REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 260 of 2008

REPUBLIC .....APPLICANT

VERSUS

TEACHERS SERVICE APPEAL TRIBUNAL .....1ST RESPONDENT

TEACHERS SERVICE COMMISSION.....2ND RESPONDENT

EXPARTE
ALFRED MWITI OBED

JUDGMENT

The ex-parte applicant is Alfred Mwiti Obed. He will henceforth be simply referred to as the applicant. The Teachers Service Appeals Tribunal and the Teachers Service Commission are the 1st and 2nd respondents respectively. This decision is in respect of the applicant's notice of motion dated 24th October, 2008 and amended on 14th April, 2010. In the application the applicant prays for orders that:-

1. An Order of Certiorari be granted to remove unto the court and quash the decision of the Teachers Service Commission Appeal Tribunal dismissing his appeal against a conviction and dismissal from employment by the Teachers Service Commission and also quash the decision of the Teachers Service Commission's conviction of the applicant for the offence of having carnal knowledge of a student Idah Gakii resulting to her being pregnant and giving birth to a baby girl on 19th May, 2005.

2. Upon quashing the decision of the Teachers Service Appeals Tribunal and Teachers Service Commission, an Order of Mandamus do issue to compel the Teachers Service Commission to reinstate him to the Roll of Teachers and also reinstate him back to his employment.

3. Cost of this application be provided for.

The application is supported by a statutory statement, the applicant's verifying affidavit sworn on 8th May, 2008 and annexures thereto. The application is also supported by grounds on its face as follows:-

1. The applicant is a former teacher of Kiini Secondary School in Meru and was duly registered and his name entered on the Roll of Teachers by the Teachers Service Commission.

2. The applicant was accused and convicted by the Teachers Service Commission of the offence of having carnal knowledge of a school girl Idah Gakii and impregnating her.

3. The Teachers Service Commission ignored the recommendations by the Board of Governors Kiini Secondary School which had found the teacher innocent of the charges leveled against him.

4. The applicant was not accorded a fair and just trial before the verdict of guilt against him was entered by the Teachers Service Commission.

5. That both the 1st and 2nd respondents ignored crucial evidence by the complainant exonerating the applicant from the offence charged and proceeded to convict him without giving grounds for their decisions.

6. The procedure followed by both 1st and 2nd respondents in convicting the applicant for offence disputed by the complainant was flawed and did not accord him a fair hearing as required by the law.

7. After being found guilty, of the offence accused of, the applicant was dismissed from employment by the Teachers Service Commission and his named removed from the roll of teachers.

8. **Unless the orders sought are granted, the applicant is bound to suffer irreparable harm since the career he trained for has been brought to an abrupt end by an offence not committed**.

The respondents opposed the application by way of a replying affidavit sworn by Peter Ole Shonko on 28th October, 2009.

The applicant is a former teacher at Kiini Secondary School in Meru. According to him his tribulations started on 22nd October, 2004 when the school principal one Mr. Justus Riungu summoned him to his office and confronted him with an allegation that he had impregnated a school girl by the name Idah Gakii. The applicant denied the allegation but the matter did not end there.

The principal went ahead and reported the matter to the 2nd respondent and he was instructed to convene a Board of Governors (B.O.G) meeting to investigate the matter and forward its findings to the 2nd respondent. The B.O.G. investigated the matter as directed and concluded that there was no evidence to connect the applicant with the offence. The minutes of the B.O.G. meeting together with the evidence of the witnesses were sent to the 2nd respondent but the 2nd respondent wrote back to the school principal insisting that the applicant had a case to answer and that the matter should be taken up again by the B.O.G in an upcoming meeting. The 2nd respondent went ahead to indicate in its letter dated 16th January, 2006 that "records held in this office indicate that the Board was partisan and the teacher was protected." Subsequently the B.O.G. in its meeting of 10th March, 2006 addressed the matter and concluded that it would not reopen the disciplinary proceedings against the applicant and its earlier decision that he was not guilty would remain in force.

The 2nd respondent decided to take over the matter and through a letter dated 17th May, 2006 the applicant was formally charged as follows:-

"You breached the TSC Act Cap 212 Section 7(3b) of the Laws of Kenya and Regulation 66(2) (a) of the Code of Regulations for Teachers in that you had carnal knowledge of your student Hydah Gakii Adm.3780 Form 3N, on 22/5/2004, 24/7/2004 and during the months of August, September, and December, 2004. This resulted to her being pregnant and gave birth to a baby girl on 19th May, 2005."

Through a letter dated 16th February, 2007 the applicant was informed about a hearing that was to take place on 16th March, 2007 at the District Education Officer's office at Chuka. Letters dated 16th March, 2007 conveyed to the applicant the information that he had been dismissed and removed from the Register of Teachers.

On 6th April, 2007 the applicant appealed to the 1st respondent. He listed ten grounds of appeal. Vide a letter dated 12th November, 2007 the 1st respondent informed the applicant about the outcome of his appeal as follows:-

"The Teachers Service Appeals Tribunal (TSAT) hereby writes to inform you that your appeal was heard on 24th September, 2007 in your presence. The Tribunal perused and considered all evidence on record and carefully listened to your appeal and that of your witnesses before it, and determined that you were guilty of the allegations leveled against you. For this reason, your appeal was dismissed and the Teachers Service Commission's (TSC) decision on your case upheld. You may, if you so wish, apply to the Teachers Service Commission (TSC) for reinstatement back into their register two (2) years from the date of your removal from the said register. Please note however that this reinstatement is solely at the discretion of TSC."

According to the applicant, the respondents took him through a process which was improper, unfair, unlawful and unreasonable. To support his case he contends that the 2nd respondent took him through a second disciplinary process even after the B.O.G. had found that he was not guilty of the alleged offence. He contends that he was not given an opportunity to respond to or cross-examine the witnesses and especially Idah Gakii. He submitted that the respondents went ahead to convict him despite the overwhelming evidence showing that Idah Gakii and her father had withdrawn the complaint against him. The applicant further argued that the respondents did not give him the reasons for their decisions and he only learned through the annexures to the replying affidavit the reasons in support of the respondents' decisions.

The respondents did not agree with the applicant's submissions. In the replying affidavit of Mr. Peter Ole Shonko, the 2nd respondent's Deputy Secretary in charge of Administration, it is averred that the case against the applicant was heard by the 2nd respondent's Disciplinary Committee on 16th March, 2007 in the presence of the applicant who had also responded to the allegations in writing. After the hearing it was decided that the applicant's name should be removed from the Register of Teachers. It is the 2nd respondent's case that the decision to dismiss the applicant and remove his name from the register was just, fair procedural and within the provisions of the law.

Considering the material placed before the court, I find that the issues for determination by this court are:-

(1) Whether the applicant was treated fairly by the respondents.

(2) Whether the orders sought by the applicant are deserved; and

(3) Who should meet the costs of the application?

The case against the applicant proceeded before the two respondents under the Teachers Service Commission Act, Cap 212 (herein after simply referred to as the repealed Act) which was repealed by the Teachers Service Commission Act No. 20 of 2012. For the purposes of this judgment I will confine myself to the provisions of the repealed Act. Section 9 provided for disciplinary proceedings against registered teachers as follows:-

"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 produce any relevant documents .

(3).....”

Sections 11 and 12 of the repealed Act created the 1st respondent and provided for its procedure.

The applicant’s case has to be considered in light of the said provisions. The applicant’s case is that he was taken through a second disciplinary process by the 2nd respondent after the B.O.G. found him not guilty of the allegation that he had carnal knowledge of his student. This argument cannot stand since the 2nd respondent was the body mandated by the law to take disciplinary action against teachers. Whatever the B.O.G. did was done as an agent of the 2nd respondent and it cannot be said that the applicant was ‘tried’ twice for the same offence.

The applicant complained that he had been taken through an unfair process. A look at the documents filed by the parties in these proceedings clearly shows that the 2nd respondent complied with the provisions of the repealed Act. A perusal of the proceedings of the 2nd respondent’s Disciplinary Committee clearly shows that the applicant put in a written statement and even cross-examined Idah Gakii. The Disciplinary Committee may not have recorded its evidence in a manner appealing to the eye of a trained lawyer but such shortcomings cannot be used to fault the decision of the 2nd respondent.

The applicant complained that no reasons were given for the respondents’ decision. From his letter of appeal it is clear that he had understood the reasoning behind the 2nd respondent’s decision. The 1st respondent’s letter conveying the reasons for the rejection of the appeal was detailed enough. It would have been better had the 1st respondent supplied a full transcript of its decision to the applicant. This, however, cannot be used to impute non-compliance with the rules of natural justice.

Judicial review concerns itself with the decision making process and not the merits of the decision. An overview of the evidence that was placed before the 2nd respondent may lead one to conclude that the 2nd respondent reached a wrong decision. It must be noted, however, that the fact that Idah Gakii may have withdrawn her complaint did not mean that the disciplinary proceedings against the applicant were to come to a halt. The basis of the charge that the applicant was faced with was that he had carnal knowledge with his student. Once carnal knowledge was proved, that was the end of the matter. It appears that the 2nd respondent operated on this understanding. In any case, this court does not have the power to consider the merits of the 2nd respondent’s decision. That would be exceeding the mandate of judicial review.

The purview of judicial review was summarized by Lord Diplock in the famous case of **COUNCIL OF CIVIL SERVICE UNIONS V MINISTER FOR THE CIVIL SERVICE [1984] 3 ALL ER 935**thus:-

“Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety.”……..

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness"

(Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

In judicial review therefore, the court's jurisdiction is limited to applying the three tests of "legality", "rationality" and "procedural propriety" to the decision under review and once the decision passes the tests the court has no business taking any further step in respect of that decision.

As already demonstrated, the respondents complied with the procedural requirements of the repealed Act. The rules of natural justice were also complied with as required by the repealed Act.

The only question that remains to be answered is whether the decisions of the respondents passed the rationality test. For the court to descend into the arena of decision-making and conclude that a decision is unreasonable, the applicant ought to place clear evidence before the court showing that the decision is obviously and truly irrational. No such evidence has been placed before this court.

Even if the applicant had succeeded, I do not think that an order of mandamus would have issued in the circumstances of this case. The court will always be very reluctant to force an employee on an employer where trust has been lost. In the case of **REPUBLIC v KENYATTA UNIVERSITY EX-PARTE HARON NJOROGE NJOGU [2011] eKLR** cited by the applicant, Musinga, J (as he then was) correctly observed that:-

"As regards the prayer for an order of mandamus to issue to compel the respondent to reinstate the applicant to employment, such an order cannot be granted because contracts of service have mutuality of rights and obligations for both parties and this court does not have jurisdiction to impose upon an employer an employee whom it does not wish to retain in its establishment."

At the end of the day, the applicant's application fails and the same is dismissed. There is no order as to costs.

Dated and signed at Nairobi this 29th day of November , 2012

W. K. KORIR

JUDGE