



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. 126 OF 2018**

**IN THE MATTER OF ARTICLES 10(2) (a) & (d), 19, 20, 21, 22, 23, 43 (f), 53,**

**(1) (b), 53(2), 55(a), 73, & 237 OF THE CONSTITUTION OF KENYA 2010**

**IN THE MATTER OF THE BASIC EDUCATION ACT, ACT NO. 14 OF 2013**

**AND**

**IN THE MATTER OF THE KENYA NATIONAL QUALIFICATIONS FRAMEWORK ACT NO.22 OF 2014**

**BETWEEN**

**KENYA UNION OF POST PRIMARY**

**EDUCATION TEACHERS (KUPPET).....PETITIONER**

**- VERSUS -**

**MINISTRY OF EDUCATION.....1<sup>ST</sup> RESPONDENT**

**THE KENYA NATIONAL QUALIFICATIONS AUTHORITY.....2<sup>ND</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**-AND-**

**TEACHERS SERVICE COMMISSION.....1<sup>ST</sup> INTERESTED PARTY**

**FRONTIER COUNTIES DEVELOPMENT COUNCIL(BEING A REGIONAL**

**BLOC OF COUNTY GOVERNMENTS OF LAMU, TANA RIVER,**

**GARISSA, WAJIR, MANDERA, MARSABIT, ISIOLO,**

**TURKANA, SAMBURU, AND WEST POKOT).....2<sup>ND</sup> INTERESTED PARTY**

**(Before Hon. Justice Byram Ongaya on Thursday 20th December, 2018)**

**RULING**

The petitioner filed the petition on 23.11.2018 through Triple A. Advocates and learned counsel Ms. Jacqueline Lorraine Akello Advocate has appeared and urged the petitioner's case in that regard. Alongside the petition the application by way of the notice of motion dated 22.11.2018 was filed under a certificate of urgency. The application was certified urgent on 26.11.2018 at the ex-parte hearing and was served for inter-partes hearing on 03.12.2018. Learned Litigation Counsel Mr. Motende appeared for the Attorney General for the Respondents and by consent of the parties it was ordered:

- a) The respondents to file a replying affidavit by next mention.
- b) That parties to meet, including the Teachers Service Commission, towards a compromise and further orders in the case.
- c) That the Teachers Service Commission is enjoined as Interested Party and the Petitioner to serve the Commission accordingly.
- d) That mention on 13.12.2018 at 9.00am for further directions and orders including recording consent.

On 13.12.2018 all parties (the petitioner, 1<sup>st</sup> interested party and the respondent) were present in Court and it was ordered by consent:

- a) The respondents and interested party to file and serve replying affidavits by close of 14.12.2018.
- b) Parties at liberty to file written submissions by inter-partes hearing of the application on 17.12.2018 at 9.00am for 30 minutes.
- c) Costs in the cause.

On 17.12.2018 the petitioner and the respondent had filed their respective submissions on the application. The 1<sup>st</sup> interested party had not filed submissions. The respondents and the 1<sup>st</sup> interested party had not filed the replying affidavits or grounds of opposition. The hearing proceeded. Counsel for the 1<sup>st</sup> interested party Mr. Oyocho Advocate made oral submissions to support the petition. In the processes of concluding the hearing the 2<sup>nd</sup> interested party had filed an application through Gurane & Somane Advocates to be enjoined. The application was urgently urged by learned counsel Yussuf Bashir and the petitioner as well as the respondent not being in opposition, orders were made accordingly to enjoin the 2<sup>nd</sup> interested party. Being belatedly enjoined, the 2<sup>nd</sup> interested party did not therefore participate in the hearing.

The application as amended and filed on 10.12.2018 was under section 21(b) of the Labour Relations Act, 2007; Regulation 43 (1) (a) of the Teachers Service Commission Regulations for Teachers 2015; Order 40 Rule 1&2 of the Civil Procedure Rules; sections 1A, 1B, & 3A and 63 (e) of the Civil Procedure Act; and all other enabling provisions of law.

The application was for orders:

- a) That the Honourable Court be pleased to issue a conservatory order barring the 1<sup>st</sup> and 2<sup>nd</sup> respondents from lowering the minimum admission requirements for the Diploma and Certificate level pending the hearing and determination of the petition.
- b) That costs of the application be provided for.

The application was based on the supporting affidavit of Akelo Missori, the petitioner's Secretary General and upon the following grounds:

- a) That the petitioner is a duly registered and recognised trade union that represents post primary teachers and trainers in Kenya and has about 52, 000 subscribing members including trainers at Teachers Training Colleges (TTCs). The petitioner is therefore a concerned stakeholder of the quality of education in Kenya.
- b) The petitioner is apprehensive that the lowering of the minimal admission requirement of the trainees' in the TTCs will affect the quality of education offered to the children.
- c) The 1<sup>st</sup> respondent is mandated to promote and coordinate quality education and lowering of the KCSE admission requirements will affect the quality of education offered by the teachers who scored lower grades.
- d) Article 43(f) of the Constitution of Kenya 2010 provides that education is a mandatory social and economic right that should be based on international standards for global competitiveness so that lowering of the KCSE admission requirements is counter-effective as it would lead to the degeneration of the current education system.
- e) That by endorsing the Kenya National Quality Framework Regulations which inter alia lowers the KCSE admission requirements for TTCs the 1<sup>st</sup> respondent has contravened the principle provided for in Article 53(2) of the Constitution as it is not in the best interest of the child.
- f) That the directive issued by the 1<sup>st</sup> respondent as a form of affirmative action is not a panacea to the reduced number of students enrolling in the TTCs.
- g) In issuing the regulations lowering the entry grade at KCSE for TTCs, the 1<sup>st</sup> respondent did not allow public participation, directly or indirectly.
- h) The 1<sup>st</sup> respondent's actions through the Cabinet Secretary usurped the role of the 1<sup>st</sup> interested party by purporting to amend the Teachers Service Commission Code of Regulations as amended in 2016 – by the Cabinet Secretary issuing the amendment through the promulgation of the Kenya National Qualifications Framework Regulations, 2018 which was in violation of section 31(c) of the Interpretation and General Provisions Act, Cap. 2 that only a maker of subsidiary legislation can revoke such legislation.

i) The 2<sup>nd</sup> respondent usurped the role of the 1<sup>st</sup> respondent as it went ahead and communicated the intended changes on the students' admission requirements into the TTCs to the education stake holders.

j) The prayers sought should be granted in the interest of justice and fairness.

The supporting affidavit raises many qualitative considerations for quality education that is globally competitive and in the best interest of the child. It is stated that lowering the entry grade is believed to increase the otherwise reducing numbers of student population in the TTCs. However, the international emphasis is on quality education which is the No. 4 of the United Nations Sustainable Development Goals (SDGs), 2030. Further, it had been reported in the print media that in 2016, 5000 out of 12, 000 trainees in the TTCs who sat the examinations failed or were required to repeat – so that lowering the grade would only worsen the failure rates at the TTCs in circumstances whereby the training funds are out of state resources and it would be wasteful. The supporting affidavit states that the 1<sup>st</sup> interested party had already rejected the lowering of the grades with the consequence that those trained with lower entry grades will at the end of their training not be registered by the 1st interested party as qualified teachers and with the consequence that the training and involved public resources would have gone to waste.

It was stated in the affidavit that the 1<sup>st</sup> respondent's focus should therefore be quality assurance and management of standards in the education sector as envisaged in SDGs – the SDG report 2018 having proposed that more trained teachers are needed for quality education, the emphasis being not on the numbers but on the relevant training. In any event, Kenya already has over 200, 000 trained teachers but who have not yet been deployed. Further lowering the entry grades will demoralise those teachers with higher entry grades but who will be registered and deployed as those with lower entry grades.

Further, the affidavit stated that the National Curriculum Policy of December 2015 indicated that the nexus between the training and sustainable development is quite crucial and it has profound implications on how education is conceptualised, organised, delivered and outcomes measured. Thus it was important that Kenya embraces a benchmark with the best performing countries in the world such as Finland, Shanghai in China, Hong Kong, and Japan all of which put emphasis on best academic and other performance for those joining the teaching services or profession.

The circumstances leading to the present dispute as set out in the supporting affidavit are as follows:

a) In exercise of the powers conferred under section 47(2) of the Teachers Service Commission Act No.20 of 2012, the 1<sup>st</sup> interested party made the Teachers Service Commission Code of Regulations for Teachers (Amendment), 2016 published as Legal Notice No. 50 of 22.03.2016. Section 47 (2) of the Act empowers the 1<sup>st</sup> interested party to make regulations generally for the better carrying out of its functions and exercise of its powers under the Constitution and the provisions of the Act including regulations on the guidelines on the qualifications of persons entering the teaching service. Under regulation 20 (1) thereof as amended, a person shall be eligible to be registered as a teacher if the person is of good moral character; holds relevant academic and professional qualification from a training institution recognised in Kenya; and meets the requirements for registration set by the Commission from time to time. Under regulation 20(2) thereof as amended, a person qualifies for registration as an Early Childhood Education teacher if the person holds a certificate of Primary Education (CPE) with 15 points; a Kenya Certificate of Primary Education (KCPE) with 30 marks; a certificate in Early Childhood Education from an institution recognised in Kenya; or any other recognised equivalent qualification. Under regulation 20(3) thereof as amended, a person qualifies for registration as P1 teacher if the person holds a certificate in Primary Teacher Education; obtains a minimum Mean Grade C (Plain) or its equivalent in Kenya Certificate of Secondary Education; obtains a minimum of Grade D (Plain) or its equivalent in Mathematics in Kenya Certificate of Secondary Education; and obtains a minimum Grade C- (Minus) or its equivalent in English in Kenya Certificate of Secondary Education. Under regulation 20(3) thereof as amended, a person qualifies for registration as diploma teacher if the person holds a Diploma Certificate in Education; obtains a minimum Mean Grade C+ (Plus) or its equivalent in Kenya Certificate of Secondary Education; obtains a minimum of Grade C+ (Plus) or its equivalent in the two teaching subjects in Kenya Certificate of Secondary Education; obtains a minimum Grade C- (Minus) or its equivalent in English in Kenya Certificate of Secondary Education; obtains a minimum Grade C (Plain) or its equivalent in for science based course in Kenya Certificate of Secondary Education; and obtains a minimum of Grade D+ (Plus) or its equivalent for non-science based course in Kenya Certificate of Secondary Education (KCSE). Under regulation 20(4) for a person with visual and hearing impairment the qualifications for registration as a diploma teacher are a step down except for English, that is C for C+; C- for C; and D for D-. Under regulation 20(6) a person qualifies to be registered as a technical teacher if the person holds a Diploma in Technical Education, Mean Grade C+ in KCSE; C in English in KCSE; and C in Mathematics in KCSE. Under regulation 20 (7) a person qualifies to be registered as a graduate teacher if the person holds a Bachelor's Degree in Education; C+ in KCSE in the two teaching subjects; holds a Bachelor of Arts Degree or Bachelor of Science Degree; or holds a post graduate Diploma in Education with C+ in KCSE in the two teaching subjects.

b) Following the publication of Teachers Service Commission Code of Regulations for Teachers (Amendment), 2016, the qualifications as stated therein have been applied as the entry qualifications for P1 certificate and Diploma certificate for training of teachers in the TTCs.

c) The 2<sup>nd</sup> respondent is established under section 6 of the Kenya National Qualifications Framework Act No.22 of 2014 as a body corporate. The long title to the Act states, "**An Act of Parliament to establish the Kenya National Qualifications Authority, to provide for the development of a Kenya Qualifications Framework and for connected purposes.**" Section 8 of the Act provides for the detailed functions of the 2<sup>nd</sup> respondent which are co-ordinate and supervise the development of policies on national qualifications; develop a framework for the development of an accreditation system on qualifications; develop a system for assessment of national qualifications; develop and review interrelationships and linkages across national qualifications in consultation with stakeholders, relevant institutions and agencies; maintain a national database of national qualifications; publish manuals, codes and guidelines on national qualifications; advisory and support function; publish an annual report on the status of national qualifications; set standards and benchmarks for qualifications and competencies including skills, knowledge, attitudes and values; facilitate linkages, credit transfers and exemptions and a vertical and horizontal mobility at all levels to enable entry,

re-entry and exit; conduct research on equalization of qualifications; establish standards for harmonisation and recognition of national and foreign qualifications; build confidence in the national qualifications system that contributes to national economy; provide pathways that support the development and maintenance of flexible access to qualifications; promote the recognition of national qualifications internationally; and perform such other functions as may be provided under the Act. The Act is hereafter referred to as KNQF Act.

d) The 2<sup>nd</sup> respondent is managed by a Council established under section 10 of KNQF Act. Section 2 of the Act provides that “**Cabinet Secretary**” in the Act means the Cabinet Secretary for the time being responsible for matters relating to education. Section 29 thereof provides that the Cabinet Secretary may, in consultation with the Council, make regulations generally for the better carrying out of the purposes of the Act including for any matter prescribed under the Act. In exercise of that power as conferred under the Act, the Cabinet Secretary responsible for education (and currently being Amb. Amina Mohamed) has by Legal Notice No. 118 of 2018 made and published the Kenya National Qualifications Framework Regulations, 2018. The regulations offer detailed provisions towards carrying out of the functions of the 2<sup>nd</sup> respondent. Regulation 7(1) provides for quality standards in the Second Schedule to the regulations. Part II of the Second Schedule provides for Admission requirements as follows:

- Artisan Certificate qualification level mean grade E in KCSE or its equivalent or a certificate of experiential learning issued by the 2<sup>nd</sup> respondent.
- Craft Certificate qualification level a mean grade D (Plain) in KCSE or its equivalent, Division III in Kenya Certificate of Education Examinations (KCE), or completion of KNQF level 4.
- Diploma Qualification level mean grade C-(Minus) in KCSE examination or its equivalent, Division II at KCE, at least one Principal Pass at Kenya Advanced Certificate of Education examination (KACE); or completion of KNQF level 6.
- Post-Graduate Certificate or Diploma Qualification level the minimum shall be a bachelor’s degree from an accredited education institution.
- Masters Qualification level the minimum requirements shall be a bachelor’s degree from an accredited education institution – provided that the applicant satisfies the minimum requirements for admission to a Bachelor’s degree qualification level.
- Doctorate Qualification level the minimum requirements shall be a master’s degree from an accredited education institution or completion of KNQF level 9.
- An accredited education institution shall not admit a person to a qualification on the basis of experiential learning if that person has not been issued with a certificate of experiential learning by the 2<sup>nd</sup> respondent.

e) The effect of the said regulation 7(1) and the Second Schedule is to set Mean Grade D (Plain) in KCSE and C- in KCSE as the entry grades in TTCs for the Certificate and Diploma levels respectively. The further effect is that the requirements for Mean Grade C (Plain) for eligibility for registration of P1 certificate teachers and C+ for eligibility for registration of Diploma teachers plus other criterion as prescribed in the Teachers Service Commission Code of Regulations for Teachers (Amendment), 2016 published as Legal Notice No. 50 of 22.03.2016 is thereby seriously eroded as per the petitioner’s and the 1<sup>st</sup> interested party’s case.

f) The 2<sup>nd</sup> respondent has issued the letter dated 03.09.2018 addressed to recognised institutions that regulate or are involved learning and employment in Kenya drawing their attention to the Kenya National Qualifications Framework Regulations, 2018 for general information and implementation.

g) By the letter Ref. No. KNQA/CONF/12/VOL.II/(47) signed by Dr. Juma Mukhwana as Director General of the 2<sup>nd</sup> respondent, the Chief Executive Officers for the 1<sup>st</sup> interested party, the Kenya Institute of Curriculum Development, the Kenya National Examinations Council, and the Kenya Universities and Colleges Central Placement Services were requested to implement the changes the revised entry requirements and admission criteria into teacher training programs because the entry requirements apply to all courses or programs offered at institutions in Kenya and as published by the Cabinet Secretary Amb. Amina Mohamed in July 2018 per Kenya National Qualifications Framework Regulations, 2018. A further letter by Dr. Juma Mukhwana Ref. No. KNQA/RoQ/10/VOL.I/(27) addressed to the same Chief Executive Officers clarified that the admission requirements (KCSE level mean grade qualifications) for various levels of teacher training were D (Plain) for certificate, C- (Minus) for Diploma, and C+ (Plus) for Degree; and for Early Childhood and Development Education (ECDE) for proficiency E (Plain), certificate D (Plain), Diploma C-(Minus), and C+(Plus) for Degree. The letter concluded, “**I hope that this clarifies and helps in the implementation of these new entry admission requirements for teacher education in the country.**”

h) The Cabinet Secretary in the Ministry of Education issued the letter Ref. No. MOE. HQS.3/12 dated 15.10.2018 addressed to Dr. John Muraguri, the Chief Executive Officer, Kenya Universities and Colleges Central Placement Services (KUCCPS) titled, “**Affirmative Action in Placement of Teacher Trainees From Kenya’s Marginalised Counties.**” The marginalised counties were identified in the letter as being Turkana, Samburu, Wajir, Marsabit, Isiolo, Mandera, Garissa, Lamu, Tana River, West Pokot, Homa Bay (Suba and Mbita Sub Counties only), Narok ( Narok South, North, and West and East Sub-Counties), Baringo (Baringo North, Marigat, Tiaty East, East Pokot Sub-Counties), and Kajiado (Mashuru, Loitoktok, Kajiado West and Kajiado Central Sub-Counties), Kwale, Kilifi and Taita Taveta. The letter stated that section 28 of the Basic Education Act No. 14 of 2013 provided for the right of child to free and compulsory education and requires the Cabinet Secretary to implement the right of every child to free and compulsory basic education. The letter further stated that Article 56 of the Constitution provides that the state

shall put in place affirmative action programmes designed to ensure that minorities and marginalised groups are provided special opportunities in educational and economic fields. Further, the letter stated that Article 10 of the Constitution lists non-discrimination and protection of the marginalised as an integral part of the national values and principles of governance. The letter stated thus, **“The mobility of nomadic communities, hardships associated with Arid and Semi – Arid Lands (ASALS), and shortage of teachers with nomadic background makes recruitment, deployment and retention of teachers in these areas very difficult. The heightened insecurity in the areas has further exacerbated the situation.”** The letter continued that teacher trainees from these counties will now be admitted as follows:

- Primary teachers training colleges will admit at mean grade of D+ (plus) in 2018. The mean score will be revised to C- (minus) from 2019 when the colleges start offering Diploma in Primary Education.
- Diploma teacher training colleges will admit from the above counties with a mean score of C- (minus) with C- (minus) and above in the two teaching subjects.
- Only candidates who sat their KCSE from 2006 are eligible

The letter concluded, **“Kindly ensure that the students from the above Counties who have shown interest in training as teachers and who meet the new criteria are admitted to teacher training colleges from this year. Please bring the contents of this letter to the attention of all Principals of Teachers Training Colleges.”** The letter was copied to the Secretary and Chief Executive Officer of the 1<sup>st</sup> interested party.

i) The petitioner has exhibited press reports which show that the 1<sup>st</sup> interested party’s Chief Executive Officer Dr. Nancy Macharia has decried the high rate of failure in TTCs across the country in the past few years. Further the petitioner has exhibited print media reports showing that the Principal Secretary for Early Learning and Basic Education Dr. Bello Kipsang has raised red flag over mass failure of teacher trainees. The exhibited press reports also show that the 1<sup>st</sup> interested party has opposed the lowering of entry grade for training of teachers in certificate and diploma as offered by the TTCs as a ground or strategy for providing teachers for children in the marginalised areas and instead, it is reported that the 1<sup>st</sup> interested party has recommended that some 295, 000 trained teachers who are yet to be absorbed should be posted to the marginalised areas.

The Court has considered the material on record including the oral submissions made. The Court makes findings on the pertinent issues for determination as follows.

The **1st issue** for determination is whether the Cabinet Secretary by issuing the Kenya National Qualifications Framework Regulations, 2018 thereby usurped the constitutional and statutory powers and functions of the Teachers Service Commission, the 1<sup>st</sup> interested party, in so far as the entry qualifications in TTCs for P1 certificate and Diploma are concerned. It was submitted for the petitioner and the Commission that under Article 237 (2) of the Constitution the Commission’s functions are:

- a) **To register trained teachers.**
- b) **To recruit and employ registered teachers.**
- c) **To assign teachers employed by the Commission for service in any public school or institution.**
- d) **To promote and transfer teachers.**
- e) **To exercise disciplinary control over teachers.**
- f) **To terminate the employment of teachers.**

Further it was submitted that Article 237 (3) provides that the Commission shall:

- a) **review the standards of education and training of persons of persons entering the teaching services;**
- b) **review the demand for and the supply of teachers; and**
- c) **advise the national government on matters relating to the teaching profession.**

It was submitted that in performance of the constitutional functions, the Commission had acted under section 47(2) of the Teachers Service Commission Act, 2012 and promulgated the Teachers Service Commission Code of Regulations for Teachers (Amendment), 2016 published as Legal Notice No. 50 of 22.03.2016. Thus, it was not open for the Cabinet Secretary to revoke the qualifications for eligibility to register teachers as provided in the Teachers Service Commission Code of Regulations for Teachers (Amendment), 2016 published as Legal Notice No. 50 of 22.03.2016 through the Cabinet Secretary issuing the Kenya National Qualifications Framework Regulations, 2018. It was submitted that under section 31(c) of the Interpretation and General Provisions Act, a subsidiary legislation can only be amended by the same authority that issued it and therefore the Commission and not the Cabinet Secretary could amend or revoke the grades as provided in the Teachers Service Commission Code of Regulations for Teachers (Amendment), 2016. Thus the entry grades as provided for in the Teachers Service Commission Code of Regulations for Teachers (Amendment), 2016 should be protected and preserved pending the hearing of the petition because the grades as prescribed by the Cabinet Secretary in the Kenya National Qualifications Framework Regulations, 2018 is unconstitutional null and void.

For the respondents it was submitted that the Cabinet Secretary had authority to issue the Kenya National Qualifications Framework Regulations, 2018 as per the provisions of section 29 of the KNQF Act, 2014. The KNQF Act, 2014 provides for amongst other matters, the function to put measures for transition to the next level of education. It was submitted that the Cabinet Secretary had acted to lower the entry grades for certificate and diploma in TTCs in furtherance of section 28 of the Basic Education Act on the right of child to free and compulsory education, as well as, Article 56 of the Constitution requiring the state to put in place affirmative action programmes designed to ensure that minorities and marginalised groups are provided special opportunities in educational and economic fields.

The Court has considered the submissions. First, it is clear that the Commission is vested with the exclusive constitutional mandate to register trained teachers and, to recruit and employ the teachers. For that purpose of registering trained teachers and, recruiting and employing them, the Court returns that the Commission is entitled to set such qualifications of eligibility for registration, recruitment, appointment and promotion of teachers. The Court finds that the Commission was perfectly in order in setting the qualifications by way of academic grades for eligibility of registration of teachers as was done in the Teachers Service Commission Code of Regulations for Teachers (Amendment), 2016. The Constitution is clear that the Commission registers the **“trained teachers”**. To that extent it is the Court’s considered opinion that the Commission enjoys no constitutional function, to set or fix or determine the qualifications for prospective teachers (who essentially are untrained including the school leavers at KCSE level) for entry or admission to the TTCs. It is therefore the Court’s considered view that the use of the phrase **“trained teachers”** was carefully calculated to set the boundaries of the Commission’s mandate in that regard.

The Court has carefully considered the Commission’s function in Article 237 (3). The operative words are **“review”** and **“advice”**. The Court considers that the words have been used in their ordinary meaning. The Black’s Law Dictionary, 9<sup>th</sup> Edition defines **“review”** as, **“consideration, inspection, or re-examination of a subject or thing”** and **“advice”** as, **“guidance offered by one person, especially a lawyer, to another.”** Thus under Article 237(3) the role of the Commission is essentially to carry out its analysis on the prevailing standards of education and training of persons entering the teaching services; and on the demand for and the supply of teachers so that by way of, say or probably, a report and recommendations, provide the much needed professional or expert advice to the national government (such as to the respondents) on matters relating to the teaching profession.

The Court returns that it is by way of undertaking the review and advisory function under Article 237 (3) that the Commission may advise the national government on such matters as the entry grades of trainees for P1 certificate and diploma in TTCs and who once trained, will be subject of the registration, recruitment, appointment and promotion qualifications as may be prescribed by the Commission for purposes of the discharge of the Commission’s functions. While the Court reckons that the Commission will need to set some qualifications and criterion to guide its consistent or accountable or transparent and professional performance of the functions in Article 237 (2), the Court returns that such is a prudent and necessary obligation but which is not constitutionally prescribed – so that such setting of qualifications are matters the Parliament may legislate and by statutory provisions vest the fixing or setting or determination of qualifications in such other appropriate authority and as appears to have been done under the KNQF Act, 2014. In that sense, the Court returns that there was no constitutional provision that the Commission would by itself, set or determine the standards of education and training of persons entering the teaching profession, or by itself, set the demand for and supply of teachers. The setting, fixing, or determining of such standards of education and training of persons entering the teaching profession, as well as the fixing, setting or determining the demand and supply of teachers would be done by some person or authority or body within the national government. The constitutional mandate of the Commission under Article 237(3) is to undertake the prescribed review and advise such person, authority or body within the national government accordingly.

Indeed the Court has carefully considered the constitutional provisions on service commissions and as relates to the question of standards and qualifications, in Article 234 (2) (d) it is provided that the Public Service Commission shall, **“review and make recommendations to the national government in respect of conditions of service, code of conduct and qualifications of officers in the public service.”** Thus the Court returns that the consistent constitutional role is to advise or make recommendations to the national government – so that the role of the 1<sup>st</sup> interested party is to make advisories to the national government about the standards of education and training of persons entering the teaching profession and not necessarily, by itself, to set and determine such standards of education and training of the persons entering the teaching profession. It is the Court’s opinion that through such advisories, it should be possible for the 1<sup>st</sup> interested party to achieve harmony between its own qualifications and standards for registration, recruitment, appointment and promotion of teachers without there being a conflict with such standards as may be set by the national government such as may be made under the KNQF Act, 2014 and the Kenya National Qualifications Framework Regulations, 2018 as made under the Act.

While making that finding, the Court notes a weighty shift introduced through the Kenya National Qualifications Framework Regulations, 2018 whereby despite the grade attained at a lower level of learning (and particularly including in KCSE) a person can conceivably go all the way to the highest level of learning – in the KNQF levels 1 to 10 as designed, the lowest being 1 and the highest 10. In that sense, the 1<sup>st</sup> interested party may therefore wish to carefully study such new prescriptions as they may impact on its otherwise previously unsettled registration, recruitment, appointment and promotional grades and qualifications without having to eternally lock out persons desirous of improving themselves and becoming registered as trained teachers despite their otherwise poor performance at KCSE level. Thus the Court has observed the 10 KNQF levels and progression pathways which are carefully designed to permit, for lack of a better phrase, **“the late bloomers”** to nevertheless progress to the highest possible level towards the realisation of their full potential. The Court considers that such progressive innovation and provisions by the respondents would be consistent with Article 43(1) (f) which provides that every person has the right to education. Those are all progressive developments in our education system which invariably will unsettle previous comfort zones and attitudes towards academic qualifications. It could be that the 1<sup>st</sup> interested party may have been charged with doing all that which has been vested in the 2<sup>nd</sup> respondent with respect to the qualifications, not only for registration and employment of trained teachers, but also the entry qualifications to the TTCs. In the opinion of the Court, as much as the new developments may be unsettling to well established practices and operational policies and systems of the earlier agencies like the 1<sup>st</sup> interested party, as long as the new progressive developments are constitutional, they obviously constitute positive developments of a more sophisticated new Republic and such should be encouraged and welcomed.

So did the Cabinet Secretary usurp the powers and functions of the 1<sup>st</sup> respondent to purport to revoke or amend the Teachers Service Commission Code of Regulations for Teachers (Amendment), 2016 published as Legal Notice No. 50 of 22.03.2016, when, the Cabinet Secretary issued the Kenya National Qualifications Framework Regulations, 2018? The answer is obviously not in the affirmative. The Court returns that the Cabinet Secretary has not stated anywhere that she is revoking any of the provisions of the Teachers Service Commission

The Court has carefully and silently examined the actions by the Cabinet Secretary in issuing the Kenya National Qualifications Framework Regulations, 2018 and returns that she had the relevant constitutional and statutory authority to issue the regulations but the manner she exercised her authority may actually have undermined the constitutional advisory function as vested in the 1<sup>st</sup> interested party under Article 237(3) of the Constitution – as the Court will show later in this ruling.

Thus, the Fourth Schedule to the Constitution provides for distribution of functions between the national government and the county governments. Paragraph 15 and 16 thereof vests in the national government functions as follows:

**“15. Education policy, standards, curricular, examinations and the granting of university charters.**

**16. Universities, tertiary educational institutions and other institutions of research and higher learning and primary schools, special education, secondary schools and special education institutions.”**

Article 132 (3) (c) provides that the President shall by a decision published in the Gazette, assign responsibility for the implementation and administration of any Act of Parliament to a Cabinet Secretary, to the extent not inconsistent with any Act of Parliament. There is no doubt that Amb. Amina Mohamed is the person for the time being assigned by the President under that constitutional provision as the Cabinet Secretary responsible for education. It is also clear that by provisions of section 2 of the KNQF Act, 2014, “**Cabinet Secretary**” means the Cabinet Secretary for the time being responsible for matters relating to education. Thus, the Court returns that the Cabinet Secretary by issuing the Kenya National Qualifications Framework Regulations, 2018 under section 29 of the KNQF Act, 2014 acted within the cited constitutional provisions and within the conferred statutory provisions.

Next, did the enactment of the KNQF Act, 2014 and the making of the Kenya National Qualifications Framework Regulations, 2018 undermine the constitutional and statutory mandate of the 1<sup>st</sup> interested party? The Court has already found that the Parliament would be entitled to make statutory provisions on fixing or setting or determination of qualifications and standards of learning and training generally, and more specifically, on the learning and training of public officers including training and other preparatory qualifications for training teachers towards their becoming “**trained teachers**” for purposes of facilitating the 1<sup>st</sup> interested party to undertake its constitutional mandate as provided in Article 237(2). Such statute or law is the KNQF Act, 2014. Chapter 15 of the Constitution makes general provisions on Commissions and Independent offices. Article 249 (2) thereunder provides that the commissions and the holders of independent offices –

**a) are subject only to the Constitution and the law; and**

**b) are independent and not subject to direction or control by any person or authority.**

The Court returns that the KNQF Act, 2014 is one such law that is envisaged in Article 249(2) (a) and unless it is shown to be unconstitutional in one way or the other, the 1<sup>st</sup> interested party is subject to it in the exercise of its powers and functions. So far, it has not been suggested or shown to the Court that the Act is inconsistent with or in violation of any given constitutional provision and the Court returns that the Act would pass as binding accordingly.

To answer the 1<sup>st</sup> issue for determination, the Court returns that the Cabinet Secretary by issuing the Kenya National Qualifications Framework Regulations, 2018 did not thereby usurp the constitutional and statutory powers and functions of the Teachers Service Commission, the 1<sup>st</sup> interested party, in so far as the fixing or setting or determining of the entry qualifications for trainees for P1 certificate and Diploma offered by the TTCs are concerned.

The 2<sup>nd</sup> issue is whether the Court should intervene and grant some interlocutory order against lowering of grades for persons entering TTCs for training as certificate and diploma teachers. The Court has found that it has so far not been established to the Court that there is some provision in the KNQF Act, 2014 that by its provision is inherently by its rule or content, in violation of or inconsistent with the provisions of the Constitution of Kenya, 2010.

In the judgment in George Maina Kamau –Versus- The County Assembly of Murang’a and 2 Others [2016]eKLR, the Court stated, **“While addressing the 3<sup>rd</sup> issue for determination, the court is alert that in considering a case, a litigant may show that a provision of a statute as applied to that litigant is unconstitutional and if the court finds as much, the decision would apply to the parties to such litigation, such decision binds only the parties and the matter ends there. In the opinion of the court, in such cases, the statute does not thereby become unconstitutional generally and it remains good law to be applied constitutionally in future circumstances. However, if a statutory provision contains unconstitutional prescription or rule and the court finds as much, then the statute would not apply to any future circumstances as is a nullity as against every person. Such a statute or statutory provision would be incapable of ever being applied constitutionally. In such cases, where a statute is unconstitutional because it inherently contains a prescription or rule that is unconstitutional, it is the opinion of the court that the legislature should move with speed to repeal the statute so that the offensive provision does not remain on the statute book. In the opinion of the court, that is more so because by promptly repealing the unconstitutional statute or the offending unconstitutional provision, public officers and the general users of the statute or statutory provision would not be misled to apply it for the time it persists to exist on the statute book.”**

In the instant case and in absence of any further submissions or material on the issue, the KNQF Act, 2014 appears to be a constitutional law capable of being applied constitutionally. The Court has carefully considered the material on record and the submissions made. The Court returns that the petitioner and the 1<sup>st</sup> interested party have successfully established that the way the statute is being implemented is indeed being implemented unconstitutionally. The Court has already returned that the Cabinet Secretary has made the regulations under the KNQF Act in a manner that undermines the role of the 1<sup>st</sup> interested party under Article 237(3).

It has been established that towards delivery of its constitutional mandate, the 1<sup>st</sup> interested party set the eligibility qualifications including grades for registering trained teachers. In prescribing the lower grades for entry to the TTCs for certificate and diploma trainees, the respondents have failed to show that they sought the 1<sup>st</sup> interested party's review and then advisory as envisaged in Article 237 (3). The Court returns that whereas Article 237 (3) uses advice, it was imperative that the advisory of the 1<sup>st</sup> interested party is specifically sought and obtained but that was not done as per the material on record.

The Court holds that in view of the 1<sup>st</sup> interested party's constitutional function that amounts to the most important constitutional safeguard in on the standards of education and training of teachers as well as demand for and supply of teachers, it was mandatory that the respondents seek and obtain the Commission's review and advisory. The Court further holds that the advisory as given by the 1<sup>st</sup> interested party would be binding unless for justifiable and good reason that the Cabinet Secretary and the 2<sup>nd</sup> respondent would show in that regard and founded upon a constitutional provision. Why does the Court say that the advisory would be binding except for a constitutionally provided justifiable and good reason to be shown? Article 129 of the Constitution provides thus:

- 1) Executive authority derives from the people of Kenya and shall be exercised in accordance with this Constitution.**
- 2) Executive authority shall be exercised in a manner compatible with the principle of service to the People of Kenya, and for their well-being and benefits.**

Article 249(1) of the Constitution then provides that the objects of the commissions and the independent offices are to –

- a) protect the sovereignty of the people;**
- b) secure the observance by all State organs of democratic values and principles; and**
- c) promote constitutionalism.**

In view of the provisions, the advisory by the 1<sup>st</sup> interested party to the respondents would be properly given in furtherance of the objects as cited in Article 249(1) and which is binding in terms of Article 249(1) and 129.

For avoidance of doubt, the Court is guided that the Court of Appeal has in **Teachers Service Commission (TSC) –Versus- Kenya National Union of Teachers (KNUT) & 3 Others [2015]eKLR** (Githinji, Koome, Mwilu, Azangalala, & Odek, JJ.A) held that when Article 230 (4) (b) provided that the Salaries and Remuneration Commission shall “**advise the national and county governments on the remuneration and benefits of all other public officers,**” the obtaining of the Commission's advise as provided was mandatory. The Court is guided accordingly and holds that the respondents did not seek and obtain the binding advisory of the 1<sup>st</sup> interested party so that in implementing the authority to issue the regulations under the KNQF Act, 2014 the Cabinet Secretary and the 2<sup>nd</sup> respondent were bound to act in accordance with the advisory given by 1<sup>st</sup> interested party but that has been shown not to have been the case or done.

It could be that the 1<sup>st</sup> interested party may not have put in place elaborate regulatory provisions on the discharge of its functions to review and advise the national government as provided in Article 237(3) of the Constitution. Promulgation of such regulation will be a progressive plus for the 1<sup>st</sup> interested party in the days to come. However the Court returns that the absence of such regulations did not in any manner vitiate the mandatory obligation that the respondents were to obtain the advisory by the 1<sup>st</sup> interested party prior to setting or fixing or determining the entry grades for trainees for P1 certificate and diploma offered in the TTCs. Thus Article 259 (11) of the Constitution provides that if a function or power conferred on a person under the Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with that approval or consent, or after that consultation, except to the extent that the Constitution provides otherwise. The Court returns that the Constitution has not been shown to have provided otherwise and the advisory was mandatorily to be obtained by the Cabinet Secretary and the 2<sup>nd</sup> respondent.

The petitioner and the 1<sup>st</sup> interested party are entitled and are right by submitting that the principle of service to the People of Kenya, and for their well-being and benefits will not be served through the manner the entry grades for P1 certificate and diploma trainees in TTCs are being lowered through the Kenya National Qualifications Framework Regulations, 2018. The evidence is that letters have been issued by the respondents including on clarifications and even varying the grades in the Kenya National Qualifications Framework Regulations, 2018 – and by such letters it is established that the regulations are incomplete and inherently deficient in content and specifications including deficiency on how they are to be implemented. The further evidence is that the grades as prescribed in the Kenya National Qualifications Framework Regulations, 2018 are in serious variance with the Teachers Service Commission Code of Regulations for Teachers (Amendment), 2016 published as Legal Notice No. 50 of 22.03.2016. The consequence as submitted is that the public resources applied to train the teachers in the TTCs may go to waste because upon completion of the training the certificate and diploma teachers that will not meet the grades as prescribed by the 1<sup>st</sup> interested party's regulations will not be eligible for registration as trained teachers and subsequently employed in the 1<sup>st</sup> interested-party's or other employers' teaching service. Such obvious turn of events will clearly be in contravention of the already cited Article Articles 249(1) and 129 and further in contravention of Article 232 (1) (b) on the public service value and principle of efficient, effective and economical use of resources and Article 10 (2) (d) on sustainable development.

It has been shown for the petitioner and the 1<sup>st</sup> interested party that there has been questionable balancing of the desired affirmative action to provide special opportunities in education and economic fields to minorities and marginalised groups under Article 56 (b), as against, the right of every child (including children in marginalised areas) to free and compulsory basic education as per Article 53(1) (b). Various policy alternatives have been suggested in the submissions such as whether to employ thousands of the already trained teachers to serve in the marginalised areas backed with sufficient security and safety provisions instead of lowering the grades so that the affected children do not get exposed to otherwise “**lower standards and quality**” of education. It is urged for the petitioner and the 1<sup>st</sup> interested party that lowering of

the entry grades is not one of the things that are prescribed in section 28 of the Basic Education Act, 2013 required to be done by the Cabinet Secretary towards implementing the right of the child to free and compulsory education but it is urged that the lowering of the grades is inconsistent to that right - and the section prescribes infrastructural provisions so that the section is improperly invoked in the circumstances and purportedly towards advancing the right for the children in marginalised areas to quality education.

The 1<sup>st</sup> interested party was concerned that it had received the letters to implement the Kenya National Qualifications Framework Regulations, 2018 as a directive devoid of the necessary consultations and public participation by all key stakeholders as envisaged in Articles 232(1) (d) on involvement of the people in the process of policy making; and Article 10 (2) (a) on patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people. It was submitted for the 1<sup>st</sup> interested party that no child in the Republic should be discriminated through provision and exposure to “**third grade teachers**” and that the Republic being one, all children must be provided with equal quality of education manifested in provision of teachers of equal quality across the country.

The Court has already identified the constitutional vesting of the policy on education in the national government. What is clear at this stage is that there is need to revisit the policy and other considerations prior to the implementation of the KCSE grades for admission of trainees to the TTCs for certificate and diploma teachers.

In view of the established reasons the Court returns that the petitioner has established a case for the interlocutory order to preserve the status quo obtaining prior to issuance of the Kenya National Qualifications Framework Regulations, 2018 and all processes flowing from the regulations towards implementation of the entry grades prescribed therein for admission of trainees in the TTCs to train as P1 certificate, diploma, and other teachers be stayed accordingly.

The Court has noted that the parties and the public is confronted with the Kenya National Qualifications Framework Regulations, 2018 and the Teachers Service Commission Code of Regulations for Teachers (Amendment), 2016 published as Legal Notice No. 50 of 22.03.2016 both of which the Court has found to be in conflict in their provisions with very disastrous impact on the standards of education and training of persons entering the teaching service. The Court will therefore direct the Cabinet Secretary to urgently convene the parties and all other key stakeholders towards harmonising the qualifications as set out in the two sets of regulations. While making the finding, the Court has taken into account that thousands of trainees are due to join the TTCs any time now and it will be in the best national interest that the harmonisation is achieved immediately.

In conclusion the application by the amended notice of motion herein filed on 10.12.2018 and dated 07.12.2018 is hereby determined with orders as follows:

- 1) Pending the hearing and determination of the petition or further orders by the Court, a conservatory order is hereby issued preserving the status quo obtaining prior to issuance of the Kenya National Qualifications Framework Regulations, 2018 and all processes and decisions flowing from the regulations towards implementation of the entry grades prescribed therein for admission of trainees in the TTCs to train as P1 certificate, diploma and other teachers are hereby stayed forthwith and accordingly.
- 2) Pending the hearing and determination of the petition or further orders by the Court, the 1<sup>st</sup> respondent through the Cabinet Secretary shall urgently convene the parties and all other key stakeholders towards harmonising the qualifications as set out in the two sets of regulations (the Kenya National Qualifications Framework Regulations, 2018 and the Teachers Service Commission Code of Regulations for Teachers (Amendment), 2016) with a view of paving way for timely admissions to the TTCs for trainees for P1 certificate, Diploma, and other teachers and who upon graduation would be automatically qualified as eligible for registration by the 1<sup>st</sup> interested party as trained teachers.
- 3) The matter being certified extremely urged, it is hereby admitted for listing during the forthcoming Court’s Christmas Vacation and mention on 03.01.2019 at 9.00 O’clock in the forenoon or soon thereafter before the Recess Duty Judge to record progress in view of order (2) above and for further directions and orders on the petition.
- 4) Costs of the application in the cause.

**Signed, dated and delivered in court at Nairobi this Thursday 20<sup>th</sup> December, 2018.**

**BYRAM ONGAYA**

**JUDGE**