



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CONSTITUTIONAL PETITION NO. 4 OF 2020

IN THE MATTER OF: CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER ARTICLES 1, 10, 20, 22, 23, 25, 27, 28, 41, 43, 47, 50, 73, 232, 236, 237 & 238 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF: FAIR ADMINISTRATIVE ACTION ACT; TEACHERS SERVICE COMMISSION ACT; TEACHERS SERVICE COMMISSION REGULATIONS, POLICIES & GUIDELINES; EMPLOYMENT ACT AND THE PUBLIC SERVICE COMMISSION ACT

BETWEEN

MS JANE ANGILA OBANDO

PETITIONER

v

TEACHERS SERVICE COMMISSION

1st RESPONDENT

TSC COUNTY DIRECTOR OF NAIROBI

COUNTY

2nd RESPONDENT

PRINCIPAL MOI GIRLS SCHOOL,

NAIROBI

3rd RESPONDENT

JUDGMENT

1. Jane Angila Obando (Petitioner) is a teacher in the employment of the Teachers Service Commission (the Commission) and was at all material times deployed to Moi Girls School, Nairobi until 18 December 2019, when the County Director for Nairobi County (County Director) wrote to notify her of transfer from Moi Girls School, Nairobi to Dagoretti High School.
2. The notification advised the Petitioner that in case she wanted to appeal against the transfer, she had 14 days to appeal but first, she had to report to the new school.
3. The Petitioner appealed on 2 January 2020 (the main reason for the appeal was that she had 1 year to retirement). On the same day, the County Director reminded her to report to the new school.
4. At the same time, the County Director wrote to the Principal of Moi Girls School, Nairobi requesting that the Principal advise her of the date of the Petitioner's release (the Principal of Moi Girls School had issued a release letter on 30 December 2019).
5. The Petitioner made another appeal against the transfer through a letter dated 7 January 2020 contending that the Commission had a policy exempting teachers who had attained 56 years and above from the transfer, and more so where a mandatory retirement notification had been issued.
6. On 10 January 2020, the Petitioner filed a Petition together with a motion under a certificate of urgency alleging a contravention of her rights to *fair administrative action, equality and freedom from discrimination, equal protection of the law and benefit of the law, dignity, fair labour practices, national values and principles and legitimate expectation*.
7. On 13 March 2020, the Court issued a conservatory order staying the transfer of the Petitioner pending the hearing and determination of

the Petition.

8. In the same Ruling, the Court directed the Respondents to file and serve responses to the Petition, affidavits and documents before 31 March 2020.

9. The Petitioner was directed to file and serve any further affidavits and submissions before 17 April 2020, and the Respondents to file and serve submissions before 30 April 2020 ahead of highlighting of the submissions on 19 May 2020.

10. Because the parties had not fully complied by 19 May 2020, the Court extended the time for the parties to file and exchange the pleadings/submissions to 11 June 2020 for the Petitioner, and 15 June 2020 for the Respondents.

11. The Respondents a filed replying affidavit to the Petition and submissions electronically on 19 May 2020 (brought to the attention of the Court on 18 June 2020) and supplementary submissions on 9 June 2020.

12. The Petitioner's supplementary affidavit and submissions were filed electronically on 3 June 2020.

13. The Petitioner identified 4 Issues in her submissions

(i) Whether the impugned transfer letter was ultra vires and unconstitutional.

(ii) Whether attendant release letter was ultra vires, unconstitutional and irrational.

(iii) Whether the transfer was an act of unfair discrimination in view of the Appeal.

(iv) Whether the Respondents arbitrary transfer of the Petitioner was motivated by collateral reasons.

14. The Respondents did not explicitly identify the Issues in their submissions but the running theme in the submissions were

(i) Whether the relationship between the parties was contractual and therefore moving the Court through a Petition was an abuse of the court process.

(ii) Whether granting the prayers sought would amount to the Court rewriting the contract between the parties.

15. The Court has considered the pleadings, all the facts/evidence and submissions placed before it and identified the primary and determinative question raised by the Petition as

(i) Whether the Commission was in breach of contract or Petitioner's legitimate expectation.

16. In other words, the question is whether the Commission could unilaterally transfer a teacher aged over 56 years, and who had been issued with notification of retirement.

17. In this regard, the Court does not find the complaints raised on the timelines on the release of the Petitioner by Principal upon transfer as being determinative of the primary dispute. Any such breaches were minor administrative handicaps which were not implemented nor sanctions imposed.

18. The Court will also address the objection raised by the Respondents that the Petition did not raise with precision constitutional violations or questions.

19. It is not in dispute that the Petitioner was (and is) in a contractual relationship with the Respondents. The contractual relationship is guided by the constitutional norms establishing the Commission, the public service and officers, the Teachers Service Commission Act and the Regulations made thereunder, the Code of Regulations for Teachers and the general law of employment. Any breach of the tenets of this legal framework would amount to breach of contract.

20. In challenging the validity or fairness of the transfer, the Petitioner asserted that having been notified of retirement (she was over 58 years at the time), the Respondents in exercising the power to transfer her under Regulation 12(1)(d)(ii) of the Code of Regulation for Teachers, could not unilaterally take such a decision without consideration of the Commission's *Transfer Policy* which provides that

Teachers with medical conditions have been spared from the ongoing delocalisation/transfer exercise. Also spared are teachers aged above 56 years and those set to retire.

21. The decision to transfer, the Petitioner contended was in violation of the national values and principles, the responsibility of leadership, values and principles of public service and infringed her right to equal protection and benefit of the law.

22. According to the Petitioner, she was entitled to be heard before the decision to transfer was taken, and because she was not heard, her right to fair administrative action was breached.

23. Further, the Petitioner contended that the decision ran counter to her legitimate expectation not to be transferred having been notified of

impending retirement and that the decision was an unfair labour practice.

24. To demonstrate that there was a *Transfer Policy*, the Petitioner filed an extract of a newsletter said to be from the Commission's website and minutes of a meeting between the Commission and the National Assembly Departmental Committee on Education held on 16 April 2019 where the Commission's Chief Executive confirmed to the Committee the existence of a Policy not to transfer teachers aged above 56 years.

25. In resisting the Petitioner's complaints, the Respondents contended that the Commission had a constitutional mandate to employ and assign teachers with a view to ensuring appropriate staffing balance across the country and that constitutional imperative had been given context in the Code of Regulation for Teachers and individual employment contracts, and the Court should not interfere in the exercise of such mandate.

26. The decision to transfer a teacher, it was stated, was at the discretion of the Commission or its agents and was in tandem with public policy or public interest.

27. On whether there was a *Transfer Policy* exempting teachers who had attained 56 years from transfer, it was contended that the purported extract of *Transfer Policy* exhibited by the Petitioner was not authored by the Commission.

28. The Respondents exhibited copies of proceedings before the National Assembly to buttress their case.

29. The Court has considered the material placed before it including case law, even if no express reference is made to them.

30. Although denying the existence of *Transfer Policy* in respect of teachers aged 56 and above as asserted by the Petitioner, the Respondents produced copies of the presentations it and other stakeholders made before the National Assembly and proceedings thereof.

31. The proceedings and more so the submissions by the Commission confirm the existence of a *Transfer Policy*.

32. The proceedings capture the Commission submitting at page 28 thus

Exemptions on Implementation of Delocalisation

Teachers Aged 56 years and above

In the implementation of delocalisation, the Commission has made a decision to exempt all teachers who are aged 56 years and above.

33. In light of such clear submissions and expression of a *Transfer Policy* before the National Assembly, the Court finds it legally mischievous for the Respondents to deny the existence of a *Transfer Policy* as asserted by the Petitioner.

34. The *Policy*, the Court finds, gave the Petitioner not only an assurance but a legitimate expectation that being over 56 years old, and having received a notification of retirement, she would not be unilaterally transferred.

Whether Petition raised constitutional questions

35. Decades ago in *Harriskisson v Attorney General of Trinidad & Tobago* (1980) AC 265, the Privy Council had stated

The right to apply to the High Court underof the Constitution for redress when any human right or fundamental 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 for invoking judicial control of administrative action. In an originating application to the High Court under the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court or being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.

36. The legal proposition was given an endorsement by our Court of Appeal in *Gabriel Mutava & 2 Ors v Managing Director, Kenya Ports Authority & Ar* (2016) eKLR.

37. The Respondents relying on the legal proposition submitted that the dispute before Court was contractual and could be resolved within the purview of private law, and therefore the Petitioner was not deserving of any of the constitutional remedies sought.

38. Further, the Respondents urged that the Petitioner had failed to identify and set out with precision the constitutional rights violated and the nature of the violations.

39. The Court agrees with the Respondents that the issues raised in the Petition could have been resolved without invoking the Constitutional route.

40. As a matter of practice and procedure, the constitutional questions advanced by the Petitioner, if any, could have been raised in terms of Rule 7(3) of the Employment and Labour Relations Court (Procedure) Rules, 2016.

41. The Rule envisages a party raising disputes regarding the enforcement of any constitutional rights and freedoms or any constitutional provision through a *Statement of Claim*.

42. However, on what should be the legal implication of needlessly invoking the constitutional petition route, the Court is of the view that a denial of costs and/or an order directing that the Petition be converted in a Statement of Claim would be sufficient to deter this practice which is spreading at an alarming rate.

Appropriate remedies

43. The Petitioner sought 2 declarations, an order of certiorari, compensation and costs.

44. In light of the foregoing, the Court will not issue declarations or orders in the format sought by the Petitioner.

Conclusion and Orders

45. Consequent to the above, the Court allows the Petition and issues a declaration **THAT**

(a) The transfer of the Petitioner through the letters dated 18 December 2019 and 2 January 2020 were invalid and unfair and the transfer is quashed.

46. The Petitioner is denied costs because of the following considerations

(a) The transfer order was stayed by the Court and the Petitioner did not report to the new station.

(b) The Petition has been resolved on grounds which are not purely constitutional.

(c) The parties are in an ongoing employment relationship.

Delivered through Microsoft teams, dated and signed in Nairobi on this 26th day of June 2020.

Radido Stephen

Judge

Appearances

For Petitioner Mr Masika instructed by Masika & Koross Advocates

For Respondents Ms Manyasa, Advocate, instructed by Teachers Service Commission

Court Assistant Judy Maina