



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS**  
**COURT AT NAIROBI**  
**CAUSE NO. 1298 OF 2014**

(Before Hon. Lady Justice Hellen S. Wasilwa on 16<sup>th</sup> February, 2017)

DICKSON KABIRU MUBURU.....CLAIMANT

VERSUS

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

KENYA NATIONAL UNION OF TEACHERS .....2<sup>ND</sup> RESPONDENT

**JUDGMENT**

1. The Claimant filed suit on 6<sup>th</sup> August, 2014, seeking the following orders:

- i. A declaration that the Claimant having fully qualified as a P1 teacher with experience of over 20 years has been subjected to unfair, unequal treatment by the Respondents tantamount to discrimination hindering his career growth.*
- ii. A declaration that the Claimant is fully qualified for a promotion to the same category/job group as that of his counterparts KACE graduates who are now at job group ATS I/job group L.*
- iii. An Order direction the 1<sup>st</sup> Respondent to immediately promote the Claimant to the job group ATS I/job group L.*
- iv. Compensation for unfair/discriminatory treatment by the Respondents.*
- v. Any other relief as the Court may deem just.*

2. He avers that he has been an employee of the 1<sup>st</sup> Respondent since February 1994 as a Primary School Teacher in various stations: Wamboo Primary School (4 years), Mukalala Primary School (10 years) and then at Kithimani Primary School (serving his 7<sup>th</sup> year with the school as at 2014). His TSC Number is cited as 344539.

3. The Claimant states that he sat for his Kenya Certificate of Secondary Education (KCSE) in the year 1989, and obtained a mean grade of C+ of 65 points in his KCSE examinations. In this same year the last Group of Kenya Advance Certificate of Education (KACE) sat their examinations.

4. He further avers that after results were released in 1989, he qualified for admission for a diploma course in education but there were no chances for training as the colleges were admitting KACE students only until further notice. In light of this, the Claimant states that he joined Kamwenja Teachers Training College for a P1 Course which is a Certificate Course in education which he successfully completed gaining employment thereafter with the Respondent in 1994 as a P1 teacher in job group G on permanent and pensionable terms. His counterparts who had qualified for a diploma in education but failed to join teachers training colleges and undertook P1 training were employed as P1 teachers in job group G as well.

5. The Claimant avers that as at the time of entry or employment by the Respondent both KACE and KCSE P1 trained teachers were treated equally in terms of job group and employment terms. He continues to state that sometime on or before the year 1990, the Respondent had employed KACE students who had not gone for training in education as untrained teachers (UTs).

6. That in the year 1995, the UTs were promoted to a grade equivalent to a diploma in education known as S1 on permanent and pensionable terms which grade was higher than P1. As a result KACE P1 teachers lodged complaints with the Respondent and in the year 2003. The KACE P1 teachers were promoted to job group ATS IV/job group H which job group was still lower than S1 and hence they continued agitation until they were promoted to job group L based on:

***a. That the respective teachers had obtained 1 principal 2 subsidiary pass for arts and principal 1 subsidiary for science subjects excluding general paper.***

***b. That the respective teachers had a P1 Certificate.***

***c. That the respective teachers were serving the Commission as at 1<sup>st</sup> July, 2010.***

7. The Claimant alleges that he had met the above minimum qualification for undertaking a diploma course in education in his KCSE results but was sidelined for promotion by the Respondent on account of the fact that he was a KCSE graduate in the year of transition hence belonging to a minority group.

8. That after the said promotions, the UTs who were at a lower level than the KCSE P1 teachers who were at the same job group as the Claimant herein. They were promoted to group L which is four times higher than what the KCSE P1 teachers including the Claimant hold. That both the KACE P1 teachers and KACE untrained teacher's promotions was brought about by pressure which they respectively asserted based on the numerically superior numbers as compared to the Claimant's numerically inferior group.

9. The Claimant alleges that he has never benefited from any promotion due to his group's inferior numbers which he states is tantamount to unfair and discriminatory treatment by violating his fundamental rights of reasonable, fair and equal treatment. Further that the Respondent's actions are in breach of statute to deny him opportunities for career and personal growth and development.

10. It is the Claimant's contention that he was properly qualified for promotion alongside KACE P1 teachers and hence he has maintained the pressure for his promotion by lodging complaints with the Respondents which have not been addressed.

11. In addition to the above the Claimant states that he applied for the Teachers' Proficiency Course which is managed by the 1<sup>st</sup> Respondent in 2012, but was not admitted.

12. His action against the 2<sup>nd</sup> Respondent is that they failed to agitate for his aforementioned rights whereas he contributes annually towards welfare of the trade union. He prays for the Claim to be allowed.

13. The 1<sup>st</sup> Respondent filed a Memorandum of Response wherein they admit the employment

relationship and the terms as stipulated in the Claimant and further state that teachers entering the Commission are vetted individually based on their professional and academic qualifications, availability of vacancies and requirements of the existing schemes of service. That the Claimant did not meet any of the requirements precedent to any promotion. They deny that KACE and KCSE P1 teachers were treated the same.

14. In response to the allegation that untrained teachers were treated better than KCSE P1 teachers they state that the said UTs were taken for training by the Ministry of Education pursuant to their mandate and were later classified as S1 teachers by the Ministry. That the 1<sup>st</sup> Respondent had no role to play in the said training and classification.

15. The Respondent avers that it is not true that P1 teachers are fewer in number than any other group of teachers and that it applies its scheme of service without regard to the number of employees in a particular grade. Further that the Claimant has not been treated unfairly in any way and that all allegations set out by the Claimant are false and have no basis in law.

16. That at no point did the Respondent equate A Level Certificates with KCSE Certificates for purposes of promotions or upgrading and they have no existing policy at the moment allowing promotion of P1 teachers to ATS1 and as such the Claim is untenable.

17. It is the Respondent's further contention that the Claimant has been advised severally that he qualifies for promotion upon undertaking a Teacher Proficiency Course in line with the existing scheme of service and to exempt him from this requirement will be unlawful. They further contend that the Court has no jurisdiction to order career progression of the Claimant as the same is regulated by internal schemes of service. They pray for the Claim to be dismissed.

18. The 2<sup>nd</sup> Respondent in response states that it has acted within its mandate in protecting and advancing collectively the interests of its members within the law and the suit against them should be dismissed.

19. In submissions the Claimant states that he has been subjected to unfair and unequal treatment tantamount to discrimination, which has hindered his career and personal growth. This he states is contrary to Article 27(1), (2), (3), and (4) and (5) of the Constitution of Kenya 2010.

20. It is the Claimant's submission that at the time the 1<sup>st</sup> Respondent employed him as a KCSE P1 teacher, KACE graduates were also taken in on similar terms but their advance along the years has differed which in his view amounts to unfair and unequal treatment tantamount to discrimination.

21. The Claimant submits that as a result of infringement of his constitutional rights the prayers sought should be allowed as drawn.

22. It is the Respondent's submission that the Claimant has not suffered any discrimination and his Claim should be dismissed. They state failure to progress in his career has been occasioned by his inability to go through the Teachers Proficiency Course and only has himself to blame.

23. They further submit that promotions at the workplace are determined by internal process and the Court should not interfere. They cite the case of **Kenya Plantation and Agricultural Workers Union vs. James Finlay (K) Limited (2013)** wherein it was stated:

***"...the general principle is that the Court shall not interfere in the employer's entitlement to undertake these functions and interference by the Court shall be exercised very sparingly. The Court's rare intervention can be justified on account of obvious breach by the employer of the statutory or agreed due process or such other manifest injustice and in circumstances whereby the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal processes."***

24. The 1<sup>st</sup> Respondent prays for the Claim to be dismissed with costs.

25. The 2<sup>nd</sup> Respondent submits that the Claim does not disclose a reasonable cause of action against them and it should be dismissed with costs. They state that the Claimant is bound by his pleadings and cite the case of **Crescent Construction Company Limited vs. Delphis Bank Ltd (2007) eKLR** to buttress this position.

26. Having considered the evidence and submissions of both parties, it is clear that the issues of promotion of an employee are a preserve of the employer and are based on the workplace policy and the contract of employment. Courts would not normally interfere in this process unless there is evidence of gross violations based on the law and processes and unless it is evident that the Applicant has been obviously discriminated against.

27. From the Respondents' case, for Claimant to have been promoted, he failed to take the Teachers Proficiency Course. His insistence that he should nevertheless be promoted is unsustainable because his promotion is pegged on policy directions of 1<sup>st</sup> Respondent which he has not adhered to.

28. I will decline to interfere with Respondents discretion to promote its staff and find the case of Claimant is not established as by law. I dismiss it accordingly with costs.

Read in open Court this 16<sup>th</sup> day of February, 2017.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

Kaluai holding brief for 1<sup>st</sup> Respondent and holding brief for Kwegu for 2<sup>nd</sup> Respondent – Present

Claimant – Absent