



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**PETITION NO. 1 OF 2010**

**BETT FRANICS**  
**BARNGETUNY .....PETITIONER**

**=VERSUS=**

**THE TEACHERS SERVICE COMMISSION .....1<sup>ST</sup>**  
**RESPONDENT**

**THE TEACHERS SERVICE APPEALS TRIBUNAL.....2<sup>ND</sup>**  
**RESPONDENT**

**JUDGMENT**

**Bett Francis Barngetuny**, the petitioner, filed this petition under section 87(1), 77(9) (10) and 74 of the repealed Constitution for the following orders and declarations!

- (a) A declaration that his right to a fair hearing under the provisions of section 77 (9) and 10 of the said Constitution has been violated.
- (b) A declaration that he has been discriminated against and has been subjected to inhuman and degrading treatment.
- (c) A declaration that he has been unfairly deprived of his right to a livelihood.

(d) A declaration that all steps, actions and decisions made in the Teacher's Service Commission Disciplinary Case No. 0132/02 are illegal, null and void.

(e) An order directing the 1<sup>st</sup> respondent to immediately and unconditionally reinstate him into its register.

(f) Costs.

It was agreed by counsel that the principles applicable in this petition are the same as those applicable in petition number 628 of 2006 for **Constantine Simati**. Counsel therefore adopted the arguments made therein in this petition. A detailed consideration of those principles are therefore found in that petition. The facts underlying this petition are however somewhat different. They are in summary as follows:-

The petitioner was, on 11th July, 1995, employed by the 1<sup>st</sup> respondent on probation as a P.1 Teacher which employment was confirmed on 29<sup>th</sup> January, 1996.

On or about 22<sup>nd</sup> March, 2002, while engaged as such teacher, he received a letter from the District Education Officer, Uasin Gishu district, on the 1<sup>st</sup> respondent's direction, informing him that the 1<sup>st</sup> respondent intended to remove his name from its register of teachers on the main ground that he had carnal knowledge of one **Hellen Jepkosgei Songok**, hereinafter "the complainant" who was alleged to be his pupil then. In or about the month of October, 2002, the 1<sup>st</sup> respondent summoned him for a disciplinary committee hearing on 29<sup>th</sup> October, 2002, a date he was attending a criminal trial on a charge of rape of the same complainant. Vide a letter of even date, he was notified by the 1<sup>st</sup> respondent that he had been dismissed from the teaching service. In the premises, the petitioner contended that he was not given a fair hearing.

Being aggrieved by that decision of the 1<sup>st</sup> respondent, he attempted to lodge an appeal against the same with the 2<sup>nd</sup> respondent. The latter however, declined to entertain his appeal on the ground that he had not been removed from the 1<sup>st</sup> respondent's register. A sub-committee of the 1<sup>st</sup> respondent was convened but declined to review the decision of the 1<sup>st</sup> respondent's Disciplinary Committee.

The respondent's actions or omissions, according to the petitioner, have deprived him of his right to a livelihood notwithstanding that a competent authority i.e the court, absolved him of any wrong doing.

The petitioner swore an affidavit in support of his petition. In the affidavit he elaborated the above grounds of the petition.

The respondents opposed the petition by way of replying affidavits. The 1<sup>st</sup> respondent swore the replying affidavit through its Senior Deputy Secretary in Charge of Administration, **Simon Musyimi Kavisi** and the response of the 2<sup>nd</sup> respondent was through **Margaret W. Makara**, its Secretary. The gist of the response of the 1<sup>st</sup> respondent was that a complaint had been lodged against the petitioner by the complainant that the petitioner had had carnal knowledge of the complainant, who at the time was his pupil, without her consent which complaint was considered by the 1<sup>st</sup> respondent in accordance with its

regulations and after regarding the evidence presented, determined that the petitioner be dismissed from its service. A review was sought by the petitioner and after considering the same, the 1<sup>st</sup> respondent confirmed the petitioner's dismissal. The petitioner's union (KNUT) Intervened on behalf of the petitioner. A TSC/ KNUT consultative committee was held on 27<sup>th</sup> 2008 at which meeting the facts of the case were reconsidered and re-evaluated but the 1<sup>st</sup> respondent's decision to dismiss the petitioner was upheld. In the premises, according to the 1<sup>st</sup> respondent, the petitioner was given a fair hearing.

The 2<sup>nd</sup> respondent's response was that it lacked the requisite jurisdiction to entertain the petitioner's appeal since he was not de registered and /or removed from the Register of Teachers.

I have considered the petition, the supporting affidavit and the annexures thereto. I have also considered the responses of the respondents and the documents exhibited in support thereof. Finally, I have given due consideration to the submissions of counsel and the authorities cited. Having done so, I take the following view of this matter.

The petitioner's main complaint against the 1<sup>st</sup> respondent is that it did not accord him an opportunity to be heard on the complaint made against him. He states that on the date he was supposed to appear before the 1<sup>st</sup> respondent's disciplinary committee on 29<sup>th</sup> October, 2002, he was required to defend himself on the said rape charge which he indeed did that day. That may very well be the position but the petitioner was served with the 1<sup>st</sup> respondent's said replying affidavit to which are annexed proceedings of the 1<sup>st</sup> respondent's disciplinary committee hearing. The said proceedings clearly indicate that the petitioner was given an opportunity to present his defence and he did so before the said committee. The same are exhibited as "smk"-6 to the replying affidavit of **Simon Musymi Kavisi**. The petitioner did not challenge the proceedings in a subsequent or further affidavit. The proceedings must therefore be taken to represent the correct factual position of what transpired at the 1<sup>st</sup> respondent's disciplinary committee hearing.

Having considered the said proceedings, I am in doubt that the petitioner was given an opportunity by the 1<sup>st</sup> respondent to be heard on the complaint against him and was indeed heard by the 1<sup>st</sup> respondent's disciplinary committee.

The petitioner appears to lay emphasis on the fact that a competent court of law tried him on the same complaint and acquitted him. In my view, however, the 1<sup>st</sup> respondent was not bound to take the same position which the regular court took. It is illustrative that the 1<sup>st</sup> respondent was acting in its quasi-judicial capacity. It was not bound to strictly apply the law of evidence and procedural rules which bind the regular court. The standard of proof before the 1<sup>st</sup> respondent is not also that of proof beyond reasonable doubt which the regular court was bound to apply.

The record also shows that the petitioner requested for a review of the 1<sup>st</sup> respondent's decision to dismiss him. The request was considered but the 1<sup>st</sup> respondent declined to review its decision. The petitioner then enlisted the help of its union (KNUT). A TSC/KNUT committee was convened and considered the intervention but the decision of the respondent was confirmed.

In all those premises, I have come to the conclusion that the petitioner's allegations against the 1<sup>st</sup> respondent have no merit and are dismissed.

With regard to the 2<sup>nd</sup> respondent, the Teachers Service Appeals tribunal, the petitioner's main complaint was that it denied him the opportunity to lodge an appeal against the decision of the 1<sup>st</sup> respondent's disciplinary committee to dismiss him. The petitioner therefore contended that he was denied a fair hearing by an unbiased tribunal. I have, in petition No. 628 of 2006, held that where a teacher is merely dismissed but not also removed from the register of teachers, the 2<sup>nd</sup> respondent has no jurisdiction. The

petitioner herein was dismissed but not also de-registered or removed from the register of Teachers. In that event, the 2<sup>nd</sup> respondent could not entertain his appeal. The allegations made against the 2<sup>nd</sup> respondent are therefore also without merit and are dismissed.

My above findings dispose of the petitioner's allegations that he was deprived of his right to earn a livelihood and that he was discriminated against or subjected to inhuman and degrading treatment.

So, like the petitioner in 628 of 2006, the petitioner herein is not entitled to any of the reliefs sought in his petition – which I hereby dismiss.

As in the said earlier petition each party shall bear its own costs.

Orders accordingly.

**DATED AND DELIVERED AT ELDORET THIS 15<sup>TH</sup> DAY OF MARCH 2011.**

**F. AZANGALALA**

**JUDGE**

***Read in the presence of:-***

1. **Mr. Ngeno** for the petitioner

2. **Mr. Muiruri** for the 2<sup>nd</sup> respondent and holding brief for **Mr. Situma** for the 1<sup>st</sup> respondent

**F. AZANGALALA**

**JUDGE**

**15/3/2011**