



REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAKURU

PETITION NO. 10 OF 2014

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL

FREEDOMS UNDER ARTICLES 35, 41, 47 AND 50(1) OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE INTERDICTION OF THE PETITIONER

BETWEEN

HEZRON MUKOKO SILUNYA.....PETITIONER

AND

TEACHERS SERVICE COMMISSION.....RESPONDENT

JUDGMENT

1. Hezron Mukoko Silunya (Petitioner) was employed on or around 6 September 2006 as a graduate teacher by the Teachers Service Commission (Respondent) and posted to Murindiko Baptist Secondary School. In 2008, he was transferred to Moi Girls High School, Eldoret.
2. Sometime in November 2013, the Respondent received letters complaining about the Petitioner having a love relationship with a student. Through a letter dated 4 March 2014, the Respondent requested its County Director for Uasin Gishu to investigate the allegations.
3. An investigation was carried out on 10 March 2014 by the District Staffing Officer, Eldoret East and District Staffing Officer, Eldoret West. The team interviewed several witnesses including the Petitioner and reached the conclusion that the Petitioner had a case to answer because he had bought food items for the student and because the student had gone to his house on the night of 10 November 2013. The team in what was titled *recommendation* stated that the Petitioner was of immoral behaviour.
4. As a consequence of the team's report, the Respondent interdicted the Petitioner through a letter dated 14 March 2014, on allegations of immoral behaviour in that he had a love relationship with one of his students. The interdiction letter requested the Petitioner to respond within 21 days and also informed him of his right to be heard. The interdiction letter dated 14 March 2014 was to facilitate further investigations.
5. The Petitioner replied to the interdiction letter through a letter dated 27 March 2014. He denied all the allegations. The letter also indicated that he had made a request for certain information (the request was through Petitioner's Advocate).
6. The Respondent had through its letter dated 19 March 2014 replied to the Petitioner's Advocate's letter (date explained as typographical error).
7. Prior to the background above, the Principal of Moi Girls High School, Eldoret had on behalf of the Respondent caused inquiries to be conducted on the allegations against the Petitioner and statements were recorded and a meeting was held on 12 November 2013 culminating in the suspension of the student. The meeting also recommended that the issue be forwarded to the Principal.
8. On 21 January 2014, a meeting chaired by the Principal was therefore held but the report did not make any findings or recommendations. However, through a letter dated 6 March 2014, the Principal wrote to the Respondent's County Director informing him that no tangible proof had been found of the allegations to warrant disciplinary action against the Petitioner. This letter was triggered by anonymous complaints to

the Respondent.

9. On 11 June 2014, the Petitioner lodged the Petition now under consideration alleging that his rights under Articles 35, 41, 47 and 50 of the Constitution had been violated and seeking that the interdiction be nullified and he be reinstated to employment with full benefits from time of interdiction. The Petitioner also sought to be supplied with full evidence in the Respondent's possession were the disciplinary process to continue.

Petitioner's case

10. The Petitioner's case is that under the Basic Education Act, 2013, in his day to day activities he is under the supervision of the school's Principal and Board of Management and therefore the Respondent had no mandate to interdict him without involving the Principal and the Board.

11. The Petitioner contended that in failing to involve the Principal and the Board of Management in its investigations and in interdicting him when he had been absolved by the Principal, the Respondent violated his right to fair administrative action.

12. The Petitioner also asserts that he requested for information/particulars on the allegations through a letter dated 20 March 2014, but the Respondent declined to tender the information.

13. The Petitioner further contended that he did not participate in the investigations conducted by the Respondent in breach of the right to a fair hearing and procedural fairness.

Respondent's case

14. The Respondent's case is contained in a Replying Affidavit sworn on 10 July 2014 by its Director of Administration, Simon Musyimi Kavisi.

15. On the non involvement of the school's Principal and Board of Management in the interdiction process, it was deposed that some of the primary functions of the Respondent pursuant to Article 237 of the Constitution include the registration, recruitment and employment of teachers and exercise of disciplinary control.

16. Further, it was deposed that the Teachers Service Commission Act, Code of Regulations for Teachers and the Teachers Service Code of Conduct and Ethics provided for the daily operations of the Respondent.

17. In this regard, the Respondent contended that it could delegate some of its functions to agents and to this end an appointment letter of one Beatrice Agala Chedeye was filed. It was also deposed that the Respondent in delegating its functions could still exercise the functions and the Principal and Board were also exercising delegated powers.

18. In the same vein, the Respondent avers that it in interdicting the Petitioner, it was exercising disciplinary control over the Petitioner pursuant to the Code of Regulations and that in the carrying out of investigations, it interviewed and recorded statements from witnesses and the Petitioner on 10 March 2014, and it is only after being satisfied there was a case that it requested the Petitioner to respond to the allegations through its letter of interdiction dated 14 March 2014.

19. The Petitioner responded through a letter dated 27 March 2014.

20. In reply to the contention that the Respondent declined to supply information/particulars of the allegations to the Petitioner, the Respondent contends that the Petitioner was supplied with all the information he sought through a letter dated 19 March 2014 to his Advocates and which were annexed to the Petition.

Evaluation

21. The Court has considered the pleadings, affidavits, documents annexed, written submissions and authorities cited by the parties and identified the issues arising for determination as subtitled and discussed hereunder.

Whether Respondent's agent had mandate to interdict the Petitioner

22. The Petitioner contended that the Respondent's agent had no power to interdict him without involvement of the School Principal and Board of Management. He cited the Basic Education Act, 2013.

23. He further contended that the non involvement of the Principal and Board of Management amounted to a violation of his right to fair administrative action as espoused in Article 47 of the Constitution.

24. Through a circular dated 24 May 2012, the Respondent informed all of its County Directors that it was withdrawing Agency from Provincial Directors of Education, District Education Officers among others and placing the functions performed by the erstwhile agents upon the shoulders of the County Directors.

25. Article 237(1) (e) of the Constitution has placed the exercise of disciplinary control over teachers and the function to terminate their employment upon the Respondent.

26. Article 6 of the Constitution has on its part placed a constitutional obligation upon all state organs to ensure that they devolve access to their services in all parts of the country.

27. Pursuant to regulation 5(1)(c) of the Code of Regulations for Teachers made in accordance with section 4(1)(b) of the Teachers Service Commission Act, the Respondent delegated its function of disciplinary control over teachers to Provincial Directors of Education among others. The Provincial Directors of Education are, as is common knowledge a relic of educational history of Kenya. Their functions were taken over by County Directors of Education. A circular to that effect was produced.

28. The Code further reserves to the Respondent the power to exercise its delegated functions despite and in spite of appointment of agents.

29. Considering the constitutional and statutory framework in place currently concerning disciplinary control over teachers, the Court is unable to find any merit in the contention by the Petitioner that in bypassing the school Principal and the Board of Management, the Respondent was violating any known constitutional, statutory or contractual right of the Petitioner.

30. By appointing County Directors of Education and assigning them some delegated powers or responsibilities, the Respondent was being faithful to the constitutional call to devolve access/services closer to the stakeholders.

Petitioner's right of access to information

31. The Petitioner contended that he sought from the Respondent information and or particulars' concerning the allegations made against him and this was not tendered. This, it was submitted was against Article 35 of the Constitution which provides for right of access to information.

32. The request for information was made through the Petitioner's Advocate's letter dated 20 March 2014. The Respondent replied through a letter dated 19 March 2014 (there were typographical errors in the date). Although the Respondent's letter of response started on a stone hearted premise, towards the end the Respondent informed the Petitioner that it was making available statements, reports dated 21 January 2014 and 10 March 2014 and other documents. It is true as asserted by the Respondent and it is a fact that the Petitioner annexed the documents to the Petition.

33. The information sought by the Petitioner was to enable him assert his rights to fair labour practices and fair hearing. The interdiction letter required him to respond in writing within 21 days, which should have expired on or around 7 April 2014.

34. The interdiction letter also informed him of the right to be given an opportunity of being heard.

35. In my view, the Respondent provided the Petitioner with the information and particulars he sought. He knew the charge he was supposed to respond to and within what time. He also had a further opportunity of appearing at a hearing. If he were to be confronted with any further documents during the hearing, he still had other options available to him such as seeking more time.

36. In the circumstances, the Court is unable to reach a conclusion that the Respondent had violated the Petitioner's right of access to information. The disciplinary hearing or process had not ended.

Petitioners right to fair administrative action and fair labour practices

37. The Respondent conducted investigations into the allegations against the Petitioner. Prior to the investigations, the Principal had caused inquiries/investigations to be conducted.

38. The investigations/inquiries conducted by both the Principal and the Staffing Officers were to establish the facts upon which the disciplinary process could be commenced against the Petitioner.

39. The mere fact that the investigations caused to be carried out by the Principal did not *find sufficient proof* to take any disciplinary action could not stop the Respondent from reopening investigations or carrying fresh investigations. The Principal and Board of Management could not interdict or suspend the Petitioner. The reopening of the investigation by the Staffing Officers was necessitated because stakeholders raised hue and cry when they saw no action forthcoming.

40. After completion of the investigations by the Staffing Officers, the Petitioner was interdicted pending disciplinary hearing. The interdiction letter informed him of the reasons thereof and invited him to respond. He sought more information. The same were made available. He was informed he would be given an opportunity of being heard.

41. An examination of the contractual terms and conditions of service and the statutory framework governing the disciplinary process involving teachers show that interdiction is envisaged and provided for and therefore interdiction was not improper as suggested by the Petitioner.

42. Being in mind the foregoing, I am unable to agree with the Petitioner that his right to fair administrative action or fair labour practices had been violated thus far. The constitutional Petition herein was prematurely filed.

Conclusion and Orders

43. In consideration of the foregoing, the Court comes to the conclusion that the Respondent has not violated the constitutional rights of the Petitioner under Articles 35, 41, 47 and 50 of the Constitution.

44. The disciplinary process should therefore continue to its logical conclusion and should the Petitioner not be satisfied with the outcome, he is at liberty to institute appropriate legal proceedings based on the relevant statutory framework.

45. The Court orders that the Petition be dismissed with no order as to costs.

Delivered, dated and signed in open Court in Nakuru on this 24th day of October 2014.

Radido Stephen

Judge

Appearances

For Petitioner Ms. Kibiru instructed by Wambua Kigamwa & Co. Advocates

For Respondent Ms. Ruto instructed by Ms. Zipporah Mambo Advocate c/o Teachers Service Commission