



**Gatere v Teachers' Service Commission & another (Employment and Labour Relations
Petition E134 of 2021) [2024] KEELRC 13432 (KLR) (16 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13432 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS PETITION E134 OF 2021
BOM MANANI, J
DECEMBER 16, 2024**

BETWEEN

GRACE NJOKI GATERE PETITIONER

AND

TEACHERS' SERVICE COMMISSION 1ST RESPONDENT

PRINCIPAL, RUNGIRI SECONDARY SCHOOL 2ND RESPONDENT

JUDGMENT

Introduction

1. This action challenges the 1st Respondent's decision to withhold the Petitioner's salary. According to the Petitioner, the 1st Respondent's action was unlawful. On the other hand, the 1st Respondent posits that the decision was lawful since the Petitioner had deserted her duties.

Petitioner's Case

2. Through the Petition dated 20th August 2021, the Petitioner contended that she was an employee of the 1st Respondent stationed at Rungiri Secondary School. She contended that she was posted to the school in October 2020.
3. The Petitioner averred that after reporting to the school on 12th October 2020, she was taken ill. As a consequence, she did not report to work between 19th October 2020 and 6th November 2020. She alleged that she secured sick leave for this duration.
4. The Petitioner contended that she reported back to work on 7th November 2020 but was taken ill again forcing her to seek further sick leave. She asserted that her request for sick leave was granted and she was allowed to stay away until 23rd November 2020.



5. The Petitioner alleged that she was still unwell on 24th November 2020. As a result, she applied for and obtained further sick off until 8th December 2020.
6. The Petitioner contended that she resumed duty on 9th December 2020 and worked until 23rd December 2020 when the school closed for the December holiday. She contended that she resumed duty after the school opened on 10th January 2021 and worked until 19th January 2021 when she was again taken ill. She alleged that she was granted sick leave until 25th January 2021.
7. The Petitioner further contended that she resumed work on 26th January 2021 but was taken ill on 15th February 2021. As a result, her doctors allegedly gave her sick off until 21st February 2021.
8. The Petitioner contended that in February 2021, she contracted the Covid 19 virus. As a consequence, she was placed in isolation until 2nd March 2021.
9. The Petitioner contended that in March 2021, she learned from her bank that her salary for February 2021 had not been credited onto her account. She averred that when she inquired from the 1st Respondent the reason for this development, she was informed that the decision had been taken following information from her school Principal that she had not been on duty.
10. The Petitioner averred that the 1st Respondent did not formally inform her of the reasons for its decision to stop her salary. Neither did it subject her to disciplinary action before the decision was made.
11. The Petitioner contended that she resumed duty on 22nd March 2021. However, the school closed for a regular break on the same day.
12. The Petitioner averred that she resumed duty on 11th May 2021 and continued working without remuneration. She contended that she was forced to apply for compassionate leave on 20th May 2021 because of the financial strain she had been subjected to following the stoppage of her salary.
13. She averred that she tried to get the 1st Respondent to address the issue to no avail. It is her case that the decision to withhold her salary subjected her to humiliation and suffering.
14. The Petitioner contended that the decision violated her constitutional rights. As such, she prays for the following reliefs:-
 - a. A declaration that the withholding and or stoppage of her salary and benefits was unfair, unconstitutional and null and void.
 - b. A declaration that the Respondents violated her right to fair labour practices.
 - c. An order of certiorari to quash the 1st Respondent's decision to withhold her salary.
 - d. An order of Mandamus to compel the 1st Respondent to pay her the accrued salary.
 - e. An award of punitive damages for alleged discrimination.
 - f. An award of damages for violation of her right to fair labour practices.
 - g. Cost of the case.

Respondents' Case

15. In response, the 1st Respondent filed a replying affidavit dated 4th November 2022. Through the affidavit, the 1st Respondent accused the Petitioner of perennial absenteeism from duty. The 1st



Respondent gave a detailed account of the various times that the Petitioner had been away from work without authorization.

16. The 1st Respondent stated that the decision to stop the Petitioner's salary was informed by her perennial absenteeism from duty. As such, the decision was justified.
17. The 1st Respondent contended that following the Petitioner's chronic absence from duty, the Board of Management of Rungiri Secondary School convened a meeting on 4th September 2021 to discuss her conduct. It was this Respondent's case that despite the Petitioner being invited to attend the session, she snubbed it. As a consequence, she was interdicted.
18. The 1st Respondent contended that it subsequently invited the Petitioner to a disciplinary hearing on 14th October 2021. It contended that although the Petitioner appeared at the session, she asserted that she could not submit to its (the 1st Respondent's) jurisdiction because the dispute between them was already in court. She thus walked away but after admitting to the charge of chronic absenteeism. The 1st Respondent contended that it found the Petitioner guilty of the charge and suspended her from duty for a period of one month.
19. The 1st Respondent averred that the Petitioner was required to report to Muhu Kangari Secondary School after her suspension ended. However, she did not.
20. The 1st Respondent averred that prior to her suspension from duty, the Petitioner had been issued with a myriad letters of warning over her misconduct. Despite this, she did not amend her ways.

Issues for Determination

21. Having regard to the pleadings as framed, the issues that emerge for determination in the dispute are the following:-
 - a. Whether the decision by the 1st Respondent to withhold the Petitioner's salary was unfair, unconstitutional and null and void.
 - b. Whether the aforesaid decision violated the Petitioner's right to fair labour practices.
 - c. Whether the Petitioner is entitled to an order of certiorari to quash the aforesaid decision.
 - d. Whether the Petitioner is entitled to an order of Mandamus to compel the 1st Respondent to pay her salary allegedly outstanding to date.
 - e. Whether the Petitioner is entitled to punitive damages for alleged discrimination against her.
 - f. Whether the Petitioner is entitled to damages for alleged violation of her right to fair labour practices.
 - g. Whether the Petitioner is entitled to costs of this action.
22. The Petition shows that the Petitioner elected to include the 2nd Respondent in the action. However, there is no employment relation between the two.
23. It is unclear from the pleadings why the 2nd Respondent was sued in the action. The pleadings do not disclose a cause of action, claim or relief against this Respondent. As such, the suit against the 2nd Respondent is hereby dismissed.
24. The Petitioner has challenged the 1st Respondent's decision to withhold her salary. She contends that she learned from her bankers in March 2021 that this Respondent had not remitted her salary to her account.



25. It is her case that the 1st Respondent did not inform her of the reasons for the decision. And neither did it take the decision after subjecting her to disciplinary action.
26. On its part, the 1st Respondent contends that it took the decision to withhold the Petitioner's pay after it became apparent that she had been perennially absent from work without permission. The 1st Respondent contends that the decision to withhold the Petitioner's pay was arrived at after she was interdicted by the Board of Management, Rungiri Secondary School, where she had been posted to teach.
27. The relationship between the Petitioner and the 1st Respondent is regulated by the provisions of the *Teachers Service Commission Act*, Cap 212, Laws of Kenya together with subsidiary legislation made pursuant thereto. Part III of the Act deals with registration, discipline and general conduct of teachers.
28. By virtue of the Act, the power to register, discipline and monitor the conduct of teachers is vested in the 1st Respondent. The Third Schedule to the Act identifies negligence and chronic absenteeism by a teacher as punishable offenses.
29. Pursuant to the Act, the 1st Respondent promulgated the Teachers Service Commission Code of Regulations for Teachers, 2015. Regulation 148 in the Code reiterates the offenses mentioned above.
30. Regulation 148 of the Code recognizes the right of a teacher on interdiction to receive half his/her salary. However, it excludes teachers charged with certain infractions from this entitlement. These include: chronic absenteeism and desertion of duty.
31. The Petitioner alleged that she was prevented from reporting to work during the period that preceded her interdiction due to poor health. However, the records she supplied to court show that her last approved sick leave ran up to 21st March 2021. There was no other sick leave that was granted to her thereafter.
32. The 1st Respondent has provided evidence to demonstrate that the Petitioner continued to be absent from duty without its permission after March 2021. For instance, annexure EM6 on the 1st Respondent's replying affidavit is a letter by the Principal of Rungiri Secondary School addressed to the Petitioner showing that she had been absent without permission on several occasions in the months of June and July 2021. There is also evidence that the 1st Respondent wrote to the Petitioner on 13th August 2021 raising concerns about her chronic absenteeism.
33. The record shows that following the Petitioner's unexplained absence from duty, the Board of Management of Rungiri Secondary School interdicted her. The 1st Respondent contends that the Petitioner's salary was stopped following this decision.
34. As shown earlier, the 1st Respondent's regulations entitle it to withhold the entire salary of a teacher who has been interdicted on account of chronic absenteeism or desertion of duty. As such, the 1st Respondent's decision to withhold the Petitioner's salary was justified and within the law.
35. The next issue for consideration is whether the 1st Respondent's decision to withhold the Petitioner's salary violated her right to fair labour practices. As has been demonstrated above, the 1st Respondent's decision was anchored on regulation 148 of its Code. As such, it cannot be said to have violated the Petitioner's right to fair labour practices.
36. The other issue for consideration is whether the Petitioner is entitled to an order of certiorari to quash the 1st Respondent's decision to withhold her salary. I do not think so. As has been stated above, the 1st Respondent's decision was anchored on its Code of Regulations which has the force of law. The Code



has neither been repealed nor declared unconstitutional. As such, the impugned decision was lawful and cannot be quashed by this court.

37. The other matter for consideration is whether the Petitioner is entitled to an order of Mandamus to compel the 1st Respondent to pay her salary that is alleged to be outstanding to date. I do not think so. It has been observed that the 1st Respondent lawfully withheld the Petitioner's salary for reasons of chronic absenteeism in terms of regulation 148 of the aforesaid Code. As such, the court cannot order it (the 1st Respondent) to remunerate the Petitioner in contravention of its regulations which have the force of law.
38. It is noteworthy that after the Petitioner's suspension ended in November 2021, she was posted to Muhu Kangari Secondary School but did not report. The posting was done through the 1st Respondent's letter dated 29th November 2021.
39. During the oral hearing, the Petitioner confirmed that she was indeed posted to Muhu Kangari Secondary School. She further confirmed that she did not report to the school.
40. Her contention is that she did not get the letter that transferred her to Muhu Kangari Secondary School. She contended that she only received a telephone call informing her of this decision.
41. I do not believe the Petitioner's contention that she did not receive the letter of transfer. The 1st Respondent is a body corporate which transacts its business in a formal manner. Indeed, there is a letter dated 29th November 2021 addressed to the Petitioner asking her to report to Muhu Kangari Secondary School.
42. If it is true as contended by the Petitioner that she did not receive the letter of transfer, what prevented her from raising the matter with the 1st Respondent now that she had been notified about this decision through telephone? She did not venture to explain this.
43. Despite the 1st Respondent lifting the Petitioner's suspension and asking her to report at Muhu Kangari Secondary School for duty, she did not do so. In effect, she deserted duty and the 1st Respondent is entitled to take disciplinary action against her for desertion of duty.
44. The question the court has to address is whether it will be justifiable to require an employer to remunerate an employee for services not rendered outside the remedies that are prescribed under section 49 of the Employment Act. In the court's view, it will be against public policy and good conscience to compel an employer to remunerate an employee for services not rendered (see *Kenya Wine Agencies Ltd v Murungu* (Appeal E 016 & E 019 of 2021 (Consolidated)) [2022] KEELRC 13413 (KLR) (2 December 2022) (Judgment) and *Kithinji v Kenya Conference of Catholic Bishops* (Employment and Labour Relations Cause 1334 of 2018) [2023] KEELRC 3230 (KLR) (7 December 2023) (Judgment)). As such, the court cannot issue an order of Mandamus to compel the 1st Respondent to remunerate the Petitioner for the duration she is shown to have deserted duty.
45. The Petitioner prayed for punitive damages for alleged discrimination against her. However, she did not provide particulars of the alleged discrimination in her Petition. Neither did she present evidence on the issue. As such, this claim fails.
46. Having disallowed the various pleas aforesaid, it is apparent that the Petitioner is not entitled to damages for the alleged violation of her rights to fair labour practices. Neither is she entitled to costs of the case.



Determination

47. The upshot is that the court finds that the Petitioner’s case against the Respondents is without merit.

48. Accordingly the matter is dismissed with costs to the Respondents.

DATED, SIGNED AND DELIVERED ON THE 16TH DAY OF DECEMBER, 2024

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Petitioner

..... for the Respondents

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties 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.

B. O. M MANANI

