



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT KISUMU**  
**PETITION NO. 20 OF 2017**

*(Before Hon. Lady Justice Maureen Onyango)*

**IN THE MATTER OF ARTICLES 22(1) AND 162(2)(a) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF ARTICLES; 47(1)**

**AND 50(1) OF THE CONSTITUTION OF KENYA, 2010**

**AND**

**IN THE MATTER OF THE ALLEGED CONTRAVENTION OF THE TEACHERS' SERVICE COMMISSION CODE OF REGULATIONS FOR TEACHERS, 2015; REGULATIONS 146(1), (2)(1), (6) AND (12)**

**BETWEEN**

**MAUREEN K. IMBIAKHA.....1<sup>ST</sup> PETITIONER**

**JULIUS FELIX KISANYA.....2<sup>ND</sup> PETITIONER**

**VERSUS**

**TEACHERS' SERVICE COMMISSION.....1<sup>ST</sup> RESPONDENT**

**KAKAMEGA COUNTY TEACHERS' SERVICE**

**COMMISSION DISCIPLINARY PANEL.....2<sup>ND</sup> RESPONDENT**

**BOARD OF MANAGEMENT,**

**BUSILWA PRIMARY SCHOOL.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

By notice of motion dated 15<sup>th</sup> May 2017 filed under certificate of urgency, the petitioners seek the following orders –

1. That this matter be certified as urgent and service thereof be dispensed with in the first instance.
2. That pending the *inter partes* hearing of this application, the Court be pleased to restrain the respondents from conducting any disciplinary proceedings against the petitioners based upon the allegations of sexual misconduct leading to their interdiction.
3. That pending the final determination of the petition, the Court be pleased to restrain the respondents from conducting any disciplinary proceedings against the petitioners based upon the allegations of sexual misconduct leading to their interdiction

4. That costs be provided for.

The grounds upon which the orders are anchored are that the petitioners who were both Assistant Teachers employed by the 1<sup>st</sup> respondent and were at the time material to this application deployed at Basilwa Primary School as teachers were interdicted by letters dated 27<sup>th</sup> April and served upon them on 3<sup>rd</sup> May 2017, without compliance with Regulation 146 of the Teachers Service Commission Code of Regulations for Teachers, 2015 and that the interdictions were unfair.

The application is supported by the affidavit of MAUREEN K. IMBIAKHA sworn on 15<sup>th</sup> May 2017.

The application is opposed by the respondents who filed a replying affidavit of LOICE A. NYASEDA, the 1<sup>st</sup> respondent's Acting Senior Deputy Director Discipline at the Teachers Service Commission Headquarters.

In the petition filed with the application, the petitioners seek the following orders –

1. That the procedure employed by the respondents to interdict the petitioners be declared null and void.
2. That the interdiction of the petitioners be quashed and they be permitted to resume their employment as teachers.
3. Costs of the petition.

In view of the similarity in the prayers in the application and petition, the court consolidated the two and both were argued together.

The parties agreed to dispose of the suit by way of written submissions and subsequently filed and exchanged the submissions.

The case of the petitioners is that on 6<sup>th</sup> January 2017 they were summoned and directed to respond to allegations against them in 30 minutes. That having not been given the allegations beforehand, they declined to respond as directed seeking time. The request for more time was rejected and they were both transferred. The 1<sup>st</sup> petitioner was transferred to Shirandalo Primary School and the 2<sup>nd</sup> petitioner to Shihalia Primary School.

The petitioners were by notice dated 21<sup>st</sup> April 2017 summoned to appear before the 2<sup>nd</sup> respondent on 27<sup>th</sup> April 2017 to defend themselves against the allegations raised against them.

It is the petitioners' averment that their interdiction was based on procedure that was inherently capricious, unfair, unprocedural and ultra vires the Teachers Service Commissions Code of Regulations for Teachers, 2015 (COR, 2015) and therefore an infringement of their fundamental freedoms as guaranteed under Article 47 (1) of the Constitution of Kenya.

It is the petitioners' case that the law that governs discipline of teachers is Part XI of the COR 2015 enacted pursuant to the Teachers Service Commission Act 2012, that Regulation 144 sets out a list of authorities who may conduct disciplinary process against a teacher, that under Regulation 145 such misconduct must be reduced into writing and under Regulation 146(1), the 1<sup>st</sup> respondent may institute investigations on its own accord or through an agent such as Board of Management (BOM). It is further the petitioner's case that where the investigations are in respect of a teacher (other than a head of an institution) the concerned BOM is to set up an Investigation Panel to carry out the investigations on the alleged misconduct. That Regulation 146(6) gives guidelines on how the investigations are to be conducted. That under Regulation 146(8) the Investigation Panel is required to present its report to the BOM. If the report discloses commission of an offence the BOM has mandate to undertake various actions including interdictions as provided under Regulation 146(10). It is further provided under Regulation 146(2) that a person who sits on the Investigation Panel cannot be part of the Disciplinary Panel.

The petitioners rely on the case of *'The Speaker of the National Assembly -V- The Hon James Njenga Karume* where in the Court of Appeal stated that: -

*"In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of parliament, that procedure should be strictly followed."*

The petitioners submit that the Respondents have exhibited Minutes in the Replying Affidavit, which clearly denote the fact that indeed a JIP made up of officials of the 1<sup>st</sup> respondent and Executive of the 3<sup>rd</sup> Respondents conducted investigations into the allegations against the Petitioners on the 6<sup>th</sup> day of January 2017 at Busilwa.

That it was only the 3<sup>rd</sup> Respondent herein which could institute investigations against the Petitioners as Regulation 146(1) and (2)(a) of the COR, 2015 do not envisage an investigation along the parameters of the JIP. That the word "shall" used in the Regulation gives no room for discretion.

The Petitioners urge the Court to be guided by the persuasive observations in *Kisumu Industrial Court Constitutional Petition No. 231 of 2013, Nakuru Employment and Labour Relations Court Cause No 91 of 2017* and *Eldoret High Court Judicial Review Applications Nos 13 and 14 of 2013* affirming that only the Board of Management has the right to conduct investigations into the discipline of a teacher and interdict him or her as the case may be.

That the Petitioners were issued with Summons to appear before the 2<sup>nd</sup> Respondent and defend themselves against the allegations of sexual

improprieties. The Respondents argue that the appearance before the 2<sup>nd</sup> Respondent was not in relation to disciplinary proceedings but was instead a continuation of the investigations commenced by the JIP.

That the 2<sup>nd</sup> Respondent is a creation of Regulation 151(3) of the COR, 2015 and its only mandate is to determine cases where teachers have been interdicted as can be seen from Regulation 150 of the COR, 2015 which provides:

***R. 150. The Commission shall in accordance with section 33 of the Act, consider all the evidence, the investigation report and determine proceedings in each case of interdiction whenever it is alleged that a registered teacher should be disciplined in accordance with these Regulations.***

That the 2<sup>nd</sup> Respondent lacked the legal and statutory capacity to engage in an investigatory role as urged by the Respondents. It follows then that the interdiction of the Petitioners on the recommendation of the 2<sup>nd</sup> Respondent was as a result of a fatally flawed process and consequently a nullity.

That the persons who sat on the JIP which supposedly investigated the Petitioners also formed part of the membership of the 2<sup>nd</sup> Respondent which recommended the interdiction of the Petitioners.

That the persons who sat on both panels were Ebby Miheso Shiokamili, Bernadine Wekesa, Jafred Nakoche and Fridah Kweyu. On the face of it, this was in itself a violation of Regulation 146 (12) of the COR, 2015 which prohibits a member of the investigating panel from sitting on the disciplinary panel as was the case herein.

The petitioners further rely on the decision in ***Eldoret High Court Judicial Review Applications No. 13 and 14 of 2013*** in which the court observed that where the initial process is itself flawed, everything else which follows this initial process remains a non-starter: -

*“At the first stage, the process was carried out by the Commission’s agent, that is the BOG (1<sup>st</sup> respondent) in a flawed manner. This means that the second stage could not commence as the same too would have been founded on a non-starter process.”*

The petitioners submit that procedural fairness by virtue of Article 47 (1) of the Constitution of Kenya, 2010 has been elevated to a fundamental right relying on the decision of ***Judicial Service Commission -V- Mbalu Mutava & Another*** that –

*“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights.*

*The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability.*

*The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”*

It is submitted that the 1<sup>st</sup> Respondent has every right to prefer disciplinary process against any teacher if the circumstances warrant the same as this is a right available to an employer. The Petitioners urge the Court to ensure that the Respondents adhere to the law when undertaking the disciplinary process.

That as was observed in ***Fredrick Saundu Amolo -V- Principal Namanga Mixed Day Secondary School & 2 Others*** courts will only intervene with internal disciplinary mechanisms where the same are inconsonance with the law: -

*“In conclusion, I find that the Court can only intervene in an employer’s internal disciplinary proceedings until they have run their course, except in exceptional circumstances - that is where grave injustice might result or where justice might not by other means be attained.*

*The hearing of the claimants has not run its course, but the procedure adopted with sanction before according him a fair chance to be heard in the presence of his Union or a fellow employee of his choice not accorded to him. This far the court will interfere with the proceedings as by not so doing grave injustice will be occasioned to the claimant This is one such exceptional case.”*

The Petitioners urge the Court to arrive at a finding that the Respondents adopted a process that was unlawful, unfair and ultra vires the relevant statute when their combined industry led to the interdiction of the Petitioners; and that in doing so, the fundamental freedoms of the Petitioners as enshrined under Article 47(1) of the COK, 2010 were violated.

## **Respondent’s Case**

It is the respondent’s case that the Petitioners were teachers employed by the 1<sup>st</sup> Respondent and were stationed at Busilwa Primary School at the time material to this petition. That the Management of Busilwa Primary School scheduled a prayer day for the 2016 KCSE candidates at the Church of God, Busilwa, within the school compound on 28<sup>th</sup> October 2016. Members of the Board of Management (BoM), teachers, parents and all the 2016 KCSE candidates were in attendance. At their Staff Meeting of 24<sup>th</sup> October 2016 teachers agreed on duty allocation

for the occasion.

The 1<sup>st</sup> Applicant, Maureen K. Imbiakha was allocated the duty of preparation and cooking of rice and beans which she did not perform. The 2<sup>nd</sup> Applicant, Julius Felix Kisanya, alongside four other teachers was not assigned duties.

That a teacher named Timothy Shiava Shiakamili, TSC/633265, (the Whistle Blower) briefly left the prayer session in progress in Church at around 10:30 a.m. for a call of nature at the staff washrooms when he bumped into the Petitioners herein engaging in sexual intercourse inside the nursery school building within the school compound.

That the Whistle Blower made a verbal report on the matter to the Deputy Head Teacher, Mr. Clive S. Malikhu, who later informed the Head Teacher. The Head Teacher immediately constituted A Guidance and Counselling panel to address the issue with the Petitioners on 9<sup>th</sup> November 2016. However, the Petitioners failed, refused, declined and/or ignored to attend despite being invited.

That on 4<sup>th</sup> January 2017 when the school opened for the New Year the Petitioners caused great tension in the school when they accosted the Whistle Blower for having reported them to the school authorities. The Head Teacher informed the TSC County Director of the tension in the school vide a letter dated the same day.

On 6<sup>th</sup> January 2017, two events occurred in the school simultaneously:

(a) The Executive Board of Management, Busilwa Primary School, held a meeting to interrogate the Petitioners on the allegations levelled against them. The Petitioners appeared in person and were afforded an opportunity to defend themselves.

(b) A team of officers from Kakamega South Sub-County TSC office in the company of the KNUT Chairman, Kakamega South, Mr. Godfrey Mulinya, visited the school to investigate the issue. The Petitioners were interviewed alongside the Whistle Blower. The Petitioners were requested to make written statements and submit to the investigative team but they failed, refused, declined and/or ignored to do so even after later reminders.

That vide letters dated 27<sup>th</sup> January 2017, the TSC Kakamega South Sub County Director issued the Petitioners with letters to show cause why disciplinary action should not be taken against them for infamous conduct and insubordination; and were required to respond in writing in fourteen (14) days.

That the petitioners put in their responses vide letters dated 9<sup>th</sup> February 2017 and were subsequently invited to attend before the Kakamega County TSC Disciplinary Panel pursuant to Regulation 146(6) of the CORT on the 27<sup>th</sup> April 2017 to answer to allegations of immoral behaviour.

That given the nature of the complaints levelled against the Petitioners, and upon preliminary investigations the Kakamega South Sub-County TSC Director acted in line with Regulation 67 of the COR 2015 and transferred the Petitioners from Busilwa Primary School to different schools within the Sub-County to facilitate further investigations into the matter.

That vide letters dated 21<sup>st</sup> April 2017, the Petitioners were summoned to appear before the TSC Kakamega County Disciplinary Panel on 27<sup>th</sup> April 2017 to answer to the allegations levelled against them. The Petitioners attended before the panel and were afforded an opportunity to cross-examine the Whistle Blower.

That vide letters dated 28<sup>th</sup> April 2017, the TSC Kakamega County Director issued letters of interdiction to the Petitioners/Applicants on the grounds "*of immoral behaviour in that you had sexual intercourse with a fellow teacher ...on 28<sup>th</sup> October 2016 at around 10:30 a.m. in the nursery building while teaching at Busilwa Primary School.*"

It is the respondents' submission that contrary to the allegation by the petitioners that the 2<sup>nd</sup> Respondent did not comply with the provisions of Regulations 146(6), it is clear from evidence on record that the 2<sup>nd</sup> Respondent did in fact comply.

It is submitted that the 1<sup>st</sup> Respondent observed due process as provided for in its COR 2015 in interdicting the petitioners and they cannot be heard to assert that they were interdicted unprocedurally by the 1<sup>st</sup> Respondent. The respondents rely on **Fredrick Saundu Amolo -Vs- Principal Namanga Mixed Secondary School & 2 Others [2014] eKLR** to the extent that in interdicting the petitioners, the Respondent met the 3-dimension criteria developed by the Court, viz:

(a) *The Respondent had justifiable reason to believe that the petitioners had engaged in serious misconduct;*

(b) *The Respondent was justified to deny the petitioners access to the institution (through transfers out of Busilwa Primary School to separate schools) on the basis of the petitioners' impugned immoral behaviour, unethical conduct and integrity in view of pending further investigations.*

(c) *The petitioners was given an opportunity to orally state their case and to reduce the oral evidence into writing before the decision to interdict them was arrived at.*

The respondents submit that in the circumstances the process which was commenced by the petitioners is premature and the respondents ought to be allowed to proceed with the disciplinary process to full determination. They rely on **Rose W. Kirazu -V- Teachers Service**

**Commission [2016] eKLR** to the extent "that Courts should not interfere with the employer's right to internally discipline an employee unless the process is lawfully and out rightly flawed and this interference will be in this case limited to correcting wrong Procedural Internal Mechanisms."

That the orders being sought by the petitioners are not ordinary injunctive orders, but are conservatory orders which can only issue to public entities. That the 1<sup>st</sup> Respondent is a public body, which exercises its constitutional mandate as an employer and a regulator of the teaching service.

The respondents relied on the decision of the Supreme Court of Kenya in **Gitarau Peter Munya -Vs-Dickson Mwenda Kithinii & 2 Others [2014] eKLR** which they submit has settled the conditions precedent for issue of conservatory orders against public entities. At paragraph 86, the Court emphasized:

*"Conservatory orders bear a more decided public-law connotation: for these are orders to facilitate ordered functioning within public agencies, as well as to uphold the adjudicatory authority of the Court, in the public interest. Conservatory orders, therefore, are not, unlike interlocutory injunctions, linked to such private-party issues as the prospects of irreparable harm occurring during the pendency of a case; or high probability of success in the supplicant's case for orders of stay. Conservatory orders, consequently, should be granted on the inherent merit of the case, bearing in mind the public interest, the constitutional values, and the proportionate magnitudes, and priority levels attributable to the relevant causes."*

That the Court ought to consider the seriousness of the allegations levelled against the petitioners in view of four principles adopted by the Supreme Court of Kenya in **Gitari Peter -Vs-Dickson Mwenda Kithinji & 2 Others [2014] eKLR**.

The respondents submit that the petition lacks inherent merit. No sound ground has been propounded by the petitioners to merit the orders sought in the petition. That the petition before Court tends to fly in the face of public interest in regard to the public trust bestowed on the petitioners as professional teachers to behave in a manner befitting their stature in the eye of the public. That despite being aware of the statutory and regulatory requirement that they conduct themselves in a manner befitting public officers, the petitioners chose to defile the very place sanctified for the carrying out of the activities of their profession when they elected to arm themselves with un-satiable lust for sex; and in broad day light chose no better place than a classroom to quench their sexual quest.

That the public interest underlying the conduct of teachers as society role models, specifically in matters of morality and fidelity to the law cannot be overstated. That it would be in bad taste, taking the evidence on record, for the Court to issue the conservatory orders being sought by the petitioners to restrain the Respondents from conducting disciplinary proceedings against the Petitioners, against the backdrop of serious allegations of immoral behaviour inside a classroom within the school compound.

The respondents submit that a Constitutional Petition such as the one before Court must acquire its nature in strict adherence to the provisions of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013 (Mutunga Rules)**, more specifically **Rule 4(1) and (2)** thereof.

The respondents rely on the judgement of in **Kisumu ELRC Pet No. 7 of 2016: Christopher Abuyeka -Vs- Teachers Service Commission** (unreported) which concurred with the judgements in **Anarita Karimi Njeru -Vs- Republic [1979]** and **Mumo Matemu -Vs- Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR** which "laid dozen the principle that a person claiming constitutional infringement must give sufficient notice of the violations to allow the adversary party to adequately prepare its case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies and "the importance of precise claims in due process."

The respondents submit that the Petition herein has not stated the constitutional provisions that are alleged to have been violated or threatened, or the nature of the injury caused or likely to be caused by the Respondents. Mere mention of the alleged violation of the provisions of the 1<sup>st</sup> Respondent's COR 2015 does not constitute violation of the fundamental rights of the Petitioners by the Respondents, they submit.

## **Determination**

I have considered the pleadings, submissions and the authorities cited by the parties. The issues for determination are –

- (i) Whether the respondents complied with the regulations on interdiction procedure for teachers.
- (ii) Whether the interdiction was unconstitutional.
- (iii) Whether the petitioners are entitled to the remedies sought.

Before I address the substantive issues in the petition, I wish to address the issues raised by the respondent as to whether this petition raises any constitutional issues. The petitioners have cited Articles 237(1), 47(1) and 50(1). These provisions provide as follows –

**47.(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

**50.(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.**

### **237.(1) There is established the Teachers Service Commission.**

Article 47(3) provides that Parliament shall enact legislation to give effect to the rights in Clause (1), and that legislation shall provide for review of administrative action by a court or tribunal and for promotion of efficient administration. The legislation contemplated is the Fair Administrative Actions Act No. 4 of 2015.

The right to fair hearing in employment matters is embodied in Section 41 of the Employment Act while the provisions of Article 236 in so far as teachers are concerned are provided for under the Code of Regulations for Teachers (COR 2015) which the petitioners have relied on.

There is no further reference to any other provision of the Constitution, which in any event does not provide for interdiction, which is the action that was taken against the petitioners by the respondent which is the subject matter of the instant proceedings.

In the South African case of *Trasnet Limited & 2 Others -V- Petronella Nellie Nelisiwe Chirwa*, the Supreme Court of Appeal South Africa discussed this issue at length and stated that where a statute affords a direct remedy it is unnecessary and inappropriate to go directly to a constitutional provision. The court agreed with the decision in *Naptosa And Others -V- Minister Of Education, Western Cape and Others* in which the court held that it is impermissible for an applicant, save by attacking the constitutionality of a statute, to go beyond the regulatory framework which it establishes. Chaskalson CJ stated as follows –

*“Where, as here, the Constitution required Parliament to enact legislation to give effect to the constitutional right guaranteed in the Constitution, and Parliament enacts such legislation, it will ordinarily be impermissible for a litigant to found a cause of action directly on the Constitution without alleging that the statute in question is deficient in the remedies that it provides. Legislation enacted by Parliament to give effect to a constitutional right ought not to be ignored. And where a litigant founds a cause of action on such legislation, it is equally impermissible for a court to bypass the legislation and to decide the matter on the basis of the constitutional provision that is being given effect to by the legislation in question.”*

I fully agree with the position of the court in the judgment which has been adopted in several decisions in Kenya in which similar sentiments have been expressed.

In the present case, the regulatory framework for discipline of teachers is **The Teachers Service Code of Regulations for Teachers 2015**. It provides for the process of interdiction under Regulation 147 as follows –

#### **147. Process of Interdiction**

**The Commission or the Board of Management shall –**

- (1) serve the teacher with a letter of interdiction specifying the actual allegations made against him;**
- (2) ensure that the interdicted teacher or head of institution clears and leaves the educational institution within forty eight hours upon receiving the letter of interdiction;**
- (3) where the Board of Management issues a letter of interdiction, it shall deliver two copies of the letter to the county director for onward transmission to the Commission's headquarters;**
- (4) the Commission may avail to the teacher upon application and at the teacher's cost, any documents that the Commission may use against him during the hearing of the discipline case; and**
- (5) The Commission shall reserve the right to amend the letter of interdiction constituting the charge.**

Regulation 146 provides for investigations as –

#### **146. Investigation of Allegations**

- (1) The Commission shall upon receiving an allegation touching on a teacher's professional misconduct institute investigations either directly or through its agents.**
- (2) An investigation under this regulation shall where the allegation is made against a teacher other than a Head of the Institution be instituted by the –**
  - (a) Board of Management of the respective educational institution, acting as an agent of the Commission;**
  - (b) County Director in an institution where there is no functional Board of Management, by constituting a team of not less than three technical officers; or**
  - (c) Heads of institution, in consultation with the boards of management as the case may be, and the county director, jointly where the allegations made relate to a teacher in an institution other than the one the teacher is stationed.**
- (3) Where an allegation is made against a head of institution –**

- (a) the county director shall institute investigations in liaison with the board of management; and
  - (b) the county director or his representative shall constitute a team of not less than three technical officers to institute investigations where there is no board of management or in the case of a primary educational institution.
- (4) Where an allegation is made against a head of institution or a teacher in an institution other than the one the head of institution or a teacher is stationed –
- (a) both boards of management, in consultation with the county director may jointly institute investigations; and
  - (b) the county director or board of management in whose jurisdiction the teacher in question is stationed shall lead the investigation process.
- (5) The head of institution or the teacher under investigation shall not be a member of the Investigating Panel where the head of institution or teacher is the subject of investigation.
- (6) The Investigating Panel shall, upon investigation, accord the head of institution or a teacher a fair hearing during the investigation process which shall include being –
- (a) presumed innocent until proven that he has a case to answer;
  - (b) informed of the allegation, with sufficient details to answer it;
  - (c) given at least seven days to prepare a defence;
  - (d) given an opportunity to appear in person before the Investigation Panel, unless his conduct makes it impossible for the investigation to proceed in his presence;
  - (e) present when the witnesses are being interviewed by the Investigation Panel;
  - (f) warned that any incriminating evidence may be used against him during the disciplinary proceedings; and
  - (g) given an opportunity to adduce and challenge any adverse evidence.
- (7) Where a minor is involved in the investigation, the panel shall take precaution to protect the rights of the minor.
- (8) The Investigation Panel shall, upon completing the investigation compile a written report in regard to the teacher's disciplinary status and shall present the report to the Board, the County Director and the Secretary.
- (9) The Board of Management or head of institution or any other agent shall, in conducting the investigations liaise with the county director's office for the purpose of offering technical advice.
- (10) Where the report of the investigation panel discloses that an offence has been committed, the Board of Management or the county director or the Secretary shall –
- (a) where necessary, issue an administrative warning in writing;
  - (b) where a teacher's misconduct is as result of a medical condition, recommend to the Commission Secretary for approval of any leave or further direction as the case may be; or
  - (c) interdict the teacher using the Letter of Interdiction set out in the Thirty Fourth Schedule.
- (11) The Commission or an officer acting under its direction may undertake direct investigation into any allegation and may recommend the interdiction of a teacher in accordance with these Regulations.
- (12) 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 petitioners herein contend that the investigation panel, the 2<sup>nd</sup> respondent herein, failed to comply with Regulations 146(1) and (2)(a) and (6)(b), (c), (e), (f) and (g) in respect of –

- a. *The right to be informed of the allegations with sufficient details to respond to it;*
- b. *The right to be granted a minimum of 7 days to prepare a defence to the allegations;*
- c. *The right to be present in person when witnesses are being interviewed by the investigating panel;*

- d. To warn the Petitioners that any incriminating evidence may be used against them during the disciplinary proceedings; and
- e. The right of the Petitioners to adduce and challenge any adverse evidence against them;

From the proceedings, I gather that the petitioners were first required to appear before a guiding and counselling panel on 9<sup>th</sup> November 2016 which they snubbed. After that the matter seems to have gone silent until opening day on 4<sup>th</sup> January 2017 when the Petitioners' confronted the whistle blower prompting intervention of both the Board of Management (BOM) and the Kakamaega Sub County TSC office on 6<sup>th</sup> January 2017. The petitioners were heard and thereafter issued with show cause letters which they both responded to on 9<sup>th</sup> February 2017. The Board of Management meeting of 6<sup>th</sup> January also decided that the two be transferred from the school.

In the meantime the Kakamega Sub-County TSC office also submitted a report of its investigation into the matter and recommended that –

*“Recommendations (Office)*

*That the two teachers should be separated (transferred)*

*The two teachers to be written show cause letters to explain why they*

*have failed to submit their statement and infamous conduct which they should respond within 14 days.”*

It is after this that the two were interdicted for insubordination and infamous conduct. The letters of interdiction state as follows –

*“Ref. No: KKS/TSC/265481/91*

*Date: 27/01/2017*

*Julius F. L. Kisanya*

*TSC. 265481*

*Thro'*

*The Head Teacher*

*Shihalia Primary School*

*P.O. Box 1305 – 50100*

*KAKAMEGA*

*RE: INSUBORDINATION/INFAMOUS CONDUCT*

*On 6/1/2017 we, the SCD and SCHRO came to your school after receiving information that on 28/10/2016, at 10.30 a.m. in the nursery building you were found having sexual intercourse with Madam Moureen Imbiakha (TSC. 4817891789), a fellow teacher at Busilwa Primary.*

*The purpose of our visit was to investigate and establish the truth that our investigation was to ease the tension that was in school between you and Mr. Timothy Shava, the PTA teacher who saw you.*

*After the panel heard from you, it was a requirement that you write a statement of defence which you were instructed to do but up to 2.00 p.m. when you were leaving the school you had not written your statement and even when you were reminded on 8/1/2017 at 15.43 p.m. through S.M.S to bring on Monday 9/1/2017 quote, “Hallo! Good afternoon, refer to our meeting on 6/6/2017. Kindly come to the office tomorrow TSC Malinya at 9.00 a.m. with your statement of defence.” You defiantly refused through SMS “Hallo, again, with due respect I would wish to let you know and understand that as much as you are doing your work, it should not infringe on my constitutional rights. The meeting you talk about was full of threats, bias. My legal council is ready to put the defence statement only a written claim, a defence originates from a claim, am waiting for the claim documents.”*

*This amounts to insubordination. Can you explain why disciplinary action not taken against you for:*

- i. Infamous conduct*
- ii. Insubordination (failure to obey instructions)*

*Respond within 14 days from the date of this letter.*

*SIGNED*

B. N. WEKESA

FOR: TSC SUB-COUNTY DIRECTOR

KAKAMEGA SOUTH

Copy to: The TSC County Director

Kakamega County

P.O. Box 2964

KAKAMEGA”

From the foregoing I find that the interdiction of the petitioners complied with the COR 2015 as there was compliance with Regulation 146. The panel investigating the petitioners was composed of Jonathan Jelimo, the Sub-County Staffing officer, the Chairman; Benedate Nekesa, the Human Resources Officer, the Secretary and Geoffrey Mulinye, KNUT Chairman Kakamega South. The hearing was done during a board meeting at which members of the Board of Management were present.

Under Regulation 146 an investigation may be carried out by the Board of Management, County Director or Head of Institution. In the present case, because the petitioners had reported the matter to the CID and had also harassed the teacher who was the whistle blower, all the three bodies that is County Director, BOM and Head Teacher were at the meeting of 6<sup>th</sup> January 2017 at which the petitioners were heard and the letters of interdiction were signed by the TSC Sub-County Director, Kakamega South.

The interdictions were not unconstitutional as there was no violation or infringement of the petitioners' rights or the relevant regulations during the investigations or the hearing.

At the County Disciplinary panel held on 27<sup>th</sup> April 2017, the Chairperson was Beatrice Ogure while the Secretary was Lameck Rasugu. Only the Secretary was a member of both the disciplinary hearing of 27<sup>th</sup> April 2017 and the Investigation Panel of 6<sup>th</sup> January 2017. Further, the petitioners attended both the meetings of 6<sup>th</sup> January and 27<sup>th</sup> April 2017 and were allowed to interrogate the witness as well as defend themselves. At both meetings they did not object to the composition of the panel.

On the final issue whether the petitioners are entitled to the orders sought, I take note that this is an internal disciplinary process undertaken by the respondents pursuant to a mandate under both the constitution and the Act. As has been stated and restated by this court in several decisions, it is not the court's duty to take over the disciplinary role of the employer. The court would only intervene in the rare occasions where it finds that the internal process has been mismanaged to the detriment of the applicant, in this case the petitioners. This was the decision in *Rose W. Kiragu –V- Teachers Service Commissions (2016) eKLR*; *Frederick Saundu Amolo –V- Principal Namanga Secondary School and 2 Others (2014) eKLR*; *Dr. George Wekesa –V- Multimedia University of Kenya*; to cite but a few.

The petitioners still have an opportunity to move the court at the end of the disciplinary process after appearing before the Commission as stated in the letters of interdiction dated 28<sup>th</sup> April 2017.

For the foregoing reasons I find that the petitioners have not proved to the court that they are entitled to the orders sought with the result that the entire petition is dismissed.

Each party shall bear their costs.

**DATED AND SIGNED AT NAIROBI ON THIS 15<sup>TH</sup> DAY OF MARCH 2019**

**MAUREEN ONYANGO**

**JUDGE**

**DATED AND DELIVERED AT KISUMU ON THIS 14<sup>TH</sup> DAY OF MAY 2019**

**MATHEWS NDERI NDUMA**

**JUDGE**