



**Bosire v Teachers Service Commission (Petition E014 of 2022)  
[2023] KEELRC 2024 (KLR) (4 August 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2024 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E014 OF 2022**

**B ONGAYA, J**

**AUGUST 4, 2023**

**IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 22, 23, 25 (C)  
27, 28, 41, 47, 48, 50, 165, 258, 259 OF THE CONSTITUTION OF  
KENYA**

**IN THE MATTER OF SECTION 5 AND 45 OF THE  
EMPLOYMENT ACT NO. 11 OF 2007**

**AND**

**IN THE MATTER OF SECTION 4 OF THE FAIR  
ADMINISTRATIVE ACTIONS ACT OF 2015**

**BETWEEN**

**DOMINIC ATANDI BOSIRE ..... PETITIONER**

**AND**

**TEACHERS SERVICE COMMISSION ..... RESPONDENT**

**RULING**

1. The respondent filed the notice of preliminary objection on May 29, 2023 through learned counsel Isaac Ochieng', for the Teachers Service Commission. The respondent raised the preliminary objection upon the following grounds that:
  - a) This honourable court lacks jurisdiction under the law to entertain, interrogate and determine the petition as the same is time barred, the substratum thereof having been filled outside the provided time limit.
  - b) That the claim herein is filed out of time allowed under section 90 of the [Employment Act](#). Hence, the court lacks the requisite jurisdiction to entertain the matter in its present form.



- c) That the petition is bad in law, frivolous, vexatious and amounts to gross abuse of the court process.
2. The preliminary objection is against the petition as amended on April 26, 2023 and as filed through Otwal & Manwa Associates Advocates.
  3. This court directed that the preliminary objection be disposed of by way of written submissions. The respective counsel filed submissions for the parties.
  4. The record shows the facts of the case are as follows. The petitioner was interdicted by the letter dated January 19, 2018 upon allegations of immoral behavior in that he had forced sexual intercourse with one of his named class six girl (pupil) on diverse dates between August 28, 2017 and September 5, 2017 and on several times in second term, 2017 in the computer room or office while the petitioner was a teacher at Milimani Primary School. The further allegation was that the petitioner was of infamous conduct in that he threatened to send the said named girl pupil away from school if she reported the petitioner's immoral behavior of forceful sexual intercourse with her in the computer room or office between August 28, 2017 and September 5, 2017; and, in that the petitioner quarreled the said named girl pupil when she refused to heed to the petitioner's advances while a teacher at Milimani Primary School. The interdiction was effective January 19, 2018. By letter dated June 8, 2018 the petitioner was invited to hearing of the disciplinary case on July 13, 2018 at the TSC County Director's Office, Nakuru at 8.30am. By a letter also dated June 8, 2018 the respondent invited the six listed witnesses to attend the hearing. The hearing was to proceed as was scheduled on July 13, 2018 in presence of the petitioner but only two witnesses the Head Teacher and another officer known as CSO were present but the hearing adjourned in view that the key witnesses being the alleged victim pupil, two other pupils and the parent had failed to honour the summons to attend. The hearing was adjourned to take place on October 11, 2018 at Nyahururu. The TSC County Director was directed by letter dated September 25, 2018 to invite by summons all six initial witnesses plus the new head teacher of the school. In the meantime, the claimant had written his response to the allegations as signed and undated but received by the respondent on September 11, 2019. He stated on August 28, 2017 was opening date for third term and assigned three class six girls to clean the computer room located inside the head teacher's office. On the fifth day he assigned the alleged victim girl, alone, to clean the computer store and it is on that date that the girl alleged that the petitioner had raped, defiled and impregnated her. Further, the petitioner stated he had been arrested and on October 30, 2017 was taken to court to take a plea on the related criminal charges. While stating that he assigned the girl on the material date, the petitioner appeared to contradict himself in his response by stating that he had reported to school on September 6, 2017 as he was absent from school on the alleged date of the immoral behavior on account of ill-health. Be it as may, the disciplinary hearing proceeded on October 11, 2018 in presence of the petitioner and the record of the proceedings is filed. The record shows that the petitioner had previously faced another alleged case of defiling a pupil sometimes in August 2012. The record also shows that the pupil confirmed to him that the pupil had been defiled by the petitioner twice and the petitioner confirmed his arrest and being charged. The other witnesses did not attend the hearing.
  5. The further facts of the case on record are as follows. After the disciplinary hearing on October 11, 2018, by letter dated November 1, 2018 the petitioner was dismissed effective October 11, 2018 on grounds that he was of immoral behavior in that he had sexual intercourse with his named class six pupil in the computer room of Milimani Primary School on diverse dates in term two and three 2017 while the petitioner was a teacher at Milimani Primary School. The petitioner applied for review and he attended the hearing on February 21, 2019. His major ground was that the girl in issue, the pupil had not attended as a witness at the disciplinary hearing. However, the record of the review hearing shows that the petitioner confirmed that the girl had appeared during the investigations stage and he had by



himself heard the girl say that the petitioner had defiled her as was alleged. By the letter dated March 21, 2019 the respondent communicated that the dismissal decision had been upheld. The letter further stated thus, "Please note that as per regulation 156(9) of the TSC Code of Regulation for Teachers, this decision of the review committee is final." The further material on record is the incomplete judgment in the criminal case No 820 of 2017 against the petitioner delivered on April 15, 2019 by Honourable Abraham K Gachie, Senior Resident Magistrate, Maralal. The judgment shows that the petitioner was acquitted under section 215 of the Criminal Procedure Code.

6. The preliminary objection is that the claims and prayers in the petition arise from the dismissal of the petitioner and when the petition was filed on January 19, 2022, the time of limitation of three years had lapsed long lapsed and as provided for in section 90 of the Employment Act, 2007. The petitioner's case is that the cause of action being time barred, the court lacks jurisdiction to hear and determine the suit. It is submitted for the petitioner that the decision on his review application was delivered on March 21, 2019. That was the decision he was aggrieved with and the three years were lapsing on March 21, 2022 being within the time of limitation of three years. It is submitted for the petitioner that section 90 of the Act states, "90. Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof." However, as submitted for the respondent, the claimant is clearly complaining about the dismissal and not the refusal by the respondent to set aside the dismissal decision following the rejection of the review application on March 21, 2019. Thus, the prayers in the petition are as follows:
  - a) A declaration that the respondent's refusal to vacate dismissal orders following the finding of the criminal court in *Republic -Versus- Dominic Bosire* Case No 820 of 2017 is unconstitutional.
  - b) An order of *certiorari* quashing the decision to dismiss the petitioner by the respondent.
  - c) An order of *mandamus* directing the respondent to reinstate the petitioner to employment.
  - d) Damages for wrongful termination.
  - e) Costs of the petition.
7. The decision of dismissal to be quashed is the one conveyed in the letter dated November 1, 2018 so that as urged for the respondent, the three years were lapsing on or about November 1, 2021. The decision on review was by letter dated March 21, 2019 long before November 1, 2021. Similarly, the acquittal judgment in the criminal case was delivered on April 15, 2019 being more than 2.5 years before the lapsing of the time of limitation on November 1, 2021. The court considers that- want of exhaustion of the review procedure or even want of hearing and determination of the related criminal case fail to a proper or good reason for the petitioner to file the petition outside the prescribed statutory time of limitation of three years. No explanation was given. The court also finds that the dates in issue were not in dispute and thus the preliminary objection passed the well settled test of a pure point of law based on undisputed facts. As submitted for the respondent, the issue of time barring goes to the root of jurisdiction and in the instant case the cause of action is time barred and the court returns that it lacks the jurisdiction to hear and determine the petition. The court has considered the employment dispute and all circumstances surrounding the dispute and each party will bear own costs of the preliminary objection and petition.
8. In conclusion the preliminary objection is hereby determined with orders:
  - a) The preliminary objection is upheld and the petition dismissed.



b) Each party to bear own costs of the proceedings.

**SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS  
FRIDAY 04<sup>TH</sup> AUGUST, 2023.**

**BYRAM ONGAYA**

**PRINCIPAL JUDGE**

