



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS
COURT OF KENYA AT KISUMU
PETITION NO. 7 OF 2016
(FORMERLY KAKAMEGA H.C. PETITION NO. 6 OF 2013)
(BEFORE HON. LADY JUSTICE MAUREEN ONYANGO)
C A PETITIONER
VERSUS
TEACHERS SERVICE COMMISSION..... RESPONDENT

JUDGMENT

The Petitioner was until 15th August 2011 a teacher employed by the Respondent. In the Petition filed herein he states that he was employed by the Respondent in 1980 and posted to [Particulars withheld] Primary School where he taught for 7 years. He was thereafter transferred to [Particulars withheld] Primary School where he taught for 16 years until his dismissal and removal from the register of teachers on 15th August 2011 on allegations that he was engaged in an illicit love affair with a pupil (name withheld to protect her identity as she was a minor, and herein after referred to as THE PUPIL).

The Petitioner avers that he was dismissed before any investigations were conducted to verify the accusations against him. He seeks the following remedies:-

- “a) A declaration that the dismissal of the Petitioner by the Respondent was unjust, unwarranted and grossly violated the constitution;**
- b) An order directing the Respondent to unconditionally reinstate the Petitioner;**
- c) An order directing the Respondent to pay the Petitioner's salary and all dues from the date of the dismissal;**
- d) Any other relief that this honourable court shall deem just and expedient.”***

In the affidavit in support of the Petition, the Petitioner states that he was arrested on allegations of defilement of the pupil but was absolved of all blame following investigations by police and the prosecution office in Kakamega. He further depones that the investigations revealed that a person named ABDUL NASSIR was the one who defiled the pupil and not the Petitioner. The Petitioner denied ever having any illicit relationship with the pupil.

The Respondent filed a replying affidavit of SIMON MUSYIMI KAVISI, a director of the Respondent

in-charge of Administration who depones that he is conversant with this matter and has authority to swear the affidavit.

Mr. Kavisi depones in the affidavit that the Respondent is a Commission established under Article 237(1) of the Constitution of Kenya 2010 with its primary function being the management of teachers employed for service in public schools. Among the functions of the Respondent is to recruit and employ, assign for service in any public school or institution, promote and transfer and exercise disciplinary control over teachers.

Mr. Kavisi further depones that besides the Constitution the commission is regulated by the Teachers Service Commission Act and the Code of Regulations for Teachers published pursuant to Section 6 of the Act, and the Teachers Service Code of Conduct and Ethics published pursuant to the provisions of Section 5(1) of the Public Officer Ethics Act (No. 4 of 2003). He states that the Commission is thus clothed with broad constitutional and statutory mandate that encompasses the exercise of disciplinary power over teachers who breach the provisions of the Code of Regulations.

Mr. Kavisi depones that on 28th February 2011 one D O reported to the Head teacher of [Particulars withheld] Primary School that (the pupil) of Standard 8 had disappeared from home on 27th February 2011. By letter dated 2nd March 2011 the Head Teacher reported the disappearance of (the Pupil) to the District Education Officer. He deponed that on 4th April, 2011, the District Education Officer held a meeting with the District Quality Assurance and Standards Officer together with the Head Teacher, the Applicant, (the Pupil) and D O (Guardian). The Pupil gave her oral statement that her teacher, the Petitioner was responsible for her disappearance but the Applicant denied any unusual relationship. On 5th April, 2011 the School Management Committee held a meeting in which (the Pupil) revealed that her teacher, the Petitioner had rented a lodging for her at [particulars withheld] Estate within Kakamega town where she had been staying from the date of disappearance to 31st March, 2011 and he had carnal knowledge of her on several occasions. Mr. Kavisi deponed that these allegations, if proved, were a gross contravention of the Code of Regulations for Teachers [hereafter referred to as "COR"].

On 15th April, 2011, the school held a special School Management Committee meeting and the Petitioner, the Pupil and D O, the guardian were heard and their statements recorded. That in exercise of its mandate the Commission through the District Education Officer (DEO), Kakamega Central, dispatched a team of officers headed by the District Quality Assurance and the Standards Officer to the school to investigate the matter. A report of the Committee's finding and witness statements pointed to the fact that the Petitioner could have committed an offence punishable under the Code of Regulations for Teachers hence the Commission reached the decision to interdict the Petitioner. That subsequently and in strict compliance with its administrative process, the Commission summoned the Petitioner and other witnesses and set the hearing of the case on 15th August, 2011 at the District Education office, Kakamega Central District. At the hearing, the Petitioner was given the opportunity to present his case, defend himself and cross examine all the witnesses. That upon evaluating both the oral and documentary evidence in the matter, the commission arrived at a considered decision to dismiss the Petitioner from its service and to further remove his name from the register of Teachers.

Mr. Kavisi deponed that the punishment meted out on the Petitioner was commensurate with the offence and was in strict compliance with Regulation 66(5)(c) of the Code, that the Commission operated within the confines of the law and exercised its mandate lawfully and complied with the rules and principles of natural justice. Mr Kavisi deponed that the Commission specifically informed the Petitioner of allegations against him at the earliest opportunity and he was invited to write his defence; the Petitioner made his representations by way of a written defence statement which was presented and duly considered by the Commission; the Petitioner appeared before the Commission, heard the evidence against him and had the opportunity to cross examine witnesses and was accorded the opportunity to present his evidence, both orally and in writing and to rebut the adverse evidence; the Petitioner's evidence was duly considered by the Commission, that the decision was without unjustified delay communicated to the Applicant. Mr. Kavisi further deponed that the Commission was not influenced or actuated by bad faith as alleged by the Applicant.

It is the Respondents contention that the Petitioner withheld material facts from the Court and is therefore not entitled to the reliefs sought.

Petitioner's Submissions

In the submissions filed on behalf of the Petitioner it is submitted that the Petition is premised on Articles 19(2), 20(1), (3) and (4), 21(1), 22(1), 23(10, 28, 47(1) and (2), 48 and 50(1) of the Constitution. It was submitted that the Respondent's decision to interdict the Petitioner was made without basis and was actuated by malice. It is submitted that the Respondent did not make any reference to the letters from the Criminal Investigation Department which recommended that the Petitioner be discharged.

It was further submitted that the interdiction was unconstitutional as the Petitioner's right to fair trial was violated as the rules of natural justice fundamental in an adversarial system were ignored. It was submitted that the Respondent has not placed any material before the Court to show that it delegated to the District Education Officer the power to interdict the Petitioner; that the delegation should be published in an instrument like the Kenya Gazette with clear guidelines on how the delegated authority would be exercised in the absence of which the court should find that the District Education Officer acted without jurisdiction and his action was void ab initio.

The Petitioner relied on the case of **Catherine Wanjiru Watoro V. Teachers Service Commission & 2 Others [2014] eKLR** in which the Judge observed as follows:-

"... the person exercising such delegated powers has to observe the standards, procedures and all safeguards as would be done by the 1st respondent if the 1st respondent had exercised the powers by itself. The court's further opinion is that where the decisions may be adverse or have far reaching consequences, then rules of due process or natural justice, as they have come to be celebrated, must be provided for with clear efficient appeal or review steps of dissatisfaction. In absence of the delegation by the 1st respondent and the demonstration of the relevant safeguards and standards to be observed, the court finds that the 2nd respondent in making the two letters walked outside her authority and pretended to make decisions in the sole preserve of the 1st respondent."

It is further submitted that there were procedural flaws at the disciplinary hearing of the Petitioner's case as the record does not disclose who was asking questions in-chief, on the re-examination session, the language used and there is no record of whether or not the Petitioner admitted or denied the charges. It is submitted that the Respondent had a pre-determined decision as to the guilt of the Petitioner as the record shows the Petitioner did not cross-examine the (Pupil) on some issues. The Petitioner further submits that the procedural safeguards guaranteed under Section 41 of the Employment Act were not afforded to the Petitioner as he did not have a union representative or person of his choice present at the hearing. It was submitted that the Respondent was unable to prove the allegations made against the Petitioner as required by Section 43 and 45 of the Employment Act. It is further submitted that the proceedings of the Commission were only signed by one Commissioner and not all the Commissioners present.

The Petitioner relied on the case of **Sarah Nyanchama Ratemo – Kizito V. Teachers Service Commission [2013] eKLR** in which the Court observed that

a. The respondent did not accord the claimant presence of a person of her choice or a union representative as envisaged in section 41 of the Employment Act, 2007.

b. The record does not show the disciplinary hearing's record of the claimant's response to the charges and if the findings is that the respondent's statement was also absent, it is difficult to resist the finding that the claimant suffered serious miscarriage of justice because the grounds and material leading to the imposition of the punishment of dismissal remains at large.

c. Only the chairperson of the committee and not the other two commissioners present at the disciplinary hearing signed the proceedings. In such circumstances, it is the opinion of the court

that the proceedings as recorded amounted to failure by the other two commissioners present to exercise their good judgment and authority by directing their respective minds to the claimant's case. It is the opinion of the court that in absence of their respective signatures and record of their vote or opinion on the matter, it is difficult to make sense of the committee's decision in the matter.

It is further submitted that by stating at paragraph (7) of the Replying affidavit that the punishment meted out to the Petitioner was commensurate with the offence the Respondents usurped the powers of the judiciary as only a court of law can determine if an offence has been committed and mete out punishment.

Respondent's Submissions

The Respondent submitted that Regulation 66(2) of the Teachers Code of Regulations outlines professional offences breach of which mandatorily invite penal consequences, that the Petitioner breached the professional rules and had to be subjected to the disciplinary process as prescribed in the Code. The Respondent submitted that the Petitioner's disciplinary process had nothing to do with Criminal investigations as the two verdicts are mutually exclusive.

The Respondent submitted that the standard of proof in criminal cases and the standard for professional misconduct are different, and the rules of admissibility of evidence and procedural technicalities required in criminal cases are different from the standard in professional misconduct cases.

The Respondent further submitted that both the police and the Respondent have a statutory authority to investigate cases under their respective mandates and the failure of the police to successfully investigate their cases cannot impede the commission's investigations for professional misconduct. The Respondent submitted that its statutory duty is not subservient to the success or failure of the police to discharge its duties. The Respondent further submitted that it would be against public policy and public interest for it to ignore material breaches of professional conduct by its employees. It further submitted that it has capacity as an employer and statutory duty under the Teachers Service Commission Act to take administrative action against its employees pursuant to terms and conditions of service in its Code.

Responding to the issue raised by the Petitioner that he was not given an opportunity to defend himself the Respondent submitted that the Teachers Service Commission Act outlines broadly the procedures to be followed in exercising disciplinary powers under the Act while Regulation 66 outlines the specific steps to be followed. The Respondent submitted that it meticulously followed the procedures and adhered to the principle of natural justice.

On the issue whether the Petitioner's Constitutional rights were infringed the Respondent submitted that the Petitioner failed to demonstrate how his constitutional rights were infringed by the Respondent. The Respondent submitted that a person whose rights have been infringed must cite with precision the rights that have been infringed and how they have been infringed.

The Respondent submitted that the Petitioner having failed to demonstrate which rights and how the rights have been infringed, is not entitled to any of the remedies sought.

The Respondent submitted that it has lost trust and confidence in the Petitioner as an employee and has exercised its freedom to invoke the terms and conditions of the petitioner's service relating to termination. It submitted that the petitioner's contract was procedurally terminated and he is not entitled to reinstatement.

The Respondent relied on **CIVIL SUIT NO. 156 OF 1997 JOSEPH MUJIBI OUMA V. NATIONAL CEREALS AND PRODUCE BOARD AND TWO OTHERS** where the High Court applied the decision of the Court of Appeal in **DALMAS B. OGOYE V. KNTC IN CIVIL APPEAL NO. 125 OF 1995** wherein the court held that:

“It is a well established fact that courts have been reluctant to make orders for reinstatement because such relationships are purely contractual hence if an order is made in that direction it

would be like imposing a contract on another which is not the function of the Court”

The Respondent further relied on the decision of this Court in **Cause No. 379 of 2010 UNIVERSITIES ACADEMIC STAFF UNION V. MASINDE MULIRO UNIVERSITY OF SCIENCE AND TECHNOLOGY** in which the court stated that:-

“Reinstatement is one of the remedies available to a dismissed employee. It is not an automatic remedy as the court must consider other factors such as practicability of implementing the remedy. It is considered that it would NOT serve the interests of furtherance, securing and maintenance of good employment and labour relations in Kenya as envisaged by 4(1) of the Industrial Court Act.”

The Respondent further submitted that having not rendered any service from the date of interdiction the Petitioner is not entitled to any salary arrears as prayed. The Respondent prayed that the Petition be dismissed for being devoid of merit.

Determination

I have considered the pleadings and written submissions and I am of the considered opinion that the issues for determination are the following:-

1. Whether the Petitioner's constitutional rights have been infringed by the Respondent.
2. Whether the Petitioner is entitled to the remedies sought.

Whether the petitioner's constitutional rights have been violated

The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 commonly referred to as “**Mutunga Rules**” set out the procedure in proceedings for protection of rights and fundamental freedoms under the Constitution of Kenya 2010.

Rule 4(1) and 10(1) and (2) provide as follows:-

4(1) Where any right or fundamental freedom provided for in the constitution is allegedly denied, violated or infringed or threatened, a person so affected or likely to be affected, may make an application to the High Court in accordance to these rules.

10 (1) An application under rule 4 shall be made by way of a petition as set out in form A in the Schedule with such alterations as may be necessary.

(2) The petition shall disclose the following -

(a) the petitioner's name and address;

(b) the facts relied upon;

(c) the constitutional provision violated;

(d) the nature of injury caused or likely to be caused to the petitioner or the person in whose name the petitioner has instituted the suit; or in a public interest case to the public, class of persons or community;

(e) details regarding any civil or criminal case, involving the petitioner or any of the petitioners, which is related to the matters in issue in the petition;

(f) the petition shall be signed by the petitioner or the advocate of the petitioner; and

(g) the relief sought by the petitioner.

In the petition filed herein the Petitioner did not state the constitutional provisions that are alleged to have been violated or threatened, or the nature of injury caused or likely to be caused to the Petitioner by such violation. The facts relied upon are also not set out precisely. All that the petitioner states in the petition is that **“The petitioner's rights have been grossly violated.”**

In **ANARITA KARIMI NJERU V. REPUBLIC [1979]eKLR** the court laid down 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.

In the present petition the Petitioner made reference to several articles of the Constitution by way of introduction as follows:-

“My lady, the petitioner now comes to this court for a declaration that his fundamental rights and freedoms were grossly violated. The petition is premised on articles 19(2), 20(1, 3, (b), 4(a) and (b), 21(1), 22(1), 23(1), 28, 47(1) and (2) 48 and 50(1) of the Constitution of Kenya 2010. He desires that upon finding that his rights were grossly violated the court should give the remedial measures pleaded for in the petition.”

However in the body of the submissions reference is made only to Articles 23, 47 and 50 and only in reference to what the sections provide without relating them to the Petitioner's case. In **MUMO MATEMU V. TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 5 OTHERS [2013]eKLR** the Court of Appeal stated as follows with regard to framing of petitions -

“ we cannot but emphasize the importance of precise claims in due process, substantive justice, and the exercise of jurisdiction by a court. In essence, due process, substantive justice and the exercise of jurisdiction are a function of precise legal and factual claims. However, we also note that precision is not coterminous with exactitude. Restated, although precision must remain a requirement as it is important, it demands neither formulaic prescription of the factual claims nor formalistic utterance of the constitutional provisions alleged to have been violated. We speak particularly knowing that the whole function of pleadings, hearings, submissions and the judicial decision is to define issues in litigation and adjudication, and to demand exactitude ex ante is to miss the point.”

I agree with the Court of Appeal's position which is also binding on this court. Likewise I find that the instant petition fell short of the very substantive test set out in the principles of **ANARITA KARIMI NJERU**'s case. Besides not stating the constitutional provisions alleged to have been infringed and how they were infringed there also appears to have been a confusion about whether the Petitioner was dissatisfied with the interdiction or the dismissal. In the prayers the Petitioner seeks a declaration that ***the dismissal was unjust, unwarranted and grossly violated the Constitution.*** However in the written submissions the petitioner addresses the issues ***“whether the interdiction was fair”*** and ***“whether the interdiction was Constitutional.”*** This raises further questions on the petitioners intentions and competency of the petition.

The Petitioner raised two other issues, that is, fair hearing and whether he suffered double jeopardy.

On fair hearing the petitioner did not disclose in either the petition or the affidavit in support thereof that he had been given a hearing by the District Education Office on 4th April 2011 before he was interdicted and again on 15th August 2011 before he was dismissed and his name removed from the Register of Teachers. The Respondent has given a detailed account of the proceedings undertaken from the time the petitioner was reported to have been responsible for the disappearance of the Pupil on 27th February to 29th March 2011.

The Petitioner further did not disclose that he was invited to appear before the Management Committee

on 18th April 2011 to shed light on the allegation that he was responsible for the disappearance of the pupil but failed to attend the meeting.

The proceedings of the disciplinary hearing by the TSC Commissioners on 15th August 2011 disclose that the charges against the Petitioner were read to him and he was allowed to cross-examine all witnesses present. The petitioner's allegations that he was dismissed before investigations were concluded is therefore not factual.

The Court is persuaded on the evidence on record that the Claimant was subjected to a fair disciplinary hearing as prescribed in the TSC Act and Code of Regulations for Teachers.

The Claimant's allegation that another person by the name ABDUL NASSIR KASSIM was responsible for the disappearance of the Pupil is not mentioned in any of the proceedings or in his defence during the disciplinary process. The petitioner attached to the affidavit in support of the petition three statements he wrote in defence to the letters of interdiction on 18th May, 12th July and 9th September 2011 all of which do not mention the said KASSIM. It is the court's opinion that the introduction of the said KASSIM is an afterthought.

The petitioner further submitted at length that he was absolved from blame by the C.I.D. and prosecution office, Kakamega. He states that it was unconstitutional to subject him to the disciplinary hearing following his "acquittal" by the police.

As ably submitted by the Respondent, disciplinary proceedings and criminal proceedings are mutually exclusive. The standard of proof required of the two are different with a higher threshold required in criminal cases. Further, the disciplinary proceedings were on a different charge, that of professional misconduct which falls under the civil law as opposed to the criminal investigations which were on a charge of defilement. In the disciplinary procedure envisaged under the Employment Act there is no mention of criminal charges being preferred against an employee as an alternative to the disciplinary proceedings. Indeed Section 44(4)(g) allows an employer to dismiss an employee who has committed a criminal offence against the employer or employer's property or to the substantial detriment of the employer. This means that after being charged with a criminal offence against the employer or employer's property or to the substantial detriment of an employer, an employee can again be subjected to a disciplinary hearing on the very same grounds in the criminal charges that lead to his dismissal from service.

The foregoing notwithstanding, the petitioner was not absolved of blame as alleged as he was never subjected to a hearing by a competent court. His submissions that his disciplinary hearing was unlawful on grounds that he was absolved of blame by the criminal investigative arm of the government are therefore not valid.

Conclusion

Having found that the petitioner did not set out the provisions of the Constitution alleged to have been violated or demonstrate how the violation occurred, and having found that the petitioner was subjected to disciplinary procedure as prescribed by the Teachers Service Commission Act and the Code of Regulations for Teachers, I find that the petition has no merit and dismiss the same. There shall be no orders for costs.

DATED SIGNED AND DELIVERED THIS 19TH DAY OF JANUARY, 2017

MAUREEN ONYANGO

JUDGE