



Barasa v Teachers Service Commission (Judicial Review Miscellaneous Application 5 of 2020) [2023] KEELRC 2873 (KLR) (2 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2873 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
JUDICIAL REVIEW MISCELLANEOUS APPLICATION 5 OF 2020
MA ONYANGO, J
NOVEMBER 2, 2023**

BETWEEN

STEPHEN BARASA APPLICANT

AND

TEACHERS SERVICE COMMISSION RESPONDENT

JUDGMENT

1. By a Notice of Motion dated 2nd March 2020, the Applicant herein sought the following orders: -
 - a. An order of Certiorari to remove to this honourable court to be quashed the decision of the Teachers Service Commission dated 20th June 2019 dismissing the Applicant from service.
 - b. An order of Prohibition prohibiting the Teachers Service Commission from proceeding to remove the name of the applicant from the register and if the name has been removed, to be reinstated.
 - c. An order of Mandamus compelling the Teachers Service Commission to withdraw their decision dated 20th June 2019.
 - d. Costs of this application be provided for.
2. The application is supported by the following grounds set out in the statement of facts filed in court on 10th December 2019:-
 - i. The proceedings before the disciplinary committee of the Teachers Service Commission was against the Rules of Natural Justice
 - ii. The committee did not have powers to conduct proceedings on allegations that had been recanted by the complainant and her witnesses. The Respondent's actions was *ultra vires*
 - iii. The proceedings were unfair and unjust



- iv. The Commissioners ignored all the evidence presented before it as given in writing and by way of oral evidence and recorded its own evidence.

The Applicants' Case

3. In the verifying affidavit of the applicant Stephen Barasa sworn on the 28th November 2019, he avers that he is a teacher by profession of TSC no. 371618 and has been a teacher for over 15 years. That prior to his dismissal from service, he was the Principal of St. Augustine Maziwa Secondary School. That In April 2019, he received an interdiction letter dated 23rd March 2019 from the Respondent interdicting him on grounds that he had acted immorally by being in a love relation with his form two student (R.K) and that he had sexual intercourse with her in his residential house at Maili Saba on the 9th December 2018.
4. The Applicant states that in the said letter, he was given 21 days within which to respond to the allegations which response he wrote. The Applicant stated that he was later called to appear before the Teachers Service Commission Discipline Committee on 28th May 2019.
5. That on the said date he proceeded to the offices of the Director at Kitale where he was given copies of letters dated 18th April 2019 from the complainant's parents as well as their affidavits together with that of the complainant. That upon asking what to do with the aforesaid documents, he was advised to read and respond to them during the hearing of his case.
6. The Applicant stated that after he read the said documents he was confused as the complainant had recanted her evidence. That nevertheless he appeared before the Disciplinary Committee on the said date and pleaded his case. The Applicant stated that the complainant was called to give her evidence and she recanted her earlier evidence stating that whatever she had complained about were lies. That she told the panelists that she wished to withdraw the complaint.
7. It was the Applicant's evidence that the mother of the complainant was also called and she too denied the allegations and averred that she was coerced into making the false allegations against the Applicant.
8. The Applicant averred that the 3 other witnesses who were called to testify had a grudge against him. That his witnesses were never given an opportunity to be heard as they were summarily dismissed for flimsy reasons.
9. The Applicant stated that the findings of the disciplinary committee were biased, unfair and against the rules of natural justice. He stated that the conduct of the Commissioners was suspect as they did not record the evidence as presented by the witnesses.

The Respondents' Defence

10. The Respondent filed a Replying Affidavit sworn on 23rd October 2020 by Catherine Morogo Kertich, the Acting Director in charge of staffing of the Respondent. The gist of the Respondents defence is that in November 2018, it received a complaint against the Applicant through the County Director alleging that the Applicant was of immoral behavior. The Respondent immediately constituted a panel chaired by the Deputy County Director, Laikipia (sic) to establish the veracity of the allegations made against the Applicant. In carrying out the investigations, the panel visited the school and the complainant's home, conducted interviews and obtained written statements from several witnesses and eventually generated a report recommending that the Applicant had a case to answer. That based on the overwhelming information, a resolution was made to subject the Applicant to a disciplinary hearing. The Applicant was duly informed of his right to put in is defence which right he exercised in his response to the interdiction letter by denying the allegations. According to the Respondent,



as per the Code of Regulations for Teachers (CORT) the Applicant was invited to the disciplinary hearing and was given an opportunity to present his witnesses during the disciplinary hearing. During the Applicant's disciplinary hearing, the Applicant did not cross examine the witnesses presented by the Respondent particularly the complainant and her mother. After deliberating and evaluating the evidence presented in the matter, the Respondent arrived at the decision to dismiss and remove the Applicant from the register of teachers' which decision was communicated to the Applicant *vide* letters dated 20th June 2019.

11. It is the Respondent position that in determining the Applicant's disciplinary case, it acted impartially, independently and with outmost professionalism and that the resulting decision was fair, just and appropriate based on the merits of the case, the evidence adduced before it and the nature of the offence committed by the Claimant under the provisions of the CORT.
12. At the hearing the parties called witnesses in support of their respective cases.
13. The applicant testified as CW1 on 9th November 2022. In his testimony, the CW1 reiterated that he was interdicted by the Respondent on grounds that he was of immoral behavior and invited to a disciplinary hearing. He maintained that before the said hearing, he was given affidavits and letters from the complainant (R.K) who from the said affidavits, had withdrawn the complaint. CW1 stated that during the disciplinary hearing, the complainant recanted her evidence and maintained that she had been coerced by the teachers to lie against the Applicant. It was his testimony that the complainant's father and mother in their affidavits stated that they had established that the complainant had a boyfriend named Leon and that both of them exonerated the Applicant from the allegations leveled against the Applicant.
14. CW1 stated that although he was allowed to call his witness, the said witnesses were not heard. That 14 days after the disciplinary hearing he received a dismissal letter and a letter removing him from the register of teachers.
15. On cross examination, the Applicant denied sending any money to the complainant. He stated that the complainant's mother was a casual laborer at the school and her salary was used to clear school fees for the complainant. He stated that he would occasionally pay wages to the Complainant's mother as the school did not have a resident account's clerk.
16. It was the Applicant's testimony that the complainant's family had exonerated him from the allegations made against him and that the whole issue was orchestrated by the teachers whom he did not have a good relationship with.
17. On re-examination, CW1 maintained that the witness statements he was given before the disciplinary hearing were handwritten but the one's the Respondent filed in court are typed. He contended that the that the statements had had been edited. He stated that he never met the victim's parents to ask them to change their statements.
18. CW2, the complainant relied on her witness statement recorded on 13th December 2022. According to CW2, on 3rd January 2019, she was at home when two of her teachers, Mary Muthoni and Genevieve Sikolia picked her from her home and took her to a hotel in Kitale town. She was 8 months pregnant at the time. She was told to write a statement addressed to the County Director, and in return, she would be taken to school and her child would be taken care of. It was her testimony that she was told to write that she had a relationship with the Applicant herein.
19. CW2 maintained that later on, she regretted that she had fabricated the lies against the Applicant and that she wrote a letter dated 3rd November 2022 to the Respondent withdrawing her earlier statement.



20. She further stated that she was called to appear before the disciplinary hearing against the Applicant. That she told the committee that the allegations against the Applicant were false and that the child she had delivered was not the Applicant's.
21. On being cross examined, CW2 maintained that the two teachers who picked her from her home dictated the contents of the letter she wrote to the Respondent. CW2 stated that at the time of making the initial statement, she was very depressed and thus fabricated lies against the Applicant.
22. Sarah Anjani testified as CW3. She introduced herself as the complainant's mother. CW3 adopted her witness statement dated 13th December 2022. She maintained that it was after the two teachers went to her home that she sat the complainant down and that is when she realized that the Complainant had lied about having an affair with the Applicant. She stated that they attended the disciplinary hearing against the Applicant and categorically informed the disciplinary committee that the allegations made against the Applicant were false.
23. She further stated that the money paid to her by the Applicant was for firewood and flowers that she supplied to the school. That some of the money went to paying fees for the complainant, and the balance was sent to her phone.
24. CW4 was Elias Anjani, the complainant's father. CW4 reiterated the evidence of CW2 and CW3 that the allegations made against the Applicant were false. He stated that he learnt that his daughter had filed a complaint against the Applicant much later. That he carried out investigations and found that his daughter was pregnant and that the pregnancy was not the Applicant's but of the complainant's boyfriend. It was his testimony that he went to the Respondent's office with CW3 and informed the office that the allegations made by CW2 against CW1 were false.
25. The Respondents on its part called Mary Muthoni who testified as RW1. She adopted her witness statement recorded on 15th June 2022 as her evidence in chief. She introduced herself as a former class teacher of CW2 who was the complainant in the disciplinary case against the Applicant in this case. According to RW1, she confronted CW2 after she noticed that CW2 was not behaving like her usual self and it is then that CW2 confided in her that she had an affair with the Applicant and that she was 8 months pregnant. RW1 stated that CW2 informed her that she was afraid of disclosing the issue to anyone. That is when RW1 took the initiative of taking up the issue with the Respondent and advised CW2 to write a letter to the County Director. RW1 told court that immediately after investigations were done by the Respondent, she noticed that she was being followed by unknown people and got scared. She reported the matter to the police. She testified that she reached out to the complainant and learned that the applicant had gone to her home and pushed her to recant her statement. It was RW1's testimony that the Applicant had built a home for the complainant's parents after the Respondent concluded the investigations. According to RW1, she was helping the complainant in good faith as there were many reports from students that the applicant was having affairs with some students in the school.
26. Catherine Morogo Cheruiyot, the Deputy director, discipline at the Respondent's headquarters testified as RW2. She adopted her affidavit sworn on 23rd October 2020 as her evidence in chief. RW2 stated that after the Respondent received the report of the illicit affair between the Applicant and the complainant, investigations were conducted and the Applicant was thereafter interdicted. RW2 testified that the Applicant was invited to a disciplinary hearing where he presented his case. RW2 testified that before the complainant recanted her evidence, she had been consistent all through about the alleged sexual affair with the Applicant. It was her testimony that after the disciplinary hearing, the Commission found the Applicant guilty and dismissed him from service and also removed his



name from the register of teachers. According to RW2, due process was followed in the dismissal of the Applicant from service.

27. On cross examination, RW2 stated that she appeared in the disciplinary hearing as a representative of the Commission and was not among the panelists. She testified that the composition of the panelists is provided for in the CORT. It was her testimony that preliminary investigations were carried out by the counseling mistress and teacher Genevieve at the school level and that the Applicant being the secretary to the board could not have been informed of the said investigations. She stated the matter was investigated at the County level.
28. RW2 stated that the complainant submitted a letter to the County Director of the Respondent alleging that the Applicant had an illicit affair with her. That a panel was thereafter constituted to investigate the complaint. RW2 maintained that at no point during the disciplinary hearing did the complainant recant her statement. According to RW2, the complainant took an oath, identified the Applicant and was shown her statement which she read. She maintained that even if she would have recanted her statement before the disciplinary hearing, the hearing would still have taken place and a decision made guided by all the evidence before panel.
29. At the close of the hearing the court directed parties to file written submissions. The *ex-parte* applicant's submissions were filed on 16th August 2023 while the Respondent's submissions were filed on 19th September 2023.

Determination

30. I have carefully considered the grounds in the statement of facts, the verifying affidavit, the replying affidavit, the evidence adduced in court as well as the submissions of the parties on record. The issue that presents itself for my determination is whether the Applicant's employment was unfairly, unprocedurally and wrongfully terminated to form a good basis for seeking review orders.
31. Section 45 (1) and (2) of the [Employment Act](#) makes the following provisions regarding unfair termination of employment—
 - (1) No employer shall terminate the employment of an employee unfairly.
 - (2) A termination of employment by an employer is unfair if the employer fails to prove—
 - (a) that the reason for the termination is valid;
 - (b) that the reason for the termination is a fair reason—
 - (i) related to the employee's conduct, capacity or compatibility; or
 - (ii) based on the operational requirements of the employer; and
 - (c) that the employment was terminated in accordance with fair procedure.
32. In *Jane Nyandiko v Kenya Commercial Bank Limited* (2017) eKLR, the Court held, and which was cited with approval by the Court of Appeal in the case of [National Bank of Kenya v Anthony Njue](#) (2019) eKLR, thus;

“Section 45 of the [Employment Act](#) makes provision inter alia that no employer shall terminate the employment of an employee unfairly. In terms of the said section, a termination of an employee is deemed to be unfair if the employer fails to prove that the reason for the termination was valid; that the reason for the termination was a fair reason and



that the same was related to the employee's conduct, capacity, compatibility or alternatively that the employer did not act in accordance with justice and equity.

The parameters for determining whether the employer acted in accordance with justice and equity in determining the employment of the employee are inbuilt in the same provision. In determining either way, the adjudicating authority is enjoined to scrutinize the procedure adopted by the employer in reaching the decision to dismiss the employee; the communication of that decision to the employee and the handling of any appeal against the decision. Also, not to be overlooked is the conduct and capability of the employee up to the date of termination, the extent to which the employer has complied with the procedural requirements under section 41.....”

33. In the instant case, the Respondent averred that it dismissed the Applicant from employment after it was established that he had an illicit affair with his student by the name R.K.
34. According to the Respondent's witnesses and particularly RW1, who introduced herself as the former class teacher of the complainant, she learnt from other students that the complainant and the Applicant had an immoral relationship and upon inquiring from the complainant, she confided in RW1 that she indeed had sexual relations with the Applicant and was 8 months pregnant at the time.
35. RW1 informed the court that she did preliminary investigations and thereafter asked the complainant to forward the complaint to the County Director. That the Respondent conducted independent investigations which led to the Applicant's interdiction. From the record, the Applicant was invited for a disciplinary hearing and later on dismissed from service.

36. The interdiction letter reads:

Thirty Fourth Schedule

Ref/no: TSC/371618/29

Mr/Mrs, Miss: Stephen Barasa

TSC/no: 371618

Grade: Graduate

Status: Principal

Address: P.o. Box 3274-30200 Kitale

Name and Address of Institution: St Augustine Maziwa Secondary School

PO Box 3274-30200,

Kitale

Sub-county: Kwana

County: Trans Nzoia

Letter of Interdiction

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

You are of immoral behavior in that while the Principal at St. Augustine Maziwa Secondary School, you had a love relationship with your Form Three (3) student, R.K.A, Adm(xxx) from third term 2017



and on the afternoon of 9th December 2018, you had sexual intercourse with her in your residential house at Maili Saba along Kitale-Kapenguria Road

Consequently, you are hereby interdicted with effect from 25/03/2019. Before the Commission proceeds to consider and determine your case;-

1. You are invited to make Defense statement/ Response to the Commission in writing 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 your 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 contact address, email and telephone number
7. Forfeit your annual leave

Signed

Name: Boniface Okumu,

Designation: TSC County Director

37. From the above interdiction letter, the issue that led to the dismissal of the Applicant from employment is the alleged immoral behavior of engaging in an illicit affair with his student.
38. In *Zachariah Wagunza & Another v Office of the Registrar, Academic Kenyatta University & 2 others* (2013) eKLR the court reiterated the broad grounds on which the court exercises its judicial review jurisdiction as was stated in the Uganda case of *Pastoli v Kabale District Local Government council and Other* (2008) 2 EA 300, where the court observed *inter alia*, that:

“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 the decision or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires* or contrary to the provision of law or its principles are instances of illegality...

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 is usually in defiance of logic and acceptable moral standards.

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 non-observance of the Rules of Natural Justice act 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.”



39. Again in *Republic v Director of Immigration Services & 2 others Ex parte Olamilekan Gbenga Fasuyi & 2 others* (2018) eKLR it was held that:

“...It is common ground that the prayers sought are Judicial Review remedies and the rules governing grant of judicial review orders do apply. Judicial Review is about the decision-making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and the court should not attempt to adopt the forbidden appellate approach. Judicial Review is the review by a judge of the High court of a decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction- reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised. Judicial Review is a means to hold those who exercise public power accountable for the manner of its exercise. The primary role of the courts is to uphold the fundamental and enduring values that constitute the rule of Law. Judicial Review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the process followed by the decision-maker are proper, and the decision is within the confines of the Law, a Court will not interfere.”

40. According to Halsbury Law of England 4th EDN.Vol. 1 (1) para 12 page 270:

“The remedies of quashing orders (formerly known as orders of Certiorari) prohibiting orders formerly known as orders of prohibition (mandatory orders formerly known as orders of mandamus) ...are all discretionary. The court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief.

41. The objective of Judicial review was also restated in *Chief Constable of the North Wales Police v Evans* (1982)1 WLR where at 1155 Lord Brightman noted:

Judicial Review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power...Judicial Review, as words imply, is not an appeal from a decision but a review of the manner in which the decision was made.

42. In *Commissioner of Lands v Kunste Hotel Limited* (1997) eKLR the court reiterated with approval Lord Brightman’s view and observed:

“...it must be remembered that judicial review is concerned not with private rights or the merits of the decision being challenged but with the decision-making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected.”

43. Recently in SC. Pet. no. 4 of 2022 as Consolidated with Pet. no. 6 and 8 of 2022 *Edwin Harold Dande 3 Others v DPP & 2 Others* the Supreme Court, after reviewing several of its judicial review decisions, observed as follows:



- (85) It is clear from the above decisions that when a party approaches a court under the provisions of the Constitution then the court ought to carry out a merit review of the case. However, if a party files a suit under the provisions of Order 53 of the Civil Procedure Rules and does not claim any violation of rights or even violation of the Constitution, then the Court can only limit itself to the process and manner in which the decision complained of was reached or action taken and following our decision in *SGS Kenya Ltd* and not the merits of the decision per se.
44. The instant suit was brought under section 8 and 9 of the Law Reform Act and Order 53 of the Civil Procedure Rules. This court is therefore mandated to limit itself to considering only the process and manner in which the decision complained of was reached and not the merits of the decision.
45. The process of discipline for teachers in Kenya is contained in the Code of Regulations for Teachers (CORT).
46. It is the Applicants case that there was irrationality, procedural impropriety and violation of the rules of natural justice.
47. On irrationality the Applicant averred that the Respondent had information that the complainant had withdrawn the complaint against him before commencement of the disciplinary proceedings vide a letter and an affidavit.
48. Further, that the complainant and her parents appeared before the Committee and testified that they had withdrawn the complaint against the Applicant for reasons that they had been previously been coerced by two teachers to frame the Applicant. He relied on the case of *Republic v Public Procurement Administrative Review Board ep parte Trippex Construction Company Limited & Another*
49. On procedural impropriety the Applicant relied on the decision in *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 Others*.
50. It is submitted that the Applicant was denied an opportunity to call his two witnesses by the Disciplinary Committee in violation of the rules of natural justice and the right to be heard.
51. It is the Applicants submission that by presenting statements which had been withdrawn and denying him a right to call his two witnesses the Committee acted irrationally and in the process arrived at a decision that adversely affected the Applicant.
52. According to the minutes of the disciplinary hearing against the Applicant which was held on 28th May 2019, the Applicant did not mention anything about the withdrawal of the complaint against him during the disciplinary hearing. He also did not cross examine the complainant or her mother who testified during the disciplinary hearing.
53. Again according to the minutes of the disciplinary hearing the Applicant had three witnesses but only one witness was allowed to testify as the other two could not be identified and were not allowed to give evidence. No mention was made by the Applicant about who the two witnesses who were not allowed to testify are.
54. In his closing remarks after the disciplinary hearing the Applicant did not request for an opportunity to call the two witnesses who were not allowed to testify. He did not even after the hearing file a complaint over the same or raise any issue about the complainant's recounted statements until he filed the instant suit on 3rd March 2020.



55. From the evidence on record I find no proof of impropriety on the part of the Respondent. I further find that the Applicant was given an opportunity to present his case and to cross examine witnesses who testified against him. I find further that at the time of the disciplinary hearing no mention was made either by the Applicant or by the Complainant and her mother about having withdrawn or recanted their statements against the Applicant.
56. I find no evidence of irrationality or procedural impropriety or denial of the right to be heard on the part of the Respondent. It is my finding that the process followed by the Respondent throughout the disciplinary proceedings as well as the making of the decision were fair, objective and in accordance with the procedure in the Code o Regulations for Teachers; the Applicant did not raise any issues over the procedure of the disciplinary hearing. The Applicants Notice of Motion lacks merit.
57. The upshot is that the *ex parte* applicants' application dated 2nd March 2020 is hereby dismissed. There shall be no orders as to costs.

DATED, DELIVERED AND SIGNED AT ELDORET THIS 2ND DAY OF NOVEMBER 2023.

M. ONYANGO

JUDGE

