



**REPUBLIC OF KENYA**

**AT THE EDUCATION APPEALS TRIBUNAL NAIROBI**

**EAT A 005/018**

**DUNCAN NJAGI KIBARA.....APPELLANT**

**VS**

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

**AWARD**

**Facts of the Case**

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

1. He was employed by The Teacher’s Service Commission. He worked at Oloosinon Primary school in Lolgorian-Transmara until when through a letter dated the 12<sup>th</sup> day of November, 2009, he was interdicted by the District Education Officer. Vide that letter, it was recommended that his name should be removed from the register of teachers based on allegations made against him that;

(i) He breached **Section 7(3) (b)** of the Teachers service Commission Act and **regulation 66(2)** of the Code of regulations for teachers as it was alleged that he had Carnal knowledge of a standard Seven school girl named Susan S. Lekumo which resulted in her pregnancy.

2.The appellant was then requested to make a statement in writing within 21 days in response to the allegation before the commission investigates, considers and determines the case. He was also informed that he will be given an opportunity to be heard by the commission in person.

3. From the documents on record it appears that the appellant’s case was heard before the District education Officer Transmara, West District on 18<sup>th</sup> May 2010 and vide Two letters dated 18<sup>th</sup> May 2010 referenced TSC/DISC/CASE/NO;0469/11/2009/2010/13& TSC/DISC/CASE/NO;0469/11/2009/2010/14 The teachers Service Commission wrote to the appellant conveying it’s decision to remove his name from the register of teachers with effect from 18/5/2010 and also dismiss him from the teaching service on account of the allegations levelled against him.

4. The appellant was also informed of his right to appeal against the decision within 28 days to the Teachers service Appeal tribunal.

5. It appears that vide a letter dated 21<sup>st</sup> June 2010, the appellant appealed against the decision as advised. The appeal was heard on 6<sup>th</sup> September 2016 and vide a letter dated 17<sup>th</sup> September 2016,the respondent herein upheld its decision to dismiss the appellant from the teaching service.

6. Aggrieved by the decision of the respondent, vide a letter dated 4<sup>th</sup> September 2018,the appellant sought redress from this tribunal over the decision to dismiss him on the grounds that;

**a) He appealed against the decision and subsequently tried to defend himself before the Teachers service Appeals Tribunal which did not hear him as he did not have DNA test results despite having requested for a DNA test from the baby born by Susan Lekumo in order to have a fair hearing.**

7. The appeal was set down for hearing on 30<sup>th</sup> July 2019 when the appellant appeared before the tribunal. He reiterated the history of the matter as captured above and asserted that;

a) He has tried on several occasions to have DNA samples extracted from Susan lekumo's baby and have them matched with his to confirm that he is not the father of the child.

b) The allegations levelled against him were not properly investigated.

c) He was not subjected to fair administrative action as per the constitution and wants the matter to be investigated well as he feels he was not accorded a fair hearing.

### **Determination**

8. From the foregoing, it is emerging that the respondent was the employer of the appellant herein. It has the mandate to conduct all affairs pertaining to employment & discipline of teachers. The respondent made a decision to dismiss the appellant from the teaching service. It appears that the allegations against the appellant were conducted within the confines of section 144 resting with appellate mechanism provided for by The Teacher's Service Review Committee established at section 156 of The Teachers Service Commission Code of Regulations for Teachers, 2015. This tribunal notes that the appeal mechanism provided for under the Teachers service Commission act was exhausted by the appellant.

9. Having analysed the above facts, 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.

10. From the foregoing, having analysed the facts of the case and the law, there is only one preliminary issue that arises for determination;

(i) The question as to whether this tribunal has jurisdiction to preside over the appellant's case.

(i) **On Jurisdiction**

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 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).***

11. 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.”***

12. 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. With utmost respect, the appellants case does not arise from the decision of a County Education Board but from The Teachers Service Commission which is an independent Commission established under Chapter 15 of The Constitution of Kenya. On that account alone this tribunal holds and finds that it does not have jurisdiction to preside over the appeal in the nature presented.

13. The appellant has exhausted the appellate mechanism provided for under The Teachers service Commission Act.

Most importantly Section 156 of the Teachers Service Commission Code of Regulations for Teachers, 2015 provides as follows;

156. Teachers Service Review Committee

(i) There is established an adhoc Committee of the Commission known as the Teachers Service Review Committee which shall consider and determine reviews arising from the discipline process under these Regulations.

(ii) The Review Committee shall consist of—

(iii)

(a) the Chairperson of the Commission or a representative;

(b) two other members of the Commission;

(c) the Secretary or his representative; and

(d) officer for the time being in charge of teacher discipline or a representative.

(iv) The Review Committee shall regulate its own practice and procedure.

(v) Where a teacher is aggrieved by the decision of the Commission in a disciplinary process, the teacher may apply for review to the Teachers Service Review Committee within ninety days from the date of the letter communicating the decision.

(vi) An application by a teacher for review under these Regulations shall be accompanied by the prescribed fee set out in the Fifth Schedule.

(vii) An officer or member of the Commission who has participated in the hearing of the discipline case, shall not sit in the Review Committee over the same case.

(viii) A teacher who applies to the Commission for the review of the decision of the Commission shall demonstrate that—

a) there is discovery of new evidence or fact which at the time of hearing was not within the knowledge of the teacher;

b) there was an error or mistake apparent on the face of the record or on the part of the Commission in arriving at the decision;

c) there was fundamental flaw in the procedure by the Commission: or the decision was made in breach of any written law.

14. The Review Committee shall upon receiving an application for review, consider the application and may—

a) uphold the decision and subsequently dismiss the application for review;

b) allow the review and set aside the decision; or

c) vary the decision on such terms as it may deem fit.

15. The decision of the review committee shall be final.

By dint of the provisions of section 9 above, the decision of the review committee is final and that effectively limits the jurisdiction

of this Tribunal.

**Conclusion**

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 Law as captured above at section 9 of The Teachers Service Commission Code of Regulations for Teachers, 2015.

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 to challenge the dismissal from service.

Following the facts outlined above, this tribunal is not inclined to grant the appellant the relief sought save to dismiss the appeal.

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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