



HARUN MOHAMED YUSSUF.....PETITIONER

VERSUS

TEACHERS SERVICE COMMISSION.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

PROVINCIAL COMMISSIONER NORTHEASTERN PROVINCE.....INTERESTED PARTY

JUDGEMENT

Introduction

1. The petitioner brought the Petition dated 13th May 2011 alleging that his fundamental rights under Articles 22,23(3)(b)9(c) 26,27,28,33,47,237, 248 and 249 of the Constitution have been violated by the 1st respondent acting on the instructions of the Interested Party. The petitioner therefore sought the following reliefs from the court:

- (a) **A DECLARATION** that the rights of the Petitioners have been denied, violated, infringed and/or threatened.
- (b) **A DECLARATION** that the actions of the 1st Respondent to transfer the Petitioner on the instigation of the interested party is invalid, null and void.
- (c) **AN ORDER** for compensation of the Petitioner for the damages and loss suffered.
- (d) **AN ORDER** for judicial review to wit certiorari to call to the High Court the decision of the 1st Respondent to transfer the Petitioner and quash it.
- (e) **AN ORDER** for certiorari to issue to call to the High Court the letter by the interested party demanding the transfer of the Petitioner to quash it as it is an abuse of power and it is done in bad faith.

2. The petition is supported by an affidavit sworn by the petitioner on the 13th of May 2011, a Supplementary Affidavit sworn on the 30th of May 2011 and a Replying Affidavit to the Grounds of Opposition sworn on the 12th of July 2011.

3. The 1st respondent filed a replying affidavit sworn by **Nancy Macharia**, the Director in Charge of Staffing, on the 25th of June 2011 while the 2nd respondent filed grounds of opposition dated 20th June 2011. The petitioner and the 1st respondent filed written submissions. The matter was argued before me on the 4th of June 2011.

The Petitioner's Case

4. The petitioner was employed by the 1st respondent on the 6th of June 1994 as a graduate teacher. He

has taught in various schools and is currently the Principal of Garissa High School where he has been since 2007.

5. By a letter dated the 29th of April, 2011, the 1st respondent transferred the petitioner from Garissa High School to Mosoriot Teachers Training College where he was to teach IRE/History, with effect from 2nd May 2011. The petitioner contends that his transfer was a direct result of a letter dated 13th April 2011 addressed by the Interested Party to the 1st respondent (Annexure HMY3) in which various allegations were made against the petitioner by the Interested Party. The petitioner deems the transfer a demotion and instigated by the Interested Party coming as it did barely two weeks after receipt by the 1st respondent of the letter from the Interested Party. The Interested Party had in the letter sought a transfer of the petitioner to a school outside of North Eastern Province on the basis of complaints set out in the letter, including allegations that the petitioner was engaging in politics.

6. The petitioner contends that the transfer infringed his rights under Articles 19, 20, 21, 22, 23(3), 25, 26, 27, 28, 33, 47, 237, 248 and 249 of the Constitution. He argued that the transfer was done on the basis of political connection since it had been effected at the whim of another person.

7. The petitioner also contended that his transfer was in violation of the provisions of Article 249 of the Constitution which had established independent commissions such as the 1st respondent. The Interested Party acts as an agent of the 1st respondent in his capacity as the Chairman of the Provincial Education Board. He therefore has the duty of appraising the 1st respondent on matters relating to education in his area of jurisdiction. However, by advising the 1st respondent to transfer the petitioner, he had acted in his capacity as the Provincial Commissioner, thus eroding the independence of the 1st respondent and subjecting it to executive manipulation.

8. The petitioner also argued that the 1st respondent had violated Article 237(1) (c) (d) and Article 237 (3) (b) of the Constitution in relation to policies on ensuring equitable distribution of teachers. The 1st respondent had failed to take into account the shortage of 15 teachers experienced at Garissa High School before effecting the transfer of the petitioner. It should have brought in more teachers to the school, rather than removing the petitioner. Further, the petitioner contended that his transfer was actuated by malice. This was because it could not be true, as alleged by the respondent, that he was the most resourceful person in Islamic Religious Education and History; that even if he was, there were over 900 students enrolled in Islamic Religious Education at Garissa High School and a critical shortage of 2 Islamic Religious Education teachers, a fact that was known to the 1st respondent; that the petitioner had failed to co-operate in the 'grabbing' of the school land; that he had not in any way been involved in politics and had only participated in a stakeholders' consultative meeting held between 11th-13th March 2011 as a community leader to discuss issues relating to the new constitutional dispensation at the invitation of the Hon Haji and nominated Member of Parliament Sofia Abdi. His transfer to Mosoriot Teachers College was therefore done in violation of his rights and of the Constitution and he therefore prayed that this Court should declare the transfer null and void.

The 1st Respondent's Case

9. Mr. Sitima for the 1st respondent submitted that the 1st respondent is established under Article 237(i) of the Constitution. It is vested with several functions, among them the recruitment, employment and assignment of teachers for service in public schools all over the country. Article 237 (c) and (d) specifically mandates the Commission to distribute and transfer teachers so recruited to public schools and public institutions. In addition, Article 237 (3) (b) empowers the Commission to review the demand for and supply of teachers amongst schools to ensure equitable distribution. The 1st respondent is guided in the discharge of its functions by the Teachers Service Commission Act, Cap 212 Laws of Kenya, and the Code of Regulations for teachers enacted under section 6 of that Act.

10. The 1st respondent's position is that the transfer of the petitioner from Garissa High School to

Mosoriot Teachers College was done in the course and within the scope of the 1st respondent's constitutional and statutory mandate, the sole objective of the transfer being to ensure equitable staffing conditions for both institutions. Regulation 27 (3) of the Code of Regulations for Teachers confers upon the 1st respondent discretion to transfer teachers at any time. Further, sub section 5 of the same Regulation provides that a teacher deployed to an administrative post may be transferred to a higher post on promotion, an equivalent post or on deployment. The transfer of the petitioner was done upon a consideration of the staffing levels in the two institutions, subject combination and mastery of Islamic Religious Education and History.

11. Mr.Sitima submitted that the 1st respondent had considered the wealth of experience of the petitioner, his mastery of Islamic Religious Studies, and his capacity to lecture, mentor and produce teachers who would offer exemplary teaching services to the country. The decision to transfer the petitioner was made in good faith and without undue influence, and the letter by the Interested Party dated 13thApril, 2011 had no bearing on the decision to transfer the petitioner.

12. The 1st respondent urged the court to dismiss the petition. No violation of the petitioner's rights had been demonstrated. As a public officer, the petitioner was bound to serve wherever within the Republic he was required to serve, and it would be against the public interest and set a bad precedent should the orders prayed for be issued as it would incite teachers and other public servants to decline transfers and select the schools in which they would wish to serve

The 2nd Respondent's Case

13. Mr.Wasike for the 2nd respondent submitted that the transfer of the petitioner to Mosoriot Teachers Training College was based on the petitioner's exemplary performance and on the 1st respondent's policy guidelines. There was no evidence that the 1st respondent relied on or was influenced by the letter by the Interested Party dated 13thApril 2011.

14. Mr.Wasike submitted further that the 1st respondent as a public body is mandated to receive all complaints, but there was no evidence that it had acted on the complaint lodged against the petitioner by the Interested Party. There was also no discrimination against the petitioner as alleged as there were other teachers affected by transfers. The petition did not raise any constitutional issue, is frivolous and ought to be dismissed with costs.

Determination

15. The petitioner has alleged violation of his right under the constitution arising out of his transfer from Garissa High School to Mosoriot Teacher Training College. The basis of the complaint is the letter by the Interested Party dated 13th April 2011 which sought the petitioner's transfer. Having considered the respective submissions of the parties in this matter, I take the following view.

16. First, the petitioner is under an obligation to cite the provisions of the Constitution that have been violated with respect to him, and demonstrate in what way the violations have occurred. This is the position taken by this court in a long line of decisions starting with the case of **AnaritaKarimiNjeru-v-Republic, (1979) KLR 154** where the court stated at Page 156 of the judgment that:

'We would however again stress that if a person is seeking redress from the High Court or an order which invokes a reference to the Constitution, it is important(if only to ensure that justice is done in his case) that he should set out with reasonable degree of precision that of which he complains, the provisions said to be infringed and the manner in which they are alleged to be infringed.'

17. As a teacher employed in the public service, the petitioner is subject to policies and regulations of the 1st respondent with regard to deployment and transfer. The petitioner does not dispute this, nor did I hear

him to dispute the right of the 1st respondent to transfer him to any part of the Republic in exercise of its powers under the Constitution and the Teachers Service Commission Act. To my mind, a transfer in exercise of the functions of the 1st respondent cannot amount to a violation of the petitioner's rights, and though the petitioner has cited various provisions of the Constitution, he has not demonstrated how the alleged violations have occurred. I therefore find no basis for the allegation by the petitioner that the respondents have violated his rights under the Constitution by his transfer to Mosoriot Teachers College.

18. A matter of concern to the court, however, is the timing of the transfer of the petitioner. The Interested Party wrote his letter dated 13th April 2011 specifically requesting for the transfer of the petitioner outside North Eastern Province, The letter, marked 'very Urgent,' appears to have been received by the 1st respondent on the 18th of April 2011 and by the Permanent Secretary, Ministry of Education, on the 15th of April, 2011. Less than two weeks after receipt of the letter, the 1st respondent sent its letter dated 29th of April, 2011, to the petitioner transferring him to Mosoriot Teachers College with effect from the 2nd of May, 2011.

19. There is nothing before the court that would show that the transfer of the petitioner was brought on by anything other than the letter by the Interested Party. While the 1st respondent has power to transfer the petitioner and to evaluate the staffing needs of schools and make the necessary deployment of teachers, any reasonable person, confronted with the facts of this case, would conclude that the transfer was instigated solely by the letter by the Interested Party.

20. The 1st respondent is established under Article 237 of the Constitution which provides as follows:

(1) There is established the Teachers Service Commission.

(2) The functions of the Commission are—

(a) to register trained teachers;

(b) to recruit and employ registered teachers;

(c) to assign teachers employed by the Commission for service in any public school or institution;

(d) to promote and transfer teachers;

(e) to exercise disciplinary control over teachers; and

(f) to terminate the employment of teachers.

(3) The Commission shall—

(a) review the standards of education and training of persons entering the teaching service;

(b) review the demand for and the supply of teachers; and

(c) advise the national government on matters relating to the teaching profession.

21. The 1st respondent is an independent commission in which is vested specific powers by the Constitution, yet it appears to have acted on the basis of instructions or at any rate a specific request from the Interested Party. The question is then what is the effect in such circumstances of an act done by an independent commission at the request or instigation of a third party? Article 249 of the Constitution provides as follows:

(1) The objects of the commissions and the independent offices are to—

(a) protect the sovereignty of the people;

(b) secure the observance by all State organs of democratic values and principles; and

(c) promote constitutionalism.

(2) The commissions and the holders of independent offices—

(a) are subject only to this Constitution and the law; and

(b) are independent and not subject to direction or control by any person or authority.

22. From the facts before me, it is clear that the 1st respondent acted at the behest of the Interested Party, and did not exercise its mandate independently as it was required to do under the Constitution. In such circumstances, its action of transferring the petitioner, though within its legal mandate, was done in contravention of the Constitution and is therefore null and void.

23. For the avoidance of doubt, this finding by the court should not be taken by the petitioner as insulating him from transfer from Garissa High School. From his pleadings, it is clear that he has served in various schools in the province, and as he states, he has no problem with being transferred. Indeed, as submitted by the 1st respondent, the petitioner, being a public officer and having voluntarily accepted the terms and conditions of service as a teacher, is bound to respect and obey the regulations governing the teaching service. In this instance, the transfer appears to have been effected on the basis of other than the independent decision of the 1st respondent, and to allow it to stand would weaken the functioning of the 1st respondent as it would render it subject to manipulation by the administration. Should the 1st respondent however, in future, deem it necessary, on an independent consideration of relevant factors, to transfer the petitioner, then he cannot be heard to complain.

24. In the circumstances, of this case, however, I hold that the transfer was unconstitutional null and void. As no violation of the rights of the petitioner has been demonstrated, I make no award of damages to the petitioner as prayed. The petitioner shall however, have the costs of this petition.

Dated Delivered and Signed at Nairobi this 25th day of July 2012.

**MUMBI NGUGI
JUDGE**