



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**JUDICIAL REVIEW NO. 53 OF 2010**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS AND  
IN THE MATTER OF AN APPLICATION FOR ORDERS OF MANDAMUS AND  
CERTIORARI**

**AND**

**IN THE MATTER OF REPUBLIC.....APPLICANT**

**VERSUS**

**THE TEACHERS SERVICE COMMISSION.....RESPONDENT**

**EXPARTE: PETER MUHURA**

**RULING**

The subject matter of this Ruling is the Motion dated 23<sup>rd</sup> November 2010, taken out by Peter Muhura, the Exparte Applicant herein, pursuant to *Order LIII rule 3(1)* of the Civil Procedure Rules (now Order 53 rule 3 of the Civil Procedure Rules). In the aforesaid Motion, the applicant sought for the following orders:

- (a) An order of MANDAMUS do issue to compel the respondent herein to pay the applicant herein all unpaid salaries, allowances and other benefits with further interest thereon at the court rate from the date of last payment until payment in full to the applicant herein.**
- (b) A order of CERTIORARI do issue to bring into this court and quash respondent's notice and or decision of applicant's interdiction dated 31.05.10 and respondent's notice and or decision of**

***applicant's dismissal from the teaching service dated 13.08.10.***

***(c) That the costs of this application be provided for.***

The Motion is accompanied by statement of facts and the verifying affidavit sworn by the Applicant. When served with the Motion, Teachers Service Commission, the Respondent herein, filed the replying affidavit of Simon Musyimi Kavisi to oppose the same.

I have considered the grounds set out on the face of the Motion and the facts deponed in the verifying affidavit plus the facts set out on the statement of facts. I have further considered the facts deponed in the replying affidavit and the rival oral submissions presented by learned counsels. The history behind the Motion appear to be short and straightforward. Peter Muhura, was employed by the Teachers Service Commission, the Respondent herein, on 7<sup>th</sup> May 1987 as a teacher on permanent and pensionable terms. It is said that the Respondent through the Provincial Director of Education, Central Province transferred the Applicant from Dr. Kiano Boys Secondary School to Gikondi Secondary School on 2<sup>nd</sup> May 2000. The Applicant was released to his new station by his previous principal on 22<sup>nd</sup> May 2000. It is said that on 27<sup>th</sup> May 2000 the Applicant fell off from his bicycle while on his way riding to Dr. Kiano boys Secondary School. He got injured hence he was admitted to various hospitals before being taken to Mathari Hospital for mental treatment for nine years. It is said he was certified mentally fit to resume his duties on 2<sup>nd</sup> February 2010. The Applicant has also alleged that he previously suffered schizophrenic disorder on 22<sup>nd</sup> September 1999. He was, however, treated at Mathari and later allowed to continue with his teaching career. The Applicant contends that he was too sick to apply for sick leave from the Respondent between 27<sup>th</sup> May 2000 and 2<sup>nd</sup> February 2010. The Applicant reported to the respondent's offices at Nairobi on 5<sup>th</sup> February 2010 for posting whereupon he was advised to explain his whereabouts under regulation 54(5) (c) of the Teachers Service Commission Code of Regulations. The Applicant said he wrote the letter dated 11<sup>th</sup> February 2010 in which he explained himself to his employer. The Applicant wrote to the applicant on 25<sup>th</sup> March 2010 summoning him to appear before its disciplinary committee on 14<sup>th</sup> April 2010. On the aforesaid date, the Applicant appeared before the Respondent's disciplinary committee armed with his medical reports. The Applicant was heard and told to go home to await for the Respondent's decision on his case. On 31<sup>st</sup> May 2010, the Applicant was served with a letter of interdiction with a requirement that the Applicant files a written submission which he did vide the letter dated 15<sup>th</sup> June 2010. Upon receipt of the Applicant's written submissions the Respondent invited the Applicant for the hearing of his disciplinary case on 13<sup>th</sup> August 2010. The Applicant avers that on that date, he appeared before the Respondent's disciplinary committee. He claims he was dismissed without being given a chance to produce his documents in support of his case. The Applicant now contends that both his interdiction and dismissal from the teaching service was unlawful, illegal, null and void due to the following reasons:

- (i) That he was not given a right of hearing on 13<sup>th</sup> August 2010.
- (ii) That he was made to answer charges on 13<sup>th</sup> August 2010 which had already been heard and determined on 14<sup>th</sup> April 2010 hence he was subjected to double jeopardy.
- (iii) That his salary from 2001 upto date was stopped before he was interdicted hence it is illegal. That the decision to interdict and sack him was unreasonable in view of the uncontroverted medical evidence.
- (iv) That the Applicant's interdiction is contrary to regulation 66 (3) of the Teachers Service Commission Code of Regulation.

(v) That the respondent has refused to perform a public duty by paying the Applicant salary and other benefits in view of explanation given.

I have already stated that the Respondent opposed the Motion by filing the replying affidavit of Simon Musyimi Kavisi, its director in charge of Administration. Mr. Kavisi, averred that the Applicant was transferred from Dr. Kiano Secondary School on 2<sup>nd</sup> May 2000 and was released by his principal on 22<sup>nd</sup> May 2000. It is said the Applicant did not report to Gikondi Secondary School on the basis that he did not know the location of Gikondi Secondary School. The Respondent alleged that the Applicant continued to draw salary from May 2000 until May 2001 despite having failed to report to his new school. The respondent averred that the applicant's whereabouts was unknown until February 2010 when the Applicant wrote the letter dated 11<sup>th</sup> February 2010. The Respondent averred that the Applicant had failed to inform his employer of his medical condition for more than 10 years. It is said he failed to apply for sick leave under regulation 54 of the Code of Regulation for teachers. The Respondent further stated that the Applicant was given a chance to explain himself out and in the end he was interdicted for breaching regulation 66 (2) (e) of the Code of regulation of teachers. It is said the Applicant was afforded an opportunity to organize his defence upon his interdiction and that he took that opportunity by giving a written statement of defence which was duly considered by the Respondent. That the Applicant was summoned before the respondent's disciplinary Committee on 13<sup>th</sup> August 2010 where he was interrogated and was recommended for dismissal. It is the Respondent's view that it acted within the law and in compliance with the rules of natural justice before taking the action it took against the Applicant.

Having considered the case of each side and the oral submissions of learned counsels, I form the following view of the dispute before me. In my view, the Applicant has raised three main grounds to support the Motion namely:

(i) That the Applicant was interdicted, dismissed without being heard.

(ii) That the Applicant was interdicted and his salary stopped without following the laid down regulations.

(iii) The decision to interdict and dismiss the Applicant was unreasonable in view of the Applicant's medical evidence.

Let me now deal with those grounds in their order. On the first and second grounds, it has been argued that the Applicant was interdicted and subsequently dismissed without being heard and without following the laid down regulations. The Respondent is of the view that the Applicant was heard before he was interdicted and dismissed. The affidavit evidence tendered by both sides agree in several respects. First, is that the Applicant was transferred from Dr. Kiano Secondary School in the year 2000. Secondly, that the Applicant did not report to that school. Thirdly, that the Applicant did not inform the Respondent of his predicament until the month of February 2010 when he visited the Respondent's offices. Fourthly, that the applicant was requested by the Respondent to explain the circumstances which made him to miss duty for nearly ten years. The Applicant gave detailed explanation in his letter dated 11<sup>th</sup> February 2010. The Respondent duly acknowledged receipt of the aforesaid letter by stamping on top of it and by its letter dated 25<sup>th</sup> March 2010. In the aforesaid letter, the Respondent requested the Applicant to visit the Respondent's office on 14<sup>th</sup> April 2010. He was requested to carry with him the medical documents. It would appear that after hearing the Applicant on 14<sup>th</sup> April 2010, the Respondent decided to interdict the Applicant vide the letter dated 31<sup>st</sup> May 2010. In the aforesaid letter, the Applicant was given 21 days to write a statement of defence. The Applicant responded to the letter of interdiction by his letter dated 15<sup>th</sup> June 2010. The Applicant confirmed that he appeared in person before H. J. Lukhawa and three other

commissioners whereupon he produced all the medical documents showing he was mentally ill. By a letter dated 5<sup>th</sup> July 2010, the Applicant was again summoned to appear before the Respondent's disciplinary committee on 13<sup>th</sup> August 2010. The Applicant was heard and in the end the Respondent decided to dismiss the Applicant on the basis he breached Section 7 (3) of the Teachers Service Commission act and Regulation 66 (2) (e) of the Code of Regulations for teachers. The charge the applicant faced is that he failed to report to Gikondi Secondary School upon his release from Dr. Kiano Secondary School. In short he was found guilty of deserting duty. Can it be said in the circumstances of this case that the Respondent breached the rules of natural justice? With respect, I do not think so. It is quite obvious that the Applicant was heard before he was interdicted. In fact he was heard in person and his written statement was considered. After interdiction, the Applicant was also called to submit a written defence fore appearing before the Respondent's disciplinary committee. He also appeared personally to present his case before the disciplinary body. In the end, I am convinced the Respondent followed the laid down law and regulations by hearing the Applicant before interdicting and subsequently dismissing him.

In the third ground, it is argued that the decision to dismiss the Applicant was unreasonable in that the Respondent acknowledged the genuiness of the medical documents produced by the Applicant to justify his absence from duty. It is also alleged that the Respondent arrived at an erroneous decision when it concluded that the teacher accepted the charge. A decision is said to be irrational or unreasonable if it is lacking ostensible logic or justification. The Respondent had called upon the Applicant in its letter of interdiction dated 31<sup>st</sup> May 2010 to answer to the allegations leveled against him i.e. that he breached the Teachers Service Commission Act and Regulation 66(2) (e) of the Code of Regulations for teachers in that he failed to report to Gikondi Secondary School from Dr. Kiano Secondary School hence deserting duty. The Applicant presented a written Memorandum and appeared in person to explain himself. The Respondent acknowledged receiving the Applicant's defence. It appreciated the fact that the Applicant was mentally sick and hence he was away from duty for 10 years. The affidavit evidence shows that the Respondent had asked the Applicant to explain why he did not apply for sick leave. The Applicant admitted that he did not apply for sick leave but gave no reasons why he failed to do so. It is noted that he did not communicate with his employer since the year 2000. Can it be said that the decision by the Respondent is irrational and unreasonable? In my view, I do not think the Respondent acted unreasonably nor irrationally. First, the Applicant was given a chance to explain himself. He admitted to the accusation that he deserted duty because he was mentally ill. The Respondent requested him to explain the reasons why he did not apply for sick leave, a right which he was entitled to. The Applicant failed to offer any reasons. The Respondent, like any prudent employer, would not just reinstate an employee who had not communicated with it for more than 10 years. The Applicant gave no reasons why he did not apply for sick leave. The Respondent is vested with the powers to terminate the services of any teacher under its employment if such an employee contravenes the terms and conditions of his contract of employment.

In the end I see no merit in the Motion. It is dismissed with costs to the Respondent.

***Dated and delivered at Nyeri this 3<sup>rd</sup> day of June 2011.***

**J. K. SERGON**

**JUDGE**

In open court in the presence of Mr. Chweya holding brief Kang'ata for the Applicant and no appearance for Nduna for the Respondents.