



**Mohammed v Teachers Service Commission & another (Employment and Labour Relations
Petition E070 of 2023) [2024] KEELRC 2629 (KLR) (24 October 2024) (Judgment)**

Neutral citation: [2024] KEELRC 2629 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E070 OF 2023
MN NDUMA, J
OCTOBER 24, 2024**

BETWEEN

MUMINA HIRBO MOHAMMED PETITIONER

AND

TEACHERS SERVICE COMMISSION 1ST RESPONDENT

KENNETH MARANGU 2ND RESPONDENT

JUDGMENT

1. The Petitioner in the amended petition dated 12/3/2024 filed on 13/3/2024 by the petitioner against the respondent is seeking the following reliefs: -
 1. A declaration do issue that the instrument (resolution) which the respondent used in transferring or delegating its constitutional functions of handling, discipline matters of its teachers and other secretariat staff on 14th May, 2021 was an illegal instrument which did not have any force of law, because the instrument was never subjected to public participation as required under Article 10(2)(a) of *the Constitution* of Kenya, the said purported instrument was also never tabled before parliament for scrutiny and approval as required under section 1(4) of the Statutory Instrument Act 2013 and is therefore null and void and legally defective.
 2. A declaration do issue that the 2nd respondent's officer Mr. Kenneth Marangu who chaired the disciplinary panel on behalf of the respondent on 18/5/2022 and made a decision to dismiss the petitioner from the employment service of the respondent lacked lawful authority to chair the panel because he was not commissioner as required under Clause 119(2) of the TSC Human Resource and Procedure Policy Manual for secretariat staff which states that, the discipline panel shall comprise of at least one member of the Commission who shall be the chair of the panel. Mr. Marangu's decision contained in the proceedings signed by him



and dated 18/5/2022 and communicated to petitioner vide respondent's letter reference no. TSC/500085/154 of 31/5/2022 is therefore null and void for all intents and purposes.

3. Declaration do issue that the disciplinary panel of the respondent that met on 18/5/2022 and made a decision to dismiss the petitioner from the employment service was not properly constituted as required under the TSC Human Resource Policy and Procedures Manual for Secretariat Staff and as such, the decision to dismiss the petitioner on 18/5/2022 vide letter reference no. TSC/600007/37 of 31/5/2022 is null and void for all intents and purposes.
4. A declaration do issue that Mr. Marangu's action of purporting to sign on behalf of the respondent's Commissioners the proceedings containing the decision of the disciplinary panel dated 18th May, 2022, Mr. Marangu not only acted ultra vires, but also unconstitutionally and illegally hence making the said proceedings to have no legal consequences and effect.
5. A declaration do issue that, the decision to dismiss the petitioner which was communicated vide the respondent's letter dated 31st May, 2022 violated Article 27(1) of *the Constitution* on non-discrimination after the respondent dismissed the petitioner for erroneously causing an overpayment of Kshs. 482,356/= while her other colleagues Mr. Keago Samuel Oroni, Maina Managa, Leonard Muiruri Waweru, Dorcas Mueni Kyungu and 3 others who caused an overpayment of Kshs. 2,978,572/= were issued with warning letters while others were suspended for a period between 2 and 5 months and therefore the decision of the respondent was therefore null and void.
6. An order of certiorari be and is hereby issued calling into this court and quashing the 1st respondent's instrument/resolution of 14th May, 2021 which delegated its constitutional function of disciplinary control to its employees without first subjecting the purported instrument transferring those functions to public participation and without publishing the same in the official Kenya Gazette Notice and without seeking approval of by the National Assembly.
7. An order of certiorari be issued so as to remove into this honourable court, for the purpose of quashing, the offending disciplinary proceedings which were signed by Mr. Marangu on behalf of the respondent on 18/5/2022.
8. A mandatory order do issue directing the respondent to reinstate the petitioner back to her position off the Chief Human Resource Officer at the Headquarters within 14 days from the date of the order and be paid in full, all the outstanding emoluments and benefits that she would have otherwise earned from the time she was unlawfully interdicted on 16th December 2021 up to the time of this order.
9. An order do issue compelling the respondent to pay the petitioner general damages for showing an open discrimination and biasness by dismissing her from employment for erroneously causing an overpayment of Kshs. 482,356/= for 3 teachers who were later deducted the said money from their salaries, while 5 of her colleagues who erroneously caused an overpayment of Kshs. 2,978,572/= for 6 teachers were either suspended for a period of between 3 and 5 months.
10. Any other relief the honourable court deems appropriate, just and fit to grant.
11. The costs of this petition be provided for.



Facts relied upon

2. The petitioner relies on facts that may be summarised that the petitioner was employed as clerical officer by the 1st respondent on 28/2/1984 and rose through the ranks to become principal Human Resource Officer and her main duties were to compile personal data of all new teachers who were being employed and others who were being promoted to the next grade by the respondent. That her gross salary was Kshs. 132,975/= per month.
3. The petitioner states that she worked for 38 years and had a clean record except a caution letter dated 9/4/2018 which caution ceased to be valid after 12 months in terms of regulation 123(6) of the TSC Human Resource Policy and Procedures Manual for Secretarial Staff 2018.
4. That sometime in May 2021, the petitioner and eight Human Resource Officers (HR05) were assigned duty of capturing data entry of teachers who were promoted and others who were being employed afresh by the respondent.
5. That the petitioner was in October 2021 summoned to the office of the Internal Auditor and accused of wrongly posting data entries of four teachers named Julia Gagwe Kasichana TSC. No. 236654; Paul Mpoje Musango TSC. No. 432784, Benjamin Sang Kiprotich TSC. No. 427904 and Beatrice Nyaoke TSC. No. 519034.
6. The petitioner states that she was interdicted by the respondent through a letter dated 16/12/2021 in contravention of clause 112(3)(a)(b); 5 and (13) of the Human Resource Policies and Procedures Manual for the secretarial staff 2018 for irregularly changing the details of the aforesaid officers causing a salary overpayment of Kshs. 482,356/=.
7. The petitioner states that she was invited to a disciplinary hearing on 18/5/2022 before a panel which concluded its hearing on the same day and made a decision to dismiss the petitioner via a letter dated 21/11/2022.
8. The petitioner states that the panel was not properly constituted because the officer who chaired the panel, Mr. Kenneth Marangu was not a commissioner of the respondent. That the said officer usurped the statutory and constitutional powers of the nine (9) Gazetted Commissioners of the respondent by chairing the disciplinary hearing on 18/5/2022 and signed the minutes of the hearing on behalf of the commissioners and dismissed the petitioner from employment on 18/5/2022.
9. The petitioner states that the respondent's commissioners made unlawful resolution on 14/5/2021 delegating their constitutional mandate to employees of the respondent.
10. That the resolution was not subjected to public participation in terms of Article 10(2)(c) of *the Constitution* of Kenya and was not placed before the National Assembly for approvals as required under section 11(3) and (4) of the Statutory Instrument Act 2013.
11. The petitioner states that the disciplinary panel was biased and treated the staff who appeared before it in a discriminatory manner because the petitioner was dismissed whereas her colleagues namely:
 - i. Mr. Keago Samuel Oroni TSC. No. 700284 was only suspended for 5 months.
 - ii. Mr. Peter Maina Maranga TSC. No. 700780 was only issued with a warning letter.
 - iii. Mr. Leonard Muiruri Waweru TSC. No. 700771 was suspended for 5 months and
 - iv. Mrs. Dorcas Mueni Kyungu TSC. No. 700641 was only given a warning letter.



12. The petitioner states that she was not given any reasons in writing why they took drastic measures against the petitioner unlike her colleagues who had played the same role and were facing same charges.

Violations of *the constitution*

13. The petitioner states that the conduct by the respondent violated Articles 41 and 47 of *the Constitution*. That the petitioner suffered loss and damage as her 38 years' service was disregarded by the unfair decision and was not based on merit.
14. That the petition be allowed as prayed.

Replying affidavit

15. The respondent replied to the petition by a replying affidavit of Evaleen Mitei, Director in charge of Human Resources Management and Development (HRM&D) of TSC.
16. The respondent deposes that TSC is established under Article 237(1) of *the Constitution*.
17. That the HR policies and procedures for the secretarial staff 2018 was published by respondent pursuant to section 47(2) of TSC Act and section 5(1) of the Public Officers Act.
18. That part X of the said procedure outlines the procedure to be followed when allegations of professional misconduct are made against staff.
19. That the internal audit revealed irregular promotion of 22 teachers and their promotions reckoned in the payroll. That there was no documentary evidence to justify the promotions and payments, pursuant thereto to the loss and detriment of TSC.
20. That pursuant to clause 115 of the procedure, the respondent instituted an investigation committee and the committee recommended that the five (5) employees be subjected to disciplinary hearing. The petitioner was thus interdicted via a letter dated 16/12/2021. That the petitioner was asked to defend herself within 21 days and responded via a letter dated 3/1/2022 admitting the allegations by stating that the names of the four promoted officers were captured in error due to the pressure of work at the time since the June payroll was closing and there was a lot to be done including, new appointments, promotions, deletions and amendments. That the above case was part of the intended amendment and the petitioner was given the list by his supervisor to amend except in the case of TSC No. 236654, Julius Gagwe Kasichana which the petitioner personally erroneously captured.
21. That the petitioner apologized for the errors made since she was the only person capturing data in unit four. The petitioner sought for forgiveness since the error was not intentionally done and promised to be more careful in future.
22. The petitioner was however invited to a disciplinary hearing on 8/4/2022 and offered the same explanation.
23. The respondent stated that the disciplinary panel confirmed that the petitioner was a capturer in Human Resource Unit 4 and was aware of the process of salary adjustments.
24. The panel found that the petitioner had admitted to have captured the said data erroneously due to work pressure.
25. The panel found the petitioner guilty as charged and resolved to dismiss the petitioner from service with effect from 18/5/2022. The decision was communicated to the petitioner vide a letter dated 31/5/2022.



26. The respondent produced the letter of dismissal dated 31/1/2022 in which it has provided reasons for the decision to dismiss the petitioner from service following the disciplinary hearing held on 18/5/2022. The three charges the petitioner was found guilty of are set out in the letter. The petitioner was informed of her right of appeal in terms of regulation 124(4) of the HR policy and procedures manual for secretarial staff.
27. The petitioner appealed the decision by a letter dated 19/7/2022.
28. The deponent states that the petitioner was invited for the review hearing on 10/11/2022 by a letter dated 6/10/2022.
29. That the review panel found that the dismissal of the petitioner was for poor performance of duty and negligence of duty. The panel found that the petitioner had admitted to erroneously capturing Julia Kasichana TSC No. 1236654 invertedly due to pressure of work.
30. The panel found that the petitioner had previously been cautioned and served a show cause letter for a similar offence. The panel confirmed the dismissal upon considering the plea by the petitioner to reduce her punishment.
31. The respondent states that it acted within the law and procedure in dismissing the petitioner.
32. The respondent prays that that suit be dismissed with costs.

Determination

33. The parties filed written submissions which the court has carefully considered together with all the deposition by the petitioner and that by the respondent.
34. The issues for determination are:
 - a. Whether the panel chaired by Mr. Kenneth Marangu that dismissed the petitioner was irregular for usurping the authority of commissioners in terms of clause 119(2) of TSC HR policy and procedures manual for secretariat.
 - b. Whether the panel erred in considering the previous caution given to the petitioner in determining the severity of the sentence.
 - c. Whether the panel treated the petitioner in a discriminatory manner.
 - d. Whether the respondent violated the petitioner's right under Article 41 and 47 of *the Constitution*.
 - e. Whether the petitioner is entitled to the reliefs sought.
35. The Petitioner adduced evidence that the panel chaired by one Mr. Marangu that dismissed her from employment was not properly constituted as per clause 119(2) of the TSC HR policies and procedures manual for the secretariat staff.
36. The place of human resource policy and procedures Manual in regulating employment relationship was aptly stated by Onesmus Makau J in Cause No 273 of 2019 Edah Cheronu Maiywa versus the University of Nairobi Enterprises and Services Limited where the Court had the following to say as regards employer policy document;

The above provisions of the Human Resource Policy and procedures manual cannot be wished away as it is incorporated into the contract of service of every employee of the



Respondent. CW2 and, RW1 and RW2 confirmed in their testimonies that the claimant was an efficient HR professional who had no performance issues in the HR docket. She had acted for a fairly long time as SHRAO and as such, nothing prevented the employer from conducting internal recruitment under clause 2”

37. The Court of Appeal in Civil Appeal No 114 of 2016 Heritage Insurance Company versus Christopher Onyango and 23 others 2018 eKLR observed that;

‘It is axiomatic that companies as employers do from time to time come up with new staff handbooks or staff manuals to reflect new regulations in the area of employment of their own staff. In practice, employment contracts do make reference to staff manuals or staff handbooks as forming part of the terms of the contract’

38. So, where incorporated into the contract, a human resource manual is part and parcel of a contract of employment. The subject manual can be said to have impliedly been incorporated into the terms and conditions of the employees of the Respondent including the Petitioner.

39. Clause 119 (1) & (2) of the Manual provides that;

(2) The Discipline Panel Shall Comprise-

- a. At least one member of the Commission who shall chair the panel;
- b. Two directors or their representatives, appointed by the Secretary; and in attendance;
- c. An officer directly representing the division dealing with matters touching the discipline who shall prosecute the case;
- d. An officer representing the Commission Secretary who shall record the proceedings of the hearing; and
- e. Any other technical officer whose attendance shall be deemed necessary. (Emphasis added).

40. The Respondent states at paragraph 9 of the Replying Affidavit that the Manual was published by the respondent in exercising its mandate under section 47 (2) of the *Teachers Service Commission Act* and Section 5 (1) of the Public Officers Act. The manual is therefore a Statutory Instrument under the *Statutory Instruments Act, 2013*.

41. It is the Respondent’s submission that the HRPPM cannot be read in isolation but must be read in tandem with the TSC Act that operationalizes the Commission. That section 11 (g) of the TSC Act gives the Respondent powers to do all such other functions as may be necessary for the effective discharge of its functions under the Act. The Commission says that it is in pursuance of the above provisions that it passed a resolution delegating to Management the hearing in the first instance of all discipline cases of teachers and secretariat staff except reviews and applications for reinstatement to the register to the Commission’s management office.

42. The Petitioner submits that though the Manual is an Instrument under the Statutory Instrument Act, 2013, transfer or delegation of duties could not be validly done as there was no parliamentary approval as required by section 11(4) of the *Statutory Instruments Act* 2013. He also says there was no public participation as required by Article 10(2) of *the Constitution* and the resolution itself was not legal as it was not passed in compliance with the required quorum under paragraph 2 of the Second Schedule of the TSC Act requiring a quorum of at least 5 members to transact its business.



43. This Court finds that the Manual being a statutory instrument, as is indeed conceded by the Respondent, could not be changed internally by the Respondent without involvement of its employees including the Petitioner. It could not be changed in breach of paragraph 2 of the Second Schedule to the TSC Act on the quorum and without the involvement of Parliament as contemplated by section 11 (4) of the *Statutory Instruments Act*, 2013. The court also finds that the manual was part of the contract and cannot be displaced by the general stipulations in the TSC Act as to the powers of the Respondent vis a vis the Petitioner as is contended for the Respondent.
44. It is not in doubt that Mr. Marangu who chaired the disciplinary panel was not a member of the Commission. This clearly falls foul of the clause 119(2) of the Manual. The disciplinary panel was accordingly not properly constituted.

Was the Commission wrong in considering the previous caution in determining the disciplinary action given to the Petitioner?

45. The Manual provides that where a 1st and 2nd caution are issued, they cease to be effective where the employee completes 12 months from the date of issue of such warning without committing a further breach. The Respondent whilst alluding to the caution having been issued to the Petitioner has not addressed the contention by the Petitioner that the previous caution ceased to apply by virtue clause 123(6) of the Manual. The court finds that the said caution could not be used in support of the decision to terminate the Petitioner's employment.
46. In answer to the 3rd issue, the Court returns that the petitioner has established that she was discriminated whilst being dismissed. The Petitioner gave specific details of other officers who were equally or more culpable as relates the action leading to her dismissal but who were given more lenient disciplinary action by Respondent. The Respondent has also not provided the Court with disciplinary records of the said officers to dispute the claim of discrimination by the Petitioner. This is more so, as it is the Respondent's responsibility under section 74 of the *Employment Act* 2010 to keep employment records.
47. The Court further finds that the termination was a result of admitted error which could reasonably have attended the kind of exercise the Petitioner was engaged in. Her defense that the mistake came as a result of pressure of work ought therefore to have been considered as a mitigating factor.

Did the Respondent violate the Petitioner's rights under Article 41 and 47 of *the Constitution*?

48. It is now well accepted as part of our law that not each and every violation of the law must be raised to a constitutional issue before the High Court/Employment and Labour Relations Court.
49. In *Speaker of National Assembly versus Njenga Karume* (2008) 1 KLR, the Court held that;

In our view, there is considerable merit ..that where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should strictly be followed”
50. In *Isaac Ngugi versus Nairobi Hospital and Another* Petition No. 461 of 2012 it was stated as follows;

For instance, the Court will be reluctant to apply *the Constitution* directly to horizontal relationships where specific legislation exists to regulate the private relations in question”
51. This Court whilst acknowledging the various violations of the law by the Respondent is of the view that the said violations are common place employment issues sufficiently covered under the prevailing



Employment Act, 2014. The Court therefore does not make any finding of breach of the said Articles of the Constitution.

What remedy, if any, is the Petitioner entitled to?

52. In *Mutisya versus Teachers Service Commission and Another* (Petition E159 of 2022 (2023) KEELRC 659 (KLR) it was held,

The Panel proceedings and recommendations having been found null and void as ultra vires, the reason for dismissal being a grievance that ought to have been investigated and constituted unfair reason for termination, the petitioner having established discrimination, the Court returns that the Petitioner has established exceptional grounds per section 49 of the Act to justify reinstatement. The Respondent has established no circumstances to show impartiality to implement the reinstatement. Further, the Court finds reinstatement as a sufficient remedy and no justification has been shown for grant of damages as was prayed for”

53. This court finds as in the above case, reinstatement to be sufficient remedy under section 49 of the Employment Act. The petitioner had served for 38 years with a substantially clean record. The petitioner stood to suffer grave damage as a result of the wrongful dismissal and could not easily get alternative employment due to her advanced age. The petitioner was not compensated for the wrongful loss of earnings and support. The petitioner suffered discrimination since all other colleagues who faced similar disciplinary action were retained at work and given light sanctions except her. The prayer for damages is not sufficient remedy in the circumstance of this case.

54. In the final analysis judgment is entered for the Petitioner as against the Respondent as follows;

- a. A declaration is issued that the 2nd respondent’s officer Mr. Kenneth Marangu who chaired the disciplinary panel on behalf of the respondent on 18/5/2022 and made a decision to dismiss the petitioner from the employment of the respondent lacked lawful authority to chair the panel because he was not a commissioner as required under Clause 119(2) of the TSC Human Resource Policy and Procedures Manual for secretariat staff which states that, the discipline panel shall comprise of at least one member of the Commission who shall be the chair of the panel. Mr. Marangu’s decision contained in the proceedings signed by him and dated 18/5/2022 and communicated to the petitioner vide respondent’s letter reference no. TSC/500085/154 of 31/5/2022 is therefore null and void for all intents and purposes.
- b. An order is hereby issued directing the Respondent to reinstate the Petitioner back to her position of the Chief Human Resource Officer at the Headquarters within 14 days from the date of the Order and to be paid in full, all the outstanding emoluments and benefits that she would otherwise have earned from the time she was unlawfully interdicted on 16th December, 2021 up to this time of the Order.
- c. The respondent to bear the costs of the suit.

DATED AT NAIROBI THIS 24TH DAY OF OCTOBER, 2024

MATHEWS NDERI NDUMA

JUDGE

Appearance:

M/s. Njeri Ngunjiri for petitioner



Mr. Mulaku for respondent

Mr. Kemboi – Court Assistant

