



**Mutuku v Teachers Service Commission (Miscellaneous Application
E038 of 2025) [2025] KEELRC 2285 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEELRC 2285 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
MISCELLANEOUS APPLICATION E038 OF 2025**

BOM MANANI, J

JULY 31, 2025

BETWEEN

GEOFFREY MUTUKU APPLICANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

RULING

1. The Applicant is a teacher in the service of the Respondent. He is currently facing disciplinary proceedings relating to alleged flirtation with a student.
2. Through the instant application, he has moved the court for an order to compel the Respondent to allow him to have legal representation during the aforesaid proceedings. He contends that during the investigative hearing of his case, his right to fair hearing was violated.
3. The Applicant contends that during the aforesaid hearing, the Respondent's Sub-County Director prevented him from putting certain questions to the alleged victim of the flirtation. He further avers that the said Sub-County Director kept shouting at and intimidating him during the process leaving him feeling humiliated by the manner in which he was handled.
4. The Applicant also avers that the said Sub-County Director manipulated the recommendations of the Investigation Panel in order to force the anticipated disciplinary hearing. As such, he believes that the entire disciplinary process is likely to be manipulated.
5. In view of these developments, the Applicant contends that there is no guarantee that he will be accorded a fair hearing in the remaining stages of the disciplinary process. As such, he contends that he should be permitted to get legal assistance to protect his right to fair hearing.
6. The Applicant avers that immediately the investigation hearing was over, he wrote to the Respondent flagging his fears and asking that he be allowed to have legal representation. However, he contends



- that the Respondent ignored this request and is intent on convening the disciplinary hearing without addressing his request.
7. The Applicant contends that the right to legal representation is granted by the Constitution. As such, he should be allowed to enjoy it without unnecessary impediments.
 8. The Respondent is opposed to the application. Through the replying affidavit dated 18th March 2025, it contends that the Applicant is not entitled to the relief that he seeks.
 9. The Respondent avers that the law that anchors it (the Respondent) and which provides for disciplinary processes for teachers serving under it (the Respondent) does not contemplate legal representation for individuals facing disciplinary proceedings before its (the Respondent's) Disciplinary Panels. It further contends that the Collective Bargaining Agreement between it and the teachers' Trade Union does not provide for such representation.
 10. The Respondent further contends that the Applicant's contract does not provide for the right to legal representation during disciplinary proceedings before its (the Respondent's) Disciplinary Panels. It further avers that the Employment Act does not provide for such right either.
 11. The Respondent contends that section 48 the Employment Act bars legal representation in informal proceedings in respect of labour disputes before a Labour Officer. It contends that the provision should be deemed to apply mutatis mutandis to disciplinary proceedings conducted by its Disciplinary Panels.
 12. The Respondent contends that members of its Disciplinary Panels are neither trained in law nor are they practicing lawyers. As such, it contends that it would be improper to allow lawyers to represent teachers before the Panels as this will create an uneven playground for the parties.
 13. The Respondent avers that its disciplinary proceedings are internal administrative processes between an employer and her employees which are devoid of legal technicalities and procedures. As such, lawyers should not be allowed to participate in them.
 14. The Respondent further contends that the procedures and policies it has put in place to guide disciplinary action against teachers are in any event meant to ensure fairness in the process. It contends that the provisions entitle an accused teacher to attend a disciplinary trial with witnesses and a colleague thus ensuring adequate representation for him/her. As such, it contends that there is no reason to bring lawyers on board.
 15. The Respondent avers that article 50(2) of the Constitution which the Applicant has invoked to anchor his request in the application only applies to criminal trials in court. As such, it cannot be relied on to sanction legal representation in internal disciplinary proceedings at the workplace.
 16. The Respondent contends that if the court grants the Applicant's request, it will mean that it (the Respondent) will also be entitled to hire legal counsel to represent it in the disciplinary proceedings. According to the Respondent, such eventuality will be highly undesirable as it will, in effect, have elevated the internal disciplinary process into a court trial thus, inter alia, affecting the requirements relating to the standard of proof in internal disciplinary processes.
 17. The Respondent avers that when Parliament enacted the Teachers Service Commission Act and the regulations under it, it (Parliament) did not intend to elevate its (the Respondent's) internal disciplinary processes into law suits. It contends that to bring lawyers on board these processes will erode the role of Trade Unions at the workplace.
 18. The Respondent contends that as an employer, it enjoys the managerial prerogative to discipline its employees without undue interference from the court. It asserts that if the court accedes to



the Applicant's request, that will be tantamount to illegitimately interfering with this managerial prerogative. As such, it prays that the instant application be dismissed.

Issues for Determination

19. After evaluating the application, the affidavit evidence and submissions by the parties, the following issues fall for determination:-
 - a. Whether the court is entitled to intervene in the ongoing disciplinary process at this stage.
 - b. Whether the Applicant is entitled to seek legal representation in the ongoing disciplinary proceedings between the parties on account of article 50(2) (g) of *the Constitution*.
 - c. Whether the Applicant is, in any event, entitled to legal representation in the ongoing disciplinary proceedings against him.
 - d. Who should bear costs of the application?

Analysis

20. The first issue for resolution relates to whether the court should meddle in the ongoing disciplinary proceedings against the Applicant at this stage. Whether a court is entitled to intervene in workplace disciplinary proceedings before they are concluded is a matter which, in my view, has been settled and requires no much discussion. Undoubtedly, the court has the power to intervene in such proceedings.
21. However, it should only do so if it is demonstrated that the proceedings are being conducted in a manner that is contrary to the law, an internal rule or the contract between the parties. Even then, such intervention should not be with the intent of stalling the process altogether but only for purposes of ensuring that the infringement that has been identified is corrected so that the process can progress in accordance with the law (see *Onsongo & 2 others v Naivasha Water Sewerage & Sanitation Company Limited (Petition E020 of 2023)* [2024] KEELRC 76 (KLR) (25 January 2024) (Ruling) & *G J K v KPMG Advisory Services* [2017] eKLR).
22. Courts should exercise utmost restraint when invited to interfere with the exercise of the employer's managerial prerogative. They should only interfere with the exercise of the prerogative where it is demonstrated that the injury that the employee may suffer as a result of the exercise of the power may not be redressed in any other way. Restating this point, the South African Labour Appeal Court in the case of *Booyesen v Minister of Safety and Security and Others (CA 09/08)* [2010] ZALAC 21; [2011] 1 BLLR 83 (LAC); (2011) 32 ILJ 112 (LAC) (1 October 2010) observed as follows:-

“...the Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. However such an intervention should be exercised in exceptional cases. It is not appropriate to set out the test. It should be left to the discretion of the Labour Court to exercise such powers having regard to the facts of each case. Among the factors to be considered would in my view be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means.”
23. The second issue the court has to determine is whether article 50(2) of *the Constitution* has application to internal workplace disciplinary hearings and whether the Applicant can anchor his request for legal representation in the ongoing disciplinary proceedings against him on the aforesaid provision. It is noteworthy that one of the provisions under which the Applicant has moved the court for the aforesaid relief is article 50 (2) (g) of *the Constitution*. He contends that by virtue of this provision, he is entitled to legal representation in the internal disciplinary proceedings that have been instituted against him by the Respondent in order to secure his right to fair hearing. He further contends that the Respondent's failure to grant him the right to be represented by a lawyer in the said proceedings violates this right.



24. On the other hand, the Respondent disputes that this right is available to the Applicant. The Respondent contends that article 50(2) of *the Constitution* applies to criminal trials and has no application to workplace disciplinary processes which are essentially private and informal.
25. A key principle of statutory interpretation is that provisions of a statute, including *the Constitution*, ought to be read as a whole. No single provision should be construed in isolation of other provisions that surround it.
26. The Supreme Court underscored the foregoing in the case of *In the Matter of Kenya National Commission on Human Rights [2014] eKLR*, when it observed that *the Constitution* should always be read holistically in order to be properly understood. Discussing the concept of holistic interpretation, the court expressed itself on the subject as follows:-

“It must mean interpreting *the Constitution* in context. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what *the Constitution* must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.”

27. In order to determine the scope of application of article 50 (2) (g) of *the Constitution*, one needs to consider the provision in the context of the entire of article 50(2) thereof. When the aforesaid sub-articles are considered together, it becomes apparent that they were not intended for application to internal workplace disciplinary proceedings.
28. For instance, sub-article 50(2) (d) which is a critical component of article 50(2) of *the Constitution* entitles one to a public hearing as one of the series of rights to a fair trial under the provision. Yet, workplace disciplinary proceedings are essentially non-public in nature. As such, when the two provisions are read together, they suggest that the rights donated under the aforesaid article (article 50(2)) apply in the context of court trials conducted in public as opposed to Boardroom disciplinary proceedings.
29. In the case of *Attorney General v Ndii & 73 others (Petition 12 (E016) of 2021) [2021] KESC 15 (KLR) (Civ) (9 November 2021) (Ruling)*, the Supreme Court suggested that article 50(2) of *the Constitution* applies to criminal trials only. Whilst commenting on the subject, the court stated as follows:-

“Article 25 of *the Constitution* protects the right to fair trial under article 50(2) of *the Constitution* which only applies to accused persons in criminal proceedings. This is distinguishable from fair hearing alluded to by the applicant under article 50(1) of *the Constitution*.”

30. The aforesaid position by the Supreme Court is in consonance with the position expressed by the Respondent on the scope of application of the aforesaid article in *the Constitution*. A similar position was expressed by the High Court in the case of *Oluoch Dan Owino & 3 others v Kenyatta University [2014] KEHC 8577 (KLR)*.
31. In the case of *Ouma Christopher Odongo v Kenyatta University [2016] eKLR*, Lenaola J, as he then was, stated that article 50(2) of *the Constitution* only applies to criminal trials. He expressed his doubts that the provision could be applied to administrative proceedings.



32. In *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR, the Court of Appeal drew a distinction between the right to fair hearing under article 50 of *the Constitution* and the right to fair administrative action under article 47 thereof. It implied that the rights under article 50 of *the Constitution*, which cannot be limited, have application to proceedings before courts of law and other tribunals discharging judicial and quasi-judicial functions through which final decisions are rendered. On the other hand, the right to fair administrative action, which bears semblance with the right to fair hearing under article 50 of *the Constitution* but which can be limited, applies to proceedings before administrative bodies not exercising a judicial or quasi-judicial function. The court went further to observe that it was inappropriate to invoke the right to fair hearing under article 50 of *the Constitution* in investigative proceedings before the Judicial Service Commission essentially implying that article 50 has no application to proceedings before bodies discharging functions which are not judicial or quasi-judicial but purely administrative.
33. On the authority of the foresaid judicial precedent, it is apparent that article 50 (2) of *the Constitution* is not intended to apply to workplace proceedings which are conducted internally and not through public fora (courts of law and tribunals). Consequently, I find that the right to legal representation granted by article 50(2) (g) of *the Constitution* is not applicable to internal workplace disciplinary proceedings. As such, the Applicant was not entitled to seek the orders in the present application under the article.
34. The next issue for consideration is whether the Applicant is, in any event, entitled to legal representation in the ongoing disciplinary proceedings against him. As seen from the earlier discussion in this decision, the Applicant's request for legal representation cannot be founded on article 50 (2) (g) of *the Constitution*. Nevertheless, he may still pursue the right based on other provisions of law including article 47 of *the Constitution*.
35. It is in this latter context that I propose to explore the matter. However, whilst considering the matter from this viewpoint, it is imperative to bear in mind the distinction between the right to fair hearing under article 50 of *the Constitution* and the right to fair administrative hearing under article 47 of *the Constitution*. The Court of Appeal alluded to this distinction in the case of *Fredrick Oduor Lamba v Kenya Electricity Generating Company PLC. (Civil Appeal E126 of 2021) [2023] KECA 118 (KLR) (3 February 2023) (Judgment)* when the learned Judges of the court stated as follows:-
- “ It is imperative to appreciate the distinction between the right to a fair hearing under Article 50 of *the Constitution* and the right to a fair hearing under Article 47 of *the Constitution*. In *J.S.C. v Mbalu Mutava* {2015} eKLR the Court of Appeal held that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law. Fair hearing under Article 50 (1) applies in proceedings before a court of law or independent and impartial tribunals or bodies. The disciplinary proceedings are largely governed by the procedural safeguards under Article 47 of *the Constitution*.”
36. The Respondent's disciplinary procedures in respect of teachers who are not Heads of Institution provide for various phases. The first phase involves reporting of an alleged infraction. This is then followed with investigations which are conducted either by the Respondent or its appointed agent.
37. The agencies which are mandated to conduct the preliminary investigations on behalf of the Respondent include: the Head of the Institution where the accused teacher works; the Board of Management of the school where the accused teacher works; or a County Director of the Respondent



(see regulations 144 to 146 of the Teachers Service Commission Code of Regulations for Teachers, 2015).

38. During investigations, the accused teacher should be granted a fair hearing as dictated by regulation 146(6) of the aforesaid Regulations. He/she should be presumed innocent until it is demonstrated that he/she has a case to answer. He/she should be informed of the charge against him/her with sufficient details. He/she should be given at least seven days to prepare his/her defense. He/she should be given the opportunity to appear before the Investigation Panel in person unless his/her conduct will impede the process. He/she should be present when witnesses are being examined. He/she should be warned that any adverse evidence collected may be used against him/her during the disciplinary hearing. He/she should be given a chance to adduce evidence and to challenge evidence that is presented by witnesses during the investigations.
39. Upon finalizing investigations, the Investigation Panel is required to prepare an investigation report. If the results of the investigations disclose a possible offence against the teacher, the school's Board of Management or County Director or Secretary of the Respondent will, inter alia, interdict him/her (the teacher).
40. Once the teacher has been interdicted, the Respondent is required to invite him/her for a disciplinary hearing which is to be conducted either at the Respondent's Head Office or County Office. This process is conducted by a Disciplinary Panel constituted for this purpose.
41. After the Disciplinary Panel has conducted the hearing, it is required to issue a verdict. If the teacher is unhappy with the verdict, he can appeal to the Teachers Service Review Committee.
42. Regulation 139 of the regulations referred to earlier provides guidelines to be followed by the Respondent whilst processing a disciplinary case against a teacher. These guidelines are applicable throughout the disciplinary process starting from the investigation stage.
43. Under the aforesaid regulation, the Respondent is required to ensure that: the presumption of innocence is upheld in respect of the accused teacher; and the teacher is accorded a fair opportunity to present his case.
44. However, in conducting the disciplinary process, the Respondent is neither bound by the rules of evidence nor required to handle the process as would, a court of law. At the same time, it (the Respondent) is required to ensure that where the proceedings involve minors, they receive the protection that is accorded to them under the *Children Act* (see regulation 139 (2) & (4)).
45. Although the Respondent's regulations obligate it to accord an accused teacher a fair hearing both at the investigative and disciplinary hearing stages of its disciplinary process, there is no express provision in the said regulations which suggests that the teacher is entitled to legal representation during the process. The question which arises is whether, despite this lacuna, a teacher facing a disciplinary process is entitled to legal representation.
46. The court is alive to the fact that section 48 of the *Employment Act* excludes Advocates from representing employees and employers in inquiries which are conducted by Labour Officers in respect of labour disputes between such employers and employees. The court is also alive to the fact that the rationale for this exclusion was the desire to ensure that such inquiries remain informal and devoid of legal technicalities that accompany formal court processes. It was hoped that this exclusion will ensure that the inquiries are expedited thus ensuring prompt resolution of labour disputes.



47. However, it is important to point out that the *Employment Act* predates *the Constitution* of Kenya 2010. As such, provisions in the statute must be construed in the context of the current constitutional dispensation.
48. Article 47 of *the Constitution* guarantees every person the right to fair administrative action. This right has since been operationalized through the *Fair Administrative Action Act*, Cap 7L, Laws of Kenya.
49. Section 3 of the Act provides as follows regarding the extend of its application:-
- “This Act applies to all state and non-state agencies, including any person:-
- a. exercising administrative authority;
 - b. performing a judicial or quasi-judicial function under *the Constitution* or any written law; or
 - c. whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.”
50. Section 2 of the Act also gives definitions which are critical in discerning the scope of the legislation. For instance, it defines the term "administrative action" to denote:-
- “the powers, functions and duties exercised by authorities or quasi-judicial tribunals or any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.” Emphasis added by underlining.
51. Clearly, the purview of the statute is wide. It is not limited to decisions that emanate from persons exercising administrative authority as traditionally conceptualized. It also applies to any acts or omissions by any person which have the potential of affecting the legal rights or interests of another person. This, in my view, includes decisions by Disciplinary Committees at the workplace if the decisions impact on the right of an employee.
52. Section 4 of the Act provides the minimum requirements for fair decision making. These include the duty on the decision maker to:-
- a. Ensure that the decision is made expeditiously, efficiently, lawfully, reasonably and in a manner that is procedurally fair.
 - b. Supply the person who is affected by the decision written reasons for it.
 - c. Give the person likely to be affected by the decision prior and adequate notice of the nature and reasons for the proposed action.
 - d. Give the person affected by the decision an opportunity to be heard and to make representations on the matter.
 - e. Notify the person affected by the decision of the right to review or internally appeal against the decision, where applicable.
 - f. Give the person affected by the impending decision notice of the right to legal representation, where applicable.
 - g. Give the person likely to be affected by the impending decision the opportunity to cross-examine, where applicable.
 - h. Share with the person who is likely to be affected by the decision all information and material which will be relied on to make the decision.



- i. Allow the person who is likely to be affected by the decision the opportunity to request to adjourn the proceedings in which the decision is to be considered if the dictates of fairness demand for it.
53. Without doubt, the Respondent's disciplinary processes impact on the rights of the employees against whom the proceedings are mounted. As such, it (the Respondent) is bound to ensure compliance with the foregoing requirements of the *Fair Administrative Action Act* whenever it is undertaking these processes.
54. As is apparent from the foregoing, the *Fair Administrative Action Act* grants a person against who a decision is to be made the right to legal representation. However, the Act recognizes that this right is not absolute. And hence the statement that it (the right) should be granted, "where applicable."
55. Whether an employee who is facing disciplinary proceedings should be precluded from seeking legal assistance has been the subject of consideration in both academic and legal discourse. The foregoing can be discerned from both local and international jurisprudence as well as scholarly commentaries on the subject.
56. Locally, in the case of *Ratemo v Kenya Film Commission & another* (Cause 2192 of 2012) [2014] KEIC 3 (KLR) (3 February 2014) (Ruling), the trial court commented on the matter as follows:-
- "Disciplinary proceedings are viewed as internal labour relations exercises, which must be shielded from the incendiary effects of lawyers. The less the lawyers are involved, the more likely it is presumed, that the employment dispute will be resolved without escalating into a full blown legal dispute."
57. The court went further to comment on the matter as follows:-
- "The court does not see why a lawyer in certain circumstances, should not be allowed to actively represent an accused employee at the workplace. There are complex matters that may be raised, such as the matter raised by the Claimant on the information he is said to have leaked to outsiders from his computer, which would require legal representation at the disciplinary proceedings. Employers ought to consider allowing lawyers to participate in disciplinary proceedings depending on the complexity of the case. There is no significant prejudice which would be occasioned to the employers in allowing legal representation. Such legal representation may have the effect of improving the overall fairness in the termination procedure; encourage voluntary settlement; minimize the number of disputes escalated to the Industrial Court; and strengthen the employer's position in demonstrating the fairness of procedure whenever called upon to do so. Furthermore, the workplaces are changing. Complex legal issues in Human Resource Management call for a mind shift. The Respondent's Human Resources Policies and Procedures Manual on Discipline for instance, reads almost like the *Employment Act* 2007 on termination and dismissal, and there would be considerable value addition in the disciplinary proceedings by having an accused employee's lawyer participate."
58. Commenting on the same subject, George Ogembo in his publication titled "Employment Law Guide for Employers, 2nd Edition" pgs 385-386, states as follows:-
- "The thorny issue is whether an employer is obligated to allow legal representation of the accused employee in a disciplinary hearing. Majority of the employers' Human Resource Policies and Manuals forbid legal representation of an employee in a disciplinary hearing.



On the face of it, the prohibition appears justifiable since disciplinary hearings are internal administrative exercises that ought to be shielded from incidental effects of lawyers. Lawyers, it is presumed, have the tendency of escalating the disciplinary hearing into a full blown legal dispute.

However, the prohibition cannot be absolute. Depending on the complexity of the case, lawyers should be allowed to participate and represent the accused employee.

Courts have generally leaned towards allowing legal representation during administrative hearing processes. An employer desirous of forbidding legal representation ought to demonstrate a statutory bar or an identifiable prejudice to the right to fair hearing occasioned by permitting the participation of lawyers in the proceedings. This is important especially in instances where neither the law nor the employer's terms and conditions of employment forbid representation by lawyers and an employee proceeds to invite participation of a lawyer at the proceedings with no prior objection by the employer.”

59. In *Republic v Arnord Karani Njiru - Fund Account Manager, Laikipia East Constituency Fund & 10 others Ex Parte Amin Mohammed Ali* [2015] KEELRC 1163 (KLR), the trial court stated that where the law and the employer's internal policies are silent on whether an employee is entitled to legal representation during a disciplinary hearing and an employee requests for such representation but the employer does not expressly object to the request, the employee gains legitimate expectation that he will be entitled to legal representation during the proceedings. As such, it will be improper for the employer to subsequently purport to deny such employee legal representation during the proceedings.
60. In *Khamasi v Paramount Bank Limited (Appeal E033 of 2021)* [2023] KEELRC 910 (KLR) (20 April 2023) (Judgment), the court ruled that the failure to allow an employee to have legal representation in a disciplinary hearing does not render the process unprocedural. In *Samwel Wambisah v Eastern Produce Kenya Ltd* [2021] eKLR), the court held that since the law is silent on whether an employee is entitled to legal representation in internal disciplinary proceedings, such proceedings will not be rendered irregular merely because the employer has refused to grant this right. In effect, these two decisions imply that there is no automatic entitlement to legal representation in disciplinary proceedings at the workplace and denial of this right does not vitiate the outcome of the disciplinary process.
61. In *Biwott & another v County Government of Uasin Gishu* [2022] KEELRC 13415 (KLR), the trial court expressed the view that the right to legal representation in disciplinary proceedings should be granted sparingly in order to avoid turning employment disputes into full blown legal dispute at that stage. The court commented that the right should only be granted in situations where the proceedings entail complex legal issues. The court also expressed the view that in instances where the law does not expressly recognize the right, it should only be granted if it is provided for in the contract between the parties or the employer's human resource policy or with the concurrence of both parties to the contract.
62. Further afield, the matter has been handled with circumspect. For instance, in *McKelvey v Irish Rail* [2019] IESC 79, the Supreme Court of Ireland stated that granting the right to legal representation during workplace disciplinary proceedings should be the exception rather than the rule. The court stressed that the right should be granted only in exceptional circumstances where it is apparent that absent legal representation, the process would result in unjust outcomes. The court provided guidelines to be considered when deciding whether to grant the right. These include:-
 - a. The seriousness of the charge the employee is facing and the potential penalty.
 - b. Whether there are points of law that may be raised for consideration in the proceedings which will require the assistance of a lawyer to navigate.



- c. The capacity of the employee to present his own case.
- d. If there are serious procedural difficulties in the proceedings.
- e. The need for reasonable speed in making a decision in the cause.

63. In *Maboe v Lesotho Mountain Brewery (Pty) Ltd* (LC 49 of 11) 2011 LSLC 29, the Labour Court of Lesotho commented on the subject as follows:-

“By and large, disciplinary procedures do not permit employees the right to be represented at disciplinary hearings by external persons, including lawyers. Representation is usually limited to a co - employee. Where the employer’s code is ambiguous it may be interpreted as including the possibility of representation by a lawyer or a union official - see *Ibhayi City Council v Yantolo* (1991) 12 ILJ 1005 (E). The rationale behind this restriction is normally that lawyers in particular would unnecessarily complicate what is supposed to be an otherwise informal process. Workplace codes may however provide otherwise....

There is generally no absolute right to legal representation during disciplinary hearings. It is only recognized in the context of Courts of law – the right to a fair trial. In some jurisdictions such as South Africa and the United Kingdom, courts have reiterated that there is no absolute right to legal representation at disciplinary hearing but have held that it is advisable in difficult and complex cases.....

Courts can be and are indeed agents of change but our jurisprudence and legislative intent has been not to interfere with administrative action at the administrative level. The question of representation has been left to the discretion of the employer, to be reasonably exercised, of course. Even in South Africa one observed that it is not a right that is easily inferred. The emphasis seems to be on the curbing of delays and discouraging legal technicalities in the resolution of labour disputes in the quest for a labour dispute machinery that is informal, speedy, accessible, and affordable.....

A disciplinary enquiry as the name suggests is but an enquiry and is generally factual. It is in essence concerned with establishing whether or not an employee is on a balance of probabilities guilty of the alleged misdemeanor. The general requirement is that the accused person should know the nature of the accusation and have an opportunity to state his/her case and the employer on the other hand has to act in good faith - see *Mondi Paper Products v Tope* [1997] 3 BLLR 263 (LAC). Disciplinary proceedings are essentially informal and should not be judged according to standards expected of courts of law.”

64. In *Police And Prisoners Civil Rights Union v Minister of Correctional Service and Others* (D 511/99) [1999] ZALC 77 (21 May 1999), the South African Labour Court declined to allow a request for legal representation in internal disciplinary proceedings. The court was of the view that despite the 1994 constitutional dispensation which brought about constitutionalism and the adoption of the fundamental bill of rights in the country, the failure to allow legal representation in internal disciplinary enquiries does not, ipso facto, violate the constitutional right of an employee to a fair trial. The court observed that whether the right to legal representation is to be granted depends on the circumstances of each case, taking into account the nature, scope or circumstances of the particular disciplinary enquiry and the charges which the employee is facing. In effect, the court expressed the view that the right to legal representation in workplace disciplinary proceedings is neither absolute nor automatic.

65. The court further observed that the request for legal representation should be lodged with the employer and or the Disciplinary Panel in the first instance. In effect, it (the request) should only be escalated to



- court after the employer has had the opportunity to consider it and has either given an unfavourable result or failed to act on the matter.
66. What emerges from the foregoing evaluation is that whilst an employee may be entitled to legal representation during internal disciplinary proceedings, this entitlement is neither absolute nor automatic. Indeed, this is the very reason why the clause on the right to legal representation under the *Fair Administrative Action Act* provides that the right is exercisable only where it is applicable.
 67. Further, the general position that emerges from the discussion is that whilst participation of lawyers in internal disciplinary proceedings should not be encouraged, it is not prohibited. However, granting the right for legal representation in disciplinary proceedings at the workplace should be the exception rather than the rule.
 68. As was noted in the case of Fredrick Oduor Lamba v Kenya Electricity Generating Company PLC (supra), this right, stemming from article 47 of *the Constitution*, is amenable to limitation as it does not fall in the family of rights that cannot be limited as set out under article 25 of *the Constitution*. However, in terms of article 24 of *the Constitution*, it should only be limited by law.
 69. In my view, section 4 of the *Fair Administrative Action Act* imposes a limitation on the right when it proclaims that it is exercisable only where it is applicable. This permits limitation of application of the right in workplace disciplinary proceedings to the extent that it should only be granted where complex legal issues may arise in the proceedings.
 70. As mentioned earlier, the rationale for this limitation is to ensure that resolution of workplace disputes is kept simple and informal in order to expedite the process. In my view, this limitation is justifiable in terms of the parameters that are set under article 24 of *the Constitution*.
 71. According to the letter of interdiction which the Applicant was issued with, he faces a charge of flirtation with a learner. Regulations numbers 140 to 142 in the Respondent's Teachers Service Commission Code of Regulations for Teachers, 2015 set out a list of offenses that the Respondent may prefer against its teacher employees. They include flirtation.
 72. Regulation 141 provides that flirtation may lead to the removal of a teacher from the register of teachers. In effect, the penalty that the offence carries has the potential of shuttering the Applicant's career. This, undoubtedly, is a severe penalty which should ordinarily entitle the Applicant to representation.
 73. However, this is not the only consideration I have to take into account whilst deciding on the request for legal representation. As noted in the case of McKelvey v Irish Rail [2019] IESC 79, the court must have regard for other factors including whether the case raises complex legal issues which will inform the need for legal representation.
 74. I have looked through the averments in the affidavits sworn by the Applicant in support of his application and he does not suggest that the proceedings against him involve complex issues of law which require the assistance of a lawyer to navigate. What he expresses are fears of bias prompted by the treatment he was allegedly subjected to by the Respondent's Sub-County Director during the investigation hearing.
 75. By virtue of regulation 146(12) of the Teachers Service Commission Code of Regulations for Teachers, 2015, an officer who participates in the investigation of an offense against an accused teacher is precluded from being a member or chair of the Disciplinary Panel that will hear the case. As such, the Sub-County Director whom the Applicant accuses of impropriety and bias during the investigative hearing will not be part of the Disciplinary Panel that will hear his case.



76. The Applicant will thus be appearing before a new Panel which will not be carrying the burden of the alleged bias by the investigation team. This being the case and there being no contention that the case involves complex legal matters, the court has no cogent basis to order for external legal representation for the Applicant.
77. I note that the parties are in agreement that the Applicant is a member of the Kenya National Union of Teachers. In his further affidavit dated 24th March 2024, the Applicant has annexed a copy of the Trade Union's Constitution.
78. Article II of *the Constitution* sets out the functions of the Trade Union. Sub-article 10 thereof sets out one of the Union's functions as follows:-
- “To offer advice and general assistance to individual members in education and professional matters and in legal cases in which a member may be involved.”
79. Undoubtedly, this provision in *the Constitution* entitles the Applicant to representation by the Trade Union in proceedings by or against him in a court of law, quasi-judicial and administrative body including a Disciplinary Panel set up by the Respondent.
80. In *McKelvey v Irish Rail* [2019] IESC 79, one of the reasons why the court declined to grant the Applicant's request for legal representation in the disciplinary hearing against him was that his Trade Union had the requisite competencies to represent him in the said hearing. The court noted that, absent proof that complex legal questions were to be considered in the hearing, a Trade Union official was sufficiently experienced to represent the Applicant in the proceedings.
81. I am persuaded by the above view. Where there is evidence that an employee is a member of a Trade Union, there would be no compelling reason to allow him to seek legal representation in a disciplinary hearing against him when the Trade Union can ably represent him unless it has been demonstrated that the proceedings involve complex legal questions which require the assistance of a lawyer to navigate. This will ensure that the informality of the disciplinary process is secured whilst at the same time not compromising an employee's entitlement to a fair hearing.
82. Although the Applicant in the case before me admits that he is a member of the Kenya National Union of Teachers and although the Union's Constitution and the *Labour Relations Act* (see section 55(2) of the Act) permit it (the Trade Union) to represent him in legal proceedings by or against him, it is apparent that he has not sought the Union's assistance in the current proceedings. It is however unclear why he has not exploited this opportunity.
83. In my view, although the Applicant is entitled to apply for legal representation in the disciplinary proceedings, such request should only be granted in exceptional circumstances. This includes scenarios where he is able to demonstrate that he cannot obtain suitable representation by any other means.
84. In this case, it is evident that the Applicant can get representation from his Trade Union. As such and in order to keep the internal disciplinary process informal as was intended, I decline to grant the request for legal representation.
85. In my view, the Applicant should consider approaching his Trade Union to offer him representation in the impending proceedings. This will assist him to overcome the challenges which he avers that he faced during the investigative hearing on 21st June 2024 should they arise again at the stage of the disciplinary trial.



Determination

86. After considering the affidavit evidence, the submissions by the parties and the applicable statutory and case-law on the matter, I find that the application dated 14th February 2025 is not merited.

87. As such, it is declined.

88. Each party shall bear own costs.

DATED, SIGNED AND DELIVERED ON THE 31ST JULY, 2025

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Applicant

.....for the Respondent

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

