



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
JUDICIAL REVIEW NO. 001 OF 2016
(ORIGINAL KAKAMEGA JUDICIAL REVIEW NO. 2 OF 2015)
(BEFORE HON. LADY JUSTICE MAUREEN ONYANGO)

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS OF
CERTIORARI, MANDAMUS AND PROHIBITION UNDER ORDER 53 OF CIVIL
PROCEDURE RULES 2010.**

BETWEEN

REPUBLICAPPLICANT

-VERSUS-

THE SECRETARY, TEACHERS SERVICE COMMISSION....1ST RESPONDENT

AND

**THE SECRETARY, B.O.G CHAVAKALI HIGH SCHOOL, THE CHAIRMAN B.O.G.
CHAVAKALI HIGH2ND RESPONDENT**

AND

SAMUEL MULAMULA LIPEYAEXPARTE APPLICANT

J U D G E M E N T

The *ex- parte'* applicant, Samuel Mulamula Lipeya filed a Judicial Review application dated 14th May, 2015 seeking the following orders:

- a. *An order of Certiorari to remove into the High Court and quash the decision, deliberations and/or proceedings of the Teachers Service Commission purporting to dismiss and remove the ex-parte applicant's name from the register*
- b. *An order of mandamus be issued compelling the respondents to set aside the interdiction of the ex-parte applicant as a teacher at Chavakali High School.*
- c. *An order of prohibition prohibiting the respondents from enforcing their decision or arbitrarily deliberating on the removal of the applicant's name from the register of teachers.*

Ex Parte Applicant's Case

According to the applicant, he is a teacher or was a teacher employed by the **Teachers Service Commission**, the 1st Respondent herein (hereinafter referred to as “the Commission”). On or about 18th April, 2013 the ex-parte applicant was charged with a criminal offence in Vihiga Criminal Case number 352 of 2013 on allegations of sexual assault of a student from a neighbouring school. As the matter was still pending before the court, the 1st respondent through its agent, the Board of Governors (B.O.G) Chavakali Boys High school, summoned him to a B.O.G meeting where he was required to shed light on the whole issue.

The ex-parte applicant deponed that on 8th May, 2013, he, through his counsel, wrote a letter to the B.O.G informing it that its actions of purporting to deliberate on the matter was arbitral and against the principles of natural justice the matter was still pending in court and some members of the B.O.G were witnesses in the criminal case. That the applicant felt that he would be prejudiced if he was made to appear before members of the B.O.G who were also witnesses in the criminal case.

The applicant stated further that following his protest to appear before the B.O.G, the Commission interdicted him pending the conclusion of the criminal case. After the conclusion of the criminal case in which the applicant was acquitted, the commission constituted a tribunal to conduct disciplinary hearing against the ex-parte applicant over the same issues that had been dealt with by the Court. According to the ex-parte applicant the commission acted *ultra vires* its power by dealing with the matter a second time and subjected him to double jeopardy, that the proceedings of the tribunal were defective in substance and form and should be quashed.

In his submissions through counsel the applicant reiterated the contents of his statement and submitted that he had established a case for judicial review. He submitted that there was a legitimate expectation that after the criminal case had been concluded in Court, he would be reinstated back to his teaching position at Chavakali High School. He argued that the Commission acted unfairly and unprocedurally and its decision should be quashed.

Respondents' case

The case for the respondents is set out in the affidavit of Pascalia Koske sworn on 8th June, 2015 in reply and opposition to the application. In the affidavit she states that under Article 237(2) of the Constitution the Commission is mandated with the registration of trained teachers, recruitment and exercise of disciplinary control over the teachers. That on 28th March, 2013 the Commission received information through its agents that the applicant was involved in immoral acts of sexually abusing boys whilst he was a teacher at Chavakali Boys High School.

Following such information, the Commission commenced its own investigations into the matter and recorded a statement from one the students from a neighbouring school who alleged to have been abused by the applicant and also received other statement from students in Chavakali. Meanwhile, the principal of Chavakali notified the Police of the allegations and the applicant was charged with a criminal offence.

Pascalia deponed that given the veracity of the allegations levelled against the applicant the BOG invited the applicant to a meeting to shed light to the matter. That on the day slated for the meeting, the applicant appeared before the BOG but refused to discuss the issues levelled against him and walked out of the meeting. Following such protest, the BOG reached a decision to interdict him and such interdiction was communicated via a letter dated 10th May, 2004 quoting insubordination and immoral behaviour as the reasons for interdiction.

That on 28th May, 2013 the applicant wrote a letter to the BOG requesting for a chance to be heard and he was consequently allowed to appear before a tribunal established by the Commission on 11th February, 2015. Pascalia contended that during the tribunal meeting, the applicant was given a chance to present his case and to call any witnesses and produce evidence in support of his case. That after analysing the evidence from both sides, the Commission reached a decision to remove his name from the register.

According to Pascalia, the proceedings were in strict compliance with the Code of Regulation for Teachers and in accordance with Section 12(2) (d) of the TSC Act. Pascalia deponed that Regulation 66(4)(b) of the Code of regulations for Teachers exempts the respondent from receiving and considering evidence admissible in a court of law and that the Respondent's decision was not actuated by bad faith or malice.

In its submissions the Commission contended that reinstatement was not a remedy available to the applicant considering the nature of the relationship between the parties to these proceedings. Based on sections 30 and 31 of the **TSC Act**, the Commission submitted that it reserved the right to decide whether to return the applicant to the register or not and its decision did not have to be influenced by the court decision in the criminal case. It was submitted that the Commission has its own internal mechanism of dealing with discipline issues concerning its employees and such mechanism was not dependent on the decision of any other party. The Commission urged the court to dismiss the application with costs.

Court's Rendition

Having considered the pleadings and submissions by the parties, the issues arising for determination in the court's opinion are the following-

1. whether the disciplinary committee of TSC acted in contravention of the law;
2. whether the TSC tribunal acted in excess of its jurisdiction and/or ultra vires;
3. whether the action against the applicant was contrary to legitimate expectation and fair administrative action;
4. whether the applicant is entitled to the orders sought.

It is the applicant's contention that the TSC disciplinary committee acted ultra vires because the complainant was not a student and ought to have complained to the police and further that the applicant had been acquitted for criminal charges similar to those upon which the disciplinary charges against him were based. It was further submitted for the Applicant that the Committee could not reopen the charges and reach a contrary decision from that of the court acquitting him. It was further submitted that the disciplinary charges against the applicant were based on professional misconduct yet the alleged charges were not committed in the line of duty. It was submitted that once the applicant was charged he should have been suspended and once acquitted the suspension should have been lifted.

It is further the applicant's contention that the Respondent acted as prosecutor, witness and judge and therefore the applicant was not accorded a fair hearing. It is further contended that the applicant has suffered double jeopardy, having been charged in a criminal court and acquitted, and again on the disciplinary charges for which he was dismissed and his name removed from the register of teachers. It is further his contention that he was granted an order of stay of the dismissal and removal from the register of teachers by the High Court on 29th April 2015.

For the Respondents it was submitted that the Applicant's case was conducted in conformity with the provisions of law and the Code of Regulations for Teachers, that the applicant was invited to write a statement of defence and further appeared before the disciplinary committee to present his case and cross examine witnesses, that the evidence was evaluated before a decision was reached to dismiss him for gross violation of the provisions of the Code. It is further the Respondent's position that the decision of the Committee was promptly communicated to the applicant.

Under Article 237(2) of the Constitution, the Commission is mandated:-

- (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;
- (f) to promote and transfer teachers;
- (e) to exercise disciplinary control over teachers; and
- (f) to terminate the employment of teachers.

According to Regulation 66 of the Code of Regulations for Teachers (Revised 2005) which was applicable at the time material to this suit, a teacher may be interdicted by the Commission or its agent for any of the grounds that the teacher;

- (a) is not a good character,
- (b) has been convicted for a criminal offence which, in the opinion of the Commission, renders him/her unfit to be a teacher,
- (c) is guilty of infamous conduct in any professional respect,
- (d) has been engaged in any activities which, in the opinion of the Commission, are prejudicial to peace, good order or good government in Kenya,
- (e) has deserted duty,
- (f) has mismanaged/misappropriated public funds,
- (g) has submitted forged documents to the Commission or its Agents.

The process of interdiction as provided in Regulation 66 as follow:-

- (a) On receiving allegations against a teacher conduct investigations and assemble evidence to establish whether the teacher has a case to answer.
- (b) Where there is a Board of Governors, the Board will invite and interview the teacher except for desertion cases.
- (c) If satisfied that the teacher has a case to answer, serve the teacher with a notice of interdiction on the form prescribed in Schedule XXXVIII specifying the actual allegations made against him/her.
- (d) Send a copy of interdiction notice to the Secretary Teachers Service Commission attaching all the relevant documentary evidence.
- (e) Ensure that the interdicted teachers/headteacher clears and leaves the institution and the institution house (where applicable) within 48 hours upon receiving the letter of interdiction.

The Applicant has not stated the law that is alleged to have been contravened. From the provisions of both the Constitution and the Code of Regulations set out above I do not find any contravention of the law as alleged as the Respondent's acted within its constitutional mandate and in compliance with the Code of Regulations for Teachers.

On the issue of double jeopardy section 44(4) of the Employment Act which provides for the grounds for summary dismissal does not bar disciplinary action by employers against employees where such an employee has been charged with a criminal offence. The section on the contrary sanctions dismissal on grounds that-

(g) an employee commits, or on reasonable and sufficient grounds is suspected of having committed, a criminal offence against or to the substantial detriment of his employer or his employer's property.

Also as submitted for the Respondents, the power to investigate a criminal offence committed by a teacher is shared by the police and the commission and is not exclusive to either. The object of action by the police is to punish for offences committed against the state through criminal proceedings while the Respondent's investigations are aimed at disciplinary action being taken against a teacher if found liable under the code. The standard of proof in respect of the two is also different as in criminal proceedings the case must be proved beyond reasonable doubt while in civil proceedings under which disciplinary proceedings may be classified the standard of proof is on a balance of probability. The two are therefore independent of each other and the determination in one may not necessarily be the same in the other as was the case herein where the applicant was acquitted of the criminal charges but found guilty on the disciplinary charges. There is therefore no proof of double jeopardy by the mere fact that the applicant was subjected to both proceedings or that the two findings appear to be in conflict, both proceedings having been conducted within the provisions of the law.

The Applicant raised the issue of conflict of interest on grounds that the persons who sat in the meeting of the Board where the decision was made to interdict the applicant were the same persons who filed the criminal complaint against him. Disciplinary proceedings are not judicial proceedings and the rules of conflict of interest cannot be applied to such proceedings. By law, the employer is required to hear an employee and consider his representations before deciding to dismiss such employee. This is what is provided for in section 41 as read with section 12 of the Employment Act. This is also the mandate given to the Respondent in Article 237(2) of the Constitution, the TSC Act and the Code of Regulations for Teachers. The composition of the disciplinary committee with respect to the discipline of teachers is provided in the Code and in the Teachers Service Commission Act.

In the present case there is need to distinguish between the hearing before interdiction and the hearing before the decision to dismiss the Applicant was made. In the hearing before interdiction the Applicant refused to present his defence while in the hearing before the Commission the Committee the Applicant was given an opportunity to present his case and examine witnesses who testified against him.

The applicant has not distinguished which of the proceedings he alleges was not within the law. However as I have already established above both the hearing before interdiction and the hearing before dismissal were in accordance with the law. From the foregoing I find that the applicant has not proved the allegations that the disciplinary hearing was unlawful, ultra vires or in violation of the principles of natural justice.

The claim that the applicant had legitimate expectation that his suspension would be lifted once he is acquitted of the criminal charges is not borne by the law relevant to the case. His interdiction was not as a result of the criminal charges but based on independent investigations of the respondent. there was therefore no basis for his expectation of reinstatement following his acquittal on the criminal charges.

Remedies

The Applicant prayed for the remedies of certiorari, mandamus and prohibition. As was stated by the Court of Appeal in **Civil Appeal No. 266 of 1996, Kenya National Examinations Council v Republic Ex Parte Geoffrey Gathenji Njoroge & Others**, the orders sought only lie against a public body when exercising public authority. In that case the court stated as follows-

... an order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same. If the complaint is that the duty has been wrongly performed, i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done. Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the

decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons...

The Applicant has not proved any of the grounds upon which he sought the orders prayed for in his application for judicial review.

Before I conclude I would like to comment on the choice of employees to seek judicial review orders in employment matters. This court has reservations as to whether judicial review is the appropriate vehicle through which an employee should come to court where he has been dismissed by his employer. This is because judicial review only considers the process and not the validity of the decision. The Applicant's submissions in respect of the correctness or otherwise of the decision is therefore not material to the determination in a judicial review application. It is further the opinion of this court that judicial review is only applicable in limited circumstances in employment disputes where the employee can prove that the employer was exercising public authority.

Having found that the Applicant has not proved that the disciplinary process violated rules of natural justice, the procedure set in its Act and Code or any Constitutional rights of the applicant, he is not entitled to any of the remedies sought herein with the result that the application is dismissed.

There will be no orders for costs.

Judgment dated, signed and delivered this 17th day of November, 2016.

MAUREEN ONYANGO

JUDGE