



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT & LABOUR RELATIONS**

**COURT OF KENYA AT MERU**

**CAUSE NO. 23 OF 2017**

**HUMPREY MUTHURI RIUNGU.....CLAIMANT**

**VERSUS**

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

**JUDGMENT**

1. The Claimant sued the Respondent after his termination as a teacher. He averred that he was employed as a P1 teacher and rose through the ranks to position of head teacher at T Academy, Marsabit. He averred that the Respondent interdicted him on 30<sup>th</sup> May 2017 before his dismissal on 15<sup>th</sup> June 2017. The Claimant avers his termination was unlawful, unjustifiable, unprocedural as the Claimant was never given proper audience before dismissal. He averred that his termination was without an investigation being undertaken on the animosity between the Claimant and T Academy support staff. He averred that he was dismissed without the Respondent allowing him to call a representative of the employees union or another person chosen by the Claimant before dismissal. The Claimant averred that before his services were unfairly terminated he was earning a salary of Kshs. 33,389/- and that he had over 19 years of service. He thus sought a declaration that his termination by the Respondent was unfair and wrongful; an order for reinstatement of the Claimant to employment and put the Claimant in the status he was before interdiction and dismissal; an order that the Respondent do pay the Claimant a salary at the rate of Kshs. 33,000/- per month with other relate benefits from 30<sup>th</sup> May 2017 to the date of reinstatement; general damages for unfair/wrongful termination; costs and interest.

2. The Respondent averred that the Claimant was of immoral behaviour in that on 21<sup>st</sup> May 2017 while a teacher at T Academy he molested a girl ASA a class 2 student by putting his hand in the minor's petticoat and touched/caressed the private part while the minor was asleep in the girls dormitory. The Respondent averred that upon receiving the complaint about the Claimant's immoral behavior it conducted independent investigations through its county office in Marsabit which pointed towards the Claimant's culpability on the allegations levelled against him. Consequently the Respondent interdicted the Claimant and required him to write a defense statement and submit the same within 21 days of the letter of interdiction. The Respondent averred that it invited the Claimant for hearing of his discipline case whereat the Respondent also invited the victim, the school matron WMB, a class one pupil, a class two pupil, the PTA teacher Samuel Cheruiyot Jacob, the site manager Isacko Dalacha, the DEO's representative Tume Halake, the TSC sub-county director Dominic Dabasso and the TSC county director's representative Lentdanya Rachel. The Respondent averred that the meeting however did not proceed as the witnesses did not attend. The Respondent then called for another meeting on 24<sup>th</sup> May 2017 where the victim, school matron, the class one and two pupils did not attend. The Claimant was heard and granted opportunity to cross-examine the witnesses present. The Respondent reached the decision to dismiss the Claimant upon satisfying itself that the allegations levelled against the Claimant were proved before the disciplinary panel. The Respondent averred that the witnesses who failed to appear before the disciplinary panel were constrained by strong cultural beliefs given that they were minors. In view of the foregoing the Respondent averred that it relied on among others, the statements that had been made by the witnesses during the investigations to determine the Claimant's case. The Respondent averred that the Claimant was not entitled to have a union representative or an employee of his choice to be present at the disciplinary hearing. The Respondent averred that it did not breach any law or the rules of natural justice in the dismissal of the Claimant and that it acted procedurally in allowing the Claimant the opportunity to cross-examine the witnesses and rebut the evidence provided. The Respondent averred that the Claimant was duty bound to strictly observe the Code of Regulation for Teachers if he was desirous of keeping his employment till the retirement age. The Respondent denied liability and thus prayed for the dismissal of the claim with costs.

3. At the hearing the Claimant as well as the Respondent's witnesses Tume Halake and Antonina Letoinjoni testified. The Claimant stated that he was working in Marsabit at Chalbi from 17<sup>th</sup> March 2016 till 30<sup>th</sup> May 2016. He stated that he was posted to the academy which had class one and two pupils. He stated that on 21<sup>st</sup> May at 8.30pm he went through the dormitory occupied by the girls and boys. He testified that the school had a PTA teacher employed by an NGO Basida. He said that he went through the dormitory and the matron asked him what he was doing there. He stated that he was not restricted from visiting any part of the school. He testified that the matron, the cook, 2 watchmen and the site manager came. He said there was hostility towards him by the matron and other staff. He testified that only the PTA teacher attended the disciplinary meeting and the child who was stated to be the victim did not attend. He sought to be reinstated and paid salary for the period he was not at work. In cross-examination he stated that he went to the dormitory to check if the students had been attended to and that he went immediately they left the tv room between 8.30pm and 9.00pm. He stated that he did not ask the matron to accompany him and that he was just to check and go. He testified that he was questioned by TSC Marsabit and later wrote the defence after receiving the interdiction letter. He stated that the first disciplinary meeting did not take place as no witness came. He stated that he was allowed to question the witnesses who came but he was not allowed to address the panel. He stated in re-exam that he was called for a hearing in Meru at TSC office and for a hearing in Nairobi. He testified that he was not restricted to visit the children and that he did not get any indication that he could be accompanied at the hearing. He stated that he was checking on the negligence of the matron as there were ablutions and the boys were to clean their feet.

4. The Respondent's first witness was Tume Halake a Ministry of Education official. She testified that she was sent to investigate about a teacher having sexual relations with young girls. She stated that she visited the school and spoke to the girls. She stated that the girl who witnessed the teacher putting his hand on the private parts of her colleague told her she heard the matron saying 'stop stop' and the head

teacher said 'nyamazā'. The witness stated that the student said this was not the first time there was something untoward as previously she had fallen and bruised herself in the tv room and the head teacher had put her on his lap and tried to remove his pants and that the girls screamed and managed to flee. She stated that the children did not write statements but she spoke to them in mother tongue and made a report. She testified that she recorded the testimony of the girls and that she did not record it in his presence as it would be taboo and against their culture to do so. She stated that the finding was that the teacher had a case to answer. She stated that the teacher was notified of the allegations and he was given a chance to respond and he denied them. She testified that they recommended disciplinary action. In cross-examination she stated that she worked in Chalbi, Marsabit as a Chief Education Officer in the Ministry of Education. She testified that she did not interview the teacher or the matron but only the girls. She stated that she was in the company of Joseph Galgalo TSC sub county 0 director, and 2 other officials from CSO Marsabit. She testified that they met as a team and established that there was sexual assault committed and they recommended disciplinary action against the teacher. She stated that she spoke to the children and if they had been coached she would have known from their wordings. She stated that she had testified of what had happened and did not know why the other child was not mentioned in the letter. She denied that there was hatred which motivated the removal. She stated that she did not see the matron and did not know why the matron was not present at the disciplinary hearing. In re-examination she testified that the Claimant never complained about hostility to the county director TSC. She stated that she was allocated the girls and the other team spoke to the other people in the school. The second defence witness was Antonina Letoinjoni who testified that she was the Assistant Deputy Director teacher management directorate TSC Nairobi. She stated that she was the director's representative on the panel. She stated that the teacher was asked to avail his defence and given time to prepare the defence which he did. She stated that he was heard and the panel considered the defence and the evidence adduced considered the factors that led to the witnesses not attending which are age, the cultural and religious factors and proceeded in the absence of the children and in the best interests of the minors. She testified that he did not request for witnesses and was not denied the opportunity to avail witnesses. She stated that the discipline panel dismissed the teacher and relied on the testimony and evidence. She testified that the Claimant was allowed to question each and every witness. She was cross-examined and stated that she was a panel member who heard the Claimant. She stated that they called the matron who did not attend as she had been married. She testified that the Claimant alleged he was fixed by the matron but the other witnesses had no idea. She stated that she did not know if there was any criminal case against the teacher. She stated that there was no allegations of bad blood raised prior when the investigations were undertaken. She stated that the Claimant did not question the minors and she thought the case had been proved as the evidence they had was enough. In re-examination she testified that the first meeting aborted due to lack of witnesses and they did try to trace them and the children did not come. That marked the end of oral testimony.

5. The Claimant filed written submissions in which he submitted that he had proved his case on a balance. He submitted that under Section 44(2)(9) of the Employment Act there was grounds for dismissal on commitment of a criminal offence. He submitted that it was the duty of the Police to investigate and charge for any sexual offenders in a court of law. It was submitted that there was no evidence of any formal complaint against the Claimant by the Respondent and he was never investigated for having committed the alleged sexual harassment of a minor. It was submitted that sexual harassment is a serious offence especially where it is alleged to have been perpetrated on a minor. The Claimant submitted that he gladly attended the disciplinary meeting but the minor did not attend for cross-examination which resulted in a miscarriage of justice in the whole proceedings before the disciplinary panel. It was submitted that the rules of natural justice require the accused to hear the accuser and the accuser to appear before the jury. He submitted that the explanation given for the absence of the minor before the disciplinary panel was fallacious. He submitted that the hearing and the findings thereof were a sham, a mockery of justice and the basic tenets of natural justice. The Claimant submitted that had the Claimant been subjected to criminal proceedings at the very least, the Respondent would have had basis to take the drastic action of dismissing him from employment. The Claimant submitted that the action of dismissing him from employment on unsubstantiated allegations was very harsh and in the extreme. The Claimant submitted that there were procedural flaws and inadequate evidence and the Claimant deserves another chance and that seeking reinstatement was not too much in the circumstances.

6. The Respondent submitted that the Claimant was accused of immoral behaviour towards his nine year old pupil ASA at T Academy in that he had sexually harassed the said minor by touching and caressing her private parts while she was asleep. The Respondent submitted that through its County Director, Marsabit County, instituted investigations and upon ascertaining the culpability of the Claimant interdicted him and consequently he was dismissed after a lawful disciplinary process. The Respondent submitted that in the dismissal it complied with all the legal requirements under the Code of Regulation for Teachers and the Employment Act. The Respondent cited the provisions of Section 43 and submitted that the reasons for the dismissal were reasons it genuinely believed to exist in terms of the Section as read with Section 45 of the Employment Act. The Respondent relied on the case of **Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike [2017] eKLR**. The Respondent submitted that there was due process as the Claimant was accorded a hearing and given an opportunity to be heard in terms of Section 41 of the Employment Act. The Respondent cited Section 4(2)-(4) of the Children Act 2001 in support of the course adopted when taking the evidence of the girls. It was submitted that having regard to the cultural norms and religion of the girls it was the course to adopt as the girls were allowed to freely express themselves to the investigator without any intimidation. The Respondent also relied on Regulation 146(7) of the Code of Regulation for Teachers which requires the investigation panel to take precaution to protect the rights of the minor. The Respondent submitted that the Claimant actively participated in the disciplinary process and that the evidence of the girls taken in camera was tendered and taken into consideration before the decision to dismiss the Claimant was reached. The Respondent relied on the case of **Rueben Ikatwa & 17 Others v Commanding Officer British Army Training Unit Kenya & Another [2017] eKLR** where the Court of Appeal held that the burden of proving a wrongful termination lies on the employee while the burden of justifying the grounds for the termination rests with the employer. The Respondent submitted that failure to pursue a criminal proceeding did not absolve the Claimant of the employment offence and relied on the case of **Clement Karuri v Kenya Ports Authority [2017] eKLR** for the proposition that the Respondent was concerned with the professional culpability of the Claimant which was not subservient to the filing of a criminal charge. The Respondent submitted that an order of reinstatement would not be appropriate in the circumstances and cited the case of **Okong'o v AG & Another (1988) KLR** as cited with approval by Kasango J. in **Simon P. W. Karimi v Kenya Commercial Bank Limited & Another [2005] eKLR** as well as the case of **Kenya Airways Limited v Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** where the Court held that reinstatement is one of the remedies provided for but it is not automatic and the common law position is that courts will not force parties in a personal relationship to continue in such a relationship against the will of one of them. The Respondent submitted that upon interdiction the Claimant stopped teaching as per Code of Regulation for Teachers regulation 148(1) and thus was not entitled to any salary and accordingly could not recover in any claim ensuing. The Respondent submitted that the employer had cause to terminate after the disciplinary process and urged the dismissal of the claim with costs as it was devoid of merit.

7. The Claimant was a head teacher at T Academy, Chalbi, Marsabit. He was accused of immoral behaviour in that he caressed the private parts of a pupil whose identity is protected for purposes of this case and goes by the initials ASA. It was stated that another student witnessed this occurrence as she was not asleep when the Claimant crept into their dormitory. The account was corroborated by the matron whose

evidence was taken by a separate person. The minors were stated to have indicated with clarity that it was the Claimant who had committed the indecent act. The inescapable conclusion of the proceedings conducted pursuant to the laying of charges was that the Claimant was culpable. He attacks the finding on the grounds that a criminal charge was not preferred against him as the offence is serious. He also faulted the panel for not availing the witness for cross examination. Having considered the provisions of Section 41 of the Employment Act and the Code of Regulation for Teachers, the Claimant was accorded a hearing that fairly complied with the law. It was not the ideal situation granted that the Claimant was not able to see the accuser but given the provisions of Section 4(2)-(4) of the Children Act, 2001, the Claimant could not anticipate any deviation since it was clear the minor would be unable to face the accused in the disciplinary proceeding. The court finds that the failure to pursue a criminal proceeding did not absolve the Claimant of the employment offence and as such in terms of Section 43 the employer had reasons to believe there were grounds for dismissal. As the interdiction was procedural and the termination followed the law there is nothing for the Claimant to recover. His reasons for going through the dormitory unaccompanied were not cogent and the attempt to blame the matron and other staff for his woes unfounded. His suit is dismissed with costs to the Respondent.

It is so ordered.

**Dated and delivered at Nyeri this 3<sup>rd</sup> day of December 2019**

**Nzioki wa Makau**

**JUDGE**