



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**  
**CAUSE NO. 172 OF 2015**

(Before Hon. Lady Justice Maureen Onyango)

**KENNEDY ONDIGO OLERO.....CLAIMANT**

VERSUS

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

**JUDGMENT**

The Claimant in filed his memorandum of claim on 28<sup>th</sup> May 2015 seeking the following orders:

- a. A declaration that the termination and or dismissal of the Claimant by the Respondent on 7<sup>th</sup> December 2012 was unfair and unlawful.
- b. An order compelling the Respondent to reinstate him back to service without any loss of benefits like salary increments and promotions with payments of his salary during interdiction period from September 2012 to December 2012 and unpaid salary from January 2013 till date of reinstatement of Kshs.43,705/= per month excluding any salary increments during this period, or pay the Claimant terminal benefits amounting to Kshs.15,078,225/=.
- c. Costs and interests of this claim.

The Claimant avers that he was employed by the Respondent as a P1 teacher in 2005 and was posted to [particulars withheld] Primary School. In 2009, he was posted to [particulars withheld] Primary School then to [particulars withheld] Primary School in 2010 where he was elevated to the position of Deputy Head Teacher and doubling as a guidance and counselling master. That he was thereafter transferred to [particulars withheld] Primary School in May 2012.

He further avers that while at [particulars withheld] Primary School his attention was drawn by a Teacher, Mrs ENO to a standard 6 student, one JA whose performance was dropping and who was found to be in possession of a booklet containing love writings. That the said student was also found with a love letter addressed to a boy at [particulars withheld] Primary School called KO.

That the Claimant became very concerned and sought permission from the Head Teacher to conduct investigations on the cause of the drop in performance. That he talked to the student who confessed to having written a letter to a boy who was her boyfriend. He also summoned her friends CAO (the complainant in this case) and LA, both of whom gave written confessions and statements confirming the same. He states in his memorandum of claim that he proceeded to counsel the student with her friends and avers that at no time during the counselling did he engage in immoral or unlawful behaviour.

The Claimant contends that on 5<sup>th</sup> June 2012, he received a letter from the Respondent summoning him to attend a special School Management Committee (SMC) meeting at [particulars withheld] Primary School on 11<sup>th</sup> June 2012, and a complaint on immoral behaviour involving a student by the name CAO. That the meeting was not held on 11<sup>th</sup> June 2012, but on 12<sup>th</sup> June 2012, and he discovered that the Respondent had already held a SMC meeting at [particulars withheld] Primary School the previous week which was attended by the concerned pupils in his absence.

That on 12<sup>th</sup> June 2012, the Claimant was informed verbally that CAO was found pregnant and that she alleged that the Claimant was the one responsible. That he was put on his defence which he recorded, denying responsibility for the pregnancy. That despite the clear explanation given by the Claimant he was arrested on 11<sup>th</sup> July 2012 while at school in Nyahera and on 12<sup>th</sup> July 2012 and was charged at the Chief Magistrates Court Homa-Bay with the offence of defilement of CAO in Criminal Case No. 790 of 2012.

He avers that during the pendency of the said criminal case the Respondent wrote to the Claimant an interdiction letter accusing him of immoral behaviour - flirting with a pupil – CAO on 21<sup>st</sup> March 2012, and of infamous conduct on 21<sup>st</sup> March 2012, by using vulgar language to RA, LA and CAO and having carnal knowledge of CAO. That he was invited to make his defence to the said letter.

That on 27<sup>th</sup> November 2012, he was summoned for a hearing which he attended although he was not allowed to call any witnesses and present any documentary evidence and neither was he allowed to see and sign the minutes of the said meeting. He contends that he was not given a fair hearing and that there was no proof that he was guilty of the charges levelled against him by the Respondent.

That on 23<sup>rd</sup> December 2012 the Claimant received a letter from the Respondent dated 7<sup>th</sup> December 2012, terminating his services with effect from 27<sup>th</sup> November 2012 and another letter removing his name from the Register of Teachers from 27<sup>th</sup> December 2012 for reasons of immoral behaviour and infamous conduct. That he appealed against the decision on 23<sup>rd</sup> December 2012, to which he never received a response.

That during the criminal case the said CAO gave birth to twin baby boys and the Claimant applied for and was granted an order for DNA testing whose report was released on 6<sup>th</sup> August 2013, revealing that the Claimant was not the father of CAO's babies. He avers that he proceeded to write to the respondent on a possible reinstatement following the DNA results but the Respondent responded stating that the appeal was time barred.

The Claimant alleges that he was not satisfied with the response to his letter of appeal and being convinced that his dismissal and removal from the register of teachers was unfair caused a demand letter to be sent to the respondent. On 3<sup>rd</sup> March 2015 and on 1<sup>st</sup> April 2015, the respondent responded to the demand letter, stating it stood by the dismissal.

He alleges that as a result of the Respondent's actions he suffered immensely physically, mentally and psychologically as he lost his source of livelihood and eventually lost his wife because he could no longer maintain his family.

He therefore prays for reinstatement to service without loss of service or in the alternative he prays for salary in lieu of notice, unpaid salary during interdiction period of September to December 2012, unpaid salary from January 2013 – February 2015, compensation for unlawful termination and loss of future earnings.

The Respondent filed a Statement of Defence wherein it admits the employment relationship but denies that the Claimant was unfairly terminated. It avers that on or about May 2012, it received information through its agent, the District Education Officer, Mbita District that the claimant had engaged in acts which breached the provisions of its Code while he was a teacher at Wamai Primary School.

That the alleged act was in breach of Regulation 66(2) of the Code, Clause 9 of the Code of Conduct and Ethics read together with *inter alia* the Teachers Service Commission Act, 2012. That on these grounds the Respondent undertook investigations into the allegations against the claimant and found that not only had the Claimant had carnal knowledge of his pupil one CAO, he had also used vulgar language to one RA, LA and CAO while allegedly guiding and counselling them in his office.

That to this end statements were recorded from:

- MM – Teacher at [particulars withheld] Primary School
- EN – Teacher at [particulars withheld] Primary school
- PAM - Teacher at [particulars withheld] Primary school
- PA – A pupil at [particulars withheld] Primary school
- LAO – Victim/pupil at [particulars withheld] Primary school
- RA - Victim/pupil at [particulars withheld] Primary school
- CAO - Victim/pupil at [particulars withheld] Primary school
- SOM - Head Teacher at [particulars withheld] Primary school

The Respondent avers that these allegations were further interrogated with a view to ascertain their veracity by the School Management Committee (SMC) of [particulars withheld] Primary School. That the Claimant was thus invited to attend a Special Meeting of the SMC where he was informed of the allegations against him and given an opportunity to be heard. That the Committee recommended further investigations into the matter.

That the Respondent set up a Standards Assessment Committee, which continued to interrogate the victims, the Claimant and other witnesses. Thereafter the Committee recommended that disciplinary action be taken against the Claimant.

The Respondent further avers that it wrote an interdiction letter to the Claimant in which he was given an opportunity to present his defence. Accordingly he wrote an elaborate statement of defence denying the allegations. That thereafter the Respondent convened a Disciplinary Committee at the County Director's office, Homabay on 27<sup>th</sup> November 2012 where the Claimant and 14 witnesses were summoned to tender evidence.

That the Respondent considered the oral and written statement of the Claimant all facts adduced during the hearing and the peculiar circumstances of the case. In the end the committee determined that he Claimant was guilty of breach of the provisions of the code hence recommended that he be dismissed from service and be removed from the Register of Teachers with effect from 27<sup>th</sup> November 2012.

That the decision was timeously communicated to the Claimant vide letters dated 7<sup>th</sup> December 2012. The respondent contends that the Claimant, being aggrieved by their decision, appealed vide a letter dated 9<sup>th</sup> February 2015, whereupon he was advised that his appeal was time barred.

It contends that at the disciplinary hearing the respondent acted impartially, independently and with utmost professionalism resulting in a fair decision, which was appropriate in the circumstances of the case.

In response to the Claim the Respondent avers that during the disciplinary hearing the claimant did not adduce any written confessions from the victims despite having been given an opportunity to do so.

The Respondent contends that the criminal proceedings against the Claimant were instigated and prosecuted by the police pursuant to the provisions of the Penal Code, the Sexual Offences Act and Police Act and in no way did the police action diminish, impact or oust the administrative action by the Respondent. The respondent prays that the Claim to be dismissed for want of merit and be awarded costs of the suit.

### **Claimant's Evidence and Submissions**

The Claimant was the only person who led evidence in support of the Claim where he narrated the events leading to his termination and the process followed to terminate him.

It is submitted on behalf of the Claimant that the Respondent did not have reason for termination of the Claimant's services as the accusation of carnal knowledge was not proved. Counsel based this on the reasons that the complainant was an organisation by the name of Devlink on behalf of parents and not the school itself.

Furthermore, that from the statement provided by Devlink, the statement by CAO dated 4<sup>th</sup> June 2012, statement by Mrs EN and the report by the Head Teacher it is clear that CAO was defiled in February but the year and date is not specified. That the statement refers to a complaint made to an unnamed teacher and that the complaint was of carnal knowledge but did not include a complaint of vulgar language. Counsel also submits that Mrs. MM wrote a statement, which she did not date, in which she states that CAO told her she was defiled by the teacher on 18<sup>th</sup> February 2012. Additionally, Mrs. EN in a statement dated 4<sup>th</sup> June 2012, does not say when the alleged defilement took place but that when she noticed that CAO was pregnant, she examined her and although CAO initially refuted that she was pregnant, she later on said she had already told her parents that it was the teacher who had impregnated her.

It is also submitted that the said S.M.C meeting conclusively determined the matter and did not recommend any further investigations and as such the evidence of RW1 and RW2 that the County Director ordered for fresh investigations necessitated by the fact that the S.M.C committee was unable to reach a decision as they appeared compromised is untrue.

That the evidence of RW3 was not cogent as he told the court that further investigations were prompted by further evidence/letter/statement given by CAO. However he was unable to prove or show the existence of the same.

He further submits that it is baffling that the commission during the disciplinary hearing on 27<sup>th</sup> November 2012 faced with overwhelming evidence to the contrary and with so many contradictions by the witnesses, found that the Claimant had carnal knowledge of CAO on 15<sup>th</sup> February 2012 contrary to CAO's evidence during the said hearing to the effect that the teacher had sex with her on 21<sup>st</sup> March 2012.

That none of the witnesses at the disciplinary hearing led proof that CAO was at the teacher's office on 15<sup>th</sup> February 2012 or 18<sup>th</sup> February 2012. That from the aforesaid account the offence of carnal knowledge was not proved.

On the charge of infamous conduct, it is submitted that the complaint by Devlink did not contain the issue of vulgar language but cropped up in the female teacher's report of 30<sup>th</sup> May 2012. Further that there is no single document authored by the teacher that would connect him with the said vulgar words that led to his dismissal whereas there is cogent evidence to show and prove that CAO and her friends were at that tender age already sexually active to the extent that they would write love letters and author documents and or booklets containing explicit sexual words as well as engage in sex. That the allegations were untrue and were only meant to tarnish the Claimant's name.

As to due process it is submitted that the Respondent failed to follow procedure while terminating the claimant's services. Counsel submits that teachers in the service are regulated by the Teacher's Code of Regulation (COR). Chapter 10 of that Code deals with discipline. Regulation 66 of the same sets out the disciplinary procedure.

That first, there must be an allegation against a teacher which will enable investigations to be conducted. Secondly, upon receiving a complaint, the commission embarks on investigation, which includes assembling evidence and witnesses to establish whether the teacher has a case to answer. That it is imperative that in the process of gathering statements especially when recording witness statements the accused teacher should be present or at the very least copies of the witness statements and documentary evidence be given to him within sufficient time, at least 7 days before the SMC meeting to enable him prepare his defence.

Counsel goes on to submit that at all times during this investigative process, the teacher should be accorded a fair hearing which includes being presumed innocent until proved that there is a case to answer. He must be allowed to adduce and challenge evidence.

That the investigating panel (SMC) must then write a report indicating whether the teacher has a case to answer. In this instance the head teacher, the SMC meeting and the committee of three found the teacher with no case to answer especially the SMC meeting which was very categorical and this matter should have ended there.

Regulation 66(3)(c) of the COR provides that, if satisfied that a teacher has a case to answer, serve the teacher with a notice of interdiction specifying the actual allegations made against him or her. That in this case the claimant was interdicted when he had been found to have no case to answer. Furthermore, that the commission breached regulation 66(4) when the Claimant was not supplied with witness statements, with documentary evidence and was not accorded a chance to adduce his own evidence or those of his witnesses during the disciplinary hearing on 27<sup>th</sup> November 2012.

That regulation 66(7) allows a teacher to appeal against the commission's decision, both on dismissal from service and removal from the Register of Teachers. The teacher had 90 days to appeal which he did on 23<sup>rd</sup> December 2012, which was well within the 90 days period. Having received no answer, he re appealed on 28<sup>th</sup> December 2012 and wrote to the commission again on 18<sup>th</sup> September 2013 which was a reminder of the two appeals he had made but still there was no response.

Counsel for the Claimant submits that the Claimant was not accorded a chance to defend himself and is guilty of unfair labour practice contrary to Articles 41(1) and 47(1) of the Constitution of Kenya, which protect the fundamental rights of fair labour practices and fair Administrative action. He prays for the Claim to be allowed in its entirety for the said reasons.

### **Respondent's Evidence and Submissions**

The Respondent put up three witnesses who led evidence on the reasons for dismissal and the procedure followed in terminating the Claimant.

It is submitted on behalf of the Respondent that Section 43 (1) of the Employment Act states: -

“In any claim arising out of termination of a contract, the employer shall be required to prove the reasons or reasons of termination...”

Subsection 2 states: -

“The reason or reasons for termination 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.”

That in determining whether there was reasonable ground the respondent conducted investigations and got statements from various witnesses as set out in the statement of defence. That it set up a School Management Committee where one of the members confirmed having overheard the claimant use obscene language in his office when he had visited the school.

Further that in the Claimant's oral evidence and in his written statements of defence to the letters of interdiction, he admitted to the fact that he would summon girls/victims to his office for counselling between the hours of 4-5 pm which time is past the official learning hours which is evidence of motive to act unprofessionally.

That contrary to the Claimant's submission that the love letters that triggered the counselling sessions were confiscated from CAOs, it is submitted that there was only one girl who was found in possession of the love letters and only that girl was eligible for counselling. The respondent questions why the other girls who were not privy to the love letters were summoned to the claimant's office if not only to lure innocent girls to the world of vulgarity and immorality.

That Regulation 66(4)(b) of the Code allows the Respondent to act on general evidence or statements relating to the character and conduct of a teacher and is not bound to receive and consider only evidence admissible in a court of law. Consequently, the submission that there was no documentary evidence to prove that the victim of immoral behaviour was present in the Claimant's office on the alleged date of the offence is baseless.

In Counsel's view, there was overwhelming circumstantial evidence in support of the case of professional misconduct, which was rightfully considered. Counsel cites the case of *Kisumu Civil Appeal No. 8 of 2014. Teachers Service Commission Versus Joseph Okoth Opiyo* where the Judges of Appeal opined that:-

“That in matters of sexual immorality it is not easy to get eye witnesses evidence as such acts are committed behind closed doors and that such cases are in most cases proved by circumstantial evidence of opportunity to commit the same.”

On due process it is submitted that the Respondent did not breach any process as set out in the Code of Regulations or the law. That proper investigations were conducted and it was found that an offence had been committed prompting the Respondent to write interdiction letters dated 14<sup>th</sup> August 2012 and 25<sup>th</sup> September 2012 to the Claimant inviting him to respond to the allegations in writing which he did. That he was thereafter invited for a disciplinary hearing on 27<sup>th</sup> November 2012, at the County Director's office in Homabay, which he attended in person but failed to call witnesses or tender any documentary evidence. That his failure to call witnesses cannot be blamed on the Respondent. Counsel cites the case of *Nairobi Misc Civil Application No. 171 of 2006, David Kimani v TSC [2007] eKLR* where Justice Nyamu (as he then was) stated:- “there is no evidence that he was prevented from calling his witnesses or that the time allowed was insufficient or that he did apply for the adjournment of the proceedings and that this was declined”.

On the issue of being denied the opportunity to appeal it is submitted that the Claimant was given the opportunity to do so within 90 days in line with regulation 66(7) of the Code. That the Respondent received the Claimant's letter of appeal dated 9<sup>th</sup> February 2015, which was time barred and the Claimant was advised as such. Any other appeals alleged by the Claimant were never received by the Respondent and

the Claimant did not adduce any evidence to the contrary.

That the Disciplinary proceedings against the claimant conformed to statutory requirements and were therefore regular. Further that the Respondent is a quasi-judicial body hence the proceedings of the Respondent must not be compared to those of a court of law created under the Judicature Act and the Constitution as was observed by the Court of Appeal in **Civil Appeals No (S). 26 & 27 of 2012: Bett Francis Berngetuny & Another vs. Teachers Service Commission and Another**. In that case the Court of Appeal held that:

“The general principles that should guide statutory, domestic or administrative tribunals sitting in a quasi-judicial capacity.... are incorporated in the Regulations... accusing an employee of misconduct by way of query and allowing an employee to answer the query before a decision is taken satisfies the requirement of fair hearing or natural justice. The Claimant was given a fair hearing since he answered the queries before he was dismissed... If an employer has conducted disciplinary proceedings fairly in accordance with statutory or laid down regulations, a court of law should exercise great caution before it interferes with the employer's findings.”

It is further submitted that the Respondent is not bound by the Criminal Court decision and cite the case of **Nairobi Civil Appeal No. 50 of 2014. Judicial Service Commission v Gladys Boss Sholei & Another** the Court of Appeal Judges quoted several authorities to demonstrate that criminal law should not be applied in disciplinary Proceedings and professional proceedings. In the said judgement, G. B. M Kariuki J. relied on a number of cases from several other jurisdictions in support of the principle. He relied upon **Sinha and General Medical Council (Neutral Citation Number [2009] EWCA Cir 80)** where the Court of Appeal in London observed that:-

“Criminal proceedings are designed to establish guilt or innocence of a member of the public with a view to punishment by society if the verdict is guilty, and acquittal if the verdict is not guilty. Proceedings before a professional body are designed to establish whether or not professional men and women have fallen below the standards expected of their profession; whether or not the professionals concerned should remain members of the profession concerned and if so, on what terms”

That the Judge also referred to **Dr Anil Mussani and College of Physicians and Surgeons of Ontario (reported at (2003)C 64 O.R. (3d) 641** where the Court of Appeal for Ontario, Canada, referred to a plethora of authorities to demonstrate that:

“Professional disciplinary hearings are not criminal or quasi- criminal in nature because despite their potentially serious sanctions, they do not result in true penal consequences. Rather, they are administrative and regulatory in nature, designed to maintain professional integrity and professional standards and to regulate conduct within the profession in question.”

It is further submitted that the law of this court is now settled that decisions of a criminal court have no relationship whatsoever in employment matters. In **Industrial Cause No. 1492 of 2011: David Kemei vs. Energy Regulatory Commission (2013) eKLR**, Rika J. held:

“The employment disciplinary process remains an internal and private mechanism. It is not subject to criminal process; which is a public process. It cannot be expected that employers have to wait for Policemen, prosecutors and judicial officers to determine employment offences at work place ...the work place is not a public arena, and the procedures and the standards of proof in dealing with gross misconduct do not match the onerous requirements of the public criminal trial...”

“The finding of not guilty in the criminal process did not tie the hands of the employer from arriving at a guilty finding in the disciplinary process. The timing and pace of the disciplinary process did not follow the criminal process. The Claimant misperceived the essence of two processes, by his assertion that he was double jeopardized; he was not but only put through two legitimate but different processes: one private and the other public, which processes are not bound to reach the same outcome”

Counsel for the Respondent submits that the Respondent is exempted from the application of the rules of evidence and procedural technicalities that apply to a criminal trial and that the Court should not delve into criminal matters which were not the subject of the respondent's disciplinary process as to do so would turn an internal disciplinary process into a criminal process where the rigours of a criminal trial are statutorily exempted.

Counsel further submitted that the remedy of reinstatement may no longer be tenable owing to the fact that 3 years have passed since the dismissal. Further that an employment contract is a contract of mutual obligations and not servitude. That the Respondent has lost trust and confidence in the claimant as an employee and the relationship cannot be salvaged and to order otherwise would amount to imposing a contract on an unwilling party.

As to compensation it is submitted that an employee is only entitled to wages which are due or which he/she has worked for and nothing else. This provision buttresses the long held principle that payment of salary in a contract of employment is a compensation for services rendered by an employee. Salary only accrues to an employee who has rendered quantifiable service. Therefore, that the claim for unpaid salary for the period the Claimant was not working must fail.

That the Claim of over Kshs.15 Million by the Claimant is not only unreasonable but lacks legal justification. Counsel for the Respondent cites **Kisumu Civil Appeal No. 72 of 2014: Hema Hospital v Wilson Makongo Marwa [2015]** where the Court while considering a plethora of authorities on the subject of compensation, observed that employment remedies must be proportionate to the economic injuries suffered by the employees and noted that the remedies are not aimed at facilitating the unjust enrichment of aggrieved employees; they are meant to redress economic injuries in a proportionate way.

That the Respondent had reason to terminate the Claimant and due process was followed and as such the Claimant's case should be dismissed with costs.

## **Determination**

I have considered the pleadings, evidence, submissions and authorities cited. The issues for determination are first, whether the termination of the claimant's employment was fair both substantively and procedurally and second, if he is entitled to the remedies sought.

## **Fair Termination**

Fair termination entails both fair procedure and valid reason for termination. The disciplinary procedure for teachers is contained in the Code of Regulations for Teachers, the relevant one for this case being the Revised 2005 Edition. Under Regulation 66(2) thereof a teacher may be removed from the register and thus become ineligible to teach for the following grounds –

### **(2) Letter of Interdiction**

**Where it comes to the knowledge of the Commission or its Agent and it is alleged that a registered teacher should be removed from the register because he/she is an unsuitable person to be a teacher, on any of the following grounds. He/she:-**

- a. is not of good moral character,**
- b. has been convicted for a criminal offence which, in the opinion of the Commission, renders him/her unfit to be a teacher,**
- c. is guilty of infamous conduct in any professional respect,**
- d. has been engaged in any activities which, in the opinion of the Commission, are prejudicial to peace, good order or good government in Kenya,**
- e. has deserted duty,**
- f. has mismanaged/misappropriated public funds,**
- g. has submitted forged documents to the Commission or its Agents.**

**The Commission or the Agents will serve the teacher with notice of interdiction in the form prescribed in Schedule XXXVIII.**

The process for interdiction and disciplinary proceedings are contained in Regulations 66(3) and 66(4) respectively reproduced below –

### **(3) Process of interdiction**

**The Agent shall:**

- a. On receiving allegations against a teacher conduct investigations and assemble evidence to establish whether the teacher has a case to answer.**
- b. Where there is a Board of Governors, the Board will invite and interview the teacher except for desertion cases.**
- c. If satisfied that the teacher has a case to answer, serve the teacher with a notice of interdiction on the form prescribed in Schedule XXXVIII specifying the actual allegations made against him/her.**
- d. Send a copy of interdiction notice to the Secretary Teachers Service Commission attaching all the relevant documentary evidence.**
- e. Ensure that the interdicted teacher/head teacher clears and leaves the institution and the institution house (where applicable) within 48 hours upon receiving the letter of interdiction.**

### **(4) Disciplinary Proceedings by the Commission**

**The Commission shall in accordance with Section 9(1) and (2) of the Act investigate, consider and determine each case of interdiction whenever it is alleged that a registered Teacher should have his/her name removed from the Register.**

**The Commission shall:**

- a. inform the teacher concerned on/about the nature of the allegation made against him/her, afford that teacher adequate time for the preparation and Presentation of his/her defence and the opportunity of being heard in person.**
- b. act on general evidence of statements relating to the character or conduct to the teacher concerned and shall be bound to**

**receive and consider only evidence admissible in a court of a law and**

**c. Administer oaths and may, for the purpose of dealing with any matter before it, summon any person to attend and give evidence and to produce any relevant documents.**

**d. Consider only those allegations that the teacher has been informed and charged with.**

The claimant's case was first heard by the SMC on 12<sup>th</sup> June 2012. The

finding of the SMC after hearing the witnesses before it including CAO was that –

“There is no tangible evidence against the teacher since there is a lot of contradiction in that the child did not mention any carnal knowledge prior, the girl did not tell anybody the problem until she realised she was pregnant, none of her friends had any evidence or information and therefore this girl could be taking advantage of the Teacher's desperate situation.”

According to Regulation 66(3), a teacher is supposed to be served with a letter of interdiction only where after investigations the respondent comes to the conclusion that the teacher has a case to answer.

According to RW3 further investigations were prompted by a complaint from DEVLINK, an NGO to the DEO, Mbita following a complaint by the Father of CAO. The DEO set up a panel of 3 which carried out investigation. The Committee concluded that the claimant was guilty of immoral behaviour and infamous conduct but that the allegations of carnal knowledge was difficult to confirm. The claimant was thus for the second time absolved of the charge of immoral conduct.

The claimant's first letter of interdiction dated 14<sup>th</sup> August 2012, accused the claimant of immoral behaviour and infamous conduct. The claimant was served with another letter of interdiction dated 25<sup>th</sup> September 2012, which indicted him of the same charges. At the disciplinary hearing, the claimant was found guilty of the charges and a verdict made to dismiss him from service and to remove his name from the register of teachers.

I have perused the proceedings of the disciplinary hearing and specifically the record of the testimony of witnesses 2 and 3 (recorded as such), witnesses 4, 5, 6 and 7 (the classmates of CAO) – who were asked questions in unison so that it is not clear who among the witnesses gave the answers that are recorded. The record of witnesses 7, 8 and 9 was also taken jointly.

Specifically for witnesses 4, 5, 6 and 7, it is not clear who gave the responses on record as the record is in plural e.g.

“Question: were you forced to write those statements before you

Answer: No, we voluntarily wrote them.”

A perusal of the proceedings also discloses that at the hearing the claimant was asked questions by the panel which he responded to. There is no record of him being asked to present his case or to call a witness. There is further no record that he was asked if he had any witness or informed of his right to call one. The letter of invitation reads –

“DATE: 30/10/2012

TSC NO.: 461289

TSC/DISC/NO: 0237/08/2012/2013/6

MR/MRS/MISS: Kennedy Ondigo Olero

Thor' The Headteacher

[particulars withheld] Primary School

P.O. Box 7 – 40319

NFANGANO

RE: HEARING OF DISCIPLINE CASE (INVITATION)

I am directed to inform you that, your case will be heard at the County Director's Office, Homabay on 27/11/2012 at 8.30 a.m. You are invited to attend.

Please bring the original copies of your academic and professional certificates, your last payslip as well as your identity card and Certificate of Registration as a teacher which the Commission may wish to examine during the interview.

You are also advised to bring with you your letter of interdiction together with any documents that may be useful in your defence.

You are advised to contract the Teachers Service Commission if the decision of the above hearing is not communicated to you within 28 days from the date of the hearing.

ABUBAKAR I. MAALIM

FOR: SECRETARY

TEACHERS SERVICE COMMISSION”

I have further considered the statements of PO, LAO, RA at pages 32, 34 and 37. I do not consider what is contained in the statements is proof that the claimant used vulgar language in the context of a guidance and counselling session for girls who according to the evidence on record were already sexually active and writing love letters with explicit sexual language to their boyfriends. All the other witnesses did not witness the use of the said vulgar language.

Further the evidence of the claimant as contained in his responses to SMC and the letter of interdiction do not appear to have been considered by the respondent. The record further reflects that the questions put to the claimant and the witnesses were leading, and intended to lead to preconceived result that the claimant was guilty.

On the charges of immoral behaviour by having carnal knowledge of CAO, both the reports of the SMC and the DEO's Investigation Committee were clear that there was no evidence of the same. Indeed this was confirmed by the DNA test which proved that the claimant was not the father of CAO's twins whom she alleged were conceived as a result of her defilement by the claimant. It was the finding of SMC that there was a lot of contradiction in CAO's statements and that she only came up with the story of defilement by the claimant when she realised she was pregnant.

Based on the findings of the SMC and the DEO's Investigation Committee, the Disciplinary Committee ought to have been cautious about CAO's evidence.

Court further notes that after the SMC found no proof of the accusations against the claimant, he was subjected to criminal proceedings instigated by DEVLINK who were also the cause of the second investigations by the DEO. The criminal proceedings also returned a similar verdict leading to the claimant's acquittal without being put on his defence.

I find that subjecting the claimant to a second investigation after the SMC absolved him of all charges was unprocedural. This was done while the claimant was facing criminal charges before a court of competent jurisdiction on the same facts. The resultant interdiction on the two charges, including a charge that both the SMC and the DEO's investigations had found not proved was unfair. I further find that there was no sufficient evidence before the respondent's disciplinary committee to prove either the charge of immoral behaviour or infamous conduct.

The result is that the termination of the claimant's employment was both procedurally and substantively unfair. I find and declare accordingly.

### **Remedies**

The claimant prayed for reinstatement. Having found that the termination of his employment was unfair both substantively and procedurally, he would be entitled to reinstatement. This is because being a teacher and having been removed from the Register of Teachers unfairly, he would be unable to practice his profession. He had a clean record before this incident. Further, the respondent is a large public organisation and the claimant would be able to comfortably go back to work in any school other than Wamai Primary School at which the incidents leading to the termination of his employment occurred.

He can however not be reinstated as it is more than 3 years since his employment was terminated and his name removed from the Register of Teachers on 17<sup>th</sup> and 27<sup>th</sup> December 2012 respectively. Section 12 of the Employment and Labour Relations Court Act provides for reinstatement only within 3 years of termination.

The alternative remedies available are reengagement and compensation. I find that compensation would not be appropriate in the circumstances of the instant case as that would still leave the claimant without his registration as a teacher.

For these reasons, I make the followings orders –

1. Reinstatement of the claimant to the Register of Teachers
2. Re-engagement of the claimant as a Teacher by the respondent with effect from the date of judgment to the position he would have held had he not been dismissed from service.
3. An order that the respondent pays the claimant all the salary withheld from date of interdiction on 14<sup>th</sup> August 2012 to 23<sup>rd</sup> December 2012 when he received the letter of dismissal from service.
4. The respondent shall pay the claimant's costs for this suit.

**DATED AND SIGNED AT NAIROBI ON THIS 26<sup>TH</sup> DAY OF APRIL 2019**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 20<sup>TH</sup> DAY OF MAY 2019**

**MATHEWS NDERI NDUMA**

**JUDGE**