



REPUBLIC OF KENYA
IN THE HIGH COURT
AT NAIROBI
MILIMANI LAW COURTS
Judicial Review 251 of 2007

REPUBLIC

AND

TEACHERS SERVICE COMMISSION 1ST RESPONDENT

TEACHERS SERVICE TRIBUNAL 2ND RESPONDENT

EX PARTE

JARED MONGARE NYAKUNDI APPLICANT

JUDGMENT

The Application

1. The *ex-parte* applicant, Jared Mongare Nyakundi (“the applicant”) has filed a Notice of Motion dated 30th March 2007 under **Order 53 rule 3 and 4** of the ***Civil Procedure Rules*** seeking the following orders of Judicial Review;

(a) An order of certiorari directed to the Teachers Service Commission quashing the proceedings and decisions of the Teachers Service Commission of dismissing the applicant on account of misconduct.

(b) That the applicant be reinstated to his employment and resume his normal duties with the Teachers Service Commission.

(c) That the applicant be paid his accumulated arrears which dates to the day he was removed from the pay roll.

(d) Any other or further relief this honourable court may deem fit to grant.

(e) An order that the Respondent do pay costs of this matter.

2. The application is supported by the statement dated 14th March 2007 and the verifying affidavit and a supporting affidavit of the applicant sworn on the same date. The applicant has also filed a Supplementary

Affidavit sworn on 10th May 2012.

3. I shall not consider prayers (b) and (c) of the Notice of Motion as the Court lacks jurisdiction to grant these orders under the provisions of the **Law Reform Act (Chapter 26 of the Laws of Kenya)** and **Order 53 of the Civil Procedure Rules**. Furthermore, leave granted to commence judicial review proceedings was only in respect of the order of certiorari.

4. In setting out the facts material to this judgment and in view of the nature of this matter, I have abbreviated the identities of the affected persons and location to protect them.

Applicant's Case

5. It is not in dispute that the applicant was an employee of the Teachers Service Commission ("TSC"). He was employed as an assistant teacher and was promoted to the position of acting deputy headmaster of a local primary school, GPS.

6. In October 2004, he was verbally summoned by the area Education Officer for a meeting with the Zonal Education Officer with four other persons over allegations of a love affair with a pupil, EN, from a neighbouring school, KPS.

7. After a week, the applicant claims that unknown to him, a panel of officers from the District Education Office in Nyamira came to KPS for a meeting chaired by the Deputy Education Officer and attended by EN and her parents, the Headteacher and Deputy of KPS. At the meeting the applicant was given a paper to respondent in writing to the allegations against him. He duly responded to the allegations.

8. After the meeting, the applicant received a Notice of Interdiction dated 11th November 2005 from the District Education Officer over allegations that he had breached the **Teachers Service Commission Act (Chapter 212 of the Laws of Kenya)** ("**TSC Act**"). The Notice addressed to the applicant stated as follows;

You breached the TSC Act (Cap 212) Section 7(3)(b) and Regulation 70(2)(a) of the Code of Regulations for teachers in that, while teaching at GPS, you had carnal knowledge of EN, a standard six pupil at KPS. The act took place on diverse dated between the month of March 2004 and August 2004. This resulted into the pupil's pregnancy.

Before the commission proceeds to investigate, consider and determine your case, you are invited to make a statement to the commission in writing, which should be received by the commissions within 21 days from the date of this letter. Before your case is determined, you will be given an opportunity of being heard by the Commission in person.

9. The applicant thereafter received a letter dated 18th February 2005 from TSC to appear before the Disciplinary Committee of the TSC on 11th March 2005 at the DEO's officer at Nyamira. The applicant avers that during the hearing he was not given a chance to advance his arguments and the decision to interdict him was hurriedly reached.

10. In March 2005, the applicant received two letters dated 11th March 2005 from the TSC. The first letter was a letter dismissing him from the teaching service and the second one was removing his name from the register of teachers. He was duly informed of his right to appeal to the Appeals Tribunal and by a letter dated 18th April 2005 he duly lodged his appeal.

11. On 24th April 2006, his appeal was heard by the Appeals Tribunal and the decisions of the TSC upheld. The applicant now seeks to quash the decisions dismissing him from the teaching service.

12. The applicant's case is that he was not given an opportunity to defend himself and the decision to dismiss him was arbitrary and unlawful since the entire proceedings were conducted unfairly.

13. The applicant contends that there was no evidence to support the decision reached to dismiss him from service. Moreover, the allegations made against him were malicious and lacked any material basis.

14. The applicant also contends that the School Committee that is said to have sat and discussed his case was not properly constituted in accordance with the law and applicable regulations. According to the submissions, a school committee meant to decide or discuss the applicant was required to have seven members yet the applicant's case was discussed by six members who were not even members of staff contrary to **regulation 6** of the **Education (School Committee) Regulations** made pursuant to **section 9** of the **Education Act (Chapter 211 of the Laws of Kenya)**. Counsel for the applicant contended that the school committee also breached **regulation 11** by failing to take written proceedings. The proceedings are also impugned on the basis that the committee that purported to discipline the applicant was that where EN attended rather than where the applicant was teaching.

15. The applicant contends that all the proceedings were conducted in breach of the rules of natural justice as he was denied the right to present his case. The applicant submits that the school committee took the trouble to hear all accuser's evidence while denying him the opportunity to contest the evidence against him. He was also denied the opportunity to prepare for his defence as a matter of right.

16. The applicant also maintains that the notice dated 11th March 2005 was defective as it did not bring out the alleged offence that he was accused of and not such offences as quoted exist.

17. Counsel for the applicant, Mr J. Onyancha adopted the written submissions dated 13th July 2010 and supplementary submissions dated 10th May 2012. Counsel relied on two decisions; **Solomon Mmula Bundi v Teachers Service Commission Eldoret HC Misc. 20 of 2005 (Unreported)** and **Elizabeth Wainaina & Others v Board of Governors of Pangani Girls' School Nairobi HC Misc. App. No. 818 of 1992 (Unreported)**. Both cases, counsel argued, emphasized the importance of the rules of natural justice. Counsel urged the court to allow the application as the proceedings leading to the dismissal of the applicant were conducted contrary to the rules of natural justice.

The Respondents' Case

18. The respondents oppose the application by the affidavit of Simon Musyimi Kavisi sworn on 15th April 2012. He is the Director in charge of Administration at the TSC and is conversant with the matters relating to the proceeding concerning the applicant.

19. Mr Kavisi confirms that sometime in October 2004, the District Education Officer ("DEO"), Nyamira District received information that the applicant has carnal knowledge with EN, then a standard six pupil at KPS, which resulted in pregnancy. The DEO thereafter appointed a team lead by the Zonal Inspector of Schools to carry out investigations. These investigations were carried out on 4th November 2004 at GPS where the applicant was interrogated and after deliberations, the team concluded that there was further need for investigations. At this stage the applicant made a written statement denying the allegations against him.

20. The respondents also confirm that the letter dated 11th November 2004 asking the applicant to show cause why disciplinary proceedings should not be undertaken was issued and the applicant responded to it in his own letter of 26th November 2004 where he categorically denied the allegations. Disciplinary proceedings were thereafter held on 11th March 2005 at the District Education Office. According to the record of proceedings held on that date, the applicant was present and evidence taken from several witnesses. The Committee, after deliberating and evaluating the evidence directed that the applicant be dismissed from service. He was duly informed through the letter dated 11th March 2005.

21. The applicant appealed from the decision of the disciplinary panel to the Appeals tribunal by a letter dated 18th April 2005. The appeal was considered and consequently dismissed. The applicant was duly informed of the decision on 26th August 2006.

22. The respondents' contention is that the applicant was given a fair hearing and due process of law was followed. They contend that the applicant was given the opportunity to defend himself at the earliest opportunity when the preliminary investigation was being conducted at the Zonal level and his response was duly considered. The respondents submit that the applicant appeared in person before the disciplinary panel, heard all the evidence presented against him and had the opportunity to cross examine all the witnesses and indeed cross examined the witnesses. In the circumstance the respondents maintain that the applicant was accorded a fair opportunity to counter the evidence against him.

23. The respondents also contend that the applicant's evidence was duly considered and that his case was further considered at the appellate level hence he was given sufficient opportunity to be heard.

24. Mr Sitima, counsel for the respondents, relied on the written submissions dated 18th April 2012. He submitted that the dismissal was regular and within the law as provided by the **Code of Regulation for Teachers** and at all stages the applicant had the full opportunity to present his case and challenge the evidence against him.

25. Counsel submitted that the reference of **sections 7(3)(b)** of the **TSC Act** and **regulation 70(2)(b)** of the **Code of Regulations for Teachers** in the letter interdicting the applicant did not lead to or in any way occasion a miscarriage of justice. The respondents submit that the court must look at the case as a whole and consider whether the applicant was prejudiced in light of the fact that the disciplinary proceedings are *quasi judicial* and that legal technicality must be avoided.

26. The respondents also submit that the provisions of the **Education Act** and the **School Committee Regulations** under **section 9** were not applicable. The disciplinary proceedings, the respondents submit, were based on the report from the District Education Office and therefore the allegations regarding legality of the proceedings are baseless.

Determination of issues

27. It is unfortunate that this matter has taken over five years to determine. The parties relied on their written submission and made short oral arguments which I have considered.

28. The applicant's case is founded on the lack of jurisdiction by the School Committee to commence disciplinary proceedings and the breach of the rules of natural justice. In making the determination it is important to recall the legal principles that guide the court in exercising its discretion in granting orders of judicial review.

29. Firstly, the right to be heard is an important constitutional right and has been emphasized by our courts from time to time. It is a right that is jealously guarded. (See **Dickson Ngigi Ngugi v Commissioner of Lands Nairobi Civil Appeal No. 297 of 1997 (Unreported)** and **David Oloo Onyango v Attorney General Nairobi Civil Appeal No. 152 of 1986 (Unreported)**).

30. The question whether there has been a breach of natural justice must be determined in light of the facts of the case. As was stated by Lord Denning in the case of **Reg. v Gaming Board ex parte Benaim (1970) QB 417,430 (quoted in David Oloo Onyango's case)**, **"It is not possible to lay down rigid rules as to when the principles of natural justice are to apply not as to their scope and extent. Everything depends on the subject matter."**

31. Secondly, the court will be careful not to substitute itself as the decisions maker. In **Nyongesa & Others v Egereton University College [1990] KLR 692**, Justice Nyarangi, **"Courts in Kenya have no desire to run Universities or indeed any other bodies. However, courts will interfere to quash decisions of any bodies when moved to do so where it is manifest that decisions have been made without fairly and justly hearing the person concerned or the other side."** This point was emphasized in the case of **Republic v Egerton University ex parte Robert Kipkemoi Koskey** where Justice Musinga noted that, **"The Court is interested in knowing whether the rules of natural justice were observed by the respondent in the conduct of its investigations as against the applicant. It has been held that Judicial Review is not**

an appeal from a decision, but a review of the manner in which the decision is made, see Chief Constable of the North Wales Police v Evans [1982] 1 WLR 1155. I find that the applicant was given an opportunity to be heard by the disciplinary committee. As was held in the case of Board of Education v Rice [1911] AC 179, a person facing accusations such as the one the applicant herein faced has to be given an opportunity to be heard. This can be done orally or in writing.”

32. The applicant’s application seeks the courts intervention in quashing the disciplinary decisions of the TSC. The applicant has not identified the three decisions with specificity but my consideration of the material before the court discloses three decisions to which the applicant was subject. There was the first preliminary investigation, the hearing before the disciplinary panel and the appeal before the Appeal Tribunal. I shall consider each stage of the proceedings.

33. The first decision concerns the school committee and the issue for determination is whether the school committee investigating the complaint against the applicant was properly constituted. The applicant contends that the School Committee that investigated the complaint against him lacked the requisite jurisdiction. **Section 9** of the **Education Act** provides as follows;

9.(1) For every primary school maintained and managed by a local authority there shall be a school committee, established by the local authority, to advise the local authority on matters relating to the management of the school.

(2) The members of a school committee shall be appointed by the local authority in the prescribed number and manner, and the members of the committee shall include persons to represent the local authority, the community served by the school and, where a sponsor to the school has been appointed under section 8, the sponsor.

34. The jurisdiction of the school committees is to be found in the **Education (School Committees) Regulations. Regulation 8** provides as follows;

8. Functions of Committee

(1) The functions of the committee shall be—

(a) to advise the chairman and secretary of the district education board or the municipal education committee on matters affecting the general interest of the school and the welfare of the pupils;

(b) to collect and account for any funds accruing to the school approved by the district education board or the municipal education committee;

(c) in respect of a sponsored school, to maintain reasonable religious traditions of the school;

(d) to advise the chairman and the secretary of the district education board or the municipal education committee on the staffing needs of the school; and

(e) to provide buildings, including houses and furniture, from funds collected by the committee after approval by the district education board or the municipal council.

35. A plain reading of **regulation 8** shows that the school committee lacks jurisdiction to discipline a teacher or to initiate disciplinary proceedings against a teacher. The discipline of teachers on the other hand is governed by the provisions of the **TSC Act**. Under the Act, TSC is empowered to compile a **Code of Regulations for Teachers** which governs inter alia, the discipline of teachers. Under the provisions of the **TSC Act**, the disciplinary authority may be delegated to an agent, in this case, the DEO.

36. **Regulation 66(3)(a)** of the Code provides that the Agent, “*On receiving allegations against a teacher conduct investigations and assemble evidence to establish whether the teacher has a case to answer.*” It

further provides that, “*If satisfied that the teacher has a case to answer, serve the teacher with a notice of interdiction on the form prescribed in Schedule XXXVIII specifying the actual allegations against him/her.*”

37. The investigation conducted by the DEO is preliminary in nature. He was entitled to adopt any means available to him including empaneling a group of persons to assist him. I find and hold that the investigation was conducted in a manner consistent with fairness. The DEO was satisfied that there was a case to answer and he issued a Notice of Interdiction dated 11th November 2004. The contents of the notice, which I have set out in paragraph 8 above, sets out the allegations against the applicant. It is against the allegations set out in this notice that the teacher is given the opportunity to defend himself. The DEO, I find acted in accordance with the provisions of the ***Code of Regulation for Teachers***.

38. I have considered the proceedings before the TSC Disciplinary Committee (Case No. 1638/11/04) which took place on 11th March 2011. The proceedings disclose that the charge was read to him, he was interrogated by the members of the Committee on the allegation against him which he duly answered. EN was called as a witness and was cross examined by the applicant. 4 other witnesses gave evidence and were cross examined by the applicant. The committee reviewed the evidence and came to the conclusion that the charges had been proved.

39. The applicant has claimed that he did not have an adequate opportunity to prepare for the hearing. Whether there was a reasonable opportunity must be determined from the circumstances of the case. The applicant received the notice of interdiction dated 11th November 2004. That notice set out the charges in general terms. The applicant alleges that he received the notice of the hearing dated 18th February 2005 on 11th March 2005 which was on the date of hearing.

40. Though the applicant claims that he was served on the date of the hearing, he actually attended the hearing on that date. The applicant’s allegation is negated by the fact that he did not object to the matter proceeding despite the late notice. In fact, he actively participated in the proceedings. His appeal to the Appeal Tribunal did not allude to the fact that he was prejudiced by the late service of the notice or that in fact he was denied the opportunity to prepare his case. Taking the evidence as a whole and on the balance of probabilities I find that the applicant had reasonable opportunity to prepare his defence.

41. The applicant attacks the charges against him on the ground that he was charged under **section 7(3)(b)** of the ***TSC Act*** which does not disclose any offence. That section empowers the Commission to establish and keep a register for teachers and the Minister to make regulations. However, this does not end the matter as the entire section has to be read to understand the meaning thereof and its application to the facts of the case.

42. **Section 9** of the ***TSC Act*** empowers the Commission to discipline teachers. It provides;

9. (1) *The Commission shall investigate, consider and determine any case where it is alleged that a registered teacher should have his name removed from the register on the ground that, if he were not registered, the Commission would refuse to register him.*

(2) *In any proceedings under this section the Commission-*

(a) *shall inform the person concerned of the nature of the allegations made against him, shall afford that person adequate time for the preparation and presentation of his defence, and shall afford him the opportunity of being heard in person;*

(b) *may act on general evidence or statements relating to the character or conduct of the person concerned, and shall not be bound to receive and consider only evidence admissible in a court of law;*

(c) *may administer oaths and may, for the purpose of dealing with any matter before it summon any person to attend and give evidence and to produce any relevant documents.*

(3) Subject to subsection (2) of this section, the Minister may make rules for regulating the practice and procedure of the Commission in proceedings under this section, and, subject as aforesaid, the Commission may regulate its own practice and procedure.

43. In the case of **Solomon Mmula Bundi v Teachers Service Commission (Supra)** cited on behalf of the applicant, Justice Gacheche considering the case of a teacher who was dismissed on account of charges **section 7(3)(b)** of the **TSC Act** stated that, “the aforementioned legal provision which the TSC relied on in its decisions to dismiss the applicant does not support its action simply because he was already registered as a teacher and was not therefore seeking registration as a teacher at that moment.” In the applicant’s view therefore, as a registered teacher he could not be dismissed under the cited section.

44. In order to determine whether the charges are valid, the **TSC Act** must be read as a whole. Disciplinary proceedings against a teacher lead to the removal of a teacher from the register of teachers established under **section 7** of the **TSC Act**. Under **section 9(1)** of the **TSC Act**, the grounds for removal are those that would entitle TSC not to register a teacher. Under **section 7(3)(b)**, the Commission may refuse to register a teacher if, “it is satisfied that he is an unsuitable person to be a teacher on the grounds that he is not of good moral character, or has been convicted of a criminal offence which, in the opinion of the Commission, renders him unfit to be a teacher, or is guilty of infamous conduct in any professional respect, or has been engaged in any activities which, in the opinion of the Commission, are prejudicial to peace, good order or good government in Kenya.”

45. I therefore find and hold that the reference to **section 7(3)(b)** of the **TSC Act** is a reference to the grounds for removal from the register and which constitutes the basis for the Commissions to exercise disciplinary authority over teachers under **section 9(1)**. It is in this respect that I respectfully depart from the finding and interpretation of **sections 7** and **9** of the **TSC Act** by my learned colleague in **Solomon Mmula Bundi v Teachers Service Commission (Supra)**.

46. The allegation against the applicant is that he had carnal knowledge with a student. In the context of **section 7(3)**, such a teacher would be an unsuitable person to be registered as a teacher. The applicant would also be unfit to be a teacher or in any case guilty of infamous conduct.

47. The important consideration is that the Commission was empowered under statute to discipline the applicant. The charges set out the facts in clear terms that the applicant was able to answer to those charges. At all times, the applicant knew that he was charged with having carnal knowledge of the student, EN. These facts were set out in the interdiction letter issued to him and the charge read at the disciplinary committee hearing. He gave evidence and cross-examined witnesses on the basis of these facts. Once he was found guilty on of the facts alleged, he was a person considered unsuitable to be on the register. I therefore agree with the respondents that there was no miscarriage of justice in this respect.

48. Finally, the applicant has set out factual matter which he asserts demonstrate that the evidence was inconsistent, full of falsehoods and calculated to fix the applicant. As I have stated these proceedings are not an appeal against the finding of the Disciplinary Committee or the Appeals Tribunal but judicial review proceedings. The court’s mandate in this respect is limited to ensuring that the TSC acted within its jurisdiction and provided a fair hearing to the applicant. The disciplinary body, provided it is fair, is entitled to make a decision based on the evidence before it and I should not interfere merely because I could, on evaluating the evidence, come to a different conclusion.

49. I am satisfied that the DEO’s investigation was conducted in accordance with the **Code of Regulations for Teachers**, TSC Disciplinary Committee proceedings were conducted in accordance with the rules of natural justice and the applicant’s right to natural justice was not violated as alleged or at all.

50. Finally, there is nothing in the Statement or Verifying Affidavit that attacks the decision of the Appeals Tribunal.

Conclusion

51. The order of certiorari by the applicant cannot lie in the absence of any breach of the law or procedure by the respondents or in the circumstances of this case.

52. The Notice of Motion dated 30th March 2007 and amended on 19th November 2010 lacks merit and is dismissed with costs to the respondents.

DATED and **DELIVERED** in **NAIROBI** this 19th day of June 2012.

D.S. MAJANJA

JUDGE

Mr J. M. Onyancha instructed by J. M. Onyancha Advocates for the *ex-parte* applicant

Mr Sitima, State Counsel, instructed by the respondents.