



**REPUBLIC OF KENYA**  
**IN THE INDUSTRIAL COURT OF KENYA AT KISUMU**

**CONSTITUTIONAL PET. NO. 231 OF 2013**

*(formerly Bungoma Pet No. 11/2012)*

(Before Hon. Justice Hellen S. Wasilwa on 16<sup>th</sup> September, 2014)

PATRICK WANYONYI KHAEMBA ..... CLAIMANT

-VERSUS-

SECRETARY – T.S.C. ....1ST RESPONDENT

ZAHARA BASHIR SHEIKH .....2ND RESPONDENT

**JUDGMENT**

**Introduction:**

On 15.11.2012, the petitioner filed his petition at the High Court at Bungoma seeking orders as follows:-

1. **A declaration that 1st and 2nd respondents failure to reveal to the petitioner the particulars and evidence they had against him before the hearing of disciplinary case TSC/DISC/NO. 1067/05/2011/2012 was a breach of his right to a fair hearing as the respondents were adopting the method of ambushing the petitioner with charges and denying him adequate time to prepare and defend himself and therefore all consequential decisions and measures made arising therefrom are null and void.**
2. **A declaration that the 1st and 2nd respondents did not comply with the law and regulation that regulated the matter in disciplinary case NO. TSC/DISC/1067/05/2011/2012 before them, as a consequence of which the 1st and 2nd respondents fell into error, and violated/infringed on the petitioner's right to a fair hearing as envisaged in Article 50(1) and therefore all consequential decisions and measures made arising therefrom are null and void.**
3. **A decision that the letters dated 17.4.2012 and 23.5.2012 from the 2nd respondent did not contain adequate/sufficient and specific particulars of the alleged offences/breaches nor did they disclose the nature of the charges to enable the petitioner adequately respond to the charges and therefore amounted to an ambush and violation of the petitioner's right to a fair hearing as envisaged in Article 50(1) and any consequential decisions and measures made arising therefrom are null and void.**

4. A declaration that the 1st and 2nd respondents are obliged by the law to observe rules of natural justice in exercising their statutory duty under Section 9 of the Teachers Service Commission Act Cap 212 and regulation 66 of the Code of Regulations for Teachers (Revised 2005) and also as envisaged in Article 50(1) of the Constitution of Kenya.
5. A declaration that the 1st and 2nd respondents in instituting disciplinary proceedings against the petitioners adopted a procedure tainted with procedural improprieties and statutory violations which led to violations and infringement to the petitioners right to fair labour practices as provided for in Section 5 and 46(h) of Employment Act and under Article 41(1) and his right to fair hearing as envisaged in Article 50(1) and therefore all consequential decisions and measures made arising therefrom are null and void.
6. A declaration that regulation 68 of the Code of Regulations for Teachers (Revised 2005) under Section 9 of the Teachers Service Commission Act Cap 212 is unconstitutional null and void to the extent that it does not permit equality of treatment to persons in similar circumstances in that some interdicted teachers get half their salary and allowances while other interdicted teachers are denied the same.
7. A declaration that the petitioner herein has a right to his good name, character and reputation and also has a right to the correction or deletion of untrue or misleading information as provided for in Article 33 and 35 of the Constitution of Kenya.
8. A declaration that the petitioner's fundamental rights and freedom to a fair trial, human dignity, fair labour practices, right to fair administrative action and the right to a fair hearing as encapsulated under Article 25, 27, 28, 41, 47, and 50 of the Constitution have been violated, transgressed and trampled upon by the 1st respondent.
9. Judicial Review Order to quash all the decisions and measures of the 1st and 2nd respondent made purportedly to interdict the petitioner in their letters/notices of interdiction dated 17.4.2012 and 23.5.2012.

10. Judicial Review Order quashing the proceedings in respect of disciplinary Case No. TSC/DISC/1067/05/2011/2012 and all consequential decisions and measures made arising therefrom to this Honourable Court for the purposes of quashing the same as the said proceedings were undertaken and determination made contrary to the rules of natural justice.

11. Judicial Review Order of prohibition directed at the 1st respondent restraining/prohibiting it by itself, it's servants on further decisions, resolutions and measures aimed at implementing of the decisions arising out of the disciplinary Case No. TSC/DISC/1067/05/2011/2012 .

12. Judicial Review Order of mandamus directed at the 1st respondent to halt forthwith implementation of any decisions arising out of disciplinary Case No. TSC/DISC/1067/05/2011/2012 and ensure that the petitioner herein receives his full salary and other allowances and benefits that he is entitled to as a teacher withheld by the 1st respondent from 1.2.2012 to date.

13. An order that the 1st respondent and 2nd respondent are individually, jointly and/or severally liable to compensate the petitioner in terms of general and exemplary damages, defamation and malicious falsehood.

14. Damages and interest thereon at court rates as follows:-

(a) Refund of travelling, lodging and boarding from Mandera to Nairobi and back at Ksh 20,000/= per trip on 13.2.2012, 22.3.2012, 26.3.2012.

(b) Refund of travelling, lodging and boarding from Bungoma to Nairobi and back at Ksh 3,000/= per trip on 9.5.2012, 11.6.2012, 5.7.2012, 6.9.2012, 12.9.2012 and 12.10.2012.

(c) General damages for infringement of the petitioner's rights and freedoms under the Constitution of Kenya, 2010.

15. Costs of and incidentals thereto be paid to the petitioner by the 1st respondent.

## 16. Any other orders.

### **Factual Background:**

The background to this petition stems from a decision made by the 1st respondent, to interdict the petitioner. The petitioner was an employee of the 1st respondent, the Teachers Service Commission from 4.9.1992. The 2nd respondent on the other hand was the Principle of Rhamu Girls Secondary School, a school where the petitioner was employed at the time of his interdiction.

It is the petitioner's contention that the 2nd respondent, systematically set a stage for the petitioner's removal and interdiction when she set out to employ 2 other teachers to replace him on 3.1.2012 contrary to Regulation 18(d) of the Code of Regulation for Teachers (2005) which prohibits employing a non-registered teacher to be employed if not exempted by the Minister under S. 21(1) (d) of the Teachers Service Commission Act Cap 212.

(b) The petitioner avers that during the 1st term staff meeting on 10.1.2012, the 2nd respondent re-allocated all the petitioner's duties to other teachers not qualified to be employed. The petitioner was therefore left without any duties and rendered duty less. The petitioner was thus excluded from the school time table. The petitioner avers that this was done purposively to set the stage for his eventual interdiction. Further, it is the petitioner's contention that the 2nd respondent had the sole responsibility to assign duties and responsibilities to teachers including the petitioner herein according to Regulations 26(3) and 65(1) (a) of the Code of Regulations for Teachers (2005) and under the Education Act, Cap 211.

The petitioner was aggrieved by the 2nd respondent's decision and proceeded on 13.2.2012 to lodge a complaint/report about his predicament to the 1st respondent on 13.2.2012. This is as provided for in Regulation 6 of the Code of Regulation for Teachers (2005). The petitioner avers that he never received any response from the 1st respondent and on 22.3.2012 returned to 1st respondent's office in Nairobi to find out the progress of his case.

On 17.4.2012, the 2nd respondent convened a BOG meeting at the school where the board was invited to consider allegations that:-

**(a) The petitioner herein had deserted duty with effect from 18.1.2012 to-date.**

**(b) That the petitioner had tampered with the block time- table between 14th and 17th January, 2012. The petitioner was however not invited at this BOG meeting of 17.4.2012. Following this meeting, the petitioner was served with a letter of interdiction dated 17.4.2012 through registered mail. The petitioner avers that the letter did not specify the actual allegations against him. A second interdiction letter was again served on petitioner dated 23.5.2012.**

Subsequently, vide a letter dated 4.6.2012 the 1st respondent invited the petitioner to a disciplinary hearing in Nairobi on 5.7.2012 without giving him any particulars of the charges/allegations against him. The petitioner contends that he attended this disciplinary hearing which was not a fair hearing as he did not have prior notice of the allegations against him.

During the disciplinary Case No. TSC/DISC/1067/05/2011/2012, the Deputy Principal of Rhamu Girls, a Mr. Andrew Wafula Nyongesa of Teachers Service Commission No. 472840 gave evidence which the petitioner avers was favourable to him but which the 1st respondent chose to ignore. The petitioner contends that the hearing he was subjected to was unfair. He contends that rules of natural justice were not observed as he was confronted with a case without having been supplied with specific and sufficient particulars that constituted the allegation of “**desertion of duties**” and also specific and sufficient particulars that constituted the allegation of “**tampering with the block time-table**”. Further, he contends that evidence of his witnesses was ignored as it was favourable to him.

The 1st respondent made a decision on 12.9.2012 to punish the petitioner after this hearing by

suspending him for two months with effect from 12.9.2012 which the petitioner contends was reached without according him a fair hearing.

It is the petitioner's contention that he suffered gravely, as a result of the respondents' actions hence this petition and prayers sought.

### **The Respondents Case:**

In answer to this petition, the respondent filed their replying affidavit on 15.1.2014 through their advocate **Stella C. Ruto**. The affidavit was sworn by the 1st respondent's chief executive officer one Gabriel K. Lengoiboni on 13.1.2014. The respondents averred that as part of their duties, they recruit, deploy, assign, promote, transfer and terminate employment of teachers within the public service. The respondents admit that the petitioners served as a teacher in their employment with effect from 1st September 1992 on permanent and pensionable basis. Further, the respondents aver that the petitioner's contract of employment is governed by the provisions of the Basic Education Act, No. 14 of 2013, Teachers Service Commission Act, No. 12 of 2012 and the Code of Conduct compiled and Published by the Commission and other administrative circulars issued from time to time by the 1st respondent and/or it's authorized agents.

The respondents further aver that from 18th January 2012 while stationed at Rhamu Girls Secondary School, the petitioner deserted duty and his whereabouts were unknown for the entire school term. Subsequently, the School's Board of Governors was informed of the said desertion in it's meeting held on 17th April 2012 and the full Board reached a decision to interdict him. The respondent's position is that the action of the petitioner was in breach of Regulation 65(1) (c) of the Code of Regulation for Teachers (2005) and hence was liable to the disciplinary action under the Teachers Service Commission Act and the said Regulations. The respondents avers that the petitioner was subjected to due process in that he was issued with a letter of interdiction asking him to show cause why disciplinary action should not be taken against him for desertion which included removal from the register and/or dismissal. He was further given an opportunity to be heard in person and also advised to prepare a statement of defence in answer to the allegations levelled against him.

The respondents contend that after careful deliberations, considerations and evaluation of the entire case as well as the evidence presented before it and taking into consideration the circumstances of the case, the panel directed that the petitioner be suspended for a period of two months. The respondents contend that in view of the foregoing averments that it is apparent that the disciplinary action taken against the petitioner was lawfully effected pursuant to the perimeters laid down under Article 47 of the Constitution as well as the spirit and provisions of the other relevant constitutional provisions, the Teachers Service Commission Act, No. 20 of 2012 and the attendant Regulations. It is also the respondents' contention that if indeed the 2nd respondent had caused the petitioner to be removed from the time table then he was duty bound to report the same to the Commission immediately so that appropriate action could be taken. Further, the respondents contend that the petitioner never reported his removal from the time table and his letter written 8.5.2012 was an after thought written after his interdiction on 17.4.2012.

The respondents maintain that they acted within the law and if the petitioner suffered any misfortune, he was the author of his own misfortunes. It is the respondents prayer that the petitioner's petition be dismissed as being unjustifiable and devoid of any merit.

This petition was initially filed before the High Court Bungoma but at one time, the parties consented to have it transferred to Kisumu Industrial Court for hearing.

### **Issues for determination:**

Upon consideration of the respective averments and submissions by the parties, the issues for determination are as follows:-

1. **Whether the respondents are the proper parties in this claim.**
2. **Whether there were valid reasons to cause the interdiction of the petitioner and have subsequent action as taken against him employed.**
3. **Whether in the disciplinary process meted out against the petitioner due process was observed.**
4. **Whether the petitioner was defamed following the action of the respondents against him.**
5. **Whether Regulation 68 of the Code of Regulation for Teachers is unconstitutional for being discriminatory.**
6. **Whether the petitioner is entitled to prayers sought.**

The petitioner sued the Principal of the Rhamu Girls Secondary School Mr. Zahara Bashir Sheikh and the Secretary – Teachers Service Commission. The respondents have contended that the 2nd respondent are wrongfully enjoined in this suit. The respondents submitted that under Article 253(a) and (b) of the Constitution 2010, the Commission is a corporate body with capacity to sue and be sued in its corporate name and therefore suing its secretary was uncalled for. That the Commission should have been the proper party in this suit.

On the other hand, the respondents also submitted that the 2nd respondent being the secretary to the Board of Governors sat in the Board of Governors in her official capacity and vide Section 62 of the Basic Education Act (2013), she cannot be held personally liable for her acts in the board. Furthermore, the respondents submitted that the respondents being public officers are protected from personal liability by virtue of S. 22 of Teachers Service Commission Act which states that:-

**“No matter or thing done by a member of the Commission or any officer, staff or agent of the Commission shall, if the matter or thing is done in good faith for executing the functions, powers or duties of the Commission, render the member, officer, staff or agent personally liable to any action, claim or demand whatsoever.”**

The issue of the parties enjoined in this suit is governed by S. 22 of the Teachers Service Commission Act as cited above and no member of the Commission or its officers can be personally held liable for anything done in the course of duty in good faith. By virtue of this provision, and S. 21(1) of the same Act, the proceedings against the Commission shall be deemed to be proceedings against the government and shall be subject to the Government Proceedings Act.

Section 21(2) of Teachers Service Commission Act states that:-

**“Any notice or other processes in respect of legal proceedings under subsection (1) shall be served upon the secretary to the Commission.”**

It is quite in order therefore for the petitioner to have sued the 1st respondent who is secretary to the Commission and he has not been sued in his personal capacity.

However in respect of the 2nd respondent, it was not proper for the petitioner to sue her in her personal capacity by name as the pleadings read. This contravenes the provisions of S. 22(1) of the Teachers Service Commission and S. 62 of the Basic Education Act (2013) which states that she acts as secretary to the School Board of governors. The holding in the case of *Kenya Anti-Corruption Commission Vs Judith Marilyn Okungu & Another (2013) eKLR* is a case in point where the court rendered itself thus:-

**“The plaintiff has submitted that the 1st defendant is sued in her personal individual capacity since it is alleged she abused her office and/or acted in excess of her powers as the Commissioner of Lands in allocating the 2nd defendant land that was not available for allocation. The fact of the matter is that she was the Commissioner of Lands at the time the transaction took place and she states she was acting as Commissioner for Lands and not in her individual capacity. Without any other allegations and/or evidence that the 1st defendant accrued a personal benefit, I am not able to hold that she was acting otherwise than in her official capacity as the Commissioner.**

**She may have made mistakes and/or committed acts that were tortuous but then Section 4(3) of the Government Proceedings Act Cap 40 envisages that and that is why public officers are not made liable for any tortuous acts they commit in the course of their duties. In the premise I would hold that the 1st defendant is not properly enjoined in this suit as in my view she was acting as the Commissioner of Lands when she executed the certificate of Title for the suit property in favour of the 2nd defendant. I hold that she cannot be personally liable for those acts.”**

I therefore find that the 2nd respondent is improperly enjoined in this case in her personal capacity by name and I proceed to dismiss the suit against her.

The next issue relates to the reasons for which the 1st respondent had against the petitioner in order to take action against him.

Under S. 65(1)(c) of the Code of Regulations for Teachers (Revised 2005) herein after referred to as the Code:-

**“A teacher who is absent from duty without permission granted in writing as provided in the Code shall have committed a gross breach of these Regulations. Such absence may be without pay and shall result in interdiction which may lead to dismissal from employment with loss of benefits.”**

If it is established that indeed the petitioner was absent from duty without permission then the action taken by the respondents was proper. This is in tandem with the provisions of S. 43 of the Employment Act 2007 which provides that there must be proper reasons which must be proved for any action that may lead to termination being undertaken.

The 3rd issue is on processes that were meted on the petitioner and whether due process was followed.

Under S. 66(2) of the Code:-

**“Where it comes to the knowledge of the Commissioner or it's agent and it is alleged that a registered teacher should be removed from the register because he/she is an unsuitable person to be a teacher on any of the following grounds, he/she ---**

(a) -----

(b) -----

(c) -----

(d) -----

(e) **has deserted duty ---**

(f) -----

(g) **has submitted forged documents to the Commission or it's agents.**

**The commission or the agents will serve the teachers with notice of interdiction in the form prescribed in Schedule XXXVIII.”**

The process of interdiction under S. 66(3) (a) of the Code, involves the agent on receiving allegations against a teacher conducting investigations and assembling evidence to establish whether the teacher has a case to answer where there is a Board of Governors. The Board shall be involved and invite and interview the teacher except in cases of desertion. It is only if the Board is satisfied that the teacher has a case to answer that teacher will be served with a notice of interdiction prescribed in Schedule XXXVIII

specifying the actual allegations made against him/her.

The petitioner was served with an interdiction letter dated 17.4.2012 but as per the certificate of posting, dispatched on 2.5.2012. a revised version was done on 23.5.2012 but dispatched on 20.6.2012. the letter just indicated that the petitioner had deserted duties with effect from 18th January 2012. Whether investigations had been done by the agent prior to the letter of interdiction being made, is not clear.

From the evidence of the Principal, the 2nd respondent during the disciplinary hearing on 12.9.2012, she stated that she announced the petitioner's replacement in a staff meeting and thereafter after the petitioner deserted, she allocated his duties to other teachers. The investigations done if any is not indicated. It therefore appears that the 2nd respondent failed by not doing any investigation before interdicting the petitioner. This contravenes Article 47 of the Constitution which states that:-

**“Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.”**

After the interdiction, the petitioner was asked to attend a disciplinary hearing in Nairobi. However prior to this hearing, the petitioner did write to the 1st respondent on 8.5.2012 after he visited the 1st respondent's offices on 22.3.2012 and also on 9.5.2012. This is as per the petitioners exhibits **PWK 7** and **PWK 10**, which are customer care visitors passes issued by the 1st respondent. The 1st pass **PWK 7** even shows that the petitioner was referred to 2nd floor to be served at staffing post primary area to deal with his placement. The document is signed by an officer of 1st respondent and even stamped accordingly. At the hearing of this disciplinary case however, the panel hearing his case ignored this aspect stating that he never complained to the Teachers Service Commission about his removal from the time table.

Under S. 66 of the Code;

**“The Commission shall in accordance with Section 9(1) and (2) of the Act investigate, consider, determine each case of interdiction whenever it is alleged that a registered teacher should have his/her name removed from the register.**

**The Commission shall**

**(a) Inform the teacher concerned on/about the nature of the allegation made against him/her, afford that teacher adequate time for the preparation and presentation of his/her defence and the opportunity of being heard in person.**

**(b) Act on general evidence or statements relating to the character or conduct of the teacher concerned and shall not be bound to receive and consider only evidence admissible in a court of law and;**

**(c) Administer oath and may for the purpose of dealing with any matter before court, summon any person to attend and give evidence and to produce any relevant documents.**

**(d) Consider only these allegations that the teacher has been informed and charged with  
---”**

Considering the above provisions, it is apparent that the 1st respondent followed the procedures set out in their Code of Regulations.

However, they failed to consider the evidence of the petitioner. He had indicated that he visited the 1st respondent's office to lodge a complaint on his removal from the time table. This aspect was ignored during the disciplinary hearing proceedings. Further the petitioner had valid reasons for not being in School having been removed from the time table. His removal from the time table was attested to by Director of Studies of the petitioners school who was in charge of making the time table. In his evidence

the said Director stated that in the list of teachers to be put on the time table given to him by the Principal, the petitioner's name was missing. He also stated that the classes the petitioner was teaching were allocated to him and to another teacher.

The Principal also admitted he announced the replacement of petitioner as a teacher in the school yet she had not received his transfer letter. She contradicted herself though when she said that she did not authorize the petitioner's removal from the time table whereas the petitioner had been replaced. Her evidence also contradicted that of the director of studies who stated that in the list of teachers given to him for purposes of making a time-table, the petitioner's name was missing.

With these contradictions and with evidence adduced that was clear the petitioner had valid reasons to be away and having visited the Teachers Service Commission Headquarters to lodge his complaint, the verdict made by the hearing panel that he was guilty as charged was arrived at without valid considerations. It is therefore the finding of this court that any decision made against the petitioner on account of that verdict is null and void.

The 4th issue is defamation of character. The petitioner had stated that his character was defamed following the action taken against him by the respondents. From the analysis above, I stated that the 1st respondent followed its Code of Regulation in the processes taken against the petitioner. There is no indication that he was maliciously treated despite the verdict arrived at. The issue of defamation does not therefore arise and therefore the contention by the petitioner that he was defamed does not have any force of law.

The 5th issue relates to Regulation 68 of the Code of Regulations for Teachers. It is the petitioner's contention that this regulation is discriminatory in that the regulation singles out teachers on interdiction to be denied ½ pay while other government officers are given their ½ salary. The petitioner contends that while on interdiction, the 1st respondent stopped payments of all his salaries and emoluments with effect from 1.2.2012 till 12.11.2012. Under Regulation 68, teachers on interdiction shall be paid half salary except in cases of chronic absenteeism, desertion of duty etc.

The petitioner contends that other government servants employed under the Public Service Commission, Judicial Service Commission and other Commissions are all paid half salary while on interdiction irrespective of the reasons for the interdiction. In the way the teachers are treated therefore unconstitutional. Under Article 27(1) of the Constitution of Kenya 2010:-

**“Equality includes the full and equal enjoyment of all rights and fundamental freedoms.”**

The state is not to discriminate either directly or indirectly against any person or any of the grounds – specified or contemplated under Clause (4) of Article 27.

A look at the disciplinary processes espoused by the various Commissions – show that all employees on interdiction receive half salary. The regulation under the Public Service Commission – Regulation 2005 – Regulation 23 state that:-

**“ A public officer who is interdicted shall receive such salary, not being less than half his salary as the authorized officer shall think fit”**

Under Regulation 17 of the Judicial Service Commission:-

**“An officer who is interdicted shall receive such salary, not being less than half his salary, as the chief justice shall think fit.”**

Under Regulation 23 of the Public Service Commission (Prison Service) Regulations 2006:-

**“An officer who is interdicted under this regulation shall receive such salary, not being less than half his salary, as the Commissioner of Prisons shall think fit.”**

It is apparent that employees employed in the public sector in Kenya are all paid half salary while on interdiction except for teachers. This flouts provision of Article 27 of the Kenya Constitution. It is for this reason that this court finds Regulation 68 of the Code of Regulation for teachers unconstitutional and discriminatory to teachers to the extent of providing that certain teachers on interdiction will receive no salaries at all. All employees on interdiction cannot be presumed guilty and denied their salary/wages and any regulation that presumes such employees guilty is null and void and therefore unconstitutional.

Is the petitioner therefore entitled to the prayers sought? Having analyzed as above, I find that the petitioner is entitled to the following prayers which I now order:-

1. **A declaration that the 1st respondent did not comply with the law and regulations that regulated the matter in disciplinary Case No. TSC/DISC/1067/05/2011/2012 before them as a consequence of which they fell in error and infringed on the petitioner's right to a fair hearing as envisaged in Article 50(1) and therefore all consequential decisions and measures arising therefrom are null and void.**
2. **A declaration that Regulation 68 of the Code of Regulation for Teachers (Revised 2005) under Section 9 of the Teachers Service Commission Act Cap 212 is unconstitutional null and void to the extent to which it permits non equality and discrimination of certain teachers on interdiction not to be paid half salary.**
3. **An order quashing all the decisions and measures taken against the petitioner as a result of the disciplinary proceedings against him in TSC/DISC/1067/05/2011/2012**
4. **An order directed at the 1st respondent to halt salary forthwith implementation of any decisions arising out of the disciplinary Case No. TSC/DISC/1067/05/2011/2012 and forthwith ensure payments to the petitioner of his full salary and other allowances and benefits that he is entitled to withheld by the 1st respondent from 1.2.2012 to-date.**
5. **The respondent to meet costs of this petition.**

**HELLEN S. WASILWA**

**JUDGE**

**16/9/2014**

**Appearances:-**

Petitioner present

Respondents absent

CC. Wamache