



David & another v PO (Principal K Girls Sec.) & 2 others (Cause E001 of 2022) [2022] KEELRC 1511 (KLR) (16 June 2022) (Ruling)

Neutral citation: [2022] KEELRC 1511 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT MALINDI
CAUSE E001 OF 2022
BOM MANANI, J
JUNE 16, 2022**

BETWEEN

**EVANS KIMATHI DAVID 1ST CLAIMANT
MTOC (KUPPET KILIFI BRANCH EXECUTIVE SECRETARY) 2ND
CLAIMANT**

AND

**PO (PRINCIPAL K GIRLS SEC.) 1ST RESPONDENT
BOM K GIRLS SEC. SCHOOL 2ND RESPONDENT
TEACHERS SERVICE COMMISSION 3RD RESPONDENT**

RULING

1. The 1st Claimant is a teacher at K Girls Secondary School within Kilifi County in the Republic of Kenya. The 2nd Claimant is the branch secretary, Kenya Union of Post Primary Education Teachers (KUPPET).
2. A student at the School appears to have complained to the 1st and 2nd Respondents that she was being sexually molested by the 1st Claimant. Acting on this complaint, the 1st and 2nd Respondents appear to have carried out preliminary investigations that led them to believe that the student's assertions against the 1st Claimant were justified. As a consequence, on 24th February 2022 acting as an agent for the 2nd and 3rd Respondents, the 1st Respondent issued the 1st Claimant a letter of interdiction pending disciplinary action against him by the 3rd Respondent. It is this interdiction that appears to have triggered the current case.
3. According to the 1st Claimant, the interdiction was ill advised. It was handed down to him even before he was given an opportunity to be heard in response to the accusations leveled against him.



4. The 1st Claimant swears to his innocence. He prays that the interdiction be set aside and that he be allowed to resume duty but at a different institution.
5. It is not immediately clear why the 2nd Claimant has been included in these proceedings. He appears to have no claim against the Respondents. At best, he probably is considered as a witness for the 1st Claimant. But that alone should not be a reason to include him as a party to the action.
6. Alongside the Claim, the 1st Claimant has filed an application under Order 40 of the [Civil Procedure Rules](#) and sections 3 and 3(a) of the [Civil Procedure Act](#). By this application, the 1st Claimant prays for several orders including: an order to stay the interdiction of 24th February 2022; an order directing the Respondents to allow the 1st Claimant to continue discharging his duties pending the determination of the case; and an order that the 1st Claimant is entitled to his full salary and allowances.
7. The Respondents have filed a response to the application for interlocutory relief. In addition, they have filed a Preliminary Objection to the action.
8. The main ground of objection in my view is that the suit has been filed prematurely as the 1st Claimant has not exhausted the internal dispute resolution procedures available to him before resorting to court action. There is also the ancillary question whether this court should hear the matter in view of the jurisdiction donated to the Magistrate's Court to hear and determine employment disputes where the gross monthly salary of the Claimant does not exceed Ksh. 80,000/=.
9. Section 34 of the [Teachers Service Commission Act, 2012](#) mandates the Teachers Service Commission to handle matters relating to the discipline of teachers registered by the Commission. Under the section, the Commission has power to interdict a teacher for any of the offenses set out in the 3rd Schedule to the Act or indeed any other written law. These include offenses relating to immoral conduct on the part of a teacher.
10. The power of the Commission to exercise disciplinary control over teachers registered by it is in fulfillment of its mandate under Section 11 of the Act. This includes monitoring the conduct of teachers.
11. Under Section 47 of the Act, the Commission has powers to make regulations for the better discharge of its functions under [the Constitution](#) and the Act. By virtue of Section 47 (2) (a) of the Act, the Commission is required to compile and publish a code of regulations which shall apply to all registered teachers. Under Section 48 of the Act, the Commission is to develop a code of conduct for its members and staff and registered teachers.
12. In exercise of this mandate the Commission published the Code of Ethics for Teachers, 2015 under Legal Notice No. 162 of 2015. Regulations 22 and 23 of the Code forbid teachers from any form of sexual relation with their learners. Regulation 38 of the Code vests the Commission with the power to investigate any form of misconduct (including sexual misconduct) alleged against a teacher.
13. The Commission also published the Teachers Service Commission Code of Regulations for Teachers, 2015. These regulations address how various issues relating to registered teachers ought to be addressed. Part XI of the regulations is dedicated to the discipline of teachers. Starting with regulations 139 to 156, there is an elaborate procedure on: reporting of cases of indiscipline; investigation thereof; interdiction before trial and protection of the rights of affected teachers; hearing of the affected teachers; processing and communication of the determination; and processing and determination of appeals by way of review.



14. From the record, the 1st Claimant has just begun the journey that covers the disciplinary process that is entrenched in law. In his Statement of Claim, he does not assert that there has been any procedural lapse in the process. The Claimant appears to suggest that the interdiction is synonymous with termination. However, this is clearly not the case. Indeed, from the letter of interdiction, it is clear to this court that the Claimant is expected to be heard on the charges against him. That is why he is asked to file his defense on the allegations made against him.
15. The question to be determined at this point is whether the court should intervene and stall the internal disciplinary process before the 3rd Respondent. The Claimant is of the view that the court should. The Respondents think otherwise.
16. In *Ann Wambui Kamuiru v Kenya Airways Limited* [2016] eKLR, the court had this to say about the power of the court to meddle in an internal disciplinary process by an employer: -

“There is a convergence in agreement that an employer who commences disciplinary proceedings must ensure due process, fair hearing and due regard to natural justice. The Courts on their part will not interfere with proper internal disciplinary processes unless the Court is satisfied that the process is marred with irregularities or it is stage managed towards dismissal.”
17. In *Republic v County Secretary and Head of Public Service, Bomet County & another Ex parte Bernard Soweke* [2017] eKLR, the court expressed itself as follows on the issue:-

“It is true as stated above that Court should never interfere with internal disciplinary processes unless the process is in contravention of *the constitution* or legislation or is in breach of the parties’ agreement/contract and the HR Policies and Manual of the parties or the process is manifestly unfair in the circumstances of the case.

The process so far initiated was commenced with a suspension letter. The Applicant has been asked to respond. He has not.”
18. These two decisions represent a widely agreed position on the role of the court in internal disciplinary processes commenced by an employer. A court of law must take precaution not to meddle in the process unless there is obvious breach of some regulation.
19. The foregoing must be considered in the context of the wider principle of exhaustion. This principle requires that where a procedure has been provided by law to address a grievance, parties should exhaust that procedure before resorting to litigation. This is discussed in a myriad cases including *Robert Khamala Situma & 8 others v Acting Clerk of the Nairobi City County Assembly* [2022] eKLR.
20. On my part I think that the Teachers Service Commission Code of Regulations for Teachers, 2015 provides an elaborate procedure for hearing and clearing the 1st Claimant’s name. He has a duty to submit to this process before approaching this court. He can only overlook the internal process if there is evidence of violation of procedure by the 3rd Respondent in handling his case. At the stage where the process is, I have not seen any evidence in this respect.
21. I have considered the authorities cited by the 1st Claimant in opposition to the objection. In relation to the case of *Fredrick Saundu Amolo v Principal Namanga Mixed Day Secondary School and 2 others* (2014) eKLR, it is clear to me that the observations by the learned judge were without the benefit of considering the import of Part XI of the Teachers Service Commission Code of Regulations for Teachers, 2015 in processing disciplinary cases against members of the teaching staff who are registered



with the 3rd Respondent. Nowhere in her ruling does the learned judge make reference to these regulations. In my view, had she considered these regulations, she probably would have arrived at a different conclusion. With respect to *Samuel Maina Njoroge v Teachers Service Commission and others* (2019) eKLR, it is to be noted that the case was commenced only after the Claimant had gone through the entire procedure set out under the Teachers Service Commission Code of Regulations for Teachers, 2015. The case was therefore properly presented to court.

22. Regarding the effect of legal notice number 6024 of 2018, my view is that whilst the notice donates power to the Magistrate's court to hear matters set out therein, it is not to be understood as divesting this court of jurisdiction over those matters. The court's jurisdiction which is spelt out under article 162 of *the Constitution* as read with section 12 of the *Employment and Labour Relations Court Act* still extends to cover causes contemplated under the said legal notice.

Disposition

23. I hold that the current Claim has been filed prematurely. Accordingly, I find merit in the Preliminary Objection. I therefore strike out the Claim with costs to the Respondents.
24. I should point out that the reason for declining jurisdiction at this stage is purely because the matter is not ripe for determination by the court. Therefore, should the cause proceed before the disciplinary panel set up by the 3rd Respondent and the Claimant comes to the conclusion that the process was either procedurally or substantively unfair, he will still be entitled to invoke the court's jurisdiction at that stage for relief that he will deem fit.

DATED, SIGNED AND DELIVERED ON THE 16TH DAY OF JUNE, 2022

B. O. M. MANANI

JUDGE

In the presence of:

No appearance for the Claimant

Kalugi for the Respondents

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 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M. MANANI

JUDGE

