



**Bonface v Teachers Service Commission & another (Employment and Labour Relations  
Petition E001 of 2022) [2023] KEELRC 1069 (KLR) (27 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 1069 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI  
EMPLOYMENT AND LABOUR RELATIONS PETITION E001 OF 2022**

**ON MAKAU, J  
APRIL 27, 2023**

**BETWEEN**

**JANE WANGARI BONFACE ..... PETITIONER**

**AND**

**TEACHERS SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**

**THE HON.ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

1. The petitioner was employed by the 1<sup>st</sup> respondent as a graduate teacher vide the offer letter dated 22<sup>nd</sup> December, 1997 and her appointment confirmed on 14<sup>th</sup> March 2008. She is currently serving as a Secondary School Principal.
2. On 10<sup>th</sup> December 2019, she was transferred from Garison Secondary school in Laikipia County to Ncoroiboro Secondary School in Meru County. She appealed against the transfer citing marital problems among other reasons. However, the employer advised to report to the new station pending consideration of her appeal.
3. In compliance with the above directive she handed over the school to the incoming principal and she was released to go to her new station for a taking over- handing over but the handing over team received her with hostility and frustrations. The bone of contention was the financial records which was allegedly contained in a digital system which was low at the moment and there was no hard copy. There was also a problem with the bank account which was said to be new and only one page statement was in the hands of the auditor who refused to share with her.
4. When the hostility persisted, the petitioner sought assistance from the 1<sup>st</sup> respondents County Director and the Deputy County Director to no avail. As a result she signed the visitors book and endorsed the frustrations she faced from the handing over team and went to seek assistance from the County Director



but no remedial measures were taken and she reported the matter to the 1<sup>st</sup> respondents Headquarters, in Nairobi.

5. The employer took no immediate action until October when the petitioner's salary was stopped without any reason. Again on 11<sup>th</sup> January, 2021 she was interdicted on allegation that she had declined to report and take up duties upon her transfer to Ncoroiboro secondary school. On 7<sup>th</sup> July, 2021, she was invited for hearing of a disciplinary case. On 25<sup>th</sup> August 2021 she was suspended for 3 months pending posting but no posting was done until 8<sup>th</sup> December 2021 after serving the employer with notice of intention to sue.
6. On the above facts, the petitioner brought the petition herein alleging that her rights under Article 27, 47 and 50 of the Constitution had been violated by the employer by subjecting her to disciplinary process for no wrong doing and without complying with its Code of Regulations for Teachers 2015, (CORT) Teachers Service Commission Act, and the Fair Administrative Actions Act.
7. The petitioner seeks the following reliefs:-
  - a) A declaration that the interdiction, disciplinary action and suspension of the Petitioner were irregular and/illegal for not meeting the requirement of the TSC Code and the requirements of the Fair Administrative Action Act and the Constitution of Kenya, 2010 under Articles 47 and 50 and thus unconstitutional and null and void ab initio.
  - b) A declaration that the administrative action taken against the Petitioner was not fair and did not meet the constitutional threshold under Article 47 of the Constitution and the Fair Administrative Act under section 4 of the Act.
  - c) An order for payment of all salary which was withheld, the benefits, and annual increments and promotion for the period she was on interdiction and suspension from October, 2020 to date.
  - d) An order for exemplary damages for mental anguish, torture, inhuman treatment and embarrassment.
  - e) Compensation for wrongful interdiction and suspension of 12 months wages and general damages emoluments/contingencies at a rate of 15%.
  - f) An order for payment of annual leave (1 month salary) for the two years she was on interdiction and suspension.
  - g) An order for payment of her disturbance allowance on transfer (one month salary)
  - h) An order for payment of her disrupted medical cover when she was on interdiction and suspension.
  - i) An order for award of damages for breach of her fundamental rights and freedom.
  - j) An order that the costs consequent upon this petition be borne by the Respondents.
  - k) Any other orders that this Honorable court shall deem fit and just to grant.



8. The petition is supported by an affidavit sworn by the petitioner on 22<sup>nd</sup> December 2021 annexing a bundle of documents as exhibits. The affidavit mimics the facts set out above.
9. The 1<sup>st</sup> respondent filed a Replying Affidavit on 21<sup>st</sup> February 2021 sworn by its Director in charge of field services one Mrs. Mary Rotich. The affidavit admits the employment relationship as pleaded by the petition and avers that the employment contract was regulated by the Employment Act, the TSC Act and the COURT. She reiterated the fact that the petitioner was transferred to Ncoroiboro secondary school as a principal on 16<sup>th</sup> December 2019 and was released from her former station on 20<sup>th</sup> January 2020 by the County Director Laikipia.
10. She further deposed that the petitioner failed and/or refused to cooperate during the school handing over/take over citing inter alia, her pending appeal for re-routing and/or reconsideration of her transfer to the new station. That despite directives to report to the new station pending her appeal, she blatantly disregarded the directive by refusing to take up the new duty station which constituted a clear and valid ground for interdiction.
11. The petitioner was then interdicted with effect from 11<sup>th</sup> January 2021 to pave way for the disciplinary process with respect to the said violation of the COURT. The interdiction letter called upon the petitioner to respond to the allegations within 21 days and she complied denying the allegations. A letter dated 7<sup>th</sup> July 2021 invited her to a hearing before a disciplinary committee on 9<sup>th</sup> August 2021.
12. The petitioner allegedly attended the hearing and gave oral testimony and produced documentary evidence to support her defence. She was also examined by the committee which also considered her testimony, documents and her written response to the interdiction letter. In the end the committee found the petitioner guilty of breach of the COURT and sentenced her to a suspension from duty for 3 months and recovery of any salary over payments she may have received. The decision was communicated to the petitioner via letter dated 28<sup>th</sup> August 2021.
13. The 1<sup>st</sup> respondent avers that it acted impartially, independently and professionally and the punishment to the petition by a suspension of 3 months from work was fair, just and appropriate as it was based on the evidence showing that she violated the COURT. The 1<sup>st</sup> respondent further avers that as an employer, it has the mandate to punish its errant employees upon compliance with the due process.
14. In addition, the 1<sup>st</sup> respondent took issue with the petition contending that it does not meet the threshold set for reliefs under the Constitution as the rights allegedly infringed by it have not been identified with precision. Consequently, the court was urged to dismiss the petition with costs as the prayers sought are unreasonable, unlawful and grossly offend the Constitution and the Employment Act.
15. In her supplementary supporting affidavit, the petitioner contended that the petition is properly before the court. She further contended that she reported to the new station ready to take over the school but the handing over team became uncooperative. She maintained that she did nothing wrong to deserve interdiction and averred that the employer acted without any preliminary investigations as required under the COURT.
16. As regards the hearing, she contended that the disciplinary committee that heard her was not properly constituted as required under the COURT and the alleged hearing was interrogated by a man and a woman virtually and she was not given opportunity to produce documentary evidence or to have representative and witnesses during the hearing.
17. She further averred that the deduction of half of her salary without prior hearing was flawed, prejudicial, unprofessional and inhuman treatment which led to mental and psychological torture by



the employer. Further the administrative action against her violated Article 47 of *the Constitution*, section 4 of FAA Act and the CORT. She urged the court to grant the orders sought in the petition.

## Submissions

18. It was submitted for the petitioner that complied with transfer letter and she never contravened Regulation 64 of the CORT. Accordingly it was contended that there was no reasonable ground for any disciplinary action to be taken against her. Besides it was argued that the procedure under section 34 of the TSC Act was not followed before her suspension and stoppage of her salary. It was submitted that the failure to take over the new station was ceased by the handing over team who failed to cooperative and by the employer's officials who failed to intervene in the deadlock.
19. As regards the procedure followed it was submitted that the disciplinary hearing on 9<sup>th</sup> August 2021 was conducted virtually by only two people who mocked and chastised the petitioner and denied her any chance to make representation either through herself as legal counsel in her defence, or call any witnesses. Consequently, it was submitted that the procedure followed contravened Regulations 151 and 153 of the CORT and thereby violated over right to fair hearing under Article 50(1) of *the Constitution* of Kenya.
20. Further it was submitted that she was denied her right too half salary during the interdiction period contrary to Regulation 148 of CORT. Her salary and allowances including medical cover were stopped and thereby subjecting her to anguish, suffering and torture. The foregoing amounted to infringement of her fundamental rights and freedoms including freedom from torture and cruel or degrading treatment or punishment.
21. Further it was submitted that the delay in posting the petitioner beyond the expiry of 3 months, and until a notice of intention to sue was secured amounted to contravention of section 4 of the FAA Act and Article 47 of *the Constitution*. Besides the said interdiction, disciplinary hearing and suspension were not expeditiously done and therefore it infringed the petitioner's right to fair labour practices contrary to Article 41 of *the Constitution*.
22. Reliance was placed on the case of Simon Natal Ntoitha v Sub-County Land Adjudication & Settlement Officer, Igembe (North) & 2 others [2022] eKLR and Gladys Boss Shollei v Judicial Service Commission, Petition No.E02 of 2021. Finally the court was urged to grant the prayers sought in the petition.
23. The 1<sup>st</sup> respondent submitted that the petition as filed does not meet the threshold for a constitutional petition and principles of avoidance. It was argued that the relationship between the 1<sup>st</sup> respondent and the petitioner is contractual within the purview of employment laws and therefore it does not extend to the realm of a Constitutional question. For emphasis reliance was placed on the case of Joseph Mutuura Mberia & Anther v Council of JKUAT [2013] eKLR and Uhuru Muigai Kenyatta v Star Publications Ltd (2013) eKLR where the court were of the view that where a right is regulated be a legislation a litigant may not bypass the legislation and rely on *the constitution* directly.
24. It was further submitted that the petition has not set out with precision the provision of *the constitution* alleged to be infringed and the manner in which it was infringed as it was held in the case of Anarita Karimi Njeru v Republic (1979) eKLR and affirmed by the Court of Appeal in Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2013) eKLR. In the present case it was argued that the petitioner merely cited various provisions of *the constitution* but failed to provide a critical nexus between the same and the matters of transfer, discipline and desertion which are purely labour law matters. Therefore it was urged that the petitioner's grievances can effectively be addressed as a claim under the *Employment Act* and attendant Labour laws.



25. As regards the merits of the petition, it was submitted for the 1<sup>st</sup> respondent that the reason for the disciplinary action taken against the petitioner were reasonable considering Regulation 67 and 70 of the CORT. It was submitted that the petitioner was transferred to Ncoroiboro Secondary School vide letter dated 10<sup>th</sup> December 2019 and she was released on 20<sup>th</sup> January 2020 to take up the new assignment. However, the 1<sup>st</sup> respondent received a letter dated 29<sup>th</sup> January 2020 and a Report dated 27<sup>th</sup> January, 2020 from the sub-county Director, the BOM OF Ncoroiboro Secondary School indicating THAT ON 3<sup>RD</sup> January 2020 the petitioner never showed up for taking over exercise, and subsequently on 27<sup>th</sup> January 2020 she walked away without competing the takeover/handing over exercise as required.
26. It was submitted that the petitioner was given a chance to defend herself in writing and orally before disciplinary committee but she failed to exonerate herself using medical evidence, evidence that she reported to the employer about the frustration by the handing over team, and the fact that she had already absconded work even before 16<sup>th</sup> March 2020 when the country lock down was declared due to Covid-19 pandemic.
27. It was submitted that the petitioner was never dismissed but just interdicted and subsequently suspended for 3 months under Regulation 154 (2) (b) (iii) of the CORT after the due process conducted under Regulation 151 and 153 of the CORT. It was submitted that under Regulation 148 (i)(b) of the CORT stipulates that a teacher on interdiction is entitled to half alary except in the case of desertion of duty.
28. It was submitted that the employer deserted employment and the employer made all necessary effort vide various letters to reach out to her directing her to report to the new station but she failed and/or neglected to report to her duties. For emphasis, reliance was placed on Ronald Nyambu Daudi v Tornado Carriers Limited 2019 eKLR and Boniface Nkubi Karagania v Protective Custody Limited [2019] eKLR.
29. Finally the court was urged to decline the reliefs sought and proceed to dismiss the petition with costs.

### **Determination**

30. Having considered the pleadings, evidence and submissions, it is clear that the disciplinary action taken against the petitioner was a punishment of suspension for three months, and recovery of salary overpayment as per the payroll records. The issues for determination are:-
  - a) Whether the petition meets competence threshold.
  - b) Whether the interdiction and the subsequent suspension was grounded on valid reasons.
  - c) Whether due process was followed.
  - d) Whether process and the action violated petitioner's constitutional rights.
  - e) Whether the reliefs sought are merited.

### **Competence threshold**

31. In Anarita Karimi Njeru case, supra, the court held that:-

“...if a person is seeking redress from the High court on a matter which involves a reference to *the Constitution*, it is important (if only to ensure that justice is done to his case) that



he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

32. In the present case, the dispute revolves around interdiction without half pay and the subsequent suspension and recovery of salary overpayment as per the payroll records. The said action has been described as violation of the petitioner’s right to fair labor practices, right to fair administrative action, right to fair hearing amounting to inhuman treatment which has exposed the petitioner to mental and psychological torture. The petition cites Article 47 and 40 of *the Constitution* as having been violated by the respondents.
33. The respondents contend that the alleged violations are not true and even had they occurred, the same constitutes employment and labour grievances which can effectively be remedied under the *Employment Act* and Attendant Labour laws considering the avoidance doctrine.
34. It is now well settled that inclusion of Labour rights in the Bill of Rights under Article 41 of *the Constitution* of Kenya elevated the said rights to constitutional rights. Therefore it would be incorrect for the employer here to say that a claim founded on violation of a labor right under a contract of service is a mere grievance limited to remedies under the Labor Laws. However what the courts in the land have held is that if there is another process under legislation that can effectively remedy the grievance, then such procedure should be first exhausted.
35. In this case, I am satisfied on the basis of the material before the court that the allegations raised if proved point to violations of the petitioner’s right not to be exposed to inhuman treatment, right to fair labour practices, and right to fair administrative action as envisaged under Article 28, 41 and 47 of *the Constitution* of Kenya. The said rights have been amplified and regulated under section 41 and 45 of the *Employment Act* and Section 4 of the FAA Act.
36. In the case of Joseph Mutuura Mberia & another v Council of JKUAT [2013] eKLR, this court held that:-
- “Direct reliance on fundamental rights as contained in *the Constitution* is impermissible when the right is regulated by legislation, as is actually the case with the *Employment Act* which directly regulates fair labour practices suspension, termination and dismissal. When a legislation is enacted to give effect to a constitutional right, a litigant cannot by pass the legislation and rely directly on *the constitution* without challenging that legislation as falling short of the Constitutional standards.”
32. In *Uhuru Muigai Kenyatta v Nairobi Star Publications Ltd* [2013] eKLR the court held that:-
- “I need say no more where there is a remedy in civil law, a party should pursue that remedy and I say so well aware of the decision in *Haco Industries* (supra) where the converse may have been expressed as the position. My mind is clear however that not every ill in society should attract a Constitutional sanction and as stated in *Attorney General v Dutambala Cr.Appel No.37 of 1991* (Tanzania Court of Appeal), such sanction should be reserved for appropriate and really serious occasions.”
32. Further the Court of Appeal in *Speaker of the National Assembly v Njenga Karume* [1992] eKLR held that:-
- “...where there is a clear procedure for redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.”



32. The grievances raised in the petition are contractual in nature arising from an employment relationship which is regulated by the [Employment Act](#), TSC Act and the CORT. The grievances take the nature of breach of rights which can be effectively remedied under a normal claim without any reference to [the Constitution](#). The monetary claims are also not particularized. The petition is therefore rejected and since the limitation period has not lapsed, the petitioner is directed to file a normal claim as prescribed by the Employment and Labour Relations Court (Procedure) Rules, 2016. Each party shall bear his or its own costs.

**DATED, SIGNED AND DELIVERED AT NYERI THIS 27TH DAY OF APRIL, 2023.**

**ONESMUS N MAKAU**

**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> April 2020, this judgment 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.**

**ONESMUS N. MAKAU**

**JUDGE**

