



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**CAUSE NO. 2444 OF 2016**

**JOSEPHAT MUNYAO KOVULO.....CLAIMANT**

**VERSUS**

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

**JUDGMENT**

**Introduction**

1. The claimant brought this suit on 28.11.2016 alleging that he was unfairly and unlawfully dismissed from employment and removed from the register of teachers without following due process by the respondent on 8.8.2106. He therefore sought the following reliefs:

- a. The court declares that the Claimant's termination was unfair, procedural and unlawful.
- b. An order that the Claimant's name be re-registered in the register for teachers.
- c. One month's salary in lieu of notice Kshs.28,520.00.
- d. Twelve (12) months compensation for unfair and unlawful termination (Kshs.28,520.00x 12 months) Kshs.342,240.00.
- e. The Claimant be reinstated back to his position.
- f. Costs of this claim.
- g. Interest on c, d & f above.

2. The Respondent filed her Memorandum of Defence on 4th January 2017 denying the alleged unfair dismissal of the claimant from employment and his removal from the teachers' register and averred that both the dismissal and de-registration were done fairly in compliance with the due process envisaged under the Employment Act, Teachers Service Commission Act and rules of natural justice. She therefore prayed for the suit to be dismissed with costs.

3. The main issues arising from the pleadings are whether there was a valid and fair reason for dismissing the claimant from service; whether a fair procedure was followed before the dismissal; whether the due process was followed before removing the claimant from the register of teachers; and whether the claimant is entitled to the reliefs sought.

4. During the hearing, the Claimant testified on his own behalf while the Respondent called her two witnesses. Thereafter, both parties filed their respective submissions.

**Claimant's case**

5. The Claimant, Cw1, adopted his Witness Statement filed on 28th November 2016 and the List of Documents filed together with his claim as his evidence in chief. The gist of the statement is that he was registered by the Respondent as a teacher on 18th January 1988, TSC/265995 and subsequently employed as a teacher on permanent basis and posted to Lungu Primary School in Makueni District. That on 16th March 2016 he was arrested and thereafter charged, in Criminal Case No. 63 of 2016 at Tawa Resident Magistrate's Court with the offence of defilement of a child contrary to section 8 (1) as read with subsection 4 of the Sexual Offences Act No. 3 of 2006 and an alternative charge of committing an Indecent Act with a child contrary to Section 11 (1) of the Sexual Offences Act. That the specific allegations against him

were that on 16.3.2016, he had sexual intercourse with his standard 7 pupil called PNK who was aged 16 years but he denied.

6. He further stated that, upon knowledge of the alleged offence the Respondent commenced preliminary investigations and consequently interdicted him by the letter dated 11th April 2016. The letter also invited him to make a written statement about the incident within 21 days before being given a personal hearing by the respondent. The reason cited for interdiction was that he was of immoral behaviour in that he had sexual intercourse with his standard 7 pupil named PNK at his business premises on Wednesday 16.3.2016 at around 7.00 PM while a teacher at Lungu Primary School.

7. He further stated that, before the disciplinary hearing commenced, the said criminal case was heard and concluded by a Judgment delivered on 20th May 2016 whereby the Resident Magistrates Court acquitted him of the said charges. That thereafter he received letter dated 23.6.2016 from the Respondent inviting him to a disciplinary hearing on 11.7.2016. That the charge against him at the hearing was that he had sexual intercourse with his standard 7 pupil named PNK at his business premises on Wednesday 16.3.2016 at around 7.00 pm while a teacher at Lungu primary school.

8. He further stated that by the letter dated 8.8.2016, the Respondent communicated her decision to him that he had been summarily dismissed from the teaching service and he had also been removed from the Register of Teachers. The reason cited was that he had sexual intercourse with his standard 7 pupil named PNK at his business premises on Wednesday 16.3.2016 at around 7.00 pm while a teacher at Lungu primary school. That being aggrieved, he appealed, through his advocates by the letter dated 3rd October 2016, against the dismissal from employment and also the removal from the register of teachers. However, the appeal was dismissed by the Respondent vide a letter dated 3rd November 2016 without according him an opportunity to prosecute it. He therefore contended that his dismissal from employment and removal from the teachers' register was unfair and prayed for the reliefs sought.

9. In cross-examination, he testified that he was dismissed for allegations that he had sexual intercourse with his pupil. He admitted that he was arrested by police at 7 pm outside his posho mill where was being held by men. He further admitted that the pupil was still with him at the time of the arrest. He confirmed that he was charged with defilement but the charge as per the interdiction letter was immoral behaviour in that he had sexual intercourse with his Standard 7 pupil. He maintained that the charge before the Court and before the disciplinary tribunal of the employer were the same. He admitted that he was invited to make a written defence and thereafter accorded a hearing but contended that his request to the employer to summon a fellow teacher who was to be his witness was declined. He concluded by stating that in his defence before the TSC he presented the Judgment in the Criminal case as prove that he had been acquitted of the alleged offence.

#### **Respondent's case**

10. Agnes Muoka, the respondent's Makueni Sub- county HR Officer testified as Rw1. She confirmed that the Claimant was a teacher in her area of administration. She testified that a report was lodged by members of the community that the Claimant was found with a pupil at his posho mill after working hours and she thereafter went to the school with other technical officers to investigate the matter.

11. She testified that during the investigation, they interrogated some pupils and teachers in the school and recorded their statements. She contended that PNK stated that she had a sexual affair with the Claimant and had sex with the him 3 times in exchange of gifts of money, shoes and socks. She further contended that other pupils (friends of the PNK) confirmed the allegation by PNK but clarified that only one friend (MK) recorded a statement. She further contended that they also recorded statements from the persons who rescued the girl from the Claimant on the fateful night and also the area chief.

12. Rw1 further testified that the investigation revealed that the claimant had illicit affairs with his pupil which had gone on for quite some time unnoticed; that the claimant invited and/lured the minor to his business premises on 16.3.2016 and was caught with her there at night; that he had sexual intercourse with the pupil at the posho mill on various dates especially on 16.3.2016; that the claimant's behaviour was in breach of the tenets of the teaching profession, CORT, COCE and other regulations; and the pupil's evidence was consistent, cogent and believable. After the investigations, Rw1 compiled the report dated 18th March 2016 recommending that disciplinary action be taken against the claimant and forwarded the case to the Disciplinary Section of the respondent and thereafter the Claimant was interdicted and later dismissed from employment.

13. In cross-examination, Rw1 admitted that when they interrogated the witnesses, the Claimant was not present to ask them questions. She further admitted that the in its Judgment in Criminal Case No. 63 of 2016, the court dismissed the evidence by PNK as false and not credible. She stated that the charge against the claimant before the TSC hearing was immoral behaviour in that he had sexual intercourse with PNK on Wednesday 16.3.2106. She however admitted that she never attended the disciplinary hearing and she did not know whether the witnesses who recorded the statements during her investigations attended the disciplinary hearing.

14. Lawrence Kigen, the Respondent's Assistant Deputy Director testified as Rw2. He stated that on or about 18.3.2016, the respondent received information that on 16.3.2016, at his posho mill, the claimant had sexual intercourse with his pupil PNK who was a standard 7 pupil at Lungu Primary School. That a panel of officers visited the school on 18.3.2016 and obtained written statements from witnesses in relation to the matter and compiled a report. That PNK gave a statement that made chilling and comprehensive revelations about the claimant's unprofessional conduct. That after considering the evidence gathered the respondent believed that there were sufficient grounds that the claimant had violated the Code and interdicted him.

15. Rw1 further testified that the claimant was given a chance, and indeed he wrote an elaborate defence and thereafter invited to a personal hearing together with his witnesses before a Disciplinary Committee on 27.6.2016 at the office of the County Director Makueni. That during the said hearing the claimant was heard in his defence and also cross examined the witnesses lined up by the employer, including those who recorded statements during the investigations. That on 8.8.2016, the respondent dismissed the claimant for immoral behaviour after she had lost trust in his professional integrity. He admitted that the claimant had earlier been charged with a criminal offence and acquitted but contended that the charge before the Disciplinary Committee was immoral behaviour which related to his professional conduct. He contended that the procedure followed before the said dismissal was fair and lawful because the due process envisaged under the Employment Act, TSC Act and the rules of natural justice was complied with. He admitted that the claimant appealed against the dismissal

and the appeal is still pending because the claimant has not yet paid the required fee of Kshs.2,000.

16. In cross examination, Rw2 admitted that he also never attended the disciplinary hearing. He further admitted that the charge at the Disciplinary hearing was that the claimant had sexual intercourse with standard 7 pupil on 16.3.2016 while in the criminal case he was charged with defiling the same girl on 16.3.2016. He also admitted that the claimant was acquitted of the criminal charge before the disciplinary hearing was conducted and used the evidence of the acquittal during the latter hearing. He confirmed that, during the disciplinary hearing, there was no charge of attempt to have sexual intercourse or having relation with a pupil. He further confirmed that, during the disciplinary hearing, PNK denied having any relationship with the claimant.

17. He further admitted that the procedure for dismissal from employment and removal from the teacher's register are different and requires two different decisions. He confirmed that the claimant was never charged with removal from the teachers' register. He also admitted that the claimant's appeal was dismissed by the respondent's letter dated 3.11.2016. Finally, he admitted that the claimant was not paid any terminal dues after the dismissal but contended that in view of the dismissal, he was not entitled to any payment.

#### **Claimant's submissions**

18. The Claimant submitted that there was no valid reason for his termination as the Respondent was aware that the Magistrate's Court had already found him innocent of the charge of having sexual intercourse with the minor. Therefore, the Respondent was bound by the said finding. He relied on the cases of *Paul Ngeno v Pyrethrum Board of Kenya Ltd [2013] eKLR* and *Robi Stephen Nyamohanga v Judicial Service Commission [2017] eKLR*. He submitted that having been acquitted of the charges it meant that the Respondent in terminating him sat as an appeal of the criminal court and set aside the critical finding of the criminal case.

19. He submitted that the disciplinary tribunal's act of deciding the already closed criminal suit, it opened up the criminal proceedings and had indeed gone against the principle of res judicata. He submitted that the Respondent was bound by the finding of the criminal court and even if she was not bound by that finding she ought to have proved the reason for termination as per section 45 (2) of the Employment Act.

20. He submitted that he ought to have been given a reason why there was a violation of his right under Article 50 (2) (o) of the Constitution of Kenya for an offence he had been acquitted off. He relied on the case of *Onyongo Oloo v Attorney General (1986-1989) EA 456*.

21. He submitted that the Respondent failed to consider his defence therefore, she denied him an opportunity of being heard and curtailed his right to natural justice. He argued that the Respondent did not grant him a chance to be heard before his de-registration from the teachers' register. He relied on Article 47 of the Constitution and submitted that his de-registration was not procedural against the rules of natural justice.

22. He further submitted that the Respondent vide the letter dated 3rd November 2016 made a decision on his appeal in which the Respondent raised new grounds which the Claimant had not been charged with. It was therefore his submissions that although his dismissal and deregistration were premised on specified grounds this decision was upheld on different grounds on appeal. He submitted that the Respondent is estopped from raising the issue that the Claimant's appeal has not been determined and is pending. He relied on the decision in *Combe v Combe (1951) 2KB 215*.

23. In respect of the reliefs sought he submitted that he had shown there was no valid and fair reason for his termination thus the Court should declare that his termination was unfair and unprocedural. He submitted that his prayer was willing to go back to work as the 3 year time limitation is set to lapse on 8th August 2019. He relied on the decision in *Jadiah M. Mwarania v Kenya Reinsurance Corporation Limited [2018]eKLR*. He submitted that his reinstatement should be done without loss of any benefits.

24. He submitted that his de-registration was devoid of any hearing. Further, in any event this Court finds that the termination was invalid, then it follows that any consequential decision such as de-registration which was premised on the termination stands invalidated.

25. He submitted that he is also entitled to the alternative remedies of one month salary in lieu of notice and 12 months compensation as there was no valid reason on his part regarding his termination. He relied on the case of *Bamburi Cement Limited v William Kilonzi [2016]eKLR*. He further submitted that he is entitled to costs of the suit.

#### **Respondent's submissions**

26. The Respondent submitted that she dismissed the Claimant for proper and established reasons pursuant to section 43(1) of the Employment Act. She submitted that in compliance with section 12 (2) (b) and (d) of the Teachers Service Commission Act and Regulation 66 (4) of the Code of Regulation for Teachers, upon receiving the allegations of immoral behaviour it commenced investigations to confirm the veracity of the allegations.

27. She argued that the minor's testimony was never controverted by the

Claimant save for mere denial of the element of having sexual intercourse. That the victim's evidence before the Respondent's investigating team and disciplinary committee meeting remained consistent, coherent, cogent and compelling and that the Claimant could not challenge the factual testimony of the victim. That she further relied on circumstantial evidence tendered by other witnesses and was convinced that on a balance of probability that the pupil was telling the truth.

28. She further submitted that the Respondent considered the Claimant's position as a teacher which position assumes the legal doctrine of *Loco Parentis*. That the Claimant owed PNK a duty of care whose nature was to act as PNK's parent and guided her through her primary education. That the particulars of the Claimant's immoral conduct included forcing a minor to enter his personal business, unlawfully and

immorally holding and engaging a learner in personal business premises at 7.00 pm past official hours, forcefully and unlawfully removing the learner's pants while holding her at his personal business premise and engaging a learner in immoral activities outside working hours amongst others.

29. She argued that the Respondent as an employer of teachers in the public service she is bound to consider the terms and conditions governing employment relationship. She relied on Clauses 6, 9(1) and 22 of the Code of Conduct and Ethics (COCE) pursuant to the provisions of the Public Officers and Ethics Act. She further relied on Regulation 66 of the Code of Regulations for Teachers (CORT) which provides that a teacher may be interdicted if he is not of good moral character. She submitted that she had discharged her burden under section 43 of the Employment Act and stated that the reason for the Claimant's dismissal was valid, sufficient, compelling and lawful and should be upheld by the Court. She relied on the Court of Appeal decisions in *Kenya Power and Lighting Company v Aggrey Lukorito Wasike [2017] eKLR*, *Teachers Service Commission v Joseph Okoth Opiyo [2014] eKLR* and *Teachers Service Commission v Joseph Wambugu Nderitu [2016] eKLR*.

30. She submitted that the Claimant was accorded a fair hearing and was granted the right to be heard in compliance with the provisions of section 41 of the Employment Act. She submitted that the claimant was present throughout the disciplinary hearing and at no time did he object to the manner in which the proceedings were conducted.

31. She submitted that the criminal charges against the Claimant were distinguishable as they were based on defilement while before his employer, the Claimant was accused of immoral behaviour which was conclusively proved within the threshold expected in employment relations. She contended that she had a constitutional mandate under Article 237 (2) (e) of the Constitution to exercise control over teachers.

32. She further submitted that it is now settled that decisions of a criminal court have no relationship with employment matters and the degree of proof in criminal matters is distinct from that required in employment disputes. To fortify the foregoing submission, she relied on *David Kemei v Energy Regulatory Commission [2013] eKLR*. She further submitted that the finding of the Court of Appeal in the decision of *James Mugeru Egati v Public Service Commission of Kenya [2014] eKLR* captures the spirit of section 12 (2) (b) and (d) of the TSC Act.

33. She submitted that the Claimant was taken through the full disciplinary process as provided under sections 30 (e) and 34(3) (d) the Teachers Service Commission Act (TSC Act). She argued that the demand to have 2 separate hearings and processes for dismissal and deregistration is not only irrational, untenable and unreasonable but also practically impossible since the set of facts leading to the disciplinary action was the same.

34. As regards the reliefs sought, she argued that the Claimant was terminated on established grounds therefore the prayer for declaration that he termination as unfair has no merit. She however argued that the claimant has a duty to apply for reinstatement to the register pursuant to section 31 of the TSC Act.

35. She submitted that the Claimant is not entitled to one month's salary in lieu of notice and 12 months' compensation since the Claimant was dismissed from service following the laid out procedure under section 41 of the Employment Act.

36. She submitted that she has lost trust and confidence in the Claimant as an employee thus exercised its freedom to invoke the terms and conditions of the Claimant's service relating to termination. She relied on the decision in *David N. Kimani v Teachers Service Commission [2007] eKLR*. She urged the Court to consider public policy and interest and the welfare of the innocent school girls whom the society has entrusted in the hands of teachers. She therefore urged the Court to dismiss the Claim.

37. The Claimant in his Supplementary Submissions argued that the Court should disallow the Respondent's particulars of immoral behaviour as indicated in the submissions since the Respondent sought to introduce new evidence yet parties are bound by their pleadings. He relied on the decision in *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 Others [2014] eKLR*. He further submitted that the Respondent never called any of the witnesses relied upon to confirm the veracity of the evidence.

### **Analysis and determination**

38. The undisputed fact is that at all material times to this suit the Claimant was a registered teacher employed by the respondent until 8.8.2016 when he was dismissed from employment and removed from the register of teachers for reason that he had sexual intercourse with his standard 7 Pupil, PNK at Lungu Primary School on Wednesday 16.3.2016 at 7.00 pm at his business premises while a teacher. The issues for determination framed herein above are:

- a. Whether the dismissal of the claimant was unfair and wrongful.
- b. Whether the removal of the claimant from the register of teachers was done without following the due process.
- c. Whether the Claimant is entitled to the reliefs sought.

#### **(a) Whether the Claimant's dismissal was wrongful.**

39. Termination of employment is unfair and unlawful if the employer fails to prove that it was substantively justified and procedurally fair as required by Section 45 of the Employment Act. Under the said provision, termination of an employee's contract of service is unfair if the employer fails to prove that it was grounded on valid and fair reasons(s) related to the employee's conduct, capacity and compatibility or

based on the employer's operational requirement; and that a fair procedure was followed by according the employee a fair hearing in accordance with section 41 of the Act, and issued him with Certificate of Service under section 51 of the Act.

**Reason for the termination.**

40. Section 43 of the Employment Act provides that:

***“(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.”***

41. The reason for the dismissal of the claimant cited by the Respondent in the dismissal letter dated 8.8.2016 and was:

***“You had sexual intercourse with your standard 7 Pupil, PNK on Wednesday 16.3.2016 at 7.00 pm at your business premises while a teacher at Lungu Primary School.”***

The foregoing reason was explained to the claimant during the disciplinary hearing on 11.7.2016 as required by section 41 of the Employment Act and the rules of natural justice. The question that arises is whether the said reason was valid.

42. The Claimant contended that the reason was not valid because a competent court had acquitted him of the said charge after verifying that there was no sexual intercourse between him and the pupil on the 16.3.2016. According to him, the Respondent was subjecting him to double jeopardy by dismissing him for purely the same reason he had been acquitted of. He therefore submitted that the said conduct by the respondent amounted to sitting as an appellate court. Finally, he contended that his defence evidence including the judgement from the criminal case was not considered by the disciplinary committee.

43. On the other hand, the respondent contended she has proved the reason for the dismissal in the required standard. She relied on the evidence adduced by the witnesses in the disciplinary hearing, and the statements they recorded during the investigations done by her team which according to her showed that the claimant was involved in a sexual relationship with his pupil contrary to his professional ethics.

44. During the hearing the Claimant's counsel objected to the production of documents by Rw1 and the Court directed claimant to challenge the documents during cross-examination of Rw1 or in his submissions which he did. The objection therefore is now overruled since though Rw1 did not make any of the statements, she prepared the Report which summarized the witnesses' statements. It is also clear that the makers of the statements testified both in the criminal case and the disciplinary hearing which proceedings were produced in evidence herein without any objection. I therefore proceed to consider the said evidence.

45. The respondent relied on the investigation report and the proceedings from the disciplinary hearing to contend that although PNK during the disciplinary hearing stated that she was not a friend to the claimant, she confirmed that on 16.3.2016, while on her way from Mrs Sammy's place, the claimant forced her into his posho mill kiosk and had sexual intercourse with her there before some people interrupted them. That PNK further confirmed that the said incidence on 16.3.2016 was the 4th time the claimant had sexual intercourse with her. She explained that she previously had sexual intercourse with the Claimant in the bush and also in the posho mill but she never told anyone.

46. The Respondent further contended that the criminal proceedings against the Claimant were pursuant to the Penal Code and the Sexual Offences Act and that the proceedings did not in any way diminish, impact or oust the Respondent's administrative action. She submitted that Courts have held that the outcome in criminal proceedings ought not to strictly determine the outcome of a disciplinary hearing undertaken by an employer. That although both proceedings arose from the same incidence, the evidence presented before both fora were different with that presented in the criminal proceedings being dismissed as not credible while that collected by the Respondent in her independent investigations establishing that there were sexual encounters between the Claimant and PNK in return for gifts to the PNK.

47. In *Joseph Wambugu Kimenju v Attorney General [2013]eKLR* the Court held:

***“It therefore means that an acquittal by a criminal court would not debar an employer from exercising power in accordance with rules and regulations governing the conduct and operations of the employment relationship. The two proceedings, that is criminal and disciplinary proceedings operate in different fields and have different objectives. Whereas the object of a criminal trial is to inflict appropriate punishment on the offender, the purpose of the disciplinary proceedings is to deal with the delinquent in accordance with the internal mechanism and to impose penalty in accordance with the internal rules and procedures.”***

48. The foregoing position was further fortified by the Court of Appeal in *Teachers Service Commission v Joseph Wambugu Nderitu [2016]eKLR* where it held that the disciplinary process are distinct from criminal proceedings even if they emanate from the same set of circumstances.

49. The foregoing precedent is good law and binds this court. I therefore dismiss the claimant's contention that his acquittal from the criminal charges insulated him from internal disciplinary action being taken against him by the employer. The criminal process against him by the state was distinct and quite separate from the internal disciplinary process under the employment contract as contained in the letter of appointment, COCE, CORT and the law. The standard of proof for the two process is also quite different as it was confirmed by the court of

Appeal in *Attorney General & another v Andrew Maina Githinji & another [2016]eKLR* where it held as follows:

***“Finally, I may refer to two decisions where a distinction between internal disciplinary proceedings of an employer and criminal proceedings was upheld for the reason that the internal disciplinary proceedings are anchored on the contract of employment and the burden of proof is on a balance of probability, while in criminal proceedings, proof beyond reasonable doubt is required.”***

50. Clause 9 of The Teachers Service Commission Code of Conduct and Ethics provides that:

***“ (1) A public officer shall not engage in any sexual activity with a student regardless of whether the student consents.***

***(2) A public officer shall not make a request to, or exert pressure on, a student for sexual activity or favours.***

***(3) A public officer shall not flirt with a student.”***

51. Further, the TSC in its Circular dated 29th April 2010 stated that the increase in physical, psychological and sexual violence against pupils/students requires that teachers do protect their pupils/students from sexual abuse.

52. I have perused and keenly considered the evidence and the submissions by both parties including the judgment from the criminal case and made a finding of fact that, the respondent has proved on a balance of probability, the reason for summarily dismissing the claimant as required by section 43 and 45 of the Employment Act. I agree with the submissions by the defence that the evidence tendered by RW1 and RW2 squarely placed the claimant at the scene of the offence on 16.3.2016 at about 7.00 pm and all that was required is that the claimant had the opportunity. That such evidence coupled with the corroborating evidence of earlier sexual relationship between the claimant and PNK, in my opinion, entitled the respondent to make a partly subjective but honest belief that the claimant had sexual intercourse with PNK on the date, time and the place stated in the dismissal letter contrary to the COCE, COURT and the Law.

#### **Procedure followed**

53. Section 41 of the Employment Act provides as follows:

***“41(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct ... explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.***

***(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee ...hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee, make.”***

54. The Claimant does not seem to have any issue with the conduct of his disciplinary hearing, save that he accused the employer of failing to summon his witness, his fellow teacher despite his request. However, the proceedings produced as evidence do not show that the claimant revisited the request for summoning of his witness during the hearing. I therefore find that he did not wish to call the witness anymore and the respondent has proved on a balance of probability that the procedure in the disciplinary proceedings accorded with the said procedure provided by section 41 of the Employment Act.

55. As regards the appeal lodged by the claimant on 6.10.2016 through his Advocate’s letter dated 3.10.2016, I find that the same was never heard and that the respondent’s letter dated 3.11.2016 did not communicate a decision that the appeal had been dismissed. In my view the letter was misconceived and made with a mistaken belief that the letter of appeal was a notice of intention to file suit. The respondent realized the mistake later and pleaded in paragraph 27 and 28 of the defence that the appeal was still pending and the suit was prematurely filed. I however find that by the claimant opting to file this suit, the appeal was abandoned and is therefore overtaken by events and the claimant has no right to base his claim for unfair dismissal on the abandoned appeal.

#### **b) Whether removal of the claimant from the register of teachers done without following the due process.**

56. The claimant also contended that he was not heard in separate proceedings before his removal from the register of teachers and also in his appeal against removal from the register. He therefore contended that his right to fair administrative action under Article 47 and right to fair hearing under Article 50 of the Constitution were violated in removal proceedings and in his appeal. However, the respondent submitted that the claimant was notified of the intended removal from the register through the interdiction letter and thereafter taken through the disciplinary hearing, under section 30 (e) and 34 (3) (d) of the TSC Act, which culminated in the dismissal and removal from the register of teachers. She contended that the facts leading to the dismissal and the de-registration were the same and therefore submitted that it was irrational for the claimant to demand separate proceedings.

57. I agree with the submissions by the respondent that the claimant was notified of the intended de-registration by the interdiction letter dated 11.4.2016 which initiated the disciplinary proceedings. He was therefore aware that at the end of the said proceedings the de-registration was one of the possible outcomes. The claimant appealed against the de-registration and as observed herein above, he abandoned the appeal to bring this suit. As a result, the de-registration is likely to have taken effect by dint of Regulation 66 (7) (b) of the Code of Regulations for Teachers which provides that:

**“In accordance with Section 10 of the Act, where the Commission has determined not to register a teacher or that the name of a teacher be removed from the register:-**

***(i) A teacher aggrieved by the Commission’s refusal to register or to remove him/her from the Register may within twenty-eight days of that notice, appeal to the Teachers Service Appeals Tribunal, established under Section 11 of the Act. A copy of the notice of appeal must be served to the Commission.***

***(ii) The notice to remove a registered teacher from the Register shall not take effect until the expiry of twenty-eight days after the service of the notice, or in the event of an appeal to the Teachers Service Appeals Tribunal, until that appeal has been withdrawn or dismissed.”***

58. However, all is not lost because under Section 31 of the TSC Act, the Claimant can still apply for reinstatement to the register 18 months from the date when removal from the register took effect.

**c) Whether the Claimant is entitled to the reliefs sought.**

59. In view of the finding herein above that the respondent has proved the reason cited for the dismissal of Claimant from service, I decline to make declaration that the dismissal was unfair and unlawful as prayed.

60. Flowing from the foregoing, I decline to order that the claimant be reinstated to his employment or to award compensatory damages under section 49(1) of the Employment Act as prayed. I therefore dismiss the prayer for salary in lieu of notice and 12 months’ gross salary for unfair termination of his employment.

61. Finally, for the same reason that there was a valid reason for the removal of the claimant from the register of teachers and that due process was followed, I decline to order for his re-registration in the register of teachers and direct that he follows the procedure laid down under the TSC Act.

**Conclusion and disposition**

62. I have found that the dismissal of the claimant from employment and his removal from the register of teachers was justified by a valid reason and fair procedure was followed. I have further found that the claimant is not entitled to the reliefs sought because the dismissal and the de-registration was not unfair and unlawful. Consequently, I dismiss the suit with no costs.

**Dated, Signed and Delivered in Open Court at Nairobi this 31st day of July 2019**

**ONESMUS N. MAKAU**

**JUDGE**