



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT NAIROBI

PETITION NO. E015 OF 2021

CAROLINE KEMUMA.....PETITIONER

VERSUS

TEACHERS SERVICE COMMISSION.....1ST RESPONDENT

NGENIA HIGH SCHOOL

BOARD OF MANAGEMENT.....2ND RESPONDENT

WARUTERE PAUL WAINAINA

HEAD TEACHER NGENIA HIGH SCHOOL.....3RD RESPONDENT

CORPORAL JOHN KIPTANUI KOECH.....4TH RESPONDENT

JUDGMENT

1. The Petitioner filed the Petition dated 2nd February 2021 against the 4 Respondents seeking for declaratory orders that the Respondents have violated her rights guaranteed under various Articles of the Constitution and for which she seeks compensation of Kshs. 5 Million or an amount ordered by the Court. Further, that the decisions of the 2nd and 3rd Respondents purporting to interdict her are illegal, null and void. She further prays that the Honourable Court grants Judicial Review Orders to compel the 1st to 3rd Respondents to reinstate her to her previous position, quash her interdiction and stop the implementation of the said interdiction. The Petitioner also seeks a permanent injunction against the Respondents and their agents from intimidating, blackmailing, witch-hunting, discriminating, insubordinating, ignoring, frustrating or in any way harassing her. She also seeks that this Court be pleased to order the 1st Respondent to refund and or pay all her unpaid dues since July 2019 to date or alternatively pay her the sum of Kshs. 22,320,000/- being salary for the remainder of the contract period. She seeks for an order for full compensation for general and aggravated damages and for costs of the Petition.

2. The Petitioner avers that she was employed by the 1st Respondent Commission in 2016 under permanent and pensionable terms and was deployed to Ngenia High School on 15th February 2016 as a Kiswahili and History Teacher. She avers that she held various positions and played various roles in uplifting the quality and educational standards for the three years she worked at Ngenia High School and further maintained high standards of professionalism at all times. She asserts that she previously had pregnancy complications in the year 2014 and August 2018 when she had miscarriage of pregnancy on both occasions and that she also suffers from endometriosis which often necessitates medical attention. She asserts that on 20th March 2019 she was unable to attend school due to sudden sickness and called the Head Teacher the following day to explain her absence from the school but was nevertheless served with a notice to show cause letter and instructed to see the TSC Sub-county QASSO at Kinyogori Secondary School. She further asserts that when she got pregnant in April 2019, she started experiencing on and off bleeding and excruciating stomach pain on various dates in May 2019 and was thereafter diagnosed with threatened miscarriage at Mbagathi Hospital. She avers that she was consequently directed to take a seven-day bed rest before reporting back for review and that she had diligently informed the Deputy Academic and Deputy Administration of the condition and requested for time off. She avers that when she reported back to the School on 23rd May 2019, the Head Teacher directed her to write a letter detailing the events and reasons for her absence as a requisite for her sick leave application. She avers that on the same day at around 12:45pm, she was summoned by the Head Teacher who in the presence of two Deputy Heads and the Dean accused her of forging the sick leave sheet and feigning pregnancy and further threatened to report her to the Police. The Petitioner avers that while at Mater Hospital waiting to be served for a review of her condition, she was called by the 4th Respondent, a Police Officer, who directed her to report to Tigoni Police Station in regards to a forgery complaint filed by the Head Teacher. She avers that she recorded her statement at the said police station on 27th May 2019 and that on 17th June 2019 she was called to attend a meeting at Mater Hospital on the allegations of forgery of the sick sheet from their hospital. She asserts that after the said meeting she attended her duties at the School in the afternoon and unfortunately had a miscarriage later in the evening, all on the same day and that after seeking medical attention, she was given a four-day sick leave and thereafter presented the sick sheet to the

Head Teacher on 18th June 2019. She asserts that she tried to mitigate the bad working relationship which had developed between her and the Head Teacher but was unsuccessful. She avers that on 21st June 2019, she received a WhatsApp message and an email from the Head Teacher summoning her for Board of Management meeting on 4th July 2019 and also forwarding to her four notices to show cause letters dated 20th June 2019, to answer to charges of chronic absenteeism, negligence of duty and desertion the letters. She asserts that she attended her normal duties at the school on 24th June 2019 and on 25th June 2019 while conducting her third lesson, the Head Teacher ordered her away from the school. She avers that she compiled the medical reports and records and presented them to the Head Teacher for verification by the 4th Respondent and that on 27th June 2019, she was issued with a letter of insubordination and ordered to clear her desk for the new teacher who had already been hired. She avers that after the board meeting of 4th July 2019, the Board subsequently advised the 1st Respondent to interdict her and she submitted her defence to the TSC-County Office on 25th July 2019 for presentation to the TSC Sub-County Office and that on 29th July 2019 she received a letter detailing the decision of the 2nd Respondent to interdict and or suspend her from employment with the 1st Respondent.

3. She asserts that she has consistently reported to the TSC Limuru Sub-County offices as stipulated TSC Regulations and further filed an official complaint on the irregularities during the interdiction process among other grievances. She avers that the hearing of her interdiction which was effectively transferred to the national offices and was to take place on 11th March 2021, never took off and there has been no information in regards to its continuation or withdrawal. The Petitioner depones that the 2nd and 3rd Respondents denying her witness from testifying before the Board and the 3rd Respondent being the prosecutor and judge during the process, infringed on her right to a fair trial under Article 25(c) guaranteed under Article 50(1) & (2)(d) of the Constitution. She avers that the Respondents denied and infringed on her right to equal treatment and benefit under the law as provided under Article 27 and that the deliberate harassment, mental and psychological torture meted out on her by the 3rd Respondent in particular, infringed on her right to equal opportunity in economic and social spheres. Further, that she has been discriminated against on the basis of sex and on her being a pregnant mother contrary to Article 27(5). She avers that the 3rd Respondent's actions as deponed herein above infringed on her right dignity which is protected under Article 28 and that the involvement of the 4th Respondent further violated her right to security under Article 29.

4. The Petitioner further avers that the 2nd and 3rd Respondent forcing her to relay private medical accounts of her condition and the investigation of the said records by the 4th Respondent was an infringement of her right to privacy guaranteed under Article 31. She avers that in violation of Article 35(1)(b) the Respondents have also refused to provide the information she requires to exercise protection of her rights with the 4th Respondent particularly refusing to provide the expert report which declared the sick sheet a forgery. She asserts that all the actions by the Respondents constitute unfair labour practices contrary to Article 41(1) and that as a worker she is entitled to reasonable working conditions as guaranteed in Article 41(2)(b) and that failure by the Respondents to constitute an investigation panel and further undertake disciplinary action against her as required under the Code of Regulations of the 1st Respondent, violated Article 47 on the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. The Petitioner annexes in her Supporting Affidavit copies of documents marked **CKN 1 – CKN 38** in support of her case.

5. The 1st, 2nd and 3rd Respondents filed a Replying Affidavit sworn on 6th April 2021 by Catherine Morogo Kertich who is the Deputy Director in charge of Discipline at the 1st Respondent Commission. She depones that the 1st Respondent's primary functions among others under Article 237(2) of the Constitution is to exercise disciplinary control over teachers. She asserts that the operations of the 1st Respondent are further buttressed by provisions of the Teachers Service Commission Act, No. 20 of 2012 Laws of Kenya, the Code of Regulations for Teachers (CORT), the Basic Education Act, 2013 and the Teachers Service Code of Conduct and Ethics. She asserts that the 1st Respondent's mandate is decentralized and vested in the 2nd and 3rd Respondents as the case may be, for effective management of the learning institutions including the teachers. She avers that in gross violation of the edicts of the teaching profession and the 1st Respondent's Regulations, the Petitioner started exhibiting traits of truancy, missing school and lessons which later turned into chronic absenteeism. She asserts that despite the Petitioner being aware of the provisions of the CORT on leave in instances of sickness, she proceeded to procure a number of documents to prove her ailments, including a sick-off sheet from The Mater Hospital and that the 3rd Respondent's investigation revealed that the said sick sheet was a false document because the Patient Number indicated on the said document is not one issued at The Mater Hospital. She asserts that a competent doctor cannot lift a patient number issued by Mbagathi Hospital or any other hospital and purport it to be the same number of the patient at the later hospital. She urges the Court to also look at the dates noted on the said doctor's statement which raise concern as to when the statement was written. She further avers that The Mater Hospital had distanced itself from the sole document which the Petitioner relied on to justify her absence and that the 3rd Respondent was thus justified to demand the Petitioner to substantiate her illness.

6. She avers that the Petitioner declined to respond to the show cause letters issued to her by the 3rd Respondent but was nevertheless heard by the 2nd Respondent and that the 2nd Respondent analyzed the evidence and facts presented before it and was satisfied the Petitioner had failed to adequately respond to the allegations leveled against her. She asserts that the board comprised of 9 members and that the 3rd Respondent could not have therefore been the final decision maker of the Petitioner's interdiction as alleged. She urges the Court to go through the minutes of the board hearing which confirm that the Petitioner never stated she had a witness who would testify on her behalf. She further asserts that a new teacher was appointed to take over the Petitioner's classes since the students could not continue to be unattended during the Petitioner's disciplinary process. She avers that the Petitioner's disciplinary hearing had been put off due to the COVID-19 global pandemic and that she however refused to attend the hearing of her case rescheduled for 4th February 2021. She asserts that a hearing scheduled for 17th March 2021 was again adjourned at the Petitioner's request on account of being indisposed and that the Petitioner shall still be re-invited before the panel for her case to be determined on merit. She further avers that in the totality of her averments, the Petitioner has not exhibited any malice or ill will on the part of the 1st, 2nd and 3rd Respondents and how they infringed on the specific provisions of the law as quoted. She asserts that the Petitioner is not entitled to the declaratory prayers as sought in the Petition and that she is not deserving of an award of Kshs. 5 Million since none of her constitutional rights have been violated. She avers that the Petitioner cannot also be compensated for work not done and the prayer for remainder of contract is thus untenable. She asserts that it is in the interest of justice for the Court to allow public bodies including Constitutional Commissions to perform their administrative duties without undue interference through delving into issues pending before an employer as is the case herein.

7. The 3rd Respondent also swore a Further Affidavit on 1st April 2021 averring that the Petitioner resorted to unorthodox and unverifiable means of communication despite being aware of the legal procedures of seeking leave. He further avers that there are well outlined guidelines and procedures of dispute resolution mechanism in the CORT and nothing would have barred the Respondents from invoking the ADR had the Petitioner formally requested for the same with regards to addressing the allegations of absenteeism and subsequent desertion of duty. He denies evicting the Petitioner from her classroom as alleged and asserts that there is further no evidence that he either usurped the powers of the Board or influenced the Board in any way in making its decision. He asserts that the Petition has not met the threshold of grant of conservatory orders which ought to be declined and that this Court should allow the due process run its final course.

8. The Petition was dispensed by way of written submissions. The Petitioner submits that the right to a fair trial provided under Article 25 of the Constitution of Kenya 2010 is a non-derogable right and cannot therefore be limited and that the right to a fair trial is infinitely tied to the right to fair administrative process, right of access to justice and right to fair hearing. She submits that she has from the onset not accessed the report presented by the 4th Respondent and which report the 2nd and 3rd Respondents relied on to find her culpable of forgery. She cites the case of **Beth Nyawira Gathomi v Unilever Kenya Limited [2020] eKLR** where Wasilwa J. held that the need for the accused to be accorded a fair hearing is emphasized in Article 50 of the Constitution after observing that the claimant had been denied knowing in advance the charges against her and access to the investigation report. She submitted that as per Regulation 153(2) of the CORT, where the teacher denies the allegation, the discipline panel shall examine the Commission's witnesses and allow the teacher to cross-examine the witnesses and further give any statement or submission in mitigation. She submits that Regulation 153(3) further provides that the Commission shall inform the teacher when the proceedings come to an end and communicate the decision to the teacher in writing within twenty-eight days. She submits that Regulation 146(12) of the CORT provides that an officer who undertakes or participates in an investigation of an offence shall neither preside nor sit as a member of the disciplinary panel determining the same. The Petitioner submits that she was not given a chance to cross-examine the 3rd and 4th Respondents and which can be confirmed by a reading of the minutes. She avers that it was against the CORT for the 3rd Respondent to have been part and parcel of the meeting, deliberations and decision making of the Board as he was the investigator. She asserts that the decision reached by the Respondent does not in any way or form relate to the findings made in the minutes of the board meeting held on 4th July 2019. She relies on the case of **Republic v Deo Mount Elgon District & Another Ex-Parte Applicant Bwome N. Renison [2014] eKLR** where Mabeya J. observed that the respondents breached the applicant's Constitutional right to fair administrative action under Article 47 of the Constitution and held that the process and decision of interdiction was both made in breach of the Constitution, in excess of jurisdiction and contrary to the rules of natural justice and it cannot stand. In regards to the issue of discrimination and human dignity, the Petitioner cites the case of **Josephine Kathure Muriungi v Teachers Service Commission & 2 Others [2019] eKLR** where this Honourable Court stated that the petitioner's rights to fair labour practice, freedom from discrimination and her right to life and human dignity had been threatened considering her gravid condition. On her right of access to information, the Petitioner submits that Section 4 of the Access to Information Act, 2016 provides for the procedure to access information. She submits that in the case of **Katiba Institute v Presidents Delivery Unit & 3 Others [2017] eKLR**, Mwitwa J. held that once a citizen places a request to access information, the information should be availed to the citizen without delay and that Article 35 of the Constitution does not in any way place conditions for accessing information. She submits that the Court went on to hold that it is not enough for a party to allege that the information sought affects state security without showing how. The Petitioner submits that the Court is also guided by the rules of natural justice as was upheld in **Republic v National Land Commission & 2 Others Ex Parte Archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kahawa West) [2018] eKLR**. She submits that the decisions dated 15th July 2019, 29th July 2019 and 21st May 2019 are all based on infringement of the rights to fair hearing, fair trial, fair administrative process and the principles of natural justice and are therefore all void *ab initio*.

9. The Petitioner submits that the Court of Appeal in **Judicial Service Commission & Another v Lucy Muthoni Njora [2021] eKLR** adopted the "hard look doctrine" that Judicial review as an area of law is not static and its parameters have never been cast in stone. She submits that the Court of Appeal went on to analyze that in the United States, for instance, there has been a decisive shift with their Supreme Court seeming to impose a heightened standard of judicial review that involves more judicial scrutiny of administrative action through "a searching and careful" engagement. She further submitted that hard look represents an internal duty owed by the courts to the constitutional function of judicial review. The Petitioner further submits that since the Respondents necessitated the instant suit they should be liable to pay the costs of the Petition.

10. The 1st, 2nd and 3rd Respondents submit that the Petitioner is yet to be heard on the charges leveled against her and has also not provided any sufficient evidence to warrant grant of the orders sought. They submit that by summoning the Petitioner to present her case or defence on more than one occasion, the 1st Respondent has shown that it has granted the Petitioner ample opportunity to exonerate herself. It is submitted that in any case, such a move would amount to the Court usurping the powers and functions of the employer's internal disciplinary process and considering that the Petitioner has not been terminated. They further submit that the pattern of adjournments and the prayers sought by the Petitioner depict her intentions to ensure she does not subject herself at all to the disciplinary process and they pray the Court dismisses her Petition. They submit that the Petitioner cannot allege that her disciplinary process has violated any of her rights when she does not come to equity with clean hands. They further submit that where a direction is given in the CORT that an employee would not be entitled to his/her half salary while on interdiction until the conclusion of their disciplinary hearing, the same is legal and does not amount to unfair labour practice. They submit that Regulation 148 of the CORT provides instances where the 1st Respondent can withhold the entire salary of a teacher under interdiction. They rely on the decision in **Kenyatta University & Another v Fred Obare [2017] eKLR** where the Court of Appeal pronounced itself on the legality of the provisions in the agreement of the parties and HR Manuals permitting suspension with half or no pay pending conclusion of the disciplinary hearing. They urge the Court to be guided by the authorities of: **Nairobi ELRC No. 383 of 2011-Nahashon Muriithi Wambugu v Teachers Service Commission [2016] eKLR**; **Kisumu Petition No. 20 of 2017 – Maureen K. Imbiakha & Another v Teachers Service Commission & 2 Others [2019] eKLR**; and **Nairobi ELRC No. 284 of 2020 – Matilda Tenge Mwachia v Kenya Industrials Estate**.

11. The Petitioner is seeking relief for the alleged violation of her constitutional rights. She seeks compensation by payment of Kshs. 5 Million for the alleged infringement. The 1st Respondent together with the 2nd and 3rd Respondent are accused of bias and discrimination on account of sex while the 4th Respondent is accused of infringing on the Petitioner's right to dignity and privacy. The Petitioner was alleged to have been guilty of truancy, negligence of duty and chronic absenteeism as well as forgery leading to the commencement of the disciplinary proceedings against her. She has been a teacher at Ngenia High School among other schools but it was while at Ngenia that matters came to a head. She states that when she was pregnant she suffered inhuman treatment from the 2nd Respondent and the 3rd Respondent in particular. From the evidence adduced it would seem that the 3rd Respondent took it upon himself to harass and intimidate the Petitioner to the point she

suffered stress and even miscarried. Whereas the Petitioner herself was not a paragon of virtue by sending the sick off sheets late, seeking off by mere SMS or call instead of writing, and in one instance being guilty of forgery of a sick sheet from Mater Hospital, she nevertheless had every right to expect to be treated with dignity and respect by the 1st to 3rd Respondent. The 4th Respondent only executed his duties as a Police Officer and no malice was shown in regard to his investigation. It is only regrettable that he did not participate in these proceedings as he would have been able to shed more light especially in relation to the allegations of forgery. However, given the report he delivered to the 2nd and 3rd Respondent there is sufficient basis for the 1st Respondent to have commenced the proceedings against the Petitioner.

12. The Petitioner has been going through the disciplinary process of the 1st Respondent which disciplinary process must of necessity accord with the Code of Regulations for Teachers (CORT). The Code allows for the disciplinary proceedings to be taken either at the local level – meaning within the jurisdiction of the School where the alleged offences occurred or at the Headquarters. I did not see what the mischief was in ordering the Teacher (Petitioner) to attend at Murang'a as the School she was serving at is in Murang'a County. However, given the gravity of the offences she is accused of a hearing at Nairobi at the Headquarters of the 1st Respondent would perhaps have mollified parties as the Petitioner would have felt somewhat comforted that she was not appearing before the investigators of her case who are at the County level.

13. From a reading of the above it is amply clear that whereas there was infarction by the 2nd and 3rd Respondent, the infarction would be such as to compel a Court to order payment of compensation of Kshs. 500,000/- for the infringement of the Petitioner's rights. The 1st and 4th Respondent having shown not to have been malicious in their conduct escape this dragnet. The Petitioner must however be subjected to a fair disciplinary process which should be concluded speedily so as to permit the ventilation of any outstanding issue in any other forum the Petitioner may chose. In as far as this suit goes the relief she gets is a declaration that the intrusive actions of the 2nd and 3rd Respondent are found to have been in contravention to the Petitioner's right to dignity under Articles 28 and 29 of the Constitution. The second relief is a declaration that the 1st Respondent must avail to the Petitioner all the information in its possession including the report by the 4th Respondent within 3 days of this Judgment failing which the 1st Respondent will be subject to sanctions by this Court. The Petitioner shall be entitled to half the costs for the Petition from the 1st, 2nd and 3rd Respondents.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY 2021

NZIOKI wa MAKAU

JUDGE