



REPUBLIC OF KENYA



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**Mutuku v Teachers Service Commission (Petition 127 of 2022)
[2023] KEELRC 815 (KLR) (28 March 2023) (Judgment)**

Neutral citation: [2023] KEELRC 815 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 127 OF 2022
M MBARÚ, J
MARCH 28, 2023**

BETWEEN

ANTHONY MUEMA MUTUKU PETITIONER

AND

TEACHERS SERVICE COMMISSION RESPONDENT

JUDGMENT

1. The petitioner is a male adult and the respondent is a constitutional commission established pursuant to article 237 of *the Constitution* (the Commission) with mandate to register trained teachers, recruit and employ registered teachers, assign teachers employed by the Commission for service in any public school or institution.
2. The petition is that the petitioner is aged 34 years and was employed by the Board of Management (BoM) of Ndula Secondary School in May, 2015 and 30th August, 2018 the petitioner was officially employed by the respondent Commission.
3. On 23rd July, 2019 the petitioner was invited to appear before the BoM of Ndula Secondary School scheduled for 26th July, 2019 to answer to allegations of immoral behaviour. The allegations against the petitioner were that he had immoral behaviour with a student named Victoria Mbatha (the Leaner) and as directed, he attended before the BoM and afterwards, he was issued with a letter of warning dated 2nd August, 2019.
4. On 22nd November, 2019 the petitioner was issued with another letter from the Secretary of BoM requiring him to appear before the TSC Sub County Director offices at Thika on 27th November, 2019 but the letter did not disclose the purpose of the summon. The petitioner was confronted with the same allegations as had been settled by the BoM that he had immoral behaviour with a student, the Learner.



5. On 16th January, 2020 the petitioner received another invitation to appear before the BoM on 23rd January, 2020 but was postponed to 4th February, 2020 when he attended and was issued with an interdiction letter over alleged immoral behaviour with the learner and relating to the same allegations that had already been addressed and a warning issued by the BoM on 2nd August, 2019.
6. The letter of interdiction was to the effect that on unknown dates between 2017 and 2018 the petitioner flirted with his student, the learner and had sexual intercourse with her and allowed her to visit him in his house while being a teacher at Ndula Secondary School. That the petitioner also flirted with the same student in 2017 by kissing her and touched her on different dates while she was cleaning the staffroom.
7. On 2nd October, 2020 the petitioner received an additional interdiction letter on the same allegations that had already been addressed in the warning letter dated 2nd August, 2019.
8. In a letter dated 30th October, 2020 the petitioner was invited to appear on 3rd December, 2020 for a disciplinary hearing at Kiambu TSC County Director's office.
9. Through letter dated 9th November, 2020 the petitioner submitted his written responses and denied having sexual intercourse with the said student. On 4th January, 2021 the petitioner received another letter inviting him for a disciplinary hearing at Murang'a TSC County Director's office over the same allegations.
10. On 26th February, 2021 the petitioner received a letter of summary dismissal and Notice of Removal from the Register of Teachers.
11. The petitioner appealed against the decision and the respondent invited him for hearing of the appeal on 23rd March, 2022 which upheld the dismissal. The petitioner applied for a review of the decision and removal from the Register of Teachers and requested for the records used in his case;
 - a) The anonymous complaint letter that TSC and its agents used to initiate the Board Sitings/hearings against the petitioner;
 - b) The BoM minutes for the meetings held on 26th July, 2019 and 4th February, 2020 at Ndula Secondary School;
 - c) Minutes of disciplinary hearing held at TSC County Director's office – Kiambu on 3rd December, 2020;
 - d) Minutes of the disciplinary hearing held at TSC County Director's office - Murang'a on 5th February, 2021;
 - e) Copies of any investigations that were conducted by TSC on the allegations made against the petitioner;
 - f) A copy of the TSC Human Resource Manual and copy of their internal disciplinary rules manual; and
 - g) Any other evidence held by the respondent on the matter.
12. In a letter dated 27th June, 2022 the petitioner requested the respondent to provide him with a copy of proceedings and reasons leading to his dismissal by the TSC Review Committee. The documents required were never supplied and the respondent refused to recognise the warning letter issued to the petitioner on 2nd August, 2019 as a form of punishment under Section 33(3) (a) of the [Teachers Service Commission Act](#) and as far as there existed a punishment against the alleged offences, it was not open to



the respondent to carry out subsequent disciplinary proceedings for the same offences using the same evidence without first vacating the earlier punishment and upon giving notice of the changes.

13. The petition is that the respondent violated the petitioner's right to fair administrative action by making reviews on the decision taken by the BoM contrary to its own policy and the law and article 47 of *the Constitution*. The practice of duplicate proceedings was contrary to fair labour practices and contrary to section 33(3) (a) of the *Teachers Service Commission Act* (TSC Act) for double jeopardy. The petitioner has a result suffered loss and damage, his right to a fair hearing has been violated, he has suffered discrimination and been punished severally over a matter that he was already issued with a warning. The removal from the register of teachers was an additional punishment in violation of his rights to fair labour relations and fair administrative action. The right of appeal was violated since the respondent has refused to issue the petitioner with the necessary records of the disciplinary hearings.

The petitioner is seeking the following orders;

- a) A declaration that the disciplinary process carried out by the respondent leading to termination of employment was in violation of his rights under Article 27, 29, 35, 41, 47 and 50 of *the constitution*;
- b) A declaration that the disciplinary process leading to the decision to dismiss the petitioner is null and void and should be quashed;
- c) A declaration that termination of employment as unprocedural and wrongful;
- d) An order for general damages for the violation of the petitioner's rights and fundamental freedoms;
- e) An order compelling the respondent to compensate the petitioner for unfair termination of employment at 12 months gross pay at Ksh.36,280 x 12 = 435,360;
- f) Costs of the suit.

The petition is supported by the Supporting Affidavit of the petitioner.

14. In response to the petition, the respondent filed the Replying affidavit of Doreen Njage Munene the acting Director Field Services Directorate and who avers that the respondent is established pursuant to article 237 of *the Constitution* and given further mandate under section 47(2) of the TSC Act and section 5(1) of the Public Officers Ethics At and has also published a Code of Regulations for Teachers (CORT) and the Code of Conduct and Ethics (COCE). The codes outline the general rules of behaviour governing the teaching profession with procedures and penalties to be applied in case of a breach. Under Regulation 146 of CORT it give details and procedure to be followed where allegations of professional misconduct have been levelled against a teacher in the public service.
15. The respondent as the regulator of the teaching profession is required under Article 53 of *the Constitution* to uphold children interests and due to widespread cases of sexual harassment against learners by teachers and with a view to deter the practice, on 29th April, 2010 the respondent issued Administrative Circular No.3 of 2010 on Protection of Pupils/Students for Sexual Abuse with the objective to issue guidelines on the relationship between teachers and learners with a view to compliment the provisions of CORT and COCE.
16. The petitioner was employed by the respondent as a secondary Teacher II in 2018 and part of his letter of appointment; his employment was subject to the TSC Act, CORT, COCE and Administrative circulars issued by the respondent from time to time.



17. In 2018, the petitioner while being a teacher at Ndula secondary school was alleged to have had sexual intercourse with his student, a form two student and on diverse dates was at his house at Makutano shopping centre and he also was found flirting with her by kissing and touching her while cleaning the staffroom. During a meeting held on 26th July, 2019 the BoM discussed the matter and opted to issue the petitioner with a warning letter as they had not obtained sufficient evidence against him at this stage. The warning letter did not emanate from a disciplinary hearing as alleged and is distinct from the offence he was dismissed for.
18. The BoM forwarded the minutes of the meeting to the respondent and upon perusal, several gaps emerged and it became apparent that there was an attempt to cover up the matter.
19. Ms Munene avers that pursuant to Regulation 146(8) of CORT, the BoM's mandate is limited to conducting investigations and compiling a report in regard to the teacher's status and presenting the same to the respondent and upon such report, the respondent has the discretion to call for further investigations.
20. Under Article 252(1) of *the Constitution*, the respondent is allowed to conduct investigations on a complaint made by a member of the public and under Regulation 146(11) of CORT an officer acting for the respondent may undertake direct investigations into allegations and may recommend the interdiction of a teacher. Given the gravity of the matter, the respondent executed its mandate and investigated the matter and a report was done by the County Director and in light of the new evidence, the BoM invited the petitioner on 4th February, 2020 to reinvestigate the matter and upon considering the submissions by the learner and the petitioner's responses, the BoM made the following observations;
 - a) The petitioner had a special relationship with the learner which culminated into a sexual relationship;
 - b) The petitioner would offer the learner Ksh.200 on a daily basis for motorbike rides;
 - c) The learner had visited the petitioner's house at Makutano several contrary to circular No.3 of 2010;
 - d) The petitioner had bought her a phone which they used for communication;
 - e) The petitioner often gave the learner money to buy tables to prevent pregnancy;
 - f) The learner confessed that she got pregnant and could not tell who was responsible because she had another relationship;
 - g) The petitioner showed too much concern about the learner and her baby after she dropped out of school; and
 - h) The learner's parents were not cooperative during the meeting and seemed to have been compromised.
21. Upon consideration of all the evidence and submissions by the petitioner, he was interdicted on 2nd October, 2020 and granted a chance to respond. He was invited to a disciplinary hearing pursuant to Regulation 149 of CORT but the hearing was deferred to allow the petitioner to cross-examine the learner who was absent on this day. He was then invited to attend through letter dated 4th January, 2021 where the learner testified and the petitioner cross-examined her and the disciplinary panel noted the following;



- a) The learner stuck to her original statement confessing that she had sexual relations with the petitioner;
 - b) She testified to the fact that she would arrive early in school and they would kiss and touch each other at the staffroom;
 - c) She had visited the petitioner at his house in Makutano shopping centre and he had bought her a phone to ease communication;
 - d) The petitioner would give her money to buy contraceptives to prevent pregnancy;
 - e) During cross-examination, the petitioner asked the learner to describe his house which she accurately did and the petitioner did not challenge it;
 - f) The learner's father told the panel that the daughter had told him that she had a close relationship with him and that he was aware that the petitioner gave the daughter money for motorbike rides and advised her to take some pills to prevent pregnancy assuming that the petitioner was assisting her due to poverty;
 - g) Investigations were quite difficult due to threats from unknown persons getting the victim to write statements or appear before the disciplinary panel was a challenge; and
 - h) The learner's statement was consistent and credible from the onset and the petitioner did not challenge the oral and written statements despite being granted the opportunity to do so.
22. Ms Munene also avers in reply that upon the conclusion of the disciplinary hearing, the committee recommended dismissal of the petitioner and removal from the Register of Teachers and notices issued in this regard. The petitioner applied for a review and was invited before the review committee through letter dated 4th February, 2022 and the committee noted that the application made did not meet the threshold of a review and the dismissal was upheld through letter dated 23rd March, 2022.
23. The petitioner violated the tenets of the teaching profession and the respondent was obligated to discharge its constitutional and statutory mandate which includes disciplinary powers over teachers who breach CORT and COCE.
24. The petitioner misconstrued the intent and purpose of the BoM meeting held on 26th July, 2019 which was merely investigatory and not a disciplinary hearing which took place before the respondent interdicted him and has misapplied the provisions of Section 33(3) of the TSC Act. Termination of employment was not in double jeopardy since the offence over which the petitioner was issued with a warning was different from the offence leading to dismissal from employment. The respondent under Section 12(2) (d) of the TSC Act is not bound by the strict rules of evidence in its disciplinary proceedings.
25. On the request for records, the petitioner had duty to pay for the same which he failed to do pursuant to Regulation 147(4) of CORT and to date he has not paid. The petitioner was faced with serious allegations and was not immune to disciplinary action and the orders sought should not issue and should be dismissed with costs
26. Both parties addressed the petitioner by way of written submissions.
27. The petitioner submitted that disciplinary procedures against him were unfair and unlawful since the BoM heard his case and issued a warning on 2nd August, 2019 and the subsequent disciplinary proceedings were unlawful. Under Regulation 145(1) of CORT the person with information that a teacher has engaged in professional misconduct may lodge a complaint in writing and where there is a



- verbal complaint, the person to whom the report is made should cause the same to be put on record and sign a statement of the complaint. No such complaint exists or served upon the petitioner. To therefore proceed after the BoM warning was in double jeopardy as held in *Henry Thurania Ruuti & 2 others v National Police Service & 3 others* [2020] eKLR that under article 50(2)(a) of *the Constitution* the principle of double jeopardy apply to protect an accused person from multiple prosecutions. Being subjected to multiple disciplinary hearings over the same matter is contrary to such constitutional principles.
28. There was no valid reason leading to dismissal from service. The phone allegedly bought by the petitioner for the learner was different from what the learner said she had and that there was no flirting or sexual intercourse and that she never saw the petitioner while cleaning the staffroom. The petitioner denied all allegations made against him before the various panels he was made to attend and as held in *Grace Gacheri Muriithi v Kenya Literature Bureau* [2012] eKLR the court held that there was no benefit in undertaking further investigations in a matter that had already been resolved. In *Walter Ogal Anuro v Teachers Service Commission* [2013] eKLR the court held that the fairness test in termination of employment must be applied which was not the case for the petitioner who was unfairly treated and his constitutional rights violated as held in *Kahara Mbugua v National Industrial Training Authority* [2020] eKLR and for these violations, the orders sought should issue.
29. The respondent submitted that termination of employment arose out of the petitioner being found in breach of the TSC Act, the CORT and COCE which obligated him not to engage in sexual relations with a learner and hence there existed a genuine reason to justify the disciplinary action taken as held in *Kenya power & Lighting Company Limited v Aggrey Lukorito Wasike* [2017] eKLR. the petitioner was found to have an illicit relationship with a learner which action was not justified and in the case of *teachers Service Commission v Joseph Okoth Opiyo* [2014] eKLR the court held that sexual immorality is not easy to get eye witnesses as such is committed behind closed door but can be proved through circumstantial evidence of opportunity to commit the same.
30. The petitioner was accorded a fair hearing pursuant to Regulation 146 and 156 upon investigations and was invited to orally make his representations and cross-examine the learner. When the matter went before the BoM the petitioner was warned about his conduct but that was not a disciplinary hearing which was undertaken by the respondent upon investigations and issuing the petitioner with notice as held in *Judicial Service Commission v Gladys Boss Shollei & another* [2014] eKLR that the duty to act fairly requires and depends on the nature of investigations and the consequences which it may have on the person affected by it. The petitioner is not entitled to the orders sought since there were substantive reasons which justified termination of his employment as held in *Tom Ochako v Teachers Service Commission* [2022] eKLR.

Determination

31. The petitioner was dismissed from service by the respondent through letter dated 26th February, 2021 on the grounds that following his disciplinary case held on 5th February, 2021 the charges made against him that while being a teacher at Ndula Secondary School he had sexual intercourse with a student on diverse dates in the year 2017 in the petitioner's house at Makutano shopping centre and that he was flirting with the learner by kissing her and touching her while she was cleaning the staffroom in the year 2017.
31. On the same date, 26th February, 2021 the petitioner was removed from the Register of Teachers on the same grounds.



32. The petitioner's case is that his case had been addressed by the BoM and a warning issued. But subsequently, he was subjected to various disciplinary hearings over the same matters and leading to his employment being terminated which was in double jeopardy, without evidence and this was unfair and his rights were violated.
33. In a letter dated 23rd July, 2019 the BoM summoned the petitioner to attend before it to answer to allegations that he was of immoral behaviour with a student: Victoria Mwikali Mbatha.
34. He was directed to attend on 26th July, 2019.
35. On 2nd August, 2019 the BoM issued the Petitioner with a warning letter being *first warning on: Professional misconduct. This is against the T.S.C Code of Regulations*
for Teachers (CORT) Chapter 140(g) which stipulates that a teacher is supposed to carry himself/herself with professionalism.
36. In a letter dated 22nd November, 2019 the petitioner was directed to attend at Thika TSC unit on 27th November, 2019.
37. On 4th February, 2020 the BoM invited the petitioner for a review meeting of his case.
38. On 4th February, 2020 the petitioner was interdicted on the grounds that;
39. ... Between 2017 and 2018 you flirted with your student ... and had sexual intercourse with the girl and allowed her to visit you in your house while you were a teacher at Ndula Secondary School.
40. Through the same letter, the petitioner was given 21 days to make his response and advised that he would be accorded a hearing by the respondent.
41. On 3rd December, 2020 the petitioner was invited to attend disciplinary hearing by the respondent. He was found culpable and a decision taken to dismiss him and also removed from the Register of Teachers.
42. Under article 237(2) (e) and (f) of *the Constitution*, the mandate to discipline and sanction teachers is the sole mandate of the respondent.
 - (2) The functions of the Commission are
.....
 - (e) To exercise disciplinary control over teachers; and
 - (f) To terminate the employment of teachers.
43. Under such mandate, the BoM as the agent of the respondent had limited power to sanction the petitioner with a warning. As correctly submitted by the respondent, the constitutional mandate and powers under the TSC Act and the regulations thereto could only be delegated to its agencies in writing as done through letters dated 30th October, 2020 and 26th February, 2021 through the authority of the respondent.
44. The petitioner does not contest that on 2nd August, 2019 the BoM issued him with a warning for professional misconduct following immoral behaviour of having sexual intercourse with a learner. What he is contesting is that following such warning, there were subsequent disciplinary hearing over the same matter based on similar facts and this was in double jeopardy.



45. The petitioner was the employee of the respondent as a registered teacher and hence his employment was regulated under the constitutional mandate of the respondent together with the provisions of the TSC Act and the Regulations thereto. He was not an employee of the BoM which was just but the agent without any written delegated powers to discipline employees of the respondent.
46. Indeed, the petitioner was notified of matters facing him particularly his conduct with a learner at Ndula Secondary School which he does not contest and leading to a warning by the BoM. Such warning did not in any manner absolve him. He was interdicted to allow for investigations, he was invited to attend before the disciplinary hearing and allowed to cross-examine the learner. The father of the learner was also called and testified in the presence of the petitioner and who testified to the fact that he was aware of the relationship between the petitioner and his daughter, the learner.
47. As held in *Rose Kiragu v Teachers Service Commission* [2016] eKLR, upon finding of fact on the shop floor, the court has no right to interfere with the internal disciplinary proceedings of the employer unless the same is found to be flawed. Where the employer has reasons to genuinely believe that there exists misconduct pursuant to section 43 of the *Employment Act, 2007* termination of employment cannot be faulted as held in *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* [2017] eKLR that;
47. Under Section 43 of the Act, the onus is on an employer to prove the reason or reasons for the termination, failing which the termination shall be deemed to be unfair. The test is, however, a partly subjective one in that all an employer is required to prove are the reasons that he “genuinely believed to exist,” causing him to terminate the employee’s services. In the present case, it seems quite clear from the evidence on record that KPLC believed, and had ample and reasonable basis for so believing, that Wasike had attempted to steal cable wire from KPLC stores which he was in charge of. That being the case, we think the learned Judge plainly erred in entering into a detailed examination of whether or not the 300 metres of cable wire were part of the 1,100 metres that were being legitimately removed from the store, as well as an examination of whether or not there was sufficient documentation in proof of the discrepancy, and the like. It was enough, we think, that the gateman found cables that were concealed and should not have been getting out of the stores.
48. Similarly in this case, based on the evidence from the investigations conducted by the BoM, the evidence from the learner and the father, it seemed quite clear for the respondent to genuinely believe that indeed the petitioner professionally misconducted himself by engaging in sexual intercourse with the learner and flirting with her in the staffroom and the sanction of dismissal from employment and removal from the Register of Teachers was justified in the circumstances. The petitioner cannot justify his misconduct by asserting that he had already been issued with a warning by the BoM. The mandate to discipline and terminate his employment vested in the respondent.
49. The disciplinary process was carried out by the respondent as the employer and therefore proper and lawful and devoid of any bias taking into account matters addressed with the petitioner by the BoM and the disciplinary panels and the allowed review process coupled with the appeal. Such cannot be faulted.
50. On these findings, an order of reinstatement back to employment or to the Register of Teachers cannot issue and damages or compensation are remedies not available in such a case.
51. Accordingly, the petition herein is found without merit and is hereby dismissed. Costs to the respondent.

DELIVERED IN OPEN COURT AT MOMBASA THIS 28TH DAY OF MARCH, 2023.



M. MBARŪ JUDGE

In the presence of:

Court Assistant: Japhet Muthaine

..... and

