



**Namuye v Teachers Service Commission & another (Petition
E103 of 2020) [2023] KEELRC 972 (KLR) (25 April 2023) (Judgment)**

Neutral citation: [2023] KEELRC 972 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION E103 OF 2020
MA ONYANGO, J
APRIL 25, 2023**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS UNDER ARTICLE 1, 3, 10, 25, 27(1), (2), 28, 29, 41(1)&(2), 47, 48, 50,
258, CHAPTER SIX AND CHAPTER 13 OF THE CONSTITUTION OF KENYA 2010**

AND

**IN THE MATTER OF SECTIONS 4 AND 5 OF
THE FAIR ADMINISTRATIVE ACTIONS ACT**

AND

**IN THE MATTER OF SECTIONS 4, 11, 21 OF
THE TEACHERS SERVICE COMMISSION ACT**

AND

**IN THE MATTER OF RULES 146, 149, 150, 153, 154, 156 AND
PART XI-DISCIPLINE OF TEACHERS SERVICE COMMISSION
CODE OF REGULATIONS FOR TEACHERS REGULATIONS, 2015**

AND

IN THE MATTER OF SECTIONS 5, 41 AND 45 OF THE EMPLOYMENT ACT, 2007

BETWEEN

SAMUEL MUGENYA NAMUYE PETITIONER

AND

TEACHERS SERVICE COMMISSION 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT



JUDGMENT

1. The Petitioner is a teacher by profession and was until 9th May 2019 employed by Teachers Service Commission (TSC), the 1st Respondent herein, and deployed at Shivagala Secondary School.
2. The 1st Respondent TSC is a constitutional commission established under Article 237(1) of the Constitution of Kenya with its primary functions set out under Article 237(2) as follows –
 - (1) There is established the Teachers Service Commission.
 - (2) The functions of the Commission are—
 - (a) to register trained teachers;
 - (b) to recruit and employ registered teachers;
 - (c) to assign teachers employed by the Commission for service in any public school or institution;
 - (d) to promote and transfer teachers;
 - (e) to exercise disciplinary control over teachers; and
 - (f) to terminate the employment of teachers.
 - (3) The Commission shall—
 - (a) review the standards of education and training of persons entering the teaching service;
 - (b) review the demand for and the supply of teachers; and
 - (c) advise the national government on matters relating to the teaching profession.
3. The mandate of the 1st Respondent is expounded under the Teachers Service Commission Act and the Code of Regulations for Teachers (2015).
4. The 2nd Respondent, the Attorney General, is the Chief Legal Advisor to the Government as established under Article 256 of the Constitution and the Office of the Attorney General Act, 2012.
5. The Petitioner's case is set out in his petition dated 16th December 2020, the affidavit in support of the motion application sworn by the Petitioner on 16th December 2020, the Petitioner's supplementary affidavit sworn on 7th September 2021, his submissions dated 29th October 2021 and supplementary submissions dated 3rd December 2021.
6. In the petition, the Petitioner seeks the following reliefs:
 - i) A declaration that the Respondents administrative actions and decisions against the Petitioner illustrated by the Respondents by themselves and or their servants *vide* letter of Interdiction dated 21/10/2018, the disciplinary hearings on 28/03/2019 in relation to the Petitioner by the Respondents, letter ref: TSC/D1SC/NO 0177/11/2018/2019/17 & 18 dated 09/05/2019 and the Review Hearing by the 1st Respondent on 18/09/2020 and the Review hearing decision *vide* letter ref: DICS/NO 0177/11/2018/2019/35 dated 2/10/2020 to the Petitioner violated and violate the latter's fundamental rights and freedoms set out in the Petition herein, are contrary to the Teachers Service Commission Act and Regulations thereto, Fair



Administrative Action Act and the Constitution of Kenya, illegal, unlawful, un-procedurally fair, discriminatory, null and void.

- ii) An Order of Certiorari to call, remove, deliver up to this Honourable Court and quash or revoke the 1st Respondent's letter of Interdiction dated 21/10/2018 to the Petitioner interdicting him from employment, the Disciplinary Committee proceedings the disciplinary hearings on 28/03/2019 in relation to the Petitioner by the Respondents, letter ref: TSC/D1SC/NO 0177/11/2018/2019/17 & 18 dated 09/05/2019 and the Review Hearing by the 1st Respondent on 18/09/2020 and the Review hearing decision *vide* letter ref: D1CS/NO 0177/11/2018/2019/35 dated 2/10/2020 to the Petitioner and reinstatement of the Petitioner to his position of employment with effect from 24/10/2018 without loss of earnings.
 - iii) A Conservatory Order of prohibition against the Respondents whether by themselves and or through anyone claiming under them from charging, conducting a trial, convicting the Petitioner based on charges set out in the letter ref TSC/520135 dated 21/10/2018 by the 1st Respondent to the Petitioner and or proceeding to dismiss, remove from or deregister the Petitioner based on the 1st Respondents decisions in letter ref: TSC/D1SC/NO0177/11/2018/2019/17 & 18 dated 09/05/2019 and or the Review hearing decision *vide* letter ref: D1CS/NO 0177/11/2018/2019/35 addressed to the Petitioner contrary to the Constitution of Kenya, the Teachers Service Commission Act and Regulations thereto and Fair Administrative Action Act.
 - iv) Compensation for violation of the Petitioners fundamental rights and freedoms
 - v) Costs of the Petition
 - vi) Any other relief that the Court may deem fit to grant in the circumstances of the Petition.
7. The 1st Respondent's case is contained in the replying affidavit of Mary C. Rotich, the 1st Respondent's Director in Charge of Field Services and in the written submissions dated 12th November 2021.
 8. The 2nd Respondent filed grounds of opposition dated 26th January 2020 in which it states that it was wrongly joined to the proceedings as the Petitioner did not comply with the process for joinder as set out under the Government Proceedings Act. Further, that there are no prayers against the Attorney General who was not a party to the employer-employee relationship between the Petitioner and 1st Respondent; that the 1st Respondent is an independent constitutional commission established under the Constitution and capable of suing and being sued in its own name, and does not consult the 2nd Respondent when exercising its powers and in performing its functions under the TSC Act; that the suit does not disclose any cause of action against the 2nd Respondent.
 9. When the suit came up for directions on 22nd September 2021, the 2nd Respondent's Counsel Ms. Oyugi applied that the Attorney General be released from these proceedings which orders the Court granted. The petition is therefore against TSC as the only Respondent. TSC shall therefore henceforth be referred to as the Respondent.

Petitioner's Case

10. The Petitioner avers that in or about mid-September 2018 while lawfully away from school he was informed by colleagues that a parent had lodged a complaint against him, accusing him of lavishing his granddaughter who was a student in the school with gifts and money. That actuated by malice, the Principal of the school escalated the complaint to the 1st Respondent's Sub-county Director's office without first interrogating or interviewing the Petitioner to ascertain whether the complaints were



- bona fide. That the Principal supervised the recording of statements by the affected student and two (2) other students alleged to be witnesses of the complaints against the Petitioner.
11. The Petitioner avers that on 25th September 2018, a day after the students recorded their statements, he was summoned by the School Principal, who was in the company of the 1st Respondent's Sub-county Human Resource Officer and Sub-county Director of Education, for investigations over alleged sexual relations with one of the Petitioner's students (herein referred to as "TI" to protect her true identity) on 10th August 2018 and making sexual advances to two (2) other students (herein referred to as CM and LP to protect their identities) in 2017 and 2018.
 12. The Petitioner avers that he denied the charges. That the students also disowned their statements, alleging that the statements were recorded by the School Principal under duress, inducement and compulsion.
 13. The petitioner states that on 18th October 2018 he was again summoned and appeared before the School Board of Management chaired by the County Human Resources Officer for the same charges which were later dismissed as the three students maintained that their statements were not made of their own free will.
 14. The Petitioner states that he was invited for a disciplinary hearing on 28th March 2019 at the 1st Respondent's County Offices which he attended with six (6) witnesses with recorded statements in support of his defence but the 1st Respondent declined to register the witnesses and the secretary recorded "No witnesses available" for the Petitioner.
 15. The Petitioner states that his defence to the first charge was alibi, that on 10th August 2018 he was in school at the time he was alleged to have had sexual relations with student T1 at his rented home and that his wife and children were at the said home at the time. The Petitioner averred that for the second charge he was not provided with particulars. That the charges were in any event denied by students CM and LP.
 16. It is the contention of the Petitioner that actuated by malice and disregard of the laws on fair hearing, the 1st Respondent discriminately registered and called three other witnesses from the complainant and refused to give him copies of their witness statements and evidence. That he was limited to asking only three questions while cross examining the complainant's witnesses, was interrupted, reprimanded, intimidated and controlled while cross examining the six witnesses and it was recorded that he had admitted the charges even though he had denied the same.
 17. The Petitioner states that following the bungled up disciplinary hearing, the 1st Respondent served him with a letter of dismissal dated 9th May 2019. That he was also served with a notice of removal from the Register of Teachers of even date.
 18. The Petitioner states that he lodged a review against the decisions as required under Rule 156 of the [Code of Regulations for Teachers](#) which was heard virtually on 13th August 2020 at the 1st Respondent's County Director's Office in Kakamega. That the review was based on new and important evidence which the 1st Respondent's Review Committee declined. He was informed by letter dated 2nd October 2020 that the review application had been dismissed.
 19. The Petitioner submits that the 1st Respondent's actions were marred by wanton procedural improprieties thus constituting unfair administrative action contrary to Article 47(1) and (2) of the [Constitution](#) and Section 4(3)(a) and (b) of the [Fair Administrative Action Act](#). The Petitioner relied



on the decision of the Court of Appeal in *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR where the Court stated at paragraph 23 that –

“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability.”

20. The Petitioner further submits that the 1st Respondent’s actions were marred with wanton procedural impropriety relying on the decision in *Imaran Limited & 5 others v Central Bank of Kenya & 5 others* [2016] eKLR where the Court stated:

“Procedural impropriety may be due to the failure to comply with the mandatory procedures such as breach of natural justice, such as audi alteram partem, absence of bias, the duty to act fairly, legitimate expectations, failure to give reasons etc.”

21. The Petitioner further relied on the decision in *Waweru Edwin Thini v University of Nairobi* [2020] eKLR where the Court quoted *Pastoli v Kabale District Local Government Council & Others* [2008] 2 EA 300 thus:

“Procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in the process of taking a decision. The unfairness may be in the non-observance of the Rules of Natural Justice or to act with procedural fairness towards one affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative instrument by which such authority exercises jurisdiction to make a decision.”

22. The Petitioner submits that the 1st Respondent failed to give him copies of the charges and evidence against him prior to the hearing to enable him prepare his defence contrary to Rule 146(6) of *TSC Code of Conduct for Teachers 2015* and Section 9(2)(a) of the *TSC Act*. For emphasis the Petitioner quoted and relied on the decision in *Geothermal Development Company Limited v Attorney General & 3 others* [2013] eKLR where the Court stated –

“As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well.”

23. The Petitioner further submits that the 1st Respondent did not afford him an opportunity to call witnesses at the hearing.

24. The Petitioner further submits that the 1st Respondent’s officers, being investigators, were also witnesses and Judges in the proceedings against him in violation of the cardinal rule of natural justice that a man shall not be a judge in his own cause. That this is contrary to Rule 146(12) of the *Code of Conduct for Teachers* which provides that an officer who undertakes or participates in investigations of an offence shall neither preside nor sit as a member of the disciplinary panel determining the offence. That there was therefore real bias as there was no objectiveness.



25. He submits that the 1st Respondent's Principal directed the students on what and how to write the statements implicating the Petitioner.
26. The Petitioner submits that the 1st Respondent violated Article 50(4) by using illegally obtained evidence and by admitting statements which had been made under duress and coercion or were recanted by the witnesses. That TI was compelled to attend the hearing under duress while under arrest. That the having left the school, the students are now not under threat of incentive from the School Principal and voluntarily recanted their statements.

Respondent's Case

27. In the replying affidavit filed in response to the petition, the Respondent states that it acted within its constitutional and statutory mandate under Article 237(2)(c) and (d) of the *Constitution of Kenya*, the *TSC Act* and the *Code of Regulations for Teachers* (CORT). Further, that it acted fairly, procedurally and lawfully. That it complied with the due process envisaged under the *Employment Act* and Rules of Natural Justice.
28. The Respondent contends that the Petitioner failed to adduce sufficient, compelling and reasonable grounds to support his petition.
29. It is the Respondent's case that upon receiving the complaint against the Petitioner investigations were carried out by interviewing and recording statements from several witnesses including the Petitioner before the Petitioner was invited to appear before the County Disciplinary Committee where he was given an opportunity to present his case.
30. That there was overwhelming evidence which informed the interdiction of the Petitioner. The interdiction letter gave the Petitioner full particulars of the charges against him and informed him of his right to defend himself against the allegations.
31. The Respondent states that the Petitioner was notified and invited for the disciplinary hearing one month before the hearing date to enable him adequately prepare his defence and he was present during the hearing where he cross examined the Respondent's witnesses.
32. The Respondent further states that upon a finding of guilt being made against the Petitioner he was informed of his right of appeal against the decision to dismiss him from service, which right he exercised by filing a review application. He was invited for hearing of the review application which was dismissed and the decision of the Disciplinary Committee upheld.
33. The Respondent submits that the Petitioner is not entitled to the judicial review remedy of certiorari as this is an employment matter, relying on the decision in *Staff, Disciplinary Committee of Maseno University & 2 others v Ochonga Okello* [2012] eKLR where the Court of Appeal held –

“However, orders of judicial review are orders used by the

Court in its supervisory jurisdiction to review the lawfulness of an act or decision in relation to the exercise of a public act or duty. In this case, the contract of employment between the respondent and Maseno University was a contractual relationship governed by private law. The dispute between the respondent and the appellants arose from the performance of the respondent's contract of employment. While it is true that the public has a general interest in the University being run properly, that interest does not give the public any rights over contractual matters involving the University and other parties.”



34. It is further the submission of the Respondent that the decision to dismiss the Petitioner was not ultra vires, or in breach of natural justice, citing and relying on the decision in [*Republic v Permanent Secretary, Ministry Of Housing & another Ex-Parte Eustacia Wachira Macharia \(Suing As The Legal Representative of the Estate of Florence Warundu Wachira \(Deceased\)*](#) [2014] eKLR where the Judge referred to *Captain Geoffrey Kujoga Murungi v Attorney General* misc Civil Application no 293 of 1993 in which the Court stated the circumstances when certiorari may be granted as follows:

“Certiorari deals with decisions already made Such an order can only be issued where the court considers that the decision under attack was reached without or in excess of jurisdiction or in breach of the rules of natural justice...”

35. The Respondent further relied on the decision in [*Republic v Tanathi Water Services Board & 2 others Ex parte Senator Johnstone Muthama*](#) [2014] eKLR and [*Republic v Teachers Service Commission & 3 others Ex-Parte Titus Mutua Mulinge*](#) [2013] eKLR where the Court cited with approval the decision in [*Municipal Council of Mombasa v Republic and Umoja Consultants Limited*](#) Civil Appeal no 185 of 2001. In both decisions the Courts held that to succeed in an application for judicial review, the Applicant must prove that the action or decision complained of was tainted with illegality, irrationality and procedural impropriety and that judicial review is not concerned with merits of the decision but rather with the decision making process.

Analysis and Determination

36. Having considered the pleadings, submissions and authorities cited and having further considered the oral submissions made by Counsel for the parties, the issues arising for determination are the following:

- i. Whether the Respondent’s administrative actions violated the fundamental rights and freedoms of the Petitioner;
- ii. Whether the administrative actions and decisions of the Respondent are contrary to the [*Teachers Service Commission Act*](#) and [*Regulations*](#) and the [*Employment Act*](#);
- iii. Whether the Petitioner is entitled to the remedies sought.

37. It is the Petitioner’s case that the Respondent violated his fundamental rights and freedoms as guaranteed under Articles 10, 24, 25, 27(1) & (2), 28, 29, 41(1) & (2), 47, 48 and 233. The Petitioner however does not state in the petition how any of the provisions of the [*Constitution*](#) cited were violated.

38. In the written submissions reference is made only to Article 47(1) and (2) of the [*Constitution*](#) and Section 4(3)(a) and (b) of the [*Fair Administrative Actions Act*](#).

39. It is submitted that the Respondent failed to give the Petitioner copies of the charges and evidence against him prior to hearing to enable him prepare his defence. That this was contrary to Regulation 146(6) of the [*Code of Conduct for Teachers*](#) which requires that the investigation panel gives the accused at least seven days to prepare for their defence and Regulation 146(6)(b) which provides that an accused be given prior notice of allegations against him. It is the submission of the Petitioner that the Respondent failed to afford him the opportunity to call witnesses.

40. The Respondent on the other hand submits that upon receiving the complaint from Mr. Lawrence Luyeku, the minor victim’s grandfather and guardian, the principal empanelled an investigations committee under the Chairmanship of the Deputy Principal, with members being the Senior Master, the Guiding and Counselling Mistress, the Boarding Master and the Head of Department, Languages, to carry out due diligence.



41. The Committee interviewed the victim, the petitioner, two other students alleged to have been approached by the accused teacher and the victim's grandfather. The report of the Committee was forwarded by the Principal to the Sub-County Director for further action.
42. The Ministry of Education also carried out separate investigations following a report by Mr. LL, the victim's grandfather and prepared a report dated 25th September 2018 after interviewing the students, the grandfather to the victim, the Principal, Deputy Principal and the Petitioner.
43. Since the term of the members of the School Board of Management (BoM) was ending on 15th October 2018 having been appointed with effect from 16th October 2015, the County Discipline Panel handled the disciplinary hearing. Copies of letters of appointment of Board of Members are attached to Respondent's replying affidavit at annexure MR 3 for reference.
44. The County Disciplinary Committee recommended that appropriate disciplinary action be taken against the Petitioner for breach of Clause (1)(i), (a)(iv) and (c)(iii) of [TSC Act/Code of Regulations for Teachers \[2015\]](#). Following the recommendation, the Petitioner was interdicted by letter dated 24th October 2018.
45. The letter of interdictions stated the changes against the Petitioner as reflected in the letter reproduced below:

“Ref: Tsc/520135 Date: 24th October 2018

Mr. Samuel Namuye

Tsc/NO 520135 Grade: Graduate Designation: Assistant Teacher

Teacher's Address: Po. Box 1829 - 50100

Name And Address Of Institution: Shivagala Secondary School, P O Box 1829 – 50100
Kakamega

County: Kakamega Sub County: Kakamega South

Letter Of Interdiction

I am directed by the Teachers Service Commission to say that, it is alleged that you have breached Clause (a) (iv) of the Third Schedule of the Act in that: -

- i. You had sexual intercourse with a student by the name Teresia Imbuhila of [particulars withheld] Secondary school Form 2 (2018) admission NO XXXX on 10/8/2018 in your rental house in Museno from 1.00 p.m. to 7.00 pm while you were a teacher at Shivagala Secondary School.
- ii. On diverse dales in term one 2018 and term three 2017 you made sexual advances to CM and LP of [particulars withheld] Secondary School Form 2 [2018] Adm. XXXX and form 3 [2017] Adm. NO XXXX respectively by requesting for a love relationship.

Consequently, you are hereby interdicted with effect from 24th October, 2018.

Before the Commission proceeds to consider and determine your case:-

1. You are invited to make a defense statement/response to the commission in writing within 21 days from the date of this letter;
2. You will be given an opportunity to be heard by the Commission in person;



3. Indicate the nearest TSC Sub-County office where you will be required to report once a month;
4. Present any other evidence including documents in support of your case;
5. Vacate office and continue to be away;
6. Provide your contract address, email and telephone number;
7. Forfeit your annual leave;

Signed

Name: Raphael Tarus

Designation: TSC County Director – Kakamega”

46. The Petitioner responded to the interdiction letter by his letter dated 9th November, 2018, denying the charges.
47. The Petitioner was invited for a disciplinary hearing on 14th February 2019 by letter dated 11th January 2019. The hearing however did not take place on the said date as one of the key witnesses was absent. It was rescheduled to 28th March 2019. The Petitioner was informed of both the deferment of the hearing scheduled for 14th February by letter dated 25th February 2019 and the new date of hearing by letter dated 21st February 2019.
48. The hearing took place on 28th March 2019 as scheduled. The victim T1 who had by then dropped out of school informed the panel that she was married. She was brought for the hearing by police.
49. By letter dated 9th May 2019, the Petitioner was informed that following the disciplinary hearing a decision had been made that he be dismissed from service with effect from 28th March 2019.
50. By another letter of the same date the Petitioner was issued with notice of removal from the Register of Teachers. The letter informed him that he had a right of review of the decision which must be exercised within 90 days in accordance with Regulation 155 of the [Code of Regulations for Teachers](#).
51. The Petitioner filed a petition of appeal/review against the decision to dismiss him from service and the subsequent notice of removal from Register of Teachers by letter dated 5th August 2019. In the letter he stated that he had received the letters dated 9th May 2019 on 11th July 2019.
52. The appeal was heard virtually on 18th September 2020 and dismissed as communicated to the Petitioner by letter dated 2nd October 2020.
53. From the foregoing it is evident that the Petitioner was informed and was aware of all the charges against him. He was informed of the date of hearing by both the County Discipline Panel and the Commission (Respondent) in good time and attended the hearings. The letter of invitation for hearing by the County Discipline Panel was not availed to the Court by either the Petitioner or Respondent. However, the minutes which are on record reflect that the Petitioner was present and confirmed that he received the letter of invitation.
54. With regard to the Petitioner's averments of bias, the investigations by the School Principal and Ministry of Education were preliminary inquiries to gather evidence to determine whether or not the allegations against the Petitioner warranted further action. There is no provision for notice for inquiry purposes before charges are framed against a teacher under the [Code of Regulations for Teachers 2015](#).



55. I further find no proof of the averments by the Petitioner of wanton procedural impropriety. I further find no evidence that the Petitioner was denied copies of charges and evidence against him. The charges were contained in the interdiction letter and in the letter of dismissal and the Petitioner was aware about the same from the date that inquiry commenced as is evident from his statements on record.
56. The charges were also made known to him during the preliminary investigations. The only evidence before both panels were the statements of the witnesses. There is no proof that the Petitioner requested for any documents which were never availed.
57. There is further no proof that the Petitioner had any witnesses either during the hearing at the County Discipline Panel or by the Commission. No mention is made of the witnesses by the Petitioner in his statements at the disciplinary hearings or in his review/appeal against the decision of the Respondent. The Petitioner did not present to Court the statements of his witnesses referred to at paragraph 20 of the petition to prove that such witness statements existed. The witness statements attached to the Petitioner's affidavit are all dated 2020. He further does not disclose the names of the six witnesses he alleges were present with written statements but were not heard by the Respondent on 21st February 2019 or 28th March 2019.
58. There is no evidence that the Petitioner was limited to asking only three questions to the Respondent's witnesses or that he was interrupted, reprimanded, intimidated and controlled in his cross examination. No mention of the same is made in his appeal either.
59. With regard to the Petitioner's averments that the Respondent's officers were investigators, witnesses and Judges in the proceedings against him and therefore a mockery of the principles of natural justice and a violation of Regulation 146(12) of the *Code of Regulations for Teachers*, I have carefully perused the minutes of all the meetings and find no evidence of the same. At the preliminary investigative meeting of 19th September 2018, the Deputy Principal was the Chairperson. The members were four teachers in the school. The meeting by the Ministry of Education of 25th September 2018 was by QASO, CSO and school Principal. (The abbreviations have not been defined).
60. At the County Discipline Panel, the CHRO Mr. Lameck Rusugu was the Chair, Daniel K. Kioko, the Discipline Officer was the Secretary. Ethel Palapala, Senior Clerical Officer, Kakamega South, Peter K. Henry, the Principal [particulars withheld] Secondary School and Alice Poloti, the Deputy Principal Shivagala Secondary School were the members. The witnesses were the alleged victims T1, her grandfather and guardian Mr. Lawrence Luyeku and the other alleged victims CM and LP.
61. At the main hearing by the Commission on 28th March 2019, the panel was chaired by Mr. Kinoti Imanyara, a Commissioner of the Respondent and Mary Kakutwi, PAO (QAS) was taking proceedings while Mrs. L. Oriema was prosecuting. The witnesses were TI, CM and PL, the alleged victims, Peter K. Harry, the Principal, Alice Poloti, the Deputy principal, Pamela Imbosa Katima, an ECD Teacher, Mr. LLM, the grandfather and guardian to alleged victim TI, Daniel Kioko and Lameck Mosoti (both of whom presided over the County Discipline Panel).
62. It is clear from the analysis above that none of the witnesses was prosecutor and/or Judge at any stage of the disciplinary process. At each level the prosecutor and presiding officers were different. A person who is an adjudicator at a lower level tribunal or panel can be a witness at the higher level. That would not constitute a mistrial or a violation of the principles of natural justice nor be contrary to Regulation 146(12) of the *Code of Regulations for Teachers*.



63. From the foregoing, it is my finding that there was no procedural violation of either the Rules of Natural Justice, Article 47(1) and (2) or the procedure under the TSC Act and Code of Regulations for Teachers.

Was there Sufficient Evidence to Support the Finding of Guilt of the Petitioner?

64. The grounds for dismissal of the Petitioner and his deregistration were that he had sexual intercourse with a student by the name T1 of Shivagala Secondary School in his rental house in Museno from 1:00 pm to 7.00 pm on 10th August 2018 and secondly, that on diverse dates in term one 2018 and term three 2017, the Petitioner made sexual advances to CM and LP of [particulars withheld] Secondary School Form 2 [2018] by requesting for love relationship.
65. The genesis of the charges is a report made by the grandfather and guardian to T1 that the granddaughter had become rude and disrespectful, left home very early and returned late, especially on weekends, had adopted questionable mode of dressing and started to communicate on phone up to late hours of the night. The guardian Laurance Luyeku accused the Petitioner of spoiling his granddaughter.
66. When T1 was asked to write a statement on 20th September, 2018 she wrote –

“Imbuhila Teresia

[particulars withheld] Secondary School

Box XXXX

Kakamega

20th September 2018

To the Madam Deputy Principal,

Ref: Apology For Engaging Love With My Teacher

I apologise for my bad behaviour that I have done to all of you, not my parents, teachers and other people. I have been (sic) fall in love with Mr. Samuel Namuye for only one month. He meet (sic) me in the school compound. He asked me few things that I lucked (sic) but no answer I gave him. I told him that if I luck anything I normally ask my parents.

The following day he came and told me that he had a problem with me but I did not knew what he was talking about. One week later he call me again and asked me the same question that he had told me in previous.

Few weeks later, when we have closed the school. I left home at 11:00 am morning and it was Friday 10th August 2018. I was going to D.O Office for application ID. When I was finished with them. I left the office. He met me own my way going home and he was coming from Isulu. That is the time and the day he took me to Museno his place.

I sat from 12:00 noon up to 7.00 pm. We were just talking school issues but lunch we ate ugali with fish but I played sex with him and we used protection. That is all I have but I am just asking your forgiveness to forgive me and I am promising that I will never repeat it again from henceforth up to I finished my studies and have good job in future that I am dreaming about.

I want my dreams to come true but I would like your help.

Yours Faithful



SIGNED

IT

Adm no XXXX”

67. At the County Discipline Panel meeting of 18th October 2018, T1 stated she did not have sex with the teacher. She specifically stated that she had been to the petitioner’s house on 5/11/2018 when she found a woman with children in the house and on 11/8/2018 after being chased away by her grandfather when she found a maid in the house. When asked whether she told officers who went to her school that she had sex with her teacher TI responded “I had to say it/admit it.”
68. The record of the proceedings reads:
- Question: On the day the officers came to school did you admit you had sex with the teachers
- Answer: I had to say it/admit
69. The testimony of the complainant Lawrence Luyeko Mbiyitsi, the grandfather to the student TI to the panel was that: “on 10/8/2018, I took my granddaughter to apply for the ID. She disappeared while there and only reappeared at home the following day with her teacher in her company.”
70. In his statement date stamped 25th September, 2018 Laurence Luyeku stated “on 10th August 2018, I saw my grandchild had no ID and took her to ISULU to apply for an ID card. I was given forms for application, I took to chief and assistant chief for signatory. I gave my grandchild the forms to take to the DO ISULU. She left at 9.30am upto 8.00pm. At 8.00pm, her grandmother found her outside standing at the door. I allowed her inside the house without asking her anything. In the morning of 11.8.2018 at 6.00am she left the house without notice or informing where she was going. She came back at 2.00pm and was carried by Motorcycle by a teacher called Sammy.”
71. Both Luyeku and TI changed their evidence at every stage of the disciplinary process, that is, at the initial investigatory meeting at the school, before the Ministry of Education, at the County Discipline panel and at the main hearing by the respondent. Both are in my view unreliable and their testimony to the various panel untrustworthy and must be considered in that light.
72. On the contrary, the Petitioner consistently denied that he had sexual intercourse with TI as alleged in count 1 of the charges against him. He further denied that he made sexual advances to C.M or L.P as alleged in Count 2.
73. The petitioner stated that on 10th August 2018 when he is alleged to have had sexual intercourse with TI he was in school having been given an assignment by the Principal to oversee the construction of the girls’ dormitory and to guide Form 4 students who were in school for revision. He stated that he stayed in school until 5.pm. That several teachers were also in school on that day namely Geoffrey Sakwa, Ayekha Kennedy, Nyamu Ryton, Lilechi Fred and Lyoshi Eric. That the principal was also present. That they took tea and bread for breakfast at 10.20am and ate “Ugali” and “Sukuma Wiki” for lunch. He stated that he left school at 5pm in the company of Mr. Lyoshi and Mr. Sakwa. On reaching the main road he met a Mr. Shiviliti, a teacher at Shukukha with whom he took a soda at Malinya Market before they parted ways at 5.45 pm. That he thereafter went home where he found his wife preparing chapatti while his children were playing in the house. He stated that his wife did not inform him that any visitor had gone to look for him at home.
74. The Petitioner stated that on the same day some students did a quiz which he marked. He submitted the papers as part of his evidence.



75. He stated that the only days TI visited his house were on 5th August, 2018 and on 11th August, 2018 and on both occasions his wife and children were at home.
76. TI confirmed this in her evidence at the hearing on 18th October, 2018 when she stated that on 5th November, (read August) 2018 when she went to the Petitioner's house she met "another woman and children.". She further stated that on 10th (?) she met a maid who cooked fish with Ugali which they ate. That on 11th August she went to the teacher's house to report to him what had happened at home when she arrived late and the petitioner took her back home at around 10.0am. She stated that on 11th August 2018 she met a female maid at the teacher's house.
77. It is not clear why at all the hearings no summons were issued to the teachers whom the petitioner alleged to have been with him at school on 10th August, 2018 to testify or even why they were not directed to write statements.
78. On the issue of the other two alleged victims, it is stated that TI is the one who reported the same to the panel headed by the Deputy Principal which met on 19th September, 2018. There is no mention by TI about the same in any of her statements or in any hearing before any of the four (4) panels that dealt with the issue. It is also worthy to note that the framing of the charge is vague and that neither of the two alleged victims was specific in their statements about the alleged sexual advances by the petitioner. No evidence was advanced to prove the specific allegations that the petitioner made sexual advances to either CM or LP on the alleged dates or at all.
79. It is further worth noting that at all the hearings by the various panels, the witnesses, including the petitioner, were asked leading questions that only elicited the responses desired by the persons putting the questions to the witnesses. Further, the outcomes at each stage of hearing are not supported by the evidence adduced.
80. It is further the court's finding that neither the letter of interdiction, nor the letter inviting the petitioner for hearing gave the petitioner the opportunity to attend the hearing in the company of either a union official or a colleague of his choice as required under section 41 of the [Employment Act](#).
81. What the letter of invitation to the disciplinary hearing required the petitioner to do was to attend the hearing in person together with his witnesses, if any. The letter is reproduced below: -

11th January, 2019

TSC/Disc/No: 0177/11/2018/2019/6

Mr/Mrs/Miss Samuel Namyé

Box 61 – 50127

Nambacha

Re: Invitation For Hearing of Discipline Case

Further to the interdiction letter dated 24th October, 2018, I am directed to inform you that, your case will be heard on 14th February, 2019 at TSC County Director's Office – Kakamega at 8.30am. or soon thereafter. You are invited to attend in person together with your witnesses (if any).

Please bring the following documents which the Commission may wish to examine during the hearing: -

- a. Original copies of your academic and professional certificates;



- b. Last payslip
- c. National identification Card
- d. Certificate of Registration as a teacher;

You are advised to bring your letter of interdiction together with any documents that may be useful in your defence.

You are advised to contact the Teachers Service Commission if communication of decision of the case is not communicated to you within 28 days from the date of the hearing.

Nyoro (ms)

For Secretary/Chief Executive

Teachers Service Commission

82. The Court notes from the copy of payslip on record at the second last page of the Petitioner's bundle of documents that he was a member of Kenya Union of Post Primary Education Teachers (KUPPET).
83. Based on the totality of the evidence adduced before the court it is my finding that the decision to dismiss the petitioner from service and to remove him from the Register of Teachers is not supported by the evidence that was before the Respondent.
84. I however do not find the foregoing to amount to a violation of the Constitution by the Respondent as pleaded by the Petitioner. What the Petitioner proved is in my view unfair termination in terms of sections 41 and 43 of the Employment Act. This is therefore not a proper case for grant of orders of certiorari and prohibition as prayed by the petitioner. The orders appropriate in the circumstances are those provided in section 49 of the Employment Act which include payment of compensation, reinstatement or re-engagement.
85. It is my view that the Respondent has not proved any wrongdoing on the part of the Petitioner. Payment of compensation would therefore not be adequate recompense. Reinstatement is also not available as the Petitioner has been out of employment for more than 3 years.
86. For the foregoing reasons I make the following orders: -
- i. I declare the dismissal of the petitioner and his removal from the Register of Teachers by the Respondent to be unfair.
 - ii. I order that the petitioner be re-instated to the Register of Teachers forthwith.
 - iii. I order that the respondent do re-engage the Petitioner on similar terms as he was at the time of dismissal.
 - iv. The Respondent shall bear the Petitioner's costs.

DATED AND DELIVERED VIRTUALLY IN ELDORET THIS 25TH DAY OF APRIL 2023.

MAUREEN ONYANGO

JUDGE

