payment of salary until the date of retirement.
 - (9) Costs of the suit.
25. The learned trial magistrate did not consider nor provide justification for the specific reliefs he awarded the respondent except with respect to the award of damages in the sum of Kshs 280,356 which was calculated on the basis of the equivalent of the respondent's twelve (12) months salary in terms of Section 49 of the *Employment Act*, 2007.
26. The Magistrate also in passing his judgment stated that the respondent became sick from the date of suspension and had been out of employment from 3rd August, 2009, the date of termination. He then proceeded to award the respondent lost salary for a period of 11 years from 3rd August, 2009 to the



date of judgment in the sum of Kshs 3,107,279. The award of General damages in the sum of Kshs 2,000,000 was not afforded even a sentence prior to the actual award in the final clause. This applies to the award of salary during the period of suspension from 20th March, 2008 to 3rd August, 2009 a period of 17 months.

27. Equally, the magistrate did not mention the issue of reinstatement at all nor did he consider the merits and demerits of the relief prior to making the actual award of reinstatement in the final paragraph of the judgment. The Order for reinstatement is not made in lieu of the award of damages under clauses 2, 4, 5 and 6 above. Reinstatement was indeed granted, it would appear, in addition to the raft of reliefs set out and granted before it in the judgment.
28. In the Court of Appeal decision in *Co-operative Bank of Kenya Limited v Banking Insurance and Finance Union* [2016] eKLR, the Court of Appeal before Makhandia, Ouko and M’Inot JJA stated: -

“The next issue for consideration is whether having found that the claimant’s summary dismissal was unlawful, the learned judge was right in making an Order for reinstatement. Section 49 of the *Employment Act* gives the remedies for wrongful dismissal and unfair termination. In the event of an unjustified summary dismissal or termination of contract of employment, the employer may be ordered to pay the employee the wage he would have earned had he been given the notice period prescribed by the Act on the contract of service or pay the employee’s salary or wage up to a maximum of 12 months.

By dint of Section 49(3) of the Act, where the summary dismissal or termination of the employee is unfair, he may be reinstated and treated in all respects as if the employment had never been terminated, or he may be re-engagement in work comparable to his work prior to the dismissal, or other reasonable suitable work, at the same wage.

Our understanding of the Act is that prescribed remedies, including reinstatement are discretionary rather than mandatory remedies, to be granted on the basis of the peculiar facts of each case..... Section 49(4) sets out some 13 considerations which the Court must take into account before determining what remedy is appropriate in each case.....”

What all the above means is that before exercising the discretion to determine which remedy to award, the Court must be guided by the above comprehensive list of considerations. With respect, in this appeal, the learned Judge did not, advert to any of those considerations before deciding on reinstatement as a remedy. The principles on which this Court acts when it is called upon to interfere with exercise of discretion by the trial Court are well settled. The Court will not interfere unless it is satisfied that the decision in question was clearly wrong because the learned Judge misdirected himself or because he considered matters which he should not have considered or failed to consider matters he should have considered. (see *Mbogo & another v Shab* [1968] E.A. 93). There must be a very valid reason why the statute has set out such a comprehensive catalogue of considerations to be borne in mind before determining the appropriate remedy to award cases of unfair summary dismissal or termination of employment.”

29. In the present case, the trial Magistrate failed to take into consideration the provisions of Section 49 of the Act, in awarding the raft of reliefs to the respondent.
30. The trial Court consequently gravely misdirected itself hence occasioning the appellant immense injustice by duplication and compounding the reliefs of damages, lost income; and reinstatement to remedy the loss suffered by the respondent as a result of the unlawful and unfair dismissal.



31. The Court will consider the issue of reliefs afresh taking into account the facts of the case as discerned from the record of appeal.
32. In the present case, the respondent earned Kshs 23,364 at the time of dismissal. The respondent had served the Appellant from 1994 up to the date of termination on 3rd August, 2009, a period of about 15 years. The respondent had no adverse record for the entire period of employment until when he was accused of the matters that led to the dismissal. The respondent suffered serious sickness as a result of the trauma arising from the suspension and termination for a period of many years leading to his inability to file this suit until the year 2017. The respondent was unable to get alternative employment until the time of determination of this suit.
33. Considering the testimony by the respondent himself regarding his mental health status and considering the prolonged period of absence from the teaching profession, the Court does not consider this an appropriate case for reinstatement.
37. The case warrants an award of maximum compensation in terms of Section 49(1) (c) of the equivalent of twelve months salary in compensation in the sum of Kshs (12 x 23,363) = 280,356.
38. The respondent was also entitled to the award of one- month salary in lieu of notice in the sum of Kshs 23,363, as correctly awarded by the learned trial magistrate. The Court confirms this award.
39. It is also not in dispute that the respondent did not receive salary from the date of suspension on 20th March, 2008 to the date of dismissal, a period of 17 months. The respondent is therefore entitled to the award of Kshs 397,171 awarded by the magistrate in this respect and the Court confirms that award accordingly.
40. The award of General damages in the sum of Kshs 2,000,000 has no basis and is set aside by the Court. The Court equally sets aside the award of salary from 3rd August, 2009, the date of termination, to the date of judgment in the sum of Kshs 3,107,279 since the award has no basis in law. The respondent did not teach during that period and this award is not supported by Section 49 of the Employment Act, 2007 and the decision of the Supreme Court in Kenfreight case which is binding to this Court.
41. In the final analysis, this Court sets aside the award by the trial Court and replaces it with the following final award to the respondent against the appellant.
 - (a) Kshs 280,356 in compensation.
 - (b) Kshs 397,171 being unpaid salary during interdiction.
 - (c) Kshs 23,363 in lieu of notice.
Total Awards – Kshs 700,890.
 - (d) Interest at Court rates from date of judgment till payment in full in respect of (a) above and from the date of termination (August 3, 2009) in respect of (b) and (c) above.
 - (e) The appellant to pay the costs of the suit before the trial Court and this Court.

DATED AND DELIVERED (VIRTUALLY) AT NAIROBI THIS 27TH DAY OF OCTOBER, 2022

Mathews N. Nduma

JUDGE

Appearances

M/s Manyase for Appellant



Mr. Ayieko for Respondent
Ekale – Court Assistant

