



**REPUBLIC OF KENYA**

**AT THE EDUCATION APPEALS TRIBUNAL NAIROBI**

**EAT A 003/018**

**TONNY KIPKEMEI CHIRCHIR.....APPELLANT**

**VERSUS**

**THE PUBLIC SERVICE COMMISSION.....RESPONDENT**

**AWARD**

1. Through a letter dated 13<sup>th</sup> October 2011 addressed to the Respondent's secretary, the appellant sought to appeal on termination of his appointment as an adult education teacher II Job group 'E' and which he received on 11<sup>th</sup> October 2011.

**Appellant's Case**

2. The brief facts upon which the appellant hinged his appeal are that;

*a) The Ministry of Education advertised various vacancies and invited applications for the various jobs. The appellant was short-listed for an interview vide the daily nation newspaper dated 1<sup>st</sup> March 2010 and bore serial No 2183. The appellant attended an interview by The Ministry of education on 13<sup>th</sup> April 2010 at 11:30 am as per the invitation schedule.*

*b) The appellant was successful at the interview and was subsequently short-listed for appointment Ref No.537 which appeared on the daily nation newspaper of 23<sup>rd</sup> June 2010.*

*c) The appellant received a letter of appointment from the Ministry of Education dated 1<sup>st</sup> July 2010 and accepted the appointment vide a letter dated 1<sup>st</sup> July 2010. Vide a letter dated 29<sup>th</sup> July 2010, he was posted to The District Adult Education office in Koibatek District. He subsequently reported for duty at the office on 10<sup>th</sup> August 2010 and was posted to open a new centre at Kimamoi Primary School in Esageri Division.*

**Respondents Case**

3. It was the respondent's case that;

*a) Vide a letter dated 27<sup>th</sup> September 2011, the Ministry of Education conveyed to the appellant the decision of the respondent that his employment had been terminated with effect from 30<sup>th</sup> April 2011.*

*b) The respondent's secretary vide a letter dated 17<sup>th</sup> October 2011 acknowledged receipt of the appellants letter and informed him that the appeal had been forwarded to the Permanent Secretary Ministry of Education for further action.*

*c) Vide a letter dated 6<sup>th</sup> June 2013 addressed to the appellant, the ministry of education informed him that on 14<sup>th</sup> December 2010, the respondent had nullified the recruitment exercise following complaints from members of the public. The respondent*

*further informed the appellant that following these complaints, an audit exercise was carried out which revealed certain irregularities in the recruitment exercise which did not conform to the guidelines by The respondent.*

*d) The Ministry of education also informed the appellant that it was only acting as an agent of the respondent exercising delegated authority under Part II of section 9 of The Public service Commission Act No 13 of 2012.(Now repealed)*

*e) The Ministry of Education vide a letter dated 14<sup>th</sup> October 2013 addressed to the appellant confirmed that indeed he attended the interview for recruitment of lower cadre staff while reiterating the respondent's position nullifying the recruitment exercise.*

### **Determination**

4. From the foregoing, it is emerging that the respondent delegated its authority to The Ministry of Education pursuant to the provisions of *section 9 of The Public service Commission Act No 13 of 2012.(Now repealed)* to conduct a recruitment exercise on its behalf. The ministry of education conducted the exercise and the appellant was then recruited and employed as captured in his appeal. Subsequently following a public outcry, the public service commission terminated the recruitment exercise after conducting an audit. The appellant's employment was then terminated. In his appeal he asks this tribunal to facilitate his reinstatement to his job. The appellant appeared before the tribunal on 30<sup>th</sup> July 2019 and reiterated his position as captured in his letter of appeal and requested to be reinstated to his appointed position.

5. Having analysed the rival positions of the parties herein, it is important to appreciate the law establishing this tribunal. This tribunal is established under the provisions of section 93 of the Basic Education Act No.14 of 2013.

The Basic Education Act is

*“An Act of Parliament to give effect to Article 53 of the Constitution and other enabling provisions; to promote and regulate free and compulsory basic education; to provide for accreditation, registration, governance and management of institutions of basic education; to provide for the establishment of the National Education Board, the Education Standards and Quality Assurance Commission, and the County Education Board and for connected purposes “*

### **Sec 93. The Education Appeals Tribunal**

*(1) There is established an Education Appeals Tribunal.*

*(2) Any person aggrieved by the decisions of the County Education Board may appeal to the Education Appeals Tribunal.*

*(3) The Cabinet Secretary in consultation with the National Education Board and relevant stakeholders shall prescribe regulations on the operation and structure of the Education Appeals Tribunal.*

*(4) The Education Appeals Tribunal shall comprise of—*

*(a) the chairperson of the National Education Board;*

*(b) the Director-General;*

*(c) the Secretary to the Teachers Service Commission;*

*(d) a representative of the Education Standards and Quality Assurance Council;*

*(e) a representative of the Kenya Private Sector Alliance;*

*(f) a representative of the Attorney-General; and*

*(g) the Chief Executive Officer of the National Council for Nomadic Education in Kenya.*

6. From the foregoing, having analysed the facts of the case and the law, the preliminary issue that arises for determination is the question as to whether this tribunal has jurisdiction to preside over the appellant's case.

7. From the appellant's case, he was taken through a recruitment exercise by the ministry of education which was being conducted on behalf of the respondent. The recruitment resulted into the appellant's employment by the respondent in the Ministry of Education. His employment was then terminated following irregularities in the recruitment exercise. The appellant is aggrieved by this decision hence this appeal.

**In Samuel Kamau Macharia & Another v. Kenya commercial Bank & 2 Others**, Application No. 2 of 2011 [2012] eKLR, the supreme Court pronounced itself on jurisdiction thus [paragraph 68]:

***“(68) A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.” (Emphasis provided).***

The supreme Court in an extensive analysis of the issue of its own jurisdiction quoted with approval the oft cited case of **Owners of Motor Vessel ‘Lillian S’ v Caltex Oil (Kenya) Limited** [1989] KLR 1 in the first advisory opinion rendered by the Court in **In Re The Matter of the Interim Independent Electoral Commission** where the Court stated:-

*“[29] Assumption of jurisdiction by Courts in Kenya is a subject regulated by the Constitution, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):*

***“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step.”***(underlining supplied)

*[30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”*

8. It is the considered view of this tribunal that the appellant's case is premised on the decision and the consequences of the Ministry of education recruiting him and subsequently terminating his employment on behalf of the respondent and which he now seeks to challenge by seeking to be reinstated to that position by this tribunal.

9. From the foregoing, it is important for this tribunal to consider whether it has jurisdiction to address this appeal. The jurisdiction conferred on this tribunal is an appellate jurisdiction. That jurisdiction is strictly limited by section 93(2) of The Basic Education Act to matters arising from the decisions of The County Education boards.

10. A careful reading of the appellant's case reveals with utmost respect, that the case does not arise from a decision of The County education Board. It therefore follows that the dispute herein is a dispute between an employer and employee which falls squarely within the sphere of employment and labour relations.

11. The constitution at article **162(2)(a)** has established a court that deals with employment and labour relations and at article **162(3)** Parliament has determined the jurisdiction and function of this court by enacting The Employment and Labour Relations Court Act.

**Article 162**

(1).....

(2) **Parliament shall establish courts with the status of the High court to hear and determine disputes relating to**

(a) **employment and labour relations; and**

(b) **the environment and the use and occupation of, and title to, land**

(3) **Parliament shall determine the jurisdiction and functions of the courts contemplated in clause 2**

The Employment and Labour Relations Court Act No. 20 of 2011 is an Act of Parliament to establish the Employment and Labour Relations Court to hear and determine disputes relating to employment and Labour relations and for connected purposes.

12. From the foregoing, this tribunal having considered both the facts of the appellant and respondent's case and taking into consideration the above provisions of the law makes the following observations;

a) This tribunal exercises an appellate jurisdiction by dint of section 93(1) of The Basic Education Act. This appellate jurisdiction is further limited by dint of section 93(2) of The Basic Education Act to appeals by any person aggrieved by **the decisions of the County Education Board.**

b) The appeal before this tribunal does not arise from a decision of The County Education Board but rather a decision of The Public service Commission implemented and communicated by The Ministry of Education. There is nothing that shows that the County Education Board was involved in the impugned decision herein.

c) The nature of the dispute by the appellant and lodged before this tribunal is that arising from an employer employee relationship with delegated authority under the Public Service Commission Act. The proper forum would be the Court established by Article 162(2)(a) and article 162(3) of the Constitution.

**Conclusion**

13. Taking into account the decisions in **Owners of Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Limited**[1989] & **Samuel Kamau Macharia & Another v. Kenya commercial Bank & 2 Others, Application No. 2 of 2011 [2012] eKLR**, and which are binding on this tribunal, this tribunal must **only exercise jurisdiction as conferred by statute which is The Basic Education Act. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. Put differently, it cannot usurp the jurisdiction conferred by the constitution at article 162(2)(a) and The Employment & Labour Relations Act to The Employment and Labour relations Court.**

**Therefore without jurisdiction, this tribunal cannot entertain these proceedings.**

**The upshot of the foregoing is that this tribunal makes a finding that it does not have jurisdiction to entertain this appeal and cannot therefore grant the appellant's prayer seeking reinstatement to his job as an adult education teacher.**

Therefore these tribunal is not inclined to grant the appellant the relief sought and the appeal is dismissed with no orders as to costs.

That shall be the order of the tribunal.

Dated and delivered at Nairobi this 17<sup>th</sup> day of September 2019.

**WAIGI KAMAU** - **CHAIRMAN.....**

**ELYAS ABDI** - **MEMBER.....**

**PIUS MUTISYA** - **MEMBER.....**

**HARUN YUSUF** - **MEMBER.....**



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