



**Kyungu v Teachers Service Commission (Employment and Labour Relations Cause E003 of 2024) [2024] KEELRC 2425 (KLR) (30 September 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2425 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE E003 OF 2024  
AN MWAURE, J  
SEPTEMBER 30, 2024**

**BETWEEN**

**JONATHAN MUSYOKA KYUNGU ..... PETITIONER**

**AND**

**TEACHERS SERVICE COMMISSION ..... RESPONDENT**

**JUDGMENT**

1. The petitioner avers he was the Principal of Kabaa Mixed Secondary school in Machakos. He says in 2020 he was accused of forging the signature of one Board of Management member by the name of Victoria Muindi.

**Petitioner's Case**

2. The facts of the case is that the petitioner issued a cheque to their supplier by the name of Youngeri Rich who were to supply stationaries and equipment. The cheque was for kshs 50,000/-.
3. The petitioners avers that an investigation panel from the Ministry of Education which carried out the investigations on 26<sup>th</sup> October 2020 and during the investigation he explained he was forced to write a cheque to buy sanitisers and thermos among others during the Corona Pandemic. He says the signatories were not willing to sign the cheques and he had very urgent items he needed to purchase. He says the said cheque was never paid and so the school did not lose anything.
4. He says for that reason the investigation panel recommended that the petitioner should in future adhere to the financial regulations and consult Sub County Director of Education in the event of having difficulties accessing signatories. The panel did not therefore recommend to the respondent to take disciplinary action against the petitioner.
5. The petitioner avers that after the Ministry of Education official shared their investigations report on 26<sup>th</sup> October 2020 with the respondent and the respondent constituted a county disciplinary panel



chaired by one Eunice Mwito who was a department TSC County Director. He says the panel was irregular in contravention to regulation 151(4)(a) and (c) of TSC code of regulations of Teachers which makes it mandatory for the County Director of Education or representative and a member of the commission to be members of the panel.

6. The panel recommended he had a case to answer and was invited to a disciplinary hearing.
7. He says he appeared before the disciplinary hearing on 28<sup>th</sup> October 2021 and the same was chaired by Catherine Kertich who was Assistant Deputy Director of the respondent. He says Ms Kertich was not a commissioner and so did not have the power of the commissioners when she chaired the committee meeting. The committee recommended the dismissal of the petitioners from the respondent's employment.
8. The petitioner states the actions of Catherine Kertich chairing the disciplinary panel was contrary to regulation 151(30) (a) of the TSC code which provides

“the discipline panel at the headquarters shall comprise (a) at least one member of the commission who shall be the chair of the panel.”
9. He says he filed an appeal and it was dismissed and meanwhile he was interdicted for 3 months and was not paid ½ his salary during the period of interdiction and the respondent was discriminatory against him in relying on regulation 148(1) of the TSC code of regulation as it singled out a category of teachers and respondent classified the respondent as one of those teachers who were not to be paid ½ salary during their interdiction. He says the said regulation contravenes article 27(1) of the Kenya Constitution.
10. The petitioner says the respondent had no legal right to reject the recommendation by the Ministry.
11. He therefore cites articles 2(1) and 3 and 10(2) (1) and 22(1) and 23 and 162 and 27 of *the Constitution* of Kenya 2010 among others as the laws that have been violated by the respondent in dismissing the petitioner.
12. The petitioner therefore seeks the following prayers declaration 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, and 13.
  1. A declaration do issue that M/s Catherine Kertich an assistant deputy director at the respondents secretariat lacked any constitutional and lawful authority to chair a disciplinary panel and make a decision on behalf of the respondents commissioners to dismiss the petitioner from the service of the teachers service commission because such a function is within the exclusive mandate of the respondents commissioners and therefore M/s Catherine Kertich's decision contained in the proceedings signed by her and dated 28/10/2021 and communicated to the petitioner vide the respondents letter refer no. TSC/306069/172 of 10/11/20221 is null and void for all intents and purposes.
  2. A declaration do issue that the actions of M/s Catherine Kertich a deputy director at the respondent's secretariat of purporting to sign on behalf of the respondents commissioner the proceedings containing the decision of the disciplinary panel dated 28/10/2021, not only acted ultra vires, but also unconstitutionally and illegally hence making the said proceedings to have no legal consequences and effect.
  3. A declaration do issue that any action (s) taken and/or decision(s) made pursuant to the illegal disciplinary proceedings dated 28<sup>th</sup> October 2021 are both unconstitutional and illegal hence the same be declared to have been void a initio.



4. A declaration do issue that the respondents county disciplinary panel chaired by M/s Eunice Mwito lacked any constitutional or legal authority to reject the recommendations of the investigations committee of the Ministry of Education headed by the Machakos County Schools Auditor Mr Michael Mutham which prepared the report on 26/10/2020.
5. A declaration do issue that the respondent violated article 27(1)&(2) and article 50(2)(a) of *the constitution* of Kenya on Equality and freedom from discrimination and on fair hearing for interdicting the petitioner for a period of 3 months without paying him ½ salary of Kshs 52,322/- per month on allegations of forgery yet constitution guaranteed the petitioner the right to be presumed innocent until the contrary is proved.
6. An order of certiorari be issued so as to remove into this honourable court for the purpose of quashing, the offending disciplinary proceedings purportedly signed by M/s Catherine Kertich an assistant Deputy director at the respondents secretariat and dated 28<sup>th</sup> October 2021.
7. A mandatory order do issue directing the respondent to adopt the recommendation of the Ministry of Education team who carried out investigations at the petitioner’s school on 26/10/2020 and found the petitioner had no case to answer.
8. A mandatory order do issue directing the respondent to reinstate back the petitioner to his former position of Principal of a secondary school at job group “P” and be paid in full all the outstanding emoluments and benefits that he would have otherwise earned from the time he was unprocedurally interdicted on 8<sup>th</sup> July 2021 until such time as to when he will be reinstated back to work.  
Or in the alternative
9. An order do issue directing the respondent to substitute his decision of dismissing the petitioner from employment service to a decision of issuing the petitioner with an administrative warning letter.  
Or in the alternative
10. An order do issue directing the respondents to pay the petitioner general damages as recompense for the losses and inconveniences suffered from the unconstitutional and illegal acts committed by M/s Catherine Kertich of chairing disciplinary hearing on behalf of the respondents commissioners on 28<sup>th</sup> October 2021 and signing on their behalf of the commissioners the proceedings which dismissed the petitioner from employment
11. An order to issue directing the respondent to pay the petitioner within 14 days from the date of the order an amount of Kshs. 156,966 being the withheld ½ salary for 3 months during interdiction period between 8/7/2021 and 10/11/2021.
12. The honourable court do make any such other or further orders as it may deem fair, just an expedient in the circumstances in enforcing violation of fundamental rights of the petitioner.
13. Costs consequent upon this petition be borne by the respondent.

### **Respondents Case**

13. The respondent filed a replying affidavit on 4<sup>th</sup> June 2024 deponed by one Catherine Kertich the Deputy Director of Teachers Discipline Management (hitherto Field Services Directorate) which is the directorate in charge of discipline of employees of the respondent.



14. The respondent avers that the article 237(2) & (3) of *the Constitution* empowers the commission to register trained teachers, recruit, employ, promote, transfer and exercise disciplinary control over them and may terminate them among others.
15. The respondent states that the Ministry of Education Committee Investigation Committee recommended the following:
  - a. The BOM members work closely with the principal for better school management
  - b. The principal does strictly adhere to the financial regulations and to contact the sub county director of education in case of difficulties in accessing signatories
  - c. Payment vouchers be raised before actual payment is made to any supplier
  - d. Store ledgers be purchased and regularly updated.
16. However, he said panel did not exonerate the petitioner of wrong doing. The petitioner himself admitted his wrong doing and so the respondent constituted a County Disciplinary Committee which investigated the matter and found petitioner was culpable of wrongdoing and hence invited him for a disciplinary meeting.
17. The same disciplinary panel was constituted under regulating 146(40 (b) of the Teachers Service Commission regulations and the petitioner admitted he forged a cheque and so was dismissed. The disciplinary panel was chaired by the deponent Catherine Kertich as mandated by the section 20 of the TSC Act. section 20 of TSC Act provides:

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.
18. The chair was therefore appointed as per the memo dated 7<sup>th</sup> October 2021 from the director (Field Services)
19. The respondents averment is therefore that it acted in accordance to the law and since the petitioner forged a signature and presented a cheque to the bank for cashing he was in gross misconduct of the Commission, the Public Financé Management Act, the *Basic Education Act*, the TSC Act and *Employment Act*.
20. The respondent therefore states that the petitioner was not discriminated and further he is not entitled to payment of salary in the period he was under interdiction as the code of regulation of teachers provide the terms under which the half salary is payable to the employee who is on interdictions.

### **Submissions of the respective parties**

21. The Court considered the submissions by the petitioner dated 19<sup>th</sup> June 2024. The respondents submissions dated 3<sup>rd</sup> July 2024 were also considered by the honourable court.

### **Analysis and determination**

22. The court having considered the pleadings and submissions of the respective parties finds the following should be the issues for determination
  1. Whether the respondent erred in rejecting the recommendations of the panel investigating the petitioner from the ministry of education.



2. Whether the panel constituted by the respondent was properly constituted
3. Whether the petitioner is entitled to payment of half of his salary during the three months he was on interdiction.

### Issue No 1

23. The evidence on record is that the initial investigation against the petitioner was conducted by a team from the audit team of the Ministry of Education. The team made several recommendations as follows:
  1. The BOM members work closely with the principal for better school management
  2. The principal does strictly adhere to the financial regulations and to contact the sub county director of education in case of difficulties in accessing signatories
  3. Payment vouchers be raised before actual payment is made to any supplier.
  4. Store ledgers be purchased and regularly updated.
24. The court finds the Ministry made recommendations but was non committal as to whether the petitioner was culpable of forgery of a cheque or not. The court is however alive to the fact that the petitioner admitted he had forged the cheque and promised never to repeat such an offence.
25. Forgery of a cheque is a serious offence by any standards. The petitioner went further and had it presented to the bank for cashing. In the worst case scenario if the bank was not diligent to call the person whose signature was forged there is no saying where this could have led to. There is no saying if the petitioner would not have continued to write other cheques contrary to *the constitution* and to Public Finance Management act the *Basic Education Act* the TSC Act, the *Employment Act* and indeed the Penal Code. Indeed forgery is a criminal act.
26. The petitioner sought for a short cut and yet he admitted he had been working for the respondent for about 10 years. He therefore knew the rules and regulations of the financial management and even if he did not know he should have inquired. The court finds he had no reason to write a cheque and sign instead of the legal person mandated to do so.
27. For that reason, the court finds the respondent had a right to reconsider the decision of the panel from the Ministry of Education. The respondent had a right to do so as provided under article 237(2)(e) (f) of *the Constitution* of Kenya 2010 which provides. The functions of the Commission are:
  - (e) to exercise disciplinary control over teachers; and
  - (f) to terminate the employment of teachers.
28. The court therefore finds the respondent was justified in reviewing the decision of the ministry and referring the matter to their committee as mandated under *the Constitution* and handling it as it deemed fit.

### Issue No 2

29. Was the panel constituted by the respondent properly constituted?

The petitioner's complaint is that the Ministry is the one mandated to be the accounting officer of an institution under regulation 5(2) of the *Basic education Act* and further in regulation 5(3) it is provided that in case of any impropriety on a head of institution the Cabinet Secretary shall



revoke the designation of such head of institution and request the Teachers Service Commission for a replacement.

30. The regulation however does not clarify how the Cabinet Secretary will go about in revoking the said appointment. It is trite law that *the Constitution* is the supreme law of the land. *The Constitution* denotes authority to the Teachers Service Commission to discipline the Teachers. There is an ambiguity here however because *the constitution* gives unqualified authority to the commission to discipline all teachers. It does not specify if it excludes the Head teachers. But head teachers are also teachers under the Teachers Service Commission. The court therefore reiterates that the respondent was within its mandate in taking the petitioner through this disciplinary process.
31. The petitioner participated in the process and did not object to *the constitution* of the disciplinary panel until this petition was filed. Indeed, during the hearing he admitted of wrong doing and promised not to repeat the same.
32. As for chairing of the disciplinary panel by the Deputy Director of disciplinary team of the respondent's management the court is persuaded that the said chair Madam Catherine Kertich was appointed lawfully to chair the same as provided in section 20 of *Teachers Service Commission Act*. Section 20 of the *Teachers service Commission act* provides as follows:

“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.”:
33. The court is persuaded the respondent had a valid reason to take the petitioner through a disciplinary hearing as provided in section 45(1) of the *employment act*. The said section states as follows:

No employer shall terminate the employment of an employee unfairly.
34. The respondent had a valid reason to terminate the petitioner.
35. The respondent also followed the right procedure in taking the petitioner through the disciplinary action where the petitioner also admitted he had forged a cheque. The respondent complied with section 41(1) of the *Employment Act*.
36. The court can also confidentially state that the panel that took the petitioner through the disciplinary action was properly constituted.
37. The defence by the petitioner that he is not culpable of this offence because the respondent did not lose any money is not justified because the loss was saved by the timely action of the bank otherwise the money could have been paid out. From there, there is no saying what other cheques the petitioner could have written unlawfully.
38. In view of the foregoing, the court finds that the petitioner has not proved any violation of *the constitution* or even statutory violations by the respondent. The petitioner has alleged a number of constitutional violations including discrimination under article 27 of *the Constitution* but has not proved how his constitutional rights were violated. In the case of Leonard Otieno vs Airtel Kenya Ltd (2018) eKLR cited by the respondent Judge Mativo had this to say:

“it is a fundamental principle of law that a litigant bears the burden of proof in respect of the proposition he asserts to prove his claim. Decisions on violations of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize *the constitution* and invariably result in ill considered opinions. The presentation of



clear evidence in support of violation of constitution rights is not a mere technicality rather it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypothesis.”

39. Clearly, the court finds no proof or evidence of violation of the petitioner’s rights and so his prayers in the petition fails.
40. Finally, as to whether he is entitled to payment of his half salary during the interdiction the Court is reliant on section 148(1) of the TSC code of regulation. Section 148(1) of the TSC regulation states:- “ a teacher shall be paid half salary during the period of interdiction except in the following cases (inter alia)
- a. Desertion of duty
  - b. Having been jailed or held in legal custody
  - c. Misappropriation of mismanagement of public funds
  - d. Fraudulent claims and receipt of funds
  - e. Use of false certificates
  - f. Forgery, impersonation and collusion and immoral behaviour.
41. In this case, the petitioner admitted he forged the signature of one board of Management member Victoria Muindi during the disciplinary meeting held on 28<sup>th</sup> October 2021. The court finds that forgery is a serious offence and the circumstances under which a person forges a signature does not and can never exonerate such a person from wrongdoing. The petitioner cannot ripe from a criminal offence and so the court would not be justified to award him any payment during the period he was under interdiction.
42. The court finds and holds that in view of the foregoing analysis and findings the conclusion becomes irresistible that the petitioner’s amended petition must fail and the prayers thereto in the said amended petition are all dismissed accordingly.
43. The court orders the rival parties to meet their respective costs of the petition.
- Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 30<sup>TH</sup> DAY OF SEPTEMBER 2024.**

**ANNA NGIBUINI MWAURE**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of *the Constitution* which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of



the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

A signed copy will be availed to each party upon payment of Court fees.

**ANNA NGIBUINI MWAURE**

**JUDGE**

