



**Nyamiero v Teachers Service Commission & another (Cause 192 of 2018)
[2022] KEELRC 13143 (KLR) (9 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13143 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
CAUSE 192 OF 2018
S RADIDO, J
NOVEMBER 9, 2022**

BETWEEN

ERICK BIKUNDO NYAMIERO CLAIMANT

AND

TEACHERS SERVICE COMMISSION 1ST RESPONDENT

DALMAS ARWA JOROBO 2ND RESPONDENT

JUDGMENT

1. This Cause was heard on 5 October 2021, 27 January 2022, 8 March 2022, 24 May 2022, 19 June 2022, and 19 September 2022. Erick Bikundo Nyamiero (the Claimant), Brian Misati, and 3 witnesses called by the Teachers Service Commission (the Commission) testified.
2. The Claimant filed his submissions on 6 October 2022, and the Commission on 7 November 2022 (should have been filed and served before 30 October 2022).
3. The Court has considered the pleadings, evidence, and submissions.

Unfair termination of employment

Procedural fairness

4. The Commission initially interdicted the Claimant through a letter dated 17 August 2016.
5. The letter set out the allegations against the Claimant and requested him to make a written response within 21-days (the allegations were in respect to 2013-2014).
6. The Commission thereafter sent the Claimant amended interdiction letters dated 12 September 2016 (allegation date changed to 2014-2015) and 8 December 2016 (indicating the age of the student), and again he was asked to provide written responses (another amended interdiction letter dated 12 April 2017 was also sent to the Claimant).



7. On 2 May 2017, the Commission invited the Claimant to an oral hearing on 23 May 2017 (a reminder invitation was sent on 19 May 2017).
8. The Claimant attended the hearing and was able to make representations. The Commission then notified him of dismissal through a letter dated 15 June 2017.
9. Before the interdiction, the Claimant appeared before the Board of Management on 11 July 2016 and 11 August 2016.
10. The Claimant urged that the hearing of 11 August 2016 did not meet the statutory test because the student he was alleged to have made sexual advances to was not present for purposes of cross-examination.
11. The Claimant further submitted that his defence was not considered because he was dismissed on the day of the hearing on 23 May 2017. In this respect, the Claimant argued that under Regulations 153(3) & (4) of the Teachers Service Commission Regulations, 2015, the decision should have been communicated within 28 days.
12. The Claimant took the position that the Commission was in a hurry to terminate his contract.
13. Procedural fairness within employment is generally underpinned by sections 35(1) and 41 of the [Employment Act](#), 2007. Where the employer has internal protections, it should also abide by the terms of such policy.
14. The Commission informed the Claimant of the charges to confront and allowed both written and oral opportunity to make representations. The proceedings before the Board of Management on 11 August 2016 were preliminary/ investigative in nature and set in motion the formal disciplinary process through the interdiction letter of 17 August 2016.
15. Considering that the proceedings of 11 August 2016 were preliminary/investigative, the Court is of the view that it was not necessary for the Commission to present the student for interrogation by the Claimant and that the failure was not an abrogation of the right to a fair hearing.
16. The Court has also looked at the Regulation cited by the Claimant to assert that his contract was terminated in haste. The provisions set out the outer limits that the Commission could not surpass before making and communicating a decision, and, therefore, the argument by the Claimant is based on a misapprehension of the tenor of the regulations.
17. The Court is satisfied that the Commission complied with the requirements of procedural fairness.

Substantive fairness

18. Sections 43 and 45 of the [Employment Act](#), 2007 demand that when there is a challenge, the employer should prove the validity and fairness of a termination of an employment contract.
19. The allegation that the Commission was expected to prove as valid and fair was that the Claimant was of immoral behaviour in that he sexually harassed a named student on various dates in the years 2014 to 2015.
20. To discharge the burden, the Commission called several witnesses.
21. The Principal of the school the Claimant, was teaching testified that he recorded a statement from the named student wherein he admitted that the Claimant made sexual advances at him. The student's mother was present when the statement was recorded.



22. The student's mother also recorded a statement in which she stated that the student had previously mentioned the allegations to her.
23. The named student admitted in an unsigned note during investigations/proceedings by the Board of Management that the Claimant had made sexual advances to him.
24. During the disciplinary hearing, the student stated that he had been suspended because of having a relationship with a girl student and that he stood by what he had stated in his unsigned statement. The student maintained the same ground when questioned by the Claimant and further indicated that there had been rumours from Form IV students that the Claimant was gay.
25. The student also testified before this Court.
26. During the testimony, he made an about-turn. He stated that it was the Deputy Principal who informed him that the Claimant was gay and asked him to implicate him and that, due to fear, he made the allegations and repeated them during the preliminary investigations before the Board of Management.
27. When the student was asked during cross-examination whether he had been persuaded to alter his statement, he stated that that was not the case. He also admitted that he had recorded a statement before the Principal on 2 August 2016, and in the presence of his mother and further that he had not lied during the disciplinary hearing.
28. The student was steadfast in his story before the Principal, the Board of Management, and the Disciplinary Committee. He only changed tune during the Court hearing. In the filed witness statement, he did not state that the Principal coerced him to implicate the Claimant. He also did not disclose in the witness statement that he was under duress before the Board of Management.
29. The student was likely induced to change the story for purposes of these Court proceedings. Otherwise, he would have disclosed to the Principal, the Board, or the Disciplinary Committee that the Deputy Principal had instructed him to implicate the Claimant.
30. On the state of evidence placed before the Court, the Court has no material to disbelieve the version of allegations as initially made by the student before the Principal, Board of Management and Disciplinary Committee.
31. The Court finds that the Commission had valid and fair reasons to dismiss the Claimant.

Conclusion and Orders

32. The Court finds no merit in the Cause, and it is dismissed with costs.

DELIVERED VIRTUALLY FROM MALINDI, DATED, AND SIGNED ON THIS 9TH DAY OF NOVEMBER 2022.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

For Claimant Mr Nyasimi/Ms Kittony instructed by Nchogu, Omwanza & Nyasimi Advocates

For Respondent Mr Anyuor/Ms Musundi/Me Mulakhu, Advocates instructed by the Teachers Service Commission

Court Assistant Chrispo Aura

