



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT KISUMU
PETITION NO.33 OF 2019

(Originally Eldoret Petition No. 6 of 2018)

**IN THE MATTER OF ARTICLES 10, 19, 20, 21, 25, 27, 28, 35,
41, 47, 50 AND 236 OF THE CONSTITUTION OF KENYA, 2010**

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS

UNDER ARTICLES 10, 19, 20, 21, 25(c), 27, 28, 35(1), 41(1), 47(1) & (2), 48, 50(1) & (2)

and 236 OF THE CONSTITUTION OF KENYA

AND

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS OF THE INDIVIDUAL) PRACTICE AND PROCEDURE RULES, 2013**

AND

IN THE MATTER OF THE TEACHERS SERVICE COMMISSION ACT, 2012

AND THE REGULATIONS THEREUNDER

AND

IN THE MATTER OF THE EMPLOYMENT ACT, 2007

BETWEEN

VICTOR OMOLO BURA.....PETITIONER

v

PRINCIPAL, LWANDA MAGWAR SECONDARY SCHOOL.....1st RESPONDENT

BOARD OF MANAGEMENT, LWANDA MAGWAR SECONDARY SCHOOL.....2nd RESPONDENT

TEACHERS SERVICE COMMISSION.....3rd RESPONDENT

RULING

1. On or around 5 July 2013, Victor Omolo Bura (the Petitioner) was interdicted by the Teachers Service Commission (the Commission) on

allegations of having deserted duty with effect from 13 March 2013.

2. The interdiction letter requested the Petitioner to respond in writing within 21 days.

3. The Petitioner responded to the Secretary of the Commission through a letter dated 20 July 2013.

4. On 12 August 2013, the Petitioner wrote to the Principal of Lwanda Magwar Secondary School, where he was based, requesting to be furnished with certain documents to enable him to prepare to defend himself.

5. On 28 October 2013, the Commission issued another interdiction letter to the Petitioner, and the allegation was the desertion of duty with effect from 11 January 2013.

6. Through a letter dated 7 May 2014, the Commission invited the Petitioner to attend a disciplinary hearing on 3 June 2014. However, the hearing was deferred to 23 July 2014 because of the Petitioner's absence.

7. The Petitioner attended the hearing, after which the Commission considered the case, and through a letter dated 30 July 2014, decided to issue him a warning.

8. The Commission also indicated that it would recover salary overpayments.

9. The Commission further informed the Petitioner that he would be deployed.

10. The Petitioner was not satisfied with the penalties meted, and on 11 August 2014, he requested copies of the disciplinary proceedings to enable him to appeal. The Petitioner appealed on 13 October 2014.

11. The appeal was heard, and on 7 September 2015, the Commission informed the Petitioner that the appeal was not successful.

12. On 10 August 2018, the Petitioner moved the Court seeking orders:

(i) A declaration that the casualty return form written and filled by the Principal Lwanda Magwar Secondary School on or about 11th January 2013 is malicious, ultra vires, illegal, invalid, null and void, irregular and was made in bad faith and contravened/violated fundamental rights, and freedoms of the Petitioner under Article 10 and 47 and violation of Code of Regulations for Teachers (2005) Regulation 27 and as a result renders all consequential decisions arising from is null and void.

(ii) A declaration that the summons, interrogation and subsequent interdiction by the B.O.M. Lwanda Magwar Secondary School were illegal, unprocedural, null and void, invalid and improper and in violation of the Petitioner's fundamental constitutional rights and freedoms under Articles 10, 41, 47 and 50 and as a result renders null and void al consequential decisions.

(iii) A declaration that the entire disciplinary process and proceedings violated/breached/infringed the Petitioner's fundamental rights and freedoms to a fair trial, human dignity, fair labour practices, fair administrative action, fair hearing, access to information under Articles 10, 19, 20, 21, 25(c), 27, 28, 35(b), 41(1), 47(1) & (2), 50(1) & (2) and 236 and did not comply with the law and Regulations that regulated the matter in the disciplinary case no TSC/DISC/0129/08/2013/2015, as a result, renders null and void all consequential decisions.

(iv) Judicial review orders to quash all the decisions and measures of the 2nd and 3rd Respondents made purportedly to interdict the Petitioner in their letters/notices of interdiction dated 5.7.2013 and 28.10.2013.

(v) Judicial review order quashing the proceedings in respect of disciplinary case no TSC/DISC/0129/08/2013/2014 and all consequential decisions and measures made arising therefrom to this Honourable Court for the purposes of quashing the same as the said proceedings were undertaken and determination made contrary to the rules of natural justice.

(vi) Judicial review order of mandamus directed at the 3rd Respondent to ensure that the Petitioner herein receives his full salary and other allowances and benefits that he is entitled to as a teacher withheld by the 3rd Respondent from 1.4.2013 to date.

(vii) Order for payment of half salary during the period of interdiction/since the salary was withheld to July 23rd 2014 as a court of equal competence had declared Regulation 68 of the Code of Regulations for Teachers (revised 2005) under section 9 of the Teachers Service Commission Act cap 212 unconstitutional, null and void to the extent that it did not permit equality of treatment to persons in similar circumstances in that interdicted teachers get half their salary and allowances while other interdicted teachers are denied the same.

(viii) Order for reimbursement of travelling, accommodation and subsistence allowance based on Teachers Service Commission rates from Migori to Nairobi on 23-07-2014, 03-07-2015 and 11-08-2015.

(ix) Order to be paid house allowance arrears from July 1st 2015, to June 30th 2018, as implemented by the Teachers Service Commission on teachers working in the former municipalities amounting to Kshs 206,012/- and adjustments to the correct/applicable house allowance payable of Kshs 22,000 as from July 1st 2018.

(x) Costs of the Petition to be borne by the Respondents jointly and severally.

(xi) Any other award as the Honourable Court deems fit to grant in the circumstances of this case.

13. The Commission filed a replying affidavit sworn by its acting Director in charge of Staffing in opposition to the Petition, and this prompted the Petitioner to file a further affidavit on 10 September 2018.

14. The Petitioner also filed a Reply to the Respondents Response on 18 September 2019.

15. When the Petition came up for directions on 18 February 2021, the Commission indicated that it had raised a preliminary jurisdictional objection in its replying affidavit. The Court directed the parties to file and exchange submissions on the Objection.

16. The Commission filed submissions dated 1 March 2021, while the Petitioner filed his submissions on 19 March 2021.

17. The Commission's Preliminary Objection was outlined in paragraph 19 of the Replying Affidavit thus:

THAT I am advised by Ms Faith Kaluai, counsel on record for the Respondents, which advise I verily believe to be true and sound that the Petition before this Court is time-barred and therefore the Court has no jurisdiction to entertain this matter.

18. The Court will first examine whether the Petition has properly involves application and/or interpretation of the Constitution.

Constitutional issues

19. In giving the dispute a constitutional flavour, the Petitioner sought a declaration that the casualty return form violated the Code of Regulation for Teachers as well as Articles 10 and 47 of the Constitution.

20. The Casualty form is provided for in the legal framework governing the operations of the Commission.

21. The Petitioner however, did not attempt to challenge the constitutional validity or otherwise of the legal framework upon which the casualty form was based.

22. The Court is, therefore, unable to invalidate or find that a process anchored on a legal framework would not meet the constitutional threshold.

23. The Petitioner also faulted the disciplinary process and interdiction as being in violation of Articles 10, 19, 20, 21, 25(c), 27, 28, 35(b), 41(1), 47(1), 50(1) & (2) and 236 of the Constitution.

24. Again, the Petitioner did not challenge the constitutional validity of the legal framework upon which the disciplinary process was conducted.

25. It is not lost to the Court that the Commission has been clothed with constitutional authority to exercise disciplinary control over teachers such as the Petitioner.

26. The legislature has, in pursuit of that power, enacted various pieces of legislation to guide the Commission and employers. The legal framework includes the Teachers Service Commission Act and the Regulations made thereunder, and the Employment Act, 2007.

27. The Petitioner did not set out how the disciplinary process infringed on his rights. He did not challenge the constitutionality of the legal framework upon which the Commission exercised disciplinary control over him.

28. Further, among the remedies sought by the Petitioner were reimbursement of expenses incurred while attending the disciplinary hearing, salaries, allowances and other expenses from 2013 to 2015. Some allowances were alleged to have been owing from 2018.

29. For these breaches, the Petitioner sought judicial review orders compelling the Commission to pay the outstanding or incurred amounts.

30. The Court finds absolutely nothing requiring the invocation of the Constitution for the same to be adjudicated through a Petition.

31. With only general averments, the Court finds that the Petition did not raise any questions of constitutional application or interpretation.

32. In this regard, it is germane to reiterate what was said by the Privy Council in *Harriskissoon v. Attorney- General of Trinidad and Tobago* (1979) 31 WIR 348 and endorsed by the Supreme Court that:

the notion that wherever there is a failure by an organ of government or a public authority or public officer to comply with the law, this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the constitution is fallacious. The right to apply to High Court under Section 6 (our Section 23) of the Constitution for redress when any human right or freedom is or is likely to be contravened is an important safeguard of those rights and freedoms, but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures of invoking judicial control of administrative action. The mere allegation that a human right has been or is likely

to be contravened is not itself sufficient to entitle the Applicant to invoke the jurisdiction of the court under the Section if it is apparent that the allegation is frivolous, vexatious or abuse of the process of court, as being solely for the purpose of avoiding the necessity of applying in the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.

33. Such an approach was endorsed in this jurisdiction by the High Court in *Uhuru Muigai Kenyatta v Nairobi Star Publications Ltd* (2013) eKLR where the Court stated:

Similarly, in **Re Application by Bahadur [1986] L.R.C (Cost.) 297 at 298**, the Court in Trinidad and Tobago held as follows:

The Constitution is not a general substitute for the normal procedures for invoking judicial control of administrative action. Where infringements of rights can found a claim under substantive law, the proper course is to bring the claim under that law and not under the Constitution.

I am in agreement with the above findings and looking at **Article 21** of the **Constitution**.....

34. In the Court's view and the Court so finds, the Petition was clothed as a Constitutional dispute to legally manoeuvre out of the limitation bar established by section 90 of the Employment Act, 2007.

Time-bar

35. The gravamen of the cause(s) of action advanced by the Petitioner arose out of a *contract of service*.

36. The Petitioner and the Commission were in an employment relationship. The Commission exercised its powers of disciplinary control over the Petitioner and rendered a verdict by sanctioning the Petitioner.

37. The Petitioner was aggrieved with the process and the penalty imposed. He also alleged breach of contract in respect to salaries, allowances and other benefits.

38. Under section 90 of the Employment Act, 2007, the Petitioner should have moved the Court within 3-years of the breaches of contract, or imposition of the penalty on 30 July 2014, which is on or before 30 July 2017.

39. The Petitioner did not move the Court within the prescribed time. He moved the Court after the prescribed time and gave his cause(s) of action a constitutional flavour.

40. The Court upholds the Preliminary Objection and dismisses the Petition with costs.

DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 19TH DAY OF MAY 2021.

RADIDO STEPHEN, MCIARB

JUDGE

Appearances

Petitioner in person

For Respondents Faith Kaluai, Advocate, Teachers Service Commission

Court Assistant Chrispo Aura