



REPUBLIC OF KENYA

IN THE EMPLOYMENT & LABOUR RELATIONS COURT OF KENYA

AT NYERI

CAUSE NO. 188 OF 2017

SAMUEL KIBUTHI KAHIRO.....CLAIMANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

JUDGMENT

1. The Claimant sought by this suit to obtain relief for the arbitrary and unfair/illegal transfer of the Claimant from Njeng'u Secondary School to St. Monica Gitegi Secondary School. He averred in the claim that he was a diligent and committed employee of the Respondent and has held many responsibilities in various schools such as serving in academic committee, house master, games master, class teacher, union official and Mwalimu Sacco official to name a few. He averred that on 15th February 2013, he appealed against the transfer from Kagumo to Magogoni which was allowed and he was transferred from Kagumo High School to Njeng'u Secondary School effective 20th February 2013. He averred that after he reported and working diligently at his new station, the Nyeri TSC County Director through Richard Jomo purportedly transferred him from Njeng'u Secondary School to St. Monica Gitegi Secondary School and despite protestation against the transfer the Respondent has failed to revoke the said transfer. The Claimant averred that the school is more than 50km from his place of residence and there is no proper means of transport to the school forcing the Claimant to use private means at cost of Kshs. 3,000/- daily. He averred that he was occasionally unable to commute causing the board of management of St. Monica Gitegi Secondary School to threaten disciplinary action against him. He sought declarations that the transfer was from intents and purposes unprocedural, illegal, null and void. He sought to continue in the Respondent's service at Njeng'u Secondary School. He also sought damages for the unprocedural and illegal transfer as well as costs and interest.

2. The Respondent filed a defence and in it averred that the operations of the Respondent are governed by the Teachers Service Commission Act, Act. No. 20 of 2012, the Code of Regulation for Teachers, the Code of Conduct and Ethics for Teachers, 2005 as well as other administrative policy guidelines issued from time to time by the Respondent and authorised agents. The Respondent averred that it is conferred with broad duties which include the review of the demand and supply of teachers across the country in order to guarantee appropriate balance in the teacher staffing levels in the country. The Respondent averred that the Claimant was redeployed to another school where he is qualified to teach and where there is sufficient workload. The Respondent averred that it is granted the discretion to transfer teachers in its service as circumstances demand even where a teacher has not applied for transfer. The Respondent thus sought the dismissal of the suit with costs.

3. The Claimant testified on 25th January 2018 and reiterated the following:- that he was employed as a teacher teaching woodwork, physics and physical education, that his transfer to the new school was without consideration of the family situation; that he had not sought transfer and that none of the 3 teachers taught physics or maths; that he had 25 lessons and was also the games teacher. He testified that the transfer was from Mr. Jomo who had no authority to transfer teachers a role that was the preserve of the Teachers Service Commission (TSC). He stated that he felt harassed and had been denied the chance to contribute. He indicated that his salary was stopped from April 2017 and that he had been reinstated to service but not the payroll. He stated that he was transferred to Thuguma Secondary School which was closer to his residence.

4. In cross examination he stated that the TSC has power to transfer him without seeking his say so. He confirmed that the TSC could transfer him anywhere within Kenya where the TSC considers him qualified to teach. He admitted that the entire corpus of teachers is in excess of 400,000 and that not all of them can be transferred at the same time. He stated transfer should never be arbitrary. He stated his preferred station would have been Kiambu but he was posted to Nyeri. He confirmed that he was returned to service and what he sought was the loss of benefits. He testified that he was been restored to his position.

5. In re-examination he testified that TSC had the power to transfer him and that the county director could recommend his transfer but could not transfer him. He sought relief as his transfer was arbitrary and unfair.

6. The Respondent called Richard Jomo Mwangi the deputy county director of TSC. He testified that he deputises the county director whose role is teacher management and deployment which is concerned with staff balancing. He stated that the Claimant appealed against the

transfer and thereafter deserted duty because the appeal was not granted. He stated that the law does not require consultation of the teacher being transferred. He testified there were hundreds of thousands of teachers and it is not possible to consult all of them and therefore the Respondent exercises discretion when a transfer is deemed necessary to balance staff. He testified that there was need to transfer the Claimant to a school where his skills would be utilized and that the transfer was well thought out. He stated that the teacher is consulted in situations where the transfer will affect the teacher's salary negatively or lead to loss of a legal benefit he is entitled to or if the transfer is related to discipline. He stated none of those conditions existed in relation to the Claimant. He testified that the Claimant's stature was not affected. He stated that the secretariat of the Respondent was responsible for transfers as the Commissioners did not sign transfer letters.

7. In cross-examination he testified that on transfers, his role is to look at staffing in the county and take teachers where their services are most required. He stated that it was not true that only the county director can transfer teachers. He read the provisions of Article 237 of the Constitution and Regulation 67 for Teachers which provides that the county level is administered by the county director who shall transfer per Regulation 11(d). He stated that he signed the letter for the county director. He testified that the office executes its mandate whether there was a case in court or not and that was why the Claimant was transferred to Thuguma.

8. In re-examination he stated that he signed the transfer and that the delegated power was pursuant to provisions of statute. He testified that the county director was his supervisor. That marked the end of oral testimony.

9. The parties were to file submissions and the Claimant filed his submissions on 26th February 2018 and the Respondent filed submissions on 13th March 2018. The Claimant submitted that he was transferred unfairly and that the same was executed suddenly and without proper cause by Mr. Richard Jomo the deputy county director who did not have authority to effect the said transfer. He submitted that the financial implications of the transfer were major as he was forced to spend Kshs. 300/- per day as the new school was 50 kilometers away from his home in Nyeri municipality where he lives with his family. He submitted that he was comfortable rendering service at Njeng'u Secondary School where he had even obtained recommendation from the School's principal. It was submitted that the Respondent has the power to transfer teachers and that the Respondent's witness testified that the county director has been given power to transfer teachers by delegation but there was no evidence of publication and conferment of such delegated powers. The Claimant submitted that under Regulation 66 of the Teachers' Service Commission Code of Regulations for Teachers 2015, the county director has power to consider and approve transfer requests only and not grant the transfer. The case of **Daniel Kimondo Muteru v Teachers Service Commission [2017] eKLR** was cited in support of the proposition that the county director has only the authority to approve the application for transfer. It was submitted that on the strength of the foregoing case, the decision to transfer the Claimant from Njeng'u Secondary School to St. Monica Gitegi Secondary School was unilaterally made by the county director and violated the provision of Regulation 65(3). It was submitted that there was no delegation by instrument as was enunciated in the case of **Daniel Muteru v Teachers Service Commission** (supra). The Claimant thus submitted the county director had no powers to order the transfer.

10. The Respondent submitted that the administrative decision to transfer the Claimant to a new institution to undertake teaching decisions was made within the law. The Respondent distilled the issues for determination as follows:-

- a) Whether the transfer of the Claimant from Njeng'u Secondary School to St. Monica Gitegi was lawful
- b) Whether the Claimant suffered any prejudice/damage because of the transfer, and if so, who should bear responsibility?
- c) Whether the Claimant is entitled to the remedies sought
- d) Who the Claimant is answerable to in his employment
- e) Whether indeed the Claimant has met the legal and factual threshold necessary for the intervention of the court

The Respondent was of the view that the Claimant had appealed the transfer on grounds that the distance he had to commute was great. The appeal was rejected on grounds that there were no vacancies in the schools within the vicinity. The Respondent submitted that the Respondent's commissioners are in charge of policy formulation and play an oversight role on the execution of mandates and functions of the Respondent. It was submitted that the Respondent has in its employ a secretariat/management comprising the CEO and officers based both at the headquarters and in the field offices, and that these officers jointly and severally implement the decisions of the Respondent. It was stated that the transfer of teachers in a routine and predictable function which is left to the CEO and the county directors to implement. It was the Respondent's submission that teachers do not, except in exceptional circumstances, choose their station of duty and in view of the delocalization policy, the need for staff balance and reasonable utilization of the teaching resource, it was not feasible to consult every teacher on such a mundane function. The Respondent submitted that under Regulation 64 of the Code of Regulations for Teachers 2015 permit the Respondent to transfer a teacher from one institution to another. The Respondent cited Regulation 12(1)(d) of the Code which empowered field officers to manage aspects of teacher management that include teacher transfers. The Respondent submitted that the transfer was properly executed and there was no harm suffered by the Claimant as a result. The Respondent relied on the case of **Henry Ochido v NGO Coordination Board [2015] eKLR** where the court held that it would defeat the purpose of setting up of the office of the CEO and remove the role of the board (commissioners) as the policy body of the Respondent and further that the court will only interfere in instances where the transfer is arbitrary. The decision of **Severine Luyali v Ministry of Foreign Affairs and International Trade & 3 Others [2014] eKLR** was called in aid of the submission that *the standard does not only require the employer to act in good faith, the employee is equally bound by the same rule, to act with outmost due diligence and in good faith toward the directions issued by the employer*. The Respondent submitted that the case relied on by the Claimant was subject of an appeal being Civil Appeal No. 14 of 2017 at the Court of Appeal at Nyeri. The Respondent submitted that the Claimant has not suffered any prejudice and that no damages were awardable. Reliance was placed on the case of **Shah v C. M. Patel (1961) 1 EA 397** in which the Court of Appeal reiterated the need to plead special damages with particularity and prove them. The Respondent submitted that permitting the grant of the orders would be uprooting the philosophical concept on the independence of the commissions established under chapter 15 of the Constitution.

11. The case is really one on whether the Respondent's county director has the capacity to transfer a teacher. It was the common position that the Claimant is presently happy with the posting he has been given. The letter of transfer that is the crux of the matter was signed by Mr.

Richard Jomo the deputy county director Nyeri County on behalf of the county director. The Constitution of Kenya under Article 248 establishes the Teachers Service Commission as an independent constitutional commission. The Commission has commissioners and it is from the commissioners that transfers and other policy issues emanate. The TSC has presence country wide and the Commissioners cannot sign each letter issued under the name of the Commission. However, for the effect of the power of the Commissioners to be dispensed at local level, there has to be a mechanism for this. Under the Teachers Service Commission Act, No. 20 of 2012 and The Code of Regulation for Teachers 2015, it is clear that the Commission may act through officers in the secretariat.

12. Under Section 14 of the Act, the Commission has power to create within itself such directorates, divisions or units and appoint thereto such staff in accordance with the Regulations. The transfer of teachers is a function the Respondent may well carry out as it is one of its core functions in the management of the teacher resource. The grouse the Claimant has is with the absence of a clear mandate to the county director to transfer. Indeed, the function can only be a delegated function since the authority to transfer resides in the Respondent. The instrument of transfer being the letter must therefore reflect this. The letter impugned did not communicate clearly that the transfer was by the Respondent. In so far as that goes, the letter was inaccurate. The power therefore was exercised improperly and I hold that the transfer was thus wrong on the face of it even if there exists authority for the county director to communicate the transfer. It is academic to proceed to enumerate the process the Respondent has to undertake to ensure the subsequent transfers cannot be impugned. The orders that would have ensued had the transfer not been recanted would have been to order the return of the teacher to Njeng'u Secondary School. As this was overtaken by events, I will make no orders save for the order on costs. The Claimant was successful in demonstrating the transfer was not in accordance with the Regulations of the Respondent. In that regard he will recover costs for the action which shall be minimal since the subject matter was not quantified.

It is so ordered.

Dated and delivered at Nyeri this 3rd day of May 2018

Nzioki wa Makau

JUDGE