



**Gitau v Teachers Service Commission (Employment and Labour Relations
Petition 1 of 2022) [2024] KEELRC 1981 (KLR) (31 July 2024) (Judgment)**

Neutral citation: [2024] KEELRC 1981 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI
EMPLOYMENT AND LABOUR RELATIONS PETITION 1 OF 2022**

ON MAKAU, J

JULY 31, 2024

IN THE MATTER OF ARTICLE 22 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF THE ALLEGED AND/OR THREATENED
CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 40 OF THE CONSTITUTION**

BETWEEN

GEORGE KAMWARO GITAU PETITIONER

AND

TEACHERS SERVICE COMMISSION RESPONDENT

JUDGMENT

1. The Petitioner filed this petition dated 24th July 2020 in High Court at Murang'a seeking the following remedies:
 - a. A declaration that the refusal by the respondent in denying the petitioner an equal opportunity is a threat to the petitioner's constitutional rights to equal rights under article 27 of the [constitution](#) of Kenya, 2010 and as such null and void.
 - b. A declaration that acts of the respondents is a violation of the petitioner's rights to dignity under article 28 of the [constitution](#).
 - c. A declaration that the respondents have failed to protect the rights of the petitioner who despite qualification was denied his fundamental rights contrary to article 23(1) of the [constitution](#).
 - d. An order for damages



- e. Grant the petitioner costs for this petition.
 - f. Make such other orders as this Honourable Court shall deem just.
2. The petitioner's case is that he was employed as a teacher in the Ministry of Education having qualified as a level p2 teacher in 1977. He was first posted to Kamung'ang'a primary school where he served for 11 years, then Kiangochi primary school for 25 years and Gaitega primary school for 4 years. He studied privately during his first posting and in 1980, he acquired KCSE DIV TWO. In 1981, there was inspection for promotion but he was not considered despite having been shortlisted and inspected. In 1985 the same thing was repeated in but 1995 he was promoted during a massive promotion of teachers who had served in P2 for over 15 years. He acted as a deputy headmaster for a year in 1987 but was neither shortlisted nor promoted despite holding the necessary qualifications.
 3. In the petitioner's view, the respondent's actions amounted to discrimination contrary to Article 27 and 28 of the constitution which guarantee the right to equality and freedom from discrimination.
 4. The Respondent opposed the petition vide the replying affidavit sworn on 19th September 2023 by the 1st Respondent's Human Resource Management and Development Director, Dr. Julius O. Olayo. In brief, he deposed that before the 2010 Constitution, the 1st Respondent was employed by the Ministry of Education under the Teachers Service Commission (TSC) Act Cap 212 of 1967. Currently, the Petitioner is employed by the Respondent in a contract governed by the provisions of the TSC Act, the code of Regulation for Teachers, circulars and policies made from time to time.
 5. He deposed that regulation 40 of the code provided for promotion of teachers to various grades whereas regulation 42(2) provided for promotion on merit except under exceptional circumstances. He stated that the petitioner made an application in 1981 to be issued with a certificate, which form clearly indicated that it was not to be used for promotion on academic grounds. Pursuant to regulation 5 of the TSC (Qualification for Registration) regulations 1967, the petitioner was issued with a Teacher Education p2 Certificate in May 1981 and thereafter he was promoted on merit from p2 to p1 teacher in March 1995.
 6. He further deposed that the petitioner applied for another promotion from P1 teacher vide his letter of 17th July 2007 but the respondent advised vide the letter dated 19th September 2007 to first apply and successfully undertake a Teachers Promotion Course (TPC) in order for him to be considered for the promotion. By letter dated 17th June 2011 the petitioner again requested for an upgrade from P1 teacher to an appropriate grade on the basis that he had attained a certificate in Advanced Level but upon consideration of the application, he was informed vide letter of 7th July 2011 that he did not qualify for the same. He did not have 1 principle and 2 subsidiary passes in Arts or 1 principle and 1 subsidiary passes for science subjects excluding general Paper; that he was not trained as P1 teacher; and that he was not serving the respondent as at July 2010.
 7. On 3rd October 2012, the petitioner requested for a promotion back-dated to the period from 1983 to 1995 but by the letter dated 16th November 2012, the petitioner was advised to pursue higher qualifications or attend Teacher Promotion Course in order for him to get a promotion. The petitioner was promoted to ATS IV on 1st January 2015, having successfully undertaken a Teacher Proficiency Course in April 2014.
 8. It was deposed that the respondent acted in accordance with the laid down procedures, whereas the petitioner had failed to attain the required threshold to be eligible for promotion. It was further deposed that the petitioner had failed to show how his rights under articles 23, 27 and 28 were violated to warrant the prayers sought. Finally, it was deposed that granting the reliefs sought by the petitioner



would amount to usurpation of the respondent's constitutional, statutory and administrative mandate which will in effect be an affront to its independence.

9. The petitioner replied to the respondent vide his affidavit sworn on 2nd October 2023. He deposed that his promotion in March 1995 was as a result of the abolition of the p2 grade by the Ministry of Education and hence P2 teachers were promoted to P1 teachers. Further that the requirement to take advance courses for promotion were new and to his detriment as they did not match the agreed terms of employment. He deposed that despite meeting the minimum requirements at the time, he continued service as P2 for an unfairly long time. He disputed the need to protect the commission's independence and contended that public institutions should be held accountable for wrongful acts in order to prevent further abuse by the commission.
10. Parties failed to comply with court's directions on filing submissions hence they were locked out. Further the respondent filed a Notice of Preliminary objection but it failed to prosecute and instead filed the said Replying Affidavit.

Analysis

11. Having considered the petition and the rival affidavits, the following issues fall for determination by this court:
 - a. Whether the failure to promote the petitioner amounted to discrimination contrary to Article 27 of the constitution.
 - b. Whether the petitioner is entitled to the reliefs sought.

Discrimination

12. The petitioner's claim is that he was discriminated against and denied much deserved promotions, but the respondent contended that the petitioner was given the deserving promotions but denied what was beyond his qualification in compliance with laid down regulations and procedures.
13. I have carefully considered the evidence by the petitioner in his two affidavits and the respondent's Replying Affidavit. It is evident that the petitioner was employed by the respondent as a P2 teacher on probation terms on 8th November 1977. (see letter marked "A" in the petitioners Affidavit). He got a certificate of P2 teacher on 29th May 1981 and he was promoted on merits to P1 on 1st January 1995. He was confirmed on permanent and pensionable terms on 17th march 1998. Thereafter he kept on requesting for promotion but he was advised to undergo Teachers Promotion Course but he never did the said course.
14. Instead he did Advanced secondary education and on 17th June 2011 he requested for upgrading of the position in line with his A Level education. By the letter dated 7th July 2011 the respondent informed the petitioner that he did not qualify for promotion from P1 to A-Level upgrading because:
 - "(1) You do not have : -
 - a. 1 Principle 2 Subsidiary passes for Arts.
 - b. 1 Principle 1 Subsidiary passes for science subjects excluding General Paper.
 - (2) You were not serving under the Commission as at 1st July 2010.
 - (3) You had already progressed to ATS I



- (4) You were recruited after 1st July 2003
 - (5) You did not train as a PI teacher.”
15. His further requests for promotion were declined and he was advised vide the letter dated 16th November 2012 to either pursue higher qualification or attend Teachers Promotional Course in order to qualify for promotion. He failed to undergoing the Teachers Promotional Course and again applied for promotion but he was advised vide the letter dated 5th July 2013 that:

“To enable you advance further in the scheme of service for Non- Graduate teachers you are advised to pursue and pass the following courses.

 - i. Teachers proficiency Certificate for ATS IV and thereafter for ATS III; or
 - ii. Diploma in Education from a recognized Teaching institution; or
 - iii. Diploma in Special Education from a recognized Institution; or
 - iv. Diploma in Early Childhood.”
16. He took the above advise as a result of which he was promoted to ATS IV vide the letter dated 27th January 2015.
17. The question that begs for answer is whether in view of the above matters, the respondent violated the petitioner’s fundamental right to equality and freedom from discrimination as envisaged under Article 27 of the *constitution*. The respondent maintains that it acted within the law and regulations in handling the petitioner’s requests for promotions.
18. I have considered the Code of Regulation for teachers (CORT) 1986 which was relied upon by the Respondent. Regulation 40 provides that a teacher may be promoted to professional grades such as P3, P2, P1, S1, in accordance with the regulations for promotion of teachers laid down by the Ministry of Education. Regulation 42 then provides that:

“A teacher may be promoted on merit if he has displayed exceptional ability as a teacher in the performance of his duties provided-

 1. That the commission shall not consider any teacher for the promotion until he has been confirmed in his permanent appointment in accordance with this code.
 2. That a teacher, except under exceptional circumstances determined by the Director of Education, shall have completed not less than five years recognized teaching service within a given grade to be considered for promotion under regulation 40 of this code.
 3. A teacher who has been suspended by the Commission shall not be considered for promotion until he has completed two years teaching service since the end of his suspension; and
 4. A teacher who has been removed from the register, and/or dismissed and then reinstated by the commission must complete five years teaching service after reinstatement before he may be considered for promotion.”



19. It appears from the evidence before the court that the petitioner did not meet the qualification for the promotions he was seeking. Although he had A-Level certificate, the requirement was more than the Subsidiary he scored in one subject (Kiswahili). He was therefore required to pursue higher qualification or undergo Teachers Promotion Course in order to be eligible for the promotions he was seeking but he declined. The only advise he took was to pursue Teachers Proficiency Certificate for ATS IV in scheme of service for Non-Graduate teachers in April 2014 and he was promoted from 1st January 2015.
20. As such, it is evident from the record that the petitioner was not treated differently from other teachers. I say so because the petitioner stated in paragraph (g) of the Petition that:
- “That he worked as p2 for 18 years and was never promoted to P1 level until 1995 where there were mass promotions for all those who had served in one grade for over 15 years were all promoted, thus the petitioner took advantage.” [emphasis added]
21. Article 1 of the *Discrimination (Employment and Occupation) Convention*, 1958 (No. 111) defines discrimination as follows:
1. “For the purpose of this Convention the term discrimination includes—
 - (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation;
 - (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with representative employers' and workers' organizations, where such exist, and with other appropriate bodies.”
22. The Supreme Court also defined discrimination in the case of *Gichuru v Package Insurance Brokers Ltd* (Petition 36 of 2019) [2021] KESC 12 (KLR) (22 October 2021) (Judgment) as follows:
- “... where a person is treated differently from other persons who are in similar positions on the basis of one of the prohibited grounds like race, sex, disability etc or due to unfair practice and without any objective and reasonable justification.”
23. The *Employment Act* under section 5 gives effect to Article 27 of the *constitution* and cautions employers against discrimination as follows:
- “(2) An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.
 - (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.”

24. Applying the facts of this case to the law and the precedents cited above, I find that the petitioner has not proved the alleged discrimination on a balance of probability. Despite the much effort he made to educate himself and teach for a long time, he did not meet the criteria for promotion he desired to get. It was clearly provided under Regulation 42 of the CORT (1986), that promotion was on merit and if the teacher had completed 5 years teaching service in one job grade. The petitioner met the criteria of serving in one grade for over five years but he failed the academic qualification and profession training. Further that, where he met the qualification, the delay in getting the promotion did not affect him alone but many others as demonstrated above.

Reliefs

25. In view of my earlier finding that the petitioner has failed to prove the respondent discriminated him by denying him promotion, I must hold that he is not entitled to the reliefs sought in his petition. Consequently, the petition is declined and dismissed with costs.

DATED, SIGNED AND DELIVERED AT NYERI THIS 31ST DAY OF JULY, 2024.

ONESMUS N MAKAU

JUDGE

Order

This judgment has been delivered to the parties via Teams video conferencing with their consent, having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N MAKAU

JUDGE

