



REPUBLIC OF KENYA



KENYA LAW
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**Ondara v Teachers Service Commission (Petition E042 of 2021)
[2022] KEELRC 13275 (KLR) (24 November 2022) (Judgment)**

Neutral citation: [2022] KEELRC 13275 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
PETITION E042 OF 2021
CN BAARI, J
NOVEMBER 24, 2022**

BETWEEN

JEREMIAH DAUGLAS ONDARA PETITIONER

AND

TEACHERS SERVICE COMMISSION RESPONDENT

JUDGMENT

1. The petition herein is dated June 24, 2021, and filed on June 25, 2021. The petitioner seeks the following reliefs:
 - i. A declaration that whereas the Teachers Service Commission has been given the function of registering trained teachers, article 237 of the Constitution has not given it the function of deregistering and/or removing those registered trained teachers from the register, and consequently that section 30 of the Teachers Service Commission Act No 20 of 2012, in so far as it confers upon Teachers Service Commission the function, of removing a teacher from the register of trained teachers, that is not expressly set out article 237(2)(a-f), that section is inconsistent with article 237 of the Constitution, and thus null and void and it be struck out for inconsistency.
 - ii. A declaration that the decision of the respondent of removing the petitioner from the register of trained teachers is unconstitutional, null and void and the same be set aside.
 - iii. A declaration that the respondent infringed on the petitioner's rights under article 47 and 50 of Constitution in conduction the disciplinary hearing and in making their decision and consequently, the petitioner's rights under articles 41, 43 and 55 are threatened and that the entire decision of the respondent be declared null and void and the respondent directed to restore the petitioner to his employment with the respondent.
2. The petition is premised on the following grounds:



- i. That the petitioner sought employment with the respondent, and was employed and deployed to St Elizabeth Likuyani Girls in September, 2018.
- ii. The petitioner avers that a complaint was lodged with the respondent against him being case no 0299/08/2019/20, and the respondent proceeded to dismiss the petitioner from its service without affording him an opportunity to hear and cross examine the complainant.
- iii. The petitioner avers that he proceeded to secure another employment opportunity with Chemelil Sugar Academy, where he is currently working. The petitioner further avers that his current employer, in a letter dated May 28, 2021, has brought to his attention, information from the respondent's online web services that the respondent removed and deregistered the petitioner from the register as a trained teacher, and the current employer is now threatening to take disciplinary action against him based on that information that may include summary dismissal from his employment.
- iv. The petitioner avers that article 237(1) of the Constitution establishes the respondent, and that article 237(2)(a-c) of the Constitution sets out the functions of the respondent to include; to register teachers, recruit and employ registered teachers, exercise disciplinary control and terminate the employment of teachers.
- v. The petitioner avers that article 237 of the Constitution creates all the functions of the respondent and does not contemplate that the respondent shall get other additional functions from elsewhere otherwise than those set out article 237(a-f) of the constitution.
- vi. The petitioner further avers that whereas the respondent has been given the function of registering trained teachers, the Constitution has not given the respondent the function of deregistering and/or removing those registered trained teachers from the register.
- vii. The petitioner states that by removing and deregistering him from the register of trained teachers, the respondent exercised a function that it does not have, and that their decision is ultra vires and is expressly inconsistent with article 237 of the Constitution, hence null and void.
- viii. The petitioner avers that while the respondent has got the function of exercising disciplinary control over the petitioner as a teacher generally, and also terminating the employment of the petitioner from the respondent's employment, that disciplinary control is only limited to removing the petitioner from its payroll and not from the register of trained teachers.
- ix. The petitioner further avers that the register contemplated under article 237(a) of the Constitution is a data register that captures all persons who have trained as teachers in Kenya and is separate and distinct from the register of teachers in active employment of the respondent. The petitioner avers that the register of trained teachers is thus not a property of the respondent but rather a property of the public.
- x. The petitioner states that the respondent relied on section 30 of the Teachers Service Commission Act No 20 of 2012, in removing and deregistering him from the register of trained teachers.
- xi. The petitioner further avers that section 30 of the Teachers Service Commission Act, in so far as it confers upon the respondent a function of removing a teacher from the register of trained teachers, that is not expressly set out article 237(2)(a-f), is inconsistent with article 237 of the Constitution and the section/provision is thus null and void to the extent of the inconsistency.



- xii. The petitioner avers that the procedure contemplated at section 30 of the [Teachers Service Commission](#) is separate and distinct from any disciplinary proceedings/hearing conducted by the respondent against a teacher, and the same dictates a fresh inquiry where trained teacher, who is sought to be removed, is given an opportunity to be heard in the interest of fair hearing;
 - xiii. The petitioner states that the respondent was not afforded a hearing in relation to the deregistration, hence not afforded the right to fair trial before his name was removed from the register of trained teachers' contrary to the rule of natural justice and article 50 of the [Constitution](#).
 - xiv. The petitioner avers that the decision of removing the petitioner from the register of trained teachers is unreasonable and unlawful and the same should be set aside.
 - xv. The petitioner avers that in so far as the respondent conducted and presided over the disciplinary hearing of the petitioner and also proceeded to exercise their inconsistent powers under 30(1)(e) of the [Teachers Service Commission Act](#), contrary to the call of article 50 of the [Constitution](#), the respondent's decision is null and void and should be set aside in its entirety.
 - xvi. The petitioner finally avers that the cumulative effect of the unconstitutional decision of the respondent as set out herein, is a demonstration that the petitioner's right to employment and to earn a living have been threatened and violated and his rights under articles 41, 43 and 55 cannot be achieved.
 - xvii. The petitioner avers that his legitimate expectation to natural justice, due process and a fair trial has been infringed upon by the respondent.
3. The petitioner contends that the respondent's decision offends the following articles: -
- a. 20 (1) (2) & (3) (b) on protection of fundamental rights to be mandatorily protected by the court;
 - b. 22 (1) on the right to institute proceedings acting in both the private and public interest;
 - c. 23 (1) & (3) on the right to an injunction and conservatory orders; and
 - d. 24, 26, 41, 43, 47, 49, 50, 55 of the [Constitution of Kenya, 2010](#).
4. The respondent replied to the petition vide a replying affidavit sworn by one Mrs Mary C Rotich on September 13, 2021. The respondent's case is that:
- i. It is a creature of the [Constitution](#) as buttressed by statute law; the [TSC Act](#), which framework has donated to it a dual role to regulate the teaching service as a profession and to undertake various teacher management functions for those engaged in public service.
 - ii. The respondent avers that it derives its objects and authority from article 249(1), which mandates it to protect the sovereignty of the people, secure the observance by all state organs of democratic values and principles and promote constitutionalism
 - iii. The respondent further avers that in promoting constitutionalism, it has a duty under article 53 to protect learners from any form of abuse including sexual abuse and always considers the best interest of the learner.
 - iv. The respondent states that every learner under article 43 has a right to education, and that it has a role in ensuring actualization of this right by creating a conducive and safe learning environment for learners.



- v. The respondent avers that article 94 *inter alia* empowers the legislature to pass legislation to give full meaning and to operationalize the spirit of the Constitution under article 237(2), hence the enactment of the TSC Act.
- vi. The respondent states that the teaching service, like is the case with other professions/ disciplines, is a regulated service and the power to admit and remove the petitioner from the register of teachers is both express and implied.
- vii. The respondent states that article 252(d) of the Constitution empowers the respondent to perform any function or exercise any power prescribed to it by legislation. The respondent further contends that in this regard, section 30 of the TSC Act, stipulates that following inquiry, an errant teacher may be removed from the aforesaid register.
- viii. It is the respondent's position that section 34 (3) of the TSC Act, contemplates a disciplinary process leading to removal of the name of a teacher from the register of teachers. The respondent further avers that the process the petitioner was subjected to was an administrative inquiry that was reasonably executed and in keeping with all the Constitutional requirements.
- ix. The respondent further contends that the process it undertook in terminating and deregistration of the petitioner, constitutes a lawful and fair inquiry, in keeping with section 30(e) of the TSC Act.
- x. The respondent further avers that the constitution vests it with the power to regulate teaching service, hence is the custodian of the register of teachers. The respondent further avers it exercises the related and inherent power granted to it by section 30(2) of the TSC Act, to remove a teacher who is in breach and/or fails to meet the prescribed standards of the profession.
- xi. The respondent avers that it acted impartially, independently, and within the confines of the law hence, the decision to dismiss and remove the name of the petitioner from register of teachers was fair, just and appropriate as it was based on the merits of the case and the nature of the offence committed.
- xii. The respondent further avers the petitioner was present during the disciplinary hearing together with other witnesses, when the charge was read to him and to which he pleaded guilty. The respondent states that the petitioner was given an opportunity to mitigate before a decision was reached.
- xiii. The respondent further avers that the Code of Conduct for teachers provides for offences and punishment for each offence, and the general procedures for the disciplinary hearings. It is the respondent's further case that immoral behaviour with, or towards a learner including sexual intercourse or any form of sexual abuse of such learner is one such offense that the Code stipulates may lead to removal from the register of teachers.
- xiv. The respondent states that upon establishing that the petitioner was of immoral behavior having admitted engaging in sexual intercourse with a learner, acted within its power and the law by removing the name of the Petitioner from the register of teachers.

The Petitioner's Submissions

- 5. The petitioner submits that all trained teachers in Kenya have an inviolable right of being registered as trained teachers by the Teachers Service Commission.



6. It is the petitioner's further submission that the function given to the respondent to exercise disciplinary control over teachers, is separate and distinct from that of registering trained teachers, and as such, the respondent cannot, while in the process of exercising that function of disciplinary control, exercise it in such a manner that extinguishes the right of a trained teacher of being registered as one.
7. The petitioner submits that the effect of the implementation of the respondent's decision deregistering him, completely extinguishes the right of a trained teacher to be so recognized, and in effect, nullifies and voids the certificate(s) acquired by the trained teacher through a rigorous process of training, be they a certificate, a diploma or a degree.
8. The petitioner further submits that the constitution while giving the respondent the function, did not intend the respondent nullifies or voids any teacher's certificate be it a certificate, diploma or degree.

The Respondent's Submissions

9. The respondent submits that as a regulator, it has a duty to ensure that the names on the register of teachers reflect the members authorized/eligible to teach, which duty is exercised by the power bestowed to it by section 30 of the [TSC Act](#) to remove from the register the name of any person who exit the teaching service through inter alia natural attrition, dismissal in the event of breach or suffers mental illness.
10. It is submitted for the respondent that in considering the constitutionality of the impugned section, the court to not only look at its purpose, but also to apply the principles under article 259 of the [Constitution](#) for reason that every legislation needs to be interpreted or read in a manner that is constitutionally compliant.
11. The Respondent further submits its core mandate is derived from the [Constitution](#) and legislation, and thus the Court should interpret the roles of the Respondent under Article 237(2) broadly in consideration of its others powers and functions under the [TSC Act](#).
12. The Respondent further submits that there is a general presumption that every legislation is constitutionally valid and the burden to prove otherwise lies with the person challenging the constitutionality of the statute. The Respondent sought to rely in Nairobi Petition 484 of 2014: [LNW v Attorney General & 3 others](#) for this proposition.
13. The Respondent submits that just like all other professional regulating bodies, it has the duty to serve and protect the public interest with respect to the teaching profession governance and the conduct of its members.

Analysis and Determination

14. I have considered the pleadings and the parties' submissions. The issues for determination are:
 - i. Whether section 30 of the [Teachers Service Act](#) is unconstitutional.
 - ii. Whether the petitioner was unfairly deregistered/removed from the register of teachers.



Whether section 30 of the Teachers Service Act is unconstitutional.

15. It is now settled that this court has the power to interpret the constitution on matters within its jurisdiction. In *International Centre for Insect Physiology and Ecology (ICPE) vs Nancy Minally* [2018] eKLR the Court of Appeal held;
- “27. There cannot be any argument that the ELRC clothed with jurisdiction to hear and determine such constitutional issues as and when they arise from employment and labour relations. Any doubts on that jurisdiction were settled in the case of *United States International University (USIU) vs Attorney General* [2012] eKLR which was upheld by this Court in *Daniel N Mugendi vs Kenyatta University & 3 others...*”
16. Article 237 of the *Constitution* establishes the Teachers Service Commission and assigns it functions as follows: -
- “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.”
17. Section 23 of the *Teachers Service Commission Act, 2012*, states thus on registration of teachers: -
- “(1) The commission shall, in accordance with article 237 of the Constitution, be responsible for the registration of trained teachers in the teaching service.
- (2) A person shall not engage in the teaching service unless such person is registered as a teacher under this Act.”
18. Section 25 of the Act, provides the following requirements for one to qualify for registration as a teacher:
- “(1) A person who qualifies to be registered as a teacher under this Act may apply to the Commission in the prescribed manner.
- (2) An application made under subsection (1) shall be accompanied by— (a) certified copies of certificates and other documents as are necessary to prove the applicant’s qualification for registration; and
- (b) the prescribed fee.”



19. Further, section 27 of the TSC Act, provides instances when the commission would refuse to register a teacher, as follows: -

“The Commission shall not register a person as a teacher if such person—

- (a) does not possess the prescribed qualifications;
- (b) is not of good moral character;
- (c) has been convicted of a sexual offence or an offence committed against a learner;
- (d) has been convicted of a criminal offence which, in the opinion of the Commission, renders the person unfit to be a teacher;.....”

20. The petitioner’s assertion is that the mandate given to the Teachers Service Commission (TSC) under article 237(2)(e) of the Constitution of exercising disciplinary control, is distinct and separate from the function assigned to it in respect of registration of teachers, and that it cannot use disciplinary control to extinguish the rights of a trained teacher by removing the teacher from the register.

21. The petitioner then goes on to assert that to allow a teacher who is already registered to be deregistered arising from an act of misconduct, is unconstitutional, and hence his prayer for the court to declare section 30 of the TSC Act as being unconstitutional.

22. As submitted by both parties, the power of the Commission to register teachers emanates from the Constitution, and is thus undisputed. The TSC Act, then goes on to set out the qualifications and other requirements that are condition precedent to the registration, as well as instances when the registration can be declined, and finally under the impugned section 30, the grounds for deregistration.

23. Section 30 of the TSC Act states”-

“(1) The Commission may, after inquiry, cause to be removed from the register the name of any person—

- (a) who has died;
- (b) who the Commission is satisfied has obtained registration through fraudulent means;
- (c) who has been convicted of a sexual offence or an offence against a pupil or student;
- (d) who has been convicted of a criminal offence which, in the opinion of the Commission, renders the person unfit to be a teacher;
- (e) who the Commission has directed should be removed as a result of disciplinary proceedings instituted under this Act; or
- (f) suffers from such physical or mental illness or infirmity which renders the person incapable of performing the duties of a teacher.”

24. The question for this court is whether the purpose and effect of the impugned section, infringes on the right (s) of the petitioner or any other teacher for that matter, enshrined in the Constitution.



25. The petitioner contends that although article 237 empowers the Commission to register teachers, it does not expressly state that it can deregister those it has already registered, and hence the provision of the Act giving the Commission such power, renders the section unconstitutional.
26. The Petitioner asserts that the effect of the implementation of the respondent's statutory power to deregister teachers, completely extinguishes the right of a trained teacher to be so recognized, and in effect, nullifies and voids the certificate(s) acquired by the trained teacher through a rigorous process of training.
27. The respondent on their part contends that as a regulator, it has a duty to ensure that the names on the register of teachers reflect the members authorized/eligible to teach, which duty is exercised by the power bestowed to it by section 30 of the TSC Act, to remove from the Register the name of any person who exit the teaching service through *inter alia* natural attrition, dismissal in the event of breach or suffers mental illness.
28. The TSC Act as correctly submitted by the respondent, was passed to operationalize the functions of the respondent under article 237(2) of the Constitution. The Act had thus to provide the details of how the function of registration of teachers was to be handled, including the instances when such registration would be declined or withdrawn.
29. The respondent no doubt has a higher duty to exercise reasonable care so as not to expose children to dangerous elements within the school as well as providing a safe learning environment.
30. The Court of Appeal in Teachers Service Commission v WJ & 5 others [2020] eKLR

“We therefore, agree with the learned Judge, that the measures employed by the TSC and the State to provide a safe learning environment for children were insufficient and ineffective and this judgment should have been used to strengthen and operationalize the policies.”
31. In my view, the provisions of section 30 of the TSC Act, is intended to protect pupils from serial offenders, who abuse students in one school and move to other schools either on transfer or in search of new employment upon dismissal, where the abuses continue.
32. Further, the requirements for registration as shown from section 23 to 27 of the Act, indicates that one needs more than just the academic qualification; good conduct/morals is also a qualifier, and which is informed by the need to protect school children from sexual offenders.
33. Teachers as correctly submitted by the respondent, are considered as loco parentis to learners, and once a teacher abuses that relationship, it is upon the respondent to ensure that the perpetrator is prevented from repeating the heinous act on other innocent children in any school, be they public or private, which then in my view, justifies the removal of such perpetrators from the register of teachers.
34. In Nairobi Court of Appeal No 309 of 2015: TSC vs WJ & 4 others, the court states thus:

“Once a teacher abuses that relationship by sexually taking advantage of a learner as was the case with the petitioner, it is upon the respondent to ensure that the act is not repeated by the perpetrator to another innocent child in any other school whether public or private. The respondent can only do this through removal of the name of the errant teacher from the Register.”



35. Rights no doubt are limited, and the petitioner's rights in this respect are limited by the need to secure the best interest of the child. Anything below the standards of professionalism put in place under the TSC Act, will act against the ultimate public good, which is the protection of learners.
36. Further, taking away the respondent's mandate to remove teachers from the register, will act against its legal mandate and compromise both the professional ability and competence of persons released to schools to teach.
37. Finally, I find and hold that the petitioner has failed to prove that section 30 of the TSC Act is unconstitutional, or is in any other way offensive to good order, public interest and the law.

Whether the petitioner was unfairly deregistered/removed from the register of teachers.

38. On the issue of whether the petitioner herein was unfairly deregistered, the court is called upon to examine whether the respondent adhered to the provisions of articles 41, 47, 49, 50 and 55 of the Constitution, the TSC Act and the disciplinary procedures/regulations.
39. From the petition it is clear that the petitioner brought this petition upon realization or information that his name had been removed from the teachers register and hence the petition is not informed by the petitioner's dismissal from service. His assertion is that he ought to have been taken through a procedure related only to the removal from the register and separate from the disciplinary process.
40. The respondent on its part contends that section 30 of the TSC Act, empowers it to remove an errant teacher from the register upon adhering to the procedure set in section 34(3) of the TSC Act.
41. Section 34(3) of the TSC Act states thus: -
 - “(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;
 - (i) terminate services; or
 - (j) undertake any other lawful action as it may consider appropriate.”
42. The court record confirms that the respondent investigated the allegations against the petitioner, issued him with an letter of interdiction, informed him of his right to defend himself and make written representation, invited him for an oral hearing, where he admitted to the charges levelled against him, granted an opportunity to defend his case and finally, a decision of the disciplinary committee was communicated to him which gave reasons for both the decision to dismiss him from the service and the removal from the register of teachers.



43. In *Silvester Malei Kyengo v Kenya Meat Commission* (2019) eKLR the court set out what constitutes a fair process as follows: -

“In this case the claimant was first served with a show cause letter stating the charges against him, interdicted pending investigation, accorded an oral hearing in the company of another employee of his choice and finally served with a termination letter confirming that his defence was considered but his services terminated for reasons cited in the letter. Such procedure in my view passes the test of procedural fairness and I so hold”

44. Under section 34 (3) of the *TSC Act*, dismissal and removal from the teachers’ register are penalties imposed on a teacher found culpable of misconduct, and the two may be imposed concurrently, where appropriate.

45. The removal from the register was thus a penalty, and which in my view does not require a whole new process, separate from the disciplinary process which the petitioner has not disputed undergoing. The removal is a result of the disciplinary process and a new procedure for removal from the register is not envisaged under the law.

46. I find and hold that the procedure adopted in the removal of the petitioner from the teachers’ register, was within the confines of the *Constitution*, the law and the applicable regulations. The process was fair.

47. In the upshot, the petitioner’s petition is found to lack merit and is hereby dismissed in its entirety.

48. I make no orders as to costs.

49. Judgment accordingly.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT KISUMU THIS 24TH DAY OF NOVEMBER, 2022.

CHRISTINE N. BAARI

JUDGE

Appearance:

N/A for the Petitioner

N/A for the Respondent

Christine Omollo- C/A

