



REPUBLIC OF KENYA



KENYA LAW
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**Obita v Teacher Service Commission & another (Petition
E004 of 2025) [2025] KEELRC 1784 (KLR) (17 June 2025) (Judgment)**

Neutral citation: [2025] KEELRC 1784 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E004 OF 2025
NZIOKI WA MAKAU, J
JUNE 17, 2025**

**IN THE MATTER OF: ARTICLES 10, 19, 20 21(1), 22(1), 23(1),
27, 28, 35, 41, 47, 50(1) 258 AND 259 OF THE CONSTITUTION**

AND

**IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLES 27, 28, 35, 41 & 47 OF THE
CONSTITUTION**

AND

**IN THE MATTER OF RULE 4(1), 10, 11 AND 13 OF CONSTITUTION
OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS) PRACTICE AND PROCEDURE RULES 2013**

AND

**IN THE MATTER OF RULE 7(1) OF THE EMPLOYMENT AND
LABOUR RELATIONS COURT (PROCEDURE) RULES 2016**

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015

AND

IN THE MATTER OF CONTRAVENTION OF SECTION 5 OF THE EMPLOYMENT ACT

AND

**IN THE MATTER OF THE TEACHERS SERVICE COMMISSION
CAREER PROGRESSION GUIDELINES FOR TEACHERS 2018**

BETWEEN

FRED APIMA OBITA PETITIONER



AND

TEACHER SERVICE COMMISSION 1ST RESPONDENT
KISII TSC COUNTY DIRECTOR 2ND RESPONDENT

JUDGMENT

1. Through a Petition dated 4th February 2025, the Petitioner seeks judgment against the Respondents on various constitutional and statutory grounds arising from his alleged exclusion from consideration for promotion to the position of Senior Master IV, T-Scale 9. The Petitioner prays for the following reliefs:
 - a. A declaration that the Respondent's failure and/or refusal to shortlist the Petitioner under Advert No. 19/2024(C3-C4) and to invite him for the interview was discriminatory and an affront to his dignity, contrary to Articles 27 and 28 of *the Constitution*;
 - b. A declaration that the shortlisting stage is a critical and integral component of the interview process;
 - c. A declaration that the Petitioner met the minimum requirements for the position of Senior Master IV, T-Scale 9, and was entitled to be shortlisted and interviewed accordingly;
 - d. A declaration that the Respondents' failure to comply with the Teachers Service Commission Career Progression Guidelines for Teachers (CPG), 2018, in the shortlisting and interview process constituted unfair labour practices in breach of Article 41 of *the Constitution*;
 - e. A declaration that the 1st Respondent's failure to provide written reasons for not shortlisting the Petitioner violated his right to access to information under Article 35 of *the Constitution*;
 - f. A declaration that the 1st Respondent's failure to supply plausible and rational reasons for the omission to shortlist and invite the Petitioner for an interview infringed his right to fair administrative action as guaranteed under Article 47 of *the Constitution*;
 - g. An order of mandamus compelling the 1st Respondent to include the Petitioner in the shortlist and conduct his interview in a fair, constitutional, and non-discriminatory manner;
 - h. An injunction restraining the 1st Respondent, its agents, or employees from subjecting the Petitioner to victimisation, intimidation, or any form of retaliatory conduct arising from the filing of the Petition;
 - i. Any other orders this Honourable Court may deem fit to safeguard the Petitioner's constitutional right to fair labour practices;
 - j. An order for general damages for discrimination in the sum of Kshs. 5,000,000/-;
 - k. Costs of the Petition; and
 - l. Interest on the awarded damages from the date of judgment until full payment.
2. It is the Petitioner's case that pursuant to an earlier Advert No. 54/2023 (C3-C4), he applied for the position of Senior Master IV and was duly shortlisted. He avers that in preparation for the interview, he requested from the 2nd Respondent his appointment letter to grade C3 and the analysed Kenya Certificate of Secondary Education (KCSE) results for the years 2020, 2021, and 2022. However, these documents were not availed to him, which resulted in him not being interviewed.



3. The Petitioner further contends that in November 2024, the 1st Respondent again advertised the same position under Advert No. 19/2024 (C3-C4). He applied and received an acknowledgment via text message. Despite this, he was not shortlisted. Upon inquiry, he was initially informed by the 2nd Respondent that the reasons for the omission were unclear, but that he should leave his TSC number for further inquiries with headquarters. He avers that thereafter, he received no communication, prompting him to formally write to the 1st Respondent. In response, the 1st Respondent stated that he did not meet the shortlisting criteria.
4. Arising from the above, the Petitioner contends that the Respondents' failure and/or refusal to shortlist and interview him amounted to violations of his constitutional rights under Articles 27, 28, and 41. Additionally, he asserts that the failure to furnish him with justifiable reasons infringed his rights under Articles 35 and 47 of *the Constitution*.
5. In response to the Petition, the Respondents filed a replying affidavit dated 17th February 2025, asserting that the Petitioner did not meet the shortlisting criteria. They explained that the Petitioner had previously been interdicted and suspended for desertion of duty. Citing section 77 of the Code of Regulations for Teachers, they stated that any teacher with a disciplinary issue in the preceding two years is ineligible for promotion, and the Petitioner fell within this category.
6. The Respondents maintained that their decision was not discriminatory but lawful, fair, and applicable to all teachers in similar circumstances. They further stated that the reasons for the Petitioner's non-shortlisting had been communicated to him through a letter dated 30th January 2025. The Respondents argued that granting the orders sought would not only contravene *the Constitution*, the *Employment Act*, the TSC Act, and the Code of Regulations for Teachers, but would also undermine the integrity of the constitutional and statutory processes entrusted to the 1st Respondent. They contended that such an outcome would erode the principles of effective teacher management and diminish the authority of established policy guidelines. Consequently, the Respondents urged the Court to find that they exercised their mandate lawfully, fairly, and impartially, and to dismiss the Petition with costs.
7. By way of rejoinder, the Petitioner filed a supplementary affidavit dated 28th February 2025. He affirmed that the disciplinary proceedings alluded to by the Respondents were still the subject of ongoing litigation in Kisumu ELRC Cause No. E053 of 2024, and thus not conclusively determined. He further denied ever receiving the letter dated 30th January 2025, claiming that its inclusion in the Respondents' bundle was an afterthought aimed at defeating the ends of justice.
8. Both parties filed and highlighted their respective written submissions in support of their cases.

Petitioner's Submissions

9. The Petitioner submitted that his interdiction was actuated by malice, was procedurally unfair, and was a retaliatory measure arising from his refusal to withdraw complaints made against the Respondents. He asserted that the interdiction was an abuse of power intended to sabotage his career and constituted a gross violation of the rules of natural justice. He further affirmed that the disciplinary hearing which ensued was unlawful and infringed upon his constitutional right to fair labour practices. The Petitioner pointed out that the hearing was conducted 225 days after his interdiction, in violation of the Teachers Service Commission's Citizen Service Delivery Charter, which mandates resolution of such matters within 90 days. In support of this contention, he relied on the case of *Rebecca Ann Maina & 2 others v Jomo Kenyatta University of Agriculture and Technology* [2015] eKLR, where it was held that undue delay in disciplinary proceedings amounts to an unfair labour practice.



10. With regard to the composition of the disciplinary panel, the Petitioner submitted that it was improperly constituted in contravention of section 151(3) of the TSC Code of Regulations for Teachers, 2015, which requires the presence of at least one Commissioner as chairperson. He submitted that this requirement could not be overridden by internal circulars. In support, he cited the case of Constantine Nyongesa Wanyonyi *v Teachers Service Commission & another (Petition E016 of 2023)* [2024] eKLR, where the court held that panels not chaired by a commissioner were unlawfully constituted.
11. On the issue of desertion of duty, the Petitioner maintained that he was not guilty of the same, as his appeal against the disciplinary decision was lodged within the 90-day period prescribed under section 154(4) of the TSC Code of Regulations for Teachers, 2015. He contended that despite proper filing and service of his appeal, the 1st Respondent failed to take action within a reasonable time. He asserted that the 1st Respondent postponed and reinstated the hearing without confirming a definite date, prompting him to file KISUMU ELRC NO. E053 OF 2024, alleging breach of the Citizen's Service Delivery Charter.
12. The Petitioner further submitted that the Service Charter had binding effect and established mutual obligations between the Commission and its employees. He cited the case of Jibao Micheal Flee v Bank of Sierra Leone (150 of 2020) [2023] SLHCISSD 2, in which it was held that internal disciplinary procedures, once adopted, bind both employer and employee. He also relied on the case of Chief Constable Pietermaritzburg v Shim (1908) 29 NLR 338 at 341, which emphasized that only a statute can deprive a person of the right to be heard. The Petitioner further referred to the case of Carditor Wanjiru Muchoki v Nakuru Water & Sanitation Services Co. Ltd [2023] eKLR, which reaffirmed that an employer is bound by its own disciplinary processes.
13. The Petitioner submitted that having exhausted internal remedies without being accorded a fair hearing, he was compelled to institute KISUMU ELRC NO. E053 OF 2024. He relied on the decision in Nehemiah Kipkorir Terer & 3 others v National Police Service Commission & 2 others [2021] eKLR, where the court held that a claim becomes ripe for judicial intervention when facts mature into a real or substantial controversy.
14. On the issue of whether he met the minimum requirements for shortlisting under Advert No. 19/2024 (C3-C4): Senior Master IV (Post Primary), T-Scale 9, the Petitioner asserted that he did. He submitted that the criteria were identical to those in Advert No. 54/2023 (C3-C4): Senior Master IV (Regular School), T-Scale 9, for which he had previously been shortlisted. He relied on the 2018 Teachers Service Commission Career Progression Guidelines (CPG), which are aligned with the Code of Regulations for Teachers and are binding on matters of promotion. He further submitted that his appointment letter dated 3rd September 2018 expressly incorporated the CPGs, TSC Act, TSC Code of Conduct and Ethics, and related policies as binding instruments. In support, he cited Edah Cherono Maiywa v University of Nairobi Enterprises & Services Ltd [2020] eKLR and Heritage Insurance Co. Ltd v Christopher Onyango & 23 others [2018] eKLR, where courts held that employer policy manuals are part of the employment contract and must be adhered to by employers.
15. The Petitioner further submitted that the failure to shortlist him was procedurally unfair. He cited Feisal Hassan & 2 others v Public Service Board of Marsabit County & another [2016] eKLR, which recognized shortlisting as the most critical stage in the recruitment process. He also relied on the case of Mashengoane & another v University of North (1998) 1 BLLR, which equated appointment to a higher-status post with promotion.



16. On the issue of violation of constitutional rights, the Petitioner submitted that exclusion from the shortlist without justification violated his right to fair administrative action under Article 47 of *the Constitution*. He contended that the Respondents' failure to provide reasons for their decision, despite several inquiries, contravened Article 35 on the right to access information. He relied on *Noonan v Safety and Security Sectoral Bargaining Council & others* [2012] ZALAC 9, which held that denying an employee the chance to compete for a position constitutes an unfair labour practice. He also cited *Legeus Lomosi Mudegu v Kenyatta University* [2020] eKLR and *Judicial Service Commission of Kenya v Mbalu Mutava & another* [2015] eKLR, where the courts emphasized that fair administrative action requires expeditious, fair, lawful, and reasonable conduct, including the provision of written reasons. The Petitioner maintained that the letter dated 30th January 2025 purporting to explain his disqualification was never served upon him, and that the Respondents' communication tactics were selectively deployed to frustrate and deny him access to justice.
17. On the question of whether Articles 27 and 28 of *the Constitution* were violated, the Petitioner submitted that the Respondents discriminated against him by excluding him from the shortlist while others were considered. He cited section 16 of the TSC Code of Regulations for Teachers, 2015, which prohibits any form of discrimination in employment, and section 5 of the *Employment Act*, which reinforces Article 27 by proscribing discrimination based on gender, religion, political opinion, or other prohibited grounds. The Petitioner also cited the Supreme Court's decision in *Simon Gitau Gichuru v Package Insurance Brokers Ltd (Petition 36 of 2019)* [2021] eKLR, which placed the burden on the employer to justify any differential treatment and prove that no discrimination occurred.
18. In conclusion, the Petitioner submitted that he was entitled to the reliefs sought. He cited the decision in *VM K v C U E A* [2013] eKLR and *Jonathan Spangler v Centre for African Family Studies (CAFS) (Cause 108 of 2015)* [2017] eKLR, in which the courts awarded Kshs. 5,000,000/- as compensation for discrimination. He further relied on *GMV v Bank of Africa Kenya Limited* [2013] eKLR, where the Respondent was awarded Kshs. 3,000,000/- for discriminatory treatment by the employer.

Respondents' Submissions

19. The Respondents identified the following issues for determination:
 - a. Whether the 1st Respondent had valid reasons/grounds to disqualify the Petitioner from the teacher promotional interview process;
 - b. Whether the 1st Respondent's decision followed a fair procedure; and
 - c. Whether the Petitioner is entitled to the reliefs sought.
20. On the first issue, the Respondents submitted that the Petitioner was ineligible to be shortlisted or interviewed for the promotional position owing to his prior interdiction and suspension. They relied on the provisions of section 77 of the Code of Regulations for Teachers, which stipulate that a teacher becomes eligible for promotion only after the lapse of two years following disciplinary action. They affirmed that the 1st Respondent acted within the confines of the law and relevant policy frameworks governing the employment relationship, which neither party could unilaterally waive or ignore. The Respondents asserted that the disqualification was not punitive, but a lawful consequence of the Petitioner's disciplinary record, and submitted that the Petitioner was the author of his own misfortune.
21. With respect to the procedural fairness of the disqualification, the Respondents maintained that due process was followed. They asserted that the Petitioner was duly informed of the reasons for his ineligibility, and that the decision was made upon full consideration of the applicable legal and policy



framework, in line with sections 4(2) and 4(3) of the *Fair Administrative Action Act*. In particular, they relied on correspondence dated 29th January 2025 and 30th January 2025, which they emphasized clearly communicated the rationale for the decision.

22. In support of their position, they cited the case of *Nampak Corrugated Wadeville v Khoza* (JA 14/98) [1998] ZALAC 24 as quoted in *Judicial Service Commission v Gladys Boss Shollei & another* [2014]eKLR, in which it was held that a court should not interfere with a sanction imposed by an employer unless the employer had acted unfairly, noting that the proper test was not whether the court would have imposed the same sanction, but whether the decision taken was reasonable in the circumstances. The Respondents also relied on the decision in *Bett Francis Bargetuny & another v Teachers Service Commission & another* [2015]eKLR, where the court cautioned against interfering with an employer's findings where the disciplinary process was conducted fairly. On the Petitioner's claim to entitlement of the reliefs sought, the Respondent submitted that the Petitioner was not entitled to them. The Respondents submitted that the disqualification was legally grounded and that the process was procedurally fair. Accordingly, they urged the Court to dismiss the Petition in its entirety with costs.

Disposition

23. The Petitioner had applied for consideration for promotion and was not shortlisted. He asserts this was discriminatory and that he ought to have been given reasons why he was not shortlisted whereas he had been previously shortlisted for a promotional interview. It is argued by the Respondents that for a teacher to be promoted, the teacher should have been clear of any discipline issue 2 years preceding the date of application. In their own words, Petitioner had previously been interdicted and suspended for desertion of duty and citing section 77 of the Code of Regulations for Teachers, the Respondents stated that any teacher with a disciplinary issue in the preceding two years is ineligible for promotion, and the Petitioner fell within this category. The arguments by the Respondents are somewhat apposite what the Respondents had done prior. In the advert for 2023 which was Advert No. 54/2023 (C3-C4), the Petitioner applied for the position of Senior Master IV and was duly shortlisted. In the second iteration under Advert No. 19/2024(C3-C4), the Petitioner was curiously not shortlisted. There was no interdiction or discipline case that took place between the two advertisements as the one the Respondents were citing was an alleged desertion in 2 years prior. It would have barred the Petitioner from being shortlisted in the earlier advertisement.
24. The Court is persuaded that the Respondents' failure and/or refusal to shortlist the Petitioner under Advert No. 19/2024(C3-C4) and to invite him for the interview was discriminatory and an affront to his dignity, contrary to Articles 27 and 28 of *the Constitution*. The Court notes the shortlisting of candidates is a critical phase of the recruitment process and deserving candidates can at times be locked out capriciously at this stage effectively denying them an opportunity to attain the position subject of the advertisement.
25. Whereas the Court cannot direct the Respondents on managerial prerogatives, it is hoped the decision will allow for reflection when shortlisting candidates so as not to shut out teachers from interviews on a whim. The Court is minded that the Petitioner continues to serve the 1st Respondent as a teacher and will therefore only award him a sum of Kshs. 500,000/- to mollify him from the pain of missing out on a promotional interview. He represented himself and therefore the Court does not see grounds for grant of costs as he did not expend much by way of legal research or expense in articulating his claim before the Court.
26. In the final analysis a declaration be and is hereby issued that the Respondent's failure and/or refusal to shortlist the Petitioner under Advert No. 19/2024(C3-C4) and to invite him for the interview



was discriminatory and an affront to his dignity, contrary to Articles 27 and 28 of *the Constitution*.
Compensation of Kshs. 500,000/- is ordered as against the 1st Respondent.

Orders accordingly.

DATED AND DELIVERED AT KISII THIS 17TH DAY OF JUNE 2025

Nzioki wa Makau, MCI Arb.

JUDGE

