



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS

COURT OF KENYA AT MERU

CONSTITUTIONAL PETITION NO. 3 OF 2019

IN THE MATTER OF ARTICLES 2, 3, 10, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 41, 47, 48, 50 AND 162 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS ARTICLES 26, 27, 28, 29, 41 AND 47 OF THE CONSTITUTION & RULE 11 AND 12 OF THE CONSTITUTION OF KENYA (PROTECTION OF FUNDAMENTAL RIGHTS AND FREEDOMS) PRACTICE AND PROCEDURE RULES

AND

IN THE MATTER OF TEACHERS SERVICE COMMISSION ACT & THE EMPLOYMENT ACT

BETWEEN

JOSPHENE KATHURE MURIUNGI.....PETITIONER

VERSUS

TEACHERS SERVICE COMMISSION.....1ST RESPONDENT

TSC COUNTY DIRECTOR-MERU.....2ND RESPONDENT

THE PRINCIPAL, KAAGA GIRLS SECONDARY SCHOOL.....3RD RESPONDENT

JUDGMENT

1. The Petitioner sued the Respondents for transferring her without considering her medical condition and in her Petition asserts that she was an employee of the 1st Respondent teaching English/Literature at Lubunu day Secondary school in Tigania West Sub-County. The Petitioner applied to be transferred to Kaaga Girls Secondary School due to her medical grounds where she could access her doctors and not walk long distance to school. The Petitioner averred that she had lost her earlier pregnancies due to exerting duties and prolonged walking while gravid. The Petitioner asserts that she was 6 weeks pregnant as of 23rd January 2019 and a follow-up was advised. However, on 31st January 2019 the 2nd Respondent transferred the Petitioner to Chugu Boys Secondary School which is in the interior of North Imenti and 5 kilometers from main road with the absence of Matatus. The Petitioner tried to discuss the transfer with the 2nd and 3rd Respondent but they all stated that the transfer was final and the Petitioner appealed to the 1st Respondent and as she waited to be called to support her case, she received a letter on 26th February 2019 informing her that the appeal had been dismissed and /or was unsuccessful. The Petitioner avers that there is no tenable reason whatsoever why she must be transferred to a faraway school against the doctor’s advice as there are new and available teachers who have been brought to Kaaga Girls Secondary School and who can teach the same subject. She asserted that if the decisions of the Respondents are allowed to stand, she would lose her unborn baby and even her life. The Petitioner averred that the 1st, 2nd and 3rd Respondents’ decision is not only unlawful, illegal, unreasonable as to working conditions and unconstitutional but also it infringes her and her unborn baby’s rights to life and the fundamental rights as enshrined in the Constitution. The Petitioner therefore seeks a declaration that the decisions by the Respondents have breached or are about to breach her fundamental rights especially right to life, fair labour practices; that the Petitioner has been subjected to or is about to be subjected to physical and psychological torture; for an order of *Certiorari* to issue quashing the 2nd Respondent’s decision contained in the letters dated 31st January 2019 and 26th February 2019; for an order of *Mandamus* compelling the 1st Respondent to take into account the Petitioner’s medical condition when transferring her; and finally, the costs of this Petition.

2. In answer to the Petition, the Respondents responded vide a Replying Affidavit sworn by the present TSC County Director Dr. Esther Musani, enjoined in this suit as the 2nd Respondent. She deponed that in the execution of her duties to transfer teachers she is guided by the provisions of Regulation 64 of the Code of Regulations for teachers which stipulates the conditions for transfer of teachers. She deponed that it was a condition precedent that the Petitioner as a teacher in the public service should serve in any school in the Republic of Kenya where her services were considered necessary. The 2nd Respondent deponed that the Petitioner was transferred from Lubunu Secondary School to Kaaga Girls Secondary School upon her request and later to Chugu Boys Secondary vide a letter dated 31st January 2019 which transfer was based on the grounds that the Petitioner was an excess teacher at Kaaga Girls Secondary School, her services were required at Chugu Boys Secondary School which was in need of two English/Literature teachers, Chugu Boys Secondary School had a shortage of 4 teachers, Chugu Boys Secondary School is about 4.5 kilometres from Meru Town and is situated within a well-established shopping centre where other teachers reside hence the Petitioner would easily reside near the school in case of any medical challenges. The 2nd Respondent deponed that based on the above grounds the Petitioner's appeal against the transfer was regretted and the medical report annexed to the Petition was in respect of 2014 and did not cover the instant issue. The 2nd Respondent deponed that the transfer was not malicious nor intended to punish the Petitioner as the Respondent adhered to all the laid down policy and procedures in undertaking the Petitioner's transfer. The 2nd Respondent deponed that the transfer was not in relation to the Petitioner's performance at work but was to achieve staff balance and rationing within Meru County. The 2nd Respondent deponed that it is in the public interest, policy and benefit for the orders not to be granted and the Petition thus should be dismissed with costs to the Respondent as the same lacks merit.

3. The Petitioner testified as did the Respondents' sole witness. The Petitioner reiterated her statement as captured above. She relied on her statement and sworn in affidavits as her evidence. She was cross-examined and stated that she was at Kaaga Girls Secondary School for 1 year and that she never sought for leave while in Kaaga Girls Secondary School. She testified that she received two transfers but she had not been cleared from Kaaga Girls Secondary School. She stated that she no longer teaches but has been drawing salary except for that current month. She denied having received any posting letter officially except for a WhatsApp posting letter that advised her to report to Gachanka Boys Secondary School. The WhatsApp message did not direct her to go and pick the letter of posting. She also denied having been reached by the County Director. She testified that upon receipt of the transfer letter to Chugu Boys Secondary School on 6th February she applied for leave on 7th February a day later and another sick off in March. The Petitioner confirmed that she had not reported to her new posting as the transfer From Kaaga Girls Secondary School to Chugu Boys Secondary School is the basis of this Petition and she is waiting for the determination of the case as the same transfer was not cancelled and her appeal was rejected. She also testified that she is not aware of the intention of the new transfer.

4. The Respondents' witness Dr. Esther Musani, TSC Director Meru testified that the Petitioner's transfer was due overstaffing at Kaaga Girls Secondary School and there was understaffing at Chugu Boys Secondary School thus necessitating the balance sought through the transfer of the Petitioner. She stated the policy was first-in first-out and that therefore the teachers who came after the Petitioner could not be the ones to be transferred and that the new recruits also could not have been moved as they gave a commitment to serve for 5 years. She testified that after the Petitioner failed to report, they negotiated with her through a letter sent to her advocates to choose the 5 schools she was comfortable with but she failed to respond. The TSC then took initiative to transfer her to Gachanka Secondary School which was 2 to 2.5 Km from Meru central business district. She stated that the effort to send the transfer letter to her was futile as they sent it via email but there was no response. She testified that the Respondents sent the letter to Kaaga Girls Secondary School after which they called the Petitioner to go and pick but she failed to pick it. She testified that the Petitioner has not worked since the last sick leave in February and March and the one from March to April. She confirmed that the Petitioner had been transferred from Lubunu Secondary School to Kaaga Girls Secondary School on medical grounds and these were considered when transferring her to Chugu Boys Secondary School as Chugu Boys Secondary School and Kaaga Girls Secondary School are near each other with a distance of about 4kms. She however, confirmed that she has never been to Chugu Boys Secondary School. She testified that according to the options they had available they transferred the Petitioner to Gachanka High School as it was the nearest. She maintained the transfer was not due to poor performance but only for balancing purposes and not aimed at killing her unborn child. In re-examination she stated that she was aware that there was no record at Kaaga Girls Secondary School showing that the Petitioner was sickly and that informed the recommendation for transfer. She maintained that Gachanka Boys High School is within Meru County and the Petitioner could access Meru town for medical facilities.

5. The parties filed written submissions and the Petitioner submitted that the Petition alleges breach of several Articles of the Constitution and requested the court to give special attention to Article 26 on the right to life, Article 27 on equality and freedom from discrimination, Article 28 on human dignity, Article 29 on freedom and security of the person, Article 41 on right to fair labour practices and reasonable working conditions, and Article 47 on fair administrative action. She submitted that apart from being bound by the above-mentioned provisions of the Constitution, the Respondents are also bound by Regulation 64(e) of the Code of Regulation for Teachers to consider transfer on medical grounds as certified by a registered medical practitioner. The Petitioner submitted that though the Respondents have tried to justify the transfer to Gachanka Secondary School which is even further from Chugu Boys, they have not shown what would happen in case of an emergency if the Petitioner goes to those schools. The Petitioner submitted that she is pregnant and her efforts are geared towards saving the pregnancy which is a matter of life and death and that is why she prays that the court allows the Petition and grant the orders as prayed. She relied on the cases of **Samuel Kibithu Kahiro v Teachers Service Commission [2018] eKLR** and **Daniel Kinondo Muteru v Teachers Service Commission [2017] eKLR**.

6. The Respondents submissions were to the effect that the Petitioner was transferred on established, reasonable and compelling grounds and it was in no way malicious nor was the transfer intended to punish the Petitioner whatsoever. The Respondents submitted that Regulation 67 of the Code of Regulations for Teachers directs that the Commission shall have the discretion to transfer a teacher at any time whether or not the teacher has applied for a transfer or decline to transfer a teacher upon application. The Respondents submit that the Petitioner was transferred from Kaaga Girls Secondary School to Chugu Boys Secondary School based on the discretion bestowed on the Commission and as was recommended by her Principal that she was an excess teacher hence she was under-utilized. The Respondents submitted that the Petitioner worked at Kaaga Girls Secondary School for one year and had admitted that during her entire time at the institution had never brought to the attention of the headteacher that she had any pre-existing special medical condition. The Respondents relied on the case of **Hezron Mukoko Silunya v Teachers Service Commission & 9 Others [2017] eKLR** where it was stated "because the suspension and transfer of teachers by the 1st Respondent has constitutional, statutory and contractual basis, and because the petitioner did not demonstrate that the suspension and transfer were outside the mandate of the 1st respondent or unfair, the 1st respondent did not violate any of the petitioner's rights in meting out the sanction of suspension or transfer". The Respondents submitted that the Petitioner was aware of the fact that as a condition precedent she will serve in any school in the Republic of Kenya where her services were considered necessary as

per her offer of employment letter. The Respondents submitted that the Petitioner had the option of residing near her new work-station and that way she would not be required to walk for long distances. Moreover, it was submitted, Chugu Boys Secondary is about 4.5 Km from Meru Town and is situated within a well-established shopping center where other teachers reside and the Petitioner would easily reside near the school in case of any medical challenges. The Respondents submitted that they considered the Petitioner's appeal as they gave her 6 schools to choose from but the Petitioner failed to make a choice prompting the 1st Respondent to post her at Gachanka Secondary School on 7th June 2019 which School is approximately 2.5 kilometres from Meru Town which clearly indicates the good will of the 1st Respondent to accommodate the Petitioner. The Respondents submitted that the Petitioner had admitted in testimony that she never reported to the new posting and that she has not been working since the lapse of her sick off in April but she continued to draw a salary. The Respondents submitted that despite their efforts to notify the Petitioner of her transfer, she has failed, refused and neglected to report to her work station. The Respondents submitted that it is clear therefore that the Petitioner is not interested in performing her contract of service. The Respondents relied on the case of **Severine Luyali v Ministry of Foreign Affairs and International Trade & 3 others [2014] eKLR** where it was held that *"the standard requires not only the employer to act in good faith but also the employee to act with utmost due diligence and in good faith towards the directions issued by the employer"*. The 1st Respondent submitted that it exhibited good will by transferring the Petitioner to Gachanka Secondary and also accommodated her by paying her full salary despite the fact that she is not on any approved leave. The Respondents submitted that however, the Petitioner has outrightly abused the 1st Respondent's gesture of magnanimity exhibited in her favour. The Respondents submitted that even after this Honourable Court's directive on 25th June 2019 that she reports to either Chugu Boys Secondary School or Gachanka Secondary, the Petitioner has still not rendered any service to her employer but continues to draw a salary. The Respondents submitted that the Petitioner's conduct of ignoring the transfer allocated is unacceptable and outright abuse to the 1st Respondent. The Respondent submitted that the Petitioner had already reported to Chugu Boys after which she sought for 14 days sick leave. The Respondents submitted that the substantive Petition is spent as the Petitioner has officially reported albeit not rendering any services to Chugu Boys Secondary School. The Respondents thus prayed that the Petition be dismissed with costs to the 1st Respondent as the same is devoid of any merit.

7. The Petitioner's rights at the core of this dispute are stated to be her right to life, equality and freedom from discrimination, human dignity, freedom and security of the person, right to fair labour practices and reasonable working conditions, and fair administrative action. In executing her transfer from Kaaga Girls Secondary School it was not disputed that the 1st Respondent has every right to transfer teachers to any school within the Republic of Kenya in order to ensure a rational balance in terms of skills and competence required at the various schools the 1st Respondent manages. The 2nd Respondent in exercise of this mandate issued a letter of transfer from Kaaga Girls Secondary School. It behoves the 1st Respondent as codified in the Code of Regulation for Teachers to be cognizant of the imprimatur to ensure fair labour practices whenever dealing with teachers. It was argued that there was overstaffing at Kaaga Girls and that the new recruits also could not have been moved as they gave a commitment to serve for 5 years. In my considered view, this argument sounds hollow as the new recruits too could be transferred as they had the same terms and conditions and were subject to the Code of Regulation for Teachers as the Petitioner was. Their commitment to serve for 5 years did not mean they could not be transferred in the 5 years bond period. In any event, it was the transfer of the new teachers to Kaaga Girls Secondary School by the 1st Respondent that had led to overstaffing at the school. The Petitioner's rights to fair labour practice and freedom from discrimination were impacted by the imposition of excess teachers at the school she was serving at. That act combined with complications associated with her gravid condition threatened her right to life and human dignity as she was subjected to a harrowing transfer without consideration of her medical condition before the intervention of the court. Upon the Petition being presented the Respondents offered the Petitioner choices as to the schools she could attend to and the Petitioner failed to elect forcing the Respondents who were determined to execute a transfer, to give her another transfer in June 2019 to Gachanka Secondary School. However, as the Petitioner has ultimately reported to Chugu Boys Secondary School, the orders that commend themselves for the Court to make are as follows:-

- i. an order of *Certiorari* do and is hereby issued quashing the 2nd Respondent's decision to transfer the Petitioner to Gachanka Secondary School;
- ii. an order of *Mandamus* directing the 1st Respondent to take into account the Petitioner's medical condition when transferring her in future if she is gravid;
- iii. costs of the Petition limited to Kshs. 50,000/-
- iv. the Petitioner to report to work in January 2020 at Chugu Boys Secondary School and render services as required by the 1st Respondent unless she is on medical or maternity leave.

It is so ordered.

Dated and delivered at Nyeri this 11th day of November 2019

Nzioki wa Makau

JUDGE