



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT NYERI**

**CASE NO. 236 OF 2016**

**SAMUEL MAINA NJOROGE.....CLAIMANT**

**VERSUS**

**THE TEACHERS SERVICE COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE CABINET SECRETARY**

**MINISTRY OF EDUCATION.....2<sup>ND</sup> DEFENDANT**

**AND**

**BOARD OF MANAGEMENT,**

**THANGIRA UMOJA SECONDARY SCHOOL....1<sup>ST</sup> INTERESTED PARTY**

**GRACE NJERI MWANGI.....2<sup>ND</sup> INTERESTED PARTY**

**JUDGMENT**

1. The Claimant was an employee of the 1<sup>st</sup> Respondent working as a teacher. At the material times relevant to this suit and was Principal in job group P with a salary scale of Kshs. 930,324 -1,246,728/-. He has sued the Respondents for unilaterally terminating his employment, interdicting, suspending and withholding his salary for allegedly sexually assaulting students. The Claimant through his amended statement of claim averred that he was an employee of the 1<sup>st</sup> Respondent, and that having served his employer for several years, he rose through the ranks to the position of a principal which position he held at Thangira Secondary School. It was averred that between the 22<sup>nd</sup> and 26<sup>th</sup> July, 2016 students went on strike after which the Teachers Service Commission and a delegation from the Ministry of Education visited the school for further investigations. The Claimant avers that the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent interviewed some of the students based on statements that they had recorded under duress. Those students sought to recant such statements but the said delegation compelled the students to cling on to those statements and failed to give them an opportunity to state their true positions. The Claimant also averred that more girls were interviewed than boys hence displaying non-inclusivity. The Claimant averred that students confessed to have been coerced to participate in the strike and frame him for allegedly having sexually assaulted them. On 2<sup>nd</sup> August 2016 at 9.40a.m the Claimant received an invitation to appear before the 1<sup>st</sup> Respondent's county discipline panel. The Claimant had only 20 minutes to comply which made it impossible to defend himself. On 8<sup>th</sup> August 2016 the Claimant received a notice from the Teachers Service Commission Director requiring him to hand over the management and administration of the school to one Grace Njeri Mwangi, the 2<sup>nd</sup> Interested Party with immediate effect. He asserts that the said notice being immediate was unreasonable and impractical and that no notice of rationale behind his handing over was expounded in the letter. Further via a letter dated 8<sup>th</sup> August 2016 and served on the Claimant on 16<sup>th</sup> August 2016, the Claimant was interdicted on grounds of sexually assaulting students at diverse dates in the year 2015 and 2016. He averred that on 23<sup>rd</sup> August 2016 he proceeded to the bank to carry out school related activities but to his dismay, he could not carry out any transaction related to the school's account, he was informed the accounts had been frozen by the Ministry of Education which information was not communicated to him. He termed this a malicious act done in bad faith. The Claimant averred that he received a letter for disciplinary hearing from the 1<sup>st</sup> Respondent dated 27<sup>th</sup> February 2017 requiring him to appear before it's officers on 15<sup>th</sup> March 2017 some 8 months after the interdiction. The Claimant avers that he was denied an opportunity to challenge the witnesses or the evidence since no witness appeared to tender any evidence at the said hearing. Based on the 1<sup>st</sup> Respondent's finding of the Claimant guilty as charged, he was suspended for 6 months with effect from 15<sup>th</sup> March 2017. In the suspension letter it was demanded that the Claimant hands over. He however asserts that he had already handed over hence making the same demand untenable. The Claimant avers that the suspension was harsh and in excess since no witness appeared and/or evidence tendered at the disciplinary hearing. The Claimant asserts that the 1<sup>st</sup> Respondent has also maliciously and unfairly withheld his salary since August 2016 to date, hence causing him to suffer financial constraints and inconveniences. He thus seeks a sum of Kshs.

718,956 plus interest at commercial rates prevailing from 8<sup>th</sup> August 2016 until payment in full. The Claimant further contends that the 1<sup>st</sup> Respondent's actions were unprocedural and in complete disregard of Regulation 146 of the Teachers Service Commission Code of Regulations for Teachers (2015). He further contends that he was never accorded a fair trial and the administrative actions taken by the Teachers Service Commission were unfair and unconstitutional. The Claimant also seeks a declaration that the withholding of his salary was unlawful, unprocedural and discriminatory. He asserts that his interdiction and subsequent suspension was unjustified, unfair, illegal and irregular as he was not accorded a fair administrative action contrary to Article 47 of the Constitution and he prays that the suspension be declared as null and void. He seeks an order of reinstatement without loss of any salary or allowances and benefits from the date of interdiction and suspension; an order directed to the 1<sup>st</sup> Respondent requiring it to pay all allowances, privileges, benefits, including promotions and any other legal due lost during the period of interdiction and suspension; an order to the 1<sup>st</sup> Respondent to pay the claimant all his dues amounting to Kshs. 985,636/-. Being annual leave Kshs. 133,340/-, salary arrears Kshs. 133,340/- per month from August 2016, Mwalimu SACCO deductions not remitted and payable from the Claimant's savings of Kshs. 688,956/-, burial benevolent of Kshs. 15,000/- from the SACCO, phone allowance of Kshs 5,000/- per month, and leave allowance of Kshs. 10,000/-; a declaration that the Respondent's failure to reveal to the Claimant the particulars and the evidence they had against him was a breach of the Claimant's right to fair hearing; a declaration that the handing over notice dated 8<sup>th</sup> August 2016 did not contain details of the offence and therefore amounted to an ambush and a violation to the claimant's right to a hearing.

2. The 1<sup>st</sup> respondent denied each and every allegation and put the claimant to strict proof thereof. It stated that it received an anonymous letter alleging that the claimant was sexually harassing female students in his school. It was averred that a County Disciplinary Committee meeting was convened to deliberate on the allegations in the presence of the Claimant who was given an opportunity to respond. After gathering sufficient evidence implicating the Claimant, a decision to interdict him was arrived at. The Claimant was served with a notice of interdiction setting out the particulars of the allegations against him and he was required to write a statement of defence within 21 days. He was also to handover after interdiction to pave way for further investigations and to ensure continuity of the affairs of school. The Respondents averred that 15<sup>th</sup> March 2017, the Claimant was accorded an overwhelming opportunity to respond to the allegations and present his evidence and cross-examine the 1<sup>st</sup> Respondent's witnesses. The disciplinary panel evaluated both oral and written statements, considered the statement of defence of the Claimant, his past professional records and concluded that he was in breach of Code of Regulations for Teachers (CORT) and recommended that he be suspended for 6 months. The 1<sup>st</sup> Respondent denied owing the Claimant any money at all and asserted that it acted procedurally, fairly and with utmost professionalism. It averred that the decision to suspend the Claimant was fair and premised on the evidence adduced before it. It asserts that a fair hearing was accorded to him and they denied in toto the particulars of unfair, illegal and irregular punishment. The 1<sup>st</sup> Respondent further averred that the Board of Management of the school is its agent and the power to interdict and render punishment rests in it in accordance with Regulations 15 and 147 of the CORT. The Respondents further asserted that interdiction is the first step in a disciplinary process and thus it does not amount to miscarriage of justice. The 1<sup>st</sup> Respondent further stated that the process was conducted meticulously and it adhered to the CORT as well as the principles of natural justice. It submitted that it acted fairly, procedurally and lawfully and that the manner it was arrived at the decision conformed to the due process envisaged under the Employment Act, the Teachers Service Commission Act and the rules of natural justice. The 1<sup>st</sup> Respondent averred that the Claimant invoked the jurisdiction of this court prematurely in a bid to evade the due process as outlined in Part XI of the CORT. The 1<sup>st</sup> Respondent contends that the Claimant's suit is an abuse of the court process, based on a misapprehension of facts and the same is in this court prematurely. The 1<sup>st</sup> Respondent therefore asserts that the Claimant is not entitled to any of the reliefs sought in the amended statement of claim and prays that the court dismisses the suit as it is devoid of merit with costs.

3. The 2<sup>nd</sup> Respondent was represented by the office of the AG and on the 28<sup>th</sup> February, 2017 conceded to the Claimant's case through its counsel in essence not presenting a defence.

4. The Claimant testified as did a few former students whose statements had been critical in the disciplinary process against the Claimant. The TSC Sub county director also testified as did a TSC official from Nairobi. The Claimant reiterated that his disciplinary case was from evidence that was gathered from coached witnesses. He stated that he never molested any of his students and that the allegations made were calculated to cause unrest and precipitate the strike the students participated in. He availed the former chairperson of the school's board of management and 4 students as his witnesses. The students all recanted their statements made to the Ministry of Education officials as well as the TSC investigators accompanying them and at the TSC panel that heard the case against the teacher. The sub county director of education testified as to what he did upon receiving the report and the TSC representative testified about the process at TSC during the hearing of the disciplinary case against the Claimant. The Claimant took umbrage against the interdiction and the manner it was conducted with the mode of communication and the tenor of the letter.

5. In submissions filed, the Claimant submitted that the issues for determination were whether there were valid reasons and conclusive evidence of sexual harassment by the Claimant to warrant any disciplinary action; whether due process was adhered to in the disciplinary proceedings undertaken against the Claimant; and whether the Claimant is entitled to the relief sought. As regards the issue of validity of reasons for the disciplinary action against him, the Claimant submitted that the interdiction and subsequent suspension was pegged on anonymous reports of sexual harassment of female students made to the Teachers Service Commission offices at Murang'a. The Claimant submitted that the 2 witnesses for the Respondents did not produce any material related to the alleged anonymous reports despite both of them speaking of leaflets and the letter sent by post to the TSC. It was the Claimant's position that given the absence of evidence of these documents that it was open to assume that the allegations were a fabrication by the 1<sup>st</sup> Respondent in collusion with the 1<sup>st</sup> Interested Party. The Claimant submitted that there was no basis for the interdiction and suspension as everything other than the genesis for the complaint were availed and that the failure to adduce any evidence of the alleged leaflets and anonymous letter shows there was no proof to initiate the process. The Claimant submitted that due process was not followed and that CORT Regulation 146(3)(a) was not adhered to. The Claimant submitted that he was to be presumed innocent, was to be informed of the allegation in sufficient detail, was to be given time to prepare the defence within 7 days, have an opportunity to appear in person, be present when the witnesses were being interviewed and an opportunity to challenge adverse evidence. The Claimant argued that he never had an inkling of the investigations and was surprised to find an army of the 1<sup>st</sup> Respondent at the school and that the failure to reveal to him the particulars of the allegations against him was a breach of his right to a fair hearing. He submitted that he was given a very short period within which to respond to allegations made against him which seems to be the *modus operandi* of the 1<sup>st</sup> Respondent. The Claimant relied on the case of **Fredrick Saundu Amolo v Principal Namanga Mixed Secondary School & 2 Others [2014] eKLR** where Mbaru J. held that the respondent had a duty to inform the claimant of the allegations against him as well as remind him of the fundamental right to have at the hearing a person of his choice. The Claimant submitted that under

the Thirty Fifth Schedule CORT a teacher on interdiction shall be invited in writing for the hearing of the discipline case at least one month before the date of hearing. He submits that the notice he was served on 27<sup>th</sup> February 2017 requiring his attendance on 15<sup>th</sup> March 2017 was approximately a fortnight to the intended hearing. The Claimant submitted that the outright breach of the law were a contravention of the rules of natural justice *audi alteram partem*, the CORT and the Constitution of Kenya Articles 50, 41(1), 25(c), 27(1) and (2), 28, and 47. He submitted that the process of investigation, interdiction and suspension was unnecessarily too long from 1<sup>st</sup> August 2016 to date and that he had not been reinstated despite having served his suspension. He faulted the period he was given to appear before the discipline panel at the school on 2<sup>nd</sup> August 2016. He also faulted the two interdiction letters dated 8<sup>th</sup> August 2016 and 23<sup>rd</sup> September 2016. He submitted that one cannot cure an illegality by amendment and that the letter of 8<sup>th</sup> August 2016 was contrary to the Thirty Fourth Schedule of CORT and the attempt to amend it on 23<sup>rd</sup> September 2016 did not clothe it with legality as it was void *ab initio*. He submitted that since the date of suspension he was not drawing a salary from the 1<sup>st</sup> Respondent causing him to suffer an indefinite suspension bereft of any pay. He submitted that this was unfair labour practice and cited the case of **Patrick Wanyonyi Khaemba v Secretary Teachers Service Commission & Another [2014] eKLR** where Wasilwa J. held that failure to place the teacher under half pay flouted the provisions of Article 27 of the Constitution of Kenya and found Regulation 148(1) unconstitutional and discriminatory to teachers. He thus prayed that the court grants his prayers per the claim.

6. The 1<sup>st</sup> Respondent submitted that upon the commencement of the disciplinary process against the Claimant on 25<sup>th</sup> July and 2<sup>nd</sup> August 2016 when he appeared before the investigative panel, the Claimant was accorded an opportunity to respond to the allegations against him and that the allegations of flirting and sexual harassment of students AN, A EMW and PW were confirmed by written admissions by the students. The 1<sup>st</sup> Respondent argued that it was then that the Claimant was interdicted on 8<sup>th</sup> August 2016 in accordance with the CORT. The 1<sup>st</sup> Respondent submitted that it was noteworthy that some of the students recanted their statements belatedly after the 1<sup>st</sup> Respondent had voluntarily obtained the same from the students. As the students testified the change of mind inquisitively came at the time the Claimant had obtained legal representation and was preparing to submit his claim and that the statements were in fact authored in the Claimant's lawyer's office. The 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Interested Party submitted that through the pleadings and documentary evidence adduced before the court demonstrated that following the allegations of immoral conduct on the part of the Claimant, the 1<sup>st</sup> Respondent acted with outmost professionalism and the decision to suspend the Claimant from service for 6 months was fair, just and appropriate in the circumstances of the case. The 1<sup>st</sup> Respondent submitted that the Claimant from the earliest opportunity was informed or made aware of the allegations against him and invited to submit his defence, accorded an opportunity to present his defence both oral and written, accorded an opportunity to cross-examine witnesses before the disciplinary panel and that the decision was communicated to him. The 1<sup>st</sup> Respondent submitted that the issues for determination were whether a notice was issued to the Claimant and whether the decision to suspend him was justified, whether the Claimant was accorded a fair hearing in line with Article 47 of the Constitution, whether the investigation by the 1<sup>st</sup> Respondent including the recording of statements from the students was valid and whether the Claimant is entitled to remedies sought. The 1<sup>st</sup> Respondent submitted that the Claimant was duly notified of the allegations against him and accorded an opportunity to respond and mount his defence. The 1<sup>st</sup> Respondent submitted that it wholly adhered to the provisions of the Teachers Service Commission Act by interdicting the Claimant on grounds that at the time of the decision it genuinely believed to exist. The case of **Mary Chemweno Kiptui v Kenya Pipeline Company Limited [2014] eKLR** was cited for the proposition that the Respondent had complied with the basic tenets of natural justice by informing the Claimant of the allegations against him and a chance to submit a defence and a hearing in due cognisance of the fair hearing principles of natural justice. The 1<sup>st</sup> Respondent submitted that the principles of procedural fairness as demanded by Section 41 of the Employment Act were adhered to. The cases of **Anthony Mkala Chitavi v Malindi Water & Sewerage Co. Ltd [2013] eKLR** and **Republic v Board of Governors Our Lady of Victory Girls School Kapnyeberai & Another ex parte Korir Kipyego Joseph & Another [2015] eKLR** were cited for this proposition. The 1<sup>st</sup> Respondent submitted that the ingredients of a fair process were adhered to. The 1<sup>st</sup> Respondent submitted that the Claimant sought the court to interfere, upset or impede the administrative processes of the 1<sup>st</sup> Respondent by substituting the latter's decision with its own. The cases of **George Wekesa v Multimedia University of Kenya [2016] eKLR** and **Professor Gitile J. Naituli v Multimedia University College & Another [2013] eKLR** were cited for the proposition that courts shy away from interfering with internal disciplinary processes of bodies such as the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent submitted that its mandate was to ensure learner protection and it had a primary responsibility among others to protect learners entrusted to its employees/teachers and school administrators in the school environment and cited the case of **W.J & Another v Astarikoh Henry Amkoah & 3 Others [2015] eKLR** per Mumbi Ngugi J. The 1<sup>st</sup> Respondent submitted that the Claimant did not lay a basis for the payment of damages as the process by the 1<sup>st</sup> Respondent was lawful and fair. The 1<sup>st</sup> Respondent thus urged the dismissal of the claim with costs.

7. The provisions of the Code of Regulation for Teachers sets out elaborate processes to be undertaken in respect of teachers facing disciplinary cases. Whereas the charges against the Claimant were of a grave nature, the conduct of the matter left a lot to be desired. The investigative panel gave the Claimant a mere 20 minutes to present his defence and the notice to attend the disciplinary panel was less than the 30 days provided under the CORT. The 1<sup>st</sup> Respondent flouted its own manual in the haste to condemn the Claimant. Whereas the punishment meted out was in terms of the law and CORT, the Claimant has not been deployed subsequent to his punishment. This is contrary to his legitimate expectation. He was not issued with a letter as required under the CORT upon the expiry of the suspension. In the case before the court he sought relief regarding SACCO dues and interest on account of financial obligations. That relief is unavailable as the SACCO issue was never part of the process of the discipline case against him. The Claimant sought general damages. Ordinarily in this court, general damages are not granted though the law makes provision for such relief in certain circumstances. This is one of them as the 1<sup>st</sup> Respondent in conjunction with the 2<sup>nd</sup> Interested Party embarked on a process that was flawed whatever the merits of the complaints initially received. It was curious that the 1<sup>st</sup> Respondent did not avail the anonymous letter or leaflets that initiated the complaint. It is imperative that as the 1<sup>st</sup> Respondent exercises the prerogative to safeguard the learners under its care it does not infringe on the rights of others. In the case before me despite the sentence being served the Claimant has not been deployed as required. He was due to resume employment and in the finding of the court he is entitled to be reinstated on payroll from the date of expiry of his suspension, the 1<sup>st</sup> Respondent to issue him with a deployment letter and pay all his backdated salaries and allowances from the date of termination of his suspension to date. In addition he will receive damages for the unlawful indefinite interdiction/suspension since the 1<sup>st</sup> Respondent has not reinstated the Claimant to its payroll since the conclusion of his suspension. He will also have costs of the suit. The 2<sup>nd</sup> Respondent dodged a bullet and will not be liable for any of the payments due to the Claimant. As a parting shot, the Claimant is reminded of the sacred oath implicit in teaching that a teacher should never abuse the trust reposed in the said teacher as learners look towards the teacher for education and guidance. The principles enunciated by Mumbi J. in the case of **W.J. & Another v Astarikoh Henry Amkoah & Others (supra)** hold true as a teacher owes a greater duty of care towards students. The 1<sup>st</sup> Respondent on its part must sensitize its staff and the County Directors

of Education countrywide to follow the law when executing its mandate in discipline cases against teachers to avoid situations where there is appearance of either hubris or flagrant disregard for the law and its own Code of Regulation for Teachers (CORT). In the final analysis I enter judgment for the Claimant against the 1<sup>st</sup> Respondent for:

- a) A declaration that the continued suspension of the Claimant despite his serving the sentence meted out by the disciplinary panel of the 1<sup>st</sup> Respondent is null and void and a deployment letter be issued to the Claimant with immediate effect;
- b) Immediate reinstatement of the Claimant to the 1<sup>st</sup> Respondent's payroll effective the date of termination of the 6 months suspension;
- c) Payment of arrears of salary from date of termination of the suspension to date;
- d) General damages of Kshs. 1,600,080/-
- e) Costs of the suit.
- f) Interest on the sums in c) and d) above at court rates from the date of judgment till payment in full. Only the sum in c) above to be subject to statutory deductions as per the provisions of Section 49 of the Employment Act, 2007.

It is so ordered.

**Dated and delivered at Nyeri this 15<sup>th</sup> day of May 2019**

**Nzioki wa Makau**

**JUDGE**

I certify that this is a true copy of the Original

**Deputy Registrar**