



**Wangui v Teachers Service Commission & 3 others (Judicial Review  
E004 of 2023) [2023] KEELRC 2029 (KLR) (18 August 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2029 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
JUDICIAL REVIEW E004 OF 2023  
AN MWAURE, J  
AUGUST 18, 2023**

**BETWEEN**

**TIMOTHY NDIRANGU WANGUI ..... PETITIONER**

**AND**

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

**BOARD OF MANAGEMENT, KIAMUTURI SECONDARY SCHOOL .... 2<sup>ND</sup>  
RESPONDENT**

**TEACHERS SERVICE COMMISSION, MURANGA COUNTY DISCIPLINARY  
COMMITTEE ..... 3<sup>RD</sup> RESPONDENT**

**TEACHERS SERVICE COMMISSION, CENTRAL REGION INVESTIGATION  
PANEL ..... 4<sup>TH</sup> RESPONDENT**

**JUDGMENT**

**Petitioners Case**

1. The petitioner is an adult of sound mind residing and working for gain within Ruiru, Kiambu county and is a former employee of the 1<sup>st</sup> respondent.
2. The 1<sup>st</sup> respondent is a body established under article 237 of the *Constitution* and whose mandate is to exercise disciplinary control over teachers among other roles.
3. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents are agents of the 1<sup>st</sup> respondent.
4. The petitioner avers he was employed by the 1<sup>st</sup> respondent as a grade C2 teacher and has been a teacher at Kiamuturi Secondary School from the year 2014 till his dismissal on August 25, 2022.
5. The petitioner avers he had an encounter with a form four female student who had been absent for 2 days and had visited the school to pick some of her books. He states that it was around 6pm and that



- he was marking his students' assignments when the student requested for her classroom keys which he handed to her and upon picking the said books, the student returned the keys to the petitioner.
6. The petitioner avers that on 2<sup>nd</sup> December he received a letter from the school principal notifying him of allegations made against him that he had engaged in sexual intercourse with one female student and flirted with two others.
  7. The petitioner avers that the school principal thereafter conducted investigations and invited him for a disciplinary hearing before the 2<sup>nd</sup> respondent in which he was found not guilty, however, the sub county director was dissatisfied with the decision. He referred the matter to the 3<sup>rd</sup> respondent who found the petitioner had a case to answer and the case was heard by the 4<sup>th</sup> respondent which recommended the petitioner's interdiction. This culminated to a hearing before the 1<sup>st</sup> respondent's disciplinary committee on August 25, 2022. Consequently, the petitioner received a letter of dismissal accompanied by a notice of removal from the register of teachers.
  8. The petitioner argues that the 1<sup>st</sup> respondent's decision to dismiss him was a breach of his constitutional rights and other statutory provisions and seeks the following orders: -
    - a. A declaration be issued that the respondents actions violated the petitioner's rights as enshrined under article 50(g) and article 47(1) of the Constitution.
    - b. The court issues judicial review orders of *certiorari* to quashing the 1<sup>st</sup> respondent's decision to dismiss the petitioner.
    - c. The court issues judicial review orders of prohibition stopping the 1<sup>st</sup> respondent and its agents from removing the name of the petitioner from the list of teachers.
    - d. The court issues judicial review orders of *mandamus* directed to the 1<sup>st</sup> respondent and its agents to reinstate the petitioner to work.
    - e. The court issues judicial review orders of *mandamus* directed to the 1<sup>st</sup> respondent and its agents to remunerate the petitioner of his dues from the date of interdiction.
    - f. An order of compensation for breach of the petitioner's constitutionally protected rights as well as emotional distress and mental anguish caused by the respondents' actions.
    - g. Any other relief that the court may deem appropriate, just and expedient.

### **Respondents' Case**

9. The respondents opposed the petition through a replying affidavit sworn by Jane Irambu, the Acting Director in charge of Field Services of the 1<sup>st</sup> respondent.
10. The respondents aver that the petition is fatally defective and struck out as it was framed contrary to order 53 of the Civil Procedure Rules and further the petitioner is in breach of section 9 of the Law Reforms Act as he did not seek leave to file the same.
11. The 1<sup>st</sup> respondent is a constitutional body established under article 237 (1) of the Constitution mandated to register trained teachers; to recruit and employ registered teachers; to assign teachers employed by the commission for service in any public school or institution; to promote and transfer teachers; to exercise disciplinary control over teachers; and to terminate the employment of teachers.



12. The 1<sup>st</sup> respondent admitted the petitioner was its employee stationed at Kiamuturi Secondary School and averred that the petitioner was bound to uphold the highest standard of professional ethics based on the guidelines set on the Code of Regulations For Teachers, 2015 (CORT); Code of Conduct and Ethics for Teachers, 2015 (COCE) and Administrative Circulars by the 1<sup>st</sup> respondent.
13. The respondents aver that on March 2022, the school principal got a report from the area chief with respect to the petitioner's immoral conduct with his students and he proceeded to conduct investigations by interrogating the victims, one of the victim's mother and the assistant chief and took their written statements which were forwarded to the school's board of management on November 25, 2021 stating that: He had carnal knowledge with a student JWM a form four student on September 12, 2021. That he flirted with a student JM a form three student in the evening of November 2, 2021 by forcefully hugging her.
14. The respondents aver that the petitioner was then issued a notice to show cause letter dated December 2, 2021 to which the petitioner responded to on December 8, 2021 denying all the allegations. On January 7, 2022, the school's board of management held a meeting to discuss the allegations but the same ended on a stalemate prompting the sub county director (present in the meeting) to refer the matter to the county director for further investigations on grounds that there was an element of conflict of interest in the said meeting.
15. The respondent aver that its Muranga County office invited the petitioner for a disciplinary hearing on February 21, 2022 in which the panel concluded the petitioner had a case to answer and with due regard to the seriousness of the allegations the same was forwarded to the 1<sup>st</sup> respondent's regional offices to which the petitioner was summoned for a further hearing on June 7, 2022 in which the panel concluded the petitioner should be interdicted for immoral behaviour in breach of clause 1 (i) and (iv) of the 3<sup>rd</sup> schedule of the Teachers Service Commission Act. Further on August 25, 2022, the petitioner was invited for a further hearing at the 1<sup>st</sup> respondent's headquarters and was subsequently removed from the list of teachers and the same communicated to the petitioner *vide* a letter dated September 5, 2022.
16. The respondents aver that all through these proceeding it interviewed and interrogated the petitioner and all witness whose evidence and statements were collected and the petitioner was given a chance to respond to each allegation raised against him.
17. It is the respondents' position that it followed due process leading to the dismissal and removal of the petitioner's name from the register of teachers and that the same conformed to the rules and principles of natural justice and its regulations set under regulation 146 and 147 of the CORT.
18. The respondents further aver that the petitioner was granted a fair hearing on the grounds that: -He was granted sufficient time to avail exculpatory evidence exonerating him from his immoral behaviour. He was invited for a hearing, interviewed by the respondent and given a chance to make oral presentation in his defence during the hearing before the 2<sup>nd</sup> respondent and subsequent disciplinary panels by the other respondents. The respondents informed the petitioner of the allegations levelled against him and duly served with the interdiction notice setting out the particulars of breach. The interdiction letter informed the petitioner of his right to put in a defence to the allegations against him.
19. The respondent's further case is that the petitioners have not challenged the grounds upon which their dismissal is premised and have not produced any documents to counter the grounds/reasons for their summary dismissal.
20. Parties filed submissions in support of their various position in the matter.



## Petitioners Submissions

21. It is submitted that the respondents' decision to dismiss the petitioner is based on an illegality since the respondents acted ultra vires. The petitioner sought to rely on regulation 146 (10) of the 1<sup>st</sup> respondent's CORT which states where the report of the investigation panel discloses that an offence has been committed, the Board of Management or the county director or the secretary shall where necessary, issue an administrative warning in writing; where a teacher's misconduct is as result of a medical condition, recommend to the Commission secretary for approval of any leave or further direction as the case may be; or interdict the teacher using the letter of interdiction set out in the thirty fourth schedule. The petitioner further relied on the decision of *Republic v Technology* (Judicial Review E002 of 2021) [2022] KEHC 494 (KLR) (12 May 2022) (Judgment) in which the court relied on the guidance of the Ugandan case *Pastoli v Kabale District Local Government Council & others* [2008] 2 EA 303 where it was held as follows:

“In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice or to act with procedural fairness towards one to be 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. In response to the respondents' argument that the petition is not legally framed, the petitioner submitted that the petition is based on violation of constitutional provision and thus needs not to seek leave as provided under order 53 rule 1 of the *Civil Procedure Rules* as well as section 8 and 9 of the *Law Reforms Act* and relied on the decision of in *Masai Mara (SOPA) Limited v Narok County Government* Nairobi High Court petition number 336 of 2015 it was held that:

“On the issue of the application of order 53 of the Civil Procedure Rules to a constitutional petition where a party seeks judicial review reliefs, I must hasten to point out that since the promulgation of the *Constitution* in 2010, administrative law actions and remedies were also subsumed in the *Constitution*. This can be seen in the eyes of article 47 which forms part of the bill of rights. It is safe to state that there is now substantive constitutional judicial review when one reads article 47 as to the right to fair administrative action alongside article 23(3) which confers jurisdiction, on the court hearing an application for redress or a denial or violation of a right or freedom in the bill of rights, to grant by way of relief an order for judicial review. Order 53 of the Civil Procedure Rules do not consequently apply to constitutional petitions where the court is expected to exercise a special jurisdiction which emanates from the *Constitution* and not a statute. I consequently decline to accede to the



respondent's contention that the petitioner ought to be denied the reliefs sought on the basis that the petition was filed more than six months after the action complained of took place."

### **Respondent's Submissions**

23. It is submitted for the respondents that the issues for the court to determine are whether the 1<sup>st</sup> respondent had a justifiable reason to dismiss the petitioner; whether the petitioner was accorded a fair hearing and whether the petitioner is entitled to the prayers sought.
24. The respondent submitted that it discharged its obligation under section 43(1) of the *Employment Act* as it is very clear from the oral and written evidence investigatory evidence before the investigatory and disciplinary panels that the petitioner had breached the terms of his employment on account of having sexual intercourse with a student and flirting with another student and relied on *Kenya Power & Lighting Company Limited v Aggrey Lukorito Wasike* [2017] eKLR where the court held: -

"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."
25. The respondents further submitted in establishing its decision it relied on in addition to the witness statements, it relied on circumstantial evidence and relied on *Teachers Service Commission v Joseph Okoth Opiyo* [2014] eKLR where the court held: -

"In matters of sexual immorality, it is not easy to get eyewitness evidence as such acts are committed behind closed doors. Such cases are, in most cases, proved by circumstantial evidence of opportunity to commit the same."
26. The respondents further submitted that the petitioner was accorded a fair hearing having been taken through the stipulated disciplinary process under the CORT.
27. Finally, the respondents submitted that the petitioner has failed to demonstrate how his constitutional rights were allegedly violated by the respondents and that he has not presented any evidence in support of the said violation. The respondents holds the petition is devoid of merit and ought to be dismissed.

### **Analysis and Determination**

This case raises two issues for determination

- a. Whether the petitioner's constitutional rights violated by the respondents
  - b. Whether the 1<sup>st</sup> respondent acted ultra vires and the decision to dismiss the based on an illegality
  - c. Whether the petitioner is entitled to the reliefs sought
  - D. Whether the petitioner's constitutional rights violated by the respondents
28. This petition is premised on article 50 (g) of the *Constitution*, however the petition has heaving relied on the *Teachers Service Act* and the Teachers Service Commission Code of Regulations for Teachers, 2015 ('CORT') and not the constitutional provision it is premised on.



29. In the decision, *Satrose Ayuma & 11 others v Registered Trustees of the Kenya Railways Staff Retirement Benefits Scheme & 3 others* the court held: -

“This being a constitutional petition, it is now a well settled principle that the petitioners ought to demonstrate with some degree of precision, the right they allege has been violated, the manner it has been violated and the relief they seek for that violation – See *Anarita Karimi Njeru v Republic* [1976- 80] 1 KLR 1272 and *Trusted Society of Human Rights Alliance v Attorney General and others* petition No 229 of 2012. This is important not just to allow the respondents to know the case that they have to answer, but also to enable the court make a clear determination on the alleged violations. I shall say no more.”

30. With due regard to the matter in this court, the petitioner has failed to demonstrate his contention of not being accorded to a fair hearing as enshrined under article 50(9) of the *Constitution*. He has not shown how rights have been violated by the respondents therefore disqualifying this as a constitutional petition.

31. Further the respondents have given a detailed chronology process of the disciplinary process meted on the petitioner culminating to his dismissal. They have further satisfied the court that its investigations and subsequent hearings were done in accordance with the Teachers Service Commission Code of Regulations for Teachers, 2015 (‘CORT’) as well as the reasons upon which the dismissal is premised.

#### **Whether the 1<sup>st</sup> respondent acted *ultra vires* and the decision to dismiss the based on an illegality**

32. The 1<sup>st</sup> respondent is a constitutional body established under article 237 (1) of the *Constitution* and whose function are clearly 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.”

33. Section 34 (1) and (3) of the *Teachers Service Commission Act*, 2012 states the 1<sup>st</sup> respondents disciplinary control over teachers as follows: -

- “(1) A registered teacher shall be deemed to be a teacher in the teaching service, save as otherwise provided in this Act or any other law, and shall be subject to the law and regulations from time to time in force in respect of the service.
3. The Commission, after interdicting a teacher, may take the following disciplinary actions against a registered teacher—
  - a. issue a warning letter



- b. surcharge;
- c. suspend for such period not exceeding six months;
- d. cancel a registration certificate and remove the name of the teacher from the register;
- e. retire in the public interest;
- f. dismiss;
- g. terminate services; or
- h. undertake any other lawful action as it may consider appropriate.”

34. Section 146 of Teachers Service Commission Code of Regulations for Teachers, 2015 provides as follows: -

- (1) The Commission shall upon receiving an allegation touching on a teacher's professional misconduct institute investigations either directly or through its agents.
- (2) An investigation under this regulation shall where the allegation is made against a teacher other than a head of the institution be instituted by the—
  - (a) Board of Management of the respective educational institution, acting as an agent of the Commission;
  - (b) County Director in an institution where there is no functional Board of Management, by constituting a team of not less than three technical officers; or
  - (c) Heads of institution, in consultation with the boards of management as the case may be, and the county director, jointly where the allegations made relate to a teacher in an institution other than the one the teacher is stationed.

.....

.....
- (8) The Investigation Panel shall, upon completing the investigation compile a written report in regard to the teacher's disciplinary status and shall present the report to the Board, the County Director and the Secretary.
- (9) The Board of Management or head of institution or any other agent shall, in conducting the investigations liaise with the county director's office for the purpose of offering technical advice.
- (11) The Commission or an officer acting under its direction may undertake direct investigation into any allegation and may recommend the interdiction of a teacher in accordance with these Regulations.”

35 The facts as presented are that the principal of Kiamuturi Secondary School received a report from the area chief of immoral behaviour of the petitioner in relation to his students. The petitioner was taken through an elaborate disciplinary process for allegedly having sexual intercourse with one of his students and forcefully hugging another student. He was also accused of approaching another student through social media platform.



- 36 He was invited for a disciplinary meeting before the board of management on January 7, 2022 and board found he was not guilty. He however was invited before the County Disciplinary Committee as it was found the hearing before the board was conflicted at the Teachers Service Commission office on February 21, 2022 and the committee held he had a case to answer.
- 37 He says he was also invited to the regional investigative panel on June 7, 2022 and he then received an interdiction letter. He cleared from the school on July 1, 2022.
- 38 He however was called to make a defence to the Teachers Service Commission on July 15, 2022 and appeared before Teachers Service Commission disciplinary committee on August 25, 2022. After that he received a dismissal letter from Teachers Service Commission with effect from August 25, 2022.
- 39 The petitioner alleges that according to section 146 (10) of the Teachers Service Commission Code of regulation if the investigating panel finds the teacher is guilty as charged the management board can only give such a teacher a warning letter or give him an interdiction letter. He avers that since the investigating panel found the petitioner not guilty all other processes were illegal.
- 40 The court finds that in section 146(8) of the said code of regulation it provides that if the investigating panel shall upon completing the investigation compile a written report in regard to the teachers disciplinary status it shall present the report to the board, the county director and secretary.
- 41 Also section 146(11) provides that the commission or an officer acting under its direction may undertake direct investigation into any allegation and may recommend the interdiction of a teacher in accordance to these regulations.
- 42 Section 50 of the said code authorises the commission to consider all the evidence, the investigation report and determine each case of interdiction whenever it is alleged that a registered teacher should be disciplined in accordance with these regulation.
- 43 Article 252(1) of the constitution of Kenya mandates every independent commission to investigate on its own initiative or on complaint made by a member of the public. (TSC) Teachers Service Commission is one such a commission.
- 44 The court finds that upon the disciplinary hearing by the management board even though the majority entered a response of guilt he was declared not guilty and so it was only fair for the commission to investigate the matter in greater depth.
- 45 The statements made by the alleged victims of sexual harassment are very clear and believable. These are ladies who are over 18 years and so are adults. It is incredible that they allege they were forced to write the said statements by the principal and the deputy principal. There were conflicts therefore from the statements produced in court by the said victims JW, AKA and JM and the *viva voce* evidence where it was alleged they recanted their evidence.
- 46 The court will not embark on speculation as to what happened between when the students wrote their statements which sounds credible evidence to the time of hearing. The report from the board of management was that there seems to have been a lot of interference with the case and that explains why it was referred to the Teachers Service Commission. The court will not say more on that matter. Furthermore there is no iota of evidence to show there was malice to incriminate the petitioner neither from the Principal of Kiamuturi Secondary School nor from the three victims or their parents. As it is *res ipsa loquitur* (things speak for themselves).



47 The court is persuaded on the burden of proof by the case of Teachers Service Commission v Joseph Okoth Opiyo civil appeal No 8 of 2014 where court stated:

“in matters of sexual immorality, it is not easy to get eye witnesses evidence as such acts are committed behind closed doors. Such cases are in most cases proved by circumstantial evidence of opportunity to commit the same.”

48 Also as held by the court in Tom Ocharo vs Teaches service commission (2022) eKLR “section 43 of Employment Act only requires to have reasonable ground of a genuine belief that the employee was engaged in the conduct alleged against him which belief leads employer to terminate the contract of employment.

49 Flowing from the above the court is persuaded the respondents had a valid reason to terminate the claimant from their employment and indeed acted within its constitutional mandate and did not act *ultra vires*. The school board of management acted as agent of the 1<sup>st</sup> respondent as well as the school principal and as provided in section 146 of CORT. Section 146(11) of CORTG clearly mandate the 1<sup>st</sup> respondent to undertake direct investigation into any allegation and so the petitioner’s allegations are not merited. The petitioner has not proved breach of his constitutional rights by the respondents.

50 The prayers in the petition dated January 9, 2023 are therefore found to be unmerited and are therefore not granted and the entire petition fails in its entirety.

51 The only guidance the court would raise is the payment of salary in the months claimant was on interdiction. The respondent to work it out and report to court on October 5, 2023 as to whether they paid him those months or not.

No orders as to costs.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 18<sup>TH</sup> DAY OF AUGUST 2023.**

**ANNA NGIBUINI MWAURE**

**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> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open Court. In permitting this course, this Court has been guided by Article 159(2)(d) of the Constitution which requires the Court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 1B of the Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this Court the duty of the Court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.**

**A signed copy will be availed to each party upon payment of Court fees.**

**ANNA NGIBUINI MWAURE**



**JUDGE**

