



REPUBLIC OF KENYA



KENYA LAW
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**Kimiti v Teachers Service Commission & another (Petition
E068 of 2023) [2024] KEELRC 812 (KLR) (8 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 812 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E068 OF 2023**

B ONGAYA, J

APRIL 8, 2024

**IN THE MATTER OF: ARTICLES 2(1), 3, 10, 22, 27, 35, 47,
50, 162 AND 237 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF: RULES 4(1), 10(1) & (2), 23 AND 24 OF THE
CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013**

AND

IN THE MATTER OF: THE EMPLOYMENT ACT 2007, LAWS OF KENYA

AND

IN THE MATTER OF: TEACHERS SERVICE COMMISSION ACT 2012

AND

IN THE MATTER OF: THE STATUTORY INSTRUMENTS ACT NO.23 OF 2013.

AND

**IN THE MATTER OF: TSC HUMAN RESOURCE POLICIES
& PROCEDURES MANUAL FOR SECRETARIAT STAFF 2018**

AND

**IN THE MATTER OF: ALLEGED CONTRAVENTION OF
FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES
22, 27, 31, 47 AND 50 OF THE CONSTITUTION OF KENYA, 2010.**

AND

**IN THE MATTER OF: THE CONSTITUTIONAL AND LEGAL VALIDITY OF THE
1ST RESPONDENT'S COMMISSIONERS' RESOLUTION MADE ON 14TH MAY, 2021
PURPORTING TO DELEGATE THEIR DISCIPLINARY FUNCTION TO EMPLOYEES
OF THE 1ST RESPONDENT WITHOUT FIRST GAZETTING THE INSTRUMENT
AND TABLING IT BEFORE PARLIAMENT FOR SCRUTINY AND APPROVAL**



AND

IN THE MATTER OF: THE CONSTITUTIONAL AND LEGAL VALIDITY
OF THE 2ND RESPONDENT OF CHAIRING A DISCIPLINARY PANEL
AND SIGNING THE MINUTES DISMISSING THE PETITIONER
WHEN HE WAS NOT A COMMISSIONER OF THE 1ST RESPONDENT.

AND

IN THE MATTER OF: THE CONSTITUTIONAL AND LEGAL VALIDITY OF
THE 1ST RESPONDENT OF PURPORTING TO HAVE USED UNGAZETTED
STATUTORY INSTRUMENT TO INITIATE A DISCIPLINARY PROCESS
WHICH LED TO THE DISMISSAL OF THE PETITIONER ON 01.09.2021

BETWEEN

ROBERT KYALO KIMITI PETITIONER

AND

TEACHERS SERVICE COMMISSION 1ST RESPONDENT

JOSEPH MUGELE 2ND RESPONDENT

JUDGMENT

1. The petitioner filed the amended petition dated 27.11.2023 through Njeri Ngunjiri Advocates seeking the following orders:
 - a. A declaration do issue that the 1st respondent purported instrument the Human Resources Policies and Procedures Manual for the Secretariat staff 2018 which was used by the 1st respondent to interdict and dismiss the petitioner from employment on 01.09.21 was a non-existent statutory instrument which was never subjected to public participation as required under Article 10(2)(c) of *the Constitution* of Kenya Gazette as required under Section 8(1) of the *Statutory instruments Act* No. 23 of 2013 and is therefore null and void and legally defective.
 - b. A declaration do issue that, the resolutions of the members of 1st respondent's commissioners made on 14th May, 2021 delegating to its employees, their Constitutional functions of handling disciplinary matters of teachers and other employees of the 1st Respondent was illegal instrument which did not have any force of law, since the instrument which delegated those functions was never subjected to public participation as required under Article 10 (2) (a) of *the Constitution* of Kenya and further the purported instrument was never laid before Parliament for scrutiny and approval as required under Section 11(4) of the Statutory instrument Act 2013 and is therefore null and void and legally defective.
 - c. A declaration do issue that the 2nd respondent violated Article 237(2)(e) of *the Constitution* after he usurped the constitutional powers of the 1st respondent of exercising disciplinary control over teachers and other members of staff and Chaired a disciplinary panel which made a decision on behalf of the 1st respondent to dismiss the petitioner from the service of the Teachers Service Commission on 01.09.2021 yet such a function was within the



exclusive mandate of the 1st respondent, therefore the 2nd respondent's decision contained in the proceedings signed by the 2nd respondent and dated 01.09.2021 and communicated to the petitioner vide 1st respondent's letter reference no. TSC/500070/32 of 13.09.2021 is null and void for all intents and purposes.

- d. A declaration do issue that the 2nd respondent by purporting to sign on behalf of the 1st respondent the proceedings containing the decision of the disciplinary panel dated 01.09.2021, the 2nd respondent not only acted ultra vires, but also unconstitutionally and illegally hence making the said proceedings to have no legal consequences and effect.
 - e. A declaration do issue that any action(s) taken and decision(s) made pursuant to the illegal disciplinary proceedings dated 01.09.2021 and illegal statutory instrument (the Human Resource Policies and Procedures Manual for the Secretariat staff 2018) are both unconstitutional and illegal hence the same are declared to have been void ab initio.
 - f. A declaration do issue that 2nd Respondent by purporting to sign on behalf of the 1st respondent the proceedings containing the decision of the disciplinary panel dated 01.09.2021 the 2nd respondent not only acted ultra vires, but also unconstitutional and illegally hence making the said proceedings to have no legal consequences and effect.
 - g. An order of Certiorari be and is hereby issued calling into the Court and quashing the offending illegal statutory instrument of the 1st Respondent (the Human Resource Policies and Procedures Manual for the secretariat staff 2018) which came to operation without first being subjected to public participation and without being published in the official Kenya Gazette.
 - h. An order of Certiorari be and is hereby issued calling into the Court and quashing the resolutions of the 1st respondent's commissioners made on 14th May, 2021 delegating their constitutional functions of handling discipline matters to the 2nd respondent and other senior staff members of the 1st respondent without subjecting the instrument transferring those functions to public participation and without first seeking approval of Parliament.
 - i. An order of certiorari be issued so as to remove into this Honourable Court, for the purpose of quashing, the offending disciplinary proceedings dated 01.09.21 which were signed by the 2nd respondent on behalf of the 1st respondent.
 - j. A mandatory order do issue directing the 1st respondent to reinstate the petitioner back to his position of the Chief Human Resource Management Officer any place within the Country 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 15th February 2021 up to the time of this order.
 - k. Any other relief the Honourable Court deems appropriate, just and fit to grant.
 - l. The costs of this Petition be provided for.
2. The petition was based upon the petitioner's supporting affidavit and annexures thereto filed together with the initial petition and sworn on 12.04.2023 as well as the further affidavit filed alongside the amended petition sworn and dated 27.11.23. The petitioners' case is as follows:
- a. That he was dismissed from employment on 01.09.2021 where he subsequently wrote three different letters dated 28.09.21, 25.11.21 and 14.06.22 requesting to be supplied with various documents in order to appeal the decision. The said letters were not responded to hence locking him out of the appeal. He annexed the letters as exhibit.



- b. That through his advocate, the petitioner wrote a demand letter to the Respondent requesting for the said letters and was asked to deposit an amount of Kshs. 6700/= for a 67-page document which he did on the 24.03.23 and the 1st respondent wrote back acknowledging receipt.
 - c. That despite several visits to the office of the 1st respondent the said documents haven't been availed which he pleaded is a violation of his right under Article 35 of *the Constitution* on access to information held by the State or by another person.
 - d. That his right to fair hearing was violated by the 1st respondent's officer investigating him for the allegations of fraudulently processing pension benefits for a retired teacher.
 - e. That he is demanding to be supplied with the documents as listed in his application to assist in determining if the disciplinary panel that dismissed him was properly constituted and whether the instrument by the 2nd Respondent in dismissing him was subject to public participation as required under Article 10(2)(c) of *the Constitution*.
 - f. He prayed that his amended petition be allowed with costs.
3. The respondents filed the replying affidavit of Dr. Julius Olayo, the Director in charge of Human Resources Management and Development (HRM&D) at the Teachers Service Commission (1st respondent) sworn on 15.01.2024 and filed through Isaac Ochieng' – Advocate for Teachers Service Commission. It was stated and urged as follows:
- a. That the 1st respondent is a Commission established under Article 237(1) of *the Constitution* with its principles objectives and functions set out thereunder and under the *Teachers Service Commission Act*, No. 12 of 2012 (hereinafter "the Act").
 - b. That the 1st respondent has mandates under *the Constitution* and in the Act and to actualize its mandate, the 1st respondent recruits and maintains a secretariat staff in accordance to Section 18 of the Act who facilitate the implementation of the 1st respondent's mandate and functions.
 - c. In the exercise of its mandate, the 1st Respondent has published the TSC (Human Resource Policies and Procedures Manual, 2018) for Secretariat Staff (herein after referred to as the "HR Manual").
 - d. That under the 1st respondent's reform agenda as captured in the strategic plan 2021-2025 objectives, the 1st respondent has undertaken to continually improve its services including re-engineering the discipline function to make dispensation effective and efficient.
 - e. That in order to realize these aspirations and to implement devolution and access to service as per Article 6 (3) and Articles 174 of *the Constitution*, strategies were put in place including, strengthened operational systems, decentralization of some services, delegation of some functions and redefining of the roles and responsibilities of management panels in the management of employee discipline.
 - f. In that regard, pursuant to Section 20 and 11 (g) of the TSC Act giving the Board powers to delegate its functions and all such other things as may be necessary for the effective discharge of its functions and the exercise of its powers, the 1st Respondent's Board passed a Resolution in the meeting of 11th May, 2021, to delegate to management hearing in the first instance of all discipline cases for teachers and secretariat staff, except reviews and application for reinstatement to the register of teachers.



- g. That at all material time prior to the suit herein, the petitioner was an employee of the 1st respondent stationed at Pension Section (PIS) where he was assigned various duties.
 - h. That between 10.07.2018 and 01.10.2018 while stationed at the Pensions Section at the Headquarters, the Petitioner was involved in forgery where he processed and forwarded to treasury for onward payment, retirement documents (claim) in respect to a retired teacher without authenticating the genuineness of the payslip for June 2018 that was attached to the claim.
 - i. That preliminary investigations were conducted, which report was annexed as exhibit and that the petitioner was given ample opportunity to be heard during the investigations.
 - j. That after further investigations, the petitioner and another employee were required to answer allegations of allowing a forged payslip to pass as a genuine document.
 - k. That it was out of the investigations that the 1st respondent resolved to interdict the petitioner pursuant to section 117 (1) (a) of the HR Manual with effect from 17.09.2020.
 - l. The petitioner was informed of the reasons for interdiction and advised to prepare a written defence within 21 days. Thereafter, he was accorded opportunity to be heard. Two interdiction letters dated 05.10.2020 and 22.02.21 were exhibited.
 - m. The petitioner responded to the letters of interdiction via his statements of defence dated 03.11.2020 and 04.03.2021 admitting to the allegations made against him. Copies of the letters were exhibited.
 - n. That the petitioner was invited to a disciplinary hearing on 01.09.2021 vide a letter dated 30.07.2021. Copy of the invitation letter is exhibited.
 - o. The respondent constituted a disciplinary panel comprised of the Panel Chair and two Panel members and proceedings were recorded. A copy of the proceedings of the Discipline Committee meeting held on 01.09.2021 is exhibited.
 - p. The deponent outlined the outcome of the disciplinary committee that led to finding of the petitioner herein culpable and as recorded in the disciplinary proceedings.
 - q. That the decision to dismiss the petitioner effective 01.09.2021 was communicated by the letter dated 13.09.2021 as exhibited.
 - r. The petitioner is not entitled to any of the prayers sought and that the order of certiorari sought by the Petitioner is time barred under the provisions of Order 53 Rule 2 of Civil Procedure rules.
 - s. That the petitioner is bound by the contractual obligations he signed in his employment contract.
 - t. Dismiss the amended petition herein with costs.
4. Final submissions were filed for the parties. The Court has considered all the material on record. The Court returns as follows.
 5. To answer the 1st issue, parties are in agreement that at all material times they were in a contract of employment. The petitioner was deployed to serve at the respondent's Pension Section.



6. To answer the 2nd issue, the petitioner was dismissed from the respondent's service by the letter dated 13.09.2021 and effective 01.09.2021. The reason for the dismissal was stated in the letter thus, " Between 10.07.,2018 and 01.10.2018 while stationed at the Pensions Section (Headquarters), you processed and forwarded to Treasury for onward payment, retirement documents (claim) in respect of a retired teacher, Mr. Zablun Moruri Kengwere – TSC/145092 without authenticating the genuineness of the payslip for June 2018 hence concealing a running overpayment of Kenya Shillings one hundred and fifty thousand, seven hundred seventy-six and eighty-five cents (Kshs.150, 776.85) in respect of the teacher."
7. To answer the 3rd issue the Court returns that the reason for termination was genuine as valid as per section 43 of the Employment Act and was fair as it related to the petitioner's conduct and the respondent's operational requirement as per section 45 of the Act. The petitioner's duty at the Pensions Section was to generate genuine payslips for processing pension benefits for retiring teachers. The petitioner failed to perform his duty as expected and instead allowed a forged pay slip to pass as a genuine document exposing the government to loss of money by way of excessive pension benefits computed based on the forged payslip. The evidence on record is that the petitioner forwarded to treasury the claim where payment was made with a forged payslip being attached to the claim to avoid recovery of an overpayment of Kshs.150,776.85 which was a liability owed to the Government. Treasury was notified to recover the overpayment from the retirees' monthly pension. The Court has considered the petitioner's letter of defence dated 04.03.2021. He stated that Mr. Maroko of Treasury table requested him to assist in the case of his relative called Zablun Moruri Kengwere. Thus, the petitioner went to the registry, requested for the file TSC / 145092, and perused the file. Further, he noted that the claim had already been worked in that all copies of the file had been photocopied, the claim was already drafted, and, the payslips were already attached to the file. He further stated in the letter that he had confirmed that the documents were in order and he wrote a letter forwarding the file to Mr. Maroko at the Treasury table who, in turn received and forwarded it to Treasury for processing the payment. The petitioner denied processing the claim because the handwriting was not his; he could not authenticate the validity of the payslip of June 2018. Further, he discovered the payslip was not genuine when one Ngetich later informed him. The petitioner confirmed at the disciplinary committee meeting that his job description was to generate payslips from the computer for the retiring teachers, generating claims for pension and signing by working on the files. By that description of his work at the Pensions Section, the Court returns that he did not perform his duties with respect to file No. TSC/ 145092. The evidence as confirmed by the petitioner was that the file was not assigned to him and without authority, he forwarded the file to Treasury table in circumstances that he had not generated the last payslip of the teacher in issue. The petitioner without authority and explanation took over the file from the officer who had worked on it, by himself walking to the registry and carelessly forwarding it to the Treasury table. The petitioner was culpable and the Court returns that he fully contributed to his dismissal because of his misconduct stated in the letter of dismissal. The respondent has as well shown that the petitioner was interdicted, informed about the particulars of the allegations; he was heard; he failed to exculpate; and, was subsequently dismissed. The Court finds that sections 41 and 45 on fair procedure was duly complied with. The dismissal is found not unfair in procedure and merits.
8. The 4th issue is whether, the dismissal is null and void, because the disciplinary procedure and the Committee were based on the respondent's Human Resource Policies and Procedures Manual for Secretariat Staff, 2018 and which was a statutory instrument made in breach of relevant statutory provisions and, the respondent's delegation to the disciplinary committee comprising secretariat staff was usurpation of the 1st respondent's constitutional and statutory mandate. The Manual is exhibited and in the foreword by the 1st respondent's chairperson, Dr. Lydia Nzomo, OGW, CBS, it is stated, " The development and roll out of the TSC HR Policies and Procedures Manual is part of the



Commission's efforts to put in place subsidiary legislation and policies intended to streamline and standardize staff engagement processes in terms of compensation, service benefits and general welfare support systems prescribed for public servants from time to time. This manual summarises all major human resources policies and procedures that are currently in force in the public sector." In the Preface the respondent's Secretary and Chief Executive Dr. Nancy Njeri Macharia, CBS stated as follows, "The Code of Regulation for Secretariat Staff was last revised in 2006. Some of the regulations in the Code are not in harmony with the provisions in the Constitution of Kenya, the TSC Act 2012, the Employment Act 2007 and other relevant legal and regulatory instruments. The Management Study of TSC Secretariat Staff and the Job Evaluation for staff conducted by the Commission recommended fundamental changes in the organizational structure and staff career growth. It is for this reason that the Commission found it necessary to develop this Human Resource Policies and Procedure Manual for Secretariat Staff to incorporate the key fundamental changes." In the background to the report, it is stated that the Manual is to comply with the TSC Act and other relevant legal and regulatory instruments. Further, it is stated thus, " The Manual provides for policies and procedures in the commission that guide TSC human resource operations." It is further stated that the Manual derives its authority from the Constitution of Kenya; the TSC Act Cap 212; the Employment Act, 2007, the Labour Relations Act 2007, the Work Injury Act 2007, the Occupational Safety and Health Act 2007, Retirement Benefits Act 1997, and policies made by the Commission from time to time. The Court has considered the text of the Manual and returns that as urged for the respondent it is not a statutory instrument within the meaning of the Statutory Instruments Act but it is the respondent's administrative or management document giving instructions or information on management and development of its secretariat human resource. It draws its provisions from the relevant constitutional, statutory, and subsidiary legislative provisions. It is not by itself legislative as to amount to a statutory instrument under the Statutory Instruments Act.

9. As urged and submitted for the 1st respondent, section 20 of the TSC Act 2012 provides that subject to the Act, the Commission may either generally or in particular case, delegate to any committee or to any member, officer, staff or agent of the Commission the exercise of any of the functions under the Act. It is submitted that accordingly, the 1st respondent passed a resolution at the meeting of 11.05.2021 to delegate to management hearing of all discipline cases for teachers and secretariat, except reviews and application for reinstatement to the register of teachers. It is submitted for the respondent that such delegation was not a statutory instrument under the Statutory Instruments Act. The delegation instrument is not exhibited and the Court is therefore unable to make findings about its scope. However, it is clear that a delegation by the 1st respondent under section 20 of the TSC Act is subject to provisions of the Act. Under section 47 (1) (a) of the TSC Act, the 1st respondent is expected and therefore required to make regulations providing for the appointment, discipline and removal of staff of the Commission. There is nothing before the Court to suggest that the 1st respondent has promulgated the relevant regulations under which a delegation like the one referred to and purportedly passed by the resolution of the Board on 11.05.2021 could have been validated. The Court considers that in terms of section 20 of the TSC Act, whereas the 1st respondent was entitled to delegate, the delegation could only be based upon a regulatory provision promulgated under section 47 (1) (a) defining the scope of the delegation, the person or body to enjoy the delegation, whether despite delegation the 1st respondent could act in that respect by itself, procedure to withdraw the delegation, and the principles to be complied with in exercising the delegated powers. While the Manual 2018 may be progressive in addressing delivery of human resource functions for the 1st respondent's secretariat, it is clear that the same is not based upon the regulations promulgated under section 47 (1) (a) of the TSC Act. The findings will apply to the requirement that the 1st respondent promulgates all the regulations as required under section 47 of the TSC Act, any of which may not have been so



promulgated. The Court considers that 12 months should be sufficient period for the 1st respondent to promulgate the regulations under section 47 (1) (a) of the TSC Act. To that extent, the 1st respondent must expeditiously move to promulgate the regulations in accordance with the *Statutory Instruments Act* without which, the impugned delegation would not hold at all.

10. While the petitioner has established that the respondent's Manual 2018 and alleged delegation by resolution of 11.05.2021 were accordingly impaired, the Court has found that the reason for termination was fair and valid. The petitioner's affidavits and submissions offer no material to unsettle the reason for the termination. To that extent, the dismissal decision will be rested. While making that finding, the Court has considered the dismissal letter dated 13.09.2021 and it states that after the disciplinary hearing of 01.09.2021, the 1st respondent had directed that the petitioner be informed that 1st respondent had carefully considered the disciplinary case levelled against the petitioner and determined that the petitioner was guilty of the charges levelled against him and thereby, dismissed from the service effective 01.09.2021. The Court finds that in that view, the 1st respondent had directed its primary mind to the disciplinary case and the reasons for termination having been valid and fair, there evolves a valid bar to disturbing the dismissal decision, albeit, with a finding that the 1st respondent must henceforth promulgate due regulations as per section 47 (1) (a) of the TSC Act. The 1st respondent's consideration of the case therefore cured the adversity of the impugned delegation and provisions of the Manual in view that the 1st respondent directly made the dismissal decision.
11. The 5th issue is on remedies. The Court has found that the dismissal shall not be disturbed in the circumstances of the case. The Court has found that the 1st respondent ought to promulgate regulations under section 47 (1) (a) of the TSC Act and upon which the Human Resources Policies and Procedures Manual for the Secretariat staff 2018 ought to have been anchored. In the circumstances, considering the petitioner's margins of success, the 1st respondent will pay 50% of the petitioner's costs of the petition and the respondent to bear own costs. The prayers for reinstatement or compensation will not issue because the dismissal was not unfair. The Manual 2018 as issued incorporates matters beyond which the 1st respondent was required to promulgate the regulations under section 47 (1) (a) of the TSC Act and cannot be called for sweeping quashing order by the Court but as found, is liable to be redrawn based on the regulatory promulgation by the 1st respondent.

In conclusion, the petition is hereby determined with orders:

1. The declaration that the 1st respondent to promulgate by 01.05.2025 and in accordance with the Statutory Declarations Act the regulations prescribed under section 47 (1) (a) of the *Teachers Service Commission Act*, 2012 providing for the appointment, discipline and removal of secretariat staff of the Commission.
2. The declaration that the provisions of the 1st respondent's Human Resources Policies and Procedures Manual for the Secretariat Staff 2018 are ultra vires section 47 (1) (a) of the *Teachers Service Commission Act*, 2012 in so far as the Manual's provisions that ought to be anchored upon the regulations contemplated for promulgated under the section and to that extent, the Manual 2018, is null and void.
3. The 1st respondent will pay 50% of the petitioner's costs of the petition and the respondents to bear own costs.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS MONDAY 8TH APRIL 2024.

BYRAM ONGAYA



PRINCIPAL JUDGE

