



**Teachers Service Commission v Kahiro (Civil Appeal 1 of 2019)
[2024] KECA 1705 (KLR) (22 November 2024) (Judgment)**

Neutral citation: [2024] KECA 1705 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 1 OF 2019
W KARANJA, J MOHAMMED & AO MUCHELULE, JJA
NOVEMBER 22, 2024**

BETWEEN

TEACHERS SERVICE COMMISSION APPELLANT

AND

SAMUEL KIBUTHI KAHIRO RESPONDENT

(Being an appeal from the Judgment of the Employment & Labour Relations Court of Kenya at Nyeri (Nzioka Wa Makau, J.) dated 3rd May, 2018 in ELRC Cause No. 188 of 2017)

JUDGMENT

1. The suit before the trial court, from which this appeal arises, was commenced by way of memorandum of claim dated 15th May 2017 by Samuel Kibuthi Kahiro, the respondent herein. According to the claim, the respondent was employed by the appellant as a teacher from 14th November 1995.
2. By the statement of claim the respondent sought to obtain relief for the arbitrary and unfair/illegal transfer from Njeng'u Secondary School to St. Monica Gitegi Secondary School. He averred in the claim that he was a diligent and committed employee of the appellant and had held many responsibilities in various schools such as serving in academic committees, house master, games master, class teacher, union official and Mwalimu Sacco official, to name but a few. He averred that in February 2013, he was transferred from Kagumo High School to Magogoni Secondary School, but he appealed against the decision to transfer him there. His request was allowed and he was transferred to Njeng'u Secondary School, which was closer to his
3. He averred that after he reported and started working diligently at his new station, the Nyeri TSC County Director, through one Richard Jomo, purportedly transferred him from Njeng'u Secondary School to St. Monica Gitegi Secondary School and despite protestation against the transfer, the appellant failed to revoke the said transfer. The respondent averred that the school was more than 50km from his place of residence and there was no proper means of transport to the school forcing



him to use private means at the cost of Kshs. 3,000 daily. He averred that he was occasionally unable to commute causing the Board of Management to threaten to take disciplinary action against him. He sought declarations that the transfer was for all intents and purposes unprocedural, illegal, null and void. He sought to continue in the appellant's service at Njeng'u Secondary School. He also sought damages for the unprocedural and illegal transfer as well as costs and interest.

4. On the part of the appellant, a memorandum of defence was filed and in it averred that the operations of the appellant are governed by the *Teachers Service Commission Act*, the Code of Regulation for Teachers, the Code of Conduct and Ethics for Teachers, 2005 as well as other administrative policy guidelines issued from time to time by the respondent and authorised agents.

The appellant averred that it is conferred with broad duties which include the review of the demand and supply of teachers across the country in order to guarantee appropriate balance in the teacher staffing levels in the country. The appellant averred that the respondent was redeployed to another school where he was qualified to teach and where there was sufficient workload. The appellant averred that it is granted the discretion to transfer teachers in its service as circumstances demand even where a teacher has not applied for transfer. The appellant thus sought the dismissal of the suit with costs.

5. Upon considering the evidence before him, the learned trial Judge found, inter alia, that the main question was whether the County Director had the authority to transfer a teacher. The learned Judge (Nzioka Wa Makau, J.) made the following findings: that the claimant was happy with his current posting, but the transfer letter, signed by the Deputy County Director, was under scrutiny; the Teachers Service Commission (TSC) is established under the Kenyan Constitution as an independent body; transfers and other policy issues generally come from the TSC Commissioners. However, the TSC can act through its officers at the local level, as allowed by the *Teachers Service Commission Act* and the Code of Regulation for Teachers.

6. The learned Judge went on to hold that under section 14 of the *Teachers Service Commission Act*, the TSC has the power to create units and appoint staff to manage functions such as teacher transfers. The authority to transfer teachers lies with the TSC and must be clearly reflected in transfer documents. In this case, the court found the contested transfer letter did not clearly state it was issued by the TSC, thus making it improper. The learned Judge concluded that the transfer was irregular, even if there was authority for the county director to communicate it.

7. The learned Judge, however, observed that since the transfer issue was overtaken by events, no further orders would issue except on costs. The learned Judge found the claimant successfully showed that the transfer was not in accordance with TSC regulations and was, therefore, allowed to recover minimal costs, which were not quantified.

8. The appellant was aggrieved and filed this appeal raising fifteen grounds of appeal. In its submissions, the appellant summarized its case into the following seven grounds: that the learned Judge erred in law and fact:

- i. When he exercised judicial authority in a manner that contravened Article 237 of *the Constitution* and Section 11 of the *Teachers Service Commission Act*, 2012;
- ii. When he inappropriately applied the legal principle of delegation of duty to find that the function of and capacity of the appellant's officers to carry out teacher transfer had not been properly and/or sufficiently delegated;
- iii. By failing to appreciate that the power and authority to transfer teachers in its employment provided under *the Constitution* and the law is exercised through the staff of the commission;



- iv. By failing to appreciate that the appellant has unfettered constitutional and statutory obligation to undertake teacher management roles which included teacher transfer;
 - v. When he usurped and/or attempted to limit the policy and executive authority of the appellant in undertaking teacher management functions as per law provided and by ignoring all the material on record, law and other documentary evidence tendered before the court by the appellants hence arriving at erroneous and unsubstantiated conclusions.
9. The appellant filed very comprehensive submissions which were highlighted at the plenary hearing by learned Counsel, Mr. Allan Sitima who appeared for the appellant. There was no submission by the respondent in response to the appeal nor, did the respondent appear for hearing.
 10. We have considered these submissions along with the oral highlights made by learned counsel. We do not deem it necessary to paraphrase them for purposes of this judgment. The emphasis on the appellant's submission was that the transfer in question was in order. It was regular, lawful and it accorded with Article 237(2) of *the Constitution* and the *Teachers Service Commission Act* and the regulations made thereunder.
 11. It is worth noting that the impugned transfer letter was subsequently recanted and the respondent returned to work and as noted by the learned Judge, other than for the question whether the impugned letter was properly issued, the other issues had been overtaken by events as at the time the trial court rendered its judgment. That may explain the respondent's disinterest in this appeal.
 12. We have considered the issues raised in this appeal. This being the first appeal, this Court's mandate as re-affirmed in *Abok James Odera t/a A. J. Odera & Associates -vs- John Patrick Machira t/a Machira & Co Advocates [2013] eKLR* is:

“...to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.”
 13. In our view, the only issue that is left for our determination is whether the learned Judge erred in finding that the letter of transfer was irregular or wrong for being signed by the Deputy County Director. We do not, therefore, need to re-analyse and re-evaluate the facts as presented before the trial court.
 14. The appellant is a constitutional commission established under Article 237(1) of *the Constitution* of Kenya. Its mandate is expounded under the *Teachers Service Commission Act* and the Code of Regulations for Teachers (2015). Its primary functions are set out under Article 237(2) as follows –
 1. There is established the Teachers Service Commission
 2. The functions of the Commission are—
 - a. to register trained teachers;
 - b. to recruit and employ registered teachers;
 - c. to assign teachers employed by the Commission for service in any public school or institution;
 - d. to promote and transfer teachers;
 - e. to exercise disciplinary control over teachers; and



f. to terminate the employment of teachers.”

15. In exercising this constitutional mandate, the commission is pursuant to Article 249 of *the Constitution* not subject to direction and/or control by any person or authority. Administratively, and in compliance with Article 6 of *the Constitution*, the Commission may either act directly or effect such transfer and/or deployment at the instance of or through its officers at the County levels.
16. In addition to the above constitutional provisions, the Commission has statutory mandate under the *Teachers Service Commission Act* to transfer and/or deploy any teacher in its service to any educational institution where it deems the teacher qualified to teach and where his/her services are required. It was pursuant to this mandate that the respondent was transferred. The question that begs an answer is whether the courts can lawfully interfere with the above mandate, particularly where the transfer process was within the provisions we have cited above.
17. As has been stated often times, employers enjoy managerial prerogative to manage human resource issues within their organizations in the manner that they deem fit. They are at liberty to make decisions that they deem necessary for the general wellbeing of the enterprise as held in the persuasive ELRC case of Anne Wairimu Kimani -vs- Kenya Agricultural Livestock Research Organisation (KALRO) [2017]eKLR. This power entitles the employer to hire, transfer, re-designate, deploy and discipline staff as appropriate.
18. The general position in law is that courts should exercise utmost restraint in interfering with the exercise of this power. To do otherwise is tantamount to the court taking over the position of the employer at the workplace as held in the persuasive ELRC case of Rebecca Ann Maina & 2 others -vs- Jomo Kenyatta University of Agriculture and Technology [2014] eKLR.
19. This Court in *Teachers Service Commission -vs- Thomas Joseph O. Onyango* [2019] eKLR when dealing with a matter concerning the transfer of a teacher, expressed itself as follows:

“the court cannot usurp the appellant’s mandate to determine the school the appellant should be transferred to and for how long.”
20. Further in *Pevans East Africa Limited & Another - vs- Chairman Betting Control & Licencing Board & 7 Others* [2018] eKLR this Court held that:-

“Where *the Constitution* had reposed specific functions in an institution or organs of State, the Courts must give those institutions or organs sufficient leeway to discharge their mandates and only accept an invitation to intervene when those bodies are demonstrably shown to have acted in contravention of *the Constitution*.”
21. From the above we hold that the appellant in transferring the respondent was exercising its prerogative/ discretion as an employer in the management of its employees. Prior to effecting the transfer, the appellant must have considered numerous factors including the staffing situation in various stations, the constitutional imperative to equitably distribute teachers in public schools across the country, the best interest of learners and their right to access quality education through provision of quality teaching and the claimant’s teaching subjects, competencies and length of stay at their previous stations. We note, however, that the transfer letter was recalled, and the question whether the transfer was fair or not is a moot one.
22. The only other germane issue that calls for our determination is whether the Deputy Director’s action was sanctioned by law. Administratively, and in compliance with Article 6 of *the Constitution*, the



Commission may either act directly or effect such transfer and/or deployment at the instance of/or through its officers at the County levels. More specifically, we note that section 12 of the Teachers Service Commission Code of Regulations for Teachers 2015, provides as follows:

“ 12.

- (i) A county director shall -
 - a. facilitate the processing of teacher registration and enforcement of the requirements for teacher registration;
 - b. coordinate teacher recruitment at the county and ensure that the Commission's recruitment guidelines in force are adhered to;
 - c. maintain a data base of registered teachers including the unemployed teachers within the county;
 - d. manage aspects of teacher management as per the existing policy and guidelines within the county through recruitment;
 - (ii) transfers;
 - (iii) posting;
 - iv. receiving and recommending teachers' study leave;
 - v. handling disciplinary matters as directed by the Secretary; and
 - vi. identifying through a competitive process and ... (Emphasis ours).

23. We find that the Deputy County Director, Nyeri County who wrote the transfer letter had the mandate to issue and sign the impugned letter on behalf of the appellant as stipulated in the regulations we referred to earlier.

24. From the foregoing it is clear that the Deputy County Director has the delegated authority and mandate of the appellant to carry out the duties assigned to the appellant by the Constitution and the Teachers Service Commission Act and regulations made thereunder. We accordingly allow the appeal and set aside the judgment and orders of the Employment and Labour Relations Court dated 3rd May, 2018 in Nyeri ELRC Cause No. 188 of 2017. As the appeal was not defended, we order that each party bears its own costs of this appeal.

DATED AND DELIVERED AT NYERI THIS 22ND DAY OF NOVEMBER 2024

W. KARANJA

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JUDGE OF APPEAL

JAMILA MOHAMMED



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JUDGE OF APPEAL

A.O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

