



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**CIVIL APPEAL NO 578 OF 2013**

**JOHN OLAGO ALUOCH.....APPELLANT**

**VERSUS**

**LAW SOCIETY OF KENYA.....1<sup>ST</sup> RESPONDENT**

**DISCIPLINARY COMMITTEE/TRIBUNAL.....2<sup>ND</sup> RESPONDENT**

**COMPLAINTS COMMISSION.....3<sup>RD</sup> RESPONDENT**

**JUDGMENT**

**INTRODUCTION**

1. By its decision of 28<sup>th</sup> October 2013, the Disciplinary Committee/Tribunal (hereinafter referred to as “DC/T”) established under the Advocates Act, 1989 struck out the Appellant from the Roll of Advocates pursuant to a complaint that had been lodged by Milka Odhiambo Ojwang (hereinafter referred to as “Complainant”) after he had withheld a decretal sum of Kshs 700,000/= that he recovered on her behalf, following an accident in which her husband sustained fatal injuries in **Kisumu CMCC No 1023 of 1997**, in 2005.
2. Being dissatisfied with the said decision, the Appellant filed a Memorandum of Appeal dated 6<sup>th</sup> November 2013 and filed on the 8<sup>th</sup> November 2013. He relied on six (6) Grounds of Appeal.
3. His Appellant’s Written Submissions were dated 18<sup>th</sup> May 2018 and filed on 23<sup>rd</sup> May 2018. His Supplementary Written Submissions were dated 25<sup>th</sup> June 2018 and filed on 26<sup>th</sup> June 2018. The 1<sup>st</sup> and 2<sup>nd</sup> Respondent’ Written Submissions were dated and filed on 18<sup>th</sup> June 2018 while those of the 3<sup>rd</sup> Respondent’s Written Submissions were dated 29<sup>th</sup> May 2018 and filed on 7<sup>th</sup> June 2018. The 3<sup>rd</sup> Respondent also filed a List of Authorities dated 2<sup>nd</sup> May 2018 on 3<sup>rd</sup> May 2018.
4. When the matter came before the court on 20<sup>th</sup> September 2018, the parties requested it to deliver its decision based on their respective Written Submissions which they relied upon in their entirety. The Judgment herein is therefore based on the said Written Submissions.

**THE APPELLANT’S CASE**

5. The Appellant stated that the complaint forming the subject matter of dispute in **Disciplinary Cause No 150 of 2012 In the matter of John Olago Oluoch (Advocate)** was settled on 12<sup>th</sup> October 2012 when he and the Complainant signed a consent letter of the same date and he remitted to her a sum of Kshs 500,000/= in full and final settlement thereof. He contended that instead of the DC/T marking the matter as settled, it struck him off the Roll of Advocates.
6. It was his submission that there was no cause of action by the time the decision of DC/T was made on 28<sup>th</sup> October 2013. He referred this court to the definition of “**cause of action**” given in the Black’s Law Dictionary Sixth Edition at page 221 as:-

**“a situation or state of facts which would entitle a party to sustain action and give him right to seek a judicial remedy on his behalf”. The fact or facts which give a person a right to judicial redress or relief against another”.**

7. It was his submission that the Complainant swore an Affidavit confirming that she had indeed withdrew the complaint against him and that the DC/T was fully aware of the consent and that it referred to other offences when it imposed the penalty upon him. It was his contention that no evidence was adduced to prove these other offences but that they same were only brought up at the time of the judgment.

8. He averred that although there had been delay in remitting the decretal sum to the Complainant, he paid the same in full and consequently, the decision by the DC/T to strike him off the Roll of advocates was manifestly harsh and excessive. It was his averment that the DC/T erred when it referred to him as a habitual offender when there was absolutely no evidence of previous conviction.

9. He termed the decisions of **JR Misc No 459 of 2014 Republic Vs Disciplinary Tribunal & 2 Others** and **Civil Case No 582 of 2003 Naftali Paul Radier vs David Njogu Gichana** that were relied upon by the 3<sup>rd</sup> Respondent to have been distinguishable from the facts of his case.

10. He pointed out that he never disobeyed the order of Onyancha J (as he then was) of 13<sup>th</sup> May 2015 that he deposit in court, within fifteen (15) days of the order, a total sum of Kshs 872,000/= plus court interest from the date of the decision of DC/T because the amount was erroneous and he had intended to appeal against the same. Further, he stated that he was not able to get a date to prosecute his Appeal within the ninety (90) days of the said date of the Ruling of the said learned Judge because he was unable to obtain a date at the Registry.

11. It was therefore his argument that the DC/T, while exercising a quasi-judicial function, failed to apply the rules of a natural justice and urged this court to reverse its decision and order that he be re-admitted to the Roll of Advocates on such terms and conditions it would deem fit.

### **THE 1<sup>ST</sup> AND 2<sup>ND</sup> RESPONDENTS' CASE**

12. On their part, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents were categorical that the Appellant failed to comply with the orders of the aforesaid learned judge.

13. They also pointed out that he issued the Complainant cheques of Kshs 17,000/= and Kshs 10,000/= respectively that were dishonoured on presentation at the bank. They were categorical that when the complaint was lodged with the 2<sup>nd</sup> Respondent, the Appellant neither filed a Replying Affidavit nor a Statement of Accounts to the complaint as a result of which it proceeded to render its decision.

14. They pointed out that the 2<sup>nd</sup> Defendant found the Appellant guilty of:-

- i. Withholding Kshs 700,000/= plus interest;**
- ii. Failing to account for Kshs 700,000/= paid to him on behalf of the Complainant;**
- iii. Issuing cheques that were dishonoured by the bank on presentation.**

15. It was also their submission that the Appellant and the other parties were duly represented by counsel at the time of Sentencing and Mitigation. They averred that the 2<sup>nd</sup> Respondent noted that the Appellant had not paid the entire decretal sum, that he had issued cheques to the Complainant but that the same were dishonoured by the bank upon presentation, that since he was a politician earning over Kshs 800,000/=, there was no reason why he could not have paid the entire sum to the Complainant. It also observed that there had been another similar complaint against him.

16. They therefore submitted that the 2<sup>nd</sup> Defendant was justified in striking out the Appellant from the Roll of Advocates and urged this court to dismiss his Appeal.

### **THE 3<sup>RD</sup> RESPONDENT**

17. The 3<sup>rd</sup> Respondent submitted that it gave the Appellant an opportunity to resolve the complaint with the Complainant through its In-House Dispute Resolution session but that he had been reluctant whereupon it forwarded the complaint to the 2<sup>nd</sup> Respondent herein.

18. It was its further submission that the Appellant could not purport to have settled the entire amount as he only remitted a sum of Kshs 500,000/= out of the decretal sum of Kshs 700,000/= which could have been a mitigating factor. It pointed out that he breached the Code of Conduct when he contacted the Complainant directly and recorded a consent with her and as a result he was guilty of professional misconduct. It added that issuing dishonoured cheques and withholding Client's money for a period of seven (7) years also amounted to professional misconduct.

19. It submitted that the 2<sup>nd</sup> Respondent had power, under the Advocates Act, to investigate and adjudicate the complaint against the Appellant and that as he was to safeguard clients funds, the decision by the DC/T was fair in the circumstances.

20. It therefore urged this court to dismiss the Appellant's Appeal with costs to him.

### **LEGAL ANALYSIS**

21. This being a first appeal, this court is under a duty to re-evaluate and assess the evidence and make its own conclusions. It must, however, keep at the back of its mind that a trial court, unlike the appellate court, had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand.

22. Having looked at the parties' Written Submissions, it appeared to this court that there were two (2) issues that had been placed before it

for determination:-

- a) **Whether or not there was a cause of action against the Appellant;**
- b) **If so, whether or not the complaint had been proven;**
- c) **Whether or not the sentence that was meted upon the Appellant by the DC/T was manifestly harsh and excessive in the circumstances.**

23. The court deemed it fit to deal with the issues under the following separate and distinct heads.

#### **I. EXISTENCE OR OTHERWISE OF CAUSE OF ACTION AND PROOF THEREOF**

24. Grounds of Appeal Nos (1), (2) and (3) were dealt with under this head as they were all related.

25. It was undisputed from the respective Written Submissions that on 12<sup>th</sup> November 2012, the Appellant paid the Complainant a sum of Kshs 500,000/=. What was not agreed was whether or not the said sum was full and final settlement of the decretal sum.

26. The Appellant was emphatic that there was no cause of action as at the time the DC/T sentenced him, he had fully paid the decretal sum and the Complainant had withdrawn her complaint against him.

27. On the other hand, the Respondents were categorical that not only did the Appellant not pay the Complainant the entire sum but that he ignored all attempts by the 3<sup>rd</sup> Respondent to have the matter resolved amicably and only paid a sum of Kshs 500,000/= seven (7) years later and after having issued her cheques that were dishonoured.

28. Whereas as the Appellant had stated that a cause of action was **“a situation or state of facts which would entitle a party to sustain action and give him a right to seek a judicial remedy”**, it was evident that as at the time the decision of DC/T was rendered, the Appellant had withheld a sum of Kshs 700,000/=: that he had failed to account for the said sum of Kshs 700,000/= and that he had issued cheques to the Complainant that were dishonoured by the bank.

29. Appreciably Rule 4 of the Advocates (Accounts) Rules 1996 provides that:-

**“Subject to rule 8, an advocate shall without delay pay into a client account all client’s money held or received by him”.**

30. Rule 8 of the Advocates (Accounts) Rules stipulates as follows:-

**An advocate need not pay into a client account client’s money held or received by him which-**

- a) **is received by him in the form of cash, and is without delay paid in cash in the ordinary course of business to the client or to a third party; or**
- b) **he pays in, without delay, to the credit of a separate account opened or to be opened in the name of a client, trust or estate or of some person nominated by the client; or**
- c) **is received by him in the form of a cheque or draft and is, without delay, endorsed over and delivered in the ordinary course of business to the client or to a third party for or on behalf of or to the use of the client and is not cashed or passed through a bank account by the advocate.**

31. In view of the fact that the Appellant did not remit to the complainant the decretal sum of Kshs 700,000/= in 2005 when the said was paid to his firm of advocates, it was therefore reasonable then to state that there was a cause of action that existed at the time the DC/T sentenced him.

32. Indeed, he conceded that he only remitted a sum of Kshs 500,000/= to the Respondent on 12<sup>th</sup> October 2012 when he and she executed a consent and consequently, he had contravened the provisions of Rule 4 of the Advocates (Accounts) Rules.

33. Having found that there existed a cause of action by the time the DC/T rendered its decision, the next question for determination was whether or not the complaint against the Appellant was proven.

34. The Advocates Complaints Commission is established under Section 53(1) of the Advocates Act (Cap 16 Laws of Kenya) (hereinafter referred to as **“the Act”**). Which provides that:-

**“There is hereby established a Complaints Commission (in this Part referred to as “the Commission”) which shall consist of such commissioner or commissioners as shall be appointed by the President for the purpose of enquiring into complaints against any advocate, firm of advocates, or any member or employees thereof”.**

35. Section 53 (4) (b) of the Act provides that:-

**“It shall be the duty of the Commission to receive and consider a complaint made by any person, regarding the conduct of any advocate, firm of advocates, or any member or employee thereof; and—**

**b) if it appears to the Commission whether before or after investigation that there is substance in the complaint but that the matter complained of constitutes or appears to constitute a disciplinary offence it shall forthwith refer the matter to the Disciplinary Committee for appropriate action by it under Part XI; or...”**

36. Section 60 (1) of the Act provides that:-

**“A complaint against an advocate of professional misconduct, which expression includes disgraceful or dishonourable conduct incompatible with the status of an advocate, may be made to the Tribunal by any person”.**

37. Section 60 (3) of the Act further provides that:-

**“Where a complaint is referred to the Tribunal under Part X or sub-section (1) the Tribunal shall give the advocate against whom the complaint is made an opportunity to appear before it, and shall furnish him with a copy of the complaint, and of any evidence in support thereof, and shall give him an opportunity of inspecting any relevant document not less than seven days before the date fixed for the hearing:**

**Provided that, where in the opinion of the Tribunal the complaint does not disclose any *prima facie* case of professional misconduct, the Tribunal may, at any stage of the proceedings, dismiss such complaint without requiring the advocate to whom the complaint relates to answer any allegations made against him and without hearing the complaint”.**

38. It was evident that the complaint between the Appellant and the Complainant was never resolved through the 3<sup>rd</sup> Defendants In-house Dispute Resolution session where upon the matter was referred to the 2<sup>nd</sup> Respondent.

39. A perusal of the proceedings of 19<sup>th</sup> November 2012 before the 2<sup>nd</sup> Respondent showed that despite having been served, the Appellant did not attend. A plea of **“Not guilty”** was entered. He was also directed to file a Replying Affidavit and Statement of Account within twenty one (21) days thereof.

40. The Appellant did not attend the DC/T on 11<sup>th</sup> March 2013 and on 13<sup>th</sup> May 2013, judgment was delivered. It was on this latter date that a Mr Oure informed the DC/T that the Appellant had since paid the Complainant a sum of Kshs 500,000/= on 12<sup>th</sup> October 2012.

41. During the Sentence and Mitigation herein on 28<sup>th</sup> October 2013, counsel for the Appellant told the DC/T that whereas the claim arose in 2005, the Appellant had been busy with election campaigns and that he paid the Complainant on 12<sup>th</sup> October 2012 after the campaigns. He further stated that the Appellant was remorseful.

42. In its judgment, the DC/T observed that the Appellant failed to pay the entire decretal sum and only paid her a sum of Kshs 500,000/=. It also considered **ACC 153 of 2007** in which the Appellant was found guilty of having received on behalf of M/S United Insurance Co Ltd a sum of Kshs 924,000/= but after its judgment that it delivered on 6<sup>th</sup> March 2008, the Appellant had failed to pay the same.

43. After carefully considering the facts of this cases, this court found and held that in the absence of any Replying Affidavit and Statement of Account, the DC/T was right in arriving at the decision that it did.

44. DC/T proceeded correctly because the Appellant failed to attend the hearing on 11<sup>th</sup> March 2013. Since Mr Oure informed the DC/T that the said sum of Kshs 500,000/= had been paid in 2012, nothing would have been easier than for the Appellant to have filed the Replying Affidavit and Statement of Accounts attaching evidence of payment.

45. In the premises foregoing, Grounds of Appeal Nos (1), (2) and (3) were not merited and the same are hereby dismissed.

## **II. SENTENCE**

46. Grounds of Appeal Nos (4), (5) and (6) were dealt with under this head as they were all related.

47. Section 60 (4) of the Advocates Act provides that:-

**After hearing the complaint and the advocate to whom the same relates, if he wishes to be heard, and considering the evidence adduced, the Tribunal may order that the complaint be dismissed or, if of the opinion that a case of professional misconduct on the part of the advocate has been made out, the Tribunal may order—**

**a. that such advocate be admonished; or**

**b. that such advocate be suspended from practice for a specified period not exceeding five years; or**

**c. that the name of such advocate be struck off the Roll; or**

**d. that such advocate do pay a fine not exceeding one million shillings; or**

**e. that such advocate pays to the aggrieved person compensation or reimbursement not exceeding five million shillings, Mor such combination of the above orders as the Tribunal thinks fit.**

48. As was rightly pointed out by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the consent the Appellant said he had entered into with the Complainant was immaterial as it was not filed before the Tribunal which would then have been considered by the 3<sup>rd</sup> Respondent to pre-empt proceedings in the 2<sup>nd</sup> Respondent.

49. It was evident that the 2<sup>nd</sup> Respondent could mete out any of the penalties in Section 60 (4) of the Advocates Act. An appellate court can only interfere with the sentence if it the same inordinately excessive and manifestly harsh.

50. The Appellant's mitigation that he had been on the campaign trail and could not have paid the Complainant, was not persuasive. This is because the monies had been pending payment since 2005. He never addressed what caused this delay of seven (7) years making this court take the view that there was no real reason why he did not remit the decretal amount to the Complainant and he therefore contravened the provisions of Rule 4 of the Advocates (Accounts) Rules.

51. A sentencing authority must consider several mitigating factors so as to be guided as to what sentence should be meted. Just like criminal courts do, the past history of an offender must be considered. In this particular case, the Appellant had failed to remit a sum of Kshs 924,000/= in a separate complaint.

52. For all purposes and intent, this was a relevant and material fact during a sentencing hearing as it guided the DC/T in considering the parameters it had been given in Section 60 (4) of the Advocates Act in meting out sentences. The Appellant's argument that the DC/T had taken irrelevant matters into consideration when it struck him off from the Roll of Advocates was therefore irrelevant and misplaced.

53. Notably, striking out of an advocate's name from the Roll of Advocates was provided for in Section 60 (4) of the Advocates Act. The 2<sup>nd</sup> Respondent did not therefore exceed its jurisdiction when it struck out the Appellant herein from the Roll of Advocates.

54. As was also rightly pointed out by the 3<sup>rd</sup> Respondent, at the time the Appellant was campaigning for elections, he was still running his law practise and his fiduciary duties to his clients remained intact as the Advocate – Client relationship was still in existence.

55. Accordingly, having considered the parties' respective Written Submissions, this court came to the firm conclusion that the sentence that was meted upon the Appellant was not manifestly excessive to have warranted interference by this court because the same was expressly provided in the Advocates Act. The delay in payment of the decretal sum to the Complainant and the Appellant's failure to remit monies in another case made this court conclude that the penalty was not excessive.

56. The Respondents complied with the rules of natural justice as the Appellant was invited by the 3<sup>rd</sup> Respondent in accordance to Section 53 (1) and Section 60 (3) of the Advocates Act but he failed to take advantage of the same.

57. This court did not attach too much weight regarding the purported disobedience of the orders of Onyancha J (as he then was) as had been submitted by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents because the Appellant had actually intended to appeal against the order and further, a party would have no control of the time within which his case ought to be heard. The fact that the Appellant did not prosecute his Appeal within thirty days was not good reason to dismiss his Appeal without considering its merits.

58. In the circumstances foregoing, Grounds of Appeal Nos (4), (5) and (6) were not merited and the same are hereby dismissed.

#### **DISPOSITION**

59. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Appeal that was lodged in court on 8<sup>th</sup> November 2013 was not merited and the same is hereby dismissed. The Appellant will bear the Respondents' costs of this Appeal.

60. It is so ordered

**DATED and DELIVERED at NAIROBI this 27<sup>th</sup> day of November 2018**

**J. KAMAU**

**JUDGE**