



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MACHAKOS

PETITION NO. 1B OF 2016

**IN THE MATTER OF ARTICLES 10, 23 (1) & (3), 47(1), 259,165,232 OF THE
CONSTITUTIONA OF KENYA**

AND

IN THE MATTER OF RULES 4,13 AND 23(1) OF THE PROTECTION OF RIGHTS

AND FUNDAMENTAL FREEDOM PRACTICE AND PROCEDURE RULES 2013

IN THE MATTER OF THE CONTRAVENTION OF ARTICLES 10, 47(1), 259

OF THE CONSTITUTION OF KENYA 2010

DAVID KIMOLO KINGOO.....PETITIONER

VERSUS

TEACHERS SERVICE COMMISSION

MACHAKOS COUNTY DIRECTOR.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

[1] By an Amended Petition dated 26th January 2016, the Petitioner, a school Principal at [particulars withheld] HGM Secondary School, Kangundo District of Machakos County, sued the County Director of the Teachers Service Commission and the Attorney General challenging disciplinary proceedings commenced by the former against him on allegations of making sexual advances and flirtation with one of his girl students and sought relief as follows:

“PETITION OF DAVID KIMOLO KING’OO DATED 7TH JANUARY, 2016

Your Petitioner therefore prays that:

- 1. That this petition be certified as extremely urgent and heard ex-parte in the first instance.*
- 2. That pending the hearing of this petition inter parties, this court do issue a conservatory*

order retraining and/or preventing the 1st and 2nd respondents either by themselves or through their agents and/or servants from arbitrary suspending/expelling/unprocedurally forcing him to hand over and or removing the Petitioner/Applicant from the [particulars withheld] HGM Secondary School or any other public School thereto.

3. That pending the hearing of this instant application inter parties this court do issue a conservatory order restraining and/or preventing the 1st and 2nd respondent either by themselves or through their agents and/or servants from withholding any payments and/or expenditure allocations properly due and owing to the Petitioner/Applicant.

4. That pending the hearing and determination of the Constitutional Petition filed herein this court do issue conservatory order restraining and/or preventing the 1st and 2nd respondent wither by themselves or through their agents and/or servants from arbitrary suspending/expelling/unprocedurally handing over and or removing the Petitioner/Applicant from the [particulars withheld] HGM Secondary School or any other Public School thereto.

5. That a declaration be issued against the Respondents that any arbitrary suspension, expulsion/unprocedurally handing over or removal of the petitioner from his positions as the Head teacher at [particulars withheld] HGM Secondary school without considerations of due process and all the tenets of natural justice is violated on Article 27 and 47 of the Constitution, therefore, null and void ab initio as the period is grossly inadequate and unreasonable and in accordance to the due process of the law.

6. That the cost of this petition be provided for.”

[2] The cause of action of the Petitioner is set out in paras 4-6 of the Amended Petition as follows:

4. “The Petitioner while at his place of work at [particulars withheld] HGM Secondary School where he works as the head teacher on 5th January 2016 at around 5:00 pm served with an interdiction letter from the 1st Respondent in respect to the allegations that he is of immoral behavior.

5. That together with the said letter of interdiction, the Petitioner was also served with another letter dated 5th January 2016 also from the 1st Respondent requiring him to hand over the Administration of [particulars withheld] HGM Secondary school to one D M M not later than **Thursday 7th January 2016.**

6. That the said letter requiring him to hand over the Administration of [particulars withheld] HGM Secondary school to **D M M** within less than Two days from the date of issuance of the said interdiction letter is a violation of the Petitioners Constitution of Kenya 2010 and also a violation of his natural right as the period is grossly inadequate and unreasonable and not in accordance with the due process of the law.

7. That the Petitioner is likely to suffer more injuries if the orders sought herein are not granted immediately.”

[3] The facts of the case relied on by the petitioner are set out primarily at paragraphs 9-14 of the Affidavit filed sworn by the Petitioner on 7th January 2016 in support of the Petition as follows:

“SUPPORTING AFFIDAVIT OF DAVID KIMOLO KING’OO DATED 7TH JANUARY, 2016

9. THAT later on 27th December, 2015 I was through an SMS invited in the office of the County Director Machakos who in the said SMS had called me for some consultative meeting in his office and proceeded there as requested. When I went there I was surprised to find that it was not a

consultative meeting as informed but to answer questions based on unfounded allegations that I had sexually harassed one former female student in the school by the name [MN] which allegations were foreign to me.

10. THAT what I informed the TSC County Director Machakos as far as the said student is concerned is that there was some time back when she had issues with her parents and after she reported the same to me, I referred her to Mrs N the teacher in charge of Guidance and Counseling department in the school and nothing more.

11. THAT after I referred the student to the said teacher for counseling, the said teacher started inciting her that I had sexually harassed her and even going to her home place in Thika in her efforts to feed her with false information against me which all these were reported to me by one of the students and by one of my friends who saw the said teacher with the subject girl at Thika December Restaurant annexed and marked "DKK 3" is a copy of the report by one of the students who saw the teacher with the subject girl at their home).

12. THAT on 5th January 2016 at around 5.05pm, I was served with an interdiction letter from the 1st Respondent's office requiring me to go and make a written statement with the Commission within 21 days from the day thereof on the allegations that I was of (immoral behaviour and marked "DKK4" is a copy of the said letter).

13. THAT together with the said interdiction letter, I was served with another letter from the 1st Respondent dated 5th January, 2016 requiring me to hand over the Administration of the [particulars withheld] HGM Secondary School to one D M M within a period less than 2 days (annexed and marked "DKK5" is a copy of the said letter).

14. THAT the Notice issued in respect thereof is grossly inadequate and unreasonable as the same is not in accordance with the due process of the law and thus a violation of my constitutional Right to a fair administrative action."

[4] In response the 1st Respondent filed a Replying Affidavit in which the primary facts relied on by the 1st Respondent are set out as follows:

"1ST RESPONDENT'S REPLYING AFFIDAVIT DATED 15TH JANUARY, 2016

12. THAT sometimes in March 2015, or thereabout, while the Applicant was the school Principal at [particulars withheld] HGM Secondary School, he was alleged to have been of immoral behavior in that he flirted with a school girl, which action if proved, amounted to professional misconduct on his part.

13. THAT the allegations were raised by a form four student by the name [MN] who claimed that on various dates beginning 2nd March, 2015 or thereabout, the Applicant flirted with her contrary to the Code of regulations for Teachers, Code of Conduct and Ethics, Circular No. 3 of 2010 and the professional Ethics expected of him.

14. THAT the girl in her statement alleged inter alia as follows:-

i. The applicant made sexual advances towards her on the morning of 2nd March, 2015 after he called her to his office, dropped the curtains and told her she was beautiful and would assist her with any financial issues she may be having including payments of school fees; he then gave her Ksh. 100 to buy supper.

ii. On 13th March, 2015, he requested for her mobile phone number to enable him contact her over the holidays but she declined.

iii. On the 8th May, 2015, he summoned her to his office and asked to share his breakfast with him using the same spoon and after she refused, he offered to order special breakfast from the kitchen. He also asked for a hug but after she refused, he accused her of having a boy friend at the school by the name Carson.

iv. On 9th July, 2015, he offered to do for her shopping to ensure her comfort during her mock examinations.

v. After the mock examination on 30th July, 2015, he informed her that he has a house in Pilot Estate in Thika town and she could visit anytime during the school holidays.

vi. On 21st September, 2015, he promised to destroy her as she had refused his advances.

vii. On 16th October, 2015, he warned her not to associate with the boys in the school including exchange of greetings.

A copy of the statement from the girl is annexed hereto and marked "MI 3".

15. THAT in view of the gravity of the allegations against the Applicant, I constituted an independent investigation team to undertake investigations into the allegations.

16. THAT the officers constituting the investigation team, conducted thorough investigation to ascertain the veracity of the allegations against the Applicant.

17. THAT in conducting the investigations, the said officers interviewed the Applicant, the school girl and also considered written statements by:-

i. The girl who was the victim of the incident

ii. The Applicant

iii. The girl's mother

iv. Fellow student colleague of the girl namely R N M and

v. The guidance and counseling teacher of the school by the name, N P.

vi. Copies of statements from the girl's mother, the student colleague by the name Carson, the school matron, the guidance and counseling teacher and the Applicant are annexed hereto and marked "MI 4 a, MI 4b, MI 4c, MI 4d and MI 4e respectively.

18. THAT in the course of the said investigations, the school girl confirmed the allegations against the Applicant which were also corroborated by the other statements by persons interviewed in paragraph 17.

19. THAT it emerged from the investigations that:

i. The girl corroborated her earlier statement and added that the Applicant touched her face on 4th September, 2015 and laid his hands on her shoulder requesting to have a talk with her.

ii. Further, during the KCSE examinations, the Applicant informed the girl to go see him in the event "she felt like talking to anything in a trouser".

iii. The girl's mother confirmed that her daughter had complained of harassment from the

Applicant.

iv. On 2nd July 2015, the Applicant summoned the student by the name Carson and told him to stay away from the girl and used the words, “quite off my territory”.in reference to her.

v. The school matron confirmed that some girls noted that the girl was visiting the Applicant’s office frequently.

vi. The applicant had informed the matron that the girl had a problem at home and he had given her Ksh. 200 although the girl told the other students it was Kshs. 2,000/-.

vii. Teacher N, in charge of guidance and counseling confirmed that the girl had confided in her as regards the sexual harassment by the Applicant.

viii. The Applicant refuted the allegations against him by the girl and stated that he had only interacted with her twice.

ix. In general, the girl’s statement as regards sexual harassment by the Applicant was corroborated by Carson, teacher N, the school matron and her mother.

A copy of the report from the investigative team is annexed hereto and marked “MI 5”.

20. THAT as a result of the foregoing findings, the officers found that the Applicant had a case to answer and subsequently recommended that he be summoned to answer to the allegations raised against him.

21. THAT following the recommendation by the investigation team, I convened a consultative meeting at the county with a view to further interrogate the Applicant on the allegations in the presence of the girl and her mother.

22. THAT the Applicant, the girl and her mother were present during the said meeting.

23. THAT the girl and her mother corroborated their respective statements and repeated their allegations before the Applicant.

24. THAT the Applicant was given an opportunity to respond to the allegations at the said meeting which he did but denied the same.

25. THAT in consideration of all facts and circumstances pertaining the case, the panel recommended that the applicant had a case to answer hence he be interdicted and his case forwarded to the Commission’s headquarters for further action.

A copy of the minutes of 28th December, 2015 annexed hereto and marked “MI 6”.

26. THAT following the said recommendation action, I issued the Applicant with a letter of interdiction asking him to “show cause” why disciplinary action should not be taken against him which included removal from the register and/or dismissal. He was informed through the said letter that he will be offered an opportunity to be heard in person and was also advised to prepare a statement of defence in answer to the allegations leveled against him.

A copy of the letter of Interdiction dated 5th January, 2016 is annexed hereto and marked “MI 7”.

27. THAT as a consequence of the said interdiction and in line with Regulation 66 (3) (e) of the Code of Regulations for Teachers, the Applicant was required to hand over the school

property and leave the institution within 48 hours. **A copy of the relevant extracts of the code is annexed hereto and marked "MI".**

28. THAT consequently, and in view of the fact that the Applicant is a School Principal I informed him vide a separate letter dated 5th January, 2016 of the requirement to handover the institution not later than 7th January., 2016. **A copy of the said letter dated 5th January, 2016 is annexed hereto and marked "MI9"**

29. THAT however, the Applicant failed to appear as advised hence the handing over exercise was not finalized, instead, he moved this Honourable Court to stop the same.

30. THAT I further wish to state that the process of interdiction is part of a preliminary disciplinary procedure which commences at the institutional/county level as in this case and then escalates to a higher level which is the Commission's disciplinary panel convened from the Headquarters and where a teacher is granted an opportunity to advance his/her case.

31. THAT in the circumstances, this Application and Petition is premature as the Appellant is currently in the middle of a disciplinary process.

32. THAT there is no other way the Commission can make an informed decision as to whether or not the Applicant is culpable of the allegations against him without taking him through the full disciplinary process which entails interdiction.

33. THAT it would be in the interest of justice and the Applicant that the discipline process is left to run its full course."

[5] The petitioner responded by filing a supplementary Affidavit sworn on 25th January in which the petitioner emphasis breach of his constitutional rights at paragraph 6 thereof as follows:

"6. THAT in the light of the same and also in the cause of the said alleged investigations; my Constitutional Rights were grossly violated as follows;-

i. That I was **not informed of the allegation with sufficient details** of the allegations in question to answer it in advance as I was only tricked through a mobile telephone message (SMS) from the Director (1st Respondent herein) to attend his office for a consultative meeting and not to face the committee for the allegations where I found the panel waiting for me comprising of among other people, the director himself Mr, Muturi and Ireri and **his own son** Mr. Alex Muturi who are the only people who talked in that meeting.

ii. That even in the said Respondent's office I was **not accorded any fair hearing** as I was not given reasonable and adequate time to cross examine the girl of the said allegations since she was only reading from a written script whose origin I could not ascertain and then ordered to move out of the office by the 1st Respondent.

iii. That after the girl walked out of the Respondents office, **the 1st Respondent said to me that he was very sure that the said allegations were true to his best of knowledge** and needs no prove and thus making a premature conclusion with no valid grounds in it and even without hearing from my side and thus violated the rules of natural justice '**Audi alterum partem**' which forms part and parcel of our Constitution of Kenya and a violation of my right to be presumed innocent until proven guilty.

iv. That the 1st Respondent later on served me an inadequate notice of interdiction requiring me to hand over the administration of [particulars withherld] HGM Secondary school to **D M M** within **less than two days** and thus a violation of my constitutional right to a fair administrative action as enshrined in Article 47 of the Constitution of Kenya 2010 and also a

violation of other natural rights as the due process of the law was not adhered to.

*v. That the 1st Respondent's actions were a clear abuse of his office only to intimidate me and subject me to unnecessary agony and a violation of the National values and Principles of governance as enshrined in **Article 10** of the Constitution of Kenya."*

[6] The 2nd Respondent did not enter an appearance to the petition or file a Replying Affidavit or any pleading in response thereto.

Submissions

[7] Counsel for the parties - Mr. Andrew Makundi for the Petitioner and Ms. Stella Rutto for the 1st Respondent - filed written submissions and made supplementary oral argument and judgment was reserved.

Submissions for the Petitioner

[8] For the petitioner, it was urged that the allegations against him were untenable based on the alleged victims statement, among others that she had been seeing the petitioner in her dreams and it was submitted that –

"It was as a result of the delusions that the alleged victim was suffering from that the accusations against the petitioner were founded. In the event that the allegations against the petitioner are vitiated or turn to be imaginary as it is in the present case any process stemming from such baseless accusations becomes tainted and untenable before any court of law."

[9] As regards the procedure for his interdiction, it was contended that the procedure of interdiction was not fair in that the provisions of the Code of Regulations for Teachers requiring participation of the Board of Directors was never followed citing Regulations 66 (3) of the Code. It was further contended that Articles 47 on fair administrative action had been violated:

"In addition, we emphasise on the credibility of the alleged victim. It stands to be questionable for the reason that the accusations against the petitioner have not remained constant or consistent. The contents of the annexure marked "DKK2" in the petitioner's supplementary affidavit portray the maker of the statement as disturbed, delusional and stuck in a kind of a spiritual existence. In the foregoing, the former female student at [particulars withheld] HGM secondary school renounces all accusations formulated against the petitioner while noting to emphasis her statement as follows: "I was just confused of what I was hearing around about him. And it's like they were all rumours and false accusations from the students."

*In the light of the dithering credibility of the respondent's witness, Moureen Nzisa, the accusations against the petitioner occasioned breach of the constitutional right of the Petitioner as enshrined in Article 47 of the Constitution, which states that **"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."***

We submit that prejudice was occasioned to the petitioner as a direct result of the blurry allegations forming the basis of the petitioner's interdiction."

Breach of Articles 50 (1) and 50 (2) on fair hearing and fair trial, and Article 10 national values and principles of governance was also urged.

Submissions for the Respondent

[10] For the respondent, emphasis was made of the 1st respondent's constitutional mandate under the Teachers Service Commission Act and to the contention that the petitioner was afforded a fair hearing in

accordance with the Code of Regulations, with an explanation that the Board of Governors of the School could not be involved because it was divided and the petitioner was the secretary thereof, and further that the petitioner would be given further opportunity to respond to the charges in person before the Commission before any final disciplinary decision is taken. The Counsel for the Respondent set out the 1st Respondent's case as follows:

“The 1st Respondents Case

9. My Lord, we humbly submit that the disciplinary process commenced by the 1st Respondent so far, is regular, lawful and within the confines of the TSC Act and the Code of Regulations for Teachers.

10. Indeed, the acts alleged against the Petitioner were serious in nature and amounts to gross professional misconduct.

11. The unprofessional conduct as alleged against the Petitioner was in breach of the Code of Regulations (2005) and Circular No. 3 of 2010 rendering him liable to disciplinary action.

12. However, prior to the Petitioner's interdiction, the 1st Respondent carried out investigations to ascertain the veracity of the allegations against him and several witnesses were interviewed and prepared a statement which was duly considered by the Investigation team.

13. From the said investigations, it was indeed ascertained that the Petitioner had on several occasions approached the girl in question in an unprofessional manner and flirted with her contrary to what was expected of him as a teacher and a School Principal and for the reason, it was recommend that disciplinary action be taken against him.

14. Further, it is instructive to note that the petitioner himself was given an opportunity to respond to the allegations in writing. He was also allowed to appear before his accuser in a consultative meeting where she repeated the same allegations before him.

16. The interdiction was undertaken by the 1st Respondent given that the Board of Management at [particulars withheld] HGM Secondary school was divided over the issue hence any findings over the issue would not have been objective.

16. My Lord, we therefore submit that the disciplinary process so far undertaken against the Petitioner was procedural and lawful.

17. Your Lordship, the 1st Respondents' case is grounded on the following issues;

i. The Petitioner is in gross breach of the relevant regulatory provisions as well as requiring him to adhere to certain professional and ethical standards.

ii. The Petitioner was rightly issued with a letter of interdiction after investigations revealed that he had allegedly breached the TSC Act, the Code of Regulations for Teachers and Circular No. 3 of 2010.

iii. The Petition is an abuse of the court process as the Petitioner seeks to frustrate the disciplinary process commenced against him suing the court process.

iv. The Petitioner has not demonstrated with precision any Constitutional right that has been violated by the 1st Respondent hence does not warrant the orders he is seeking.”

Issues for Determination

[11] The only issue for determination in this petition is whether constitutional rights of the petitioner were violated in the process leading to his interdiction, and consequently whether he is entitled to the reliefs sought in the Amended petition.

Determination

Whether constitutional rights of the petitioner were violated

[12] The counsel for the respondent is right in her objection to the application of Article 50 of the Constitution to the present proceedings arising from internal disciplinary mechanism of the Teachers Service Commission, and in her reliance on the Court of Appeal decision in **Judicial Service Commission v. Gladys & Another** (2014) eKLR where it was held that the rights under Article 50 (1) and (2) apply to civil proceedings of judicial nature before court and tribunals, and criminal proceedings before a court of law, respectively. The relevance of the over-arching national values and principles of governance under Article 10 principles was also not demonstrated.

[13] However, the Petitioner is right in contention that Article 47 of the Constitution on the right to fair administrative action applies. Article 47 of the Constitution provides as follows:

“47. (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”

[14] In addition Article 27 of the Constitution is relevant as it provides for equal protection of the law. In pleading at paragraph 6 of the Amended Petition, the petitioner clearly complies with the requirements of particularity of pleadings set out in **Anerita Karimi Njeru v. The Republic** No. 1 [1976-80] 1 KLR 1272. I do not see that the respondent was in any way embarrassed in its response by the manner of pleading in the Petition.

The Principle

[15] In **DANIEL NYONGESA & OTHERS V EGERTON UNIVERSITY COLLEGE**, Civil Appeal No. 90 of 1989, [1990] eKLR, Nyarangi JA. with whom Gachuhi and Masime, JJA. agreed laid down the principle of judicial review of administrative action by school, colleges and universities as follows:

“Courts are very loath to interfere with decisions of domestic bodies and tribunals including college bodies. Courts in Kenya have no desire to run universities or indeed any other bodies. However, courts will interfere to quash decisions of any bodies when the courts are moved to do so where it is manifest that decisions have been made without fairly and justly hearing the person concerned or the other side. It does not assist for anyone to question or criticise the particular posture of courts. It is the duty of courts to curb excesses of officials and bodies who exercise administrative or disciplinary measures. Courts are the ultimate custodians of the rights and liberties of people whatever the status and there is no rule of law that courts will abdicate jurisdiction merely because the proceedings or enquiry are of an internal disciplinary character.

[16] The principle has been developed in subsequently in labour cases to give deference to the internal disciplinary mechanisms (see **Miguna Miguna v. Permanent Secretary, Office of the Prime Minister & Anor.** (2011) eKLR) save in exceptional circumstances where the action taken by the disciplining authority will lead to grave injustice. For instance, in **Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School & 2 others** [2014] eKLR, Mbaru, J held that –

*“[T]he Court can only intervene in an employer’s internal disciplinary proceedings until they have run their course, except in exceptional circumstances – **that is where grave injustice might result or where justice might not by other means be attained. The hearing of the claimants has not run its course, but the procedure adopted with sanction before according him a fair chance to be***

heard in the presence of his Union or a fellow employee of his choice not accorded to him. This far the court will interfere with the proceedings as by not so doing grave injustice will be occasioned to the claimant. This is one such exceptional case....”

[17] See also **Judith Mbayah Tsisiga v Teachers Service Commission** [2017] eKLR, approving **Frederick Saundu Amolo**.

Fair administrative action

[18] In addition, since, **De Souza v. Tanga Town Council**, (1961) EA 377, 386-387, the general principles of law as to fair procedure before domestic or administrative tribunals in East Africa, in material part, has been laid down as follows:

*“The general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity are well known. The authorities are reviewed in the recent case of **University of Ceylon v. Fernando** (1960) 1 ALL ER 631. I think that the principles, so far as they affect the present case, may be summarized as under:*

*(1) **If a statute prescribes, or statutory rules or regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed.** Lord Shaw of Dunfermline said in **Local Government Board v. Arlidge** (1915) AC 120, at p. 138 “If a statute prescribes the means it” (the Local Government Board) must employ them”; and in **University of Ceylon v. Fernando**, p. 638 Lord Jenkins, delivering the judgment of the Board and speaking of a clause in the “General Act” of the University of Ceylon, said:*

“If the clause contained any special directions in regard to the steps to be taken by the vice-chancellor in the process of satisfying himself, he would, of course, be bound to follow those directions.”

Public interest in the matter

[19] Judicial policy must frown upon incidents where pupils and students in schools colleges and universities are sexually abused, harassed and flirted with by the very persons who are charged with the responsibility of helping them to go through their education successfully. Justification for this stance is that such conduct risks terminating or otherwise adversely affecting the victim’s education and the prospects of good life in the future, which a good education is meant to guarantee. Such a policy would not only promote the Article 53 of the Constitution’s right to education and principle of paramount consideration of the best interest and welfare of the child, but also coincide with the public interest in prevention of sexual harassment. In such circumstances, the Court must uphold a position where allegations against teachers of schools, colleges and universities in the nature of sexual harassment against pupils and students are dealt with firmly and fairly, with comprehensive investigation and fair opportunity to be heard for the implicated teachers, and with due care to protect and promote the best interest and welfare of the affected pupils and students.

On the merits of this case

[20] In this case, therefore, the question then becomes whether the process leading to the interdiction was in compliance with the applicable internal rules of disciplinary procedure. The process of interdiction in accordance with the Code of Regulations is as follows:

“CODE OF REGULATIONS FOR TEACHERS (Revised 2005)

Regulation 66

(3) Process of interdiction

The Agent shall: -

- a. **On receiving allegations against a teacher conduct investigations and assemble evidence to establish whether the teacher has a case to answer.**
- b. **Where there is a Board of Governors, the Board will invite and interview the teacher except for desertion cases.**
- c. **If satisfied that the teacher has a case to answer, serve the teacher with a notice of interdiction on the form prescribed in Schedule XXXVIII specifying the actual allegations made against him/her.**
- d. Send a copy of interdiction notice to the Secretary Teachers Service Commission attaching all the relevant documentary evidence.
- e. **Ensure that the interdicted teacher/head teacher clears and leaves the institution and the institution house (where applicable) within 48 hours upon receiving the letter of interdiction.**

Disciplinary Proceeding 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:

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.”

[21] The Code of Regulations do not require that an allegation of breach of the code must be dealt with by the Board of Governors. Indeed, the Code would apply even in situations contemplated by the Code, where there is no Board of Governors. What is necessary is that the Agent of the Commission such as the first Respondent by virtue of Agency appointment Circular No. 5 of 2012 must in accordance with Regulation 66 (3) (c) -

“If satisfied that the teacher has a case to answer, serve the teacher with a notice of interdiction on the form prescribed in Schedule XXXVIII specifying the actual allegations made against him/her.”

[22] Of course, before being satisfied that the teacher has a case to answer, the Agent is required by Regulation 66 (3) (a) upon receiving allegations against a teacher to **“conduct investigations and assemble evidence to establish whether the teacher has a case to answer.”** By paragraph (b) of the Regulation 66(3) where a Board of Governors exists, **“the Board will invite and interview the teacher except for desertion cases.”** It is not the Board that decides whether a case has been established against the teacher for purposes of a decision to interdict. Its findings upon such interview as contemplated in the paragraph (b) would at best be a recommendation for consideration by the Agent whose mandate it is to make a decision on whether a case to answer has been established.

[23] I, therefore, do not find that the failure to have the Board of Governors interview the petitioner substantially affected his right of hearing as this was granted by the other panels that interviewed him both in writing and orally, before making the recommendations for interdiction and reference of the matter to the Commission for further hearing in accordance with the Regulations. The 1st respondent’s explanation that the Board was divided and the petitioner was in any event its secretary reasonably justifies the default of the interview of the petitioner by the Board. As Regulation 66(3) (a) and (c) of the

Code gives the Agent of the 1st respondent power to interdict a teacher upon being satisfied after investigation that the teacher had a case to answer, which is not conditional upon consultation with the Board of Governors, I do not find that the failure to involve the Board of Governors of the School affected the validity of the investigation proceedings in which the petitioner was given full hearing in writing and orally as shown below.

[24] From the evidence presented in the affidavits before the Court, it is clear that the petitioner was afforded an opportunity to be heard on the allegations levelled against him both orally and in writing on diverse occasions before the decision to interdict him was reached, as follows:

i. Investigations by Panel of Investigators appointed by the 1st Respondent made up of senior officers in charge of sub-county TSC affairs as Catherine G Mwenda (Mrs) SCDIR (TSC), Yatta & Masinga sub-Counties, Alex M. Muturi SCHRO, Yatta Sub County, Hilda N. Mulwa SCHRO, Masinga and Lyveen Kiio, SCHRO, Mwala sub-County in which the petitioner wrote a statement in response to the charges by a handwritten letter dated 11th November 2015 (Annexure **MI-4e** in Replying Affidavit of the 1st Respondent), which is in the following terms:

“KITHIMANI HG

P. O. BOX 120

KITHIMANI

11-11-15

RE: REPORT ON ALLEGED RELATIONSHIP WITH A STUDENT [MN] F4

The above named issue to me is unfounded because I have only interacted with her twice when

1. I found her at the Kithimani bus stage during term two 2015 when upon returning from Mid-term I cautioned her against idling at the bus stage. The instruction School Policy is that when students leave school they should go straight to their parents.

2. She sought my help as the Principal when she felt her mother was despising her. I enlisted the support of Mrs. N – the G/Counselling teacher who is also the C.U. Patron to take up the issue and ensure her welfare in school.

That’s what I know.

David Kingóo

TSC 305021”

ii. County Consultative meeting held on 28th December 2015, in the presence of the 1st Respondent, the Deputy County Director of TSC, the sub-County Human Resource Officer, Mwala and Sub-County Human Resource officer Yatta, when the petitioner was given an opportunity to meet his accuser and put any questions to her, which records the petitioner’s participation as follows:

“iii) On his part Mr. Kingoo denied any involvement to the extent of flirtation with the girl or sexual advances to her He said that his dealings with the girl were as indicated in his earlier statement. He, however, questioned the girl whether she had reported the matter of flirtation and sexual advances to anyone at the school. To this, the girl answered that she had told the matter to the Guidance and Counselling teacher Madam N P and also to teacher K the Christian Union patron. Mr. Kingoo further asked [M] whether she was aware that some people intended to destroy his career and that such people had visited her mother’s home. [M] responded that she was not aware and that what she was accusing Mr. King’oo of was truthful.”

[25] The suggestion in paragraph 9 of the Petitioner’s supporting affidavit that he got to know of the allegations against him when he was invited to a consultative meeting ‘on 27th December 2015 through an SMS’ is not accurate because there that he knew of the allegations and had responded to them in writing by the letter of 11th November 2015, set out above, during the investigations conducted by the panel of investigation officers appointed by the 1st Respondent and whose report dated 12th November 2015 is annexed as Exhibit MI 5 in the Replying Affidavit of the 1st respondent, as follows:

“Conclusion/Recommendation

The Panel concluded that the accused, Mr. David Kingoo TSC/305021 has a case to answer in that he flirted with [MN] Adm/No. XXXX while she was a student at [particulars withheld] Secondary School. This is supported by the frequent summoning of the girl to the accused (principal’s) office; the accused asking [M] to share his breakfast using the same spoon; the accused requesting [M] to hug him; the accused touching [M’s] face and giving her money; the accused requesting to meet [M] at Thika; the accused offering [M] support so long as she does not tell her problems to any other teacher; the accused telling [C] to keep off his territory and threatening the boy with dire consequences on his family. The Panel therefore recommends that the accused be summoned by the Commission to answer the above allegations as levelled against him.”

[26] The Panel that heard the accuser and the accused Petitioner during the Consultative meeting of 28th December 2015 also recommended interdiction and further processing of the case by the Teachers Service Commission as follows:

“Recommendations of the Panel

From the aforesaid, the Panel had reason to believe that the accused (Mr. Kingoo had a case to answer in matter of flirtation and sexual harassment of his student [MN]. It was recommended that the accused be interdicted and that his case be forwarded to the Commission for further action.”

Further Investigation and hearing of the Petitioner

[27] Moreover, the Code of Regulations provides for further investigation by the Teachers Service Commission with the affected teacher being given further hearing in person before the Commission as follows:

*“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:

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.”

It is clear from the Code that the investigations conducted by the 1st Respondent through his two panels were in the nature of preliminary inquiry and the petitioner will be given further and full hearing in person before the Commission upon being given information about the nature of the allegations against him and upon being given adequate time to prepare his presentation in defence.

[28] In any event, the allegation in the supplementary Affidavit as to not having been informed of the allegations with sufficient detail as he was invited by SMS to a meeting were not altogether truthful. As observe above, the petitioner had prior to the consultative meeting of 28th December 2015 been informed of the allegations and had in fact responded to them in writing by his handwritten letter of 11th November 2015.

[29] The other allegations in the supplementary Affidavit that the consultative meeting panel comprised of among other people the 1st respondent's son and that the 1st respondent had made up his conclusion that the allegations were true before the hearing were not proved by credible affidavit. It is the legal and evidentiary duty of a plaintiff under section 107 and 108 of the Evidence Act to prove the claims on matters of fact that he makes in a suit. Significantly, these new allegations of breach of his right to hearing set out in the **supplementary affidavit** left the respondents with no opportunity to respond to them, and they must for that reason be rejected.

[30] The complaint in the supplementary affidavit on a matter of law that that he was in breach of his right fair administrative action upon interdiction required to hand over within two days to another teacher is without merit as it is a requirement of the Code of Regulations 66 (3)(e) that the Agent shall **“Ensure that the interdicted teacher/head teacher clears and leaves the institution and the institution house (where applicable) within 48 hours upon receiving the letter of interdiction.”** Such a measure is in any event reasonable within the meaning of Article 24 of the Constitution in the case of an interdicted teacher to prevent any or any further injury or damage to the student or school, as case may be.

[31] The Petitioner has, therefore, not demonstrated that his right to a fair hearing under the Constitution, Statute or Regulations has been violated or threatened with violation by the process leading to and subsequent to his interdiction. The allegation that the 1st Respondent's son sat in one of the Panel investigating the matter, suggesting bias, was not proved. Even if the said Alex Muturi who is shown to be the sub-County Human Resource Officer for Yatta is the 1st Respondent's son, and he attended the meeting in his official capacity and in the group of others in the Panel where unanimous decision was taken that the petitioner had a case to answer, it would not *per se* affect the validity of the finding and recommendation of the Panel. Indeed, a different investigation panel had upon investigating the matter and taking a statement for the petitioner already recommended earlier on the 12th November 2015 that the petitioner had a case to answer. However, this is a matter that the Commission in its further investigation in accordance with the Regulations may look into to determine whether the recommendation of the particular panel was warranted.

Whether relief sought may be granted

[32] The petitioner has not demonstrated that any of his fair hearing rights under the Constitution, statute and Regulations were violated or are threatened with violation in the ensuing process after his interdiction. The petitioner shall in accordance with the Regulations heard in person before the Commission before a decision is taken on his case, and the Court must agree with the Counsel for the 1st Respondent that the petition seeking redress for alleged breaches of his constitutional rights is premature.

[33] In the terminology of the labour courts cited above, this Court does not in this case find any ***“exceptional circumstances – that is where grave injustice might result or where justice might not by other means be attained”*** to warrant the departure from the general principle that internal disciplinary proceedings by employers will not normally be interfered with before they run their full course. There cannot be an injustice if the petitioner will be afforded an opportunity to be heard before a decision is

taken on the matter, and this Court like the Court in *Judith Mbayah Tsisiga v Teachers Service Commission*, supra, cannot find any exceptional circumstances manifesting an injustice occasioned or threatened on the petitioner by the disciplinary proceedings subject of this petition.

Conclusion

[34] The petitioner was accorded opportunity to be heard before the decision to interdict him was made. The petitioner is in accordance with the 1st Respondent's Code of Conduct Regulations entitled to further hearing in person before the Teacher's Service Commission. As this further hearing has not been held and there is no indication that it shall not be held or that it shall be in violation of the petitioner's right of fair hearing, the present Petition is premature.

[35] With respect, the constitutional or judicial review court is not trying the disciplinary case against the petitioner and it, therefore, cannot go into a determination of the veracity of the allegations against the petitioner. That is a matter of the disciplinary mechanism of the particular administrative tribunal. In other words, the constitutional and judicial review court is not a finder of fact on the truth or otherwise of allegations levelled against the person undergoing disciplinary process, and, therefore, such contentions taken by the petitioner herein as to the incredulity of the allegations against him and the mental state of the accuser must be determined by the administrative tribunal conducting the disciplinary procedure.

[36] The concern of the Court is to see that the petitioner receives a fair hearing in accordance with the right to fair administrative action of Article 47, which must now be taken to encompass the common law judicial review principles of the rules of natural justice.

Orders

[37] Accordingly, for the reasons set out above, the Petitioner's Amended Petition dated 26th January 2016 is dismissed.

[38] However, in order not to discourage litigation on alleged violation of constitutional rights by persons being subjected to disciplinary proceedings, there shall be no order as to costs.

EDWARD M. MURIITHI

JUDGE

DATED AND DELIVERED ON THE 7TH DAY JUNE 2017.

D KEMEI

JUDGE

Appearances:-

M/S Andrew Makundi & Co. Advocates for the Petitioner

Ms. Stella Rutto, Advocate for the for the 1st Respondent