



**Forum for Good Governance and Human Rights v Teachers Service Commission (TSC) & 2 others (Petition E223 of 2023) [2024] KEELRC 795 (KLR) (17 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 795 (KLR)

**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION E223 OF 2023**

**B ONGAYA, J**

**APRIL 17, 2024**

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 19, 20, 21, 22, 27, 28, 29, 30, 41, 43, 47, 53, 234, 236, 237, 258 AND 259 OF THE CONSTITUTION OF KENYA, 2010;**

**AND**

**IN THE MATTER OF THE PUBLIC SERVICE COMMISSION ACT, LAWS OF KENYA;**

**IN THE MATTER OF TEACHERS SERVICE COMMISSION ACT, 2012;**

**IN THE MATTER OF CHILDREN ACT, LAWS OF KENYA**

**IN THE MATTER OF EMPLOYMENT ACT, 2007**

**IN THE MATTER OF IN THE INTERPRETATION OF PUBLIC SERVICE COMMISSION ACT, LAWS OF KENYA AND TEACHERS SERVICE COMMISSION ACT, 2012 IN CONFORMITY WITH ARTICLES 234 AND 237 OF THE CONSTITUTION OF KENYA, 2010**

**BETWEEN**

**THE FORUM FOR GOOD GOVERNANCE AND HUMAN RIGHTS ..... PETITIONER**

**AND**

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

**HON. CABINET SECRETARY, MINISTRY FOR EDUCATION .... 2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL ..... 3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner filed in person the petition dated 29.11.2023 seeking the following orders:



- a. An order of declaration does issue that the 1<sup>st</sup> respondent's circular "TSC/DS/Recruit/Advert/18A/VOL.II" dated 4<sup>th</sup> January 2023, and the subsequent contracts, contravened the provisions of the constitution when it recruited and employed duly trained, qualified teachers as interns.
  - b. An order of declaration does issue that the 1<sup>st</sup> respondent has no mandate to recruit, engage, employ and retain any person who has not trained and registered as teacher.
  - c. An order of declaration does issue that the rights to fair labour practices and remunerations of the teachers whom the 1<sup>st</sup> respondent recruited and employed as interns were violently violated.
  - d. An order of declaration does issue that by 1<sup>st</sup> respondent recruiting and employing teachers at different terms and with presumed different qualifications placed school-going children to different standards of training or learning and thereby infringing on the rights of children to quality education.
  - e. An order of certiorari does issue to quash the letters of appointment as interns issued to all teachers recruited, appointed on 1<sup>st</sup> February 2023.
  - f. An order of mandamus to issue to compel the 1<sup>st</sup> respondent to reissue substantive letters of appointment to the said teachers who were appointed as interns pursuant to the letters dated 1<sup>st</sup> February, 2023.
  - g. an order of compensation to issue directing/compelling the 1<sup>st</sup> respondent to compensate for damages, and differences in salaries underpayments, to all the teachers recruited and engaged as Interns teachers in Junior Secondary Schools in respect of the circular referenced "TSC/DS/Recruit/Advert/18A/VOL.II" dated 4<sup>th</sup> January, 2023 and contract letters dates 1<sup>st</sup> February 2023.
  - h. An order of prohibition does issue to stop the 1<sup>st</sup> respondent from recruiting and employing student-teachers as teachers and recruiting and employing interns.
  - i. Any other reliefs the court may deem fit to grant.
  - j. Provide for costs.
2. The petition was based upon two supporting affidavits and annexures thereto filed together with the petition and sworn on 29.11.2023. The first affidavit is that of Samson Omechi Ongera. His case is as follows:
- a. That he is the registered Secretary General of the Petitioner.
  - b. That the objects of the petitioner is to promote and advocate values of good governance and human rights in sound labour and employment practices.
  - c. That when the education system in Kenya changed from the 8-4-4 to CBC, there was introduction of junior secondary schools causing a need for the 1<sup>st</sup> respondent to recruit teachers.
  - d. That by a circular dated 04.01.23 the 1<sup>st</sup> respondent advertised for the recruitment of 21,500 intern teachers to be posted to the junior secondary schools and further 4000 intern teachers to be deployed in the primary schools. The postings were to be in the public schools where both are domiciled.



- e. That the affidavit is made on behalf of the petitioner to challenge the constitutionality and lawfulness of those appointments and recruitments of the duly trained, qualified, registered and certified professional teachers as interns.
  - f. That by the said circular, the 1<sup>st</sup> respondent recruited two (2) sets of teachers. The first set is those teachers who were employed on permanent and pensionable terms while the second set is those who were appointed as interns.
  - g. That by posting trainee teachers to some schools and posting trained teachers while the said students compete under the same curriculum is not putting the students in a common standard, which contravenes Article 53 of the Constitution as read together with Section 13 of the Children's Act.
  - h. That the said teachers are on an 11-month contract that is non-renewable. Continuous recruitments and appointments without renewal of ending contracts amounts to denying the students the right to receive education from experienced teachers who have been in the job for a while.
  - i. That the Teachers' Service Commission Act, 2012 and the Constitution mandates the 1<sup>st</sup> respondent to register trained teachers and recruit and employ registered teachers.
  - j. That the 1<sup>st</sup> respondent should not purport to change the training discourse of teachers in this country unilaterally.
  - k. That the said teachers now christened as interns by the 1<sup>st</sup> respondent are appointed from the pool of teachers registered by the 1<sup>st</sup> respondent and their appointment as interns is discriminatory.
  - l. That teachers are employees in the public service and the TSC Act must adhere with values and principles of appointment of public servants in the public service as provided for in the constitution.
  - m. The deponent stated that the appointments of teachers as interns by the 1<sup>st</sup> respondent is both unconstitutional and unlawful.
3. The second affidavit in support of the petition was sworn by Osoro Oganga Edwin on 29.11.23 in which he stated as follows:
- a. That he works as an intern teacher in Enkong Narok Primary School, within Kajiado County.
  - b. That he is a trained graduate and holder of Bachelor of Education from Kisii University and registered by the 1<sup>st</sup> respondent under TSC N0 885081, pursuant to Section 23 of the Teachers Service Commission Act, 2012.
  - c. That he applied for the position of intern and the 1<sup>st</sup> respondent considered him via a letter of appointment dated 01.02.23 for a contract period of 11 months which was to end on 31.12.2023.
  - d. That he reported to the said school on 07.02.2023 where he found a class of 34 learners and handling or teaching, Computer Science, Integrated Science, Social Studies, CRE, Health Education and Life Skills learning subjects whereas in the contract his subjects were identified to be History or Christian Religious.



- e. That he is responsible for the both administrative and management of his class and students without a supervisor, trainer or cooperating.
  - f. That he only receives a consolidated stipend of Kshs. 20,000/=.
  - g. The deponent reiterated that the contract is unconstitutional, illegal and bad in law and that all interns should be confirmed as permanent and pensionable employees of the 1<sup>st</sup> respondent from the time they were engaged as per the contracts.
4. The 1<sup>st</sup> respondent filed the affidavit of Antonina Lentoijoni through Allan Sitima – Advocate for the Teachers Service Commission sworn on the 6<sup>th</sup> of March 2024. It was stated and urged as follows:
- a. That she is the acting director in charge of teacher staffing at the Teachers Service Commission.
  - b. That the teacher internship programme by the 1<sup>st</sup> respondent is an initiative among those developed by the 1<sup>st</sup> respondent to benefit the young persons entering into the country’s job market.
  - c. That it is not a programme meant to lead or guarantee employment with the 1<sup>st</sup> respondent but to complement newly qualifying teachers with practical experience.
  - d. That the persons engaged in the programme are considered “gratis personnel” in the sense that;
    - i. Teacher interns are not employees of the 1<sup>st</sup> respondent hence the structure under which they serve is not and may not be identical to employment status.
    - ii. Teacher interns may not be sought or accepted as substitutes of staff to be recruited against posts or authorised establishment by the 1<sup>st</sup> respondent.
    - iii. The teacher internship programme promoted by the respondent is purely a voluntary relationship that attracts an ‘allowance’ and not a ‘salary’.
    - iv. The teacher internship programme is also distinguishable from ‘attachment’ or teaching practice, which is undertaken during pedagogical and instructional stage of training as opposed to internship that presupposes possession of necessary theoretical competencies of a trade save, the practical and on job skills, which are the primary concern of the teacher internship training.
5. That the petition herein is misleading by creating perceptions of discrimination and the same should be struck out since it does not meet the thresholds set under the constitution and the rules of the court.
6. The 2<sup>nd</sup> and 3<sup>rd</sup> respondents filed the replying affidavit of Belio R. Kipsang through the Attorney General sworn on 22.01.24 in which they stated as follows:
- a. That he is the Principal Secretary, State Department for Basic Education in the Ministry of Education, which is under the stewardship of the 2<sup>nd</sup> respondent herein.
  - b. That the 1<sup>st</sup> respondent is an independent commission established under Article 237 of the [\*Constitution of Kenya\*, 2010](#) whose functions include :
    - i. to register trained teachers;
    - ii. to recruit and employ registered trained teachers;
    - iii. to assign teachers employed by the commission to serve in any public school or institution;



- iv. to promote and transfer teachers;
  - v. to exercise disciplinary control over teachers; and
  - vi. to terminate employment of teachers.
- c. That the 1<sup>st</sup> respondent shall:
- i. review standards of education and training of persons entering the teaching service;
  - ii. review the demand for the supply of teachers;and,
  - iii. advise the National Government on matters relating to the teaching profession.
- d. That the functions and mandate of the Commission are further fortified under section 11 of the *Teachers Service Commission Act* No. 20 of 2012 as follows:
- i. formulate policies to achieve its mandate;
  - ii. provide strategic direction, leadership and oversight to the secretariat;
  - iii. ensure that teachers comply with the teaching standards prescribed by the Commission under the *Act*;
  - iv. manage the payroll of teachers in its employment;
  - v. facilitate career progression and professional development for teachers in the teaching service including the appointment of head teachers and principals;
  - vi. monitor the conduct and performance of teachers in the teaching service; and
  - vii. do all such other things as may be necessary for the effective discharge of its functions and the exercise of its powers.
- e. That in carrying out its mandate, the 1<sup>st</sup> respondent is guided by the constitutional provision on national values and principles of governance as per the *Constitution*.
- f. That the recruitment of the teachers was a negotiated relationship between the employee and the employer and the contract signed between the parties.
- g. That based on the foregoing the petition herein is baseless, misconceived and devoid of merit and warrants dismissal.
7. The petitioner's first deponent in support of the petition Samson Omechi Ongera responded to the 2<sup>nd</sup> respondent's replying affidavit by filing a supplementary affidavit sworn on 16.12.24 in which he stated and urged as follows:
- a. That it is evident that the deponent's averments pleaded are because of the 1<sup>st</sup> respondent whereas the 1<sup>st</sup> respondent is actively participating in these proceedings and hence the affidavit is defective there being no authority and should be struck out.
  - b. That the 2<sup>nd</sup> respondent neither confirmed nor denied that the contracts in issue are compliant with the requirements of the provisions of sections 5, 7 and 10 of the *Employment Act*, 2007.
  - c. That during pendency of this suit and as an attempt to circumvent the illegalities already committed in the purported contracts between the intern teachers and the 1<sup>st</sup> respondent, the



1<sup>st</sup> respondent has initiated amendments in the current TSC Act as a cure to the mess in the present dispute and exhibited the Teachers Service (Amendment) Bill 2024

8. Final submissions were filed for the parties. The Court has considered the material on record. The Court returns as follows:

a. To answer the 1<sup>st</sup> issue, the Court returns that interns are employees for purposes of the law of employment and labour relations. Section 2 of the Employment Act defines an employee to include an apprentice or indentured learner. Further, the same section defines a contract of service to include a contract of apprenticeship and indentured learner-ship. In the ruling delivered by the Court on 11.06.2021 in Michael Ouma Odera and 506 others v Public Service Commission and 2 others ELRC Cause 504 of 2018 at Mombasa the Court held,

“The Court has considered the submissions. The Black’s Law Dictionary, 9<sup>th</sup> Edition at Page 1491 defines “indentured servant” as a servant who contracted to work without wages for a fixed period in exchange for some benefit, such as learning a trade or cancellation of a debt or paid passage to another country, and the promise of freedom when the contract period expires. The same Black’s Law Dictionary, 9<sup>th</sup> Edition at Page 117 defines “apprentice” as a person bound by an indenture to work for an employer for a specified period to learn a craft, trade or profession and,

2. A learner in any field of employment or business especially, one who learns by hands-on experience or technical on the-job training by one experienced in the field.” The Court finds that the claimants as interns as pleaded amounted to employees and, again as pleaded, the relationship amounted to employment, within the meanings assigned under the Employment Act, 2007 and as submitted for the claimants....”

The Court finds accordingly.

b. To answer the 2<sup>nd</sup> issue, the Court returns that while the teachers employed by the 1<sup>st</sup> respondent were styled as interns, they were actually trained teachers and duly qualified as registered by the 1<sup>st</sup> respondent as such. The evidence is that they were employed to teach as duly qualified teachers. The Court finds that they were not “indentured servant” or “apprentice”. The Court finds that designating the teachers as interns was obviously designed to escape the inescapable effect of the employment relationship and legal safeguards. Thus, the Court finds that the teachers subject of the instant petition and as urged and submitted for the petitioner were unfairly treated and discriminated as they were denied the terms and conditions of service the 1<sup>st</sup> respondent ordinarily paid to teachers it employs at entry grades. While the 1<sup>st</sup> respondent is entitled to the prerogative to define the models of the terms and conditions of teachers it employs registered teachers, it is not open for the 1<sup>st</sup> respondent to disguise employment of some of the teachers with the adverse impact of emplacing them to disadvantageous position or terms of service. There is the freedom to contract but the chains of the right to fair labour practices envisaged in Article 41 immediately come to play. The respondents cannot be heard to validly advance that the affected teachers agreed to the advantageous terms. The respondents by their own affidavits have confirmed that the teachers in issue were not learners as it happens say in the well-established teaching practice where trainee teachers are deployed to schools for an experiential exposure to teaching. The Court holds that employment is a fact established by evidence and disguising employment to escape



the effect of employment laws and the constitutional or statutory safeguards of employers and employees cannot pass the chains of social justice in employment or work relationships. Thus, the teachers in issue were indeed employed by the 1<sup>st</sup> respondent despite disguising them as interns.

- c. To answer the 3<sup>rd</sup> issue, the Court returns that the respondents have not established the constitutional or statutory mandate of the 1<sup>st</sup> respondent to employ teachers known as interns. The cited constitutional and statutory mandate is for the 1<sup>st</sup> respondent to employ registered teachers. The respondents have not exhibited statutory, regulatory or policy arrangements that would entitle the 1<sup>st</sup> respondent to employ interns. It would appear that the constitutional design then vests in the 2<sup>nd</sup> respondent issues of intern or trainee teachers that may be deployed in schools for purposes of learning or satisfying training requirements to subsequently become legible for registration by the 1<sup>st</sup> respondent. It would appear that as long time practice stands, it is for the 2<sup>nd</sup> respondent to make policies or regulations by which individual school Boards of Management may engage registered teachers in the unique circumstances of schools and where the 1<sup>st</sup> respondent may not have been able for one or other reason to provide the full in-post teachers for the approved teacher establishment in schools. Such are policy measures that the 2<sup>nd</sup> respondent can undertake through constitutional principles of public participation in policy and regulatory making. Again, in an ideal environment, the 1<sup>st</sup> respondent should employ registered teachers upon terms that are not discriminatory and to meet the optimal staffing needs of public schools.
- d. To answer the 4<sup>th</sup> issue, the Court returns that the petitioner's submission that the employment of the teachers subject of the petition compromised the quality of education of the learners or students as envisaged in Articles 53 of the [Constitution](#) and sections 5 and 13 of the [Education Act](#) has not been established at all. The petitioner's own evidence is that the teachers were duly qualified, trained, registered and performed all relevant duties a good qualified teacher is expected to perform. The submission will collapse as unfounded.
- e. To answer the 5<sup>th</sup> issue, the Court returns that it was not possible to engage the teachers in the disguised form of interns with no approved establishment. There must be vacancies for appointments to proceed. The 1<sup>st</sup> respondent has submitted the [Government National Internship Policy and Guidelines for the Public Sector](#) define "intern" thus,

“Unemployed person with relevant qualifications who has entered into a contract with a government organisation for a period of between three and twelve months with the intent of acquiring relevant work experience for registration with respective professional bodies and or to increase chances of employability.”

Once again, the teachers in the instant case were already qualified and registered by the 1<sup>st</sup> respondent as trained teachers. They were not within that definition of interns as cited and they were actually employees being employed as duly qualified teachers but disguised as interns.

- f. To answer the 6<sup>th</sup> issue the Court returns that the petitioner has established that the disguised employment of qualified teachers as interns amounted to unfair labour practices under Article 41(2) (a) and (b) of the [Constitution](#). It is established that the practice of employing discriminated qualified teachers duly registered as such as interns amounted to violation of Articles 27 on freedom from discrimination and equality before the law; it breached section 5 of the [Employment Act](#) requiring employers to promote equal opportunities of employees and to refrain from unfair treatment and discriminatory practices; breached [ILO convention 100](#)



*(The Equal Remuneration Convention (No. 100) of the ILO, 1951 on the principle of equality of pay for work of equal value. Section 5 (3) of [Employment Act](#) provides*

- “(3) No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—
- (a) on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;
  - (b) in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.”

Section 5(7) of the [Act](#) provides thus,

- “(7) In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.”

The Court considers that the respondent has failed to discharge that burden. Registered teachers with similar qualifications have been recruited and employed by the 1<sup>st</sup> respondent upon different terms and conditions of service, some as teacher interns on a one year fixed term contract and others as regularly employed teachers.

9. While making the findings on disguised employment the Court has considered the Ruling delivered on 08.04.2024 in [Nelson Havi v Judicial Service Commission and another](#) ELRC Petition E039 of 2024 at Nairobi thus,

“16. In that regard the Court has considered the [International Labour Organization \(ILO\) Recommendation 198 \(R198 - Employment Relationship Recommendation, 2006 \(No. 198\)\)](#). The recommendation considers the difficulties of establishing whether or not an employment relationship exists in situations where the respective rights and obligations of the parties concerned are not clear, where there has been an attempt to disguise the employment relationship, or where inadequacies or limitations exist in the legal framework, or in its interpretation or application. The [R198](#) notes that situations exist where contractual arrangements can have the effect of depriving workers of the protection they are due. [R198](#) provides that national policy should at least include measures to:

- (a) provide guidance for the parties concerned, in particular employers and workers, on effectively establishing the existence of an employment relationship and on the distinction between employed and self-employed workers;
- (b) combat disguised employment relationships in the context of, for example, other relationships that may include the use of other forms of contractual arrangements that hide the true legal status, noting that a disguised employment relationship occurs when



the employer treats an individual as other than an employee in a manner that hides his or her true legal status as an employee, and that situations can arise where contractual arrangements have the effect of depriving workers of the protection they are due;

- (c) ensure standards applicable to all forms of contractual arrangements, including those involving multiple parties, so that employed workers have the protection they are due;
- (d) ensure that standards applicable to all forms of contractual arrangements establish who is responsible for the protection contained therein;
- (e) provide effective access of those concerned, in particular employers and workers, to appropriate, speedy, inexpensive, fair and efficient procedures and mechanisms for settling disputes regarding the existence and terms of an employment relationship;
- (f) ensure compliance with, and effective application of, laws and regulations concerning the employment relationship; and
- (g) provide for appropriate and adequate training in relevant international labour standards, comparative and case law for the judiciary, arbitrators, mediators, labour inspectors, and other persons responsible for dealing with the resolution of disputes and enforcement of national employment laws and standards.”

The Court is guided accordingly and the 1<sup>st</sup> respondent was not entitled to disguise the employment status of the affected teachers by designating them as Teacher Interns and thereby emplacing them on disadvantageous terms of service compared to similarly registered teachers the 1<sup>st</sup> respondent mat have regularly employed.

- a. The final issue is on remedies. The Court returns that the petitioner will succeed as found in the judgment. The petition was public interest litigation and each party to bear own costs. An order of certiorari will not issue to quash the letters of appointment as interns issued to all teachers recruited and appointed on 1<sup>st</sup> February 2023 because the letters were not exhibited and the Court cannot quash a decision not actually before the Court unless explanation is offered and leave granted in that regard as envisaged in Order 53 of the [Civil Procedure Act](#). Again, the Court has not heard the affected teachers in that regard and their respective employment cannot be quashed without due process. The Court considers that parties to the respective contracts should be the captains of their respective destinies. The 1<sup>st</sup> respondent should as well have room for rectification as may be appropriate or possible. An order of mandamus to issue to compel the 1<sup>st</sup> respondent to reissue substantive letters of appointment to the said teachers who were appointed as interns pursuant to the letters dated 1<sup>st</sup> February, 2023 and as prayed for will as well not issue because such order will amount to usurping the constitutional mandate and prerogative of the 1<sup>st</sup> respondent. The court declines to grant the prayer for an order of compensation to issue directing or compelling the 1<sup>st</sup> respondent to compensate for damages, and differences in salaries underpayments, to all the teachers recruited and engaged as intern teachers in Junior Secondary Schools in respect of the circular “TSC/DS/Recruit/Advert/18A/VOL.II” dated 4<sup>th</sup> January, 2023 and contract letters dates 1<sup>st</sup> February 2023. The prayer is in the nature of liquidated damages but the particulars of the



underpayments were not pleaded or computed and strictly proved per applicable trite law. The Court also considers that the public interest petition was focused on public interest rather than the individual contracts of service and which are sanctified unless voluntarily varied by parties. The submissions made for the respondents in that regard are upheld.

In conclusion, judgment is hereby entered for the petitioner against the respondents for:

- a. The declaration that the 1<sup>st</sup> respondent's circular TSC/DS/Recruit/Advert/18A/VOL.II" dated 4<sup>th</sup> January 2023, and the subsequent contracts, contravened the provisions of the constitution as found herein when it recruited and employed duly trained, qualified teachers as interns.
- b. The declaration that the 1<sup>st</sup> respondent has no mandate to recruit, engage, employ and retain any person who has not trained and registered as a teacher.
- c. The declaration that the rights to fair labour practices and remunerations of the teachers whom the 1<sup>st</sup> respondent recruited and employed as interns were violated as found in herein.
- d. The order of prohibition hereby issued stopping the 1<sup>st</sup> respondent, henceforward, from recruiting and employing student-teachers as teachers and recruiting and employing interns as its constitutional and statutory mandate spreads only to employment of duly qualified and registered teachers.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS WEDNESDAY 17<sup>TH</sup> APRIL 2024.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

