



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
CAUSE NO. 357 OF 2014
(Originally Nairobi Cause No. 1044 of 2011)

JOSHUA KIPKEITANY CHEPTIM

CLAIMANT

v

TEACHERS SERVICE COMMISSION

RESPONDENT

JUDGMENT

1. Joshua Kipkeitany Cheptim (Claimant) was employed by the Teachers Service Commission (Respondent) as a teacher in 2007.
2. On 16 October 2009, the Respondent informed him that he was being dismissed for breaching section 7(3b) of the Teachers Service Commission Act.
3. The dismissal aggrieved the Claimant, and he lodged legal proceedings against the Respondent alleging unfair dismissal. The Respondent filed a Response on 8 September 2011.
4. On 5 August 2014, the Principal Judge directed that the Cause be transferred to Nakuru for determination, and on 21 April 2015 hearing was fixed for 20 July 2015.
5. Both parties filed supporting documentation on 21 April 2015.
6. The hearing proceeded as scheduled and was adjourned to 3 November 2015, when the Respondent closed its case. Claimant's submissions were filed on 30 November 2015, while the Respondent's were filed on 29 December 2015.
7. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the dismissal of the Claimant was unfair and if so, appropriate remedies/orders.*

Whether the dismissal was unfair

Procedural fairness

8. The Claimant was interdicted through a letter dated 20 July 2009. The letter of interdiction outlined the allegations against the Claimant and set out the particulars.
9. The interdiction letter also requested the Claimant to make a written statement within 21 days, and also informed him that he would be granted an opportunity to be heard before the complaints were determined.
10. The Claimant complied with the request and addressed a letter dated 5 August 2009 to the Respondent.

11. Thereafter, a face to face hearing was held on 16 October 2009, and the notes of the proceedings were produced in Court. The dismissal came the same day.
12. On 16 November 2009, the Claimant appealed against the dismissal to the Respondent. The appeal was considered and rejected on 29 October 2009.
13. In the pleadings, during testimony and the submissions, the Claimant challenged the process. He contended that he was not granted an opportunity to clear his name and that the rules of natural justice were breached.
14. During the testimony, the Claimant lamented that he was not allowed to ask the witnesses questions, and during cross examination, he stated that he was not allowed to call his own witnesses.
15. It is clear beyond peradventure that the Claimant was informed of the allegations to confront. He was asked and he did respond in writing.
16. After the written phase of the process, he was called to an oral hearing. The notes of the hearing indicate that witnesses were examined.
17. A disciplinary hearing is not a mini-court where the evidential and procedural formalities and strictures of a court hearing ought to be followed, but each case will ultimately be determined on its own peculiar circumstances.
18. Based on the testimonies and documentation placed before Court, the Court is satisfied that the Respondent substantially complied with the requirements of procedural fairness/natural justice.

Substantive fairness

19. Where there is a challenge to a termination of employment, an employer has an onerous legal burden to discharge. This is courtesy of sections 43, 45 and 47 of the Employment Act, 2007.
20. The reasons for the dismissal of the Claimant are not in dispute. The reason given for the dismissal of the Claimant was that he had carnal knowledge of a pupil which resulted in a pregnancy.
21. The pupil was the first witness called by the Respondent. Her demeanour was that of a witness who appeared to be very shy and fearful.
22. She stated that the child she gave birth to belonged to another boy and not the Claimant.
23. The second witness stated that he saw the Claimant and the pupil in a toilet in 2009, but he could not recall the exact dates. He also confirmed that he testified during the disciplinary hearing.
24. He denied being the father of the pupil's child.
25. Confronted with the letter he wrote dated 26 September 2009, the witness stated that he was coerced to write the letter while in remand accused of murder.
26. The Respondent's third witness was the pupil's father. Most of his testimony related to facts post the relevant date/alleged incident.
27. The Respondent also filed in Court a Standards Assessment Report dated 17 July 2009.
28. The Claimant in his testimony stated that he was innocent and that he was implicated by the Respondent's second witness.
29. The Claimant called the 2 brothers of the pupil to testify on his behalf. The first brother stated that he took his sister to the hospital where he was confirmed pregnant after which they went to the Respondent's offices in Kabartonjo.
30. Later he stated that he was called by his brother (named) who informed him that the sister had changed her story which made him go home and interview the sister.
31. He stated that the sister appeared confused and she told him that she had been impregnated by a boy after which a family meeting was called and they met on 25 July 2009.
32. After the meeting, the witness wrote to the Respondent informing it that the pupil had changed her story and also forwarded a letter written by the pupil.
33. The second brother more or else corroborated what the first brother stated that the pupil admitted to having falsely accused the Claimant and that he brought the same to the attention of the Respondent's officers in Kabartonjo.
34. The parties have given not so clear versions. Nevertheless, the onus to prove the reasons was on the Respondent.
35. The Standards Assessment Report filed by the Respondent and which was more of an investigation/inquiry carried out in 2009 recorded the witnesses as stating that the incident

- happened on 3 April 2009. The report indicated that the events took place in the Claimant's office.
36. The Respondent's second witness however stated that the events took place in the school toilet.
37. On that score, the Respondent's witnesses' narrations appear to be inconsistent.
38. Further, it is not clear whether the second witness was interviewed by the team which compiled the Standards Assessment Report on 17 July 2009.
39. This same witness admitted to writing a letter dated 29 September 2009 but under duress while in remand. The Respondent's second witness did not appear truthful at all.
40. The Court has considered the case advanced by the Respondent.
41. It is common to the parties that the pupil gave birth but the exact date was not disclosed. The incident itself and the paternity of the child are contested.
42. In this type of case, the Court does not understand why the Respondent would not want to make use of science. The Court made the suggestion to the parties on 20 July 2015. The Respondent did not take up the suggestion.
43. In the view of the Court, and considering state of testimonies of the witnesses presented in Court, the Respondent has not proved as valid and fair, the reason given for the dismissal of the Claimant, and the Court therefore finds the dismissal substantively unfair.
44. Before discussing remedies a few words about a decision cited by the Respondent.
45. In *David Mwaniki Maluki v Sandies Tropical Village (t/a Palm Hotel (K) Ltd* (2014) eKLR, there is a suggestion that where an employer discharges an employee pursuant to section 36 of the Employment Act, 2007, then the employer need not give reasons.
46. Such a suggestion, in my view flies directly against the clear statutory requirements in sections 43 and 45 of the Employment Act, 2007 that an employer shall be required to prove the reasons for termination of employment and that the reasons are valid and fair.
47. Contrary to the suggestion, section 45 of the Employment Act, 2007 has now given ordinary employees security of tenure.

Appropriate remedies

Lost prospective income

48. The Claimant sought Kshs 2,783,000/- , being the income he would have earned had he served until retirement.
49. He cited my decision in *Mary Mutanu Mwendwa v Ayuda Ninos De Afrika-Kenya (Anidan K)* (2013) eKLR where I reviewed several authorities on the place of lost prospective income in cases of unfair termination and suggested that I follow the authority of *Southern Highlands Tobacco Union Ltd v David McQueen* (1960) 1 EA 490.
50. The McQueen case dealt with a fixed term contract and in my view, it is not prudent to follow it in this case where the contract was of a *permanent and pensionable* nature.

Reinstatement

51. In the alternative, the Claimant sought reinstatement.
52. In my view, this is not a suitable case to order reinstatement.

Pay in lieu of notice

53. Under this head, the Claimant sought Kshs 43,770/-. However, his basic wage at the material time was Kshs 13,380/- and the Court finds he is entitled to an equivalent.

Damages for unlawful/unfair dismissal

54. With the conclusion reached, and considering the Claimant's length of service, the Court is of the view that 12 months gross wages as compensation would be fair.
55. The Claimant's gross wages according to the February 2009 pay slip annexed to the Memorandum of Claim was Kshs 23,849/-.

Conclusion and Orders

56. The Court finds and holds that the Respondent has failed to prove, and prove as valid and fair, the reason given for the dismissal of the Claimant and hence holds the dismissal substantively unfair and awards and orders the Respondent to pay him

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| a. 1 month pay in lieu of notice | Kshs 13,380/- |
| b. Maximum compensation | Kshs 286,188/- |

TOTAL	Kshs 299,568/-
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57. Claimant to have costs.

Delivered, dated and signed in Nakuru on this 8th day of March 2016.

Radido Stephen

Judge

Appearances

For Claimant Mr. Kibet instructed by Mirugi Kariuki & Co. Advocates

For Respondent Ms. Mambo, Legal Officer, Teachers Service Commission

Court Assistant Nixon