



**Wanyonyi v Teacher Service Commission & another (Employment and Labour Relations
Petition E016 of 2023) [2024] KEELRC 1697 (KLR) (26 June 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1697 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT BUNGOMA
EMPLOYMENT AND LABOUR RELATIONS PETITION E016 OF 2023**

**JW KELI, J
JUNE 26, 2024**

BETWEEN
CONSTANTINE NYONGESA WANYONYI PETITIONER
AND
TEACHER SERVICE COMMISSION 1ST RESPONDENT
EJ MITEI 2ND RESPONDENT

JUDGMENT

1. The Petitioner was employed as a teacher by the 1st Respondent in 1994 until he was dismissed in 2021. He on 2nd November 2023 filed the Petition dated 9th October 2023 supported by his Supporting affidavit sworn on an even date, seeking: -
 - a. A declaration that the 2nd Respondent lacked any constitutional and lawful authority to chair a disciplinary panel and make a decision on behalf of the 1st Respondent to dismiss the Petitioner from service of the Teachers Service Commission, therefore the decision contained in the proceedings of 12th August 2021 is null and void for all intents and purposes.
 - b. A declaration that any actions taken or decisions made pursuant to the illegal disciplinary proceedings are unconstitutional and thus be declared to have been void ab initio.
 - c. An order of Certiorari be issued so as to bring to this Honourable Court the decision contained in the proceedings of 12th August 2021, for the purpose of quashing the offending disciplinary proceedings purportedly chaired by the 2nd Respondent.
 - d. A mandatory order do issue directing the 1st Respondent to reinstate the Petitioner back to his position and be paid in full all the emoluments and benefits that he would have otherwise earned from the time he was illegally dismissed until such time as to when he will be reinstated back into service.



- e. A mandatory order issued directing the 1st Respondent to pay the Petitioner a reasonable amount in form of general damages as compensation for the losses and inconveniences suffered from the illegal dismissal by the 1st Respondent.
 - f. An order for costs against the Respondent in the petition.
2. The Respondents in objection to the Petition on 13th February 2024 filed a Replying affidavit sworn by Evaleen Mitei (Acting Director in charge of the Teacher Discipline Management Services Directorate”) on an even date.

Petitioner’s Case

3. It was the Petitioner’s case that he was employed in 1994 as a graduate teacher and rose through the ranks to be the Principal Teacher of St. Austin High School in Busia.
4. It is his case that the Board of Management of the school lodged a complaint with the 1st Respondent regarding altered cheques and he was informed of the said complaint. The 1st Respondent constituted a panel to hear the disciplinary case against him which was chaired by the 2nd Respondent.
5. He testified that the case was heard on 12th August 2021 and the panel reached a decision dismissing him as per the proceedings (“CNW1”). He states that he has since pursued many appeals to have the decision dismissing him overturned as he has not been able to provide for himself and his family as he only had teaching as his profession which he was good at (CNM2-Payslips).
6. It is his case that his advocates advised him that the panel that heard his case was improperly constituted. He states that he has been denied the right to earn a living and *the Constitution* under Article 2(1) binds all persons and state organs.
7. That the Respondents have ignored the national values and principles of governance under Article 10(2)(a) &(b) and that by dint of Article 19, the rights and freedoms in the Bill of Rights are only limited as per Article 24 of *the Constitution*.
8. That *the Constitution*’s Article 20 enjoins the Court to promote the values of *the Constitution*. That all state organs are called to promote and fulfill the rights and fundamental freedoms in the Bill of Rights by Article 21 and the Court is vested with the Authority under Article 23 to grant appropriate remedies and reliefs.
9. The Petitioner’s case is that the 1st Respondent has disregarded his economic rights under Article 42 and constituted an illegal disciplinary panel without the required chair who ought to be a commissioner, thus making their decision null and void.

1st and 2nd Respondents’ Case.

10. It is the Respondents’ case that the Teacher Discipline Management Directorate supervised by the 2nd Respondent is drawn from the Board Charter of the 1st Respondent and is mandated to coordinate the processing of teacher discipline and review cases; interdict teachers for Gross Misconduct awaiting disciplinary or administrative process, coordinate investigations into reported or existing cases of teacher misconduct and non-performance, implement the recommendations of the investigation Reports into Teacher misconduct and Management of teacher Discipline cases at the 1st Respondent’s Field Stations.



11. It is the respondents' case that it is mandated with disciplinary control over teachers, to terminate their employment as regulated by publishing the Code of Regulations for Teachers (CORT) and the Code of Conduct and Ethics (COCE).
12. It is their case that the stated Codes provide for the process of dealing with professional misconduct by teachers employed in the public service.
13. The Respondents state that the Ministry of Education and the 1st Respondent have come up with Policy documents and Guidelines on financial stewardship.
14. It was the Respondents' case that the Petitioner was the Principal Teacher of St. Austin's Kingandole High School having risen through the ranks since his employment in 1994 and as a Principal Teacher, he was tasked to undertake administrative roles of the school, inter alia, implementing Education policy and professional practice at the school; be a secretary of the Board of Management; manage and control finances and the institutional assets entrusted to his office as per the Public Finance and Management Legal and Regulatory Framework; procurement of goods and service as per public procurement; appraise stakeholders on institutional performance; be a custodian of the institutional records; ensure proper management and maintenance of financial, human and physical resources of the school; offering technical advice to the Board of Management and other stakeholders; and performing such other roles as may be assigned by the Commission.
15. The Respondents' case is that on or about 4th December 2019, the 1st Respondent received information from the Board of Management of the school of allegations of institutional mismanagement against the petitioner; poor administration, and a general drop in academic performance at the school; poor financial management/stewardship at the school; procurement and implementation projects commenced without authorization and poor working relationship between the Board and petitioner (E.J.M-1).
16. On receiving the BOM's grievances, the 1st Respondent advised the Board to subject the matter to the relevant organs for investigation.
17. By a report signed on 15th January 2021, the County Schools Audit Unit-Busia undertook an Audit Investigation of the school on the alleged financial impropriety, which showed that the petitioner had fallen short of the merit or standard required of an institutional Head and that his acts/omissions contravened the law, and disciplinary action was recommended against him(E.J.M-2-Audit Report).
18. It is the respondents' case that on or about 22nd February 2021, the Busia County Disciplinary panel investigated the matter as per CORT and as outlined in the copy of the Investigative Report, the petitioner was found to have altered school cheques and he was directed to make a refund of all the money he had illegally withdrawn vide the altered cheques (E.J.M-4).
19. The Petitioner on 22nd February 2021 wrote to admit to the altering/forging of cheques and undertook to make a refund by 13th March 2021(E.J.M-5).
20. On 16th March 2021, the Petitioner was interdicted on account of the following words:-

“You altered the figures on the following three (3) cheques of National Bank of Kenya by changing the figures from Kshs. 900.00 assigned by the bank signatories to Kshs. 90,000.00 each to defraud the school:

 - i. Cheque No. 000018 withdrawn on 1st July 2020.
 - ii. Cheque No. 000025 was withdrawn on 7th July 2020



iii. Cheque No. 000026 was withdrawn on 13th July 2020” (E.J.M-6).

21. It is the respondents' case that the Petitioner through his interdiction letter dated 19th March 2021(E.J.M-7-a”) was asked to make a rebuttal by making a statement. However, in his statement dated 31st March 2021, he expressly admitted altering the cheques (E.J.M-7).
22. The respondents submit that they set up a panel to hear the petitioner on 12th August 2021 during which the Petitioner admitted to altering cheques, apologized, and requested to be forgiven as he was under duress at the material time (E.J.M-8).
23. It is after the hearing that the 1st Respondent’s disciplinary panel made a decision to dismiss the petitioner from his teaching service, a decision that was communicated to the petitioner vide the dismissal letter dated 25th August 2021(E.J.M-9).
24. The respondents submit that the Petitioner requested for review of the decision and the same was considered but denied on the grounds that he had not raised any new grounds for consideration by the Panel at the review stage (E.J.M-10).
25. The respondents submitted that they carried out an in-depth evaluation, considered all evidence provided, and determined that there were glaring grounds of CORT and public financial policies violated by the Petitioner.
26. That effective from 12th August 2021, the petitioner was dismissed from employment and the Respondents submitted that the same was merited.
27. They state that the petitioner participated fully in the discipline/administrative process and was in no way obstructed from presenting his case.
28. The respondents assert that the petitioner was subjected to an investigation to which he fully participated; he was served with an interdiction letter with grounds and reasons for his interdiction; he presented his rebuttal by way of written statement, he attended a hearing where he was accorded an opportunity to present his case, and to cross-examine all witnesses; the panel was impartial, the 1st Respondent considered the petitioner defense, made a decision dismissing the petitioner with reasons for dismissal, and requested for review which was duly considered.
29. The respondent submitted that there was no illegality and or irregularity in the process and that the 2nd respondent is obliged to participate in or superintend the petitioner’s discipline process.
30. The respondents submit that the Petitioner’s discipline process by the Teacher Discipline Management Directorate is documented in the 1st Respondent’s TSC Circular. No 26/2016(E.J.M-11-A); Concept Paper dated August 2021(E.J.M-11-B) and Minutes of the Board and corresponding Resolutions (E.J.M-11-C).
31. The respondents submit that the Petitioner’s prayers are unreasonable, unlawful offend *the Constitution* are against public policy and interest.
32. The respondents submit further that the petition is fatally defective and ought to be struck out for the reasons that the same does not meet the thresholds set out in *the Constitution* and the Rules of the Court.
33. The respondents submit that the petitioner is not entitled to the prayers sought as if granted it will set a bad precedent where institutional managers mismanage school funds and go unpunished.



Written Submissions

34. The parties consented and the Court directed that the Petition be canvassed by way of written submissions. The parties complied. The Petitioner's written submissions dated 10th March 2024 were filed by Orlando, Okello & Lusenaka Advocates on 21st March 2024. The Respondents' written submissions dated 24th April 2024 were filed by Allan Sitima, Advocate, on the 25th April 2024.

Determination

Issues for determination

35. The petitioner identified the following issue for determination in the petition: -

a. Was the disciplinary panel properly constituted?

36. The Respondents identified the following issues for determination in the Petition: -

a. Whether the 2nd Respondent had lawful authority to preside the 1st Respondent's teacher disciplinary panel.

b. Whether the Respondent adhered to the law when processing and determining the Petitioner's disciplinary case.

c. Whether, given the facts and circumstances leading to the disciplinary case against the Petitioner, the decision to dismiss him from teaching service was fair and lawful.

d. Whether the facts and circumstances of this case support the award of favourable or any favourable remedies to the Petitioner.

e. Whether the Petitioner is entitled to damages and costs.

37. The Court having perused pleadings by the parties and their submissions was of the considered opinion that the issues placed before the Court by the parties for determination were as follows: -

a. Whether the disciplinary panel was properly constituted?

b. Whether the petitioner was entitled to the relief sought.

a). Whether the disciplinary panel was properly constituted?

38. The Court discerned that the question of whether the disciplinary panel was properly constituted was what informed the petitioner in the filing of the petition. The petitioner stated that the decision to dismiss him by the 1st respondent was null and void as the panel that heard and determined his case was improperly constituted. That the 2nd respondent who chaired the disciplinary panel was not a Commissioner as required.

39. The disciplinary committee meeting minutes was produced as 'CMW1'. It was recorded that E.J Mitei, the 2nd Respondent chaired the panel on the 12th of August 2021. The verdict on page 13 of the proceedings was dismissal.

40. The respondents in response vide replying affidavit of the 2nd respondent in paragraph 26 stated that the petitioner was bound by the TSC Act, the *Employment Act*, the Code of Regulations for Teachers (2015), the TSC Code of Conduct and Ethics, and other legal instruments that include administrative circulars issued by the 1st respondent from time to time. The question was properly investigated and the decision that followed was fair, procedural, just, and appropriate as it was based on the merits of the



case, the respondents acted within the confines of the law, principles of natural justice, independently considering public interest and utmost professionalism, and the decision was communicated to the petitioner timeously.

41. The 2nd respondent then stated that his participation in the teacher discipline cannot diminish, impair, cap, or in any way divest the constitutional duty, statutory, or administrative power of the 1st Respondent to execute its mandate on teacher discipline.
42. In submissions, the petitioner submits that section 151(3)(a) of CORT states that a commissioner shall be present and chair the disciplinary panel at the headquarters level. The 2nd Respondent who chaired his panel was not a commissioner hence the proceedings and decision were null and void. That it was not controverted that the panel had no commissioner and the 2nd respondent was not one.
43. To buttress the foregoing, the Petitioner relied on decision by my brother Byram Ongaya in Nairobi ELRC Pet No. E159 of 2022; *Rose Mwende Mutisya v Teacher Service Commission & another* where in a panel not properly constituted for lack of Commissioner, the panel was found not well constituted and its decisions were null and void.
44. The Respondents in submissions on *the constitution* of the panel submits that section 20 of the TSC Act No. 20 of 2012 provides: “20. Subject to this 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 of the Commission under this Act”. That the commission had delegated its function related to teacher discipline to its management relying on TSC Circular No. 26/2016, concept paper dated August 2021, and minutes of the board meeting.
45. The Respondents further contended that the mandate and functions of the 1st Repondent teacher discipline management directorate was at all material times superintended by the 2nd respondent and entails coordination of the process of teacher discipline and review of cases. That from the foregoing, the authority of the 2nd respondent to chair the disciplinary panels was properly delegated by the commission.
46. The respondent did not distinguish the authority in Nairobi ELRC Pet No. E159 of 2022 *Rose Mwende Mutisya v Teacher Service Commission & another* relied on by the petitioner where the Court held that the proviso for the presence of a commissioner was according to a statutory instrument/Act and could not be amended internally vide circulars. Section 151 of the Teachers Service Commission Code Of Regulations For Teachers, 2015 (CORT)reads:- ‘151. (l) The discipline process will be administered at the Commission’s headquarters and at the county level.
 - (2) The Commission may by way of an administrative circular determine the offences or category of offences to be heard at the Commission’s headquarters and at the county level.
 - (3) The Discipline Panel at the headquarters shall comprise- (a) at least one member of the Commission who shall be the chair of the panel;” The preamble reads: ‘THE TEACHERS SERVICE COMMISSION ACT (No.20 of 2012) In Exercise of the powers conferred by section 47 (2) of the Teachers Service Commission Act the Commission makes the following Code of Regulations: - The Teachers Service Commission Code Of Regulations For Teachers, 2015 Part I-preliminary I. These Regulations may be cited as the Teachers Service Commission Code of Regulations for Teachers, 2015.’ (emphasis given) The Court consequently, holds that the regulations were made under section 47 of the Teachers Service Commission Act as held by my Brother Justice Byram Ongaya in Nairobi ELRC Pet No. E159 of 2022 *Rose Mwende Mutisya v Teacher Service Commission & another* and could not be changed internally by the Respondents.



47. The judgment in *Rose Mwendu Mutisya v Teacher Service Commission & another* (supra) has not been set aside by a higher court. It is law. The 1st Respondent if aggrieved should have submitted to distinguish it or even demonstrated they appealed. The Court ought to pursue consistency in decision making, so that litigants can predict outcomes with some degree of certainty on similar issues. The petitioner was justified in relying on the decision. I uphold the decision by my Brother Justice Ongaya in Nairobi ELRC Pet No. E159 of 2022 *Rose Mwendu Mutisya v Teacher Service Commission & another* to find that the disciplinary panel which recommended the dismissal of the petitioner was improperly constituted, for lack of a Commissioner, and hence its decisions were null and void.

b). Whether the petitioner was entitled to reliefs sought.

48. The petitioner sought for quashing of the null and void decision and reinstatement.

49. It is trite that anything done in violation of the law is of no legal consequences. Having nullified the proceedings and decision of the panel chaired by the 2nd respondent, the decision of termination is consequently a nullity.

50. The respondents relied on the nullified proceedings to state that the petitioner having admitted to altering the cheques, was not deserving of the orders sought. The Court holds that the petitioner having succeeded in his petition for having been heard by a panel without legal authority, was entitled to the remedy sought.

51. The acts complained of were related to his leadership duty and not a teacher. There was no submission on the difficulty in reinstatement and the Respondent was always entitled to comply with the Teachers Service Commission Code of Regulations For Teachers, 2015. As it is, it is like the disciplinary process never occurred.

52. Consequently, the petition is allowed as follows:-

- a. A declaration is hereby issued that the 2nd Respondent lacked any constitutional and lawful authority to chair a disciplinary panel and make a decision on behalf of the 1st Respondent to dismiss the Petitioner from service of the Teachers Service Commission, therefore the decision contained in the proceedings of 12th August 2021 is null and void for all intents and purposes.
- b. A declaration that any actions taken or decisions made pursuant to the illegal disciplinary proceedings are declared to have been void ab initio.
- c. An order of Certiorari be and hereby issued bringing to this Honourable Court the decision contained in the proceedings of 12th August 2021, to quash the offending disciplinary proceedings purportedly chaired by the 2nd Respondent.
- d. A mandatory order is issued directing the 1st Respondent to reinstate the Petitioner back to his position or equivalent teacher position and be paid in full special damages arising from all the outstanding emoluments and benefits that he would have otherwise earned from the time he was illegally dismissed until today and to continue earning accordingly, and the 1st respondent to deploy the petitioner upon reporting to the TSC headquarters not later than 30 days from today.
- e. The 1st respondent to pay costs of the petition.

53. It is so Ordered.



DATED, DELIVERED, AND SIGNED IN OPEN COURT AT BUNGOMA THIS 26TH DAY OF JUNE 2024.

J.W. KELI,

JUDGE.

In The Presence Of: -

CourtAssistant: - Brenda

For Petitioner: - Okello

For Respondents: - Absent

