



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MOMBASA**

**CAUSE NO 188 OF 2017**

**JUSTINE NGUMA KITONYO.....CLAIMANT**

**VS**

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

**JUDGMENT**

**Introduction**

1. This is a most tragic case. It started off as a complaint against a teacher accused of having an illicit relationship with his pupil and snowballed into a suspected murder of the pupil, a trial and conviction by the High Court and an acquittal by the Court of Appeal.
2. The teacher is Justine Nguma Kitonyo, the Claimant in this claim and the pupil is AKC alias AK alias AK alias AKK alias KKC (now deceased).
3. Justine Nguma Kitonyo was a career teacher, having been registered by the Teachers Service Commission (TSC), the Respondent herein, on 6<sup>th</sup> December 2007. He was issued with Certificate of Registration Number TSC/\*\*\*\*\*.
4. Following allegations of defilement of a pupil, who was later found dead, the Claimant was arrested and arraigned in court on a charge of murder contrary to Section 203 as read with Section 204 of the Penal Code.
5. Subsequently, the Claimant was interdicted and later dismissed from employment. It is this administrative action, executed by the Respondent, which is the subject of this case.
6. The Claimant's claim is contained in a Memorandum of Claim dated 6<sup>th</sup> March 2017 and filed in court on 7<sup>th</sup> March 2017. The Respondent filed a Memorandum of Defence on 15<sup>th</sup> May 2018.
7. The matter proceeded to full trial with the Claimant testifying on his own behalf. The Respondent called its Assistant Deputy Director, Priscila Nyoro.

**The Claimant's Case**

8. By letter dated 13<sup>th</sup> December 2007, the Claimant was posted as a teacher at the then Kilifi District. He was deployed at [Particulars Withheld] Primary School by the Kilifi District Education Officer. He earned a monthly salary of Kshs. 21,554.
9. The Claimant states that on 19<sup>th</sup> April 2010, he and his cousin attended a traditional function at Balaga Village.
10. On his return the following day, the Claimant heard rumours that he had been found with a school girl. He chose to ignore the rumours.
11. A day after his return, the Claimant was arrested on allegations that he had had carnal knowledge of a pupil. He was taken to Kilifi Police Station.
12. The Claimant avers that on 23<sup>rd</sup> April 2010, the Gender and Children Department at Kilifi Police Station sent the alleged complainant to Kilifi District Hospital for medical examination and completion of a P3 Form.
13. The Claimant adds that the P3 Form was completed by the Doctor on 23<sup>rd</sup> April 2010 and the police officers released the Claimant on the ground that the Doctor had found that the complainant had not been defiled.

14. On 24<sup>th</sup> April 2010, the Gender and Children Department wrote to the District Education Officer, forwarding the P3 Form.
15. The Claimant goes on to state that despite the communication proving his innocence, he received a letter from the District Education Officer, dated 3<sup>rd</sup> May 2010, placing him on interdiction.
16. On 29<sup>th</sup> May 2010, the Claimant wrote to the Respondent, through the District Education Officer, in response to the interdiction letter.
17. On 27<sup>th</sup> September 2010, the Claimant was arraigned before the High Court at Malindi and charged with the murder of AK, whose body had been found in a bush in Matsangoni area.
18. The Claimant pleaded not guilty to the charge of murder and was remanded in custody from 27<sup>th</sup> September 2010.
19. The Claimant states that he remained in custody until 3<sup>rd</sup> April 2013, when he was convicted and sentenced to death.
20. Being dissatisfied with his conviction and sentence by the High Court, the Claimant lodged an appeal at the Court of Appeal in Malindi.
21. On 11<sup>th</sup> November 2016, the Claimant's appeal was allowed, his conviction quashed and the death sentence set aside.
22. The Claimant states that after he was set at liberty he started following up on his employment as he wished to resume duty.
23. The Claimant further states that he went to the Respondent's office and was informed that he had been dismissed from employment.
24. While at the Respondent's office, the Claimant was given a dismissal letter dated 30<sup>th</sup> August 2011 and another letter dated 26<sup>th</sup> May 2011, deferring his disciplinary hearing.
25. The Claimant states that the Respondent was fully aware of his criminal case since some of the Respondent's officials attended and gave evidence at the High Court in Malindi.
26. The Claimant avers that he only came to know of his dismissal in February 2017, when he went to the Respondent's office.
27. The Claimant submits that the manner in which he was dismissed was unlawful and unfair as there was no justification for the dismissal and he was not allowed prior opportunity to be heard.
28. The Claimant now seeks the following remedies:
  - a) A declaration that the termination of his employment was wrongful and unfair;
  - b) A declaration that his interdiction was unlawful;
  - c) An order for reinstatement or in the alternative;
    - i) One month's salary in lieu of notice.....Kshs. 21,554
    - ii) Salary for 25 years up to retirement.....6,466,200
    - iii) 12 months' salary in compensation.....258,648
    - iv) Certificate of service
  - d) Costs plus interest.

### **The Respondent's Case**

29. In its Memorandum of Defence dated 8<sup>th</sup> May 2018 and filed in court on 15<sup>th</sup> May 2018, the Respondent admits that the Claimant was its employee from December 2007.
30. The Respondent states that the Claimant was initially posted to [Particulars Withheld] Primary School and was transferred to [Particulars Withheld] Primary School on 9<sup>th</sup> May 2008, where served until his dismissal.
31. The Respondent avers that following allegations made against the Claimant of having had a sexual relationship with one of his pupils, AKK, the Respondent instructed its agents to carry out investigations.
32. The Respondent further avers that on 29<sup>th</sup> April 2010, Mr. Munga Kaginga, TAC Tutor Bamba Zone carried out investigations at the School where the Claimant was a teacher and the victim a pupil. The investigations were carried out by collecting statements and attending a

meeting of the School Management Committee.

33. The Respondent states that on the same date, the School Management Committee convened and recommended that the Claimant be interdicted for breach of the Code of Regulations for Teachers.

34. The Claimant was issued with an interdiction letter and invited to respond to the allegations, which he did in writing.

35. In August 2010, the Respondent received information that the victim, AK had been found dead under suspicious circumstances.

36. The Respondent states that the victim had recorded several statements, which the Respondent decided to rely on at the disciplinary hearing.

37. The Respondent goes on to state that the Claimant was invited for a disciplinary hearing on 26<sup>th</sup> May 2011.

38. The Respondent adds that the disciplinary hearing did not proceed as scheduled because the Claimant was absent; it was deferred to 30<sup>th</sup> August 2011, when nine (9) witnesses were present.

39. On 30<sup>th</sup> August 2011, the Respondent's Disciplinary Panel made the following observations:

- a) That the Claimant was in police custody from September 2010, with regard to the murder of AK;
- b) The victim had recorded several statements that were consistent;
- c) The witnesses confirmed the statements they had made during the investigations.

40. The Respondent avers that the Disciplinary Panel evaluated the written and oral evidence relating to the matter and diligently considered the Claimant's written statement and determined that the Claimant was guilty of breach of the Code of Regulations for Teachers and the Claimant was accordingly dismissed.

41. The Respondent submits that in handling the Claimant's case, it acted within the confines of the law, the principles of natural justice and public interest and that the decision to dismiss the Claimant from the teaching service was lawful and fair.

42. The Respondent further submits that its mandate was restricted to professional culpability and hence any action taken by the Police or the Criminal Court could not, in any way, diminish its statutory mandate.

43. The Respondent maintains that in no way was it precluded from carrying out its internal disciplinary processes which were distinct from the criminal case instituted against the Claimant.

44. The Respondent further maintains that the disciplinary case was in no way a subject of the criminal process and therefore the Claimant's acquittal did not in any way bind the Respondent.

45. The Respondent avers that as a statutory body, it is mandated to uphold high standards of professionalism, integrity and honesty in the teaching service, which it claims to have fully discharged in the present case.

46. Further, the Respondent states that it is mindful of the need to uphold the rights of the child guaranteed under Article 53 of the Constitution.

### **Findings and Determination**

47. From the pleadings filed by the parties, the following issues emerge for determination by the Court:

- a) Whether the Claimant's claim is statute barred;
- b) Whether the Claimant's dismissal was lawful and fair;
- c) Whether the Claimant is entitled to the remedies sought.

### **Limitation of Time**

48. Before filing its Memorandum of Defence, the Respondent raised a Preliminary Objection *in limine*, on the ground that the Claimant's claim was statute barred by dint of Section 90 of the Employment Act, which requires employment claims to be brought within three (3) years after accrual of the cause of action.

49. The Preliminary Objection was considered by **Makau J**, who in a ruling delivered on 12<sup>th</sup> April 2018, overruled the Objection for the reason that it was premised on contested matters of fact rather than a pure point of law.

50. At paragraph 15 of the ruling my brother Judge stated:

***“The foregoing leads to the question whether the Preliminary Objection meets the threshold of a Preliminary Objection as it was enunciated by Mukisa Biscuits Manufacturing Limited Vs West End Distributors Limited [1969] EA. 696 where it was held that a Preliminary Objection should be on a pure point of law that should not require production of evidence and which has the ability to dispose the entire suit. As observed above, the Preliminary Objection on limitation herein is anchored on the proof of service of the dismissal letter dated 30.8.2011. The said service is a question of fact that requires evidence to prove it. Consequently, I find and hold that the Preliminary Objection by the Respondent herein does not meet the threshold of a Preliminary Objection as described by Mukisa Biscuits Limited Case.”***

51. In its final submissions, the Respondent made reference to the decision in ***G4S Security Services (K) Limited v Joseph Kamau & 468 others [2018] eKLR*** where the Court of Appeal affirmed that actions arising out of an employment contract must be brought within the three year window provided by Section 90 of the Employment Act.

52. The Respondent relied on another Court of Appeal decision in ***Attorney General & another v Andrew Maina Githinji & another [2016] eKLR*** where **Kiage JA** stated the following:

***“.....a dismissal is lawful or unlawful and therefore actionable or not on the date it is effected.”***

53. So at what point is a dismissal said to have been effected? My brother, **Rika J** answered this question in ***Ezekiel Nyangoya Okemwa v Kenya Marine & Fisheries Research Institute [2016] eKLR*** where he held that in claims arising from termination of employment, time begins to run from the point the employee is notified of the termination.

54. In his pleadings as well as in his testimony before the Court, the Claimant was consistent that he did not receive the letter of dismissal until February 2017, when he visited the Respondent’s office to find out about the fate of his employment.

55. On its part, the Respondent did not adduce any evidence to demonstrate that the dismissal letter dated 30<sup>th</sup> August 2011 was brought to the Claimant’s attention before February 2017. Indeed, the Respondent concedes that at the time the dismissal letter was written and placed in the Claimant’s personal file at TSC, the Claimant was in custody.

56. It would appear therefore that the Respondent simply wrote a dismissal letter which it placed in the Claimant’s personal file. The Respondent, who was evidently aware that the Claimant was in custody, did nothing to notify the Claimant that he had been dismissed. How then did the Respondent expect the Claimant to know that he had been dismissed?

57. The Respondent cannot be allowed to use its failure to notify the Claimant of his dismissal to defeat the Claimant’s claim on the basis of a choreographed limitation.

58. On this issue, I find and hold that time did not begin to run until February 2017, when the Claimant learnt of his dismissal upon his visit to the Respondent’s office. The claim filed on 7<sup>th</sup> March 2017 was therefore well within time.

## **The Dismissal**

59. The Claimant’s dismissal is evidenced by letter dated 30<sup>th</sup> August 2011, addressed to the Claimant as follows:

**“CODE OF REGULATIONS FOR TEACHERS: REGULATION 66(6) (B) (III)-DISMISSAL**

*I am directed by the Teachers Service Commission to say that the Commission has carefully considered your case and has determined that you should be dismissed from the teaching service with effect from the date of this letter for the following reasons: -*

***You are not of good moral character in that: -***

***On the night of 19<sup>th</sup> April 2010 at 12.00 midnight you had carnal knowledge of your own pupil, AKC of standard seven (7), at [Particulars Withheld]Village in her mother’s kitchen.***

*NB: Follow up salary overpayment with effect from 03.05.2010 to date of last pay.*

*(signed)*

**K.W. YATOR**

**FOR: SECRETARY**

**TEACHERS SERVICE COMMISSION”**

60. Prior to the dismissal, the Claimant had been placed on interdiction by letter dated 3<sup>rd</sup> May 2010 stating thus:

**“LETTER OF INTERDICTION**

*I am directed by Teachers Service Commission to say that, it is alleged that you should have your name removed from the Register of teachers.*

**The allegation(s) made against you is (are) as follows: -**

*You breached the Teachers Service Commission Act, Cap 212 Section 7 (3b) of the laws of Kenya and Regulation 66 (2) (a) of the code of Regulations for Teachers in that: -*

*You are not of good moral character in that: -*

*Ø On the night of 19<sup>th</sup> April, 2020 at 11.00pm you had carnal (sic) knowledge of your own pupil, KKC of std 7, at [Particulars Withheld] village in her mother’s kitchen.*

*Before the Commission proceeds to investigate, consider and determine your case, you are invited to make a statement to the Commission in writing, which should be received by the Commission within 21 days from the date of this letter. Before your case is determined, you will be given an opportunity of being heard by the Commission in person.*

*(signed)*

**CHARLES NYAKUNDI**

**DISTRICT EDUCATION OFFICER-GANZE”**

61. The Claimant responded to the letter of interdiction on 29<sup>th</sup> May 2010, denying the allegation made against him which he termed as ‘a political perpetuated propaganda.’ In his response, the Claimant asked for a personal hearing.

62. The Claimant filed a Medical Examination Report (P3) dated 22<sup>nd</sup> April 2010 showing that AKC was examined at Kilifi District Hospital on 23<sup>rd</sup> April 2010. Of significance, was the report on immediate clinical results, showing that the victim’s hymen was present. From the evidence on record, the Medical Examination Report was forwarded to the District Education Officer-Ganze on 24<sup>th</sup> April 2010.

63. As it turned out, the Claimant was not charged with the offence of defilement but was interdicted on 3<sup>rd</sup> May 2010. As stated in the foregoing parts of this judgment, AKK died under mysterious circumstances in August 2010, leading to the Claimant’s trial and conviction for the charge of murder by the High Court and later acquittal by the Court of Appeal.

64. The Claimant stayed in custody from 27<sup>th</sup> September 2010 until 11<sup>th</sup> November 2016, when he was set at liberty by the Court of Appeal. In the meantime, the Respondent convened a disciplinary hearing twice; first on 26<sup>th</sup> May 2011, which sitting was deferred because the Claimant was absent and second, on 30<sup>th</sup> August 2011, when despite the Claimant’s absence, the Respondent went ahead to conclude his case, with the verdict that the Claimant was guilty as charged and should therefore be dismissed.

65. I have had occasion to examine the record of disciplinary proceedings filed by the Respondent from which I draw the following observations:

a) The Claimant was not present nor was he represented during the proceedings as required under Section 41 of the Employment Act;

b) The statements said to have been recorded by the witnesses were mainly hearsay and even where there was assumption of eye witnesses, there were material inconsistencies for example, there was divergence as to where the Claimant and AKK were found in a compromising position; was it in K’s room or in her mother’s kitchen?

c) The witnesses merely confirmed their recorded statements without being subjected to any questioning by the Claimant or his representative;

d) The Claimant’s account as contained in his response to the letter of interdiction, that on the night he is accused of having had carnal knowledge of his pupil, he and his cousin brother were on their way to a traditional function, when they were attacked and robbed of a bicycle and shoes, appears not to have been taken into account in the disciplinary proceedings;

e) Further, the Claimant’s claim that he was framed was not given due consideration;

f) The Respondent did not give any consideration to the Medical Examination Report on account of K

g) , which did not tally with the allegations made against the Claimant.

66. Section 43 of the Employment Act, 2007 provides as follows:

43.(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

67. It is now well settled that the burden placed on an employer by Section 43 of the Employment Act is to establish a valid reason that would cause a reasonable employer to terminate employment. The Court of Appeal affirmed this position in its decision in **Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another [2017] eKLR** by citing with approval the following excerpt from the **Halsbury's Laws of England, 4<sup>th</sup> Edition, Vol. 16(1B) para 642:**

**“In adjudicating on the reasonableness of the employer’s conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee’s conduct within which one employer might reasonably take one view and another quite reasonably take another; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if it falls outside the band, it is unfair.”**

68. This Court needs no persuasion with regard to the evidential and procedural distinction between internal disciplinary proceedings and criminal proceedings as pronounced by the Court of Appeal in **Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR**.

69. Indeed, the only question to ask is whether, in the present case, the Respondent acted reasonably. In this instance, the answer to that question must be a resounding ‘no’. To my mind, an employer who literally sits on its own, ignores all evidence that does not support its case and condemns an employee unheard cannot be said to have acted reasonably.

70. In the circumstances, I find and hold that the Claimant’s dismissal was wrongful and unfair.

#### **Remedies**

71. The Claimant asks for reinstatement as a primary remedy and the Respondent asks the Court not to grant the Claimant’s wish. There is both statute and case law to support the proposition that reinstatement is a remedy to be granted in exceptional circumstances which are to be set out by the Court granting the order (see **Sotik Highlands Tea Estates Limited v Kenya Plantation & Agricultural Workers Union [2017] eKLR and Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 others [2014] eKLR**).

72. By the time I heard the Claimant, he had been out of the Respondent’s employment for close to ten (10) years. He had moved on and had secured alternative employment. I therefore find that this is an inappropriate case for the remedy of reinstatement.

73. Instead, I award the Claimant twelve (12) months’ salary in compensation, taking into account his length of service with the Respondent plus the Respondent’s violation of the law in handling the case.

74. I further award the Claimant one (1) month’s salary in lieu of notice.

75. I find no legal basis for the claim for salary up to retirement which is therefore disallowed.

76. Finally, I enter judgment in favour of the Claimant as follows:

a) 12 months’ salary in compensation.....	Kshs. 270,554
b) 1 month’s salary in lieu of notice.....	<u>22,554</u>
<b>Total.....</b>	<b>293,202</b>

77. This amount will attract interest at court rates from the date of judgment until payment in full.

78. The Claimant is also entitled to a certificate of service plus costs of the case.

79. Orders accordingly.

**DATED SIGNED AND DELIVERED AT MOMBASA THIS 27<sup>TH</sup> DAY OF JULY 2020**

**LINNET NDOLO**

**JUDGE**

**ORDER**

In view of restrictions in physical court operations occasioned by the COVID-19 Pandemic, this judgment has been delivered via Microsoft Teams Online Platform. A signed copy will be availed to each party upon payment of court fees.

**LINNET NDOLO**

**JUDGE**

Appearance:

Ms Kitoo for the Claimant

Ms Kaluai for the Respondent