



Sum, Deputy Principal of Moi Girls School Nairobi v Njaggah, Principal of Moi Girls School Nairobi & 2 others; Attorney General (Interested Party) (Petition E130 of 2023) [2024] KEELRC 324 (KLR) (23 February 2024) (Judgment)

Neutral citation: [2024] KEELRC 324 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E130 OF 2023**

B ONGAYA, J

FEBRUARY 23, 2024

**IN THE MATTER OF ARTICLES 10, 20, 21, 23, 27, 28, 41, 43,
47, 73, 232, 236 AND 258 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION
OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE
AND PROCEDURE RULES, 2013; RULES 4,8,10,11 AND 13**

IN THE MATTER OF THE TEACHERS SERVICE COMMISSION ACT NO. 20 OF 2012

AND

**IN THE MATTER OF THE TEACHERS SERVICE COMMISSION
CODE OF REGULATIONS FOR TEACHERS, 2015**

-BETWEEN-

**MRS DORCAS CHELEGAT SUM, DEPUTY PRINCIPAL
OF MOI GIRLS SCHOOL NAIROBI PETITIONER**

- VERSUS -

**MRS. MARGARET NJAGGAH, PRINCIPAL OF MOI
GIRLS SCHOOL NAIROBI. 1ST RESPONDENT**

THE BOARD OF MANAGEMENT MOI GIRLS SCHOOL NAIROBI 2ND RESPONDENT

TEACHERS SERVICE COMMISSION 3RD RESPONDENT

HON ATTORNEY GENERAL INTERESTED PARTY

BETWEEN

**MRS DORCAS CHELEGAT SUM, DEPUTY PRINCIPAL OF MOI GIRLS
SCHOOL NAIROBI PETITIONER**



AND

MRS. MARGARET NJAGGAH, PRINCIPAL OF MOI GIRLS SCHOOL
NAIROBI 1ST RESPONDENT

THE BOARD OF MANAGEMENT MOI GIRLS SCHOOL
NAIROBI 2ND RESPONDENT

TEACHERS SERVICE COMMISSION 3RD RESPONDENT

AND

HON ATTORNEY GENERAL INTERESTED PARTY

JUDGMENT

1. The petitioner filed the amended petition dated 25.10.2023 through M/S Masika & Koross Advocates. The petitioner prayed for:
 - a. A declaration that an interdiction in public service and in particular the Teachers Service Commission does not extend to the eviction of the staff residing in the staff quarters for such affected staff remain employees of the affected institution until the conclusion of the disciplinary process.
 - b. A declaration that a final adverse decision by the Commission upon conclusion of disciplinary process against any Teacher or officer as its decision vide letter Ref TSC/DSC/NO:NRB/001/07/2023/2023 dated 17.08.2023 must contain reasons as grounds for the decision and any such decision without any reason is in contravention of the relevant statute and Article 47 of the constitution and therefore null and void ab initio.
 - c. A declaration that the respondents decision vide letter Ref TSC/DSC/NO:NRB/001/07/2023/2023 dated 17.08.2023 was unmerited and the same is null and void ab initio.
 - d. A declaration that the 1st respondent's embracement of Teacher Elizabeth Waweru as the KCSE examination supervisor at Moi Girls Schoon rendered her as unsuitable examination center manager as well as the principal school administrator.
 - e. A declaration that regulation 156 of the TSC Code of Regulations for teachers is unconstitutional to the extent that a decision by the 3rd respondent constitutional Commission, is subject to variation or reversal without any reference to the Commission by its subordinate committee consisting of some members of secretariat.
 - f. A declaration that transfer is not one of the disciplinary punishments in the TSC Code of Regulations or any other law.
 - g. A declaration that the eviction order by the 1st respondent Ref. MGN/TSC/NO. 310742/2023 dated 30.06.2023 is invalid, null and void ab initio.
 - h. A declaration that an interdiction of teachers in public service accruing out of a process that ignored the constitution of the investigation panel or not based on the report of such a panel or not by the Commission itself out of the recommendation of the board of management is invalid null and void *ab initio*.



- i. A declaration that the interdiction of the petitioner by the 1st respondent or the 2nd respondent vide letter Ref No. MGN/TSC/NO 310742/2023 dated 23.06.2023 is invalid, null and void *ab initio*.
 - j. An order of certiorari to remove into this court for purposes of being quashed, the 3rd respondent's decision vide letter Ref. TSC/DSC/NO:NRB/001/07/2023/2023 dated 17.08.2023 together with the attendant decisions of demotion and transfers vide letters Ref NR/TSC/310742/48 dated 18.08.2023 and Ref No. TSC/310742/49 dated 24.08.2023.
 - k. An order that the petitioner forthwith resumes her duties and position as Deputy Principal Administration of Moi Girls School Nairobi.
 - l. An order of certiorari to remove into the court for purposes of being quashed, the purported eviction order against the petitioner Ref. No MGN/TSC/NO. 310742/2023 dated 30.06.2023.
 - m. An order of certiorari to remove into this court for purposes of being quashed, the purported interdiction of the petitioner vide letter Ref No. MGN/TSC/NO.310742/2023 dated 23.06.2023.
 - n. An order of prohibition do issue prohibiting the 1st and 2nd respondents from evicting the petitioner from the staff house and that she continues to pay to the school the prevailing nominal rent.
 - o. An order of prohibition do issue prohibiting the 1st respondent from assigning the petitioner peripheral duties other than the duties for the Deputy Principal of the Moi girls school Nairobi
 - p. An order be issued by the Honourable Court for just compensation by the respondents to the petitioner for an amount or sum to be determined by the court for contravention of fundamental rights and freedoms and failure to observe the national values and principles of good governance and public service enshrined in the constitution thus injuring the petitioner's feelings and dignity and exposing her to public ridicule and odium and possible prejudice as regards future National Service in view of the requirements of chapter 6 of the constitution and occasioning her losses and damages.
 - q. An order that the costs consequent upon this petition be borne by the 1st and 2nd respondents.
2. The petition was based upon the petitioner's supporting affidavit and exhibits thereto filed together with the petition, the further affidavit sworn on 25.10.2023 and the 2nd further affidavit sworn on 17.01.2024. The petitioner's case is as follows:
- a. The 1st respondent interdicted the petitioner on allegations that;
 - i. On 16.03.2023 the petitioner failed to properly coordinate and organize the logistics of the AGM meeting resulting in a disorganized official event.
 - ii. On 24.05.2023 the petitioner in-subordinated the Principal by failure to submit an investigation report for onward transmission to the Teachers Service Commission.
 - iii. On 15.03.2023 the petitioner permitted strangers into the school compound for hawking.
 - b. The petitioner states that her interdiction is for the collateral reason that the 1st respondent has for a while been unable to cause the 3rd respondent to transfer her out of Moi Girls School



Nairobi and hence the real intention is to create a reasonable ground upon conclusion of the interdiction that it is practically untenable for a Principal who has interdicted her Deputy Principal to continue working together.

- c. The 1st respondent on 03.07.2023 issued the petitioner with the impugned eviction order Ref. MGN/TSC/NO. 310742/2023 dated 30.06.2023 that required the petitioner and her family to vacate the school quarters house on the same date.
- d. It was malicious for the 1st respondent to have issued the petitioner with an eviction order on 03.07.2023 for her and her family to vacate her school rented house of years on the same day of 03.07.2023.
- e. The petitioner states that the law provides that upon interdiction the teachers housing arrangement, unlike the basic salary should not at all be interfered with at regulations 89(2) of the Code of Regulations for Teachers.
- f. The 1st respondent's reference to regulation 147(2) of the Code of regulations for teachers as the basis for eviction order is a misconstruction of the said regulation which refers to the vacation of the office held by the interdict and the same does not extend to the residence or housing arrangement.
- g. The definition of interdiction at regulation 2 of the Code of Regulations of Teachers clarifies the issue beyond any doubt that clearance is limited to the office.
- h. Interdiction as provided in the applicable Teachers Service Commission Code of Regulations for Teachers is undertaken upon a verdict of a case to answer.
- i. The regulations provide that any interdiction is preceded by an investigation report – verdict from a constituted investigation panel which carries out investigations on alleged misconduct the basis upon which a Board of Management or Principal may interdict a teacher. It is a stepwise procedure contained at regulation 145 and 146 of the Teachers Service Commission Code of Regulations for Teachers.
- j. The 1st and 2nd respondents deviated from the said stepwise procedure in arriving at the impugned decision of interdicting the petitioner.
- k. The petitioner states that the procedural improprieties and violations leading to the impugned interdiction were as follows;
 1. The 1st respondent was the complaint but did not reduce her complaint into a written complaint as required by law.
 2. The 1st respondent or the Board of Management did not constitute an investigation panel and so the petitioner was not accorded a fair hearing, was never informed of the allegation with sufficient detail, was never given opportunity to appear in person before the investigation panel as it did not exist, the petitioner was not present when the witnesses were being interviewed by the investigation panel and the petitioner was never given opportunity to adduce and challenge any adverse evidence.
 3. The 1st and 2nd respondents exceeded their powers when they elected to interdict the petitioner without the benefit of a report from the investigation panel.
 - l. The petitioner states that she knows, for a fact, that it is the offences listed at the third schedule of the Act that may qualify for an interdiction otherwise



the offences at the above Regulation 155 are housekeeping offenses that may upon conviction only result to the issuance of an administrative warning.

- m. The 1st respondent issued the petitioner a show cause letter dated 02.06.2023 under regulation 155 that allowed her 7 days to respond.
 - n. The petitioner responded vide her letter dated 07.06.2023 in turn the 1st respondent wrote to the petitioner vide letter dated 12.06.2023 and invited her to appear before the school's Board of Management.
 - o. The petitioner responded to the previously mentioned letter through her letter dated 19.06.2023.
 - p. The petitioner states that on 22.06.2023 the Board of Management violated the law as follows;
 - i. Accepting the report-verdict by and from the complainant, the 1st respondent and proceeded to interdict her, instead of declining the same and constituting an investigation panel to carry out fresh investigations or inquiries and submit a report-verdict to the board.
 - ii. Allowed the 1st respondent, the complainant, to sit in the Board of Management meeting not as witness but one of the panellists as the board of management, 2nd respondent, had in essence re-constituted itself into an investigation panel.
 - iii. The Board of Management, the 2nd respondent refused to allow the petitioner to adduce any evidence or pose any question to the 1st respondent, the complainant or witness.
 - iv. The Board of Management, the 2nd respondent, was required by law at regulation 146(11) of Code of Regulations for Teachers to have sought the Commission's permission to undertake direct investigations without investigation panel the way it appears to have elected and submit the recommendation report to the Commission for her interdiction by the Commission itself.
 - q. The petitioner maintains that the foregoing actions of the respondents offended procedural fairness or due process of rules of natural justice for being in clear breach of legislation or prescribed applicable policy standards.
3. The 1st and 2nd respondents filed the replying affidavit of Margaret Njaggah, the Principal and the Secretary of the 2nd respondent, sworn on 11.07.2023 and the undated further replying affidavit both filed through the office of the Attorney General. It was stated and urged as follows:
- a. The disciplinary process of the petitioner followed the due process in that the petitioner was afforded a fair hearing.
 - b. The petitioner was interdicted by the Board of Management and not the Principal.
 - c. Regulation 14(b) of the Teachers Service Commission Code of Regulations for Teachers provides that the Commission may generally or in particular delegate to the Board of Management or any other agent the role of exercising disciplinary control over the teachers.



- d. Regulation 18(5) provides that the head of the institution shall have the obligation to forward with the appropriate remarks any written communication from the teacher to the Commission and from the Commission to the teacher.
 - e. Regulation 140 provides for the offences that may lead to disciplinary action, and paragraph (b) prescribes professional misconduct as negligence of duty and insubordination among others.
 - f. Vide a letter of interdiction dated 23.06.2023 the petitioner breached the offences outlined in Regulation 140(b) thereby leading to her interdiction.
 - g. The reason for the interdiction was based on reasonable grounds devoid of any malice or driven by a cause to transfer the petitioner out of the 2nd respondent's school.
 - h. The petitioner was required to vacate the school quarters house as stipulated by the Code of Regulations and in particular regulation 147 which provides for the process of interdiction.
 - i. Regulation 147(1) and (2) of the Code of Regulations provides that upon the Commission or the Board of Management serving a teacher with a letter of interdiction, it shall also ensure that the interdicted teacher leaves the educational institution within 48 hours notwithstanding the payment of nominal monthly rent.
 - j. The petitioner has misconstrued the interpretation of Regulation 89(2) and that the import of the Regulation is that in order to cushion an interdicted teacher from the inconvenience arising from half salary, the Commissions will pay for the teacher's full house allowance until the case is determined.
 - k. The Regulation was intended to provide for alternative housing to a teacher housed within the school who is on interdiction. That once the teacher vacates the school quarters she would find alternative housing away from the school.
 - l. Under regulation 146 of the Code of Regulations of Teachers an investigation of an allegation made against a teacher shall be instituted by the Board of Management of the respective educational institution, County Director where there is no Board of Management or heads of institution in consultation with the Boards of Management as the case may be.
 - m. Regulation 3 of the Code of Regulations defines an investigation panel as a team of officers of the Commission, agents or any other body tasked by the Commission to make inquiries into allegations made against a teacher. This means that a Board of Management constitutes an investigative panel and that no special panel is required as the petitioner puts it.
 - n. The 1st and 2nd respondent maintain that the offences against the petitioner were weighty and they bordered on professional misconduct and thereby warranted the petitioner's interdiction.
 - o. The 1st and 2nd respondents state that the petitioner was accorded a fair hearing and that due process was followed and her rights were not violated in any way.
 - p. The petition herein is premature for reason that the petitioner has not exhausted the internal dispute resolution mechanisms established by the Commission.
4. The 3rd respondent filed the Replying Affidavit of Victoria Muoka, the regional director in charge of Nairobi County at the Teachers Service Commission, sworn on 05.12.2023 through Cavin Anyuor, Advocate. It was stated and argued as follows;



- a. The court lacks jurisdiction to determine the instant petition. The petitioner has failed to exhaust all the internal dispute resolution mechanisms and administrative remedies available to her, hence being in blatant breach of the doctrine of exhaustion.
- b. The petition offends the provisions of section 46 of the TSC Act and regulation 156 of the Code of Regulations for Teachers.
- c. The instant petition does not meet the threshold of constitutional pleadings test espoused in the case of Anarita Karimi Njeru Vs. Republic (1979) eKLR and Mumo Matemu vs. Trusted Society of Human Right Alliance, Civil Appeal no. 290 of 2012.
- d. The matter before court is a contractual dispute within the ambit of statute law. The same amounts to a blatant breach of the principle of Constitutional Avoidance.
- e. The Commission through the 1st respondent received written complaints against the petitioner. Upon receipt of the allegations, the principal of the school who pursuant to section 62 of the Basic Education Act is the Secretary to the Board of Management and the petitioner's immediate supervisor conducted preliminary inquiry and obtained written statements from persons who had relevant information on the matter.
- f. The specific allegations were communicated formally to the petitioner vide a letter dated 02.06.2023 in which she was required to show cause why disciplinary action could not be taken against her.
- g. In exercise of her right of reply the petitioner vide letter dated 07.06.2023 comprehensively responded to the allegations against her.
- h. In compliance with regulation 146 (2)(a) COURT, the Principal of the school acting as the Secretary to Board of Management convened a BOM meeting to deliberate on the matter.
- i. The petitioner was duly invited to the BOM meeting scheduled for 23.06.2023 vide letter dated 12.07.2023 for investigatory hearing as provided in the Code of Regulations. The petitioner was accorded 10 days' notice of the meeting.
- j. The letter of invitation set out the allegations raised against the petitioner to enable her prepare for the hearing at that preliminary stage.
- k. The Board held a meeting on 22.06.2023 to investigate the allegations. The petitioner duly attended the investigatory hearing and was accorded the opportunity to respond to the allegations and present any exculpatory evidence for consideration.
- l. Upon hearing the petitioner's evidence and interrogating the facts and attendant regulations the Board made a decision to interdict the petitioner for breach of the Code of Regulations and the basic tenets of the teaching profession.
- m. Acting on the instructions of the Board the secretary issued an interdiction notice dated 23.06.2023 and served the petitioner.
- n. The petitioner was given 21 days to write her statement of defence in readiness for a formal disciplinary hearing before her employer as contemplated under the Code of Regulations and the Employment Act.



- o. As per the Regulation 147(2) of the Code, upon service of the interdiction letter, the petitioner was required to hand over all the institutional property and leave the institution within 48 hours.
- p. The petitioner was informed that she would be given an opportunity to be heard in person where she would defend herself before her employer. It is the disciplinary committee of the Commission which determined the petitioner's case based on evidence placed before it by both parties.
- q. The Commission upon getting the court's nod convened its disciplinary committee meeting on 25.07.2023 in the presence of the petitioner following her invitation vide the letter of 18.07.2023.
- r. Prior to the hearing the petitioner vide letter dated 14.07.2023 sought to be given all the documents related to her case including witness statements to enable her prepare for the hearing which she was duly granted.
- s. The petitioner attended the disciplinary committee hearing on 25.07.2023 accompanied by two of her colleagues as required under section 41 of the *Employment Act*.
- t. The petitioner was accorded ample time and opportunity to tender exculpatory evidence and to cross-examine witnesses.
- u. The decision to warn the petitioner was reached by the committee after considering the following;
 - i. The safety, security and welfare of learners noting that Moi Girls is a highly sensitive school in terms of security due to past incidences where learners lost their lives due to acts of arson caused by strangers. Accordingly, as a senior school administrator in charge of administration the petitioner was negligent in exposing learners to another serious breach of security by allowing strangers into the school compound.
 - ii. The safety and security and welfare of learners noting the proximity of Moi girls to Kibera slums hence the need to maintain elaborate security protocols; accordingly, as a senior school administrator in charge of administration, the petitioner was negligent in exposing learners to another serious breach of security by allowing strangers into the school compound;
 - iii. The academic welfare of learners specifically form fours whose examinations were interrupted by loud music played by strangers in the school compound.
 - iv. The academic welfare of learners specifically form four whose right to have a serene learning environment was interrupted by loud music played by strangers in the school compound.
 - v. The academic welfare of learners whose teachers were distracted to engage in shopping during school hours; the presence of the strangers interrupted curriculum implementation to the detriment of the learners.
 - vi. The government academic regulations and time table clearly indicating school hours for purposes of curriculum delivery start from 8:00 am to 5:00 pm



- vii. The failure by the petitioner to prepare a comprehensive report on the money received and expended or the failed US trip for submission to government agencies noting that a parent had filed a formal complaint on the matter.
 - viii. The failure on the part of the petitioner to effectively discharge her administrative duties specifically her failure to make logistical arrangements for the proper management of the annual general meeting for parents
 - ix. The need for public officers to be transparent and accountable especially the school administrators like the petitioner when handling funds belonging to the parents.
 - x. The fact the evidence showed that the petitioner was granted ample time to prepare a report on the matter and rebelliously failed to do so.
- v. The petitioner's allegations that she was not accorded fair hearing while the record confirms she presented her case and cross-examined witnesses before the respondent is dishonest, malicious and false.
5. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
6. To answer the 1st issue for determination, the Court returns that the petitioner has failed to establish her allegation and claims about the impugned interdiction. The evidence is that the disciplinary process flowing from the interdiction continued and the Commission arrived at an informed decision and the matter closed. In the circumstances, the Court finds that the respondents followed due procedure and the respondents have shown that in any event, consequential to the interdiction, the petitioner was required to leave the housing accommodation located in the school per cited provisions of the Regulations. It is that by Court order, the requirement to vacate was subject to such intervention in terms of the conditions by way of timelines that the Court imposed. The Court finds that the petitioner has not established material respects in which the respondents breached Regulations 14(b) on delegation to the Board which includes the Principal; Regulation 18(5) authorising the Principal to issue by way of forwarding the correspondence from or to the Commission and Teachers serving under the Principal; allegations may be reported to the Principal or Board per Regulation 140(b) and 144(d); investigations be undertaken and reduced into a complaint per Regulation 146(2) (b); definition of Commission's agents includes the Board and or Principal per Regulation 3; and the Board investigated per regulation 146 (2). The respondents' case and submissions in that regard is upheld. A notice to show cause issued and the petitioner attended. The punishment of a warning was imposed and the petitioner has since been transferred to Huruma Girls High School. The Court finds that the disciplinary process has concluded and the petitioner's case overtaken and not established at all. That some of the Board members were involved as complainants as well as investigators occasioned bias appears to be unfounded to the extent that the petitioner did not raise the issue before the disciplinary panel. In any event, the respondents have established that the allegations levelled were true per section 47(5) of the *Employment Act*. To that extent, the respondents have shown that the reasons for the interdiction and then imposition of the warning at the end of the disciplinary process were genuine and fair per sections 43 and 45 of the *Employment Act* and in the circumstances; the Court finds that the petitioner fully contributed to her predicament. The alleged procedural impropriety cannot be relied upon to vitiate the established genuine and fair reasons.
7. To answer the 2nd issue, the Court returns that to the extent that the petitioner made allegations of specific constitutional violations at paragraph 25 of the petition, it cannot be found that the petition amounted to abuse of Court process on account of the doctrine of avoidance and as was suggested for



the 3rd respondent. The court further finds that the petition was not premature for want of exhaustion of internal grievance procedures or conclusion of the disciplinary proceedings as had been initiated because, the petitioner was entitled to seek the Court's intervention particularly in view of the sudden eviction from the housing accommodation provided within the school premises. While she may have been culpable per the allegations, she was equally entitled to seek judicial protection, albeit, upon interlocutory basis and pending progression of the administrative disciplinary proceedings. While regulation 156 (4) provides that a teacher aggrieved by the decision of the Commission shall apply for review as urged for the 3rd respondent, it is clear that the teacher elects to so apply and is not mandatory to so apply. In any event as at, the interdiction and eviction, the Commission had not made decisions. The preliminary objection will therefore collapse as unjustified.

8. The 3rd issue is whether regulation 156(1) of the Code of Regulations for Teachers issued by the Commission is unconstitutional. The Regulation provides as follows:

“ 156.

- (1) There is established an adhoc Committee of the Commission known as the Teachers Service Review Committee which shall consider and determine reviews arising from the discipline process under these Regulations.
- (2) The Review Committee shall consist of- (a) the Chairperson of the Commission or a representative; (b) two other members of the Commission; (c) the Secretary or his representative; and (d) officer for the time being in charge of teacher discipline or a representative.
- (3) The Review Committee shall regulate its own practice and procedure.
- (4) Where a teacher is aggrieved by the decision of the Commission in a disciplinary process, the teacher may apply for review to the Teachers Service Review Committee within ninety days from the date of the letter communicating the decision.
- (5) An application by a teacher for review under these Regulations shall be accompanied by the prescribed fee set out in the Fifth Schedule.
- (6) An officer or member of the Commission who has participated in the hearing of the discipline case, shall not sit in the Review Committee over the same case.
- (7) A teacher who applies to the Commission for the review of the decision of the Commission shall demonstrate that- (a) there is discovery of new evidence or fact which at the time of hearing was not within the knowledge of the teacher; (b) there was an error or mistake apparent on the face of the record or on the part of the Commission in arriving at the decision; (c) there was fundamental flaw in the procedure by the Commission: or (d) the decision was made in breach of any written law.



- (8) The Review Committee shall upon receiving an application for review, consider the application and may- (a) uphold the decision and subsequently dismiss the application for review (b) allow the review and set aside the decision; or (c) vary the decision on such terms as it may deem fit.
- (9) The decision of the review committee shall be final.”

9. It is submitted for the petitioner that the regulation is unconstitutional because it elevates the secretary or the representative and an officer in charge of discipline or the representative to constitute the Commission with voting powers. It is provided in section 249(2) of the *constitution* that the Commission is subject only to the *constitution* and the law and is independent and not subject to direction or control by any person or authority. That section 46 of the *Teachers Service Commission Act, 2012* and paragraph 3 of the second schedule of the Act provide that a person aggrieved by decision of the Commission under the Act may apply to the Commission for review of that decision; and, a decision of the Commission shall be by a majority of members present and voting and in the case of an equality of votes the person presiding at the meeting shall have a second or casting vote. Paragraph 13 of the second schedule provides that the Commission may constitute committees for better carrying out or exercise of its powers and functions; may co-opt into its committees any person whose knowledge and skills are necessary for proper performance of the function of the Commission; but a person co-opted may attend meetings of the Committee and participate in its deliberations but shall have no right to vote at the meeting. Further, it is submitted for the petitioner that Regulation 156 insubordinates the Commission to the Committee in so far as the Committee decision is final. It is submitted that section 24(2) of the *Statutory Instruments Act* provides that a statutory instrument shall not be inconsistent with provisions of the enabling legislation or any Act and the statutory instrument shall be void to the extent of the inconsistency. Section 31(b) of the *Interpretation and General Provisions Act* provides that no subsidiary legislation shall be inconsistent with the provisions of an Act. Further Article 2(4) of the *constitution* provides that any law, including customary law, which is inconsistent with the *constitution*, is void to the extent of the inconsistency, and any act or omission in contravention of the *constitution* is invalid. The 1st and 2nd respondent have submitted that Regulation 156 is not unlawful. The Disciplinary Panel of the Commission established under Regulation 151 is subordinate to the Teachers Service Review Committee under Regulation 156. The 3rd respondent appears not to have submitted on that important issue. The Court has considered the petitioner’s submissions and returns that indeed section 46 provides for an application for review to go to the Commission. Article 237 of the *constitution* provides that there is established the Teachers Service Commission. Article 250 (1) of the *constitution* provides that each constitutional Commission shall consist of at least three but not more than nine members. Section 5 of the *Teachers Service Commission Act 2012* provides: “(1) The Commission shall consist of a chairperson and eight other members appointed in accordance with the *constitution* and the provisions of Section 8. (2) The chairperson and members of the Commission shall serve on a fulltime basis for a non-renewable term of six years.” The Court finds that as submitted for the petitioner the Teachers Service Review Committee established under Regulation 156 is ultra vires sections 5 and 46 of the *Teachers Service Commission Act, 2012* providing that a person aggrieved by the decision of the Commission under the Act may apply to the Commission for review of that decision and is unconstitutional as inconsistent with Articles 2(4), Article 250(1) and Article 249(2) of the *constitution* of Kenya to the extent that it elevates the secretary and the officer in-charge of discipline to voting rights as though they are Commissioners and further makes the Committee decision final whereas the statutory authority for review is vested in the Commission. It is not said and shown that the Commission has delegate to the Review Committee and it is not said that the decision of the Review



Committee is tabled before the full Commission by way of recommendation for the Commission to determine one way or the other. In any event a reading of sections 5 and 46 of the *Teachers Service Commission Act*, 2012 shows that the review power cannot be delegated. Thus, the Review Committee may be instituted but its recommendations must go to the full Commission for a final decision and the Committee cannot by itself make a final decision.

10. To answer the 4th issue, the Court returns that Regulation 154 (2) of the Code provides for punishments that may be imposed in event of disciplinary proceedings against a teacher. They include written warning; surcharge; suspension for 6 months; retirement in public interest; retirement under the 10/50 year rule; dismissal; reference for medical examination with a view to determine retention suitability; or, any other action in the circumstances. As submitted for the petitioner transfer is not a listed punishment that may be imposed. As submitted for the 3rd respondent, Article 237(d) of the *constitution* mandates the Commission to promote and transfer teachers like it was done in the instant case.
11. The final issue is on remedies. The Court returns that considering the margins of success and findings each party shall bear own costs of the petition. Remedies will issue as found in this judgment.

In conclusion, judgment is hereby entered for the parties and the petition determined with orders:

1. The declaration that regulation 156 of the TSC Code of Regulations for teachers is unconstitutional to the extent that, a decision by the 3rd respondent constitutional Commission, is subject to variation or reversal without any reference to the Commission by its subordinate committee consisting of some members of secretariat; and in particular, the Teachers Service Review Committee established under Regulation 156 is ultra vires section 5 read with section 46 of the *Teachers Service Commission Act*, 2012 providing that a person aggrieved by the decision of the Commission under the Act may apply to the Commission for review of that decision and is unconstitutional as inconsistent with Articles 2(4), Article 250(1) and Article 249(2) of the *constitution* of Kenya to the extent that it elevates the secretary and the officer in-charge of discipline to voting rights as though they are Commissioners and further makes the Committee decision final whereas the statutory authority for review is vested in the Commission.
2. The declaration that transfer is not one of the disciplinary punishments in the TSC Code of Regulations or any other relevant law.
3. Each party to bear own costs of the petition.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 23RD FEBRUARY 2024.

BYRAM ONGAYA

PRINCIPAL JUDGE

