



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

PETITION NO. 184 OF 2019

(Before Hon. Justice Hellen S. Wasilwa 17th September, 2020)

IN THE MATTER OF ARTICLE 2, 10, 19, 20, 227, 28, 41, 47, 48, 50 AND 260 OF THE CONSTITUTION

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO. 4 OF 2015

AND

IN THE MATTER OF THE EMPLOYMENT ACT 2007, SECTION 44

BETWEEN

HELLEN KHAMALI.....PETITIONER

VERSUS

TEACHERS SERVICE COMMISSION.....1ST RESPONDENT

THE HON. ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Background

1. The Petitioner was employed by the 1st Respondent as a teacher at Kabuyefwe Friends Boys' Secondary School, Trans Nzoia County. She served in that capacity until she was summarily dismissed for alleged reason of immoral behaviour.
2. The 1st Respondent is a Commission established under article 237 of the Constitution to register trained teachers, recruit and employ registered teachers, assign teachers employed by the Commission for service in any public school or institution, promote and transfer teachers, exercise disciplinary control over teachers and terminate their employment.
3. The 2nd Respondent's office is established under article 156 of the Constitution. He is the principal legal adviser to the government and represents the national government in court or in any other legal proceedings to which the government is a party.
4. On 8/10/2019, the Petitioner filed an Application and the petition herein, both dated 8/10/2019; alleging an infringement of her constitutional, fundamental rights and freedoms by the 1st Respondent. In her Application, she sought conservatory orders staying the 1st Respondent's decision and an order directing the 1st Respondent to issue her with the documents listed herein below. In her petition, she sought the following remedies from this Court:-

a. A declaration do hereby issue that the 1st Respondent's decision and/or action of constructively suspending/interdicting the Petitioner is a violation (sic) right to be treated with dignity, and her right to fair administrative action that is lawful and reasonable under Articles 27, 28, 41 and 47 of the Constitution.

b. An order of prohibition to hereby issue prohibiting the Respondent from taking any disciplinary action and/or suspending/interdicting/ dismissing the Petitioner from her employment on the basis of the allegations levied against her.

c. An order do hereby issue permanently restraining the Respondents by themselves, their servants and/or agents from in any way interfering with the employment of the Petitioner.

d. An order of the 1st Respondent to forthwith, immediately and unconditionally allow the Petitioner herein HELLEN KHAMALI to return back to work.

e. An order do issue directing the 1st Respondent to furnish the Petitioner and this Honourable Court with the following documents and information:-

i. Certified defense statement by the Petitioner.

ii. All certified witness statements.

iii. Certified judgment entered to remove the Petitioner from the register of teachers.

iv. Certified call logs showing communication between the Petitioner and the alleged students.

v. Certified text messages showing communication between the Petitioner and the alleged students.

vi. Video clips showing the Petitioner hugging and kissing the said students.

vii. Video clips showing the Petitioner having sexual intercourse with said student.

f. The costs of this Petition be provided for.

g. Any order that this Honourable Court may deem just and fit in the circumstances.

5. The 1st Respondent has opposed the Application and the Petition vide the Replying Affidavit of Mary Rotich sworn on 23/10/2019. The 2nd Respondent opposed the Petition vide his grounds of opposition dated 18/2/2020.

The Petitioner's Case

6. The Petitioner avers that on 21/3/2019 the Respondent issued her with an interdiction letter. However, she was never given an explanation, after the issuance of that letter.

7. The Petitioner avers that she is yet to receive communication from the 1st Respondent regarding the fate of her employment and she is apprehensive that the interdiction letter amounted to an unfair and unlawful termination of employment.

8. It is the Petitioner's case that during the course of her employment, the 1st Respondent failed to meet the constitutional and statutory obligations required of an employer. Additionally, the 1st Respondent failed to accord her a fair hearing by failing to avail to her the evidence that was relied upon in taking a disciplinary action against her. Such actions infringed on her rights under articles 10, 11, 22, 23, 27, 28, 41, 47, 48 and 50 of the Constitution.

The Respondents' Case

9. The 1st Respondent avers that the Petition lacks merit, is bad in law, misconceived, fatally defective and ought to be struck out. Further, the issuance of the orders sought will amount to an usurpation and/or unreasonable limitation to the policy and executive authority of the 1st Respondent on managing teaching staff.

10. The 1st Respondent avers that the decision regarding the Petitioner's employment status was already rendered vide the decisions dated 20/6/2019, hence this Court cannot revisit the matter in the manner proposed by the Petitioner.

11. It is the 1st Respondent's averment that the Petitioner was accused of engaging sexually with her male students known as Bradley Webale Muresia and Emmanuel Koech. The allegations were investigated on 25/10/2018 and a report was compiled. On 19/3/2019, the Investigation Panel recommended the institution of disciplinary proceedings against the Petitioner. Consequently, the Petitioner was interdicted and gave a formal rebuttal vide the letter of 12/4/2019.

12. The 1st Respondent avers that the Petitioner's response was considered and she was invited to a disciplinary hearing vide the notice of 6/5/2019. The Petitioner and the witnesses familiar with the allegations were heard, the evidence reviewed and it was resolved that the Petitioner be dismissed and removed from the register of teachers.

13. The 1st Respondent maintains that the Petitioner's disciplinary case was commenced and determined within the confines of the law and the principles of natural justice. It is contended that the 1st Respondent properly executed its mandate to discipline an errant teacher.

14. It is the 1st Respondent's assertion that the Petitioner has failed to disclose the constitutional principle, law, rule, regulation or policy that they contravened by disciplining her. The 1st Respondent avers that the constitutional and statutory threshold for bringing this matter has not been met by the Petitioner. It is further averred that the issues raised in the petition relate to employment hence cannot be ventilated in the manner proposed by the Petitioner.

15. The 2nd Respondent opposed the petition on the following grounds:-

a. The 1st Respondent is a legal entity which can sue and be sued on its own behalf.

b. Article 237 (2) of the Constitution 2010, establishes the 1st Respondent as a distinct and independent entity and can only cooperate with the national government.

c. Article 152 (2) of the Constitution 2010, establishes the Cabinet and makes the 2nd Respondent a member therein at the national level where he thus represents the national government other than in criminal cases. However, this is a labour relation case where the government should not be a party and the 1st Respondent is the right party.

d. The 2nd Respondent can only be a party to this suit upon request and with the leave of court which in this case does not apply.

e. Section 5 of the Attorney General Act 2012 states that the 2nd Respondent can only be a party to a proceeding where the national government is a party otherwise in this case, he can only be present as a friend of Court.

f. This Court cannot issue the 2nd Respondent with orders with no legal force, otherwise, the 1st Respondent would be subordinate to the national government which would offend it.

g. The application as drawn is defective and bad in law as the Applicant has not sought leave to join the Respondents as required by law.

h. This Court lacks the jurisdiction to hear and determine the matter against the 2nd Respondent in light of the legal provisions mentioned hereinabove.

16. The application and petition were disposed of by way of written submissions with only the Petitioner and 1st Respondent filing their written submissions.

The Petitioner's Submissions

17. The Petitioner submits that her interdiction and the termination of her employment was based on unfounded allegations, which ruined her career and reputation. She further submits that her dismissal did not follow the procedure set out in section 41 of the Employment Act. She relies on the case of **Frederick Saundu vs. Principal Namanga Mixed Secondary School [2014] eKLR** where it was held as follows:-

“First, the employer must have a justifiable reason to believe the employee has engaged in serious misconduct to form what is commonly called a prima facie case;

Secondly, there is some objectively justifiable reason to deny the employee access to the workplace based on the integrity of any pending investigation into the alleged misconduct, or some relevant factor that would place the investigation or the interest of the affected party in jeopardy; and

Thirdly, the employer is given the opportunity to state his case or be heard before any final decision to interdict is made.”

18. It is submitted that there was no evidence or medical report tabled by any of the witnesses to ascertain that she was ever found engaging in a sexual relationship with any student. Additionally, there was no credible evidence to show that the Petitioner infected the alleged student with a sexually transmitted disease. As such, the 1st Respondent did not have justifiable reasons to conclude that she was guilty of immoral behaviour.

19. The Petitioner submits that her dismissal letter was not sent to her hence she was not informed of the reasons for her dismissal. Additionally, the 1st Respondent did not prove that they dismissed her in accordance with fair procedure. The Petitioner noted that the documents relied upon by the 1st Respondent in their Replying Affidavit were not availed to her at the time of the hearing hence she was denied the opportunity to challenge the evidence. This was contrary to rule 8.2.1 of the Teachers Service Disciplinary Rules.

20. The Petitioner submits that she is entitled to an award for costs of the suit. She relies on the case of **Affordable Medicines Trust and Others vs. Minister of Health and Others [2006] (3) SA 247 (CC)** where it was noted that in constitutional litigation between a private party and the state, the private party ought to be awarded costs if it is successful and if the private party is unsuccessful, each party should bear their own costs. The Court further observed that if there is a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure.

21. She urged this Court to allow the petition and grant the reliefs as sought.

The 1st Respondent's Written Submissions

22. The 1st Respondent submits that they did not circumvent the demands of fairness and justice in investigating and disciplining the Petitioner as alleged and that they adhered to the provisions of articles 47 and 50 of the Constitution, regulation 146 and 147 of the Code of Regulations for Teachers and the principles of natural justice.

23. An accusation was made against the Petitioner, she was investigated and a report compiled. Thereafter she was called upon to show cause why disciplinary action should not be taken against her, she responded but her response was unsatisfactory hence she was subjected to a disciplinary hearing where she and the witnesses in the matter were heard and a decision to dismiss and remove her from the register of teachers was arrived at after evaluating the evidence.

24. The 1st Respondent relies on the case of **Judicial Service Commission vs. Gladys Boss Shollei [2014] eKLR** where the Court of Appeal cited with favour the Nigerian Supreme Court decision of **B.A. Imonikhe vs. Unity Bank PLC S.C. 68 of 2001** as follows:-

“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”.

25. The 1st Respondent further submits that regulation 140 of the Code of Regulations for Teachers outlines the offences that may lead to disciplinary action and removal of a teacher from the register to include sexual intercourse, sexual harassment or flirtation; which the Petitioner had been accused of.

26. The 1st Respondent submits that the prayer to restrain them from dismissing the Petitioner from service and removing her from the register of teachers has no justification in law or policy as the Petitioner was dismissed in exercise of the 1st Respondent's mandate as stipulated in Article 237 of the Constitution and regulation 159 of the Code of Regulations for Teachers; and removed from the register by dint of Section 30 (1) (c) of the Teachers Service Commission Act. They rely on the case of **Joseph Maranga Amenya vs. Secretary to the County Assembly Service Board & 2 Others [2019] eKLR** where it was observed that Courts are reluctant to interfere in an employer's internal processes unless extraordinary circumstances disclosing an employer's unlawful conduct are revealed.

27. The 1st Respondent submits that the Petitioner owed her students a duty of care to act as their parent and guide them through their secondary education in line with the principle of *loco parentis*. The 1st Respondent further submits that reinstating the Petitioner will undermine the employment relationship between them which had been dealt an irreparable blow.

28. It is submitted that the 1st Respondent acted within its administrative jurisdiction and no valid grounds were advanced by the Petitioner to support her prayers. Additionally, the petition does not disclose the constitutional principle, law, rule, regulation or policy that the 1st Respondent contravened by disciplining her.

29. They rely on the case of **Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR** where it was held that it was not enough for an applicant in judicial proceedings to claim that a tribunal acted illegally, unreasonably or in breach of the rules of natural justice and that the actual sins of the tribunal must be exhibited for judicial review remedies to be granted.

30. The 1st Respondent urges this Court to hold that it properly discharged the burden imposed by Sections 41 and 43 of the Employment Act 2007 on employers to prove fair termination and rely on the case of **Teachers Service Commission vs. Joseph Okoth Opiyo [2014] eKLR** where the Court held that in matters of sexual immorality it was not easy to get eye witness evidence as such acts are committed behind closed doors and most of these cases are proved by circumstantial evidence.

31. I have considered the averments and submissions of both Parties herein. The issues for this Court's determination are as follows:-

1) Whether the dismissal of the Petitioner from the Respondent's service was done due to presence of valid reasons and if due process was followed.

2) Whether the Petitioner's rights under the Constitution were breached.

3) What remedies are appropriate in the circumstances?

Validity of reasons

32. The Petitioner filed the Petition on the 8/10/2019 and with it, an application Certificate of Urgency seeking orders to stay the decision of the Respondent to suspend interdiction/dismiss the Applicant. The Applicant also sought to be furnished with certain documents and information in possession of the Respondent.

33. This Court did not grant any interim orders but the Parties agreed to file submissions in this matter in order to dispense with the entire Petition.

34. The Petitioner averred that she had not been served with any dismissal letter at the time of filing this Petition but the Respondent annexed a dismissal letter addressed to the Petitioner dated 20/6/2019 indicating that she had been dismissed with effect from 27/5/2019 for the following reasons:-

1. "You flirted with your student Bradley Muresia Webale Adm. No. 9907, form 4L 2018 as follows:-

a) You gave him your telephone number and instructed him to get in touch with you over April 2018 holiday.

b) You sent him a message saying that you had begun liking him and promised to hug and kiss him while in school in second term.

c) You sent for him to come to your office several times where you hugged and kissed him.

2. You had sexual intercourse with your student Bradley Muresia Webale Ad. No. 9907 Form 4L in your office on an unspecified date

35. The Petitioner denied committing any of these acts complained of.

36. In respect of this act, the Respondent sought to rely on certain documents and information in their custody. The woes of the Petitioner began when apparently there was a report against her as stated in May and July 2018.

37. These allegations culminated in investigation of 25/10/2018 and the report is annexed herein. From the report submitted in Court, the investigation team took statements from the complainant Bradley Webale, the Principal Johnson Bulowa, outgoing School Captain, Buncan Msomi, Emmanuel Koech of Form 4K and Robert Mwangi of Form 4J. They also took unanimous statements from all Form 4 students in the school based on their likes and dislikes with regard to their school.

38. The statement relied upon by the student Bradley explained how he sought help from the Petitioner as his English and Guidance and Counselling teacher several times but later had a sexual relationship with her on several occasions.

39. The statement from Brian Msomi, the School Captain was that he was a friend of Bradley and Bradley had confided in him that he was having a love relationship with the Petitioner and later contracted a STD.

40. The statement from Emmanuel Koech was that he too was in a relationship with the Petitioner but was also informed by Bradley that he had a sexual relationship with the Petitioner.

41. The statement from Robert Mwangi also confirmed that he had had rumours that the Petitioner was having a sexual relationship with some students but he never had any relationship with her.

42. The statement from the Boarding Master Mr. Musungu was that Bradley came to him on 15/10/2018 complaining that he had contracted an STD from a teacher whom he named and so Musungu reported to the Principal.

43. The statement of the Principal was that he recalled the report of the alleged relationship between Bradley and the Petitioner from Mr. Musungu.

44. He then interrogated Bradley on the issue who confessed to this. He then recorded a statement from Bradley. He also recorded a statement from other students who corroborated this issue that the Petitioner was having a relationship with Bradley.

45. In her defence the Petitioner denied all the allegations. She indicated that she is married and blessed with 3 children and also indicated that she was in charge of guidance and counselling in 1st and 2nd term of 2018 and was also in charge of the Library and Christian Union.

46. She confirmed she knew Bradley since he joined the school and also assisted him to join the school and adjust having transferred to Kapsabet Boys High School. She denied having any sexual relationship with him other than him being her student. She also confirmed she had guided and counseled Bradley several times as he had issues including drug and substance abuse.

47. She also denied having any love affair with Emmanuel Koech and Robert Mwangi.

48. The Panel made a finding that she had a case to answer and recommended that there be a Panel hearing where Parties could give further evidence and accord the Petitioner an opportunity to cross examine them.

49. The Panel hearing was held on 19/3/2019 and the Minutes were annexed. Six witnesses testified and 2 out of the 6 corroborated their earlier statements. However, Bradley who was also invited declined to attend but instead wrote a letter recanting his earlier statement and indicated that he had been forced to write his earlier statement by the Principal and the Boarding Master who threatened to deregister him from sitting his 2018 KCSE unless he made the false statement in question. He indicated that he had been used as a scapegoat by the Principal in the problems the Principal had with the Petitioner.

50. The Principal confirmed that the Petitioner was a hard working teacher and was Patron of Christian Union and Head of Library. The other witnesses Koech, Mwangi and Bryan Musomi did not attend the panel hearing.

51. The Petitioner denied the allegations against her and indicated that her relationship with her student Emanuel was strictly as teacher counselor and as a Christian Union official. She refuted all the allegations against her.

52. The Panel returned a verdict that the Petitioner had a case to answer and she was interdicted vide a letter dated 21/3/2019. She appealed this interdiction. She was later invited for a disciplinary hearing by the Teachers Service Commission on 27/5/2019.
53. During the disciplinary hearing, the Petitioner maintained her innocence. The student Bradley still maintained he wrote the 1st statement due to instigation of the Principal. He also denied having a sexual or love relationship with the Petitioner. He indicated he recanted the 1st statement after thinking over it and feeling guilty for the lies.
54. Bradley's mother maintained that she had no doubt that her son had a sexual relationship with the Petitioner.
55. The Principal maintained his earlier statement and so did the boarding master.
56. After the hearing, the Panel found the Petitioner guilty as charged and recommended her dismissal.
57. I have gone to great lengths in analyzing this evidence. From the initial investigation period, the case seemed poised against the Petitioner.
58. However, during the initial disciplinary hearing, the students who had allegedly had sexual relationship with the Petitioner never gave any evidence. Bradley wrote a statement recanting the statement that implicated the Petitioner and even praised her for being a good teacher.
59. The Petitioner had denied ever talking to the students during the holiday and sought that the Respondent produces the call logs to prove this. None were produced. There was also an allegation that she sent the student in question text messages for him to meet her during the holiday. No such messages were produced in Court.
60. In effect, the allegations levelled against the Petitioner were never produced during the initial investigation hearing and during the disciplinary hearing as complainants denied these allegations.
61. It is not clear why the Respondent proceeded to find the Petitioner guilty without any evidence
62. Section 43 of the Employment Act 2007 states as follows:-
- 1) ***"In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of Section 45.***
 - 2) ***The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee".***
63. Presence of valid reason before such dismissal should be proved. The Respondents however have not established that they had valid reasons to dismiss the Petitioner.
64. As concerns due process, I find that due process was followed in that the Petitioner was given an opportunity to be heard and also to cross examine the witnesses. The Respondent therefore conformed to Section 41 of the Employment Act 2007.
65. Section 45(2) of Employment Act 2007 states as follows:-
- (2) ***"A termination of employment by an employer is unfair if the employer fails to prove:***
 - (a) ***that the reason for the termination is valid;***
 - (b) ***that the reason for the termination is a fair reason:-***
 - (i) ***related to the employee's conduct, capacity or compatibility; or***
 - (ii) ***based on the operational requirements of the employer; and***
 - (c) ***that the employment was terminated in accordance with fair procedure".***
66. Whereas the Respondent followed due process, they had no valid reason to dismiss the Petitioner. I therefore find the dismissal of the Petitioner unfair and unjustified.

Petitioner's rights

67. The Petitioner submitted that her rights under the Constitution were infringed upon. The Petitioner submitted that her rights under Articles 41, 47, 48 and 50 amongst others were infringed upon.
68. Article 41 of the Constitution provides that every person has a right to fair labour practices. The right to fair labour practices that a

person shall not be dismissed from employment without valid reasons.

69. In as much as the Petitioner was dismissed without any valid reason, her right to fair labour practices were infringed upon.

70. As for Article 47, the law provides as follows:-

- 1) *“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.*
- 2) *If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.*
- 3) *Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall:-*
 - a) *provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and*
 - b) *promote efficient administration.”*

71. Whereas the Petitioner was given an opportunity to be heard, the process was to be efficient and lawful. In the case of the Petitioner, the Respondent returned an invalid finding of their hearing process of guilt when in fact there was no evidence to support their finding.

72. I therefore find that the right of the Petitioner to a fair administrative process was infringed upon. I therefore find the rights of the Petitioner under the and in particular Article 41 and 47 were infringed upon.

Remedies

73. Having found that the Petitioner was dismissed unfairly and unlawfully and her rights under the Constitution infringed upon, I note that the Petitioner is a young lady, a mother and wife whose career as a teacher was cut short by the illegality of the Respondent. The chances of her getting another job will be an uphill unless she is reinstated to the service.

74. I therefore allow her prayer for reinstatement to the service of the Respondent without loss of salary and other benefits from the time of dismissal. She will remain in the service of the Respondent unless otherwise lawfully dismissed for any other cause or her services terminated for any other lawful reasons.

75. The Respondent will pay costs of this suit.

Dated and delivered in open Court this 17th day of September, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Ruto holding brief Sifuna for 1st Respondent – Present

Masaki holding brief Omari for Petitioner – Present