



**Kanene v Teachers Service Commission (Employment and Labour Relations
Petition E010 of 2023) [2024] KEELRC 130 (KLR) (30 January 2024) (Judgment)**

Neutral citation: [2024] KEELRC 130 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS PETITION E010 OF 2023
ON MAKAU, J
JANUARY 30, 2024**

BETWEEN

JOSEPH KARIUKI KANENE PETITIONER

AND

TEACHERS SERVICE COMMISSION RESPONDENT

JUDGMENT

1. The Petitioner was employed by the respondent as a secondary school teacher from 14th January 2008 until 2nd February 2021 when he was dismissed from service for gross misconduct. He was aggrieved and brought this petition seeking the following reliefs: -
 - a. A declaration do issue that the Respondent violated Article 27(1) and (2) and Article 50 (2) (a) of *the Constitution* of Kenya on Equality and freedom from discrimination and on fair hearing when he withheld the petitioner's ½ salary of Kshs.35,350/- per month for 18 months on allegations that the petitioner was of immoral behavior yet *the Constitution* guaranteed the petitioner the right to be presumed innocent until the contrary is proved.
 - b. A declaration do issue that the Respondent violated Article 50(5) (b) of *the Constitution* of Kenya on fair trial when he refused to supply the petitioner with the proceedings of the disciplinary hearing for 2 years yet the petitioner paid the requisite charges of Kshs.2,200.00 on 14/10/2021, this in essence makes the entire disciplinary trial and all the subsequent decisions made thereafter null and void for all intended.
 - c. A declaration do issue that the Respondent did not subject regulation 148(1) of the TSC Code of Regulation for teachers to public participation as required under Article 10(2) (a) of *the Constitution* of Kenya and is therefore unconstitutional, null and void for all intended purposes.



- d. An order of certiorari be and is hereby issued calling into this court and quashing the dismissal letter refer No.TSC/DISC/NO.0363/09/2019/2020/3 of 26/2/2021, the notice of removal from the register of teachers Ref No. No.TSC/DISC/NO.0363/09/2019/2020/3 of 26/2/2021 and the decision of a review case Ref No. No.TSC/DISC/NO.0363/09/2019/2020/RC/0172/2021/2022 dated 23/03/2022.
 - e. An order do issue directing the Respondent to pay the petitioner within 14 days from the date of the order an amount of Kshs.636,300/- being withheld ½ salary for the 18 months that petitioner was under interdiction between 20/8/2019 to 2/2/2022.
 - f. A mandatory order to issue directing the Respondent to reinstate the petitioner back to his position of the Graduate Teacher 1. Job Group L at Weithaga Boys within Murang'a County within 14 days from the date of the Order and be paid in full all the outstanding emoluments and benefits that he would have otherwise earned from the time he was unlawfully interdicted on 20th August 2019 up to the time of this order.
 - g. An order do issue compelling the Respondent to pay the petitioner general damages for withholding the disciplinary proceedings and other crucial documents from 20/4/2021 to 22/5/2023 (2 years) without any good reason which made the petitioner lose his appeal on 7/3/2022 yet the petitioner paid for the proceedings on 14/10/2021.
 - h. Any other relief the Honourable Court deems appropriate, just and fit to grant.
 - i. The costs of this Petition be provided for.
2. The Petition is supported by the petitioners two affidavits dated 5th June 2023 and 31st July 2023. It is also supported by the Affidavits sworn by Ms.Rahab Wangui Thuo and Mr.Solomon Thuo Wangoto on 29th November 2023. The affidavits annex bundle of documents.
 3. The respondent opposed the petition vide a Replying Affidavit sworn on 3rd October 2023 by its Deputy Director Field Services Ms.Catherine Kertich. The affidavit annexed a bundle of documents. The respondent further files witness statements by Ms.Beatrice Mugere Nduma and Margaret Amateshe.

Petitioner's case

4. The Petitioner's case is that he was a teacher at Mioro Secondary School for 13 years before being transferred to Weithaga Secondary in Kahuro sub-county, Murang'a County in January 2019. Thereafter he was accused of having a love affair with one RW Thuo, a student in Mioro Secondary School.
5. The basis of the said allegation was a love letter written by the said student, which was found dropped at the market by a business lady and handed over to Ms Beatrice Nduma, a teacher at Mioro Secondary school. The respondent constituted a Sub county panel to investigate the allegation in line with regulation 146 of the TSC Code of Regulations for Teachers (CORT), 2015.
6. The team of three visited Mioro Secondary school on 2nd July 2019 and recorded statements from teachers and students. It further received copy of the letter written by the student (R) to him. The team then compiled a report of the investigations at the school level and submitted it to the TSC County Director -Murang'a.



7. The Director constituted a County Disciplinary Committee of 8 members chaired by the Deputy TSC County Director. The committee met on 20th August 2019 and concluded the hearing. Its verdict was that the petitioner had a case to answer and recommend for interdiction without any pay.
8. After receiving the report of the County Disciplinary Committee, the respondent constituted a Disciplinary Committee chaired by a Commissioner Mr.Mbage Ng'ang'a. The committee heard the case on 2nd February 2021 and reached a verdict of summary dismissal. The grounds for the dismissal were cited as;
 - a. Immoral behavior in that while a teacher at Mioro secondary school:
 - i. He had sexual intercourse with his student RWT Adm No.0XXXX5.
 - ii. Had love relationship with the said student.
 - iii. Had touched the student's breasts and private parts on several occasions when he met her.
 - b. Infamous conduct in that on 14th March 2019 at around 10:30PM accessed Mioro Secondary School despite having been transferred and took away the original love letter by R and disappeared with it.
9. The petitioner received the dismissal letter on 26th February, 2021 and had 90 days within which to lodge an appeal. He paid Kshs.2,200/= the required fees for appeal/review on 15th April 2021. On 20th April 2021, he wrote a letter requesting to be supplied with the following documents to assist in preparing his appeal: -
 - a. Statement by Bibiana Njambi, Deputy Principal Mioro
 - b. Statement by Mr.Erick Kioko Wambua
 - c. Statement by Priscilla Njoki
 - d. Submissions by RWT of 2nd February 2021.
 - e. The love note
 - f. Copy of the proceedings for the hearing held on 2nd February 2021.
10. The said documents were not supplied promptly. the respondent waited for six months and wrote the letter dated 5th October 2021 asking the petitioner to pay for 22 copies of the requested documents at the rate of Kshs.100 per copy. He paid for the same on 12th October 2021 but again the respondent failed to supply him with the said documents and instead invited him for a hearing on 7th March 2022.
11. The petitioner attended the hearing of his appeal but he was not adequately prepared since he was not supplied with the requested documents including the proceedings of the disciplinary hearing held on 2nd February 2021.
12. The petitioner testified as PW1 and called R (PW2) and Solomon Thuo (PW3) as his witnesses. He also produced bundles of documents aforementioned. In brief, the petitioner's evidence is that the decision by the respondent should be quashed for being unfair and unlawful. He contended that he was not invited to attend the investigations meeting and further that the composition of the investigations panel was not proper. In his view the investigations ought to have been done by the BOM of Mioro Secondary school and Weithaga Secondary school.



13. He further faulted the process because some investigators sat as panelists in the County Disciplinary committee including Margaret Amateshe and Wilson Makaru contrary to CORT. He further contended that the chairman of BOM Mioro Secondary school Kihumba Kimotho, principal David Mbugua, and principal Weithaga Boys, Muthengi Tuke sat in as panelist contrary to section 151 (4) (c) of CORT.
14. He contended that the correct composition is a TSC Commissioner, County Director and a member of the BOM of the two schools involved. In this case, he contended that Weithaga Boys school was not represented. He further contended that the Deputy County Director chaired the proceedings instead of the County Director.
15. He admitted that a teacher interdicted for the offence of immoral behavior is supposed to receive no pay. However, he maintained that the reason for the dismissal was not valid since the alleged love letter by RW was not availed to him even on appeal. He prayed for the prayers in the petition.
16. PW2 (RW) confirmed that she recorded statement when respondent's investigators came to Mioro Secondary School, denying the allegation against the petitioner. She confirmed that other students also recorded statements. She further stated that when teacher Beatrice Nduma asked her about the love letter on 14th March 2019, she denied being the author.
17. She further stated that she recorded a statement at the office of Deputy Principal in March 2019 and contended that she wrote what the Deputy principal directed her to her, that is, she had an affair with the petitioner.
18. PW3 (Solomon Thuo Wangoto) is a security guard at Mioro Secondary School. He stated that on 2nd July 2019, he was called to record statement on whether he saw the petitioner and another teacher Mr.Wambua come to the school on the 14th March 2019 at night and he answered in the negative. However, he contended that the TSC investigators wrote a different thing. He also denied that on 15th March 2019 he met the principal and told her that the petitioner and Mr.Wambua came to the school at night and entered the staff room.
19. He admitted that his affidavit stated that he was called by the principal on 8th July 2019 and he was coerced to record a statement implicating the petitioner. He then contended that the statement he recorded on 2nd July 2019 went with the TSC investigatory team.

Respondent's case

20. The respondent denied any wrong doing in the dismissal of the petitioner. It contended that it acted within its mandate under Article 237 (2) (f) of *the Constitution* and the CORT in dismissing the petitioner. It maintained that the dismissal was justified and fair procedure was followed. It called three witnesses to fortify its defence.
21. Beatrice Nduma (RW1) was formerly a teacher at Mioro secondary school where she taught chemistry and Geography. She was also the Guidance and Counselling teacher. In March 2019, while going home in the evening, she was given a letter by a pharmacist in Mioro Shopping Centre. It was written to the petitioner by R (PW2), a Form 4 student in the school.
22. RW1 read the letter in which the student was requesting for a meeting because the teacher was passing without greeting her. She was requesting the teacher for a meeting on a Sunday at the Laboratory. By then the teacher had been transferred from Mioro to Weithaga Secondary School.



23. RW1 brought the letter to the staff room the following day and called PW2 to the laboratory during lunchtime to talk about the letter. PW2 confirmed that she wrote the letter but all she wanted was that the teacher would continue assisting her in Mathematics and Business studies. RW1 confirmed that the letter did not mention sex or the alleged assistance in Maths and Business studies. RW1 further confirmed that the school was day school but students used to go to school over the weekends.
24. RW1 placed the letter in her drawer and also asked the petitioner about the letter but he denied that he dropped it at the shopping Centre. When she returned to her desk at 4pm she found the love letter missing and she could not tell who took it because five teachers were sharing the office with her.
25. In July 2019, a team of TSC investigators visited the school and she recorded a statement. Thereafter she was served with a show cause letter accusing her of negligence and collusion with the petitioner to defeat the case against him.
26. Margaret Amateshe, testified as RW2. She was the Sub-county TSC Director during the material time to this case. She received an anonymous letter alleging that the petitioner was having an affair with his student (R). Accordingly, she visited Mioro Secondary school on 2nd July 2019 with her HR officer and the County HR Officer to conduct investigation. They interrogated the Principal, Deputy Principal, Rahab (PW2), several teachers and classmates of PW2.
27. RW2 testified that PW2 admitted that she wrote the said letter to the petitioner but denied that the two had an affair. She maintained that she only wanted the teacher to assist her with Maths coaching. RW2 confirmed that PW2 was complaining vide the letter that the petitioner was ignoring her and not picking her calls. She also requested for a meeting at a designated place outside school time. The girl had also been interrogated by the Deputy Principal and admitted the illicit affair with the petitioner. However, the petitioner's wife who is a teacher at Mioro took away the statement which she surrendered during the county hearing.
28. RW2 and her team also interrogated the security guard (PW3) and he recorded a statement in his own handwriting confirming that the petitioner and another teacher, Mr.Wambua, came to the school at 10.30PM. As at that time the petitioner had already been transferred to Weithaga Secondary School.
29. RW2 contended that her investigation was happening three months after the incident and therefore many witnesses including R (PW2) had recanted their earlier statement. As a result, some teachers were served with show cause letters for interfering with the case.
30. RW2 further stated that at the county level, the petitioner's case was heard by a panel chaired by Deputy County Director Ms.Evelyne Kinaka while the prosecutor was Catherine Nderitu. RW2 only appeared as a witness who compiled the investigation report dated 2nd July 2019. She contended that her investigations were guided by Regulation 146 of CORT.
31. R W2 maintained that the letter by R was presented as evidence during the County Board hearing plus her earlier statement which petitioner's wife had taken away but surrendered during the hearing. The said documents were then forwarded to the TSC Headquarters.
32. She confirmed that Regulation 146 (12) of CORT bars investigator of an offence from presiding or sitting as a member of panel determining the same. She further confirmed that the minutes of the County Disciplinary committee on 20th August 2019 indicates that she attended as a member and not as a witness. However, she maintained that she attended as a witness and neither charged nor interrogated the witnesses. She further clarified that she never sat in the panel that dismissed the petitioner since that was made up of commissioners. She also clarified that the reason they never



interrogated the petitioner in July 2019 is because he had since been transferred to another jurisdiction hence the reason for the second investigatory hearing at the County level.

33. Ms.Catherine Kertich (PW3) is respondent's Deputy Director Discipline. She testified that the petitioner was dismissed after a disciplinary hearing and on the basis of initial statements by R (PW2) and other witnesses before his interdiction. She stated that Rahab and other witnesses recanted their statements after the petitioner was interdicted, which is a common phenomenon in TSC matters. She contended that there was enough corroboration that led the disciplinary committee to believe that the offence had been committed.
34. RW3 maintained that the petitioner was accorded a fair hearing where he cross-examined witnesses. He also appealed against the dismissal and again he was heard by a panel. She admitted that the petitioner paid Kshs.2200 fees for the appeal but contended that he never paid for the documents requested for as required under Schedule 5 of CORT.
35. She further testified that the proceedings done up to the County level are investigatory and not yet disciplinary hearing. After the investigations are concluded at the County level, the teacher is interdicted and a file is compiled, then forwarded to the Headquarters for disciplinary hearing. She confirmed that she sits at the Headquarters with commissioners for disciplinary hearings. She further confirmed that she saw the letter by R (PW2) which was photographed using a phone but she could not produce it as evidence. She clarified that the original letter was stolen from the staff room by the petitioner when he went there at night in the company of another teacher Mr.Wambua.

Petitioner's submissions

36. The Petitioner submitted that he was not accorded fair hearing during the investigation process contrary to Regulation 146(6) of CORT. He submitted that the investigations conducted on 2nd July 2019 were marred with a lot of irregularities because he was not informed of the allegations before commencement of the investigations. He was also not given an opportunity to prepare his defence and appear in person before the investigation panel as required under Regulation 146 (6) (d). He was also never given a chance to be present when the witnesses were being interviewed by the investigation panel and he was not given an opportunity to adduce and challenge any adverse evidence.
37. The petitioner further submitted that the statements recorded on 2nd July 2019 during the investigations were substituted by others recorded by R (PW2) and Solomon (PW3) on 20th August 2019 and 8th July 2019 respectively. Further, that the officers who investigated the petitioner also sat as disciplinary panel which interdicted him on 20th August 2019 contrary to Regulation 146 (12) of CORT and as such the investigatory process was unfair and contrary to rules of natural justice.
38. As regards the appeal, the petitioner submitted that the respondent did not justify by good reasons the failure to supply him with documents he had sought to use during his appeal.
39. The petitioner further submitted that the respondent has failed to adduce enough evidence in this court to support the reasons for his dismissal from employment on 2nd February 2021. He submitted that the dismissal letter cited the reasons as immoral behavior and infamous conduct. The alleged immoral behavior included sexual intercourse, love relationship and touching breasts and private parts of his student Rahab (PW2).
40. The infamous conduct on the other hand involved his visit to Mioro Secondary School on 14th March 2019 at 10:30PM without official permission and stole a love letter written to him by R (PW2) from the desk of RW1. He allegedly committed the second offence after he had been transferred from the school to Weithaga Secondary School.



41. He submitted that there was no sufficient evidence to proof any sexual intercourse or other offences for which he was dismissed. He also contended that the dismissal was based on witness statements which were recanted by the same witnesses. The witnesses confessed that they were guided on what to write and forced to sign by the Deputy Principal on 20th August 2019. He further submitted that the alleged love letter was not produced as exhibit in this case and RW1 confirmed that she didn't know who stole the love letter. The respondent further failed to call the Deputy Principal to testify before the court.
42. As regards the alleged violations of *the Constitution*, the petitioner submitted that his right was violated on the basis of Regulation 148(1) of the CORT which denied him half salary during the period of interdiction. He submitted that the said Regulation was discriminatory contrary to Article 27 (1) of *the Constitution* which provides for equality in the enjoyment of all rights and fundamental freedoms. He cited Regulation of various commissioners including PSC and TSC where interdicted officers in the public sector are entitled to half salary without any discrimination on the basis of the offence involved.
43. In view of the foregoing, the petitioner urged the court to declare Regulation 148 (1) of CORT to be unconstitutional to the extent that it discriminates certain interdicted teachers from receiving half salary during the interdiction period. In his view, an interdicted teacher is presumed innocent until proven otherwise and as such he cannot be denied all his salary during the interdiction period. For emphasis he cited the case of Patrick Wanyonyi Khaemba v Secretary Teachers Service Commission & another (2014) eKLR.
44. Finally, the petitioner submitted that he has proved his case and as such he is entitled to the reliefs sought in his petition. He urged the court to make the declarations sought and award him Kshs.636,300.00 being his half salary of Kshs.35,350.00 per month for the 18 months he was on interdiction before the dismissal. He also prayed for order of certiorari to quash the dismissal letter dated 26th February 2021 and the review decision in the letter dated 23rd March 2022. Finally, he prayed for order of mandamus to compel the respondent to reinstate him to his employment without loss of benefits and salaries since 20th August 2018 when he was interdicted.

Respondent's submissions

45. The Respondent submitted that the dismissal of the petitioner was based on a justifiable reason, namely immoral behavior. It contended that a report reached its office that the petitioner had an illicit love relationship with his student, PW2 at Mioro secondary school. As a result, the student had written a love note to the petitioner who by then had been transferred to another school. The letter was handed over to RW1 by a Shopkeeper at Mioro Shopping Centre.
46. The respondent submitted that RW1 testified about the contents of the love note by the student in which;
 - a. She was complaining that the petitioner has since his transfer from Mioro secondary been avoiding her.
 - b. She wondered whether she had wronged him so that she may apologize because he was no longer responding to her messages.
 - c. She was complaining that the petitioner did not show up at their planned meeting area the proceeding Sunday.
 - d. She sought another meeting with the petitioner specifically on a Sunday and pleaded with him to show up.



47. The respondent submitted that investigations into the matter yielded a report which implicated the petitioner for breach of the provisions of the TSC Act and the TSC Code of Conduct and Ethics. It maintained that on the basis of the evidence obtained during the investigations, it genuinely believed that the petitioner had a love relationship with R (PW2). She clearly described to the RW1 and the investigators her relationship with the petitioner even after recanting her initial statements. Besides classmates of PW2 also informed the investigators that PW2 had confided in them about her relationship with the petitioner.
48. As regards due process, the respondent submitted that the petitioner was dismissed through a fair procedure. It submitted that the allegations against him were investigated in line with Regulation 146(4) of CORT at the Sub-county level led by RW2. A report was compiled and recommended for escalation of the matter to higher authority because the petitioner had transferred to another sub-county.
49. The respondent further submitted that, under Regulation 146(4), the matter went to County level where further investigations were done by a panel led by the Deputy County Director Murang'a, Evelyn Kinaka. The others were, Ms Catherine Nderitu Sub county director Kigumo and the HR Officer Mr. Wilson Makau. RW2 attended purely as a witness. The respondent further submitted that the petitioner was invited to appear before the County team personally and he complied. All the other witnesses were invited and the petitioner was given opportunity to cross-examine them.
50. The respondent contended that after the hearing, the county team found that the petitioner: -
- a. Had an illicit love affair with R (PW2), his student while at Mioro Secondary school.
 - b. Upon transfer at Weithaga Boys secondary school, PW2 wrote a love note to him and stuck under the lock of his car while parked at Mioro Shopping Centre.
 - c. The student confirmed to the investigators that she wrote the love note.
 - d. RW1 found the note first.
 - e. The learner confided to RW1 about her relationship with the petitioner.
 - f. RW1 later informed the petitioner about the love note.
 - g. The petitioner assisted by another teacher Mr. Wambua stole the love note from RW1's desk at Mioro secondary school staff room.
51. The respondent submitted that, on the basis of the above matters, the County team was convinced that the petitioner had a case to answer and recommended for his interdiction and the matter be escalated to the Head office. It maintained that the investigations were done fairly and fortified its view by citing *Judicial Service Commission v Gladys Boss Shollei & Another (2014) eKLR*.
52. As regards the failure to pay half salary during interdiction, the respondent submitted that Regulation 148 (1) (h) of the CORT barred any teacher interdicted for immoral behavior from receiving half salary. It further submitted that it is an independent commission established under Article 237 of *the Constitution* governed by its own statute and Regulations to govern its operations including TSC Act and CORT. Consequently, it submitted that it is not bound by statutes and instruments governing other commissions as insinuated by the petitioner.
53. It further submitted that the petitioner was aware of the terms and conditions of service since he took up his appointment as a teacher but he deliberately breached the same. Consequently, it contended



that the petitioner authored his own misfortune and as such he must carry his cross without passing the blame to the employer.

54. The respondent further contended that Covid-19 pandemic affected the investigations due to the lock down but clarified the process was not halted since the hearing was conducted on a virtual platform where the petitioner was invited and heard.
55. As regards the disciplinary hearing, the respondent submitted that the petitioner was invited to a disciplinary hearing pursuant to Regulation 149 of CORT on 30th September 2020. Due to absence of Rahab (PW2) the hearing was rescheduled to 2nd February 2021 when she attended and hearing proceeded to conclusion. The petitioner was informed about his right to attend in person, present documents and call witnesses if he had any during the hearing.
56. The respondent further submitted that the petitioner attended the hearing in person but presented no witnesses or documentary evidence. The employer presented witnesses and the petitioner cross examined them then gave his defence. Thereafter, the evidence tendered was considered and a verdict made that the petitioner be dismissed and removed from the register of Teachers. Subsequently, he was served with a dismissal letter informing him of his right to appeal/review within 90 days.
57. The respondent submitted that the petitioner applied for review of the decision by the Disciplinary panel and paid Kshs.2000 as fees pursuant to Schedule 5 of the CORT. He was heard but the dismissal was upheld. The respondent maintained that the petitioner never paid the fees prescribed for him to be supplied with any documents.
58. As regards the reliefs sought, the respondent submitted that the petitioner is not entitled to any since the investigation, interdiction and the dismissal from service met the legal threshold of fairness and justification. It maintained that the disciplinary process did not violate his constitutional rights or breach his contract and therefore the suit should be dismissed with costs.

Issues for determination

59. Having carefully considered the pleadings, evidence and submissions the following issues fall for determination: -
 - a. Whether the dismissal was grounded on valid and fair reasons.
 - b. Whether fair procedure was followed.
 - c. Whether Regulation 148 (1) of the CORT is inconsistent with Article 27 of *the Constitution*.
 - d. Whether the petitioner is entitled to the reliefs sought.

Reason for the dismissal

60. The reasons for the dismissal were set out in the dismissal letter dated 26th February 2021, thus:-

“Mr. Joseph Kanene Kariuki

Weithaga Secondary School

O BOX 206-10202

Kangema

Re: Notice of removal from the Register of Teachers



Pursuant to the hearing of your discipline case on 01.02.2021, I am directed by the Teachers Service Commission to say that as a result of proceedings under Section 33 of the [Teachers Service Commission Act](#), No.20 of 2012, the Commission has determined that your name be removed from the Register of Teachers with effect from 01.02.2021 for the following reasons: -

1. You are of immoral behavior in that while a teacher at Mioro Secondary School:
 - i. You had sexual intercourse with your student RWT Adm.No.0XXXXX5 of Form 4 (2019) on diverse dates;
 - ii. You had a love relationship with her leading her to write a love letter to you and place it on the handle of the door of your car which you had parked in front of a chemist in Mioro town on 13th March 2019; and
 - iii. You also touched her breasts and private parts on several occasions when you met her.
2. You are of infamous conduct in that, although you had been transferred from Mioro Secondary School, on the night of 14th March, 2019 at around 10.30 pm without official permission, had access to the original love letter RWT Adm.No.0XXXXX5, Form 4 student had written to you, which had been kept in Mrs.Nduma's locker and you disappeared with it while a teacher at Weithaga Boys Secondary School.

You have a right of Review against the decision which must be exercised within ninety (90) days of the date of this notice. Any application for Review must conform to the provisions of Regulation 155 of the Code of Regulations for Teachers and should be submitted to the Secretary, Teachers Service Commission, Private Bag -00100 Nairobi.

If, on expiry of ninety (90) days from the date of this notice, no application has been made as aforesaid or if the application is withdrawn or dismissed, your name will forthwith be removed from the Register of Teachers.

I draw your attention to Section 23 (2) as read together with Section 30 (5) of the Act to the effect that "a teacher whose name has been removed from the Register shall cease to be a teacher for the purposes of this Act with effect from the date of such removal and shall not engage in the teaching service."

Your attention is further drawn to Section 31 (2) of the Act, which provides that, an application for reinstatement to the Register of Teachers will only be considered by the Commission after eighteen (18) months from the date of removal.

Judyth Ethuro(Mrs)

For: Secretary/Chief Executive

Teachers Service Commission

Copy to: The TSC County Director-murang'a



The Principal
Weithaga Sec.school
O Box206-10202
Kangema”

61. The reasons for the dismissal were immoral behavior and infamous conduct. The petitioner contended that the said offences are not supported by sufficient evidence while the respondent was of contrary view. I have considered the record of the proceedings produced by both parties. There is evidence that a letter written by R (PW2) to the petitioner was collected by a business woman at Mioro Shopping Centre. The letter was not produced as an exhibit before this court. However, the letter was seen by several teachers in Mioro Secondary school staff room.
62. Several observations can be made from the said letter. First the letter was by a frustrated author who was crying for attention after the petitioner went on transfer just weeks before the date of the letter.
63. Second, in the estimation of an ordinary man in Mioro market, the letter pointed to an illicit relationship. RW1 wrote in her statement during the investigation that the Shopkeeper at the market greeted her with annoying words, thus; “Hamna Watoto Mioro” (you have no children in Mioro). When RW1 enquired about the nature of the greeting, she was handed a letter by PW2 to the petitioner.
64. Third, the letter revealed a relationship that was not good for a student. I say so because RW1 stated that she counselled PW2 to seek help from other teachers or bright students in Mioro secondary school and stop following the petitioner. Fourth, the letter pointed to guilt on the part of the petitioner. I say so because after it was taken to the staff room by RW1, the teachers resolved to cover up the matter and a scheme was hatched to steal it from the locker of RW1. The matter disturbed the petitioner’s wife who was also a teacher at Mioro and took away a statement written by PW2.
65. In my view, the anxiety aroused by the said letter by PW2 to the petitioner speaks volume and as such the respondent was entitled to its opinion that the petitioner had a love relationship with PW2. Section 43 of the [Employment Act](#) provides that: -
- “(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.
- (2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.”
66. The respondent contended that it genuinely believed that the petitioner had committed the offence based on the investigations report and the testimonies of the witnesses. I am also satisfied that any other reasonable employer in similar circumstances would have also dismissed the petitioner. In that respect, I find and hold that the employer has proved that the reason for dismissing the petitioner was valid.

Procedure followed

67. The procedure for disciplinary proceedings against a teacher involves investigation, interdiction, disciplinary hearing and review of the decision. Regulation 146 of CORT provides for the investigation and presumption of innocence of the teacher. The case herein fell under Regulation 146 (4) of CORT



- because the teacher involved was in a different school from where the offence occurred. Hence it was handled at the County level under the watch of the County Director in consultation with the BOM of the schools involved.
68. To begin with, a team from Sub-county office visited the school and did preliminary investigation on the matter. Since the petitioner had transferred to another sub-county, he was not invited to Mioro Secondary school during that preliminary investigations by the Sub-county team. Team prepared a report and presented it to the County Director.
69. The County Director constituted a committee composed of BOM members and Principals from the two schools involved. The committee was headed by Deputy County Director while the Sub-county Director Kigumo was the secretary. The committee invited the petitioner during the investigatory hearing on 20th August 2019 at TSC office at Murang'a. The petitioner was present during the examination of all the witnesses and he was allowed to cross-examine them. He was also allowed to give his statement. He never raised any objection to the proceedings.
70. After considering the statements by the witnesses and the petitioner the committee found that the petitioner had a case to answer and recommended for his interdiction. He was served with interdiction letter pending disciplinary hearing by the commission. His interdiction vide letter dated 20th August 2019 was without any half salary pursuant to Regulation 148 (1) (h) of the CORT.
71. The Disciplinary hearing was done on 2nd February 2021 before a Disciplinary committee. The petitioner was invited to attend in person and bring along witnesses if had any. He was also allowed to carry any documentary evidence he felt to be useful to his defence. The charges were read to him and he pleaded not guilty. Witnesses were called and he cross-examined them. He also made his representation and they were considered after the hearing but a verdict of dismissal communicated to him.
72. The petitioner appealed and the appeal was heard but the appeal panel upheld the decision by the disciplinary committee.
73. Section 41 of the *Employment Act* provides that: -
- “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.
 - (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”
74. Having considered the evidence on record, I am satisfied that a fair procedure was followed before dismissing the petitioner and removing him from the Register of Teachers. He was invited to attend the investigatory hearing at the County level. He was notified of the reason for the intended dismissal and he was afforded a fair opportunity to defend himself. He was later heard by a disciplinary committee on 2nd February 2021 and thereafter his appeal was heard by a different panel.



Constitutionality of Regulation 148 (1) of the CORT

75. The petitioner contended that Regulation 148(1) of CORT is inconsistent with Article 27 of *the Constitution* in that it allows discrimination against teachers interdicted for some offences. He contended that such discrimination presumes the teacher guilty until proven innocent. He submitted that the Regulation for other commissions do not discriminate employees on the basis of the allegations made against an employee.
76. The respondent maintained that it is independent commission with a statute and own Regulations that guide its operations and as such it is not bound by other commissions' regulations. It further submitted that the petitioner was bound by the said regulations as part of his terms and condition of service which he was aware of before the incidence.
77. I agree with the respondent that Regulation 148 (1) of CORT was at all material times to this suit, part of the petitioner's terms and conditions of service. He never challenged them before the axe fell on him. There is no doubt that it exposes teachers interdicted for some offences to different treatment with respect to payment of half salary until their case is determined.
78. However, I will leave that matter to the Teachers' Trade Unions to address the matter with the respondent while negotiating the next Collective Bargaining Agreement (CBA). I say so because the court takes judicial notice that teachers of this country have Recognition Agreement and CBA with the respondent which have not been produced in court. Indulging in the matter of terms and conditions of service without seeing the CBA applicable to this case poses the danger of this court rewriting the contract for the parties. Consequently, I find that the petitioner has not proved that the differential treatment falls within the forbidden grounds under Article 27 of *the Constitution* or that it contradicts the CBA.

Reliefs

79. In view of the finding herein that the reason for dismissal was valid and the procedure followed was fair, I must hold that the petitioner has not proved a case of unfair termination of his employment. I further hold that the petitioner has not proved that the denial of half salary during interdiction pursuant to Regulation 148 (1) of CORT falls within the forbidden grounds of discrimination under Article 27 of *the Constitution*. In the end, I am satisfied that the weight of the evidence tilts against the petitioner and proceed to dismiss the suit with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 30TH DAY OF JANUARY, 2024.

ONESMUS N MAKAU

JUDGE

Order

THIS JUDGMENT HAS BEEN DELIVERED TO THE PARTIES VIA TEAMS VIDEO CONFERENCING WITH THEIR CONSENT, 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.

ONESMUS N MAKAU

JUDGE

