



**REPUBLIC OF KENYA**

**EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI**

**PETITION NO. 14 OF 2012**

**(Before Hon. Lady Justice Hellen S. Wasilwa on 8<sup>th</sup> October, 2015)**

**PETER KABUNYI GATHINJI.....PETITIONER/APPLICANT**

**VERSUS**

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

**JUDGMENT OF THE COURT**

1. The Petitioner herein filed this Petition on 7/5/2012 through the firm of Kibunja & Associates. Accompanying the Petition was an application brought under Certificate of Urgency seeking certain orders which the court directed be served upon the Respondents. It seems the application under Certificate of Urgency was abandoned and the parties proceeded with the main Petition. The parties agreed to proceed by way of written submissions.
2. The Petitioner alleges contravention of fundamental rights and freedom of the individual contrary to Articles 20(1), 21(1), 28, 47 and 50 of the Constitution.

**Petitioner's case**

3. The Petitioner stated that he is an adult male of sound mind and a former P1 Teacher at ***[particulars withheld]*** Primary School Teachers Service Commission No. 115023/156. He averred that he was until 2008 a P1 teacher (Teachers Service Commission No. 115023/15) at ***[particulars withheld]*** Primary School.
4. However on or about the 22<sup>nd</sup> March 2007, he received a letter of interdiction from the Respondent alleging that his name should be removed from the register of teachers for breach of the Teachers Service Commission Act Cap 212 in particular that he had allegedly had carnal knowledge with:-
  - a. ***M N – class 4B 2007 and***
  - b. ***S W – 4B 2007 both of [particulars withheld] Primary School.***
5. He stated that prior to the said letter two of the Petitioner's colleagues one L N M and M N N had made false and malicious reports against the Petitioner to the Teachers Service Commission and to the police.
6. The allegations in court are that the Petitioner was charged with 2 counts of attempted defilement contrary to Section 9(2) of the Sexual Offences Act 2006 a criminal case No. 713 of 2007 by the

- Resident Magistrate's Court at Limuru.
7. On 25/6/2007, the Petitioner was acquitted on both counts vide Section 210 of the Criminal Procedure Code for lack of sufficient evidence noting that the charges were preferred on malicious grounds by the prosecution.
  8. Following the acquittal, the Petitioner avers he wrote to the Respondent asking for an opportunity to be heard and be reinstated to his former working position. The Respondent in turn refused and/or neglected to respond to the Petitioner's letters and instead went ahead to constitute a Disciplinary Panel of 24 Members to hear the same complaints that had been dismissed by the court.
  9. The Petitioner avers that on 8<sup>th</sup> May 2008, the Respondent appeared before the Disciplinary Committee of Teachers Service Commission. The Petitioner informed the Committee Members that the same matter had already been determined by a court at Limuru where he was acquitted of the alleged charges. He also informed the committee that the proceedings were a mere witch-hunt and that both the education officer, the Headmaster and one lay teacher were out to frustrate him for malicious reasons.
  10. He contends that the Committee ignored his protests and went ahead with the proceedings without giving him his right to give his side of the story. Subsequently he received a letter dismissing him from the Teachers Service Commission on grounds of alleged contravention of the Teachers Service Commission Act and Code of Regulations for teachers as he was found guilty of having had carnal knowledge of two minors.
  11. The Petitioner contends that the refusal by the Respondent to grant him a fair hearing contravened his fundamental right to a fair hearing under Article 40 of the Constitution. That further Article 47 of the Constitution, the right to a fair administrative action was also infringed upon.
  12. The Petitioner seeks the following prayers:
    - i. ***A declaration that the petitioner's right to a fair hearing and against double jeopardy has been denied without just cause.***
    - ii. ***A declaration that the Respondent is obliged by law to act lawfully, fairly and reasonably in exercising their statutory mandate under the Teachers' Service Commission Act Chapter 212 Laws of Kenya.***
    - iii. ***That this Honourable Court be pleased to order that the Respondent reinstates the Petitioner to his teaching position under the same contract.***
    - iv. ***That this Honourable Court be pleased to order that the Respondent pays the Petitioner compensation for the period that he was unlawfully dismissed as per the payroll.***
    - v. ***An Order that the Respondent do pay the Petitioner General Damages.***
    - vi. ***An Order that the Respondent do pay to the Petitioner costs of this petition.***

### **Respondents Case**

13. The Respondents filed their replying affidavit to this Petition on 22/6/2012 the same having been deposed to by one Simon Musyimi Kavisi the Respondents Director in charge of Administration.
14. He deposed that the Petitioner had been employed by the Respondent on or about 25<sup>th</sup> July 1978 as a P2 teacher under P/No.115023 and he served the Teachers Service Commission until 8<sup>th</sup> May 2008. He further avers that in 1986, the Petitioner was accused of having carnal knowledge of his girl/pupil which resulted in pregnancy. Following due procedure, he was dismissed from the

- teachers service and his name removed from the register of teachers. One year following the said dismissal, the Petitioner applied to be reinstated back to the teachers register and employed and subsequently on 22<sup>nd</sup> June 1988, his request was honoured and he was reinstated back to employment by the Respondent.
15. The Respondents aver that the said reinstatement was based on the assumption that the Petitioner was also meant to accord the Petitioner another opportunity to serve in the teaching service. Then in June 2007, the District Education Officer Kiambu received information that the petitioner had had carnal knowledge of two female pupils – M N and S W both standard four pupils of **[particulars withheld] Primary** School. The acts expressed against the Petitioner if proved were criminal and constituted an act of gross immoral behavior under the Penal Code and Code of Regulations respectively.
  16. The District Education Officer appointed a team led by the Quality Assurance Officer (QAO) Lari Division to carry out investigations as to these allegations. Investigations were carried out on 15<sup>th</sup> March 2007 at **[particulars withheld] Primary** School where the Head Teacher of the said school and the two girls/victims were interrogated. A report Annex SMK-1 was made to that effect. The investigations revealed that the girls/victims made adverse allegations against the Petitioner- (SMK-2) in Kikuyu vernacular. The Petitioner also prepared his hand written statement of defence in response to the allegations made against him denying the allegations but showing that he was clearly aware of the allegations against him (SMK 3).
  17. The Respondents avers that upon consideration of the pupils and the Petitioner's statements and after deliberations, it was resolved that there was need for further investigations hence it was resolved that the Petitioner be interdicted.
  18. The Petitioner was served with a show cause letter to show cause why disciplinary action should not be taken against him which included removal from the register of teachers and/or dismissal from service. The Petitioner was given 21 days to respond - (SMK-4).
  19. The Petitioner's response was forwarded to the Disciplinary Panel of the Commission which convened twice on 21<sup>st</sup> February 2008 and 21<sup>st</sup> May 2008 at the Respondents office. The panel interviewed and/or interrogated witnesses who included M N and S W, the two pupils, the victims in the alleged sexual assault. After deliberating and evaluating the statements and evidence presented in the matter, the panel directed that Petitioner be dismissed from service. The proceedings are Annex SMK-5. The Petitioner was duly informed of his dismissal through the Commissions' letter dated 8<sup>th</sup> May 2008 (SMK-6).
  20. Vide a letter dated 4<sup>th</sup> February 2010 the Petitioner sought for a review of the decision on the strength that he had been acquitted in the criminal case against him.
  21. The Respondents position is that the Petitioner was acquitted of the criminal charges but the court did not make a finding of whether he was of immoral conduct and hence professionally fit to be a teacher.
  22. The Respondents aver that it is their view that the dismissal of the Petitioner from the teaching service was lawfully effected pursuant to the spirit and provisions of the law, specifically the Teachers Service Commission Act Cap 212 Laws of Kenya and attendant Code of Regulations and that he was given a fair hearing and due process of the law was followed.
  23. They aver that the Petitioner's response/defence was considered at every stage of the disciplinary process and that the Petitioner appeared in person before the disciplinary panel, heard all the evidence presented against him and had the opportunity to cross examine the witnesses. They also aver that the Petitioner testified and was accorded a fair opportunity to counter the reasons for the dismissal and his evidence was duly considered prior to the decision. The letter of dismissal was then served upon him.

24. The Respondents therefore submit that the Petitioner's dismissal from the teaching service was not actuated by bad faith and/or malice as alleged. They want this Petition dismissed accordingly.

### **Issues for determination**

25. I have considered the submissions of both the Petitioner and Respondent and issues for determination are as follows:

1. ***Whether the Petitioner was accorded a fair hearing.***
2. ***Whether an employer's mandate to discipline its employee is ousted by the outcome of a criminal trial.***
3. ***Whether the reason for dismissal was justified.***
4. ***Whether the Petitioner is entitled to prayers sought.***

26. In answer to issue number 1, this court considers Regulation 66(3) of the Code of Regulations for Teachers 2005 which outlines the disciplinary process that binds the Respondents which the Respondent says was followed to the latter. Under this Regulation 66 the Respondent is obliged to do some investigations by interviewing witnesses and convening a meeting where the Respondent is expected to hear the evidence of the witnesses and cross examine them. The evidence from Respondent shows that indeed this was done and witnesses were called and the Petitioner examined them after deviations a decision to dismiss the Petitioner was made. This decision was made in 2008 before the criminal proceedings were determined and they were not any way related to the criminal proceedings.

27. The Respondent submitted that they considered all evidence that was presented and found the Petitioner culpable and decided to dismiss him. They **cited Eldoret Petitioner No. 628 of 2006 Constantine Simati vs. Teachers Service Commission and Another** and Industrial Court one **No. 879 of 2014- Peter Nidrangu vs. Teachers Service Commission** to the effect that the Respondent is not bound by the strict rules of evidence.

28. I do agree with these submissions and the decisions cited. In disciplinary hearings, the standard of proof cannot be the same as that of criminal proceedings and in this case. It matters not that the Petitioner was acquitted in a criminal Court as the evidence adduced at the disciplinary hearing was analyzed by the panel as expected by the Code of Regulations. Notice was given to the Petitioner to attend the meeting and he attended and heard evidence adduced and also cross examined the witnesses. I therefore find that he was accorded fair hearing in the proceedings of 2008.

29. Was the Commission obliged to review their case in light of the criminal court's decision?. My position is that they were not bound by the criminal Court's decision to reverse their own decision.

30. In the Industrial Court case No. 15/2013 **Joseph Wambugu Kimenju vs. Attorney General (2013) eKLR**, the court also stated: ***"that the objective of criminal trial is to inflict an appropriate punishment on the offender, the purpose of the disciplinary proceedings is to deal with the delinquent in accordance with internal rules and procedures. Furthermore the degree of proof which is necessary to order a conviction is different from the degree of proof necessary to take disciplinary measures. In criminal cases the burden of proof is on the prosecution and the standard of proof is that of beyond reasonable doubt while in disciplinary proceedings all that the management needs is some preponderance of probability that he accusations leveled might have occurred."***

31. On the 2<sup>nd</sup> issue, it is this court's position that the Respondents' mandate to discipline the Petitioner was not ousted by the criminal proceedings. In the case of **Gladys Boss Shollei vs. Judicial Service Commission**, the court held that disciplinary proceedings were anchored on a contractual relationship and the appellant was not empowered to provide penal sanctions and that

disciplinary proceedings did not include penalties or forfeitures akin to those that could be applied to a criminal trial.

32. On the 3<sup>rd</sup> issue, is whether there were justifiable reasons to dismiss the Petitioner? From evidence adduced, this was not the 1<sup>st</sup> time the Petitioner was being dismissed from the service on related behaviour. He had been reinstated earlier after being dismissed in 1979.

33. In this incident, the victims of the Petitioner's act gave evidence before the Committee and the Committee confirmed that the Petitioner had carnal knowledge of the minor. It is this court's finding and based in the law that there were valid reasons to dismiss the Petitioner from service.

34. Having found as above, I find that this Petition has no merit and I dismiss it accordingly and order the Petitioner to pay costs of this Petition to the Respondents.

Read in open Court this 8<sup>th</sup> day of October, 2015.

**HON. LADY JUSTICE HELLEN WASILWA**

**JUDGE**

**In the presence of:**

No appearance for Petitioner

No appearance for Respondent