

JUDGMENT

1. On 21 December 2015, the Petitioner moved the High Court alleging that the Respondents had grossly violated his constitutional rights by denying him the right to a fair hearing, right of access to information, right to fair labour practices by unprocedural suspension and transfer (Articles 19,22,23,25,35,41,47, 48 and 50 of the Constitution were cited).
2. The Petition was accompanied with an application which was determined on 28 October 2016.
3. The 1st Respondent filed a replying affidavit sworn by Catherine Kertich 13 April 2015. A further replying affidavit sworn by Viola Kihara was filed on 14 September 2015 while the Petitioner filed a further affidavit on 22 November 2015.
4. Because the Petition appeared to contain disputed facts, the Court directed that it would proceed through oral evidence and the hearing commenced on 18 January 2017 when the Petitioner testified and was cross examined.
5. The Respondents 3 witnesses' testimony were taken on 12 July 2017, 16 October 2017, and the Petitioner filed his written submissions on 30 October 2017.
6. The 1st Respondent's submissions were filed on 16 November 2017.
7. The Court has considered the pleadings, evidence and submissions and identified the Issues for determination as, *whether the suspension and transfer of the Petitioner violated any of his constitutional rights, whether the Petitioner's right to a fair hearing/fair labour practices were violated, whether the Petitioner's right to access information was violated and appropriate remedies* (delivery of judgment was brought back because the Court is on transfer).
8. Before addressing the *Issues* identified, some background would be in order.

Background

9. The 1st Respondent received several anonymous letters from people signing off as (parents representatives and student dated 17 January 2014) setting out allegations concerning the Petitioner and on 6 March 2014 it wrote to the Principal of the school where the Petitioner taught to explain about the allegations and the Principal responded to the letter on 6 March 2014.
10. After receiving the complaints, the 1st Respondent sent a team of 2 Investigators to carry out investigations and the team prepared a report dated 10 March 2014 (it appears the Principal had also received allegations and carried out inquiries leading to the suspension of the student involved on 8 January 2014).
11. The Investigations team made a finding that the Petitioner had a case to answer.
12. On or around 14 March 2014, the Petitioner was served with a letter of interdiction and the allegations for the interdiction were outlined as

You were of immoral behaviour in that you had love relationship with your student and on several occasions during the year 2013 you enticed her by buying her foodstuffs and gifts and specially on 18/10/2013 you had bought her a birthday cake and chips leading to her sneaking into your house on 10/11/2013 at around midnight while you were a teacher at Moi Girls High School-Eldoret.

Before the Commission proceeds to investigate, consider and determine your case, you are invited to make a statement to the Commission in writing, which would be received by the Commission within 21 days from the date of this letter. Before your case is determined, you will be given an opportunity of

being heard by the Commission in person.

13. On a date which is not very clear, the Petitioner's legal advisers wrote to the 1st Respondent requesting for several documents and the 1st Respondent responded on 19 March 2014 to the request indicating that some 8 documents were available for perusal.

14. The Petitioner responded to the interdiction letter on 27 March 2014 and denied all the allegations. The Petitioner also made reference to his legal advisors request for more information in the response.

15. On 11 June 2014, the Petitioner moved Court in Nakuru Petition No. 10 of 2014, *Hezron Mukoko Silunya v Teachers Service Commission* challenging the disciplinary process and violation of the right of access to information and in a judgment delivered on 24 October 2014, the Court dismissed the Petition.

16. Subsequently on 28 April 2015, the 1st Respondent furnished the Petitioner with copies of the documents and a disciplinary hearing was held on 19 August 2015.

17. After the hearing, the 1st Respondent wrote to the Petitioner informing him that he had been found guilty and that instead of removing his name from the register of teachers, he would be suspended for 4 months without pay, and further that he would be posted to a new school.

18. On 9 November 2015, the 1st Respondent wrote to the Petitioner instructing him to report to Kipsangui Boys Secondary School with effect from 21 December 2015.

19. Although not in contention in the instant proceedings, the Petitioner did not report to the new school, and the Court was informed that is the subject of fresh disciplinary proceedings.

Whether suspension/transfer violated Petitioners rights

20. As a teacher, the Petitioner was subject to the provisions of the Teachers Service Commission Act, Code of Regulations for Teachers and circulars issued from time to time.

21. Article 237(1)(d) of the Constitution vest the power to promote and transfer teachers upon the 1st Respondent while Article 237(1)(e) gives the 1st Respondent broad disciplinary powers over teachers.

22. In exercise of that disciplinary mandate, the 1st Respondent carried out investigations and a hearing after which it found the Petitioner guilty, and the sanction which was given was suspension for 4 months.

23. Among the sanctions or punishments which the 1st Respondent can give include suspensions and the same is provided for under the Teachers Service Commission Act and Regulation 66(6)(b)(ii) of the Code of Regulations for Teachers.

24. In the same vein, both the supreme law of the land and Regulation 27 of the Code of Regulations for Teachers give the 1st Respondent authority to transfer a teacher.

25. Because the suspension and transfer of teachers by the 1st Respondent has constitutional, statutory and contractual basis, and because the Petitioner did not demonstrate that the suspension and transfer were outside the mandate of the 1st Respondent or unfair, the Court is of the view that the 1st Respondent did not violate any of the Petitioner's rights in meting out the sanction of suspension, or in the transfer.

Fair hearing/fair labour practices

26. The procedural protection granted employees by section 41 of the Employment Act, 2007 flows directly from the constitutional imperative of right to fair labour practices as enshrined in Article 41 of the Constitution.

27. Although broadly a *right to fair hearing*, the right to a hearing in employment law and practice is better understood as the *right to procedural fairness* as in many cases it is the employer who becomes the *investigator, prosecutor and judge* unlike the classical understanding of the right to or principle of natural justice, where one generally would not be the *complainant, investigator, prosecutor and judge*.

28. The Petitioner was informed of the allegations to confront through the interdiction letter and he was given 21 days to make a written response which he did.

29. The Petitioner was also invited to an oral hearing which was held on 19 August 2015.

30. The minutes of the oral hearing show that the Petitioner was afforded an opportunity to question the 3 witnesses who were presented.

31. The student alleged to have been involved with the Petitioner was however not among the witnesses, and the Petitioner appeared to suggest that she should have been presented.

32. In my view, a disciplinary hearing should not be a mini-court for the employer does not have the means nor experience of conducting such a type of hearing.

33. From the evidence placed before the Court, the Court is satisfied that the process undertaken by the 1st Respondent was substantially in compliance with the statutory procedural fairness requirements, and therefore the Petitioner's rights were not violated.

Access to information

34. The Petitioner initially sought for documents through his then legal advisers, and the 1st Respondent through a letter dated 19 March 2014 informed the Petitioner that some 8 documents were available for perusal and record.

35. On 28 April 2015, the 1st Respondent made a further 2 documents available to the Petitioner.

36. During his testimony, the Petitioner did not disclose any further documents/information he had sought to enable him prepare for the disciplinary case and which were not supplied.

37. The Court in effect finds that the Petitioner has not proved that his right of access to information was violated.

Appropriate remedies

38. The Petitioner had sought

(i) An injunction prohibiting the 1st Respondent from transferring the Applicant herein to another school.

(ii) A Declaration that the Petitioner's Constitutional rights were violated by the conduct of the Respondents.

(iii) A Mandamus order compelling the 1st Respondent to reinstate the Petitioner to his rightful position.

(iv) General and Special Damages to be awarded to the Petitioner.

(v) Costs of this Petition to be awarded to the Petitioner.

39. Considering what the Court has set out in the body of the judgment, it becomes apparent that none of

