



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

PETITION 83 OF 2018

[FORMERLY NAIROBI 1266 OF 2018]

NYAGWA MESHACK ONINDO.....1ST PETITIONER

ASIAGO RICHARD OGOCHO.....2ND PETITIONER

MOUKO NELSON MUOGO.....3RD PETITIONER

VERSUS

TEACHERS SERVICE COMMISSION.....1ST RESPONDENT

MARYCLARE INDIRE, CHIEF PRINCIPAL,

MIGORI TEACHERS TRAINING COLLEGE.....2ND RESPONDENT

TSC COUNTY DIRECTOR MIGORI COUNTY.....3RD RESPONDENT

CONSOLIDATED WITH KISUMU CAUSE 288 OF 2018

[FORMERLY NAIROBI 1266 OF 2018]

KOKEYO CAROLYNE ADHIAMBO.....1ST CLAIMANT

OJWANG O KENNETH.....2ND CLAIMANT

WINGA NANCY ANYANGO.....3RD CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

JUDGMENT

1. The Petitioners and the Claimants instituted Petition 83 of 2018 and Cause 288 of 2018 respectively, but on 23.1.2019 consolidated. Both the Petitioners and Claimants were initially employed as primary school teachers by the Teachers Service Commission (TSC). However, upon attaining a Bachelor of Education, and a Master Degree in the 1st Petitioner's case, they successfully applied for transfer Migori Teachers Training College as lecturers of primary teacher education and they were duly released from their former stations.

2. The Petitioners and the Claimants aver that in April 2018, the 2nd Respondent orchestrated a campaign to discriminate and humiliate them for being deployed from primary school. Later, they were issued with transfer letters from Migori Teachers Training College to undisclosed primary schools to serve as primary school teachers, despite their qualifications as graduate teachers.

3. The Claimants aver that the Respondent has not complied with the law in effecting the purported transfers hence their transfers amount to

a demotion. It is their case that none of them had worked at Migori Teachers Training College for a period of 2 years before receiving their transfer letters yet the 1st Respondent's transfer policy requires employees to serve at their new stations for at least five years before they can be transferred.

4. The Petitioners aver that the Respondents actions amounted to discrimination by dint of article 27 (4) of the Constitution and was an infringement of their rights to human dignity, fair administrative action and fair labour practice. It is the Petitioners' position that their transfers would lead to their underutilization contrary to article 201 (d) of the Constitution which requires public money to be used in a prudent and responsible way.

5. The Claimants contend that in demoting them, the 1st Respondent violated the law, discriminated against them and deprived them of the legitimate expectation that they would work at Migori Teachers Training College for at least 5 years. They have sought the following prayers from this Court–

i. A declaration that the transfer of the Claimants is unlawful and unfair.

ii. An order cancelling, lifting and/or reversing the transfer of the Claimants herein.

iii. Damages for discrimination.

iv. Costs of this cause.

v. Interest on (3) and (4) at court rates.

vi. Any other relief this Honourable Court may deem fit and just.

6. On the other hand, the Petitioners term their transfers as malicious, vindictive and unreasonable as they were not informed of any relevant considerations or competing interests such as their qualifications and the learning needs of the children they were going to teach. Further, they aver that they were demoted without being afforded a chance to be heard or being informed of the reasons for the transfer pray for the following reliefs–

i. A declaration that the Respondent's decision dated 13th July 2018 violated the Petitioners rights and fundamental freedoms under article 27, 28, 29, 41 and 47 of the Constitution.

ii. An order of certiorari removing into this Court and quashing the Respondent's decision to demote or transfer the Petitioners from Migori Teachers Training College to unnamed primary schools.

iii. Damages in compensation for violation of the Petitioners' fundamental rights and freedoms.

iv. An order that the Respondents bear the Petitioner's costs of this petition.

7. On 17.8.2018, the Respondent filed a reply to the Claimants' claim. On the other hand, she adopted as her response to the Petition, the Replying Affidavit of Lucy Wangari sworn on 23.10.2018 in opposition to the Petitioners' application dated 27.8.2018. The Respondent contends that the Claimants' and Petitioners' transfers to Migori TTC was irregular, unprocedural and illegal hence their respective transfers back to primary institutions was regular, lawful, non-discriminative and did not amount to demotion.

The Claimants' and Petitioners' Case

8. On 30.7.2018, the Claimants filed the 1st Claimant's witness statement where she reiterated the averments made in their Memorandum of Claim as outlined above. On the other hand, the Petition is supported by the Petitioners' respective Supporting Affidavits each sworn on 27.8.2018 which also reiterates the averments in the Petition as outlined hereinabove.

9. The 1st Petitioner contended that he had attained a Bachelor of Education and a Master degree from the University of Nairobi and was a PHD Candidate at Rongo University College while the 2nd and 3rd Petitioners averred that they obtained a Bachelor of Education degree from the University of Nairobi and Kenyatta University, respectively.

10. They further contended that since they reported to their duty stations at Migori TTC, they have performed their teaching duties diligently but around April 2018, the 2nd Respondent begun to target them and other graduate teachers who had initially been employed on the basis of their primary teacher's education certificate, before they obtained graduate qualifications. They averred that they were labelled incompetent, compared to their colleagues who were employed as graduate teachers in the first instance.

11. They stated that they received a letter on 20.7.2018 whose contents were that the TSC had decided to transfer them from Migori TTC to Migori County as a primary school teacher to teach all subjects, with effect from 2.8.2018 but not later than 14 days from the effective date of the letter. In their view the transfer was discriminatory, in violation of the right to fair labour practices and amounted to inhuman treatment because they their new work stations were not disclosed.

The Respondent's Case

12. The Respondent avers that the claimants and petitioners were irregularly and un-procedurally deployed/transferred from the primary schools they were serving, on diverse dates in 2017 and 2018, to perform teaching duties at Migori TTC. According to TSC, the transfers grossly offended the deployment policy and other relevant guidelines hence illegal. In particular, it contended that the 1st Claimant's certificates and professional qualifications were not vetted by the Quality Assurance & Standards Division of the Respondent.

13. It is averred that the 1st claimant did not apply for the transfer in the manner stipulated in regulation 65 (1) of the Code of Regulations for Teachers but she just wrote a letter seeking to be deployed to Migori TTC; that the letter was irregularly received at the office of the Director, Teacher Management; and she finally received a deployment letter on the same day her letter was purportedly received.

14. TSC further averred that the 2nd Claimant's Application for transfer was received officially by the Commission on 14.11.2017, but later it was received un-procedurally by the Director, Teacher Management on 19th December 2017 and like the 1st Claimant, his transfer was approved promptly and he was issued with a deployment letter of 20.12.2017. However, the 2nd Claimant was later advised that the deployment was not possible as it was not in line with the Respondent's prevailing policy.

15. TSC averred that, the 3rd Claimant submitted her academic certificates in 2012, but after they were vetted by the Quality Assurance and Standards division of the TSC and it was found that she did not qualify for deployment to a post primary institution as she had not attained the requisite qualifications. Thereafter she applied again and she was irregularly issued with the deployment letter dated 19.6.2017. However, TSC contended that it received the 3rd Claimant's application on 11.7.2017, long after she had been deployed. It averred that the second application for transfer was not officially received before the deployment.

16. TSC further averred that the 1st Petitioner's academic certificates and professional qualifications were not vetted by the Quality Assurance & Standards division of the Respondent as required and was advised that his application for deployment was not tenable as the same had been halted by the Respondent. Three years later, he made another application for transfer and the letter was officially received on 15.12.2016 and he was issued with a deployment letter of 20.12.2016.

17. TSC further explained that the 2nd Petitioner's academic certificates and professional qualifications were not vetted by the Quality Assurance & Standards Division of the Respondent, but on 20.4.2016 and without following the requisite procedure, he wrote a letter seeking deployment to Migori TTC. TSC averred that it responded by a letter informing him that his request for deployment was not tenable as the deployment exercise had been suspended. However, he was issued with a deployment letter dated 19.9.2016, signed by Ms. Mberia.

18. TSC further explained that the 3rd Petitioner's academic certificates and professional qualifications were not vetted by the Quality Assurance & Standards division of the Respondent but his application was received officially by it on 22/8/2016, and was acted upon immediately and he was issued with the deployment letter of 14.10.2017.

19. TSC averred that staffing panels were not constituted to consider and approve transfer requests as required by regulation 65 (3) of the Code of Regulations; and that the officer who deployed the Claimants and Petitioners acted un-procedurally, without authority and breached the provisions of the Regulations and the Policy on Post Basic Qualification, 2006 which requires teachers in primary schools who successfully undertake degree programmes be retained in primary schools. It further averred that the concerned officer, Ms. Mberia, was cautioned on effecting irregular transfers and thereafter disciplinary action taken against her.

20. The Respondent admitted that the Claimants were issued with letters transferring them from Migori TTC for posting to Migori County primary institutions by the TSC County Director, pursuant to regulation 63 (2) of the Respondent's Code of Regulations. However, it contended that the Claimants' and petitioner's transfer is not a demotion as their salaries and allowances will remain the same and denies discriminating against them. It is the Respondent's position that the Claimants were transferred to serve within Migori County hence they cannot be socially disoriented.

21. The Respondents contended that the requirement under regulation 65 (2) of the Code of Regulations, for serving in a station for 5 years before one can be transferred applies to newly appointed teachers hence inapplicable to the Claimants. They further contended that if the said teachers are allowed to serve in the TTC, the standards of education at the TTC will go down thereby affecting the standards of education in schools all over the country.

22. The claim and the petition were disposed of by way of written submissions with the Claimants filing their submissions on 11th January 2019 while Respondent filed hers on 20.3.2019. The Petitioners filed their written submissions on 21.11.2018 while the Respondent filed her submissions on 16.1.2019. The said proceedings were done in Kisumu before Nduma J and then transferred to this court where the parties only highlighted the submissions online on 24.6.2020.

Parties' Submissions

23. Mr. Ochiel, counsel for the Petitioners submitted that the petitioners are still serving as lecturers at Migori TTC, by virtue of the interim orders issued in the matter. However, the Claimants were transferred to serve as primary school teachers. It was his submissions that there was no reason for transferring the Petitioners and Claimants hence the transfer of the Petitioners and the Claimants from Migori TTC to primary schools was a punitive administrative action and a demotion.

24. He further submitted that the Respondent's action was unfair because no written reasons were given and the Petitioners were never given a chance to be heard. He submitted that transferring the Petitioners who were serving as lecturers in Migori TTC with their level of education, to serve as primary school teachers was unfair, degrading and therefore unreasonable. He argued that public service requires deployment to the job one is well suited to serve and contended that under regulation 55 of TSC Code 2015, the Petitioners were not supposed to teach in a primary school.

25. It was Counsel's submissions that Article 23 of the Constitution grants this Court the power to give appropriate reliefs. He contended that the transfers were done without stating the reason and without hearing contrary to section 4 of the Fair Administrative Actions Act and Article 47 of the Constitution. He urged this Court to quash the letter dated 13th July 2018 so that the Petitioners could continue teaching at the Migori TTC so that there will be proper utilization of resources. His submissions applied to claimants who are seeking for their transfer to be reversed.

26. Ms. Ruto, Counsel for the Respondent, submitted that the Petitioners have failed to demonstrate how they got transferred from primary schools to Migori TTC and posited that the transfers were irregular. She further submitted that the transfers were irregular because the Petitioners never applied for deployment from primary school to TTC as required by regulation 65 (1) and (3) of the Code of Regulation of Teachers. She observed that the Petitioners' option of applying for a transfer through a letter was not the correct procedure and the application letter was not approved by a staffing personnel at the County level as required by the Code.

27. Counsel submitted that the deployment was void *ab initio* and since the irregularity fell within an employment relationship, it was unenforceable. It was her submissions that a party should not benefit from an illegal undertaking hence the Petitioners should be denied reliefs under administrative law as they miscondacted themselves in obtaining the transfer. She stated that he who comes to equity must come with clean hands.

28. She contended that, under the TSC's Policy, attaining higher education did not guarantee the Petitioners deployment to a higher position or deployment to post primary institution but only a higher pay. She further contended that regulation 55 as relied upon by the Petitioners' Counsel, was not relevant to this case.

29. She submitted that the fact that the officer who effected the transfers had been dismissed from service, showed the seriousness of the irregularities. She further submitted that the transfer was fair since the Petitioners were transferred within the county, hence their children's schooling was not affected. She posted that even though the Petitioners were qualified to teach in higher institutions, they ought to have sought the deployment lawfully. She therefore prayed that the suit be dismissed with costs.

30. In his rejoinder, Counsel for the Petitioners reiterated that reasons ought to be given before an administrative action, and relied on Judicial Service Commission vs. Mbalu Mutava & Another [2015] eKLR and Naomi Connie Lusiche vs. Barclays Bank of Kenya [2018] eKLR where the Court of Appeal held that the Fair Administrative Action Act and Article 47 of the Constitution apply to contracts of service.

31. The counsel contended that the 1st and 2nd Petitioners applied for transfer and were deployed to Migori TTC and once there, they could not be re-deployed without a reason and without due process. He maintained that reasonable use of resources does not allow a PHD holder to teach primary school pupils. He submitted that the Respondent admitted at paragraph 4 of her Reply that the Higher Qualification Policy did not address emerging issues. Finally, contended that there was no policy on the transfer of a teacher who obtains higher qualifications.

Issues for determination and analysis

32. I have carefully considered the pleadings filed by parties, the evidence adduced and Counsels' submissions and it is not contested that the Claimants and Petitioners were deployed by the TSC to Migori TTC from various primary schools. It is also common ground that in July 2018, they were issued with transfer letters deploying them to The County of Migori for posting to primary schools to teach there. During the highlighting of submissions, the Petitioners' and claimant's Counsel informed this Court that the Claimants had since been transferred to the primary schools.

33. The issues for determination therefore are as follows–

- i. Whether the transfer of the petitioners and claimants was an administrative action.**
- ii. Whether the said transfer was unlawful.**
- iii. Whether the transfer of the petitioners violated their rights under Article 27, 28, 29, 41 and 47 of the Constitution.**
- iv. Whether the orders sought should be granted.**

Was the transfer an administrative action?

34. Section 2 of the Fair Administrative Actions Act defines administrative action to include –

“(i) the power, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates.”

35. The petitioners and claimants contended that their transfer from Migori TTC back to primary schools amounted to a demotion. Demotion in its ordinary sense means lowering someone to a lower rank in employment or social status. I gather support from the Oxford Learner's Dictionary which defines demotion as a move to a lower position or rank. In Silvanus Lukoko Were v Ministry of Lands & Physical Planning & Another [2020] eKLR the Court defined demotion as follows–

“The ordinary English meaning of the word ‘demotion’ is “reduction in rank or status “. The meaning of the word ‘rank’ on the other hand is “place within a grading system”. Furthermore, the ordinary meaning of the word ‘status’ is “person’s social standing.”

36. From the above definitions, I would agree that, even if there will be no reduction of salary, the transfer of the Petitioners and claimants back to the primary schools would reduce their social standing as they would cease being lecturers at the TTC to primary school teachers and that amounts to a demotion. Applying the definition of administrative action above to the decision taken by the respondents to transfer the petitioners and claimants back to primary schools, I would return that the said decision amounted to an administrative action because it had a detrimental effect on them.

Whether petitioners’ and claimants’ transfer was unlawful

37. The petitioners and the claimants contended that their transfer back to the primary schools was unlawfully done without following the due process of law set out under the Fair Administrative Action Act despite the alleged irregularity of the initial transfers and promotion to TTC Lecturers, since it would adversely affect them.

38. Sections 4 (1) (2) and (3) of the Fair Administrative Actions Act provide as follows–

- 1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.**
- 2. Every person has the right to be given written reasons for any administrative action that is taken against him.**
- 3. Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision—**
 - a. prior and adequate notice of the nature and reasons for the proposed administrative action;**
 - b. an opportunity to be heard and to make representations in that regard;**
 - c. ...**
 - d. a statement of reasons pursuant to section 6;**
 - e. ...**
 - f. ...; or**
 - g. information, materials and evidence to be relied upon in making the decision or taking the administrative action.**

39. The Petitioners’ transfer letters did not state the reasons as to why they were being transferred neither were they given the opportunity to present their case since the transfer would adversely affect them as it amounted to a demotion. I therefore agree with the petitioners and the claimants that the TSC ought to have adhered to the provisions of section 4 (1) (2) and (3) aforesaid before making the decision to transfer them.

40. I again gather support from Silvanus Lukoko Were v Ministry of Lands & Physical Planning & Another [Supra] where the court held as follows–

“36. It therefore follows that even if a transfer is not a disciplinary or punitive action, where a transfer includes a reduction in status at the new station such as was experienced by the petitioner, the employer is obliged to explain to the employee why the action leading to diminution of status has been meted on him and also give opportunity to the affected employee opportunity to explain why the employer should not take the intended action.

37. This is what due process under Fair Administrative Actions Act 2015 contemplates and failure by an employer to do so then makes the action unfair administrative action against the employee in violation of section 4(1) of the Act and Article 47 of the Constitution. Furthermore, the action also constitutes unfair Labour practice in violation of Article 41 of the constitution.”

41. The TSC confirmed that Regulation 65 (3) of the Code of Regulations for Teachers provides that it shall constitute staffing panels at the headquarters and at the county level to consider and approve transfer requests, and that the transfers to Migori TTC were done without following that procedure. It has also confirmed that disciplinary action was taken against the officer who made the said transfers unprocedurally and without authority.

42. However, even with justified reasons for reversing the said transfers to Migori TTC and sending them back to primary schools, I do reiterate that TSC ought to have adhered to the provisions of the Fair Administrative Actions Act which amplifies the right to fair administrative action under Article 47 of the Constitution, and codifies the cardinal tenets of natural justice. It is immaterial, in my view, that the decision maker had valid ground(s) for making the decision, the same will be impugned in a court of law if the decision is made without

following the procedure set out in the Constitution, a statute, subsidiary law, Policy Manual or a contract.

43. As correctly observed by the Counsel for the Petitioners and claimants, the jurisprudence emerging from our courts is that the Fair Administrative Action Act and Article 47 of the Constitution apply to contracts of employment. In ***Naomi Connie Lusiche vs. Barclays Bank of Kenya [2018] eKLR*** the Court of Appeal held: -

“... it cannot be gainsaid that the FAA-Act applies to private contracts including contracts of employment. In fact, almost all unfair termination claims usually revolve around fairness of procedure for termination and the right to be heard before the termination is carried out. Further, part IV of the Employment Act on termination and dismissal, especially section 41,42, 44, 45, 46 and 47 are all about fairness of the reason and process of termination of employment.”

44. In view of the facts, legal provisions and the cited binding judicial precedents, I return that the transfer of the petitioners and claimants from Migori TTC back to primary schools was unlawful.

Whether the transfer of the petitioners violated their rights under Article 27, 28, 29, 41 and 47 of the Constitution.

45. I have already held herein above that the transfer of the petitioners' amounted to an administrative action that it was done without following the procedure set out by the FAA- Act. The said Act amplifies the right to Fair administrative action under Article 47 of the Constitution. The petitioners have pleaded with precision the provision of constitution which was violated and set out the manner in which the violation was done. TSC's breach of the mandatory procedure for making administrative actions set out under the FAA Act amounted to violation of the petitioners' fundamental right to fair administrative action under Article 47 and right to fair labour practices under Article 41 of the Constitution read with Article 236 which provides: -

“236. A public officer shall not be-

(a) ...

(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.”

46. As regards violation of rights and freedoms under Article 27, 28, and 29, I am satisfied that the respondents have demonstrated that the Petitioners' transfers were not a witch hunt or done out of malice as the Respondent had a genuine reason for reversing the irregular transfers. Consequently, I find that the petitioners have failed to prove that the transfer was discriminatory and unreasonable. In my view the alleged unreasonable use of resources by transferring the petitioners to teach primary school pupils, can validly be raised if the petitioners were promoted through a lawful procedure. The main issue at hand herein is the procedure followed in promoting them and the procedure followed in demoting them. In both cases the procedure followed was wrong.

47. The foregoing finding applies to the allegation that their transfer of the claimants was discriminatory.

Whether the orders sought should be granted.

48. The Petitioners and the claimants have established that due procedure was not followed by the 1st Respondent, and that the Respondent violated Article 41 and 47 of the Constitution 2010 by transferring them back to primary schools. I therefore make declaration that the transfer of the petitioners and claimants back to primary schools was unlawful and it violated their rights under Article 41 and 47 of the Constitution.

49. However, for the reason that there was a justifiable reason for the impugned transfer back to primary schools, I decline to reverse the same in favour of the claimants. I also decline to quash the same by an order of Certiorari in favour of the petitioners for the same reason.

50. The 3 petitioners prayed for damages for violation of their rights and I grant each Kshs. 300000 as general damages for violation of their right to fair labour practices and fair administrative action. The claimants will not get the same because they did not pray for same.

51. Finally, the petitioners and claimants did not prove violation of the rights and freedoms under section 27,28, and 29 of the Constitution and therefore I do not award the damages as prayed.

52. In the end I enter judgment for the petitioners and claimants as follows: -

a. A declaration that the Respondent's decision dated 13th July 2018 violated the Petitioners rights and fundamental freedoms under article 41 and 47 of the Constitution.

A declaration that the transfer of the Claimants is unlawful and unfair.

Each of the 3 petitioners is awarded Kshs.300000 as general damages for violation of their rights under Article 41 and 47 of the constitution.

I decline to award costs because the parties are still in employment relationship.

Dated, signed and delivered at Nairobi this 30th day of July 2020

ONESMUS N. MAKAU

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 15th April 2020, this judgment has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28(3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

ONESMUS N. MAKAU

JUDGE