



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CAUSE NO. 249 OF 2018**

**SAMUEL KAMAU KARIUKI..... CLAIMANT**

**VERSUS**

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

**JUDGMENT**

1. Because this case relates to allegations of sexual impropriety on part of a teacher against learners, the names of the learners will be abbreviated for purposes of concealing their identity in terms of Section 76(5) of the Children Act, 2001.

2. The Claimant sued his erstwhile employer, the Respondent, for alleged unfair and unlawful termination from employment. The Claimant averred that he was employed by the Respondent on or around 15<sup>th</sup> January 2013 as a School Principal until his termination while he was serving at Njeng'u Secondary School. The Claimant averred that he received an interdiction letter dated 23<sup>rd</sup> January 2017 from the Respondent's County Director in regards to false allegations of immoral behavior of flirtation after the County Investigating officers visited the school on 9<sup>th</sup> January 2017. The Claimant averred that the letter was null and void as the said officer did not have the requisite authority to initiate the purported disciplinary proceedings. The Claimant averred that he requested for copies of evidence that were to be used against him during the hearing through a letter dated 17<sup>th</sup> January 2017 but was denied the said copies of evidence. He averred that he however wrote a defence letter dated 4<sup>th</sup> February 2017 in response to the interdiction letter in which he raised various questions in regards to a student-teacher relationship and at what time does an immoral behavior towards the student arise as alleged. The Claimant averred that the hearing of the disciplinary case was on 23<sup>rd</sup> May 2017 a mere 15 days after the invitation date which was against Regulation 149(1) of the Code of Regulations for Teachers which allows one month before hearing. The Claimant averred that the Respondent failed to prove the allegations against him at the hearing since the two alleged victims admitted to having been 'couched' on what to write on their statements and as a result their testimonies were nothing but lies. The Claimant averred that the 3<sup>rd</sup> victim was never present during the hearing despite her name appearing on the disciplinary meeting proceedings and the other witnesses Mrs. Mwangi and the BOM Chair were also unable to prove the false claims against the Claimant when the Claimant took them through cross-examination. The Claimant averred that during the hearing the parents of the victims denied having been informed of the alleged victimization by the Respondent. The Claimant averred that he received a dismissal letter on grounds of the mere allegation on 15<sup>th</sup> June 2017 from the Respondent's Secretary/Chief Executive Officer. The Claimant averred that the basis of the false claims of immoral behavior of flirtation was a result of differences between him and the Chairman Board of Management. The Claimant averred that his rights and the Respondent's Regulations were flouted at the disciplinary hearing and that after the hearing he never received any communication within 28 days contrary to Regulation 153(3) and 154(1) of the Respondent's Code of Regulation for Teachers and this again prejudiced his right to appeal and/or review the Committee's decision. The Claimant thus prayed for judgment against the Respondent for a declaration that his dismissal was unfair, illegal, unconditional, null and void; reinstatement into the Respondent's employment; payment of all withheld salaries from the date of interdiction on 23<sup>rd</sup> January 2017; maximum compensation for wrongful dismissal from employment; general damages for malicious defamation of the Claimant for allegedly flirting with students and costs of the suit.

3. The Respondent's defence averred that through its agents, it received information alleging that on diverse dates in the third term of 2016, the Claimant had flirted with some students. The Respondent averred that the alleged act was in blatant breach of Regulation 140(a) of the Code of Regulation for Teachers, Clause 9 of the Code of Conduct and Ethics for Teachers as read together with the Teachers Service Commission Act. The Respondent averred that independent investigations were carried out and a report was compiled and sent to it with recommendation that the Claimant had a case to answer. The Respondent averred that a disciplinary committee meeting was convened and the Claimant was given a chance to cross-examine all the witnesses. The Respondent averred that thereafter it was resolved that the Claimant be interdicted for engaging in immoral behavior with his students. The Respondent averred that the Claimant through a letter of interdiction dated 23<sup>rd</sup> January 2017 was given an opportunity to prepare his defence within 21 days and a disciplinary meeting convened on 23<sup>rd</sup> May 2017. The Respondent averred that the Claimant was invited to present his case and to cross-examine the witnesses present and after evaluating the statements and the oral evidence presented, the disciplinary panel recommended that the Claimant be dismissed from service. The Respondent averred that it communicated the decision of the Committee in good time as the dismissal letter was sent to the address that the Claimant provided during the hearing of his case. The Respondent averred that the Claimant was accorded a fair hearing in accordance with the provisions of the Code of Regulations of Teachers and the rules of natural justice. The Respondent averred that the Claimant is a

habitual offender as he had been interdicted and suspended for 6 months from employment for having carnal knowledge with students in a different school in the previous years. The Respondent averred that it derives its mandate to regulate the teaching profession and ensure its employees maintain the highest degree of integrity, honesty and public morality from Article 237 of the Constitution 2010 read together with Section 11 of the Teachers Service Commission Act. The Respondent averred that the Claimant is not entitled to any salary and/or any allowances for the period he was under interdiction as Regulation 148(h) of the Code of Regulation for Teachers (CORT) prohibits the same. The Respondent averred that the Claimant is also not entitled to salary arrears as the contract between the Claimant and the Respondent ceased due to the Claimant's misconduct. The Respondent averred that it acted fairly, procedurally and lawfully and that the process that was followed conformed to the due process envisaged under the Employment Act, the Teachers Service Commission Act and the rules of natural justice. The Respondent thus prayed that the Claimant's claim be dismissed with costs as the same is devoid of any merit.

4. The Claimant testified and adopted his statement and the list of documents attached to his claim as his evidence in chief. He acknowledged that the school was visited by the officers from County Government who called the teachers and the students but stated that he was not involved. He said that he was summoned to the investigative panel at TSC County Director's office and it was decided that he had a case to answer. The Claimant testified that he was issued with an interdiction letter and was asked to respond within 21 days. He stated that he wrote to the TSC seeking for documents that would be relied on but his letter went unanswered in violation of Regulation 146(6) of CORT. He testified that he wrote his defence in absence of the evidence to be relied on after which he was served with a hearing notice. He stated that he was invited for a hearing and the witnesses were present, however he did not know anything about the witness statements that the witnesses relied on and the Chair determined the kind of questions that the witnesses could answer. He testified that one victim by the name ES had been promised by one Mrs. Mwangi that her fees would be paid so that they would write something against him. He stated that the victim however denied being in a relationship or flirting with him as was captured in the minute and she stated that the statement had been dictated by her class teacher within the County Director's office. The Claimant testified that Ruth Waguthie one of the victims also said that she copied the statement as instructed by Mrs. Mwangi the guidance and counseling teacher and the class teacher of the girls in question. He stated that she said she was not involved in any flirtation and that she was prompted by her teacher to write. He testified that Mrs. Mwangi and the Chairman BOM gave evidence but none of them confirmed the allegations. He said that he requested for documents but they were not availed as required by CORT Regulation 147(4). He testified that the Director was to institute investigations in liaison with the Board of Management but it was not involved on these investigations contrary to Regulation 143(a) of the CORT. He testified that the Chairman of the Board was involved as an accuser as he had requested for money from the Claimant but the Claimant did not give him the money sought and that is where the allegations emanated from. The Claimant stated that the Code of Regulation for Teachers were not complied with as the investigations report was not forwarded to Board by the County Director. He stated that he was not able to appeal the Committee's decision as he received the verdict more than 100 days after it was made and yet he was required to appeal within 90 days. He testified that the 5<sup>th</sup> Schedule provides that he should have received the verdict within 28 days but this was not adhered to and despite writing a letter requesting for the verdict and going the extra mile of visiting the TSC headquarters he got no reply. He stated that after he finally received the verdict he applied for review of the decision but the reply was that he was time barred. He testified that his review was not time barred as he appealed within 90 days from the date of receipt of the said letter. The Claimant confirmed during cross-examination that he had been interdicted before in 1994 and the allegation was that he had carnal knowledge of some students.

5. The Respondent's first witness Rita Wahome an acting Director of TSC adopted her statement and testified that she received a complaint that the Claimant had an affair with students. She stated that she constituted a team of officers to investigate the matter and the team visited the school and interviewed the Claimant, students, non-teaching staff and came up with a recommendation that the Claimant had a case to answer and this prompted further investigations. She stated that she then invited the Claimant to a disciplinary panel which was chaired by her and the cross-examination was done by the Deputy Director. She testified that the Claimant was given a chance to defend himself after which the Committee resolved to interdict him. She stated that the Claimant was invited to a disciplinary hearing after his interdiction and that she was present as a witness in those proceedings. She stated that ES confessed in their presence that the Claimant touched her hips and that the 2<sup>nd</sup> and 3<sup>rd</sup> victims had actually fought because one of them called the other Mrs. SK, SK meaning the Claimant and this piece of evidence was corroborated by the guidance and counselling teacher. In cross-examination she testified that she followed due process in disciplining the Claimant. She stated that the BOM was involved as its Chair was present in the disciplinary hearing. The Respondent's second witness Mr. Lawrence Kigen testified that he was familiar with the case. He stated that he works at the Respondent's disciplinary division. He adopted his statement in evidence in chief and confirmed that the Claimant appeared before the disciplinary panel and was given an opportunity to defend himself. He stated that the Claimant registered his name and address on the registration form on the day of the hearing. He testified that the disciplinary proceedings resulted in the finding of fault and the Claimant was thereafter dismissed. He testified that the dismissal letter was sent to the address that the Claimant gave at the hearing. He stated that the dismissal was warranted as the procedure was followed per the Code of Regulation for Teachers. He stated that the Claimant was not entitled to salary at the time of interdiction as per Regulation 148. He testified that at the hearing the witnesses seemed to have recanted their evidence. He stated that the notice given to the Claimant to appear to the disciplinary panel was two weeks instead of 30 days as per Regulation 149(1). That marked the end of oral testimony.

6. The Claimant submitted that the process leading to his dismissal was replete with gross violations of the Law. He submitted that the disciplinary panel which heard his case was not legally constituted as the members of the panel were 4 instead of 5 as provided for by Regulation 151(4) of the TSC Code of Regulation for Teachers and the outcome therefore was illegal, null and void. The Claimant submitted that Regulation 146(3)(c) was also violated as the County Director did not institute investigations in liaison with the Board of Management. The Claimant submitted that he was also not informed of the allegations and was not given sufficient details to answer contrary to Regulation 146(6)(b). The Claimant submitted he was accused of flirtation with no details and therefore did not have sufficient details to prepare his defence. He submitted for example there were no details of specific dates and/or time when the so called flirtation occurred and no details of specific flirtation to allow him to prepare his defence. The Claimant submitted that this was an ambush which could not facilitate any proper defence and was thus illegal, unfair and against rules of natural justice. He submitted that he was not afforded sufficient time to mount a defence as he was notified of the hearing within a short notice contrary to Regulation 146(6)(g) of the Code. Similarly, no report was presented to the Board of the Institution as required by Regulation 146(8). The Claimant submitted that Regulation 146(12) and 151(5) were also violated for the reason that the officer who initiated the investigations Mrs. Rita Wahome was also a member of the disciplinary panel contrary to the law. The Claimant submitted that she became the accuser, investigator, prosecutor and the judge in the same case which was illegal, unfair, against the rules of natural justice and prejudicial to him since she could never rule against her own initiated investigations and there could only be one outcome against him. The Claimant submitted that he was rendered defenseless as he was denied documents to challenge any adverse evidence. This act by the respondent flouted Regulation 147(4) of the Code. The Claimant submitted that he was given a notice of 10 days to the date of the hearing against the stipulated one month in accordance to 149(1). The Claimant averred that this was a short period to prepare a defence against allegations where documents had been denied. The Claimant submitted that the victims were

coached when recording their statements and were also compelled to sign them before reading the statements. The Claimant submitted that the witnesses however disowned the statements orally as recorded in the disciplinary proceedings. The Claimant submitted that he was denied the right to review and/or appeal within the stipulated 90 days since efforts to get the Commission's verdict within the stipulated time of 28 days did not yield any fruits. The Claimant averred that the verdict was received by the Claimant over 120 days after the hearing and this was blatant disregard by the Commission of its own regulations. The Claimant averred that on account of the foregoing reasons it was clear that the Respondent's decision to dismiss him from employment was malicious, callous, unfair and unlawful to the extent that the Respondent had failed to discharge its duty under Section 43 of the Employment Act which required it to prove that there were reasons to justify the dismissal of the Claimant from employment. The Claimant urged the grant of the prayers in the claim with costs.

7. The Respondent submitted that based on the evidence adduced before it and specifically the compelling evidence of the three victims it had discharged the burden of proof required in employment law and that the dismissal of the Claimant was on well-founded reasons. The Respondent submitted that investigations were carried out in compliance with Regulation 146(4)(b) and a report was compiled and submitted to the County Director and the Commission Secretary as required by Regulation 146(6)(g). The Respondent submitted that the County Director led the investigations and involved the Board of Management as the Chairperson of the Board wrote a statement. The Respondent submitted that due process was followed and the dismissal of the Claimant was in accordance with the law. It submitted that the disciplinary meeting was properly constituted as opposed to the Claimant's assertion that it was not. The Respondent submitted that Rita Wahome, the then County Director, did not chair the investigations panel and that she had chaired the County Disciplinary meeting. The Respondent submitted that the Claimant failed to prove how he was prejudiced by alleging that he was not invited within the stipulated timeline of one month. It was submitted that in any case the Claimant wrote a defence dated 4<sup>th</sup> February 2017 and appeared for the hearing. The Respondent submitted that after the main hearing on 23<sup>rd</sup> May 2017, its decision to dismiss the Claimant was communicated to the Claimant on 15<sup>th</sup> June 2017 within the set timeline of 28 days as per Regulation 153(3). The Respondent submitted that the dismissal letter was sent to the address PO Box 191-10104 Mweiga which was provided by the Claimant at the registration form on the day of the hearing. The Respondent's testimony and other invited witnesses present at the hearing was never directly controverted by the Claimant save for mere denial. The Respondent submitted that the evidence presented before its disciplinary panel both written and oral confirmed on a balance of probability that indeed the Claimant was of immoral behavior by flirting with his students. The Respondent submitted that the Claimant thus eroded the trust and confidence bestowed upon him by his employer. The Respondent submitted the Claimant's position of a teacher assumes the legal doctrine of *Loco Parentis*, a relationship similar to that of a parent, and the Claimant owed a duty of care to his students as envisaged under Clauses 6, 9(1) and 22(1) of the Code of Conduct and Ethics (COCE) published pursuant to the provisions of the Public Officers and Ethics Act and that in addition, Regulation 66 of the Code of Regulation for Teachers (CORT) provides that a teacher may be interdicted if he is not of good moral character. The Respondent submitted that the Claimant was subjected to a fair, procedural and lawful disciplinary process from the time the allegations were received up to the time of dismissal. The Respondent submitted the dismissal was justified, procedural and lawful as all tenets of fair hearing were strictly adhered to. The Respondent relied on the case of **Ba Imonikhe v Unity Bank PLC S.C 68 OF 2001** as cited by the Court of Appeal in **Judicial Service Commission v Gladys Shollei & Another [2014] eKLR** and submitted that the Claimant was given a fair hearing since he answered queries before a decision to dismiss him was arrived at. The Respondent submitted in relation to the prayer of reinstatement that it has lost trust and confidence in the Claimant as an employee and has thus exercised its freedom to invoke the terms and conditions of the plaintiff's service relating to termination. It relied on the case of **David Njoroge Kimani v Teachers Service Commission [2006] eKLR** and submitted that the circumstances of this instant case warrants that the request for reinstatement be declined. The Respondent submitted that the Claimant is not entitled to receive any compensation having been terminated on valid grounds as the Claimant's termination was lawful and fair and did not amount to any breach of contract on the part of the Respondent. The Respondent submitted that it properly discharged the burden imposed by Sections 41 and 43 of the Employment Act on employers to prove fair termination. The Respondent submitted that the Claimant was not entitled to any salaries as he was under a legally envisaged disciplinary procedure in line with Regulation 148(1)(h) of the CORT. The Respondent submitted that the Claimant was not entitled to receive payment for a period when he did not work for the Respondent as payment of salary is compensation for services rendered by an employee. The Respondent submitted that the Claimant had not tendered any evidence as to how he was defamed and he was therefore not entitled to any compensation. The Respondent submitted that the Claimant applied for review of his case outside the time provided for in terms of Regulation 156(4) of CORT. It thus prayed that the suit be dismissed with costs to the Respondent as the same is devoid of any merit.

8. The Claimant was dismissed ostensibly on account of flirtation with students under his care. He was a teacher and in the claim asserts the Respondent failed to adhere to the CORT and the rules of natural justice. The Claimant was given allegations which formed the accusation levelled against him. He responded vide a letter he authored in response to the interdiction letter. He was heard by the panel which was chaired by Rita Wahome and later appeared before the TSC panel which determined his guilt and recommended his dismissal. The dismissal was made pursuant to the charges he was accused of and for which the Respondent asserts there was proof. Under Section 43 of the Employment Act the Claimant has a burden to prove the dismissal was unfair and unlawful while the Respondent has the burden of proving there were reasons for termination. The Claimant asserted that there was failure to notify him of the disciplinary meeting 30 days before he was heard as opposed to the 14 days prior to his hearing. He asserts that this was prejudicial.

9. The record of the hearing before the Teachers Service Commission Discipline Committee Meeting on 23<sup>rd</sup> May 2017 absolves the teacher of the accusations levelled against him. The evidence of the alleged victims ES and RW was exculpatory of the teacher and even the parents of the girls did not provide any material that would indict the teacher. Only the evidence of the teachers the Claimant accuses of scheming his ouster line up. The termination that was proposed by the Committee/disciplinary panel therefore was not backed by the evidence the Respondent asserts that it had in its possession. Suspicion however strong never takes the place of evidence and the dismissal was therefore unlawful and unfair as there was no proof availed of the impropriety the teacher was accused of. Though there were elements of procedure which painted the process as substantively fair it was however unlawful and procedurally unfair for the foregoing reasons. Having found the dismissal as unfair and unlawful, what remedies lie? The Claimant sought reinstatement. In the case of reinstatement, the court has to consider various factors, to wit, the wishes of the employee; the circumstances in which the termination took place, including the extent, if any, to which the employee caused or contributed to the termination; and the practicability of recommending reinstatement or re-engagement. A court also has to factor in the common law principle that there should be no order for specific performance in a contract for service except in very exceptional circumstances; the employee's length of service with the employer; the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for the termination; the opportunities available to the employee for securing comparable or suitable employment with another employer; the value of any severance payable by law; the right to press claims or any unpaid wages, expenses or other claims owing to the employee; any expenses reasonably incurred by the employee as a consequence of the termination; any conduct of the employee which to any extent caused or contributed to the termination; any failure by the employee to reasonably mitigate the losses attributable to the unjustified termination; and any compensation, including *ex gratia* payment, in

respect of termination of employment paid by the employer and received by the employee. The Claimant's payslip indicates he was to retire in July 2029. The circumstances of his termination are not flattering to say the least and the Respondent is adamant it has lost trust and confidence in him as a teacher. He therefore may not fit well in any of the Respondent's establishments. There are other opportunities the Claimant can have in the education sector as a tutor, author, curriculum development and the like. He is able to fend for himself and his family in other areas of the sector. The Court would therefore be reluctant to order reinstatement and therefore offer the remedy of compensation instead. As the summary dismissal was not justified the Claimant's dismissal will be reduced to normal termination with notice. He never worked after his suspension in January 2017 and would not be entitled to any payment of salary without any service being rendered meaning he cannot earn unless he worked for the Respondent. In the final result there is hereby entered judgment for the Claimant against the Respondent for:-

i) A declaration that the dismissal of the Claimant was unfair and unlawful and the same is vacated and replaced with a normal termination.

ii) One month's salary in lieu of notice – Kshs. 104,324/-

iii) 12 month's salary as compensation – Kshs. 1,251,888/-

iv) Costs of the suit.

v) Interest on ii) and iii) above at court rates from date of judgment till payment in full.

It is so ordered.

**Dated and delivered at Nyeri this 20<sup>th</sup> day of January 2020**

**Nzioki wa Makau**

**JUDGE**