



**Maro v Teachers Service Commission & 2 others (Constitutional Petition
3 of 2021) [2022] KEHC 17186 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEHC 17186 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CONSTITUTIONAL PETITION 3 OF 2021**

SM GITHINJI, J

JUNE 23, 2022

**IN THE MATTER OF ARTICLE 23 (3) (A)(C) AND (D) OF THE
CONSTITUTION OF KENYA, 2010**

AND

**IN THE MATTER OF ARTICLE 50 OF THE CONSTITUTION OF
KENYA, 2010**

AND

**IN THE MATTER OF REGULATION 139 (3) & (4) OF THE
TEACHERS SERVICE COMMISSION CODE OF REGULATIONS
FOR TEACHERS, 2015**

AND

**IN THE MATTER OF DISCIPLINE CASE: TSC/ DISC/ NO.
0224/011/2017/2018/5**

AND

**IN THE MATTER OF MALINDI CHIEF MAGISTRATE SEXUAL
OFFENCES CASE NO. 25 OF 2017**

BETWEEN

ATHMAN ADE MARO PETITIONER

AND

TEACHERS SERVICE COMMISSION 1ST RESPONDENT

CABINET SECRETARY MINISTRY OF EDUCATION 2ND RESPONDENT

ATTORNEY GENERAL 3RD RESPONDENT



JUDGMENT

1. By way of a Petition dated March 10, 2021, the Petitioner sought the following orders:
 1. That Regulation 139 (3) & (4) of the Teachers Service Commission Code of Regulations for Teachers, 2015 be declared unconstitutional and with no legal consequences as against the petitioner and all other teachers within the Republic of Kenya.
 2. Costs of the Petition.
 3. Interest on 2 above at Court rates.
 4. Any other relief this Honourable Court may deem fit to grant in the circumstances.

The Petitioner's Case

2. In his Petition, he averred that he was charged in the Chief Magistrate's Court at Malindi over rape charges vide Malindi Sexual Offences Case Number 25 of 2017 and while the criminal case was still pending, the 1st Respondent commenced parallel proceedings in the name of disciplinary action against the Petitioner. He also averred that the 1st Respondent acting on an unconstitutional provision by the 2nd Respondent being Regulation 139 (3) & (4) of the Teachers Service Commission Code of Regulations for Teachers, 2015 terminated the Petitioner's employment and has failed to regard the decision of the court in Malindi Chief Magistrate's S.O Case Number 25 of 2017 which found the petitioner innocent of the offence.
3. He asserted that the 1st Respondent did not give him any chance to defend himself or call any witnesses, neither was he given time to prepare for his case and was not informed of the accusation before trial. It was also his assertion that the Disciplinary Committee had insisted that the Petitioner committed the offence and had thus proceeded to terminate his employment notwithstanding the Judgment of the court. He further asserted that Regulation 139 (3) and (4) of the Teachers Service Commission Code of Regulations for Teachers, 2015 is a clear violation of Article 50 and 159 of the Constitution of Kenya, 2010.
4. He averred that under Article 159 of the Constitution of Kenya 2010, the judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under the Constitution. According to him, the Teachers Service Commission Code of Regulations for teachers, 2015 has given the disciplinary committee decision supremacy over court decisions/ judgment.
5. He asserted that the following regulations are inconsistent with the Constitution as indicated below;
 - a. Regulation 139 (3) & (4) of the Teachers Service Commission Code of Regulations for Teachers, 2015 is in violation of Article 159 and 160 of the Constitution of Kenya.
 - b. Regulation 139 (3) & (4) of the Teachers Service Commission Code of Regulations for Teachers, 2015 encourages disobedience of Court Orders and judgments.
 - c. Regulation 139 (3) & (4) of the Teachers Service Commission Code of Regulations for Teachers, 2015 disregards the court process and thus in violation of Article 50 of the Constitution.
6. He claims the following particulars of inconsistencies with Article 50 of the Constitution:



- a. The commission is the complainant, the prosecutor and the judge thus making it very difficult to have a fair hearing.
- b. At the appeal level, the chairman is the one of the decision makers who has already heard and made a decision and thus make it difficult to access a fair hearing at the appeal.

Responses

7. The 1st Respondent filed a Replying Affidavit sworn by Doreen Njage on July 5, 2021, the Assistant Director in charge of the Discipline function at the Teachers Service Commission.
8. She deposed that on July 20, 2017 officers of the 1st Respondent visited the school to commence investigations pursuant to the alleged sexual offence charges against the Petitioner. That upon evaluating the circumstances of the case the 1st Respondent determined that there were grounds to believe that the Petitioner violated the Code of Regulation for teachers hence the decision to interdict him with effect from August 10, 2017 which interdiction paved way for the disciplinary process. She also deposed that the Petitioner was invited to make a defence statement and thereafter the 1st Respondent convened its Disciplinary committee on March 12, 2018 to hear the Petitioner's case.
9. It is her assertion that vide a letter date February 28, 2018, the Petitioner asked the 1st Respondent to postpone the hearing for reason that he was scheduled to attend the criminal matter in Malindi. The hearing was for this reason deferred to October 16, 2018 when the petitioner attended and was allowed to fully participate. That in the end, the committee determined that the petitioner breached the Code of Regulation for teachers hence recommended his dismissal and removal from the Register of Teachers.
10. It is her assertion that contrary to paragraph 14 of the petition, the 1st Respondent was guided by regulation 139 of the Code of Regulation for teachers that provides for a disciplinary process which is in line with Article 50 of the *Constitution* and that the 1st Respondent being a quasi-judicial body, its disciplinary proceedings are distinct from proceedings in courts of law and therefore not bound by the outcome of criminal justice system. She also asserted that the offence and charge preferred against the petitioner under the criminal justice system was different from the one he was charged with by the 1st Respondent in the disciplinary Administrative process. The offence concerned an immoral behavior contrary to Code of Regulation for teachers.
11. She further deposed that the Petitioner is misleading the court in citing Regulation 139 (4) of Code of Regulation for teachers as the said Regulation was amended vide L N 50/ 2015, r 6.
12. The 2nd and 3rd Respondents opposed the Petition through filing grounds of opposition. According to them, this was an issue between an employer and employee which the 2nd and 3rd Respondent are not party to. That Article 248 of the *Constitution*, the Teachers Service Commission is among the commissions and independent offices set out thereunder and therefore has their own autonomous mechanisms including legal representation. That no cause of action has been demonstrated against the 2nd and 3rd Respondents and the suit against them should be dismissed.

Submissions

The Petitioner's Submissions

13. The Petitioner through his Advocate Richard O & Company Advocates filed submissions on October 22, 2021.



14. Counsel submitted that the 1st Respondent acting on an unconstitutional provision by the 2nd Respondent being Regulation 139(3) & (4) of the Teachers Service Commission Code of Regulations for Teachers, 2015 terminated the petitioner's employment and has failed to regard the decision of the court in Malindi Chief Magistrate's S O Case number 25 of 2017 which found the Petitioner innocent of the offence. His submission is that the Petitioner was subjected to another proceedings by the commission over the same offence.
15. According to counsel, looking at Regulation 139 (4) of the Teachers Service Commission Code of Regulations for teachers 2015, the commission cannot regard or be bound by any finding of any court. He submitted that the said Regulation discriminates teachers from enjoying the fruits of their judgment in a won criminal process which is contrary to Article 27(1) of the Constitution. He also submitted that teachers do not have equal protection of the law by virtue of Regulation 139 (3) & (4) of the Teachers Service Commission Code of Regulations for Teachers, 2015 which disregards court decisions and findings.
16. Counsel submitted that the state enacted a regulation that discriminates teachers and the said Regulation encourages disobedience of court orders, decisions and judgments.

1st Respondent's Submissions

17. Counsel for the 1st Respondent identified three issues for determination; whether the 1st Respondent is bound by proceedings and findings of a criminal court, whether Regulation 139 (3) & (4) violates Article 50 & 159 of the Constitution and whether teachers are discriminated by virtue of Regulation 139.
18. On whether the 1st Respondent is bound by proceedings of a criminal court, counsel submitted that the 1st Respondent in implementing its mandate to discipline teachers, carries out that role as a quasi-judicial body and that its decisions are purely administrative and thus distinct from proceedings in a court of law.
19. He submitted that disciplinary proceedings by the 1st Respondent against its employees arise out of a contractual relationship and is therefore governed by the Act and Regulations under the contract. He relied on the case of *Sinha and General Medical Council* (Neutral citation number (2009) EWCA cited with approval in Civil Appeal 50 of 2014: *Judicial Service Commission vs Gladys Boss Shollei & another* where the court held that proceedings before a professional body are designed to establish whether or not professional men and women have fallen below the standard expected of their profession.
20. It is his submission that the offence the petitioner was charged with in the criminal case is different from the "immoral behavior" the offence faced in the disciplinary proceedings. He relied on a number of authorities; C A CA Civil Appeal 22 of 2017: *Clement Karuri v Kenya Ports Authority*, Petition E006 of 2020 *Gladys J Cherono v Board of Trustees NSSF & Another* and Petition 14 of 2012: *Peter Kabunyi Gathinji v Teachers' Service Commission*.
21. He also submitted that the disciplinary process by the 1st Respondent was not a criminal trial but purely an administrative process that led to an administrative sanction.
22. On the second issue, he submitted that Regulation 139 (4) referred to by the Petitioner was repealed by Legal notice 196 of 2015 and as such the petitioner is misleading the court by referring to a regulation that is not in existence. That the disciplinary process under Regulation 139 being an administrative process has to be distinguished from the court proceedings. It was his submission that in determining the constitutionality of the impugned Regulation, the court must look at the purpose and the outcome of implementing the Regulation. On this head, he relied on the authority of Petition No. 174 of 2016



Robert Alai v Attorney General & Another and that of Tanzania Court of Appeal in Nyanabo v Attorney General (2002).

23. On the last heading, he labored to demonstrate how criminal proceedings are distinct from the Administrative / disciplinary proceedings. He summarized the distinction as follows; While criminal proceedings remedy a wrong against the state, disciplinary proceedings remedy a wrong against terms of employment; that the standard of proof in criminal proceedings is beyond reasonable doubt while in disciplinary proceedings the test is on a balance of probability and that disciplinary proceedings are administrative proceedings distinct and independent from court proceedings.

The 2nd and 3rd Respondents' Submissions

24. Counsel for both Respondents identified two issues for determination; whether this Honourable Court has jurisdiction to hear and determine this matter and whether the 2nd and 3rd Respondents are properly enjoined in the matter. On the first issue, he submitted that the petitioner and the 1st Respondent shared an employee- employer relationship and by dint of section 12 (b) of the Employment and Labour Relations Court Act as read with Article 162 (2) of the Constitution, the Employment and Labour Relations Court is the best forum to entertain this matter.
25. He relied on the case of Benard Murage v Fine Serve Africa Limited & 3 others (2015) eKLR and that of International Center for Insect Physiology and Ecology (ICIPE) v Nancy Mcanally (2018) eKLR.
26. On the second issue, he submitted that the 2nd and 3rd Respondents are improperly enjoined going by the case of Zephir Holdings Limited v Mimosa Plantations Ltd and 2 others (2014) eKLR.

Analysis and Disposition

27. I have considered the Petition which is the subject of this Judgment, the various responses thereto, the submissions made on behalf of the parties hereto and the authorities cited.
28. The issues that I have identified for determination are as follows;
1. Whether Regulation 139 (3) & (4) of the Teachers Service Commission Code of Regulation for Teachers is unconstitutional.
 2. Whether the Constitutional Rights of the Petitioner were violated.
29. This court is guided by the Court's position in John Harun Mwau vs Peter Gastrow & 3 Others [2014] eKLR that the Constitution only ought to be invoked when there is no other recourse for disposing of the matter and in which the Court expressed itself in the following terms:
- “Courts will not normally consider a constitutional question unless the existence of a remedy depends on it; if a remedy is available to an applicant under some other legislative provision or some other basis, whether legal or factual, a court will usually decline to determine whether there has been in addition to a breach of the other declaration of rights...It is an established practice that where a matter can be disposed of without recourse to the Constitution, the Constitution should not be invoked at all. The court will pronounce on the constitutionality of a statute only when it is necessary for the decision of the case to do so.”
30. Similarly, in Federation of Women Lawyers (Fida – Kenya) & 3 others v Attorney General & 2 others; East Africa Center for Law & Justice & 6 Others (Interested Party) & Women's Link Worldwide & 2 others (Amicus Curiae) [2019] eKLR cited with approval the decision in Coalition for Reform and



Democracy (CORD) & 2 others vs Republic of Kenya & 10 Others [2015] eKLR where the court set out the principles that a court should bear in mind when interpreting the Constitution. The court held;

“The Constitution has given guidance on how it is to be interpreted. Article 259 thereof requires that the court, in considering the constitutionality of any issue before it, interprets the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights and that contributes to good governance.”

31. I wish to point out that Regulation 139 of CORT provides for guidelines in disciplinary proceedings and that particularly Regulation 139 (4) which was heavily relied upon by the Petitioner was repealed by Legal Notice 196 of 2015. The disciplinary process under the said regulation being an administrative process needs to be distinguished from the court proceedings. The Petitioner in this case was summoned before the Commission’s disciplinary committee on account of an alleged immoral behavior as opposed to the offence he was charged with under the Sexual Offences Act.
32. As has been rightly pointed out on the purpose of the said Regulations by the 1st Respondent, it is to recognize the disciplinary panel of the 1st Respondent as a quasi-judicial body determining allegations of professional misconduct on the part of the employee with the aim of ensuring high level of professionalism in the teaching profession. I have had the benefit of seriously analyzing the entire Petition and I am of the finding that the Petitioner has failed to demonstrate to this court how the stated Regulations by the 1st Respondent offends the provisions of Article 50 and 159 of the Constitution or any other provisions of the Constitution.
33. I wish to observe that a professional misconduct does not necessarily have to amount to a criminal offence. While the standard of proof in criminal cases is high, beyond reasonable doubt, in a disciplinary process it may be lower, on balance of probabilities. An acquittal in criminal case does not therefore automatically mean that there are no grounds for a successful related incident, disciplinary process. The reason for acquittal is also relevant as an acquittal per se does not exactly mean that the suspect is innocent. One can be acquitted out of a technicality rather than the weight of evidence. An acquittal does not necessarily shout “innocent” unless the court has for given reasons specified that the accused is innocent.
34. I am equally guided by the holding in NBI Hcc. Petition 347 Of 2017: Ronald Omondi V Council of Legal Education where J. Mativo held as follows,

“Thus, when the constitutionality of legislation is challenged, a court ought first to determine, through the application of all legitimate interpretive aids, the impugned legislation is capable of being read in a manner that is constitutionally compliant”
35. Essentially and of great importance is noting that there is normally such a heavy burden on the person challenging the validity of any legislation since the presumption is that the legislature understands and appreciates the needs of the society they belong to and represent, and at the end of the day the provisions are in place to address the mischiefs made manifest by real experience. Courts will only declare a statute or a certain provision unconstitutional if it is vividly and objectively in conflict with the Constitution. In the present case this court finds that there is no such demonstrated conflict with the constitution and the impugned legislation does not violate any rights enshrined in the Constitution.
36. Therefore, it is my reasoning that the Petitioner’s argument does not hold water. I find that the 1st Respondent did not violate any of the stated Constitutional provisions as alleged by the Petitioner. The Respondents only fulfilled their duties under the specific body they are constituted, to ensure



professionalism in the teaching sector as is desired. To this end, I find that the Petition is devoid of merit and is hereby dismissed.

Each party to bear own costs.

It is so ordered.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 23RD DAY OF JUNE, 2022.

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S.M. GITHINJI

JUDGE

In the presence of;

Richard O. & Company Advocates for the Petitioner(absent)

Mr Lang'at holding brief for Allan Sitima Advocate for the 1st Respondent

The Hon. Attorney General for the 2nd & 3rd Respondents(absent)

