



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Kabatha v Teachers Service Commission (TSC) & 2 others (Constitutional  
Petition E195 of 2024) [2025] KEELRC 708 (KLR) (7 March 2025) (Judgment)**

Neutral citation: [2025] KEELRC 708 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CONSTITUTIONAL PETITION E195 OF 2024**

**B ONGAYA, J**

**MARCH 7, 2025**

**IN THE MATTER OF A CONSTITUTIONAL PETITION  
BROUGHT PURSUANT TO ARTICLES 22, 23, 165(3) (B) AND  
258 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA**

**AND**

**IN THE MATTER OF THE ENFORCEMENT OF THE SUPREMACY OF  
THE CONSTITUTION AS PER ARTICLE 2(1&4) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE BREACH OF THE NATIONAL VALUES AND PRINCIPLES  
OF GOVERNANCE IN REGARDS TO ARTICLE 10 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE ENFORCEMENT OF THE  
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER  
ARTICLE 27 OF THE CONSTITUTION REGARDING THE RIGHT  
TO EQUALITY AND FREEDOM FROM DISCRIMINATION**

**AND**

**IN THE MATTER OF THE INFRINGMENT OF THE  
FUNDAMENTAL RIGHT TO BE PRESUMED INNOCENT  
UNTIL THE CONTRARY IS PROVED AS PROVIDED  
FOR UNDER ARTICLES 50(2)(A) OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE ENFORCEMENT OF THE  
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER  
ARTICLE 41(1) REGARDING THE RIGHT TO FAIR LABOUR PRACTICES**

**AND**



**IN THE MATTER OF THE INFRINGEMENT OF THE  
FUNDAMENTAL RIGHT TO FAIR ADMINISTRATIVE  
ACTION AS PROVIDED FOR UNDER ARTICLE 47 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE PROTECTION OF PUBLIC OFFICERS  
AS ALLOWED UNDER ARTICLES 236 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF INSTITUTION OF A PETITION AND JUDICIAL  
REVIEW PROCEEDINGS UNDER RULE 10 OF THE EMPLOYMENT  
AND LABOUR RELATIONS COURT (PROCEDURE) RULES, 2024**

**BETWEEN**

**SIMON MASHIGO KABATHA ..... PETITIONER**

**AND**

**THE TEACHERS SERVICE COMMISSION (TSC) ..... 1<sup>ST</sup> RESPONDENT**

**THE PRINCIPAL ST. GERMAINE GATANGA GIRLS HIGH  
SCHOOL ..... 2<sup>ND</sup> RESPONDENT**

**THE TSC COUNTY DIRECTOR MURANGA COUNTY ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner filed the Petition dated 28.11.2024. The petitioner prayed for:
  - a. A declaration that the petitioner's right to be presumed innocent until otherwise proven before a court of law under Articles 50(2)(a) of *the Constitution*, the right to fair labour practices as provided for under article 41 of *the Constitution*, and the right to fair administrative action as provided for under Article 47 of *the Constitution* have been infringed upon by the acts or omissions of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents.
  - b. A declaration that the decision to interdict, dismiss and deregister the petitioner was illegal, null and void ab initio and the same be set aside.
  - c. An order of certiorari be and is hereby issued quashing the letters dated 19.06.2023 and 25.10.2023 respectively by the 1<sup>st</sup> and 2<sup>nd</sup> respondents referenced TSC/702276/24, TSC/702276/18 and TSC/702276/19 purporting to interdict, dismiss and deregister the petitioner for being illegal, null and void ab initio.
  - d. An order of mandamus be and is hereby issued compelling the 1<sup>st</sup> respondent to reinstate the petitioner's name back to the register of teachers.
  - e. An order of mandamus be and is hereby issued compelling the 1<sup>st</sup> respondent to reinstate the petitioner back to work and be paid all his salary from the date of interdiction and all other benefits accruing to him as if he was working.



- f. A declaration that “section 140(a) and section 14(a) of the code of regulations for teachers, 2015 under the teachers service commission act no 20 of 2012 is unconstitutional in so far as it empowers the teachers service commission to try teachers in a disciplinary process with respect to acts or omissions over which the teachers may be acquitted or convicted by a court in criminal proceedings as the section is inconsistent with article 50 (2) of the Constitution and the section is unconstitutional, null and void to the extent of that inconsistency”.
  - g. A declaration that the petitioner is deserving of damages to be assessed by this Honourable Court.
  - h. Costs and interest.
2. The petition was based upon the petitioner’s supporting affidavit and exhibits thereto filed together with the petition and the further affidavit of Francis M Thiongo, a registered clinical officer at Kirwara Sub-county Hospital, sworn on 13.01.2025. The petitioner’s case is as follows:
- a. That he was an employee of the 1<sup>st</sup> respondent and was assigned number TSC/NO: 702276 with his last posting being St Germaine Gatanga Girls High school and his designation being secondary teacher 1.
  - b. He received a notice to show cause letter dated 25.05.2023 referenced GGHS/TSC/702276/21 to answer to allegations of immoral behaviour which was in breach of clause a(iv) and (i) of the third schedule of the TSC Act.
  - c. That the particulars of the said immoral behaviour were;
    - i. That on unspecified dates during April holidays, 2023 the petitioner flirted with WM Form 4E ADM No. 8270 Age 17 years by sending her love messages through Instagram saying “I love you so much remember that always”.
    - ii. That on 5.04.2023 at around 6:45 pm the petitioner kissed WM on the lips, caressed her body, laid her on the table and attempted to have sex with her in his office.
    - iii. That on 09.04.2023 around 4 pm, the petitioner engaged in sexual intercourse with the said student in his office.
  - d. The petitioner responded to the notice to show cause through his letter dated 31.05.2023.
  - e. On 06.06.2023 the petitioner received a letter reference GGHS/TSC/702276/23 inviting him to appear before the board of management on 16.06.2023 at 10.00am to answer to the allegations of immoral behaviour.
  - f. On 14.06.2023 the complainant through her father, AM, wrote to the school BOM through the 2<sup>nd</sup> respondent, informing them of their decision to have the complaint against the petitioner withdrawn having established from their daughter WM and through their independent investigations that the allegations were false and unfounded.
  - g. The petitioner appeared before the school BOM for a hearing but was surprised to be subjected to intensive grilling without having been accorded an opportunity to examine the documents or evidence containing the allegations and or charges levelled against him. He informed the BOM that the allegations of immoral behaviour were unsubstantiated and that thorough investigations should be conducted to establish the truth.



- h. That without further investigations into the matter, the BOM unanimously found the petitioner guilty of immoral behaviour and resolved to interdict him forthwith and disregarded the letter by the complainant's father, withdrawing the complaint.
- i. The BOM placed reliance on the statements by the learner, WM despite the fact that the learner had earlier recanted and disowned the said statement since the same was obtained through coercion and undue influence.
- j. On 19.06.2023 the petitioner received a letter dated 19.06.2023 from the 2<sup>nd</sup> respondent reference TSC/702276/24 informing him that he was found to be in breach of clause a(iv) and (i) of the third schedule of the tsc act and to that effect, the petitioner stood interdicted over allegations of immoral behaviour.
- k. It is the petitioner's case that the interdiction was done despite the accusations being unsubstantiated and based on a pseudo account which was never investigated to ascertain the truth and neither did the BOM consider looking at the CCTV available in the school.
- l. On 06.07.2023 after his interdiction, the petitioner wrote a letter to the 3<sup>rd</sup> respondent requesting for evidence to allow him prepare his defence, in reply the 3<sup>rd</sup> respondent replied to his request with a letter dated 10.07.2023 and informed him that the case was still under investigations.
- m. The petitioner went through emotional, psychological and physical trauma for losing his job and the stress of taking care of his young family and his health deteriorated, leading to him being in and out of hospital.
- n. While receiving medical care, the petitioner received from the 1<sup>st</sup> respondent a letter dated 21.07.2023 inviting him for a disciplinary hearing on 23.08.2023 in their Nairobi offices.
- o. By a letter dated 22.08.2023 the petitioner sought an adjournment owing to his health status and annexed his medical documents.
- p. The 1<sup>st</sup> respondent did not reply to the letter, but instead invited the petitioner to disciplinary hearing on 15.09.2023 at their Nairobi offices.
- q. Due to his health condition, the petitioner had travelled to his rural home at Kakamega and on receipt of the letter, wrote back to the 1<sup>st</sup> respondent vide his letter dated 14.10.2023 sent via courier services, informing them of his health status and sought for another adjournment on medical grounds.
- r. The 1<sup>st</sup> respondent went ahead with the hearing as scheduled, the petitioner's absence notwithstanding. It then reached a verdict of guilty and proceeded to terminate and deregister him vide letters dated 25.10.2023 reference TSC/702276/18 and TSC/702276/19 respectively.
- s. The petitioner appealed against the decision of the 1<sup>st</sup> respondent and through its letter dated 12.03.2024, invited the petitioner for a review of his case and scheduled the same for 17.04.2024.
- t. It is the petitioner's case that he was not informed of his right to legal representation which was a fundamental breach of his constitutional right.



- u. In the aforesaid letter, the petitioner was supplied with documents and other evidential material used by the 2<sup>nd</sup> and 3<sup>rd</sup> respondent to interdict him and it was at this juncture that the petitioner was interacting with the same.
  - v. The petitioner prepared his defence and attended the review session. It is the petitioner's case that at the review session he was not given a chance to present his case and after cruel treatment and grilling, he was asked to go and wait for the outcome of the said review.
  - w. Thereafter, the petitioner received a letter dated 24.04.2024 wherein the 1<sup>st</sup> respondent informed him of its decision to dismiss him and have his name deregistered from the register of teachers.
  - x. It is the petitioner's case that he was entitled by right to a fair hearing and to be presumed innocent until the contrary was proven under article 50 of *the constitution*.
  - y. The petitioner states that the decision to interdict, dismiss and degazette him as a teacher by the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents without being accorded a hearing and based on unsubstantiated allegations, flew in the face of and violated his right to be presumed innocent until the contrary is proven under article 50(2)(a) of *the constitution* and the right to fair administrative action under article 47 of *the constitution*.
3. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed the replying affidavit of Evaleen Mitei sworn on 23.12.2024, the Director in charge of teacher discipline management at the 1<sup>st</sup> respondent, through Allan Sitima Advocate. It was stated and urged as follows:
- a. The respondent employed the petitioner as a graduate teacher in November, 2016 on permanent and pensionable terms and that the employer/employee relationship that ensued was directed by inter alia, the *Teachers Service Commission Act*, the *Employment Act* and the Code of Regulations for Teachers.
  - b. On 10.06.2023 the 2<sup>nd</sup> respondent received a report from one Ann Naitore Kiogora, a guardian to a learner WM Adm no. 8270, that the petitioner had sexually harassed the learner, who was a student in form 4 at Germaine Gatanga Girls in thika.
  - c. Ann Naitore Kiogora indicated that she had received or seen messages pointing to intimate communication between the petitioner and the student.
  - d. The 2<sup>nd</sup> respondent caused a preliminary inquiry into the matter by a team that evaluated the facts from an initial perspective. The matter was escalated to the Board of Management of the school as stipulated by the CORT. In addition it was also proposed that the 2<sup>nd</sup> respondent to:
    - i. Write to the petitioner a show cause letter and allow him to respond.
    - ii. Convene a full board meeting to deliberate the matter.
    - iii. Invite the petitioner before the full board when the matter will be deliberated.
  - e. On 16.06.2023 the board convened a special meeting to formally investigate and ascertain the veracity of the allegations against the petitioner.
  - f. Upon deliberating the matter as guided by the Cort, the board resolved to interdict the petitioner thus commencing the disciplinary process prescribed by the Cort.
  - g. It is the respondent's case that before deciding to interdict the petitioner, the Board undertook an in-depth evaluation of the circumstances of the case, the oral and documentary evidence,



including the relevant statements, and determined that there were indeed grounds pointing to a violation of the CORT by the petitioner, hence the decision to interdict him.

- h. The petitioner was interdicted vide the letter dated 19.06.2023. The reasons for his interdiction were that he was of immoral behaviour in that while a teacher at St Germaine Gatanga Girls Secondary school, he;
  - i. Flirted with a student Maryann Wangui Muhindi Form 4E adm No. 8270 Age 17 years.
  - ii. On unspecified dates during the april holidays of 2023 he sent her love messages using a pseudo Instagram account saying “ I love you so much remember that always..”
  - iii. On 5.04.2023 at around 6.45pm he kissed her on the lips, caressed her body, laid her on the table and attempted to have sex with her in the office situated inside the computer lab.
  - iv. On 09.04.2023 around 4pm, he had sexual intercourse with her (Maryann Wangui Muhindi) in the office.
- i. In response to the interdiction, the petitioner wrote a formal rebuttal dated 07.07.2023 denying the allegations.
- j. Following the interdiction, the 1<sup>st</sup> respondent convened the disciplinary committee on 23.08.2023 to hear the petitioner’s discipline case. The petitioner was summoned to attend this hearing vide a letter dated 21.07.2023.
- k. The meeting could not proceed as the petitioner vide a letter dated 22.08.2023 requested an adjournment of proceedings for the reason that he was unwell. The matter was rescheduled for a hearing on 23.08.2023.
- l. Vide a letter dated 15.09.2023 the petitioner was again summoned to participate in the disciplinary panel hearing scheduled for 17.10.2023 at the 1<sup>st</sup> respondent’s headquarters office in Nairobi.
- m. The petitioner failed to appear despite the summons. Efforts to reach him on phone on the material day were unfruitful. In the circumstances, the disciplinary panel progressed to hear the matter and the testimony of the witnesses summoned.
- n. At the hearing, the panel evaluated the circumstances of the case, perused the related investigation report and witness statements, applied the relevant law and regulations on teacher discipline and arrived at a finding that the petitioner had contravened the CORT and hence his dismissal from employment and the removal of his name from the register of teachers.
- o. The respondent states that the allegations by the petitioner that he could not attend the hearings of his case on account of illness were fully probed by the 1<sup>st</sup> respondent and its field staff and found to be false and a forgery.
- p. Consequently, the 1<sup>st</sup> respondent reached the considered decision to dismiss the petitioner from employment and to further remove his name from the teachers register.
- q. The respondents maintain that the termination of the petitioner’s employment and the removal of his name from the register of teachers were lawful and procedural.



- r. Vide a letter dated 02.01.2024 the petitioner formally requested a review of the decision of the 1<sup>st</sup> respondent to dismiss and remove him from the register of teachers. He simultaneously requested documents which were subsequently provided to him.
- s. The petitioner's request for review was heard by the review committee on 17.04.2024 and the decision to dismiss and remove him from the register was upheld.
- t. The respondents argued that at no time did they or their representatives deny the petitioner the opportunity to participate in the discipline process that affected his status as a teacher and that all requirements of a fair hearing were observed within the limits provided in law. More so in typical employer-employee relations. Specifically;
  - i. The petitioner was served with the interdiction letter dated 19.06.2023 specifying the grounds for his interdiction and the explicit charges against him.
  - ii. The petitioner was informed of his right to defend himself and he responded to the said allegation in writing.
  - iii. The 1<sup>st</sup> respondent's disciplinary panel and subsequently the review committee considered the petitioner's defence statement before the determination of the matters.
  - iv. The petitioner was invited to attend the hearing of his matter at all levels, but failed to do so at the disciplinary panel hearing stage, instead he forged medical documents giving the false impression that he was incapacitated.
  - v. The petitioner had the opportunity to present his case and witnesses before an impartial discipline panel and the opportunity to examine/cross examine the witnesses, including the victim of his gross misconduct but failed to take advantage of them.
  - vi. The decision of the 1<sup>st</sup> respondent was communicated to the petitioner timeously and the reasons for his dismissal were given in writing.
  - vii. He filed a review which was duly considered by the 1<sup>st</sup> respondent discipline panel.
- u. The respondent maintains that the prayers articulated by the petitioner in the petition are unreasonable, unlawful and offend the provisions of the constitution, the employment act and the TSC Act.
- v. That they will only serve the narrow interests of the petitioner, create a bad precedent, and provoke a trend of learners being exposed to sexual abuse without redress.
- w. That the prayers are against public policy and interest in that the petitioner cannot be immune to disciplinary action when serious allegations touching on his integrity and professional standing have been raised.
- x. Seeking to be paid all his salary from the date of interdiction and all other benefits accruing to him is untenable and unjustifiable because at the material time the hitherto employer/employee relationship between the petitioner and the 1<sup>st</sup> respondent was terminated under the dictates of the law and further, he has not offered services to the respondents.
- y. Granting the prayers will amount to paying the petitioner for a service not rendered to the 1<sup>st</sup> respondent.
- z. Reinstatement and specific performance cannot and should not be issued in the circumstances of this case as the relationship of trust hitherto existing between the respondent and the



petitioner entirely and irreparably collapsed following the illegal act on the part of the petitioner to sexually abuse a learner who was under his care.

4. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
5. The Court returns that the petition must fail because of the following reasons:
  - a. The petitioner has failed to give a valid reason why he failed to attend the disciplinary hearing despite the several opportunities that were accorded. The respondent had written communication that the petitioner had not been attended to by the hospital as he had alleged. The Court finds that in absence of any other material, the respondent was entitled to find the petitioner culpable as was found.
  - b. In view that on a balance of probability the reasons for termination were valid and fair per sections 43 and 45 of the *Employment Act*, 2007 and the petitioner was accorded a chance to exculpate but by his own unjustified failure to attend the disciplinary hearings, the dismissal is found to have been fair in substance and procedure.
  - c. It appears to the Court that the petitioner knowing he had failed to take up the chance to exculpate, he feigned his claim by way of the instant petition to urge constitutional violations which he has failed to establish.
  - d. As urged for the respondent none of the reliefs have been established and justified. No constitutional violations have been shown. The petition will be dismissed with costs.

In conclusion the petition is hereby dismissed with costs.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS  
FRIDAY 7<sup>TH</sup> MARCH, 2025**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

