REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

PETITION CAUSE NO. 628 OF 2006

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

UNDER SECTION 77 (9) (10) AND 74 OF THE CONSTITUTION OF KENYA

BETWEEN

CONSTANTINE SIMATI.....PETITIONER

AND

1. THE TEACHERS SERVICE COMMISSION

2. THE TEACHERS SERVICE APPEALS TRIBUNAL.....RESPONDENTS

JUDGMENT

The Petitioner, **Constantine Simati,** moved this Court by way of a petition dated 5th May, 2006, brought under articles 77(9) (10) and 74 of the repealed Constitution. He sought the following orders:

(a) A declaration that his right to a fair hearing under the provisions of article 77 (9) and 10 of the aforesaid Constitution has been violated.

(b) A declaration that he has been discriminated against and has been subjected to in human and degrading treatment.

(c) A declaration that all steps, actions and decisions made in the Teachers Service Commission Disciplinary Case No. 743 of 2001 are illegal, null and void.

(d) An order directing the 1st respondent to immediately reinstate him onto its register.

(e) That he be awarded damages against the respondents.

(f) Costs of the petition.

The grounds founding the petition, for the material part, may be thus set out:

(1) That the Chairman of the 1st respondent's tribunal was out rightly hostile and biased against the petitioner and the petitioner was constantly interrupted and stopped from making any representation;

(2) That the petitioner was not allowed to defend himself either verbally or by producing documents. That the Chairman of the said tribunal instead kept on cross-examining the petitioner after which the petitioner was told to mitigate as the 1st respondent's tribunal had already arrived at its verdict;

(3) That the petitioner was not allowed to cross-examine witnesses and almost all the questions the petitioner asked in cross-examination were answered by the Chairman of the said tribunal;

(4) That although the petitioner availed witnesses to testify, he was not allowed to present them;

(5) That the petitioner was denied copies of proceedings and judgment for appeal purposes;

(6) That the petitioner was denied the right and opportunity to lodge an appeal before the 2nd respondent tribunal;

(7) That the petitioner was not accorded a hearing before the 2nd respondent determined that he had no right to appeal;

(8) That the respondents have continued to deny the petitioner his salary and benefits contrary to section 10 (2) of the Teachers Service Commission Act (Cap 212 Laws of Kenya);

(9) That the petitioner has therefore been denied a fair hearing by an unbiased tribunal contrary to the law;

(10) That the petitioner has further been deprived of his right to earn a livelihood;

(11) That the petitioner has been discriminated against and has been subjected to in human and degrading treatment.

The petitioner supplied evidence by way of an affidavit sworn by himself on 5th may 2006. Annexed to the affidavit, were various documents intended to advance his case. In the affidavit, the petitioner gave the background of his case which had its origin in a letter of interdiction dated 13th June 2000. The letter, exhibited as "CS2" informed the petitioner of the 1st respondent's intention to remove and or dismiss him from his employment. The allegations made against the petitioner were two namely, that he was not of good moral character having committed sodomy with three male students and that he had given the same students alcohol before harassing them sexually.

The same letter invited a response from the petitioner within 21 days of the date of the letter which response the petitioner exhibited as **"CS3".** In that letter, the petitioner denied the allegations lavelled against him and contended that the case had been framed against him. The disciplinary case then went a step further when the petitioner was severally invited to attend discipline hearings by the 1st respondent culminating in the hearing which took place on 21st November 2001. The petitioner discredited that hearing for the following reasons:-

" (i) That the Chairman of the Commission was out rightly hostile and biased against him;

(ii) That he was not allowed to defend himself and that the Chairman of the 1st respondent kept on cross- examining him after which he was told to mitigate as the 1st respondent had already arrived at its verdict;

(iii) That the petitioner was not allowed to cross-examine witnesses and almost all the questions he asked in cross-examination were answered by the Chairman of the 1st respondent;

(iv) That although the petitioner availed witnesses, he was not allowed to present them."

The petitioner further swore that pursuant to the above process which, according to him was flawed, the 1st respondent recommended his dismissal from the teaching service by letter dated 21st November 2001 exhibited as **"SC 5".** Being dissatisfied with the said decision, the petitioner intended to appeal and accordingly applied for the proceedings and judgment of the 1st respondent and handed in his appeal on 21st December 2001 through the 2nd respondent's Secretary.

The petitioner further swore that the 2nd respondent determined that he had no right of appeal even before he was given an opportunity to be heard which determination infringed his constitutional rights and was in breach of the rules of natural justice.

The petitioner further swore that under section 10 (2) of the Teachers Service Commission Act, (Cap 212 laws of Kenya), he was entitled to receive all benefits pending the hearing and disposal of his appeal but in breach thereof, the 1st respondent stopped paying him in November, 2001. In those premises, he had been deprived of his only source of livelihood yet, according to him, the disciplinary proceedings lodged against him were a nullity.

The petition was opposed by both respondents. The 1st respondent's Senior Deputy Registrar in charge of Administration **Simon Musyimi Kavisi,** swore a 25 paragraph affidavit on 26th March 2010 in opposition to the petition. In the affidavit, **Kavisi** deposed, *inter alia*, that the petitioner was dismissed from the

service of the 1st respondent after following due process prescribed under the relevant Act and regulations made thereunder and the dismissal was therefore lawful and not actuated by bad faith and/ or malice. According to **Kavisi** and on advice of counsel, if the petitioner was dissatisfied with the 1st respondent's decision, he should have instituted a suit for recovery of damages. Annexed to the said replying affidavit, are various documents including correspondences exchanged and copies of proceedings held by the 1st respondent and its agents.

The 2nd respondent filed its affidavit in opposition through **Margret W. Makena**, its Secretary, on 24th March, 2010. In the affidavit, she denied that the 2nd respondent refused to register and hear the petitioner's appeal but that to the contrary, the 2nd respondent invited the petitioner to lodge his appeal, if he so wished, t0 which invitation the petitioner failed to react. Notwithstanding that denial, **Makena** further swore that, the 2nd respondent had no jurisdiction to entertain the petitioner's appeal which was an appeal against his dismissal from service and not his removal from the register of teachers.

The pleadings were in that state, when the petition came up before me for hearing on 25th January 2011. It was canvassed by Mr. **Ngeno**, learned counsel for the petitioner and M/s **Sitima** and **Muiruri,** learned counsel for the 1st and 2nd respondents respectively. Counsel reiterated the stand-points taken by their clients in their respective affidavits. They made reference to various authorities which I have read. Counsel also agreed that since petition number 1 of 2010 is similar to this petition, the submissions on the principles herein apply to that petition.

I have now considered the pleadings, counsel's submissions and all the authorities cited to me. Having done so, I take the following view of the matter. The thrust of the petitioner's case was that he was not given a fair hearing by both respondents. It is elementary in my view that both respondents were considering the petitioner's case in their capacities as quasi judicial bodies. The general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity are well known. The case of **Hypolito Cassiani De Souza –vrs- Chairman, Members of Tanga town Council [1961] EA 77,** crystallized the principles at page 386 as follows:-

1. If a statute or statutory rules and regulations binding on the domestic tribunal prescribe the procedure to be followed, that procedure must be observed;

2. If no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue;

3. In such a case, the tribunal which should be properly constituted must do its best to act justly and reach just ends by just means. It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as a trial. It need not examine witnesses; and it can obtain information in any way it thinks best …..;

4. The person accused must know the nature of the accusation made;

5. A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement they may decide to bring forward;

6. The tribunal should see to it that the matter which has come into existence for the purpose of the *quasi-lis* is made available to both sides and once the *quasi-lis* has started, if the tribunal receives a communication from one party or from a third party, it should give the other party an opportunity of commenting on it."

Almost all the above principles are incorporated in the code of regulations governing the profession of teachers in this country. Regulation 66 (4) of the said code reads as follows:-

"4 Disciplinary proceedings by the commission. The Commission shall in accordance with Section 9(1) and (2) of the Act investigate, consider and determine each case of interdiction whenever it is alleged that a registered teacher should have his / her name removed from the register.

The Commission shall:

(a) Inform the teacher concerned on/about the nature of the allegation made against him/her, afford that teacher adequate time for the preparation and presentation of his/her defence and the opportunity of being heard in person ---"

So, did the 1st respondent breach its own fair-hearing provisions and those set out in the **De Sauza** case? The complaints made by the petitioner against the 1st respondent are that the Chairman of the 1st respondent's tribunal was hostile and biased against him and constantly interrupted and stopped him from making any representation; that he was not allowed to defend himself either verbally or by producing documents; that he was not allowed to cross-examine witnesses; that although he availed witnesses, he was not allowed to present them and that he was denied copies of proceedings and judgment for appeal purposes.

All those allegations were denied by the 1st respondent through its Senior Deputy Secretary in charge of Administration. According to him, the petitioner was given a fair hearing and due process of the law was followed. He specifically deponed that the petitioner appeared in person before the 1st respondent's disciplinary panel, heard all the evidence presented against him and had the opportunity to cross-examine the witnesses. He also specifically deposed that the petitioner testified at the said tribunal hearings and was accorded a fair opportunity to counter the reasons for his dismissal.

The proceedings culminating in the dismissal of the petitioner were exhibited by the 1st respondent. The petitioner did not allege, in a further affidavit, that the said proceedings did not reflect the correct record of the 1st respondent's disciplinary committee meetings. The petitioner's case was heard on two cases. First on 23rd May, 2001 at the D.E.O.'s office at Bungoma and secondly on 21st November, 2001 at the 1st respondent's head quarters. The unchallenged proceedings show that the first hearing was adjourned at the request of the petitioner who required more time to write his defence statement. At the resumed hearing on 21st November, 2001, the proceedings indicate that the petitioner was heard by the 1st respondent's disciplinary committee at which he denied the allegations levelled against him.
It is not however clear from the proceedings whether witnesses were cross-examined. The proceedings appear to be a summarized account of what happened at the committee hearings. There is however no doubt in my mind that the petitioner was given an opportunity to defend himself and he did defend himself before 1st respondent's disciplinary committee.

As already observed, the 1st respondent's regulations provide *inter alia*, regarding disciplinary proceedings that it should give the accused teacher adequate time for the preparation and presentation of his/her defence and the opportunity of being heard in person. The proceedings referred to above demonstrates satisfactorily, in my view, that the 1st respondent duly complied with the above regulation. The 1st respondent's disciplinary committee in its quasi judicial capacity was not expected to conduct its proceedings as a court. That is infact the Letter and the spirit of regulation 66 (4) (b) (e) and (d) which govern disciplinary proceedings of the 1st respondent's tribunal. The regulation reads as follows:-

"66 (4) (b):

The Commission shall

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

(c) 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;

(d) consider only those allegations that the teacher has been informed and charged with."

The language of regulation 66(4) (b) suggests that the 1st respondent, in considering disciplinary cases before it, need not give a detailed account of all that transpires before it. It is also not bound by the strict rules of procedure and evidence and may act on general statements.
In view of the proceedings exhibited by the 1st respondent, the 1st respondent cannot in my view be faulted. It strictly complied with its own regulations which are themselves in consonance with the principles set out in the **De Souza** case (Supra). In the premises, I have come to the conclusion that the 1st respondent did not infringe upon the petitioner's right to a fair hearing as alleged or at all.

With regard to the 2nd respondent, the petitioner alleged the following:-

1). That he handed his appeal to the 2nd respondent through its Secretary on 21st December,2001;

2). That the 2nd respondent did not set down the appeal for hearing or advice the petitioner of its status;

3). That by letters dated 17th September, 2004 and 18th March, 2005, the 2nd respondent informed the petitioner that he did not qualify for an appeal;

4). That the 2nd respondent therefore denied the petitioner his right to be heard on appeal;

5). That the 2nd respondent offended the rules of natural justice.

The provisions relating to appeals against a decision of the Teachers Service Commission's Disciplinary Committee are regulations 66 (7) and 67. The relevant provision relating the petitioner's case is regulation 66 (7) (a) which reads as follows:-

"7 Appeals against a decision of the Commission –

(a) When a teacher whose case has been determined by the TSC disciplinary committee and a decision is not dismissal and removal from the Teachers Register is dissatisfied with the decision, he/she can appeal to the TSC or to the Union. Such appeals shall be made within 90 days from the date of the determination of the discipline case.

(b) Teachers Service Appeal Tribunal –

In accordance with Section 10 of the Act where the Commission has determined not to register a teacher or that the name of the teacher be removed from the register:-

(i) A teacher aggrieved by the Commission's refusal to register or to remove him/her from the register may within twenty eight days of that notice appeal to the Teacher's Service Appeals Tribunal established under Section II of the Act. A copy of such notice of appeal must be served to the Commission.

(ii) **The notice to remove a registered teacher from the register shall not take effect until the expiry of twenty-eight days after the service of the notice or in the event of an appeal to the Teachers Service Appeals Tribunal until that appeal has been withdrawn or dismissed.**

(iii) **Where the Teachers Service Appeals Tribunal in accordance with Section 11 (1) of the Act determines that the teacher is not guilty of such conduct in respect of the matters which the allegations relates, the decision of the Teachers Service Appeals Tribunal shall be final."**

It is plain from the provisions cited above that a right to appeal to the Teachers Service Appeals Tribunal from the 1st respondent's Disciplinary Committee's decision arises only when the latter has determined that a registered teacher be removed from the register. Removal of a teacher from the register is not the same as simple dismissal. The position is clear from the provisions of regulation 66 (6) which reads as follows:-

"(66) Determination by the Commission-

As a result of proceedings referred to in regulation 66 (4) above, the Commission may in accordance with the Act section 5, determine:-

(a) That a teacher is not guilty of the allegation made against him/her and have his /her interdiction revoked.

(b) That the name of the teacher notwithstanding that he/she is guilty of the allegations made against him/her, be not removed from the register but he/she either be:-

(i) Warned; or

(ii) Suspended without pay for a period of not less than one month and not exceeding six months;

(iii) Dismissal from his/her employment; or

(iv) Retired in the public interest.

(c) That the teacher is guilty of the allegations made against him/her and be dismissed and his /her name be removed from the register and a notice of such determination be served on the teacher."

So, under the above provisions, a distinction is made between mere dismissal and dismissal and removal from the register. The petitioner has exhibited the 1st respondent's letter dated 21st November 2001 (annexture **"CS 5**") by which he was informed of the decision of the 1st respondent's disciplinary committee. The 1st respondent decided that the petitioner be dismissed from the teaching service with effect from the date of the said letter. The petitioner was not removed from the register. An appeal under regulation 66 (7) of the 1st respondent's code of Regulations for teachers did not therefore lie. The 2nd respondent, quite properly in my view, duly informed the petitioner of the position. It did so in its letters dated 17th September, 2004 and 18th March 2005 exhibited as **"CS 9 (a) (b)"** by the petitioner.

In the premises, the 2nd respondent cannot be said to have denied the Petitioner an opportunity to appeal or failed to accord the petitioner a hearing. The petitioner's intended appeal was incompetent as the 2nd respondent lacked jurisdiction to entertain it. I do not accept the petitioner's argument that his appeal should first have been accepted and a determination as to its competency subsequently made by the 2nd respondent. In my view a nullity remains a nullity. It does not depend on when, where and by whom it is pronounced. In the matter at hand, the 2nd respondent at the very first opportunity determined that it had no jurisdiction to entertain the petitioner's intended appeal. There would have been no point in considering the matter any further.

Even if the petitioner had had a competent appeal, the material availed before the court did not demonstrate that he was denied the right to be heard on the same. I say so, because in its letter dated 17th September, 2004, the 1st respondent notified the petitioner that if he had a competent appeal, it would be registered subject to production of certain documents and payment of a fee. The petitioner did not allege that he complied with the instructions in the said letter. It is plain therefore that notwithstanding the incompetence of his appeal, the 2nd respondent accorded the petitioner the opportunity to lodge his appeal but there is no affidavit evidence that he availed himself of that opportunity.

Therefore, in my judgment, the petitioner's allegations against the 2nd respondent have no legal and /or Constitutional basis.

The petitioner further alleged that he had been denied his salary and benefits contrary to section 10 (2) of the Teachers Service Commission Act (Cap 212 Laws of Kenya) and therefore had been deprived of his right to earn a livelihood. He also alleged that he had been discriminated against and had been subjected to inhuman and degrading treatment. Having found that the allegations lavelled against the respondents of breach of fair trial hearing rights had not been satisfactorily demonstrated, it cannot be said that the petitioner was unlawfully deprived of his right to earn a livelihood or that he was discriminated against or subjected to inhuman and degrading treatment.

In the end, on the law and on the facts, I find and hold that the petitioner is not entitled to any of the declarations and other reliefs sought in his petition. This petition is dismissed.

With regard to costs, I think the appropriate order to make is that each party should bear its own costs. In coming to that conclusion, I have considered, among other things that the petitioner lost his employment with the 1st respondent after serving as a teacher for over ten (10) years which service seems to have been uninterrupted until his dismissal. Considering that service, I order that each party bears its own costs of the petition.

It is so ordered.

DATED AND DELIVERED AT ELDORET THIS 15TH DAY OF MARCH 2011.

F. AZANGALALA

JUDGE

Read in the presence of :

1). Mr. Ngeno for the Petitioner

2). Mr. Muiruri for the 2nd Respondent and holding brief for Situma for the 1st Respondent.

F. AZANGALALA
JUDGE.