



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 206 OF 2010

(Industrial Cause No.69 of 2013)

MWANGI MUTAHI RUGA.....APPELLANT

VERSUS

NYERI MUNICIPAL COUNCIL.....1ST RESPONDENT

HON. ATTORNEY GENERAL.....2ND RESPONDENT

(An appeal from the judgment in Civil Suit No. 506 of 2003 by SRM Hon. M. Nyakundi delivered on 2/11/2010)

JUDGMENT

1. The appellant in this suit commenced action against the respondent in the Chief Magistrate's court by way of plaint dated 16th July, 2003.
2. In the plaint he alleged that the 1st defendant in breach of an agreement in writing entered into in 1984 between him and the two defendants wrongfully terminated his services through a letter to him dated 17th July, 2000. He averred that the said letter, which purported to retire him in public interest from the services of the 1st defendant was unlawfully initiated as the same was not in accordance with the Local Government Act. As a consequence he sought a declaration from that court that the alleged retirement was not in public interest and was contrary to law and illegal. He further sought damages for wrongful retirement and breach of agreement together with salary due from 17.9.2000 at the rate as revised from time to time by the council per month until payment in full. He also sought among others an order for salary up to retirement age.
3. The 1st defendant by a memorandum of defence dated 22nd March, 2004 refuted the plaintiff's allegations contending among others that the retirement was not unlawful. The 1st defendant further contended that the letter of 19th July, 2000 merely communicated the decision of the Public Service Commission to retire the plaintiff in public interest. According to the first defendant the plaintiff was retired on grounds of poor work performance and he defended himself by a letter dated 29th December, 1999 which was tabled before the relevant committee and which was found to be unsatisfactory.
4. The 2nd defendant on its part by way of a defence filed on 26th March 2004 denied the plaintiff's allegations, contending on the main that if at all it advised the plaintiff to lodge an appeal to Public service Commission under the Public Service Commission Act (Cap 185), then that would have been the ideal avenue of redress available to the plaintiff at the time.
5. By a Chamber Summons dated 4th November, 2009, the plaintiff sought to amend his plaint herein

in terms of the draft amended plaint attached to the application. This application was allowed by consent of the parties on 12th November, 2009.

6. The case proceeded to trial at the conclusion of which the trial magistrate upon listening to testimony, reviewing the evidence and submission of the parties came to the conclusion that the plaintiff failed to prove his case against the defendants and ordered for its dismissal.

7. The appellant feeling aggrieved by the order of the trial court brought the present appeal citing nine grounds thereof as follows:

a) The learned magistrate erred in law and fact in not finding the two respondent act contrary to Section 41 of Public Service Commission rules, 2nd schedule – standing orders part 1 obligatory orders 14 and 15 of Cap 265 and natural justice and so null and void.

b) The learned magistrate erred in law and fact by admitting exhibits which were defective and which contradicted section 32 of terms and conditions of service and were tabled in court in contravention of section 172 of evidence act and civil procedure rule order X rule 14.

c) The learned magistrate erred in law and fact in quoting evidence which was not adduced in trial and also evidence which was contradictory and not supported by any witness.

d) The learned magistrate erred in law and fact in holding that there was need of production of contract and that it was not produced although not a fact dispute by any of the defendants.

e) The learned magistrate erred in law and fact in not considering the filed authorities by the plaintiff which were binding on the court.

f) The learned magistrate erred in law and fact in giving judgment which was at variance with evidence and also contradictory.

g) The learned magistrate erred in law and fact by ignoring submissions.

h) The learned magistrate erred in law by indicating that the alleged malice had not been particularized although its within the quoted paragraph and in evidence.

i) The magistrate in this case acted with hostility towards me the plaintiff as a result of which she dismissed my applications without reason and also denied me a chance of calling my witnesses.

8. When the matter came before me on 23rd July, 2013, Mr. Muthoni who was holding brief for Mr. Wahome for the respondent and the appellant who appeared in person, informed me that they had agreed to dispose of the appeal by way of written submissions. The court therefore directed the parties to proceed and do so and leave it to the court to render a determination.

9. In his submission, the appellant contends that the documents filed as exhibits were illegally filed and were also invalid. This was because he filed a “notice to produce” under Order X rule 14 but the respondents failed to produce the documents within the stipulated time.

10. He further submitted that the various documents tabled as exhibits by the 1st defendant were invalid in their form since they lacked authentication signatures. He also submitted that the said documents were written in contravention of regulation 32 of Terms and Conditions of service. According to him the only officer authorized to write to an employer on disciplinary issues is his head of department since it was the head of department who had the mandate to allocate duties and appraise performance. As a result he submitted that any letter written by a person other than the treasurer who was his head of

department was void and should be expunged from the court records.

11. The appellant also submitted that regulation 32 of Terms and Conditions of Service specifies letters to be quoted in termination cases. These were 1st, 2nd and 3rd warning letters and that the three should be issued within 292 working days. According to the appellant all the letters filed as exhibits which were not warning letters were not within the 292 days at the commencement of the termination process hence invalid. It was his submission that any warning letter which included any other letter related to the disciplinary matters stood cancelled by virtue of section 32(iv) of terms and conditions of service for Local Government Employees.

12. Regarding evidence tendered before the court, the appellant submitted that the respondent's witnesses intentionally avoided the most crucial exhibits which was the two council resolutions and minutes which initiated the process and for approval as stipulated in L.N. 136/1998 regulation 41(1) and (2). He further urged the court to note that even the exhibit No. 25 which was a letter from the Town Clerk to the Public Service Commission did not have any accompanying resolution. To this, he submitted that the omission to include them in the letter to Public Service Commission meant they did not exist.

13. Regarding the process of his retirement, he submitted that it was the Town clerk who requested for the approval and not the Council as should have been if the regulations were abided with. According to him the Town Clerk initiated the process individually and did not involve even departmental heads nor the Council.

14. Mr. Wahome for the 1st respondent submitted that the trial magistrate did not err in not finding the appellant was denied natural justice since he was served with a notice to show cause and he replied to the same. Further the appellant had been served with numerous warnings by various departmental heads and various Town Clerks.

15. Regarding complaint over production of exhibits contrary to Order X rule 14, counsel submitted that the 1st respondent served the appellant with a notice to produce documents which were in his custody and he failed to do so hence the 1st respondent was at liberty to rely on the file copies.

16. Concerning the letter of appointment, counsel submitted that the burden of proof of the existence of such letter of appointment was on the appellant which he failed to discharge hence the court was justified in not making a finding in that regard.

17. Section 78 of the Civil Procedure Act under whose ambit this matter fell prior to the enactment of the Industrial Court Act provides that the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein. Further Order 42 of the Civil Procedure Rules empowers this court as an appellate court to pass any decree and make any order which ought to have been passed or made by the trial court.

18. In carrying on this exercise duty is cast on the court to evaluate the evidence afresh and reach its own conclusion thereon.

19. In order to determine this appeal it is critical to analyse the disciplinary procedure governing public servants in whose category the appellant fell. In this regard, the court requires to consider the provisions of Public Service Commission (Local Authority Officers) Regulations, 1984 which were in operation at the time vis-a-vis the actual process of removal of the appellant which he complains of in this appeal.

20. The court will not delve into the reason for the removal of the appellant since if a conclusion is reached that he was unprocedurally removed, the reasons for his removal would be of no consequence since an order for reinstatement cannot possibly be made at this point due to lapse of time.

21. Regulation 41 of the Public Service Commission (Local Authority Officers) (Amendment) Regulations of 1988 (L. N. 136 of 1988) provides:

41. (1) If a local authority, after having considered every report in its possession made with regard to a local authority officer, is of the opinion that it is desirable in the public interest that the services of the local authority officer should be terminated on grounds which cannot suitably be dealt with under any other provisions of these Regulations, it shall notify the officer in writing specifying the complaints by reason of which his retirement is contemplated together with the substance of any report or part thereof that is detrimental to the local authority officer.

(2) If, after giving the officer an opportunity of showing cause why he should not be retired in the public interest, the local authority in full meeting is satisfied that the local authority officer should be required to retire in the public interest, it shall-

(a) in the case of local authority officers to whom regulations 34 and 35 apply, forward to the Commission the report on the case, the local authority officer's reply and the local authority's recommendation, and the Commission shall decide whether the officer should be required to retire in the public interest; and

(b) in the case of a local authority officer to whom regulations 34 and 35 do not apply, the local authority, shall, if satisfied that the local authority officer should be retired in the public interest, retire the local authority officer in the public interest.

22. By a letter dated 15th December, 1999, the 1st respondent through its Town Clerk informed the appellant of intention to retire him in public interest. That letter laid out eight grounds on which the 1st respondent was relying on in considering retiring the appellant. The appellant in the circumstances was called upon to show cause why he should not be retired from the services of the 1st respondent in the interest of the public.

23. The appellant responded to this letter on 29th December, 1999 and by a letter dated 17th July, 2000, the 1st respondent informed the appellant that his reply was tabled before the finance, staff and General Purposes Committee and was found to be unsatisfactory and did not have any merit. The appellant was consequently informed that the Council's report was forwarded to the Public Service Commission of Kenya (PSC) for consideration and final decision and that the PSC directed that the appellant be retired from services of the 1st appellant with effect from 28th June, 2000.

24. The appellant has complained in his 1st ground of appeal that the 1st respondent breached provisions of regulations 41 of PSC (LAO) Regulations and rules of natural justice in retiring him.

25. As reproduced above, regulation 41 requires an officer being considered for retirement in the public interest to be notified in writing, specifying the complaint by reason of which his retirement is contemplated together with the substance of any report or part thereof that is detrimental to the public officer. In this case the appellant was informed in writing of the allegations against him which led to the 1st respondent contemplating his retirement in public interest by a letter dated 15th December, 1999 and was required to make a response within 14 days which he did by a letter dated 29th December, 1999. To this extent the court is not persuaded that the appellant was denied an opportunity to be heard in his defence. In fact his letter of reply dated 29th December, 1999 was brief and did not make a blow by blow response to the serious and several accusations against him spanning several years. He did not even attempt to complain that the time given to him to respond to these accusations was short.

26. Concerning his complaint that the trial magistrate admitted documents contrary to Order X rule 14 and section 172 of the evidence Act, the court agrees with submissions by the counsel for the 1st respondent that once he served notice to produce to the appellant and the appellant failed to avail the original documents that were in his possession, the 1st respondent was at liberty to produce secondary evidence.

27. This court as an Industrial Court is majorly concerned with examining and convincing itself that the entry and exit out of an employment contract is in accordance with the relevant legislation governing such relationship. In that process the court is permitted by the rules not to be bound with the finer details of

evidence or procedure especially where to do so would occasion injustice.

28. This court having come to the conclusion that there was no breach of procedure in retiring the appellant will say no more.

29. The court is however grateful to the appellant and counsel for the respondent for their well reasoned submissions together with the authorities in support. This court has not disregarded them but would not make any comments on them once it has come to the conclusion that the appellant was procedurally removed from the service of the 1st appellant.

30. Having so said, this appeal fails on its own merit and is hereby disallowed.

31. It is so ordered.

Dated at Nyeri this 26th day of November, 2013.

ABUODHA J. N

JUDGE

Delivered in open Court in the presence of Appellant in person and in the presence of Wahome for the 1st Respondent and no appearance for the 2nd Respondent.

ABUODHA J. N

JUDGE