

REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CASE NO. 348 OF 2017

JAMES MUTURI KIIRU.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

JUDGMENT

1.The Claimant sued the Respondent for the determination of the twin issues he framed as the unlawful/unfair dismissal of the Claimant and the failure to pay terminal benefits. He averred that at all material times he was a bona fide employee of the Respondent having been engaged as a teacher and rising to the post of headteacher at the time of dismissal. The Claimant averred that he served the Respondent diligently, faithfully and dutifully without any disciplinary issues or complaints of any nature whatsoever until 6th October 2016 when he was served with an interdiction letter. The Claimant averred that he was later served with a summary dismissal letter dated 15th June 2017. He averred that he was a family man with social responsibilities and the Respondent's callous actions have caused him immense mental anguish and untold social suffering and embarrassment. The Claimant averred that the Respondent breached all written laws, doctrines of equity and rules of natural justice in the summary dismissal. The Claimant averred that the summary unprocedural and unfair dismissal was orchestrated by the Respondent by itself and/or through its agents with the sole malicious aim of making the Claimant miss out on the continuous enjoyment and fulfilment of his life goals and loss of his chosen career. The Claimant thus sought a declaration that his dismissal was unlawful and both substantively and procedurally unfair; payment of his salary from the period of his interdiction; payment of his salary from the period of his summary dismissal; payment of his salary and benefits up and until his due retirement date of service as per the letter of engagement; costs of the suit and any other relief the court may deem fit to grant.

2. The Respondent in its defence averred that it was mandated under Article 237(1) of the Constitution to register trained teachers, to recruit and employ trained teachers, to assign teachers in its service to teach in various schools; to promote and transfer teachers and to exercise disciplinary control over teachers including terminating the employment of teachers. The Respondent averred that in exercise of its mandate under Section 47(2) of the Teachers Service Commission Act and Section 5 of the Public Officers Ethics Act it established a Code of Regulations for Teachers and the Code of Conduct and Ethics to enable it discharge its functions to regulate and manage the teaching service. The Respondent averred that the Claimant was employed on permanent and pensionable terms about November 1987 as a P1 teacher and posted to teach at [particulars withheld] Primary School, Nyeri District. The Respondent averred that in July 2016 while the Claimant was still the headteacher at [particulars withheld] Primary School, the Respondent through its agents received information alleging that in January 2016 the Claimant had flirted with his student one LW by touching her breasts inside his car within the school compound. The Respondent averred that the alleged action was in blatant breach of Regulation 140(a) of the Code of Regulation for Teachers (CORT) and clause 9 of the Code of Conduct and Ethics for Teachers (COCE) read together with *inter alia* the Teachers Service Commission Act. The Respondent averred that in compliance with Regulation 146 of CORT it initiated independent investigations to confirm the veracity of the allegations. The Respondent constituted a panel of officers to visit the School and obtain written statements, data and any evidence regarding the matter. The Respondent averred that statements were recorded from the victim, the victim's mother, Sr. FG the Principal [particulars withheld] Centre Kirinyaga, the victim's brother and Ernest Kiune the victim's class teacher. The Respondent averred that it received the report dated 4th August 2016 where despite clear and overwhelming evidence the panel merely recommended guidance and counselling programs for the pupils especially young adolescents and no case to answer on the part of the Claimant. The Respondent averred that it evaluated the contents of the investigative report, the circumstances of the case and rejected the verdict of the Panel report for the reasons that the reported evidence of the girl during the investigation was credible and not challenged by the Claimant; the reported evidence of the girl revealed another incidence when the Claimant had sex with her which was not denied by the Claimant. The Respondent averred that upon careful and in-depth analysis of the statements of witnesses, the impugned report of the Panel against the provisions of the Code, the gathered evidence revealed sufficient grounds to believe that the Claimant committed a professional offence which required further action. The Respondent averred that it accordingly reached a decision to interdict the Claimant through its agent the County Director – Nyeri County on the basis of the evidence collected and the investigation report. The Respondent averred that the Claimant was given an opportunity to prepare and submit his defence to the Commission in writing within 21 and he responded vide a letter dated 19th October 2016 denying the allegations and alleging that the allegations were baseless. The Respondent averred it convened its disciplinary panel and invited the Claimant for a hearing on 23rd May 2017. It averred that witnesses were invited and the Claimant was invited to present his case and cross-examine the witnesses present. The Respondent averred that after deliberating and evaluating the statements and oral evidence presented in the matter the disciplinary panel recommended that the Claimant be dismissed from service. The Respondent averred that the decision was communicated to the Claimant without unnecessary delay vide a letter dated 15th June 2017. The Respondent averred that it acted impartially, independently and with outmost professionalism and that accordingly the resulting decision was fair, just and appropriate based on the merits of the case, evidence adduced before it and the nature of the offence committed by the Claimant. The Respondent averred that the Claimant was accorded a fair hearing in accordance with the provisions of the Code and the rules of natural justice. The Respondent averred that the actions by the Claimant warranted dismissal upon being ascertained as they fundamentally breached the contract of employment between the Claimant and the Respondent. The Respondent averred that the allegations were investigated thoroughly before the decision to dismiss was arrived at. The Respondent contended that the Claimant was not entitled to any salary and/or allowances for the period he was under interdiction as Regulation 148(h) of the CORT prohibits payment of salary and allowances during the interdiction period. The Respondent averred that the Claimant was not entitled to payment of any salary arrears and/or allowances. The Respondent averred that no notice of intention to sue was issued and urged the dismissal of the suit with costs.

3. The Claimant and the Respondent's witnesses who included the victim LWG now aged 16, Rita Wamuyu Wahome Acting Director Staffing at TSC and Lawrence Kigen Assistant Director Discipline Department testified. The Claimant stated that he hailed from Nyeri County and was a teacher by profession having taught for 39 years since 1987. He testified that he was promoted to position of deputy head teacher, a position he held for 5 years and thereafter was a headteacher for 18 years before his interdiction and dismissal. He stated that he was accused of flirting with a Standard 7 student by touching her breasts in his car. He testified that this allegation was false. He stated the letter of dismissal accused him of the same incident of molestation and the allegation was false. He stated that he denied these allegations in his defence statement, the suit and the statement in support of the claim. He testified that the statement from the pupil was not true but false. He stated that the accusations against him were on the basis of the complaint by the student which he found malicious as there was nothing he had done like that. He testified that he parked in the school grounds and the parking was 3 metres from staff toilet and in open ground which was the way in and out of the school gate. He stated that it was also proximal to the student lavatories and literally a very public area. He denied taking her on an outing to the area around Outspan Nyeri. He stated that the head teachers office and staff room are close and overlooking the staff room is class 7 and 8 classroom. He denied doing anything as stated in the student's statement as he used his car because he had a bad leg. He said that students used to leave the compound in groups walking home. He stated that in Saturdays he never went to the school unless there was a *harambee* in a nearby primary school. He testified that there was a teacher present on Saturday in charge of the students. He stated that there was a matter reported to the Police Station and that the matter was actuated by malice. He said that the mother of the pupil, the girl, media houses and a nun with 20 or so women came to the school when he was away on official duties. He stated that the mother came in January as the daughter had been punished by the deputy headteacher and the case was settled and 3 weeks later she came back stating she wanted to transfer her daughter to a boarding school. He stated that he gave her a transfer letter to whomever it may concern since she had not told him which school. He stated that he later found out that she had gone to a neighbouring school and not a boarding school. He stated that in June the mother came back as she wanted to bring back her daughter and that she met the deputy headteacher who told her that there was no vacancy because they only used to admit students in January. He testified that the mother complained that the school she had taken her daughter was not performing well and she wanted to bring her daughter back. He said that the mother on being told there was no vacancy became very furious and demanded that her child be readmitted. He said that the mother indicated that if her daughter was not readmitted they would face consequences and that it was a month later when she came with the media people. He stated that he reported to the TSC Director as the office had not been notified by anyone about the incidence. He stated that he never gave the student any money and that there was never a time he was with her alone. He said that he would meet her with other students. He stated that there was a team that came to the school after he reported the matter and the team interrogated 37 students randomly selected and 3 teachers for over 4 hours. He testified that there was no student who implicated him and he had termed the student's accusation as lies. He stated that he thought the report the team gave was not accepted and that a second team came and did not meet him. He said that he knew of Sister FG as she was the headteacher of the school the student went to after transferring from the primary school he headed. He said there was no direct evidence of the accusations. He stated that the panel that interviewed him was very hostile. He testified that the chairlady called him a beast and intimidated him. He said that every time he asked a question he was told that was not relevant and he was told not to intimidate the child as what the girl had said was what they believed. He stated that the TSC director was in the second panel and that he responded that the date he was accused of raping the girl he was away on official duties. In cross-examination he testified that the minutes by the Respondent were certified as a true record. He said he did not know who had certified them and that he did not know who signed them. He stated that the TSC director through present was not recorded as being there. He said that students generally leave at different times as Std 8 left at dusk while Std 6 and 7 left by 5pm or 6pm. He testified that he was invited for the panel hearing with his witnesses and that the students were present. He stated he was invited to 2 hearings and that he was not asked to bring any witnesses. In re-examination he testified that he was recorded as being present at the panel hearing.

4. The girl testified as the first witness for the Respondent. She stated that she was presently in high school and that she had recorded the statement attached to the defence. She said that she knew the Claimant who was her headteacher in primary school as well as her English teacher. She testified that there was a rape incident at the school and that the Claimant raped her. She said it was January 14th 2016 and that on that day the Claimant was not in school but came in the afternoon. She stated that the class 6 had left and he called her from class to the office. She testified that he took her to his office, removed his belt and pushed her on the floor and had sex with her. She stated that he threatened her not to tell anyone. She stated that he did not close the door before people left and that he locked the door then removed his belt. She said that he pushed her on the floor then forced her to have sex with him. She stated that she knew what a condom was and that the Claimant wore one. She testified that she went home after the incident and arrived at 7.15pm and when asked why she was late she told her mum that she had been left behind at school. She stated that on 15th she was taken to hospital where it was found she had a problem with one ovary. She stated that she did not tell her mum about the rape and that she stayed at the school. She said that on 29th January 2016 she stated that she did not want to study at the primary school and then she was taken to Gikondi Primary school. She testified that she did not talk to the Claimant again. She stated that the Claimant took her out before the 14th but she could not recall the date. She said he bought her rice, meat, a soda and chapati. She testified that they used his car and after that he dropped her near the school. She said that she did not tell anyone about it as she had been threatened not to tell anyone about it or he would kill her. She stated that the Claimant used the same route to her new school and that he gave her gifts, money and so on and she thus sought to be transferred as she thought it would happen again. She said that she was transferred in June 2016. In cross-examination she testified that she recorded the statement on 12th December 2017 and that it was not the first statement she had recorded. She said this was not the first time she had testified and questioned. She stated that what she had told the court was the truth and that it was the Claimant who did it. She testified that the Claimant came back in the afternoon as he was not at the school in the morning hours. She stated that the Claimant took her out to a hotel and bought her food, rice and chapati. She said that the Claimant gave her money and that it was true that there was an allegation against her. She stated that at the time the other students were being punished she had left the school. She testified that she had been performing poorly at the other school and she felt that if she returned to the former school she would perform better but her request for readmission was declined. She testified that she went to the school with her mum and some press people. She stated that she did not know that the press would be present. She stated that she was fetched from her boarding school by her parents and taken to her former primary school. She stated that her older sister and older cousin picked her up. She admitted that the complaint at the Police station was withdrawn but she did not write a letter seeking to be forgiven for allegedly making false accusations. She stated that at 5-6pm there were no teachers and the students were on their own. She stated that on Mondays and Fridays the Claimant would come early on parade days and students would be present too. She said that it was her word against his. In re-examination she stated that the act happened to her alone and no one saw her. She said that her mother sought readmission in July since she did not want to study at Gikondi. She stated her mum did not know and so she sought her readmission. She said that at the time no one knew what had happened. The second defence witness was Rita Wamuyu Wahome who testified that she was the acting Director Staffing at TSC and that she was previously the TSC County Director Nyeri. She stated that she first heard of the accusations in June 2016 and that it was alleged the headteacher had assaulted a student who was in his school. She stated that upon receiving the report she launched investigations by constituting a panel to investigate the allegations and a report was generated. She stated that it was noted there were glaring gaps between the statements of the witness statements and the victim's statement. She testified that the case was investigated again and the accused given a

chance to cross-examine the witnesses. She stated that the finding was that the teacher had a case to answer for immoral behavior and he was interdicted. She stated that the Claimant was invited to record a statement and was involved in both investigations. She said that after the interdiction the case was taken over by the Respondent. She stated the Respondent heard the Claimant and that she was not involved in the proceedings that dismissed the Claimant. She was cross-examined and she stated that the initial report recommended for guidance and counselling for the students. She stated that the decision to re-investigate was part of her decision on the panel. She stated that she was familiar with the TSC Rules. She said that Regulation 139(1)(a) provided that the accused was to be presumed innocent until proven guilty. She testified that she was involved in the second panel re-investigating the case. She stated that the Commission was not investigating the criminal aspect of the case but was engaged in administrative action after the issue came up. She said that she handled her role according to the Code of Regulations for Teachers and the TSC is not exempted from the rules of justice and that was provided throughout. She stated that is why it is in the code and that the Claimant was subjected to fair hearing in the entire process. She stated they did not depart from the truth in this case and the case was subjected to due process. She stated that the case was subjected to due process and the adherence of the dictates of the Code. She stated that the statement of the victim was contrary to the finding which caused the re-investigation. She was re-examined and stated that her role stopped after she interdicted the Claimant. She testified that the Claimant was aware and was invited for a hearing. She said that the Claimant was an employee of the Respondent who was accused with a learner and that teachers are supposed to protect a learner so they took it up. She stated that they investigated and put it through an investigative process. The final witness for the Respondent was Lawrence Kigen the Assistant Director Discipline Department. He testified that the Claimant was not summarily dismissed because due process was followed before the Claimant was dismissed. He stated that the due process was that investigations were carried out by the TSC County Director before he was interdicted and after he was interdicted he was given an opportunity to defend himself before the TSC Panel, the witnesses were heard and the Claimant given the opportunity to cross-examine them and the panel deliberated thereafter and resolved to dismiss the Claimant. He stated that this was not a summary dismissal as CORT was followed. He referred to the dismissal letter and said that it was the dismissal letter issued to the Claimant after the panel resolved he was guilty. He stated that it was not headed 'summary dismissal' but 'dismissal'. He said there was delay in taking disciplinary action as there was immoral behaviour against the girl and the issue did not come to light immediately. He stated that the victim was transferred to another school and she opened up to the school administration and was able to narrate what happened and that is when the matter was taken up. He stated that the grounds for dismissal were valid as it was based on the testimony of the witnesses. He testified that the discipline issue was a professional aspect of CORT and the Commission did not deal with the criminal aspect. He stated that the Claimant was not entitled to the prayers as he was found guilty and dismissed. He was cross-examined and stated that he was aware of investigations that were to the effect that the Claimant was not guilty of the allegations. He testified that he was aware it was by a panel constituted by TSC. In re-examination he stated that he was aware the previous investigations exonerated the Claimant and the appointing authority who was the County Director was not satisfied with the recommendation of the report and initiated another investigation to look into the issue regarding the matter by conducting another investigation. That marked the end of oral testimony and parties were to file written submissions.

5. The Claimant submitted that he was employed as a teacher from 1987 and was promoted to headteacher in 1998 and on 15th June 2017 was dismissed with loss of benefits. The Claimant submitted that the charge upon which he was dismissed was disputed in toto. He cited Regulation 139(1)(a) of the Code of Regulation for Teachers (CORT) which provides that a teacher shall be presumed innocent until proven guilty. The Claimant submitted that the witness statement by LW is that she was raped by the Claimant yet the date she alleges he did so he was not at the school. The Claimant submitted that this allegation of rape was not part of charge before the court and therefore irrelevant to the charge preferred against the Claimant. The Claimant submitted that no evidence was called by the Respondent to challenge the Claimant's alibi. On the allegation that the teacher touched her breasts in his car, the Claimant submitted that it is a matter of common sense that at the age of twelve there are no breasts to touch, let alone to attract an adult man of the Claimant's age toward that kind of behaviour. He submitted that regarding the allegation that he took her to a hotel in Nyeri, no other witness was called to substantiate this allegation despite the matter having been the subject of investigations on 3 occasions. On the gifts of money the Claimant submitted that there was simply no proof and in any case this was not the offence charged and is therefore irrelevant. The Claimant submitted that the Police and the first panel that investigated this matter concluded that the Claimant was innocent of the allegations made against him. He submitted that the second panel arrived at a contrary finding not on discovery of new inculpatory matter of evidence but based on directives from above. The Claimant submitted that the evidence of LW was couched in such a way as to include not just the offence charged but every conceivable offence under the Code of Regulations. The Claimant submitted that he had adequately refuted all the allegations made against him and in any case he is presumed innocent until proven guilty. He submitted that he is not called upon, under the law, to prove his innocence. The Claimant submitted that the case against him fails and his case for unlawful dismissal succeeds and that accordingly he was entitled to all the prayers sought and for entry of judgment in his favour accordingly.

6. The Respondent submitted that the Claimant was dismissed from the Respondent's employment on grounds of immoral behaviour in that sometime in January 2016 he befriended a Standard 7 pupil LW, flirted with her by touching her breasts inside his car whilst he was the head teacher at [particulars withheld] Primary School. The Respondent submitted that it had also been reported that he had carnal knowledge of the minor in his office. The Respondent submitted that this behaviour is in blatant breach of the Code of Regulation for Teachers, Code of Conduct for Teachers, Teachers Service Act 2012 and the Public Officer Ethics Act, the Children's Act and public policy. The Respondent submitted that prior to the dismissal it initiated and concluded impartial investigations as laid down and subjected the Claimant to the due process of the law. The Respondent submitted that the investigations revealed that the Claimant had violated the terms and conditions governing the teaching service. The Respondent submitted that the issues for determination were whether the Claimant's dismissal was on valid/reasonable grounds, whether the Claimant was accorded a fair hearing and whether the Claimant is entitled to the prayers sought. The Respondent cited Section 43(1) of the Employment Act and submitted that in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons of termination and that the reasons for termination are the matters that the employer at the time of the termination genuinely believed to exist and which caused the employer to terminate the services of the employee. The Respondent cited the case of **Kenya Power and Lighting Company Limited v Aggrey Lukorito Wasike [2017] eKLR** and submitted that based on the evidence adduced before the Respondent, specifically the compelling evidence of the victim LW, the Respondent discharged the burden of proof required in employment law and dismissed the Claimant on proper and established reasons. The Respondent submitted that during the hearing before the TSC disciplinary panel as well as before this court the victim LW made chilling revelations how the Claimant had carnal knowledge of her. The Respondent submitted she revealed how on 14th January 2016 the Claimant came back to the school in the afternoon after being away in the morning and at around 6.00pm asked her to remain behind whereupon he directed her to his office and ordered her to lie down, unzipped his trousers and there on the floor had protected sexual intercourse with her. The Respondent submitted that the fact the Claimant had a condom with him clearly indicates premeditated intention to have sex with LW. The Respondent submitted that when he was done with the sexual ordeal in the typical fashion of any sexual molester he threatened the minor not to tell anyone lest he would kill her. Indeed she did not disclose this to anyone. The Respondent submitted that unable to continue studying at [particulars withheld] she sought a transfer to [particulars withheld] Primary but her performance deteriorated and her mother sought to have her re-

admitted at [particulars withheld] unaware the molester of LW was in the School. The Respondent submitted that the victim only opened up to Sister Fridah Gateri the head teacher of [particulars withheld] Education Centre when LW was admitted to the school in June 2016. The Respondent submitted that it considered the position, duty and ethical behaviour expected of the Claimant. The Respondent submitted that his profession demands high standards of integrity, honesty and morality. 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 he was entrusted with the solemn duty to mould the young learners into responsible citizens of the Republic. The Respondent submitted that the Claimant grossly abused his duty of care and turned against an innocent young and tender girl whom he abused sexually contrary to the tenets of the teaching profession and the law. The Respondent submitted that the minutes presented as an alibi do not seem authentic as they are unsigned and do not indicate the time the meeting ended. The Respondent cited the case of **Teachers Service Commission v Joseph Okoth Opiyo [2014] eKLR** and that of **Teachers Service Commission v Joseph Wambugu Nderitu [2016] eKLR** where the Court of Appeal held *that in matters of sexual immorality, it is not easy to get eyewitness evidence as such acts are committed behind closed doors. Such cases are, in most cases, proved by circumstantial evidence of opportunity to commit the same.* The Respondent submitted that the Claimant was given due process and dismissed in accordance with the Code of Regulation for Teachers and the law. The Respondent urged the dismissal of the suit with costs as the same is devoid of merit.

7. The dismissal of the Claimant was alleged to be on account of immoral behaviour with a student LW. The letter of dismissal stated that

...that the Commission has carefully considered your case and determined you should be dismissed from the teaching service with effect from 23rd May 2017 for the following reasons:-

You behaved immorally to your Std. 7, 2016 LW when you befriended her in January 2016 and flirted with her by touching her breasts inside your car in the school compound while you were the teacher [particulars withheld] Primary School

The Respondent asserts this behaviour was sufficient cause for the dismissal. Under Section 43(1) of the Employment Act, it is provided that in any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons of termination and that the reasons for termination are the matters that the employer at the time of the termination genuinely believed to exist and which caused the employer to terminate the services of the employee. In this case the employer investigated allegations of improper conduct that were revealed in the statement of LW the victim. Having heard her testimony it is not in doubt that other than the offence the Claimant was dismissed for, he had carnal knowledge of the Claimant in his office as she elaborately explained in her testimony. The only challenge the Claimant to the testimony was that it did not happen on the day she alleged as he ostensibly was attending a meeting for the 'Wings to Fly Program'. The Respondent therefore had cause to dismiss and followed due process before the termination that issued. The suit by the Claimant is devoid of merit and is dismissed with costs to the Respondent.

8. This decision was rendered online with the waiver of Order 21 Rule 1 and 3 of the Civil Procedure Rules and in line with the Chief Justice's Practice Directions to Mitigate COVID-19 dated 16th March 2020 and the Kenya Gazette Notice 2357 of 20th March 2020 issued in Vol. CXXII No. 50. In line with the Practice Directions of the Chief Justice and the Judiciary and the other stakeholders in the administration of justice agreed to scale down operations to mitigate the effects of COVID-19, execution of the judgment is automatically stayed for 14 days.

It is so ordered.

Dated and delivered at Nyeri this 24th day of April 2020

Nzioki wa Makau

JUDGE