REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT ELDORET

Misc Civ Appil 20 of 2005

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT, CHAPTER 26 LAWS OF KENYA

AND

IN THE MATTER OF THE TEACHERS SERVICE COMMISSION ACT, CHAPTER 212 LAWS OF KENYA

AND

IN THE MATTER OF PROCEEDINGS BEFORE THE TEACHERS SERVICE COMMISSION

BETWEEN

REPUBLIC ……………………………………………………………………………. APPLICANT.

SOLOMON MMULA BURUDI ……………..................……………………………… EX-PARTE

AND

THE TEACHERS SERVICE COMMISSION ………..….. RESPONDENT

R U L I N G

Solomon Mmula Burudi was employed by the Teachers Service Commission ('TSC') as a Graduate Teacher in 1990. He was later promoted to the position of a Senior Graduate Teacher, at which time he was serving at St. Anne's School (which I shall hereinafter refer to as "the school").

During his stay at the school, one of the parents lodged a complaint against 'a teacher' of the school and alleged that the teacher was engaging in sexual activities with two of his students. Burudi was made to answer to the charges and asked to appear before the School's Board of Governors ('the BOG') on several occasions, after which the BOG ordered his interdiction. The matter was then forwarded to the TSC for action. He was summoned to appear before it on 18/11/2004, which he did, after which, he was dismissed from service on the same day. His letter of dismissal informed him that:

"*I am directed by the Teachers Service Commission to say that the Commission has carefully considered your case and has determined you should be dismissed from the teaching service with effect from the date of this letter for the following reasons: You breached the TSC Act Cap 212 Section 7 (3b) of the Laws of Kenya and Regulation 70 (2a) of the Code of Regulations for Teachers in that on Saturday 29th May 2004 while you were with your students at Kapsokwony Secondary School participating in Schools*

Provincial Athletic Championships, you took one "ABC "to a lodging at Kapsokwony and had carnal knowledge of her for two hours."

His appeal to the Appeals Tribunal was dismissed, in what he claims was a summary manner and hence illegal.

Burudi who feels aggrieved by his dismissal from service and the subsequent dismissal of his appeal has now moved this court and he seeks an order of certiorari to quash the decision of TSC. He alternatively seeks an order of mandamus to compel it to constitute the TSC Appeals Tribunal, to hear and determine his appeal on its merits.

He is of the view that TSC, which investigated, considered and determined the complaint against him violated the rules of natural justice; that the notice given to appear before it was too short and that he was not afforded an opportunity to prepare for the case or to call his witnesses, and to present his defence adequately. He is also of the view that one Kilavula who sat as the then Chairman of the TSC was biased against him. All in all it is his contention that the case against him was not proved at all.

According to Mr. Machio who appeared for Burudi (hereinafter referred to as 'the applicant') the decision to dismiss, which they challenge, was based on section 7 (3b) of TSC Act, Chapter 212 of the Laws of Kenya ('the Act') yet the said section does not create such an offence or any offence at all for that matter. He urged the court to find that the charge was fatally defective, which meant that the TSC went outside its ambit when it reached the verdict of dismissal, which decision he now urges this court to declare illegal.

He also took issue with the letter by virtue of which the applicant was invited to appear before the TSC on 11/8/2004 and it was his submission that it was dated 11/8/2004, which short notice denied the applicant time to prepare for the hearing, thereby losing the element of fairness for want of sufficient time to prepare, and further that the said Kilavula who presided over the hearing before the TSC was a brother in law of the head teacher of the school, whose BOG had initially interdicted the applicant and in his view, a Commissioner with the T.S. C. such as Kilavula, ought not to have taken part in proceedings concerning the applicant and the said head teacher whom he was related to. It was also his submission that the appeal was never placed before the T.S.C. Appeals Tribunal for its consideration, and that though the applicant was entitled to a fair hearing, he was not given a hearing at all, and it appeared that his appeal was dismissed summarily, contrary to Section 10 of the Act.

Miss Mwaniki who appeared for the respondent chose to oppose the application on three angles, namely the issues of notice, bias, and the contractual relationship between the parties hereto. She urged the court to find that the relevant notice had been issued and hence his appearance before the Commission on 18/11/2005, which meant that he already had due notice and was well aware of what was required of him, in which case he should have been adequately prepared for the matter which faced him.

I have also perused the pleadings on record and I am convinced that though the letter by TSC was dated 18/11/2004, it had actually been dispatched on 18/10/2004 as evidenced by TSC'c dispatch register, and that in my humble opinion would explain his attendance on 18/11/2004. I am also convinced that a period of a month was more than adequate for him to prepare his case a fact, which was evidenced by the exhaustive cross-examination that he conducted during the hearing, after which he conceded that he had left the school on the material date without the authority of the head teacher. The panel then found him guilty as he had not been able to exonerate himself of the charges. I form the opinion that not only was he aware of the charges that faced him, but that he had ample time to prepare and should have called all his witnesses.

The other issues that arise are whether the termination of his services was well founded and whether he deserves the order which he seeks, in other words, whether the parties can be forced to move the hands of the clock back to May 2004.

Miss Mwaniki relied on the applicant's letter of appointment in support of her contention that it was

the basis of the contractual relationship between him and TSC, and that it had a right to dismiss him from service, While on the issue of bias, she urged the court to find that though it was the applicants contention that Kilavula was biased against him, his allegation was not supported by any material evidence, and even then, there was no evidence to show how such relationship if any, would have influenced the decision of the Commission. Paragraph 4 of the said letter of appointment provides that "*after the completion of any period of probation, this agreement may be terminated by either party giving to the other party three months' notice in writing or by paying to the other party an amount equal to one months' salary in lieu of notice*".

Section 7 (3) (b) of the Act which was referred to in the aforementioned letter of dismissal stipulates that:

"The Commission shall refuse to register a person as a teacher if-

(b) It is satisfied that he is an unsuitable persons to be a teacher on the grounds that he is not of good moral character, or has been convicted of a criminal offence which, in the opinion of the Commission, renders him unfit to be a teacher, or is guilty of infamous conduct in any professional respect, or has been engaged in any activities which, in the opinion of the Commission, are prejudicial to peace, good order or good government in Kenya."

It is on record that the parent who had initiated the whole issue retracted the contents of his letter before the applicant was dismissed from service. It is also on record that the student who was the alleged victim denied having had sexual intercourse with the applicant, and further that the head teacher had requested TSC to transfer the applicant and his wife from the school, on the basis of the ground that he had acquired property within the vicinity of the school, which in her opinion had 'interfered with his career'. Indeed her desire to have them moved out of the school would appear to have been so intense and well calculated that she opted not to have any replacements.

In my humble opinion, it would appear that it was actually the said head teacher who was behind all the maneuvers to have the applicant and his wife moved from the school at all costs, and it can therefore be safely assumed that the complaint emanated from and was actually actuated by the head teacher and not the victim, the said parent or even the officials of the school which had hosted the sports events. Indeed this position is well supported by the fact that the victim had indicated that she had been coerced to record the complaint against him by her teachers and furthermore, at the time when he retracted his complaint, the parent made it very clear that he had been '*conned and bribed by the head teacher'* to lodge the complaint, and also that he did "*not want to be involved in matters which were beyond my (his) comprehension*." The fact that the said Kilavula who sat and deliberated on the applicants matter on 18/11/2004 was the head teacher's brother in law was not controverted by the respondent. There cannot be any doubt that he was aware of the wishes of his sister in law, and it can therefore be safely assumed that he was well aware of her desire to have the applicant and his wife removed from the school.

It is trite that "*wherever any person or body of person has authority conferred by legislation to make decisions …………………, it is amenable to the remedy of an order to quash its decision either for error of law in reaching it or for failure to act fairly towards the person who will be adversely affected by the decision by failing to observe either one or other of the two fundamental rights accorded to him by the rules of natural justice or fairness, viz. to have afforded him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it, and to the absence of personal bias against him on the part of the person by whom the decision falls to be made"* (underlining mine) (**Al-Mehdawi and Secretary of State for the Home Department [1989] WLR 1294, 1298** as per Lord Diplock in **O"Reilly v. Mackman [1983] 2 A.C. 237, 279.**

It is also trite that "*an adjudicator must not have any direct financial or proprietary interest in the outcome of the proceedings. Secondly, he must not be reasonably be suspected, or show a real likelihood of bias." (***De Smith's Constitutional and Administrative Law 5th Edn by Street and Brazier, page 583-586).**

In my view Kilavula should have declared his interest and should not have sat in that particular committee or even dealt with any matter pertaining to the applicant, and on that ground alone I would be inclined to find that the applicant has established a cause against the respondents.

Needless to say, the aforementioned legal provision which TSC relied on in its decision to dismiss the applicant does not support its action at all, simply because he was already registered as a teacher and was not therefore seeking registration as a teacher at that moment.

Be that as it may, the relationship between the applicant and the TSC was governed by the aforementioned letter of employment, but in my view, the terms and conditions of the relationship were expressly spelt out and it is clear that they should have been adhered to strictly and that termination of services could only be undertaken in a specified and well laid manner, by either party giving the other three months notice, or payment of salary in lieu, which was not the case here. I have looked at the letter of dismissal and I as stated hereinabove, the provisions of the Act which TSC sought to rely on did not provide for the action which it took. I would in the circumstances find that his termination which appears to have been hurriedly done, for reasons which are now apparent, was not only improper but that it was illegal and it cannot lie.

It is worthy to note that a party who feels aggrieved in the manner similar to this applicant to a decision or subordinate legislation would find solace in the knowledge that "*it may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious, they may say '**why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start**'. Those who take this view do not, I think do themselves justice. As everybody who has anything to do with the law well knows, the path of law is strewn with examples of open and shut cases which, somehow, were not, of unanswerable charges, which, in the even, were completely answered, of inexplicable conduct which was fully explained; of fixed and unalterable determinations that by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the cause of events*." **(**as per Megarry J. in **John v. Rees (1970) Ch 345, 402).**

I am also well alive to the legal position that "e*ven if a case falls in one of the categories where judicial review will lie the court is not bound to grant it; the jurisdiction to make any of the various orders available in judicial review proceedings is discretionary. What order or orders the court will make depends upon the circumstances of the particular case*." **Supreme Court Practice Rules paragraph 53/1-14/14.**

The remedies which are referred to above as enumerated in De Smith Woot and Jowell 5th Edn – Sweet & Maxwell – Judicial Review of Administrative Action p. 25 are:

1. A decision or subordinate legislation may be quashed.

2. The matter may be remitted to the decision-maker for consideration.

3. The court may make a declaration as to the rights of the applicant on the invalidity of the administrative action or legislation.

4. The court may order the respondent public body to do or refrain from doing any action.

5. In limited circumstances an applicant may be entitled to damages or restitution. There is however no right to damages for unlawful action per se breach of some recognized tort must be established.

Having evaluated the pleadings before me and having also taken the submissions of both counsel into account I am of the opinion it would be in order for me to grant the applicant an order in line with his first prayer, which I hereby do.

The applicants shall also have the costs of this application.

Dated and delivered at Eldoret this 29th day of June 2006.

JEANNE GACHECHE

JUDGE

Delivered in the presence of: Mr. Koko holding brief for Mr. Machio for the applicant, Mr. Omwenga holding brief for Mrs. Mwaniki for the respondent