



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT MALINDI**

**CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION**

**PETITION NO E002 OF 2021**

**IN THE MATTER OF CHAPTER FOUR AND FIVE OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF ARTICLE 50 OF THE CONSTITUTION,**

**SECTION 146(6) OF THE TEACHERS SERVICE COMMISSION ACT**

**AND**

**IN THE MATTER OF THE TEACHERS SERVICE COMMISSION**

**AND**

**IN THE MATTER OF THE DISCIPLINE CASE BY THE TEACHERS SERVICE COMMISSION**

**BETWEEN**

**BARAWA RIZIKI SANGA.....PETITIONER**

**VERSUS**

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

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The Petitioner, a resident of Kilifi County, was employed by the 1<sup>st</sup> Respondent as a teacher until 25<sup>th</sup> June 2019 when he was relieved of his duties. By this Petition, the Petitioner seeks to challenge the lawfulness of the decision by the 1<sup>st</sup> Respondent to terminate the Petitioner's services aforesaid.
2. Although the Petitioner has joined the Attorney General in the action, it remains unclear why this decision was taken. As is clear from the Petition, no specific orders are sought against the Attorney General.
3. Further, it is asserted in the Petition that the Attorney General has been sued on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents. Yet, the pleadings disclose only two Respondents with the Attorney General being the 2<sup>nd</sup> Respondent.
4. The foregoing notwithstanding, the two Respondents entered appearance in the cause and filed their responses. In addition, the 2<sup>nd</sup> Respondent has filed a Notice of Preliminary Objection to the Petition.
5. Before venturing into the merits of the Petition, it is perhaps appropriate that I address the preliminary objection first. Indeed, it was the parties' desire that the preliminary objection be addressed concurrently with the main decision on the Petition.

6. The 2<sup>nd</sup> Respondent submits that as presented, the Petition does not disclose a cause of action against it. Indeed, and as mentioned earlier, a reading of the Petition does not indicate why the cause was instituted against the 2<sup>nd</sup> Respondent. And neither is it alleged that the 2<sup>nd</sup> Respondent had infringed any right of the Petitioner.

7. It can only be speculated that when instituting the cause, the Petitioner was perhaps influenced by section 12 of the Government Proceedings Act (GLA) which requires that proceedings by or against government be commenced by or against the Attorney General. However, article 253 of the Constitution recognizes Constitutional Commissions and Independent Offices under the 2010 Constitution of Kenya as independent and with corporate personalities of their own. They have the capacity to sue and be sued in their corporate names. As a consequence, one does not need to commence proceedings against these agencies in the name of the Attorney General in terms of section 12 of the GLA.

8. Therefore, I agree with the objection taken by the 2<sup>nd</sup> Respondent that it has been wrongly sued in the matter. Similarly, I agree with the 2<sup>nd</sup> Respondent that as framed, the Petition does not disclose a cause of action against it. Accordingly, the preliminary objection is upheld and the suit against the 2<sup>nd</sup> Respondent is struck out with costs to the 2<sup>nd</sup> Respondent.

9. Having disposed of the preliminary point of law above, it is now appropriate that I determine the dispute between the Petitioner and the 1<sup>st</sup> Respondent. I will begin this task by briefly setting out the Petitioner's case against the 1<sup>st</sup> Respondent and the 1<sup>st</sup> Respondent's answer to it.

10. From the Petition, the Petitioner avers that he was hired as a teacher on 2<sup>nd</sup> January 2007. He has served as such both under the 1<sup>st</sup> Respondent's predecessor and thereafter the 1<sup>st</sup> Respondent. His last station of work was Maojo Primary School in Ganze Sub-County.

11. The Petitioner avers that sometime in November 2018, the 1<sup>st</sup> Respondent accused the Petitioner of sexually molesting a school girl (name withheld). That as a result of the accusation, the 1<sup>st</sup> Respondent interdicted the Petitioner and took him through a disciplinary process before terminating the Petitioner's employment.

12. The Petitioner has challenged the fairness of the disciplinary process that resulted in his termination. In effect, he argues that: the disciplinary sessions were undertaken without him getting prior notice of the case against him; the sessions were choreographed to attain a predetermined outcome; the Petitioner was denied prior access to the evidence tendered against him during the sessions; and that the sessions were conducted in violation of article 50 of the Constitution guaranteeing one the right to fair hearing.

13. Consequently, the Petitioner prays for a number of reliefs. These include: -

***a) A declaration that the Petitioner's constitutional right to a fair hearing was violated by the 1<sup>st</sup> Respondent.***

***b) A declaration that the 1<sup>st</sup> Respondent's decision to dismiss the Petitioner from employment and subsequent removal from the Register of Teachers is null and void.***

***c) An order reinstating the Petitioner into employment with the 1<sup>st</sup> Respondent.***

***d) An order that the Petitioner be paid all unpaid salary and benefits from the date of termination till the date the Petitioner will be reinstated.***

***e) Costs of the Petition.***

14. The 1<sup>st</sup> Respondent filed a response to the Petition. The net import of the said response is that the Petitioner engaged in acts of sexual molestation of a school girl who had been under his care contrary to the code of conduct governing the Petitioner's employment. That upon discovery of this unethical conduct on the part of the Petitioner, the 1<sup>st</sup> Respondent took disciplinary action against the Petitioner which resulted in the decision to terminate the Petitioner's services. That in reaching this decision, the 1<sup>st</sup> Respondent observed all the stipulations of fair hearing and allowed the Petitioner an opportunity to prepare his defense and ventilate his case. That in undertaking the process, the 1<sup>st</sup> Respondent was discharging its constitutional and statutory mandate to exercise disciplinary control over teachers.

15. At this preliminary stage, it is perhaps important to reiterate the generally agreed view that courts of law should be reluctant to interfere with the exercise of the employer's managerial prerogative over the workplace unless it is evident that the employer has exercised this power in violation of the law and or some internal regulations between the parties and or rights of the affected employee to the prejudice of such employee. This view has now found wide acceptance through a number of judicial pronouncements. For instance, in ***Geoffrey Mworira v Water Resources Management Authority [2015] eKLR*** the court observed as follows: -

***"The court will very sparingly interfere in the employer's entitlement to perform any of the human resources functions such as recruitment, appointment, promotion, transfer, disciplinary control. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provisions of the Constitution or legislation; or in breach of the agreement between parties; or in a manner that is manifestly unfair in the circumstances of the case; or internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through employer's internal process."***

16. I have considered the rival evidence and submissions by the parties. From the Petition, the Petitioner does not appear to expressly deny that he may have had improper contact with the student in question. What he appears to say is that the 1<sup>st</sup> Respondent did not afford him a

*fair chance to fight off the accusations against him. Whether he wanted the court to take this to mean that he disputes the accusations of improper sexual contact with the student is not immediately clear.*

17. *I am however alive to the requirement that in order for an employer to take the decision to terminate an employee, he must not only have justifiable grounds to do so but must also afford the affected employee an opportunity to respond to the accusations leveled against him. It is with this in mind that I will consider whether the 1<sup>st</sup> Respondent had a justifiable ground for terminating the Petitioner.*

18. Although the Petitioner does not say much in the Petition whether the ground for termination was valid, the 1<sup>st</sup> Respondent has taken some time through its replying affidavit and submissions to elaborate on this aspect. From the submissions filed by the Petitioner, it appears that he holds the view that addressing the validity of the justification to terminate was not necessary as the Petition was not concerned with the reasons for the 1<sup>st</sup> Respondent's decision but with whether the rights of the Petitioner to fair trial were violated. This is a view that I do not agree with. In my view, whether or not the right to fair labour practice has been infringed by an employer's decision to terminate can only be determined by reference to two core issues: substantive fairness; and procedural fairness.

19. In the affidavit filed in response to the Petition, the 1<sup>st</sup> Respondent indicates that in November 2018, it received a report from its Kilifi County Director that the Petitioner had been implicated in the offence of having engaged in improper sexual contact with a minor who at the time was in a different school but had initially been in the school run by the Petitioner. This report triggered investigations in the matter which saw the Petitioner subsequently interdicted and terminated.

20. From the replying affidavit and the documents annexed to it, the 1<sup>st</sup> Respondent began the disciplinary process through an investigation. This was then followed by a disciplinary session.

21. I have studied the statement by the victim of the alleged sexual act. She narrates how her relationship with the Petitioner ended up in a sexual encounter on 22<sup>nd</sup> August 2018 at a Kilifi hotel.

22. On his part, the Petitioner although not admitting the sexual encounter, admits to meeting the minor in Kilifi town where the two shared a cup of tea. He also admits having shared text conversations with her and even having given her money to cover her travel expenses. The Petitioner avers that the only reason he met the girl was to assist her process her birth certificate as she had requested and that the short message texts by him to the minor were to encourage her in her school work.

23. The court takes judicial notice of the fact that the distance between Kilifi town and Ganze where the victim is said to reside is about 35 kilometers. Perhaps when the Petitioner mentioned in CMK 8 that the minor traveled a distance of between 70 and 80 kilometers to Kilifi, he was referring to the round trip of Ganze-Kilifi-Ganze.

24. It is curious that the Petitioner would involve the minor in these travels and pay for them without notifying the minor's relations whom he appeared to know. It is even more surprising that the Petitioner would offer to assist the minor to process her documentations for whatever reason without involving the minor's relations or seeking their approval. It is also curious that in order to lend a helping hand to the girl, the Petitioner had to have her travel from her rural home in Ganze to meet him in Kilifi some 35 or so kilometers away.

25. The 1<sup>st</sup> Respondent produced a record of the disciplinary proceedings it had conducted against the Petitioner on 29<sup>th</sup> March 2019 attached to the 1<sup>st</sup> Respondent's replying affidavit as annexure CMK8. This document contains a verbatim report of the proceedings. In the record, there is evidence that the victim's brother confiscated a phone from the victim which contained text messages between the Petitioner and the victim. One of the brothers was able to establish the Petitioner's identity after he sent cash to the Petitioner's telephone number which had been saved on the victim's phone simply as "MY LV1 and MY LV2".

26. There was also evidence retrieved from the victim's phone set of an mpsa transaction between the Petitioner and the victim. It was indicated that there was a message showing that the Petitioner had sent the victim Ksh. 700/=. Apart from asserting that the allegations against him were mere fabrications, all these evidence was not specifically rebutted by the Petitioner. The Petitioner only contended that the only texts he sent the minor were congratulatory and to encourage her in her academic pursuits.

27. On the basis of the facts presented before the disciplinary panel, I am persuaded that the 1<sup>st</sup> Respondent had reasonable ground to believe that there was an ongoing illicit sexual relation between the Petitioner and the victim in terms of section 43 (2) of the Employment Act. I therefore find that the 1<sup>st</sup> Respondent had a valid reason to terminate the Petitioner.

28. However, and as mentioned earlier in the judgment, the Petitioner's case is more focused on the alleged infringement of his constitutional right to fair trial during the disciplinary process. Indeed, the Petitioner contends that the 1<sup>st</sup> Respondent infringed his rights protected under article 50(2) of the Constitution as read with section 146 of the Teachers Service Commission Act.

29. I should perhaps mention that section 146 of the Teachers Service Commission Act does not exist in our statute books. Perhaps by reference to this section, the Petitioner intended to refer to the ***Teachers Service Commission Code of Regulations for Teachers, 2015 (TSCCRT, 2015)*** whose regulation 146 deals with investigation of disciplinary issues relating to members of the teaching profession in Kenya and who are employees of the 1<sup>st</sup> Respondent.

30. As indicated earlier, the thrust of the Petitioner's complaint relates to the following: -

***a) That the 1<sup>st</sup> Respondent did not accord the Petitioner the right to be presumed innocent until proven otherwise;***

- b) That the 1<sup>st</sup> Respondent failed to provide the Petitioner with sufficient details of the alleged transgressions to enable him respond to them appropriately;**
- c) That the 1<sup>st</sup> Respondent failed to give the Petitioner sufficient time to prepare his defense;**
- d) That the 1<sup>st</sup> Respondent did not afford the Petitioner a chance to appear in person before the investigation panel;**
- e) That the 1<sup>st</sup> Respondent denied the Petitioner the right to be present before the investigation panel when it was interviewing other witnesses in the matter;**
- f) That the 1<sup>st</sup> Respondent did not warn the Petitioner that incriminating information gathered from him during the investigations would be used against him during the disciplinary session;**
- g) That the 1<sup>st</sup> Respondent denied the Petitioner the opportunity to adduce and challenge adverse evidence;**
- h) That the 1<sup>st</sup> Respondent failed to provide the Petitioner with copies of the evidence the 1<sup>st</sup> Respondent was going to rely on to establish its case against the Petitioner.**

31. From the disciplinary record as furnished by the 1<sup>st</sup> Respondent the following can be established: -

- a) That the Petitioner's case was processed in two stages: the investigation stage; and the disciplinary hearing stage.**

At the investigation stage, the 1<sup>st</sup> Respondent commissioned three individuals, Godrick Masabo, Jackson Katana and Gabriel Safari Kaingu to gather preliminary information to ascertain the veracity of the allegations leveled against the Petitioner. This appears to have been in compliance with regulation 146 (2) (b) of the TSCCRT, 2015.

The Petitioner suggests, even though he has quoted the wrong provisions of statute and regulations, that regulation 146 (6) of the TSCCRT, 2015, was overlooked during the investigations. However, a perusal of the investigation panel's report marked CMK 4 (item 3.0) indicates that the panel: interrogated the Petitioner; interrogated other witnesses; and enabled cross examination between the Petitioner and the victim.

Although the Petitioner suggests in his submissions that there is no evidence that he attended the investigation stage in person and that therefore his right to appear in person before the panel was violated, this is contradicted by the Petitioner's own averments in the Petition. At paragraphs 6 to 8 of the Petition, the Petitioner avers that sometime in November 2018, he was summoned through telephone to appear before the office of the County TSC Director. That when he went to the said office pursuant to the telephone call aforesaid, he was confronted by a panel of investigators at the 1<sup>st</sup> Respondent's conference hall. That while at the conference hall, he learned for the first time that he was being accused of sexually violating the victim. That the victim was given a script which she read out before the Petitioner was asked to give his response in writing. These assertions in the Petition dislodge the Petitioner's assertion that he was not allowed to appear before the investigation panel in person.

In one of its findings, the investigations panel observes thus: ***"the teacher during cross examination could not challenge the girl with facts enough to exonerate himself from the allegations."*** This is further proof that the Petitioner appeared before the investigators in person.

The Petitioner does not provide specific challenges to these extracts from the investigators' report. In the premises, I am convinced that the Petitioner was given a chance to appear in person before the investigation panel and to cross examine at least the victim.

Further, the Petitioner asserts that he was denied time and particulars of accusations against him to enable him prepare a suitable response to the assertions against him. However, I note that the Petitioner filed a comprehensive statement with the investigation panel on 15<sup>th</sup> November 2018 (see annexure CMK 3). I also note that the defense advanced by the Petitioner in this statement to the investigators is substantially the same defense that he maintained during the disciplinary hearing. The question that begs an answer is which part of the Petitioner's defense is this that he could not present at the investigations stage due to the failure by the 1<sup>st</sup> Respondent to strictly adhere to regulation 146(6) of the TSCCRT, 2015 that he could not raise during the disciplinary session that took place later? Even if the Petitioner could not raise the defense at the investigation stage, what explains his failure to raise that detail of the defense later during the disciplinary session? I raise this matter to demonstrate that the Petitioner may be invoking regulation 146 (6) of the TSCCRT, 2015 to simply wriggle out of a bad situation. I see no prejudice that may have been caused to the Petitioner by the 1<sup>st</sup> Respondent's failure to strictly adhere to every detail of this regulation.

It must also be noted as was stated by Murithi J in ***David Kimolo Kingoo v Teachers Service Commission Machakos County Director & another [2017] eKLR*** that at the investigation stage only a preliminary inquiry is done. The accused employee still has a chance to confront the accuser at the disciplinary session should the matter escalate thus far. As was observed by Mbaru J, in ***Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 others [2014] eKLR*** I should only intervene in the process if it is clear to me that ***grave injustice might result or where justice might not by other means be attained if I do not overturn the proceedings. In this case, I think that whatever flaw that may have occurred at the investigatory stage was capable of being cured and was indeed cured at the disciplinary session as would be demonstrated later in this judgment.***

- b) Before the investigation panel made its recommendation, it gathered evidence from both parties to the dispute.**

After the allegations made against the Petitioner reached the 1<sup>st</sup> Respondent, the record shows that the 1<sup>st</sup> Respondent set out to ascertain the veracity of the assertions. It did this first by establishing a panel to gather preliminary evidence on the matter in order to establish whether the Petitioner had a case to answer.

Exhibit CMK 4, the investigators' report does show that before the panel made its recommendation, it collected evidence from both the victim and the Petitioner. It is only after doing this that the investigation panel was able to recommend for further disciplinary action against the Petitioner.

A substantially similar procedure was taken at the disciplinary stage before the final verdict was reached. What is more, the Petitioner did cross examine some witnesses particularly at the disciplinary stage of the case.

Therefore, there is nothing on record to support the assertion by the Petitioner that the panel overlooked the Petitioner's constitutional right to be presumed innocent until the contrary was established. To suggest this is to make nonsense of the evidence gathering process that was undertaken by the investigation and disciplinary panels.

*c) The Petitioner was supplied with sufficient material to prepare his response.*

Annexure CMK 3 is the Petitioner's statement to the investigation panel. It responds to the specific issues that were under inquiry before the investigation panel.

The Petitioner, while asserting that he was not given sufficient particulars of the accusations against him does not indicate which particulars may have been withheld as was gathered by him from his subsequent interaction with the process. In my view, the assertion that the Petitioner was not given sufficient particulars of the accusation against him is inconsistent with his detailed response to the accusation as appears from his statements to the investigation and disciplinary panels.

*d) Even if the investigation panel may not have strictly observed the requirements or regulation 146 (6) of the TSCCRT, 2015, these were observed at the disciplinary stage.*

Annexure CMK 5 is a letter by the 1<sup>st</sup> Respondent to the Petitioner dated 22<sup>nd</sup> November 2018. By this letter, the 1<sup>st</sup> Respondent: interdicted the Petitioner from duty; notified the Petitioner of the accusations against him in sufficient detail; notified the Petitioner of the fact that he will be subjected to a disciplinary process on account of the accusations leveled against him; invited the Petitioner to make his defense in writing in a period of 21 days; notified the Petitioner that he will be given an opportunity to be heard by the 1<sup>st</sup> Respondent in person; and advised the Petitioner to file any other evidence in support of his case including documents.

In compliance with the directions in the 1<sup>st</sup> Respondent's letter of 22<sup>nd</sup> November 2018, the Petitioner filed a defense dated 24<sup>th</sup> January 2019 as is discernible from annexure CMK 6 to the replying affidavit to the Petition. Although the Petitioner says he received the letter of 22<sup>nd</sup> November 2018 on 7<sup>th</sup> January 2019, he was able to prepare his defense by 24<sup>th</sup> January 2019, some fourteen (14) days later.

In the defense, the Petitioner describes the accusations against him as fabrications. He insinuates that they were intended to punish him because of his tribe and religious persuasion. But he gives not particulars of these assertions.

Annexure CMK 7 is a letter by the 1<sup>st</sup> Respondent to the Petitioner dated 27<sup>th</sup> February 2019. By this letter, the 1<sup>st</sup> Respondent: notified the Petitioner that the disciplinary case was to be heard on 29<sup>th</sup> March 2019; invited the Petitioner to attend the session at the County Director's office, Mombasa; and advised the Petitioner to avail any documents that may be useful in his defense.

The Petitioner states that this letter was delivered to him on 26<sup>th</sup> March 2019. This was about three (3) days to the disciplinary session. However, the court notes that the Petitioner had already filed his defense to the disciplinary case in response to a notice issued to him on 22<sup>nd</sup> November 2018. As indicated earlier, the 1<sup>st</sup> Respondent's letter to the Petitioner dated 22<sup>nd</sup> November 2018 had notified the Petitioner of the charge against him and asked him to prepare for and file his defense. This was more than four (4) months before the disciplinary session was convened on 29<sup>th</sup> March 2019. The letter of 27<sup>th</sup> February 2019 was merely to communicate the date of the session for which the Petitioner had been put on notice to prepare for as early as 22<sup>nd</sup> November 2018.

Annexure CMK 8 is a verbatim record of the disciplinary session on 29<sup>th</sup> March 2019. The document sets out: the charge against the Petitioner in sufficient detail; the Petitioner's main address to the disciplinary panel; the evidence of the witnesses including the victim of the sexual assault; the cross examination of the witnesses by the Petitioner; and the verdict by the disciplinary panel.

*e) The Petitioner was given an opportunity to seek a review of the decision by the disciplinary panel.*

This is evident from annexure CMK 9. By this letter dated 2<sup>nd</sup> October 2020, the 1<sup>st</sup> Respondent: confirms that a review session was held on 15<sup>th</sup> September 2020; a decision to uphold the disciplinary panel's decision was reached; and this decision was communicated to the Petitioner on 2<sup>nd</sup> October 2020.

32. Although the Petitioner has alleged violation of his constitutional rights in the manner the case was handled, the record before me does not support this allegation. For instance, the Petitioner says that he was denied the chance to cross-examine witnesses during the disciplinary session. Yet at pages 7, 13 and 15 of annexure CMK 8, the Petitioner is shown as cross examining some of the witnesses who appeared at the disciplinary session. More importantly, the Petitioner does not provide any cogent evidence to back up his assertion that his rights were violated. And neither does he demonstrate the prejudice he may have suffered as a result of some infractions by the investigations panel in respect of the procedure set out under regulation 146(6) of the TSCCRT, 2015. As was observed by Maureen J in *Maureen K. Imbiakha & another v Teachers' Service Commission & 2 others [2019] eKLR*, the court will not interfere with an employer's power to undertake disciplinary action against employees except where it finds that the internal process has been mismanaged *to the detriment of the employee* (emphasis added).

33. Having found as above, it is the court's view that the Petition lacks merit. Accordingly, it is dismissed with costs to the Respondents.

Dated, signed and delivered on the 3<sup>rd</sup> day of February, 2022

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Petitioner

.....for the 1<sup>st</sup> Respondent

.....For the 2<sup>nd</sup> Respondent

ORDER

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 15<sup>th</sup> April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M. MANANI

JUDGE