



REPUBLIC OF KENYA



**KENYA LAW**  
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**Rotich v Teachers Service Commission (Employment and Labour Relations Cause  
25 of 2020) [2022] KEELRC 13410 (KLR) (21 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13410 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 25 OF 2020**

**NJ ABUODHA, J  
NOVEMBER 21, 2022**

**BETWEEN**

**JOEL KIPTOO ROTICH ..... CLAIMANT**

**AND**

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

**JUDGMENT**

1. The claimant herein, Joel Kiptoo Rotich commenced this proceedings by way of a statement of claim dated April 22, 2020 and filed in court on May 8, 2020. He prayed for judgement against the respondent, Teachers Service Commission for;
  - a. A declaration that the dismissal of the claimant from employment and the subsequent removal of his name from the register of teachers was unfair, unprocedural and wrongful
  - b. A declaration that the claimant be forthwith reinstated as an employee of the respondent and his name be reinstated in the register of teachers
  - c. Payment of salary in full from the date of dismissal until reinstatement
  - d. Damages for unfair termination
  - e. Costs of the claim

**The Claimant's Case**

2. The claimant's claim in his statement of claim is that he was employed by the respondent as a P1 teacher on February 1, 1994, a position he held until June 20, 2017 when he was dismissed from employment on malicious and false allegations made against him.



3. The claimant avers that he was posted to [particulars withheld] on August 8, 2013. He further avers that an allegation was made against him that he had carnal knowledge on June 3, 2016 at around 1.30pm with his pupil, JS who was 20 years old at the time.
4. The claimant contends that the said allegations were brought to his attention by the Head Teacher of the school, Mr M on June 8, 2016 in the presence of the Deputy Head Teacher, Mrs G and the teacher in charge of the special unit Mrs O.
5. According to the claimant, in early September 2016, two officers from the County Education Directorate office visited the school without any notice and interrogated the claimant
6. The claimant further avers that on September 19, 2016, the Board of management convened a disciplinary session where the witnesses were interrogated in the absence of the claimant and that he was later called and interrogated.
7. It is averred that on October 28, 2016, the claimant received a letter dated October 10, 2016 interdicting him from service with effect from September 23, 2016 which was later amended to indicate the interdiction was effective on October 10, 2016.
8. The claimant further avers that pursuant to the said allegations, the respondent instituted disciplinary proceedings against him which were done unfairly as he was not accorded a fair hearing and as a result of which he was dismissed from employment.
9. The claimant faulted the respondent's action of instituting the disciplinary proceedings in September 2016 when the allegations were made against him way back on June 3, 2016.
10. The claimant maintained that he did not commit the disgraceful act and that the respondent proceeded to act on the unproved allegations that were made against him.
11. According to the claimant, the services offered by him are unique and he is unable to mitigate the dismissal from service having worked for 23 years and being aged 47 years he cannot be employed as a teacher in a private school since his removal from the register denies him such opportunities hence his prayer for reinstatement to the register of teachers and to employment.

### **The Respondent's Defence**

12. The respondent filed a memorandum of defence dated October 15, 2020 on October 19, 2020 .
13. In that defence the respondent denied the claim and averred that in handling the claimant's disciplinary case, it acted within the confines of the law, principles of natural justice and public interest and that, its decision to dismiss the claimant from service and remove his name from the register of teachers was fair, procedural and lawful.
14. The respondent stated that on June 22, 2016, it received a letter from concerned parents at [particulars withheld] alleging that the claimant was sexually molesting a student in the special unit and that further, through its Uasin Gishu County office , it received a letter dated August 29, 2016, from TG the head teacher of the school, of the allegations against the claimant.
15. The respondent avers that in compliance with its mandate under the law, it initiated independent investigations to confirm the veracity of the allegations against the claimant, constituted a panel of two officers who visited the school on September 8, 2016 and undertook investigations into the allegations.



16. It was contended that all the preliminary information, encompassing the witnesses' statements and evidence on record pointed to professional misconduct on the part of the claimant contrary to the tenets of the teaching profession.

### **The Claimant's Evidence**

17. The claimant testified on October 14, 2021. His evidence matched the contents of the statement of claim. He adopted his witness statement recorded on April 22, 2020 as his evidence in chief. The claimant explained that on June 3, 2016, he was at work in the school preparing for his lesson at around 1;30pm he went to the store to pick a number of items.
18. The claimant stated that while in the store, JS the alleged victim came to keep her utensils and that the claimant had noticed some materials missing where he asked JS if she had seen a cable which she responded that she had not and he asked her to tell him if she gets the cable.
19. The claimant further stated that he left the store and while at the door, he met teacher N (RW1) who entered the store, found JS and started shouting asking what the girl was doing inside.
20. The claimant testified that he was accused of having carnal knowledge with the said JS and that the County Education Officers went to school and interrogated the teachers, the learner and himself. The claimant stated that he was surprised because he was not told in advance that he was going to be questioned about the allegations levelled against him.
21. He averred that he was interdicted on October 28, 2016 and on May 30, 2017, he was invited for a hearing scheduled for June 20, 2017.
22. The claimant contended that he received the letter inviting him for a disciplinary hearing on June 12, 2017, 8 days before the said hearing and according to the claimant, the panel was very hostile and that it composed of only ladies and the only man present was the one taking notes.
23. The claimant maintained that the panel had an attitude as he was not allowed to ask questions. He alleged that he was not given a fair hearing.
24. He testified that vide a letter dated July 31, 2017, he was subsequently dismissed and removed from the register of teachers and that he appealed the decision, which appeal was also dismissed.
25. The claimant contended that he was dismissed unfairly as the allegations against him were not proved.
26. On cross examination, he admitted that he was in the store with the learner and the door was closed but maintained that the store had windows and was well lighted. He also denied summoning the learner to the store.
27. The claimant conceded that during the disciplinary hearing, he was given time to ask questions. He also stated that he was the only teacher in the school at the time.

### **Respondent's Case**

28. The respondent called NAK who testified as RW1 on February 10, 2022 and adopted her witness statement recorded on October 21, 2022 as her evidence chief. She stated that she was the one in charge of learners with intellectual disabilities at the [particulars withheld].
29. RW1 narrated the events of June 3, 2016 as follows; That at around 1:30pm, she was headed to the special unit to confirm whether the learners had left for home when she found a learner by the name N and on inquiring about the other learner, JS, she was told that she was in the office; she explained that



- special unit had two rooms, an office and a store. According to RW1, she went to the office and did not find her then while heading to the store, RW1 saw the claimant leaving hurriedly. That she entered the store and found JS very terrified and on inquiring what had transpired, the learner told her that she had been molested by the claimant.
30. RW1 stated that she reported the incident to her supervisor Mrs O who advised her to report the incident to the headteacher the following Monday.
  31. She stated that she recorded her statement concerning the incident and the school took up the matter for further investigations. She also stated that she was interrogated by the County Education Officers and also at the respondent's headquarters over the issue.
  32. RW2 was TG the head teacher of [particulars withheld]. She adopted her witness statement dated October 21, 2020 as her evidence in chief.
  33. She averred that she was informed of the incident of June 3, 2016 and that by then she was the deputy head teacher. It was her evidence that she interrogated the learner JS, reviewed the case upon which she resolved to report the same to the headteacher.
  34. RW2 maintained that the JS was interrogated before the incident was recorded in the logbook and signed by the then head teacher Mr M. According to RW2, JS stated that she had been sexually molested by the claimant.
  35. RW2 stated that the head teacher retired thereafter and she was appointed the head teacher and that she continued with the investigations, compiled a report and forwarded to the respondent.
  36. Lawrence Munene Njagi testified as RW3 and introduced himself as a teacher by profession and presently attached to the respondent's headquarters. He adopted his witness statement recorded on October 21, 2020 as his evidence in chief.
  37. According to RW1, a complaint was made against the claimant, that he had sexually molested a mentally challenged learner. He averred that after receiving the report, an investigation was carried and a report was generated which showed that the claimant was guilty of immoral behavior and a recommendation was made for the claimant to be interdicted.
  38. He stated that a disciplinary hearing was thereafter conducted, where the claimant defended himself
  39. It was further contended by RW3 that the JS, also interrogated about the issue and that she was able to comprehend the questions put to her and was not supported while being interrogated by the panel.
  40. According to RW3, the committee found the claimant guilty and recommended termination of his services and his removal from the register of teachers.
  41. RW3 maintained that the claimant was accorded opportunity to be heard at all levels including at the respondent's headquarters
  42. On cross examination with regards to the notice period, RW3 conceded that the regulations require 30 days' notice of hearing and maintained that the claimant proceeded without any protest.
  43. He also stated that the claimant was served with a hearing notice before the County Education Office visited the school on September 8, 2016 to interrogate him.
  44. With that evidence, the respondent closed its case the court directed parties to file written submissions.
  45. The claimant filed his submissions on July 6, 2022. Whereas the respondent filed its submissions on August 8, 2022.



## Determination

46. The court has carefully considered the pleadings, evidence and the rival submissions presented by both sides and considers the issues for determination to be:
- a. Whether the claimant was unfairly, unprocedurally and wrongfully terminated.
  - b. Whether the claimant is entitled to the reliefs he is seeking
48. As regard the first issue, section 45 (1) and (2) of the *Employment Act* makes the following provisions regarding unfair termination of employment—
- (1) No employer shall terminate the employment of an employee unfairly.
  - (2) A termination of employment by an employer is unfair if the employer fails to prove—
    - (a) that the reason for the termination is valid;
    - (b) that the reason for the termination is a fair reason—
      - (i) related to the employee’s conduct, capacity or compatibility; or
      - (ii) based on the operational requirements of the employer; and
    - (c) that the employment was terminated in accordance with fair procedure.
49. The above provision is couched on mandatory terms and is to the effect that an employer must establish that the termination of an employee’s contract of service has been done on the basis of valid and fair reasons(s) and upon following a fair procedure.
50. In the instant case, the respondent averred that it dismissed the claimant from employment after it was established that he sexually molested a learner by the name JS. The court has carefully considered the allegations against the claimant, his evidence in rebuttal vis-à-vis the evidence and testimony by the respondent’s witnesses and is reasonably persuaded that the respondents have established a *prima facie* case in support of the charges that were levelled against the claimant. For instance, the claimant alleges that the store where they were with JS was dusty and that he had to come out to get some fresh air. This begs the question that if the indeed the store was dusty as the claimant alleges why was the door locked while they were inside with JS? This in the court’s view placed the claimant in a very precarious situation. JS though mentally handicapped, the court was informed by both the claimant and RW1 and RW2 that she was able to narrate events sensibly and the she told Naomi (RW1) that the claimant had sexually molested her.
51. Section 140 of the respondent’s *Code or Regulation for Teachers* (CORT) empowers the respondent to take disciplinary action against a teacher who commits among others immoral behavior which included but not restricted to sexual intercourse, sodomy, lesbianism, sexual harassment or flirtation with a pupil. From the evidence, court finds that this was a valid reason to dismiss the claimant
52. Having found that the respondent had a valid reason to terminate the claimant from employment, the next issue that is intertwined with validity of a dismissal is procedural fairness. Section 45 of the *Employment Act* requires that the employer must prove that the employment was terminated in



accordance with fair procedure as was held by the Court of Appeal in the case of *National Bank of Kenya v Samuel Nguru Mutonya* [2019] eKLR where it observed as follows;

“The adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee.”

53. Also, section 41 of the *Employment Act* provides that:-

“Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.”

54. The claimant in his testimony, stated that he was ambushed by the County Education officers on September 8, 2016 when they went to conduct investigations on the allegations in issue and that further he was later invited for a disciplinary hearing 8 days to the hearing date. RW3 when cross examined on the notice period affirmed that the regulations require 30 days’ notice of hearing. Suffice it to say, the claimant stated that he attended that hearing and defended himself although he alleged that the panel was hostile. He never alleged or produced any record to show that he pleaded for more time and was never granted.

55. RW2 and RW4 stated that the claimant attended the disciplinary hearing at the respondents headquarters but was categorical that the claimant chose not to ask questions.

56. The claimant in his testimony stated that he appealed against the findings of the disciplinary committee but the appeal was dismissed. The claimant attended the disciplinary hearing and never pleaded for more time. He listened through the hearing and asked questions. The court therefore finds that the respondent has proved that the dismissal of the claimant was done in accordance with fair procedure as required by section 41 and 45 of the *Employment Act*.

57. Having found that the respondent’s dismissal was grounded on a valid and fair reason, and that there was procedural fairness in terminating his services, it follows that the claimant is not entitled to the reliefs he is seeking and therefore this claim is dismissed with no orders as to costs.

58. It is so ordered.

**DATED AND DELIVERED AT ELDORET THIS 21<sup>ST</sup> DAY OF NOVEMBER, 2022.**

**ABUODHA NELSON JORUM**

**JUDGE ELRC**

