



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NYERI

CAUSE NO. 25 OF 2016

DANIEL KIMONDO MUTERU.....CLAIMANT

-VERSUS-

TEACHERS SERVICE COMMISSION.....RESPONDENT

(Before Hon. Justice Byram Ongaya on Friday 3rd March, 2017)

JUDGMENT

The claimant filed the statement of claim on 09.02.2016 through Warutere & Associates Advocates. The claimant filed the amended statement of claim on 13.03.2016 and prayed for judgment against the respondent for:

- a) A declaration that the transfer of the claimant by the TSC County Director unprocedural, illegal, null and void.
- b) Reinstatement of the claimant to his former school, Laburra Secondary School.
- c) Compensation for wrongful action by the respondent.
- d) Costs of the suit.

The respondent's defence to the memorandum of claim was filed on 30.06.2016 through Zipporah Mambo Advocate. The respondent prayed that the claimant's suit be dismissed for lack of merit with costs to the respondent.

The claimant holds the Bachelor of Science, 2nd Class Honours (Upper Division) and the Post-Graduate Diploma in Education conferred by Jomo Kenyatta University of Agriculture and Technology, and, the Egerton University respectively. The claimant at all material time is employed by the respondent on permanent and pensionable basis as a secondary school teacher, Job Group L. Upon employment by the respondent sometimes in 1998, the claimant was deployed to serve at Gacharaigu Secondary School and assigned to teach Mathematics and Chemistry.

On 30.01.2015 the claimant applied for the respondent to transfer him to Nyeri County where the claimant's family resided. By the letter dated 02.11.2015, the respondent's secretary conveyed to the claimant that the claimant's request for transfer had been approved by the Commission. The letter conveyed that the claimant had been transferred from Gacharaigu Secondary School to Labura Secondary

School to teach Mathematics and Chemistry with effect from 03.11.2015. The letter instructed that the claimant be released by the Head Teacher as transferred within 14 days from the effective date, 03.11.2015. The claimant's case is that he reported as transferred and at the time of reporting, the school vacation was on, and he assumed teaching in January 2016.

By the letter dated 06.01.2016, the Principal at Laburra Secondary School confirms that the claimant was released from Gacharaigu Secondary on 18.11.2015 and reported to Laburra Secondary School on 20.11.2015 but he was not allocated lessons since the term was coming to an end. The letter further states that the Principal discussed the claimant's transfer with the Sub-County TSC Director and the Principal pointed out that Laburra Secondary School had enough chemistry teachers so that the Principal and the Sub-County TSC Director agreed in principle that the claimant would be allowed in Laburra Secondary School in January 2016 pending his re-routing to another school which seriously required his services.

By the letter dated 12.01.2016 the respondent's Nyeri County Director conveyed to the claimant that it had been decided that the claimant be transferred from Laburra Secondary School to St. Thomas Ruirii Secondary School to teach Mathematics and Chemistry. The Principal, Laburra Secondary School, by the note dated 27.01.2016 stated that the claimant had been released as transferred with effect from 27.01.2016.

The claimant's case was that he was not given an opportunity to appeal against the transfer from Laburra Secondary School to St. Thomas Ruirii Secondary School. The claimant's case was that his main reason for transfer from Gacharaigu Secondary to Laburra Secondary School was to be close to his family but the subsequent transfer from Laburra Secondary School to St. Thomas Ruirii Secondary School subjected him to the same adverse separation from his family which resided in Nyeri Town. The claimant's case was that after his transfer from Laburra Secondary School another teacher was posted in the same school to teach Mathematics and in such predicament, he reported to the new station at St. Thomas Ruirii Secondary School on 22.02.2016 and taught on 15.03.2016. Nevertheless, he received the interdiction letter of 07.03.2016. The letter of interdiction stated that the claimant had reported to St. Thomas Ruirii Secondary School belatedly on 22.02.2016 following the transfer dated 12.01.2016 and the release from Laburra Secondary School on 27.01.2016. The letter stated that the claimant had therefore deserted duty with effect from 28.01.2016 to 19.02.2016. The claimant's case was that the Sub-County TSC Director told him that the decision on transfer was final, thus he did not appeal, and instead he moved to court for justice to be done in his case.

The **1st issue** for determination is whether the claimant reported to Laburra Secondary School following his transfer from Gacharaigu Secondary. The evidence is clear that the claimant reported as was transferred. In particular RW1, one Kiragu Geoffrey Mbogo, the Principal at Laburra Secondary School testified that the claimant had reported on 20.11.2015 and the reporting was documented by RW1.

The **2nd issue** for determination is whether there was a valid reason for the claimant not to serve in Laburra Secondary School as had been deployed by the respondent. The reason advanced by RW1 in the letter dated 06.01.2016 was that the school had enough Chemistry teachers. First, the court finds that the claimant had been deployed to teach Mathematics and Chemistry and it was not RW1's case that the school also had enough teachers for Mathematics; and there is no reason why the claimant was not assigned to teach Mathematics and which was equally his competent subject to teach as transferred. Secondly, there was no evidence placed before the court to demonstrate that the school had enough teachers in Chemistry. RW1 referred to the curriculum based establishment providing for optimal teacher provision for the school but which he did not file in court. The curriculum based establishment for Laburra Secondary School for 2016, as subsequently filed on 10.11.2016 with consent of the parties, showed that the school required 14 teachers by 1st day of first term 2016 and had 1 excess teacher but the subject was not identified and the document was not dated so that it is difficult to tell if the claimant was included or not included in that analysis. RW1 testified that there was nothing before the court to confirm overstaffing as at time the claimant reported to Laburra Secondary School. RW2, Rita Wahome, Nyeri County TSC Director testified that she was not aware that Laburra Secondary School had excess teachers. RW2 further testified that she did not know the school's stream establishment and she needed to go back and check to confirm the school's teacher requirements as at January 2016.

The court has taken into account the evidence. RW2 testified that she made the decision to transfer the claimant from Laburra Secondary School to St. Thomas Ruirii Secondary School. The evidence is that the letter of transfer dated 12.01.2016 did not state the reason for the transfer and the evidence on record is that the alleged reason being that the claimant was an excess teacher in the school's teachers' establishment has not been shown to have existed. Accordingly the court finds that there was no formal reason stated in the letter of transfer and the alleged reason having not been established, there was no valid reason to transfer the claimant from Laburra Secondary School to St. Thomas Ruirii Secondary School.

The 3rd issue for determination is whether the Nyeri County TSC Director had the authority to transfer the claimant from Laburra Secondary School to St. Thomas Ruirii Secondary School. Article 237 of the Constitution establishes the respondent and vests in the respondent functions including promotion and transfer of teachers per Article 237(2) (d). Thus the power and function to transfer teachers is clearly vested in the respondent. RW2 testified that she enjoyed the respondent's delegated powers to transfer the claimant from Laburra Secondary School to St. Thomas Ruirii Secondary School. However, there was no evidence of publication and conferment of such delegated powers. As submitted for the claimant, under regulation 66 of the Teachers Service Commission Code of Regulations for Teachers, 2015, it is provided as follows:

“66. (1) where an application is for transfer –

(a) from one county to another, the approval shall be made by the Secretary;

(b) within a county, the respective county directors shall consider and approve the transfer request as per the existing transfer policy”

The court finds that under the provision, the teacher must have applied for the transfer. In the instant case the teacher had not applied for a transfer from Laburra Secondary School to St. Thomas Ruirii Secondary School. Further, the court finds that under the provision the Secretary or the county director (as the case may be) **“approves”** the teacher's application for transfer (but does not grant the transfer); the granting of the transfer being the sole constitutional function of the Commission. To **“approve”** as per the **Oxford English Dictionary, 12th Edition**, means to officially accept as satisfactory or to believe that something is good or acceptable. Thus the court finds that the Secretary's or county director's role is a sieving function with respect to the application for transfer which then is tabled to the Commission to grant or deny the transfer. The court considers that the Commission has not delegated its constitutional function to the secretary or the county director but the Commission has imposed upon the Secretary and the county director the duty to sieve such applications by way of approving or not approving the application. It is the view of the court that if **“approve”** in the regulation was taken to mean granting the application, then the same would amount to the Commission's abdication of its constitutional function. Thus, under regulation 66 (2) it is clearly stated that it is the Commission which processes the application for transfer, thus, **“66. (2) The Commission in processing an application for transfer of a teacher shall consider the availability of a vacancy and suitable replacement.”** In line with that provision, the Commission had transferred the claimant from Gacharaigu Secondary School to Labura Secondary School to teach Mathematics and Chemistry with effect from 03.11.2015; and there was no evidence that the Commission had failed to comply with that provision and even if that had been shown to be the case, the appropriate action would be for the Commission by itself to vary the transfer decision and not the TSC Nyeri County Director to usurp the Commission's authority. In any event, there was no attempt on the part of the Director to notify the Commission about overstaffing at Labura Secondary School.

Further, regulation 65(3) provides that the Commission shall constitute staffing panels at headquarters and at the county level to consider and approve transfer requests. The court finds that the transfer regime as provided in that regulation excludes unilateral individual decisions as was done by RW2 as there was no evidence that the panel as may have been constituted by the respondent for the Nyeri County was involved in the transfer of the claimant from Laburra Secondary School to St. Thomas Ruirii Secondary School.

The court has further considered the letter transferring the claimant from Gacharaigu Secondary School to Labura Secondary School to teach Mathematics and Chemistry with effect from 03.11.2015. The first line is clear as to the authority that grants transfers. The line stated as follows, thus, **“Following your transfer request dated 30th January, 2015, I am pleased to inform you that your transfer has been approved by the Commission.”** The letter is clear that the Commission and not the Commission’s Secretary had made the transfer decision. Thus, the court finds that it was a misconception devoid of constitutional or statutory backing or authority for RW2 to have purported to transfer the claimant from Laburra Secondary School to St. Thomas Ruirii Secondary School. It is the finding of the court that contrary to RW2’s testimony that she could perform all functions and powers as vested in the Commission by the Constitution and the relevant legislation, the county director is not the Commission and it was usurpation of the Commission’s powers and functions to transfer the claimant in the manner it was done; from Laburra Secondary School to St. Thomas Ruirii Secondary School. Article 250(1) of the Constitution provides that the Commission shall consist of at least three but not more than nine members. Regulation 3 of the Teachers Service Commission Code of Regulations for Teachers, 2015, provides that the “Commission” means the Teachers Service Commission as established under Article 237 (1) of the Constitution. The court finds that the members of the Commission constitute the legal personification of the Commission. The Commission has not been defined to mean the members and officers of the Commission; only the chairperson and the other members constitute the Commission in exclusion of the officers employed to serve the Commission.

As envisaged in Articles 250 (12) and 252 (1) (c) of the Constitution, the Commission is entitled to appoint a secretary and to recruit its own staff as may be necessary. The court finds that the Commission may impose or assign duties upon the secretary and such other staff towards the realisation of the Commission’s constitutional and statutory powers and functions but without the Commission surrendering to the secretary or such staff the decision making obligation or discretion with respect to such powers and functions as is specifically vested in the Commission by the Constitution or legislation. Thus the officers, employees or agents of the Commission may be vested with the duties such as investigating, drawing reports, gathering information and doing such other things that facilitate the exercise of the Commission’s powers and functions but the discretion to make the decisions with respect to the powers and functions as vested by the law is not thereby shifted from the Commission and the Commission must, in absence of a legitimate delegation, invariably make the decision by itself.

The court’s further view is that even where the Commission desires to delegate any of such powers and functions, the same must be published by way an appropriate legal instrument which must also spell out the step by step procedures together with the instruments the person or officer enjoying the delegated powers and functions must adhere to. In the court’s opinion, with such safeguards, the Commission would be able to uphold and assure quality performance standards so that such procedures and instruments the Commission would use are the same ones that would be applied by the person or authority exercising the delegated powers and functions. In that regard, the court has considered the Teachers Service Commission Handbook on Decentralized Teacher Management Functions of August 2015 filed together with the respondent’s final submissions. Thus, paragraph 2.1.1 (1) (d) (i) provide that the TSC County Director shall manage aspects of teacher management as per the existing policy and guidelines within the county through transfers. The scope of that management duty and the safeguards in the discharge of the duty remains at large. Needless to state the procedural safeguards would include clear procedural provisions that take into account the relevant constitutional standards such as the national values and principles of governance in Article 10, the values and principles of public service in Article 232 (1), and the provisions of Article 236 on the protection of public officers. It is this court’s pronouncement that where a statutory or constitutional body like the respondent desires to delegate or otherwise give out its power or function to another person or body or authority, to exercise such powers or to perform such functions on behalf of the statutory or constitutional body as is specifically vested by law, then the following principles must be adhered to:

- a) The delegation to the person or body or authority must not thereby preclude the primary holder of the power or function from exercising the power or performing the function by itself, that is, despite such delegation or giving of the authority.

b) The fact of such delegation must be published for all to know about it and with clear delineation of the person or body or authority enjoying the delegated power or function, together with clear boundaries of that which is delegated.

c) The procedures, instruments, values or principles and all safeguards for the exercise of the delegated power or performance of the delegated function must be published for all to know; and in so far as possible, such safeguards must guarantee that upon delegation, the function or power will be discharged in a manner such that the standards are as good as if the principal or primary holder of the power or function had undertaken it by itself.

d) In the discharge of constitutional or statutory or other public powers and functions, delegation is not a secret or private matter but must be published in a manner that the public is informed accordingly. There must be deliberate effort for those directly affected with the delegation to be sensitised and made aware.

In this case the court finds that the principles have not been shown to have existed and upheld in the making of the decision by the Nyeri County TSC Director, purporting to be acting on behalf of the respondent, in transferring the claimant from Laburra Secondary School to St. Thomas Ruirii Secondary School. Thus, to answer the **3rd issue** for determination, the court returns that the Nyeri County TSC Director lacked the authority to transfer the claimant from Laburra Secondary School to St. Thomas Ruirii Secondary School.

The **4th issue** for determination is whether the claimant was liable to disciplinary action on account of belated reporting to St. Thomas Ruirii Secondary School. The evidence is that the claimant was not given a chance to appeal against the offending transfer as the TSC Sub-County Director told him that the decision was final. The court has considered all the circumstances of the case and finds that the claimant had a valid grievance because the valid and legitimate decision by the respondent to transfer the claimant from Gacharaigu Secondary to Laburra Secondary School had been countered by WR2 without any justification and authority. Section 46 (h) of the Employment Act is clear that an employee's initiation or proposed initiation of a complaint or other legal proceedings against his employer, except where the complaint is shown to be irresponsible and without foundation, does not constitute a fair reason for dismissal or for the imposition of a disciplinary penalty. Thus the court finds that the ensuing interdiction letter was unfounded and unfair because the claimant was entitled to pursue the legitimate and valid transfer by the respondent from Gacharaigu Secondary to Laburra Secondary School as the claimant had a valid grievance against the transfer from Laburra Secondary School to St. Thomas Ruirii Secondary School.

The **5th issue** for determination is whether the court can interfere in the respondent's on-going disciplinary process as initiated against the petitioner. It has been submitted for the respondent that the court should restrain itself and allow the respondent to discharge its mandate as an employer and as provided for in the Constitution. In such cases seeking to interfere with employer's human resource powers and functions, the court follows **Geoffrey Mworira-Versus- Water Resources Management Authority and 2 others [2015]eKLR** thus, "**The principles are clear.**"

The court will very sparingly interfere in the employer's entitlement to perform any of the human resource functions such as recruitment, appointment, promotion, transfer, disciplinary control, redundancy, or any other human resource function. To interfere, the applicant must show that the employer is proceeding in a manner that is in contravention of the provision of the Constitution or legislation; or in breach of the agreement between the parties; or in a manner that is manifestly unfair in the circumstances of the case; or the internal dispute procedure must have been exhausted or the employer is proceeding in a manner that makes it impossible to deal with the breach through the employer's internal process."

In the present case it has been shown that the offending transfer from Laburra Secondary School to St. Thomas Ruirii Secondary School was unfair and illegal as it was undertaken without authority and relevant safeguards of due process. The offending transfer also undermined the respondent's legitimate

transfer of the claimant from Gacharaigu Secondary to Laburra Secondary School. In the process the claimant had a valid grievance but he was not accorded a fair grievance management procedure and there is no reason to doubt the claimant's evidence that the Sub-County Director informed him that the decision was final. It is submitted for the respondent that under section 46 of the Teachers Service Commission Act, a person who is aggrieved by a decision of the Commission under the Act may apply to the Commission for review of the decision. The court finds that in the present case the section did not apply because the offending transfer decision was not a decision by the Commission and further that RW2 confirmed in her testimony that it was her unilateral decision. Thus, the court finds that the case fails to meet the principle in Aviation and Allied Workers Union –Versus- Kenya Airways Limited [2012]eKLR thus, “ **...the court will normally not intervene if it is established that there exist mechanisms between the employer and the employee such as appeal or revision or review that the employee could invoke internally to remedy the dissatisfaction that would otherwise justify the Court's intervention and, the employee has not exhausted such internal mechanisms.**”

In the present case the claimant has established that he discussed his predicament with the TSC County and Sub-County Directors but there was no indication of an avenue to remedy the predicament or grievance. The court finds that the claimant was entitled to move the court to remedy the injury by way of the court's intervention in the manner the human resource function of transfer had been adversely undertaken against the claimant.

To answer the **6th issue** for determination and taking into account the foregoing findings by the court, the court returns that the claimant is entitled to the remedies as prayed for. The court finds that the claimant is entitled to compensation by way of payment of all withheld salaries and allowances due from the date of interdiction 07.03.2016 till the date of this judgment and to be paid by 15.04.2017 failing interest to be payable thereon till full payment. While making that finding, the court further considers and upholds its opinion in Kenya Union of Printing, Publishing, Paper Manufacturers and Allied Workers –Versus- Timber Treatment International Limited,[2013]eKLR, Industrial Cause No. 21 of 2012 at Nakuru, page 10-11, where the court stated thus “**In making the findings the court considers that the employee is entitled to pay for the period he or she is kept away from work due to unlawful and unfair suspension or termination. In such cases, the employee is entitled to at least partial reinstatement, and therefore compensation whose measure is the proportionate unpaid or withheld salary throughout that period of unlawful or unfair suspension or termination. During such period, the court considers that the employee carries a valid legitimate expectation to return to work and not to work elsewhere until the disciplinary or the ensuing conciliatory and legal proceedings are concluded. In arriving at the finding of entitlement to reinstatement during unlawful or unfair suspension and termination, the court has taken into account the provisions of subsection 49(4) (f) which states that in arriving at the proper remedy, there shall be consideration of, ‘(f) the reasonable expectation of the employee as to the length of time for which his employment with that employer might have continued but for termination;’.** The court is of the opinion that for the period the question of unfairness or fairness of the suspension or termination has not been determined, the employee carries a reasonable expectation that for the period pending the determination of that question, the employment has not validly terminated and the employee is entitled to reinstatement during that period provided the employee is exculpated; with pendency of such serious question, the employee is validly expected to pursue the resolution with loyalty not to work for another employer. It is the further opinion of the court that where the court finds that the suspension or termination was unlawful or unfair, the employee is entitled to at least partial reinstatement, and therefore, a total of the salaries due during that period. The exception (to such entitlement to partial reinstatement for the period pending a final decision on the dispute) is where it is established that during that period, the employee took on other gainful employment or the employee fails to exculpate oneself as charged.” The court adds that the opinion applies to interdiction cases like the present case as much as it applies to suspension cases as stated therein.

In conclusion, judgment is hereby entered for the claimant against the respondent for:

- 1) The declaration that the transfer of the claimant by the TSC Nyeri County Director by the letter Ref. No. TSC390676/2 dated 12.01.2016 and all the processes flowing from that letter were

unprocedural, illegal, and null and void.

2) The declaration that the claimant to continue in the respondent's service at Laburra Secondary School in line with the respondent's letter of transfer Ref. No. TSC/ 390676/66 dated 02.11.2015 and for that purpose the claimant to report to the school's Principal not later than 06.03.2017 at 8.00 O'clock in the forenoon for assignment of duties and to continue in the service of the school in accordance with the law.

3) The respondent to pay the claimant all withheld salaries and allowances due to the claimant from the date of interdiction 07.03.2016 till the date of resumption of duty on 06.03.2017 and to be paid by 15.04.2017 failing interest to be payable thereon till full payment.

4) The respondent to pay the claimant's costs of the suit.

Signed, dated and delivered in court at Nyeri this Friday, 3rd March, 2017.

BYRAM ONGAYA

JUDGE