



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 98 OF 2011

REPUBLICAPPLICANT

VERSUS

THE SECRETARY TEACHERS SERVICE COMMISSIONRESPONDENT

**EX-PARTE
STEPHEN MUTHENGI KANUI**

JUDGMENT

The application which is the subject of this decision is the notice of motion dated 4th July, 2011. Through the application Stephen Muthengi Kanui (the ex-parte applicant) prays for orders that:-

- 1. THAT the decision made by the Secretary, Teachers Service Commission dated 11th November, 2010 vide TSC/700327/170 and the proceedings and pleadings thereby be called into this court for the purpose of being quashed and/or set aside, for clearly being null and void.**
- 2. THAT an order of mandamus compelling and directing the respondent to reinstate the applicant in his employment and to pay him all salaries and allowances with effect from the date of his interdiction.**
- 3. The costs of this application be in the cause in any event.**

According to the papers filed in court, the applicant was an employee of the Teachers Service Commission (the respondent) working as the District Human Resource Officer (DHRO) Kyuso District. Through a letter dated 25th May, 2010 he was interdicted on the grounds that he had solicited a bribe of Kshs.40,000/= from a teacher by the name Mr. Samson Musyoki in order to assist him. The applicant was later summoned to appear before the respondent's disciplinary panel and he did so on 11th November, 2010. The applicant was dismissed from the respondent's service on the same date.

It is now the applicant's case that his dismissal was malicious as he did not solicit any bribe from any teacher. The applicant contended that the alleged bribery had been investigated by the police and through a letter dated 14th June, 2010 the District Criminal Investigations Officer (D.C.I.O.), Mwingi exonerated him of the allegations. The applicant also contends that the proceedings that led to his dismissal were irregular in that the respondent relied on information that had been found by the police to be false. He avers that the disciplinary panel showed open bias, and overprotected witnesses thus denying him an

opportunity to cross-examine the witnesses. He also averred that the witnesses who testified against him and in particular the District Education Officer (D.E.O), Kyuso District had differences with him. The applicant further avers that the fact that he was asked to mitigate before a decision was made meant that the decision to dismiss him was predetermined.

The application was opposed through the replying affidavit sworn on 15th September, 2011 by Josephine Maundu the respondent's Director-in-charge of Human Resources. Through the said replying affidavit, the respondent contended that it has power to discipline its employees. The respondent informed the court that sometimes in the month of December, 2009 it received information that the applicant had solicited a bribe of Kshs.40,000/= from one Samson Munyoki Musyoki, a former head teacher who had a pending disciplinary case before the respondent's disciplinary panel. This complaint later ended in disciplinary action being taken against the applicant. Through the replying affidavit the respondent narrates in detail the process that led to the applicant's dismissal on 11th November, 2010. It is the respondent's case that the law was followed prior to the dismissal of the applicant. The respondent also contended that it complied with the rules of natural justice while handling the applicant's case. Having gone through the pleadings and submissions of the parties herein, it is apparent that the issues for the determination of the court are:-

1. Whether the respondent complied with the rules of natural justice in arriving at its decision;
2. Is the applicant entitled to the orders sought? and
3. Who should meet the costs of these proceedings?

The applicant attacked the proceedings before the disciplinary panel on the ground that the chairman showed open bias against him by failing to accept the letter from the D.C.I.O. and declining to accept his evidence which was aimed at demonstrating misunderstanding between him and the Kyuso D.E.O. The applicant also claims that the disciplinary panel failed to afford him an opportunity to present his case to demonstrate this fact. He argued that the disciplinary panel refused to accept the letter from the D.C.I.O. exonerating him from the bribery charges. He further contended that the chairman of the disciplinary panel one M.E Oyoo showed open bias by claiming that the letter from the D.C.I.O had been brought.

I have had the opportunity of going through the copy of the handwritten disciplinary proceedings and nowhere do I find any evidence to support the applicant's allegations. From the proceedings, it is clear that the applicant was given an opportunity to testify. He was later told to mitigate and he said that he hoped that the disciplinary panel would come up with a fair decision. In my view he was only being asked to have the last word before the panel could retire to make its decision. There is no mention in the evidence of the applicant about the letter from the D.C.I.O. The applicant was given an opportunity to cross-examine the witnesses but he never brought up the issue of the letter from the D.C.I.O. I do not know why the applicant says the chairman of the disciplinary panel had claimed that the letter from the D.C.I.O. had been bought. I do not find such comments in the proceedings.

After carefully going through the proceedings of the respondent's disciplinary panel, I come to the conclusion that the said proceedings were above board. There is no evidence of bias or malice. It is not for this court to decide whether the disciplinary panel reached the correct decision. Judicial review is about the decision making process and not the merits of the decision. Once the court finds that the decision making process was in accordance with the law and in compliance with the principles of natural justice, then court should down its tools.

Assuming that the applicant had established that his dismissal was unlawful would he be entitled to orders of judicial review? The Court of Appeal has held that matters touching on employer-employee relationships are matters of private law and the best remedy for an employee who has been dismissed from service is to sue for damages. For example, in **STAFF, DISCIPLINARY COMMITTEE OF MASENO UNIVERSITY & 2 OTHERS v PROF OCHIENG OKELLO [2012] eKLR** the Court of Appeal stated that:-

“I concur with the proposition and find that the breach or threatened breach of the appellant’s contract of employment was not a public act or matter of public law but was a matter of contractual relationship between the respondent and the appellants, governed by private law. It was not therefore an appropriate action justifying the granting of orders of judicial review. The respondent may well have had a genuine grievance. His remedy however, lies under private law which covers disputes relating to contractual relationships. Therefore, the High Court erred in granting the orders of judicial review as Prof. Ochieng did not have public law right capable of protection under the supervisory jurisdiction of the court.”

The Court of Appeal addressed this issue in detail in **REPUBLIC V PROFESSOR MWANGI S. K. MENYI & 2 OTHERS**, Civil Appeal No. 160 of 2008 and observed that:-

“The grievance of the respondent is founded on the alleged unprocedural termination of his second contract of employment by the Permanent Secretary. If the person who terminated it had no authority to do so, or if the procedure as outlined in the contract was not followed, these are issues of breach of contract to be canvassed in private law proceedings. We hold that legality or otherwise of termination of contracts of employment that have no statutory underpinning are matters of private law and the remedies available are private law remedies. In the instant case, the learned judge erred in granting a public law remedy in a contract of employment that had no statutory underpinning.”

I am in agreement with the above quoted decisions of the Court of Appeal. In my view, judicial review remedies are not available to the applicant considering that his contract with the respondent had no statutory underpinning.

In the circumstances the applicant’s application fails and the same is dismissed with costs to the respondent.

Dated, signed and delivered at Nairobi this 2nd day of May , 2013

W.K. KORIR,

JUDGE