



Mutisya v Teachers Service Commission & another (Petition E159 of 2022) [2023] KEELRC 659 (KLR) (10 March 2023) (Judgment)

Neutral citation: [2023] KEELRC 659 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E159 OF 2022**

B ONGAYA, J

MARCH 10, 2023

IN THE MATTER OF ALLEGED CONTRAVENTION OF THE CONSTITUTION IN ARTICLES 2(1), 3, 10,22, 31,35, 47 &50 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF RULES 4(1), 10(1) & (2), 23 AND 24 OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013

AND

IN THE MATTER OF THE ACCESS TO INFORMATION ACT 2007, LAWS OF KENYA

IN THE MATTER OF THE EMPLOYMENT ACT 2007, LAWS OF KENYA

**IN THE MATTER OF THE TEACHERS SERVICE COMMISSION ACT, 2012
IN THE MATTER OF THE TSC HUMAN RESOURCE POLICIES & PROCEDURES MANUAL FOR SECRETARIAT STAFF**

IN THE MATTER OF THE CONSTITUTIONAL VALIDITY OF THE RESPONDENT ALLOWING AN OFFICER WHO IS NOT A COMMISSIONER TO CHAIR A DISCIPLINARY PANEL AND RENDER A JUDGMENT ON 17.05.2022 AND FURTHER REFUSING TO SUPPLY THE PETITIONER WITH THE DISCIPLINARY PROCEEDINGS OF 17.05.2022

BETWEEN

ROSE MWENDE MUTISYA PETITIONER

AND

TEACHERS SERVICE COMMISSION 1ST RESPONDENT

KENNETH MARANGU 2ND RESPONDENT



JUDGMENT

1. The petitioner filed a petition on August 31, 2022 through Njeri Ngunjiri & Company Advocates. The amended petition was dated October 12, 2022. The petitioner prayed for:
 - a. A declaration that the 2nd respondent lack any constitutional and lawful authority to chair a disciplinary panel and make a decision on behalf of the 1st respondent to dismiss the petitioner from the service of the Teachers Service Commission because such a function is within the exclusive mandate of the 1st respondent and therefore the 2nd respondent's decision contained in the proceedings signed by the 2nd respondent's letter reference No TSC/600007/37 of May 31, 2022 is null and void for all intents and purposes.
 - b. A declaration that the 1st respondent's refusal to supply the petitioner with copies of the disciplinary proceedings of May 17, 2022 and other documents for the purpose of filing appeal within 90 days which lapsed on August 31, 2022 was a breach of the petitioner's right to fair hearing provided under article 50(5) (b) and access of information held by the state, which information she needed in order to enable her protect her fundamental rights and freedoms under the constitution, hence such refusal clearly breached the provisions of article 35(1) of the Constitution of Kenya 2010.
 - c. A declaration do issue that the 2nd respondent by purporting to sign on behalf of the 1st respondent the proceedings containing the decision of the disciplinary panel dated May 17, 2022 the 2nd respondent not only acted *ultra vires* but also unconstitutionally and illegally hence making the said proceedings to have no legal consequences and effect.
 - d. A declaration do issue that any actions taken or decisions made pursuant to the illegal disciplinary proceedings dated May 17, 2022 are both unconstitutional and illegal hence the same be declared to have been void *ab initio*.
 - e. An order of certiorari be issued so as to remove into the honourable court, for purposes of quashing, the offending disciplinary proceedings purportedly signed by the 2nd respondent and dated May 17, 2022.
 - f. A mandatory order do issue directing the 1st respondent to reinstate the petitioner back to her position of Senior Human Resource Officer at the Headquarters and be paid in full special damages arising from all the outstanding emoluments and benefits that she would have otherwise earned from the time she was illegally dismissed being May 2022 until such time as to when she will be reinstated back into service.
 - g. A mandatory order do issue directing the respondents to pay the petitioner a reasonable amount in form of general damages as recompense for the losses and inconveniences suffered from the clearly unconstitutional and illegal acts committed by the 2nd respondent.
 - h. The honourable court do make such other or further orders as it may deem fair, just and expedient in the circumstances in enforcing violation of fundamental rights of the petitioner.
 - i. Costs consequent upon the petition be borne by the respondents in any event on indemnity basis.
2. The petition was based upon the petitioner's supporting affidavit and further supporting affidavit both on record.



3. The respondents opposed the petition by filing on November 29, 2022 the replying affidavit of Dr Julius Olayo, the Director for Human Resources Management and Development and filed and drawn by Isaac Ochieng Advocate.
4. There is no dispute that the petitioner was at all material times employed by the 1st respondent as a secretariat officer. As at the time of the dispute the petitioner held the position of Senior Human Resource Officer.
5. The factual background to the case is as follows. An internal audit report disclosed irregular promotion of teachers in the payroll. In particular, 22 teachers were verified to have been irregularly promoted in the payroll without any documentary evidence of approval in their personal files. It was considered that staff took advantage of the high number of teachers approved for promotion to irregularly introduce additional promotions into the payroll system. The 1st respondent constituted an investigation committee and whose report recommended five employees who had previously been warned or cautioned on account of erroneous salary adjustments and subsequent overpayment be subjected to disciplinary action for violating the 1st respondent's overpayment policy 7.1. the petitioner was one of the five implicated officers. She was interdicted on December 16, 2021 for breach of clause 112 (3) (a), (b) and (13) of the HR Manual for secretariat staff, 2018, the particulars whereof were duly stipulated in the interdiction letter dated December 16, 2021. She was informed that she would be given an opportunity to be heard on the allegations in person. She was asked to defend herself in writing within 21 days and responded by her letter dated December 29, 2021. In her response, she stated that the errors were purely caused by the reasons of work pressure to clear pending files that piled during the pandemic relating to promotion of common cadre cases; conversion of interns to permanent staff; upgrading to senior master iv; completion of p&p list; seven-day rule of files in the units; numerous interruption from fellow staff; limited availability of machines; and timeline when IPPD system is operating. She stated that she was required to capture all data relating to the changes made by the unit prior to close of the payroll and pressure to finalise the assignments before the next month despite voluminous work and minimal timelines. She further explained that it must have been during that period that she may have punched the wrong digits which made the error that went unnoticed. She stated the errors were due to pressure of work and were not intentional or due to negligence of duty or poor performance. Further, she stated, "There was no professional negligence on my part because upon being informed of the error by the panel on October 19, 2021 I requested the authority to reverse the cases to stop further overpayment." She concluded, "I highly regret the error and apologize for any embarrassment or loss it might have cost the commission and commit to ensure that such errors do not occur again. I promise to be more keen in future."
6. The 1st respondent constituted a panel to hear the disciplinary case and which was chaired by the 2nd respondent. The cases in issue were heard between 17th to May 20, 2022 at the 1st respondent's head office. The petitioner was invited and she attended the disciplinary hearing by letter dated May 17, 2022 in which she was invited for an ample opportunity to present her case. She also informed she would have an opportunity to cross examine the witnesses at the hearing. The petitioner wrote her letter dated May 6, 2020 requesting for documents and she was advised by the respondent's letter dated May 9, 2022 to make the necessary payment in accordance with schedule 18 of the HR Manual but she never complied.
7. The claimant attended the disciplinary hearing and the panel found as follows:
 - a. The petitioner knew the key feature differentiating a teacher from the other was the TSC number which had to correspond with the teacher's name.



- b. The petitioner knew a teacher could not skip a service grade.
 - c. She admitted an error in keying of the cases at hand and attributed it to pressure of work, intense workload, and inadequate machines, frequent interruptions and the window period on only 12 when the payroll system is active. The officer did not show the beneficiaries of the promotion to justify her claims for error. She had not raised the challenges with the supervisor or given record of work done per day. She admitted participating in the investigations and receiving the letter to show cause. The record showed she had previously been served with a show cause letter upon similar misconduct and cautioned in 2017. She apologised and pleaded for leniency, promising to be more careful in future. The panel found her culpable of the allegations as had been levelled and resolved she be dismissed from the service effective May 17, 2022.
8. To answer the 1st issue for determination, the court returns that the parties were in a contract of service. The petitioner was dismissed effective May 17, 2022.
 9. To answer the 2nd issue, was the disciplinary hearing properly constituted? The petitioner's case is that the panel was improperly constituted because it was not composed per clause 119(2) of the TSC HR Manual providing that discipline panel shall comprise of at least one member of the commission who shall be the chair of the panel. There is no dispute that the 2nd respondent who was the panel chairperson was not a member of the commission. However, the respondents have exhibited the respondent's resolution at the meeting of May 14, 2020 that hearing of all categories of discipline cases except for reviews be heard by management. It is submitted for the petitioner that the Manual was a statutory instrument under the Statutory Instruments Act, 2013 and the alleged delegation by the commission to the management as was done could not operate to validly change provisions of the HR Manual. At paragraph 12 of the replying affidavit, the respondents have confirmed that the TSC (Human Resource Policies and Procedures Manual, 2018) for secretariat staff was made pursuant to provisions of section 47 (2) of the Act and section 5(1) of the *Public Officer Ethics Act*. Thus being an instrument made under the statutory provisions, the court finds that indeed its provisions could not be changed internally by the respondents without involving the affected persons (like the petitioner) and involving the Parliament as envisaged in the *Statutory Instruments Act, 2013* – and which has not been shown to have been done. Thus, as submitted for the petitioner, the disciplinary panel was improperly constituted, its decisions null and void. The court finds accordingly.
 10. To answer the 3rd issue, the court returns that the petitioner has established that while she was discriminated because she was dismissed while other officers culpable in the similar circumstance were either suspended or simply warned. While the respondents have urged that each case was separate, the court is bound to act proportionately per objective principal in section 3 of the *Employment and Labour Relations Court Act, 2011*. It was discriminatory for the respondent to dismiss the claimant and retain in service the similarly or more culpable officers. The dismissal is found to have been excessive and is amenable to being set aside.
 11. To answer the 4th issue, the court returns that the claimant admitted an error within operational deficiencies amounting to a well-founded complaint as envisaged in section 46 of the *Employment Act, 2007*. The court finds that the error based on such well-founded complaint or grievance deserved proper resolution by the respondent instead of the respondent relying on it to dismiss. It was also misconceived for the respondent in its case to shift the blame to the petitioner that she ought to have raised it earlier with the supervisor. The court finds that she had raised the complaint in her response and without addressing it within the grievance management system, she was dismissed. It was unfair in the court's opinion.



12. To answer the 5th issue the court returns that the petitioner's right under article 35 to access the information in her self-defence was not breached in view that she failed to pay for copies of documents requested and per prevailing policies. Further, she accepted to proceed with the disciplinary hearing without objecting and asking for the documents.
13. The petitioner has substantially succeeded but also admitted that mistakes and errors happened. The court has found such to have been risks inherent in her job and her grievances occasioning the error ought to have been considered. Thus each party to bear own costs of the proceedings.
14. 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 constituting an 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 impracticability 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.

In conclusion judgment is hereby entered for the petitioner against the respondent for:

- a. The declaration that the 2nd respondent lacked any constitutional and lawful authority to chair a disciplinary panel and make a decision on behalf of the 1st respondent to dismiss the petitioner from the service of the Teachers Service Commission because such a function is within the exclusive mandate of the 1st respondent and therefore the 2nd respondent's decision contained in the proceedings signed by the 2nd respondent's letter reference No TSC/600007/37 of May 31, 2022 is null and void for all intents and purposes.
- b. The declaration hereby issued that the 2nd respondent by purporting to sign on behalf of the 1st respondent the proceedings containing the decision of the disciplinary panel dated May 17, 2022 the 2nd respondent not only acted *ultra vires* but also unconstitutionally and illegally hence making the said proceedings to have no legal consequences and effect.
- c. The declaration hereby issued that any actions taken or decisions made pursuant to the illegal disciplinary proceedings dated May 17, 2022 are both unconstitutional and illegal hence the same are hereby declared to have been void *ab initio*.
- d. The order of certiorari hereby issued removing into the honourable court, for purposes of quashing, the offending disciplinary proceedings purportedly signed by the 2nd respondent and dated May 17, 2022.
- e. The mandatory order do issue directing the 1st respondent to reinstate the petitioner back to her position of Senior Human Resource Officer at the Headquarters and be paid in full special damages arising from all the outstanding emoluments and benefits that she would have otherwise earned from the time she was illegally dismissed being May 2022 until today and to continue earning accordingly; and the 1st respondent to deploy the petitioner upon reporting not later than 30 days from today.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS FRIDAY 10TH MARCH, 2023.

BYRAM ONGAYA

PRINCIPAL JUDGE

