



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**  
**PETITION NO. 20 OF 2018**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF ARTICLES 10, 22, 23, 28, 41, 47, 50, 73 AND 237 OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015 AND TEACHERS SERVICE COMMISSION ACT NO. 20 OF 2012**

**AND**

**IN THE MATTER OF VIOLATION OF ARTICLES 10, 22, 23, 28, 41, 47, 50, 73 AND 237 OF THE CONSTITUTION BY THE TEACHERS SERVICE COMMISSION**

**AND**

**IN THE MATTER OF VIOLATION OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015, TEACHERS SERVICE COMMISSION ACT NO. 20 OF 2012 AND THE TEACHERS SERVICE COMMISSION CODE OF REGULATIONS FOR TEACHERS, 2015 AND ALL OTHER ENABLING PROVISIONS OF THE LAW BY THE TEACHERS SERVICE COMMISSION**

**AND**

**IN THE MATTER OF THE UNLAWFUL INTERDICTION AND SUSPENSION OF THE PETITIONER'S EMPLOYMENT BY THE TEACHERS SERVICE COMMISSION**

**BETWEEN**

**PETER NDEGWA MUTURI.....PETITIONER**

**VERSUS**

**TEACHERS SERVICE COMMISSION.....RESPONDENT**

**JUDGMENT**

1..... The Petitioner is an employee of the Respondent having been employed in July 1996 as a teacher. He rose up the ranks to the position of Principal. At the time relevant to the present Petition, he was the Principal at St. Mary Karumandii Secondary School with effect from 19<sup>th</sup> December 2014 earning a salary of Kshs.101,240/=.

2..... The Respondent is a constitutional commission established under Article 237 of the Constitution of Kenya, 2010 whose operations are regulated under the Teachers Service Commission Act 2012.

3..... The Respondent issued the Petitioner a letter dated 10<sup>th</sup> November, 2016 to show cause why disciplinary action should not be taken against him for allegedly barring a candidate from entering the school compound on 7<sup>th</sup> November 2016 causing him to miss sitting for Mathematics paper 1 of KCSE 2016.

4..... The Respondent subsequently issued the Petitioner with a letter of interdiction dated 30<sup>th</sup> November, 2016 which invited the Petitioner to prepare a defence within 21 days of the letter and informing that he will be given an opportunity to be heard before the Respondent made its decision. The letter of interdiction directed the Petitioner to vacate his office pending the outcome of the disciplinary proceedings.

5..... On 27<sup>th</sup> February, 2017, the Respondent convened a disciplinary meeting which was attended by the Petitioner. The Petitioner was found guilty of the allegations of denying the said student to sit for his paper and was subsequently sentenced to suspension without pay for 4 months effective 27<sup>th</sup> February, 2017.

6..... Aggrieved, the Petitioner instituted the present suit by a petition dated 14<sup>th</sup> March, 2018 where he seeks the following

orders: -

a).... *A declaration that the Respondent has violated Articles 10, 28, 41, 47 and 73 of the constitution of Kenya 2010.*

b).... *Compensation in the sum of Kshs.139,737 being the withheld salary from 30<sup>th</sup> November, 2016 to 27<sup>th</sup> February 2017.*

c).... *Compensation for Kshs.436,120 being the total withheld salary from 27<sup>th</sup> February 2017 to 27<sup>th</sup> June 2017*

d).... *Compensation for Kshs.1,214,880 being the total sum withheld salary from 27<sup>th</sup> July 2017 to 27<sup>th</sup> June 2018.*

e).... *Compensation for Kshs.20,436,612*

f).... *General damages and/or compensation for mental stress*

g).... *The court do issue orders and give such directions as it may deem fit to meet the needs of justice.*

7..... The Petition is brought under the provisions of **Article 10, 22, 23, 28, 41, 47, 50, 73 & 237** of the Constitution of Kenya, 2010, the Fair Administrative Actions Act, 2015, the Teachers Service Commission Act No. 20 of 2012 and the Teachers Service Commission Code of Regulations for Teachers, 2015. Contemporaneously with the Petition, the Petitioner filed an Affidavit in Support of the Petition sworn on 14<sup>th</sup> March, 2018.

8..... The Respondent filed a Replying Affidavit sworn by **MARY ROTICH**, the Respondent's Acting Director of Teacher Management and Development sworn on 26<sup>th</sup> April, 2018 and another replying affidavit of **LOISE NYASEDA**, the Acting Senior Deputy Director in Charge of Discipline sworn on 29<sup>th</sup> August 2018 in response to the Petitioner's motion dated 2<sup>nd</sup> August 2018. The Petitioner filed a Further Affidavit sworn on 21<sup>st</sup> June, 2018.

9..... By consent of the parties and pursuant to the Court's directions issued on 25<sup>th</sup> November, 2020, the Petitioner filed written submissions dated 8<sup>th</sup> February, 2021 and supplementary submissions dated 6<sup>th</sup> May, 2021. The Respondent filed written submissions dated 9<sup>th</sup> March, 2021.

### **Analysis and Determination**

10. I have carefully considered the pleadings filed by both parties, the evidence adduced as well as their respective submissions, and find that the issues for this Court's determination are: -

i. Whether the Respondent complied with proper procedure

in the interdictions of the Petitioner.

ii. Whether the Respondent violated the Petitioner's Constitutional Rights.

iii. Whether the Petitioner is entitled to the remedies sought.

### **Disciplinary process**

11..... The **Teachers Service Commission Code of Regulations, 2015 (the Code)** sets out the disciplinary process that ought to be undertaken by the Respondent on its employees. **Regulation 146 (1)** provides that the Commission shall upon receiving an allegation touching on a teacher's professional misconduct institute investigations either directly or through its agent.

12.... **Regulation 146(3)** provides that in the event an allegation is made against a head of an institution, the County Director is seized with instituting investigation liaising with the school's Board of Management. It further provides that the County Director or his representative shall constitute a team of not less than three technical officers to institute investigations (**Investigation Panel**) where there is no board management.

13.... **Regulation 146(6)** requires the Investigation Panel in the course of their investigation to accord the teacher or head of institution a fair

hearing the tenets of which are set out thereunder.

14... **Regulation 146(8)** requires the Investigation Panel to compile a written report and under **Regulation 146(10) (c)**, where an offence is found to have been committed by the teacher or head of institution, then the Board of Management, County Director or the secretary shall interdict the teacher. Regulation 146 (11) also allows the Respondent or an officer acting under its direction to undertake direct investigation into any allegation and may recommend interdiction.

15... **Regulation 147** sets out the process of interdiction that requires Respondent or the Board of Management to serve the teacher or head of institution with the letter of interdiction specifying the actual allegations against him. The teacher or head of institution is then required to clear and leave the educational institution upon receiving the letter of interdiction.

16. During the interdiction, the teacher or head of institution receives a half salary pursuant to Regulation 148.

17... Following interdiction, a teacher or head of institution shall be invited by the Respondent for a disciplinary hearing by a Discipline Panel whose constitution is set out under **Regulation 151**. The conduct and modalities of the proceedings are within **Regulation 153**.

18... Pursuant to **Regulation 154**, the Respondent is then required within 28 days of the hearing to inform the teacher of its decision. It further provides that in the case the offence committed by the teacher does not warrant removal of the teacher it may suspend the teacher for a period not exceeding 6 months without payment of salary.

19.... The Petitioner has pleaded and submitted that he was served with the letter dated 10<sup>th</sup> November, 2016 on 15<sup>th</sup> November, 2016 requiring him to show cause why disciplinary action should not be taken against him within 7 days of the letter.

20... He stated that while he offered a response vide his letter dated 17<sup>th</sup> November, 2016, he was not summoned by the Respondent regarding the content of his response as required by **Regulation 146(6)** of the Code and he is also apprehensive that the Respondent did not conduct investigations as per **Regulation 146(3)(a)** of the code.

21... The Respondent on the other hand detailed that the show cause letter was issued pursuant to an investigative assessment report from the Ministry of Education that brought to the attention of the Respondent the allegations made against the Petitioner. A copy of the report was enclosed in the show cause letter to the Petitioner.

22... The Respondent has pleaded and submitted that following the response to the show cause letter and the Petitioner's report with respect to the allegations and his conduct, the Respondent conducted investigations pursuant to **Regulation 146(1)** of the Code. The Report produced as annexure **MR-3** to the Respondent's Replying Affidavit indicates that the Petitioner was one of the persons interviewed by the said Investigation Panel.

23... It is not in dispute that thereafter the Respondent issued the Petitioner with the interdiction letter dated 30<sup>th</sup> November 2016. He responded to it vide a statement of defence dated 14<sup>th</sup> December, 2016. A disciplinary hearing was thereafter convened on 27 February, 2017 after which the Petitioner was found guilty and suspended.

24... The Petitioner challenges the fact that the Respondent never complied with the provisions of Regulation **146(3)(a)** of the Code, specifically that the investigations were not instituted by the Kerugoya County Director in liaison with the School's Board of Management.

25... I am inclined to agree with the opposing submissions by the Respondent that the Respondent has the prerogative to institute investigations directly or through its officers. The County Director is an officer of the Respondent and nothing stops the Respondent from taking charge of investigation proceedings. Indeed, as has been submitted by the Petitioner, the allegations of the student being barred from sitting for his exams had sparked public outrage that ultimately led to the Ministry of Education's involvement.

26... I also find that the Petitioner's claim that he was not given ample time to respond as moot considering he did not protest the same and provided a comprehensive response which he relies on as a recount of the events. Furthermore, the Petitioner participated in both the preliminary investigations conducted by the Ministry and the investigations by the Respondent.

27... From my reading of **Regulation 146**, there is no requirement of the Investigation Panel to issue the report to the Petitioner. Pursuant to **Regulation 146(8)**, the Investigation Panel is only required to compile and issue its report to the Board, the County Director, and the Secretary. Having found that an offence was committed in the Report, the Respondent acted pursuant to **Regulation 146(10)** and proceeded to interdict the Petitioner.

28... Following his interdiction, the Petitioner was given the opportunity to defend himself in writing and to be present at the hearing. At the said disciplinary hearing, the Petitioner was present during the examination of the witnesses by the Disciplinary Panel and he cross-examined the witnesses and was allowed to present his defence and any mitigation.

29. **Regulation 154** thereafter required the Respondent to communicate the outcome of the hearing within 28 days of the hearing. There is no requirement for the supply of the Panel's Judgment as claimed by the Petitioner or that the same be delivered in his presence.

30... It is clear from the proceedings of the disciplinary hearing produced as annexures **MR 12a** and **MR12b** to the Respondent's Replying Affidavit that the decision of the Disciplinary Panel was made before issuance of the said letter. The allegation by the Petitioner that his suspension was prior to the decision of the Disciplinary Panel has thus been disproved.

31... It is my view that the Respondent sufficiently communicated the outcome of the hearing in the letter dated 9<sup>th</sup> March, 2017 which also informed the Petitioner of his suspension.

32... I find that the Petitioner's suspension by the Respondent for 4 months without pay was also well within its mandate under **Regulation 154(2)(b)(iii)**.

33... The Court of Appeal in the case of **Bett Francis Barngetuny & Another v Teachers Service Commission & another [2015] eKLR** as (cited by the Respondent) cited with approval the Nigerian case of **A. Imonikhe v Unity Bank Pic S. C. 68 of 2001** where it was held that:

*“Accusing an employee of misconduct, etc by way of a query and allowing the employee to answer the query, and the employee answers it before a decision is taken satisfied the requirement of fair hearing or natural justice. The appellant was given a fair hearing since he answered the queries before he was dismissed.”*

34... The Petitioner was given an opportunity to be heard in the various stages of the disciplinary proceedings. I find the Respondent complied with the Code in the exercise of its mandate in the said proceedings. The upshot is that I find that the disciplinary process undertaken was lawful and proper.

35... The Petitioner's allegation that he had not been reinstated by the time he filed the present Petition has also been sufficiently disproved by the re-deployment letter issued by the Respondent dated 23<sup>rd</sup> May, 2017 produced as annexure **MR-13** of the Respondent's Replying Affidavit.

36... At the end of a suspension, the Petitioner as an employee ought to have reported to the Respondent either in person or in writing with respect to his reinstatement. As the proceedings related to his deployment are not the subject of this Petition, I will say nothing further on the same.

#### **Constitutional Violations**

37... The Petitioner pleaded and submitted that the Respondent in its actions violated **Article 10, 28, 41, 47, 50 and 73** of the Constitution.

38... Specifically, he submitted that the Respondent's decision to suspend him was in violation of **Article 73(2)** of the Constitution in that the decision was unfair and impartial. That it was not objective and was actuated by bad faith and ulterior motives.

39... The Petitioner pleaded and submitted that the Respondent violated **Article 10** of the Constitution by failing to act in an accountable and transparent manner. Further, that, the Respondent violated his right to fair administrative action and right to fair hearing pursuant to **Article 47** and **Article 50** of the Constitution respectively.

40... The Petitioner has not provided any proof of bad faith or impartiality in the Respondent's actions or decisions. Further, this Court has already found that the Respondent's disciplinary process was fair and lawful.

41... The Petitioner has pleaded and submitted that the Respondent violated **Article 28** of the Constitution by publicly painting the Petitioner as a person who lacks virtues and humanity. The Petitioner has not established in what manner the Respondent violated his dignity.

42... I do not find that the undertaking of disciplinary proceedings to be a violation of the Petitioner's right to dignity. The public outrage and ridicule arising from the events of 7<sup>th</sup> December, 2016 have not been shown to have been perpetuated by the Respondent.

#### **Remedies**

43... In the case of **Marion Caroline Kanuri v Teachers Service Commission [2018] eKLR**, this Court held,

*“I find that the claimant has not proved that either the interdiction before the hearing or the suspension of four months which was the punishment meted out against her were unlawful or unjustified. I also do not find any proof of malice alleged by the claimant.*

*I find that the delay in reinstating the claimant was her own making and as such, she cannot claim the same from the respondent as she was not entitled to pay for the period she did not work.*

*In conclusion, I find that the claimant's interdiction and subsequent suspension were not unlawful, and that she is not entitled to salary for the period before she resumed duty after suspension. The result is that the entire claim fails and is dismissed.”*

44. **As in the above decision which is an all fours with the present, I find that the Petitioner has not satisfied the Court that he merits the orders sought. The result is that the petition is not merited and is accordingly dismissed.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 6<sup>TH</sup> DAY OF AUGUST 2021**

**MAUREEN ONYANGO**

**JUDGE**

**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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1 of the Civil Procedure Rules**, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court had been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**