Maro v Teachers Service Commission & 2 others (Civil Appeal E039 of 2022) [2025] KECA 936 (KLR) (23 May 2025) (Judgment)

Neutral citation: [2025] KECA 936 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL E039 OF 2022

F TUIYOTT, KI LAIBUTA & GWN MACHARIA, JJA

MAY 23, 2025

BETWEEN

ATHMAN ADE MARO ..... APPELLANT

AND

THE TEACHERS SERVICE COMMISSION ..... 1ST RESPONDENT

THE CABINET SECRETARY MINISTRY OF EDUCATION . 2ND RESPONDENT

THE ATTORNEY GENERAL ..... 3RD RESPONDENT

(Being an appeal from the Judgement of the High Court of Kenya at Malindi (Githinji, J.) delivered on 23rd June 2021 in Constitutional Petition No. 3 of 2021)

JUDGMENT

1. This is an appeal against the Judgement delivered by (Githinji, J). in the High Court of Kenya at Malindi in Constitutional Petition No. 3 of 2021 on 23rd June 2021.

2. The genesis of this appeal is the petition dated 10th March 2021 brought by the appellant, Athman Ade Maro, against the 1st respondent, The Teachers Service Commission, the 2nd respondent, The Cabinet Secretary Ministry of Education and the 3rd respondent, The Attorney General. The appellant was employed by the 1st respondent as a Principal of Ganda Secondary School. Allegations arose that he was involved in an improper conduct with one of the students. According to the Standard Investigation Report dated 20th July 2017, he was being investigated for alleged sexual intercourse with a student Z.K.K. At the end of the investigations, it was recommended that the Malindi County Director of Education takes action on the matter.

3. What followed is that the appellant was charged before Malindi Chief Magistrate's Court with the offence of defilement in Criminal Case No. 25 of 2017. He was eventually acquitted of the charge. On the other hand, pending the determination of the criminal case, the 1st respondent commenced

parallel disciplinary proceedings against him, which culminated in his interdiction by a letter dated 10th August 2017. After completion of the investigations, a decision to dismiss him from employment was communicated vide a letter dated 1st November 2018.

4. The decision of the 1st respondent aggrieved the appellant, and he pleaded in his petition that the 1st respondent acted on an unconstitutional provision, being Regulation 139(3) & (4) of the Teachers Service Commission Code of Regulations for Teachers, 2015 (the TSC Code, 2015). The appellant stated that he was not given time to prepare for his case or a chance to defend himself and call any witnesses; that he was not informed of the accusation before the trial; that Regulation 139(3) and (4) of the TSC Code 2015 is inconsistent with Articles 50, 159 and 160 of *the Constitution*; and that, it encourages disobedience of court orders and judgements. The appellant particularised the inconsistencies with Article 50 of *the Constitution* as follows:

    i. The Commission is the complainant, the prosecutor and the judge thus making it very difficult for a fair hearing;

    ii. At the appellate level, the chairman is one of the decision makers who already heard and made a decision and thus making it difficult to access a fair hearing at the appeal level too.

5. The appellant contended that, many other teachers have been oppressed by the regulation and that, therefore, the Regulation ought to be declared oppressive, unconstitutional and bad law.

6. For the above reasons, the appellant asked the trial court to declare that Regulation 139(3) & (4) of the TSC Code, 2015 is unconstitutional and with no legal consequences as against the appellant and all other teachers within the Republic of Kenya. He also prayed for costs of the petition, interest on the costs at court rates and any other relief the court deemed fit to grant.

7. In response to the petition, Doreen Njage, the Assistant Director in charge of discipline with the 1st respondent, filed a replying affidavit sworn on 5th July 2021. It was deposed that the appellant was informed of the charge prior to the hearing, and that he was invited vide the interdiction letter dated 10th August 2017 to make his presentation to the charge; and that the guidelines provided by Regulation 139 of the TSC Code, 2015 accord with Article 50 of *the Constitution*.

8. The 1st respondent defended itself by stating that its disciplinary proceedings are distinct from the proceedings in a court of law and that, therefore, it is not bound by the outcome of the criminal justice system/process in the conduct of its disciplinary proceedings for a professional offence; that the charge under the criminal justice system was different from what the appellant was being charged with by the 1st respondent in the disciplinary administrative proceedings, which related to an immoral behaviour; that, its decision was final unless the appellant sought review under Regulation 156 of the TSC Code, 2015, or the court nullifies the decision; and that, Regulation 139(3) of the Code of Regulations is valid and does not promote contempt of court since it was amended vide *Legal Notice 50/2016* R.6.

9. It was the 1st respondent's further contention that the petition did not meet the threshold for a constitutional petition as the right alleged to have been infringed was not stated with precision; that its relationship with the appellant was purely contractual, and that any alleged dispute between them, if any existed, did not raise a constitutional question; that the appellant failed to demonstrate the inconsistency between Regulation 139(3) of the TSC Code, 2015 and Articles 159 and 160 of *the Constitution*; and that the petition ought to be dismissed.

10. The 2nd and 3rd respondents responded to the petition through Grounds of Opposition dated 21st July 2021. They contended that the issue at hand was between an employer and an employee, which they were not a party to; that they were therefore improperly joined to the petition; that, under Article

248 of *the Constitution*, the 1st respondent is among the commissions and independent offices set out thereunder, and that it has its own autonomous operational mechanisms, including matters legal representation; that no cause of action had been demonstrated against the 2nd and 3rd respondents; and that, therefore, the petition against them should be dismissed.

11. The petition was canvassed by way of written submissions. The learned Judge (Githinji, J.) considered two issues for determination, namely whether Regulation 139(3) & (4) of the TSC Code, 2015 is unconstitutional; and whether the constitutional rights of the appellant were violated. In the Judgment dated 23rd June 2022, the Judge observed that Regulation 139(4) that was heavily relied upon by the appellant was repealed by *Legal Notice No. 196 of 2015*; that the appellant was summoned before the 1st respondent's disciplinary committee on account of alleged immoral behaviour, which is a distinct process from the offence with which he was charged under the *Sexual Offences Act*; that the purpose of the this Regulation is to recognise the disciplinary panel of the 1st respondent as a quasi-judicial body determining allegations of professional misconduct on the part of the employee with the aim of ensuring high level of professionalism in the teaching profession; that the appellant failed to demonstrate how the stated Regulation offends the provisions of Article 50 and 159 of *the Constitution*, or any other provision of *the Constitution*; that an acquittal in criminal proceedings does not mean that there are no grounds for a disciplinary process; and that the reason for the acquittal may be relevant, but did not mean that the suspect was innocent.

12. The learned Judge went on to hold that courts will declare a statute or a certain provision as unconstitutional if it conflicts with *the Constitution*; that the petition in this case did not disclose a conflict of the referenced legislation with *the Constitution*; that the Regulation did not also violate any rights under *the Constitution*; and that the 1st respondent only fulfilled its mandate by ensuring adherence to professionalism in the teaching sector. The petition was accordingly dismissed.

13. Aggrieved by the outcome, the appellant filed this appeal in which he has raised 5 grounds of appeal which we have condensed into 3 as follows:

    a. That the learned Judge failed to appreciate that the appellant is not challenging the dismissal of his employment, but the constitutionality of Regulation 139(3) & (4) of the TSC Code 2015;

    b. That the learned Judge erred on both points of law and fact by failing to appreciate that Regulation 139(3) and (4) of the TSC Code 2015, is unconstitutional, discriminatory and takes away the supremacy of the judiciary; and

    c. That the learned Judge erred both in law and in fact by holding that the State cannot enact bad laws for its citizens.

14. We heard this appeal on 9th December 2024. Learned counsel Mr. Otara appeared for the appellant, learned counsel Mr. Sitima appeared for the 1st respondent while learned counsel Miss Lutta appeared for the 2nd and 3rd respondents.

15. Mr. Otara orally submitted that the appeal was in respect to the decision of the superior court in ELRC Claim No. 1 of 2021. Counsel told us that the gist of the appeal was premised on Section 6 of the *Civil Procedure Act* which, according to him, was misapplied by the superior court. However, towards the tail end of the proceedings, counsel clarified that he mistakenly argued a different appeal. He asked us to consider the grounds of appeal dated 18th October 2022 and the submissions dated 2nd November 2023. In that regard, we will disregard the extensive submissions made by him and any other counsel on the provisions of Section 6 of the *Civil Procedure Act* as it was a complete departure from the issues relating to the present appeal.

16. In his written submissions, the appellant submitted that Regulation 139(3) of the TSC Code, 2015 discriminates teachers from enjoying fruits of their successful judgement; that this was contrary to Article 27(1) and (2) of *the Constitution* which guarantees equality of every person; that Regulation 139(3) disregards judicial authority established under *the Constitution*; and that, for this reason, it should be declared unconstitutional.

17. The appellant termed it as mob justice where a person acquitted of a criminal offence can be punished by the public. He conceded that Regulation 139(4) of the TSC Code, 2015 had already been repealed.

18. Opposing the appeal and while relying on submissions dated 22nd September 2023, counsel submitted that the subject regulations were repealed prior to or post the filing of the appeal by Legal Notice Number 196 of 2015; that the main issue in contention is the fact that the 1st respondent commenced parallel administrative proceedings against the appellant which he stated was unconstitutional; that the proceedings of a professional body are designed to establish whether a professional man or woman has fallen below the standards expected of the profession; that quasi-judicial bodies like the 1st respondent are not bound by strict rules of procedure; that criminal justice process cannot determine the outcome of an administrative process; that, furthermore, the standard of proof in employment disciplinary processes was on a balance of probabilities and not beyond reasonable doubt as is the case in criminal proceedings; and that, in any event, professional misconduct does not necessarily connote or imply criminal liability.

19. The appellant referred to Part 4 of the Public Service Commission: Discipline Manual for the Public Service and Part D. 13 of the County Public Service Human Resource Manual (2013) both of which provide that criminal proceedings which lead to an acquittal do not prevent an officer from being punished on any other charge arising out of his conduct in the matter.

20. It was submitted that, in determining the constitutionality of the impugned Regulation, the Court should look at the purpose and outcome of implementing the Regulation as was held by this Court in Attorney General vs. Law Society of Kenya & Another [2017] eKLR; that the burden to prove the constitutionality of a statute lies with the person challenging it as was held by this Court in Haki Na Sheria Initiative vs. Inspector General of Police & 3 Others (2020) KECA 566 (KLR); and that the appellant merely alleged that the impugned Regulation is unconstitutional without demonstrating the manner in which the provision offends Articles 50 and 159 of *the Constitution* or any other Article.

21. On the assertion that the impugned regulation is discriminatory, while having regard to the definition of what constitutes discrimination under the Black's Law Dictionary and the International Labour Organization (Discrimination in Employment and Occupation) Convention, 1958 (No. 111), the 1st respondent submitted that discrimination can be said to have occurred where a person is treated differently from other persons who are in a similar position on the basis of one of the prohibited grounds or due to unfair practice, and without any objective and reasonable justification; and that, in the present case, the appellant had failed to demonstrate how the impugned Regulation was favourable to some teachers and not him.

22. The 2nd and the 3rd respondents, in their submissions dated 26th November 2024, contended that the dispute between the appellant and the 1st respondent was an employment issue; that the main question to be answered in this appeal is whether Regulation 139(3) and (4) of the TSC Code, 2015 was unconstitutional. Regard was had to the superior court's decision of John Harun Mwau vs. Peter Gastrow & 3 Others (2014) eKLR where it was held that *the Constitution* only ought to be invoked where there is no other recourse for disposing of an issue; and the Supreme Court decision of Communications Commission of Kenya & 5 others vs. Royal Media Services Limited & 5 others

(2015) KESC 13 (KLR) for the proposition that a court will decline to determine a constitutional issue where there is an alternative remedy available.

23. The 2nd and the 3rd respondents agreed with the findings of the superior court that the disciplinary process under Regulation 139 (3) is an administrative process which needs to be distinguished from court proceedings. It was contended that the 1st respondent, being a quasi-judicial body, is allowed to have its own process for disciplinary hearing separate from court proceedings as was held by this Court in Teachers Service Commission vs. Joseph Wambugu Nderitu [2016] eKLR; and that, for all intent and purposes, the appellant did not demonstrate how Regulation 139 (4) of the TSC Code, 2015 offends the provisions of Articles 50 and 159 of *the Constitution*. We were thus urged to dismiss the appeal with costs.

24. We have considered the record of appeal, the respective parties' submissions and the law. By dint of Rule 31(1) of this Court's Rules, 2022, we are required, as a first appellate court, to re-examine the evidence on record and draw our inferences of fact. We are also mindful that we can only depart from the findings by the trial Court if they were not based on the evidence on record, or where the said court is shown to have acted on wrong principles of law as held in Jabane vs. Olenja [1986] KLR 661, or if its discretion was exercised injudiciously as held in Mbogo & Another vs. Shah [1968] E.A.

25. We take to mind that this appeal is hinged on our determination as to whether Regulation 139(3) of the TSC Code, 2015 infringe Articles 50 and 159 of *the Constitution*.

26. The appellant's main grievance before the superior court was the constitutionality of Regulation 139(3) and (4) of the TSC Code, 2015. The petition was precipitated by the disciplinary proceedings which were commenced against him by the 1st respondent for the alleged offence of defilement. Vide criminal proceedings in the Chief Magistrate's Court at Malindi in Criminal Case No. 25 of 2017, the appellant was found not guilty of the offence of defilement and accordingly acquitted. Before the conclusion of the criminal proceedings, the 1st respondent commenced and concluded disciplinary proceedings against him which led to his interdiction and final dismissal vide a letter dated 1st November 2018.

27. We have taken the liberty to reproduce Regulation 139(3) and (4) of the TSC Code, 2015 as it was, as hereunder:

> 3. that the commission may take disciplinary action against a teacher who has pending criminal proceedings before a court of law or who has been acquitted by a court of law for an offense which the commission is handling.
>
> 4. the commission shall not be bound by the decision of a criminal case related to the teacher's disciplinary case.

28. The appellant conceded in his submissions that Regulation 139(4) was amended vide *Legal Notice No. 50/2015* Regulation 6. The amendment on the Legal Notice No. 50/105 states that Regulation 139 (4) was:

> Deleted by L.N No. 50/2015, r. 6.

29. It is clear therefore that Regulation 139(4) of the TSC Code, 2015 does not exist. It was deleted by dint of *Legal Notice No. 50/2015*, Regulation 6. The present Regulation 139 (3) and 4. reads:

> 3. that the commission may take disciplinary action against a teacher who has pending criminal proceedings before a court of law or who has been acquitted by a court of law for an offense which the commission is handling.

3. Deleted by L. N 50/2015, r. 6.

30. The petition having been filed in the year 2021 challenging the constitutionality of Regulation 139(4) was premised on a non-existent provision. Therefore, the appellant could not move the court to declare a provision that had been repealed as unconstitutional.

31. Turning to the argument that Regulation 139(3) offends Articles 50 and 159 of *the Constitution*, the appellant's argument is that it gives the 1st respondent an appellate function of review of decisions where a person has been acquitted of an offence. Article 50 makes provision for fair hearing while Article 159 provides on judicial authority.

32. The jurisprudence regarding presentation of constitutional petitions is well settled. A petitioner must plead with specificity the rights that have been violated. The rationale is to assist the trial court to crystallise the issues before it and give the other party the opportunity to know the exact nature of the complaint levelled against him in order to give an appropriate answer. The decisions in Anarita Karimi Njeru vs. Republic (1979) eKLR; and Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others (2013) KECA 445 (KLR) give authoritative exposition of this position.

33. In the Anarita Karimi Njeru case, it was held:

> " .....if a person is seeking redress from the High Court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."
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> Indeed, in Mumo Matemu vs. Trusted Society of Human Rights Alliance [2013] eKLR, the Court of Appeal pointed out that:
>
> > "...precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.""

34. The particulars of the breach of Article 50 of *the Constitution* which the appellant alleges was breached is that the 1st respondent acted as the complainant, the prosecutor and the judge in the disciplinary proceedings; and that there was no guarantee of fair hearing since the chairman of the 1st respondent's disciplinary committee is also one of the decision makers at the appellate level.

35. The interdiction letter dated 10th August 2017 gave the appellant an opportunity to be heard before the 1st respondent, and he was to present any evidence in support of his defence. On 10th September 2018, he was invited and given a one month's notice for a hearing which was to take place on 16th October 2018. There is also evidence that he appeared before the committee and made his presentation. We therefore do not find merit in his contention that he was denied a fair hearing.

36. On the contention that there was breach of Article 159 of *the Constitution*, we are unable to find the particularities of judicial authority the 1st respondent was stated to have usurped. Therefore, nothing turns on this submission for our determination.

37. Regulation 139(3) of the TSC Code, 2015, allows the 1st respondent to take parallel disciplinary action against a teacher who has a criminal case, or even if they have been acquitted of the offence which the commission is investigating. This is an inescapable duty which lies with the 1st respondent under the Regulation. It follows that there was nothing inhibiting the 1st respondent, being an employer of the appellant, from inquiring into the impropriety of the professional conduct after the rape accusation was fronted.

38. We take to mind what the learned Judge had to say in this regard:

> " The disciplinary process under the said regulation being an administrative process needs to be distinguished from court proceedings...as has been rightly pointed out on the purpose of the said Regulations by the 1st respondent, it is to recognize the disciplinary panel of the 1st respondent as a quasi-judicial body determining allegations of professional misconduct on the part of the employee with the aim of ensuring high level of professionals in the teaching profession. I have had the benefit of seriously analyzing the entire petition and I am of the finding that the petition has failed to demonstrate to this court how the stated Regulations by the 1st respondent offends the provisions of Articles 50 and 159 of *the Constitution* or any other provision of *the Constitution*."

39. In the case of Teachers Service Commission vs. Joseph Wambugu Nderitu [2016] eKLR, this Court stated:

> " In the Judicial Service Commission case (supra) the following observations made by Okwengu JA.:
>
> '(61) the disciplinary process undertaken by the appellant was a quasi-judicial process as it involved the appellant in an adjudicatory function that required the appellant to ascertain facts and make a decision determining the respondent's legal rights in accordance with *the Constitution* and the *Judicial Service Act*, both of which provided for fair hearing. The disciplinary proceedings were anchored on a contractual relationship and the appellant was not empowered to provide penal sanctions. Notwithstanding the seriousness of the allegations made against the respondent, the disciplinary proceedings could not be treated like criminal proceedings, as the nature of the sanctions that could be applied in a criminal trial. Thus, the learned judge misdirected himself, in holding that the disciplinary proceedings were quasi-criminal. The *Criminal Procedure Code* which is an Act providing for the procedure in criminal cases had absolutely no application in the disciplinary proceedings, and the learned judge erred in applying the provisions of the *Criminal Procedure Code*.'
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> In Kibe vs. Attorney General Civil Appeal No. 164 of 2000 approved by Waki, JA. in the Hon. Attorney General & Another case (supra), this Court was categorical that:
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> > "an acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer for the reason that a criminal trial and an internal disciplinary proceeding initiated by an employer against an employee are two distinct processes with different procedures and standard of proof requirements. While an employer may rely on the outcome of a criminal

trial against an employee to make its decision on that employee going against the outcome does not by itself render the employer's decision wrongful or unfair.""

40. The High Court in Republic vs. Public Service Commission of Kenya Ex parte James Nene Gachoka, Nairobi Misc. Application 516 of 2005 [2013] eKLR stated that:

> " 14. The phrase 'tried for that offence or for any' repealed Constitution necessarily mean that the proceedings must be before a court or a judicial tribunal and not mere administrative or civil proceedings. Disciplinary proceedings cannot be equated to a 'trial for an offence' so as to attract the defence of double jeopardy doctrine. As such, disciplinary action, professional or otherwise, being of a civil nature, is not a punishment given by a court. The Supreme Court of the United Kingdom in case of R (on the application of Coke - Wallis) v Institute of Chartered Accountants of England & Wales [2011] UKSC 1 noted that principles of autrefois acquit did not apply to disciplinary matters, which were civil not criminal proceedings. Lord Collins noted that,
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> "[60] .... The primary purpose of professional disciplinary proceedings is not to punish, but to protect the public, to maintain public confidence in the integrity of the profession and to uphold proper standards of behaviour.""

41. Ultimately, we find and hold, just as did the learned Judge, that the appellant did not demonstrate how Regulation 139(3) of the TSC Code, 2015 is an affront to Articles 50 and 159 of *the Constitution*. As observed above, he was given an opportunity to present and defend himself before the 1st respondent.

42. In the end, we find that this appeal is unmeritorious and is hereby dismissed. We hereby uphold the Judgment of the High Court at Malindi (Githinji, J.) dated 23rd June 2021. The appellant shall bear the respondent's costs of the appeal.

DATED AND DELIVERED AT MOMBASA THIS 23RD DAY OF MAY, 2025.

F. TUIYOTT

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JUDGE OF APPEAL

DR. K. I. LAIBUTA CArb, FCIArb.

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JUDGE OF APPEAL

F. W. NGENYE-MACHARIA

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JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR