



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT**  
**AT KISUMU**  
**INDUSTRIAL PETITION NO. 244 OF 2014**

**RICHARD NDUNGU KANGARA.....PETITIONER**

**VS**

**THE TEACHERS SERVICE COMMISSION.....RESPONDENT**

**J U D G E M E N T**

The petition herein was filed by Richard Ndungu Kangara against the Respondent, Teachers Service Commission. The Petitioner states in the petition that he was employed by the Respondent on 1st April, 1983 and posted to Baringo District where he worked between 1983 and 1993. He was transferred to Uasin Gishu district in 1993 and worked at Kamuyu Primary School until he received his letter of dismissal dated 31st March, 2004. The grounds for dismissal are that he deserted duty in September 2003. The petitioner states that he did not desert duty as he was in school and compiled the standard six mark list for term III which ended on 30th November, 2003. He later received a letter from the Respondent dated 23rd February, 2004 demanding a refund of salary and allowances of Kshs.30,726.05. He alleges he was never given a hearing on the charge of desertion of duty before he was dismissed and that this constitutes unfair labour practice.

The Petitioner further states that he appealed against dismissal and received communication from the Respondent dated 11th November, 2011 demanding payment of at least one-third of the over payment before his appeal for reinstatement could be considered. He made efforts and paid Kshs.10,242.10 in April, 2013 and requested the Respondent for posting. He states the Respondent reneged on the promise to reinstate him to the payroll. That the conduct of the Respondent is improper, unlawful and a flagrant violation of the Petitioner's fundamental rights and freedoms as enshrined in the Bill of Rights under Article 21(1), 28, 41 and 47(1) of the Constitutions. He seeks the following remedies:-

1. That a declaration be issued that the fundamental rights and freedoms of the Petitioner under Articles 28, 41 and 47 of the constitution of Kenya, 2010 have been violated and/or continue to be so violated by the Respondent and its agents in failing to reinstate the Petitioner to employment despite his having fulfilled the pre-condition for payment as evidenced by receipt No's 9934592 of 21st May, 2012 and 1854196 of 23rd April, 2013 and as contained in the Respondent's decision as communicated the Petitioner vide the letters dated 11st November, 2011 and 2nd May, 2012.

2. That a declaration be made that the Respondent and its agents being obligated and bound by dint of Article 20(1) and 21(1) of the Constitution of Kenya, 2010 to observe, respect, protect, promote and fulfill the rights and fundamental freedoms in the Bill of Rights has failed to comply with the National Values and principles of governance in Article 10(2)(b) and (c) of the Constitution of Kenya, 2010 in considering and dealing with the issue of the reinstatement of Petitioner to

employment and the payroll.

3. That the Respondent be compelled to reinstate the Petitioner into employment as a teacher without loss of benefits and/or seniority in rank and proceeds to post the Petitioner to a school and reinstate him to the payroll forthwith

4. That in the alternative but without prejudice to the foregoing the Petitioner be paid damages and/or compensation for breach of fundamental rights and freedoms under Articles 28, 41 and 47 of the Constitution of Kenya 2010.

5. Any other relief the Honourable Court may deem fit to grant.

6. Costs and interests.

In the replying affidavit in response to the petition the Respondent states that the Petitioner was dismissed on 31st March, 2004 for desertion of duty. He was first interdicted by a letter dated 9th December, 2004 and given an opportunity to defend himself in writing. He was thereafter invited for a hearing at the Respondents headquarters in Nairobi where he pleaded guilty to the charges following which a decision was made to dismiss him. He unsuccessfully appealed against the dismissal by his letter dated 26th April 2004 which the Respondent responded to on 8th June, 2004.

Subsequently the Respondent computed over payment of salary and allowances paid to the Petitioner and demanded refund of Kshs.30,726.50 from the Petitioner.

The Respondent states the dismissal and the demand for refund of over payments are unrelated. The Respondent further states that at no time did it expressly or impliedly make any representation to the Petitioner for reinstatement and if any employee of the Respondent did so, it was without authority and with no legal basis.

The Respondent states that the Petitioner has misconstrued, misapplied and misinterpreted the contents, tenor and true purport of its demand letters and arrived at an erroneous and factually incorrect position.

The Respondent states that the petition is incompetent and incurably defective on grounds that the issues raised therein are statute barred and the Honourable court lacks jurisdiction to entertain the petition. Further, that the Petitioner has misconstrued, misapplied and misinterpreted the law governing employment contracts and is hiding behind the petition to evade legal scrutiny. The Respondent argues that the petition is incompetent and fatally defective on the ground that the Petitioner has failed to cite with precision the relevant provisions of the constitution alleged to have been violated and the manner in which the Respondent has violated the same to warrant the intervention of the court. The Respondent further argues that having been dismissed in 2004 the Petitioner cannot apply for redress under the 2010 Constitution.

The Respondent states that it observed the text of the Constitution and the relevant law as well as the code governing the teaching service as the Petitioner was informed of the allegations against him, he duly responded to the allegations, he was given an opportunity to be heard and pleaded guilty, the dismissal was communicated to him without delay, he appealed and the appeal was considered and a decision made and communicated to him promptly. The Respondent submits that it is a creature of the constitution with a constitutional mandate to *inter alia* exercise disciplinary control over all teachers and to terminate the employment of teachers.

I have considered the pleadings and submissions of the parties. The petition appeared to be grounded on the letters dated 2nd May, 2012 and 10 January, 2013 addressed to the Petitioner by P. M. Mwamba who signed the letters on behalf of the Secretary of the Respondent. The letters state as follows:-

**TEACHER SERVICE COMMISSION**

TSC HS

Private Bag -00100

NAIROBI.

2nd May, 2012

Richard Kangara

C/o Kamuyu Pry School

P.O. Box 31 - 30102,

BURNT FOREST

**RE: REINSTATEMENT ON PAYROLL**

*Thanks a lot for your response. After thorough consultations, it was agreed that you must show some seriousness in getting your job back. It has been decided that you should make initial refunds through instalments to facilitate the reinstatement. The balance can be recovered through the payroll once you are reinstated.*

**P.M. MWAMBA**

**FOR: SECRETARY**

**TEACHERS SERVICE COMMISSION**

**TEACHER SERVICE COMMISSION**

TSC HS

Private Bag -00100

NAIROBI.

10th January, 2013

Richard Kangara

C/o Kamuyu Pry School

P.O. Box 31 - 30102,

**BURNT FOREST**

**RE: REINSTATEMENT ON PAYROLL**

*Thanks a lot for your visit on 21.5.12. I also sincerely thank you on behalf of T.S.C for making an instalment refund of Kshs.5,000.00 to TSC. Well as I had promised to peruse the issue of reinstatement on your behalf; I have done so but because of change of Management in the concerned areas of service; I must say that I was not successful.*

**P.M. MWAMBA**

**FOR: SECRETARY**

**TEACHERS SERVICE COMMISSION**

However, I still have the case in my diary and when 'weather'; improves the case will be revisited.

It is not clear how the issue of reinstatement came up as both the Petitioner and the Respondent have not brought the issue out in their pleadings and submissions. It is however clear from the letter dated 10th January, 2013 that the issue was being pursued by P. M. Mwamba in a personal capacity.

The issues I have to determine are first, whether the claim in the petition is statute barred, second, whether the claim is properly in court, and third, if the applicant is entitled to the orders sought.

It is not in dispute that the Petitioner was dismissed on 31st March, 2004 and his appeal was rejected by letter dated 8th June, 2004. The limitation period applicable at the time for employment cases was 6 years. For the claim to have been validly filed it should have been done by 1st April, 2010. The claim is therefore, on the face of it, filed out of time.

On whether the claim is properly filed by way of petition, the Petitioner has not demonstrated the specific acts or omissions that constitute breaches under the Articles of the Constitution cited, that is Articles 41 and 47 which provide for right to fair labour practice and fair administrative action. The evidence on record show that the Petitioner was given a fair hearing and pleaded guilty to the charges.

In the case of **Josephat Ndirangu v Henkel Chemicals (A.E.) Ltd [2013] eKLR** Radido J stated that a litigant should not avoid the provisions of the Employment Act regarding unfair termination or wrongful dismissal by going behind the statute and seeking to rely directly on Article 41 on the right to fair labour practice.

I agree with Justice Radido's sentiments. I am convinced that in this case the Claimant avoided filing a normal claim to hide behind a petition in order to avoid the provisions on limitation period.

The foregoing being the case, the prayers sought by the Petitioner must all fail as this court has no jurisdiction to grant the reliefs sought on grounds that the claim is statute barred. Further, the Petitioner has relied on the provisions of the 2010 Constitution in all the prayers sought. The constitution had not been enacted at the time the Petitioner's employment was terminated on 31st March, 2004 and as held by Justice Majanja in **Joseph Thuo Mwaura & 82 Others v Attorney General** in Petition No. 498 of 2009, the provisions of the Constitution 2010 do not apply retrospectively.

Consequently I strike out the Petition with no orders for costs.

**Dated and delivered in open this 30th day of July 2015**

**HON. LADY JUSTICE MAUREEN ONYANGO**

**JUDGE**