Teacher Service Commission v Kibe (Civil Appeal 5 of 2018) [2025] KECA 32 (KLR) (17 January 2025) (Judgment)

Neutral citation: [2025] KECA 32 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 5 OF 2018

J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA

JANUARY 17, 2025

BETWEEN

TEACHER SERVICE COMMISSION .... APPELLANT

AND

PETER NJOROGE KIBE .... RESPONDENT

(Being an appeal from the judgment of the Employment & Labour Relations Court of Kenya at Nyeri (B. Ongaya, J.) dated 21st July, 2017 in ELRC Cause No. 2 of 2017)

JUDGMENT

Background

1. This is a first appeal. Teachers Service Commission (the appellant) appealed against the judgment of the Employment and Labour Relations Court (ELRC) (B. Ongaya, J.) delivered on July 21, 2017 at Nyeri in Cause No. 2 of 2017.

2. A brief background will help place the appeal in context. Peter Njoroge Kibe (the respondent) sued his employer, Teachers Service Commission, at the ELRC seeking for a declaration that his dismissal was unfair and unlawful; an order for reinstatement of his service without loss of benefits; payment of consolidated salaries due to him until reinstatement; compensation for wrongful dismissal; and costs of the suit.

3. The basis of the respondent's claim was that he was a teacher employed by the respondent from 1st May, 1979 and as at the time of his dismissal, he was working at Kangai Primary School. That he was interdicted and later on dismissed from service by the respondent with effect from May 12, 2015 on allegations of immoral behavior allegedly that on 25thFebruary, 2014 he defiled his former pupil at his home. That based on the same allegation, he was charged for the offence of defilement with an alternative charge of indecent act with a child in Criminal Case No. 193 of 2014 at Baricho but was acquitted from the criminal charges on 20th February, 2015.

4. The appellant filed its defence opposing the respondent's prayers sought by averring that in deed the respondent was their employee. However, on 26th February, 2014, the respondent received information that the respondent had sexually abused a minor who was his pupil. That after carrying out investigation and disciplinary hearings, the respondent was interdicted and later dismissed from service. It was the appellant's contention that it acted within the law in handling the respondent's case and its mandate cannot be diminished in any way by any action by the police or a criminal court. The appellant urged the ELRC to dismiss the respondent's claim.

5. After considering the evidence before it, the ELRC found that the appellant's allegations in the criminal case and those leading to the respondent's termination from service were substantially similar and essentially amounted to an alleged crime. That as such the respondent having been acquitted of the said allegation, the appellant had no valid reason to terminate the respondent's service on the same allegations.

   That the respondent's allegations were of criminal liability that could only be determined by a court of competent jurisdiction. Further, the trial court found that since the appellant had not raised any bar to the respondent's prayer for reinstatement the same was allowed.

6. Conclusively, the ELRC entered judgment in favour of the respondent and ordered that:

   i. The dismissal of the claimant was unfair and unlawful.

   ii. Reinstatement of the claimant to the respondent's teaching service with effect from the effective date of dismissal 12th May, 2015 and without loss of benefits and the claimant to report to his last station of deployment not later than Wednesday 26th July, 2017 at 8:00am for appropriate assignment of duty.

   iii. The respondent to pay the claimant all monthly gross salaries from the date of reinstatement 12th May, 2015 till the date of resumption of duty being not later than 26th July, 2017 and the respondent to pay the same by 1st September, 2017 failing interest to be payable thereon at court rates from the date of this judgment till full payment.

   iv. The respondent to pay the claimant's costs of the suit.

7. It is this finding that provoked the appeal herein. The appellant filed its notice of appeal against the impugned judgment. The appellant, in its memorandum of appeal, sought for the appeal to be allowed with costs and that the impugned judgment be set aside.

8. The appellant's grounds of appeal set out in the memorandum of appeal are that the ELRC erred in law and in fact by:-

   i. Failing to consider that the criminal charge of defilement against the respondent in the criminal court was inherently distinguishable from the professional misconduct of immoral behavior that was preferred against the respondent by the appellant (his employer).

   ii. Failing to appreciate that the appellant has a constitutional mandate under Article 237(1)(e) and statutory provisions under section 33 of the *Teachers Service Commission Act*, to exercise disciplinary control over teachers in its employment on account of professional misconduct.

   iii. Holding that an acquittal in criminal case constitute the same set of facts and circumstances to invalidate disciplinary proceedings undertaken by the appellant thereby arriving at a wrong conclusion in law.

iv. Holding that a finding in a criminal court is binding on an employer thereby equating the standard of proof in a criminal matter to that pertaining to professional misconduct.

v. Ordering the appellant to pay the respondent salary and allowances for a period of over two years contrary to the provisions of section 49(1)(c) of the *Employment Act*, 2007 as read together with section 12(3)(vi) of the Employment *Labour Relations Act*.

vi. Acting in excess of his jurisdiction by posting the respondent to his previous working station in Kangai Primary School thereby usurping the appellant's Constitution, Statutory and administrative mandate.

vii. Ordering reinstatement of the respondent without considering the guiding principles set out in section 49(4) of the *Employment Act*, 2007.

viii. Failing to uphold the doctrine of judicial precedent without offering reasonable justification thereby arriving at an erroneous conclusion of point of law.

ix. Disregarding the appellant's evidence tendered by the witness and written submissions.

x. Arriving at a decision which is contrary to the evidence, law, facts, submissions and authorities.

xi. Failing to appreciate the fact that the process leading to the respondent's dismissal was fair, lawful and constitutional.

Submissions by Counsel

9. The appeal was disposed of by way of written submissions. Counsel for both parties although duly served for hearing of the appeal failed to appear for highlighting of their submissions. Nonetheless, the Court considered the written submissions filed. The appellant through its advocates, Messers Faith Kaluai Advocate filed its submissions while the respondent through Messers Mugeria & Co. Advocates filed his submissions.

10. The appellant's counsel submitted on grounds that the ELC failed to consider the evidence tendered by both parties hence made a wrong finding. That the appellant, aware of the provisions of Section 43(1) and (2) of the *Employment Act*, carried out independent investigations pursuant to Regulation 66 of the Code of Regulation for Teachers 2005 (CORT) and also took into consideration the requirement under Section 45(5) of the *Employment Act* and adhered to the laid out procedure for dismissal under the CORT. That it was erroneous for the trial court to solely rely on the respondent's assertions and evidence on his acquittal before the Criminal Case No. 193 of 2014 Baricho. That the trial court's mandate was to determine if the process was fair and not to interfere with the decision made. Counsel relied on the decision of Kisumu Civil Appeal 78 of 2018 - Lake Victoria North Water Services Board & Another vs Alfred Odongo Amombo [2018] eKLR in support of this proposition.

11. Counsel for the appellant further submitted that the appellant exercised its constitutional mandate over the respondent as an employer in the management of its employees. That the interference of its decision by a trial court is unwarranted unless the decision is found to be against fair labour practices. Counsel cited the decision of this Court in Nakuru Civil Appeal No. 122 of 2015 - Teachers Service Commission vs Thomas Joseph O. Onyango where it was held that:

> "... the appellant is a constitutional commission with express mandate of assigning teachers for service ... exercising disciplinary control over them and termination of their employment. ..."

12. The appellant's counsel maintained that the allegations against the respondent were clearly stated in the dismissal letter that the respondent was of immoral behavior in that he had sexual intercourse with his pupil after which the respondent gave her fifty shillings. Further, the trial court failed to appreciate the appellant's mandate to discipline its employees on professional misconduct regardless of criminal culpability. That the trial court misdirected itself in finding that the appellant's allegations against the respondent amounted to an alleged crime and the criminal liability could only be determined by a court of competent jurisdiction.

    Citing Section 12(2)(d) of the *Teachers Service Commission Act* 2012(repealed) which provided that appellant shall not be bound and considers only evidence admissible in a court of law.

13. Further, that the appellant is exempted from strict compliance with rules of evidence in the discharge of its disciplinary mandate as was held in Nyeri Civil Appeal 53 of 2014 Teachers Service Commissions vs Joseph Wambugu Nderitu [2016] eKLR. Further, that as a quasi- judicial body, the appellant's disciplinary mandate is limited by law to professional culpability of its employees and does not extend to criminal matters whose expected standard of proof are exceedingly high. Counsel relied on Nairobi Civil Appeal No. 50 of 2014 Judicial Service Commission vs Gladys Boss Shollei & Another [2014] eKLR where it was held that:

    > "... Proceedings before professional bodies are designed to establish whether or not professional men and women have fallen below the standards expected of their professions ..."

14. Counsel for the appellant relied on this Court's decision in Nelson Mwangi Kibe vs Attorney General [2003] eKLR and Teachers Service Commission vs Josphat Nderitu (supra) where it was held that:

    > "An acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer for the reason that a criminal trial and an internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedures and standard of proof requirements.
    >
    > ... going against the outcome does not by itself render the employer's decision wrongful or unfair."

15. Lastly, counsel for the appellant submitted that the trial court's order for reinstatement and direction for the respondent to report to work at the same school amounted to usurping the mandate of the appellant on where respondent was to be posted and to what position. That the order of reinstatement and award of payment of two years' salary was excessive and in contravention of section 49 of the *Employment Act*, 2007, citing the case of Ol Pajeta Ranching Ltd vs David Wanjau Muhoro [2017] eKLR finding that:

    > "the trial judge did not at all attempt to justify or explain why the respondent was entitled to the maximum award."

16. Counsel for the respondent opposed the appeal and submitted that Section 4 of the *Fair Administrative Action Act*, 2015 provides for issuance of notice, of a right to a review or internal appeal against an administrative action. That the decision of the appellant to interdict and dismiss the respondent from service was unlawful and unjustified as no adequate investigation was conducted by the appellant. That this was contrary to the rules of natural justice and Sections 41 and 45 of the *Employment Act*, 2007 and Regulation 66(3)(a) and (d) of the CORT.

That the disciplinary action was based on bias and ill-motive, there were no attempts to establish the veracity of any accusations levelled against the respondent. Further, that the appellant failed to take into account the findings of the medical experts in both Muranga District Hospital and Kerugoya District Hospital whose findings upon examination were that there was no evidence of defilement.

17. Counsel for respondent further submitted that although the burden of proof in criminal cases and disciplinary proceedings are not the same, applying the appellant's evidence on a balance of probability would still lead to the same conclusion as reached by the trial court that it is more probable than not that the alleged defilement and indecent act with a child were unlikely to have happened. Counsel submitted that allowing the appellant's actions would be allowing misuse of the fair administrative action where employers would easily interdict employees on frivolous allegations. Counsel asserted that the appellant will in the circumstances be allowed to be the judge, jury and executioner. Further, that the same people who investigated the complaint are the ones that participated in the disciplinary hearing. Counsel relied on the case of the ELCR in David Nyamai & 7 others vs Del Monte Kenya Limited (2015) eKLR where it was stated that:

> "… the court holds that an employer exercising the administrative disciplinary control over employee is not a prescribed court for the purpose of making findings on criminal liability of the employee and employers lack power or authority to make a finding of criminal liability against employee. The court further holds that where in the opinion of the employer the employee's conduct amounts to a criminal liability, such allegation would be a continuing injury against the employee to be resolved on the date of judgment by the trial court vested with the relevant criminal jurisdiction."

18. A similar holding found in the cited case of the ELRC in Douglas Murithi Magiri vs Teachers Service Commission (2016) eKLR:-

> "… that once a court with competent jurisdiction has made a determination about an employee's criminal liability as may have been alleged by the employer, the employer is thereby bound and cannot turn around to defeat the court's finding. …"

19. It is the respondent's counsel's contention that he was taken through a flawed process which he appealed and which the appeal was not heard by the time the respondent's case was heard and determined by the trial court. That allowing the appeal will open a floodgate of misuse of disciplinary process. The respondent thus urged this Court to uphold the findings and orders of the trial court.

Determination

20. As a first appeal, this Court reminds itself of its mandate as the first appellate court to re-evaluate the evidence, assess it and reach a conclusion bearing in mind that it neither saw nor heard the witnesses and make due allowance for that. See Rule 31 (1) of the Court of Appeal Rules 2022 and this Court's decision in Gitobu Imanyara & 2 Others v Attorney General [2016] eKLR. See also Selle & Another vs Associated Motor Boat Co Ltd & Others (supra).

21. We have considered the record of appeal, the submissions by both parties, the authorities cited and the law and discern that the issues for determination before this Court are:

    i. whether the respondent's termination from employment was fair and lawful;

    ii. whether the respondent's acquittal by the criminal court invalidated the appellant's disciplinary process based on the same facts and circumstances;

iii. whether the respondent was entitled to payment of salary and allowances for two years; and

iv. whether the order of the trial court reinstating the respondent to service and posting him to his previous work place amounted to usurping the mandate of the appellant.

22. It is common ground that the appellant and the respondent were in an employment relationship. The respondent was employed by the appellant as a teacher from 1st May, 1979 until his dismissal from service on 12th May, 2015 on account of sexual abuse of one of his pupils. The incident was alleged to have occurred on 25th February, 2014. The particulars of the allegation made against the respondent leading to his dismissal from service as stated in the dismissal letter dated 13th August, 2015 were as follows:

> "On 25th February 2014 at around 4:30pm you dragged your former pupil B.M.N std. 8(2013), Adm. No. 29057, and currently a pupil at Kangure Primary School, Std. 7S Adm. No. 3581 into your house at home in Kangai village, pushed her onto your sofa seat and had sexual intercourse with her after which you gave her fifty shillings."

23. This brings us to the first and second issues on whether the respondent's termination was fair and lawful and whether the respondent's acquittal by the criminal court invalidated the appellant's disciplinary process. Section 45 of the *Employment Act*, 2007 provides what constitutes unfair termination in the following terms:

1. No employer shall terminate the employment of an employee unfairly.

2. A termination of employment by an employer is unfair if the employer fails to prove—

   a. that the reason for the termination is valid;

   b. that the reason for the termination is a fair reason—

      i. related to the employee's conduct, capacity or compatibility; or

      ii. based on the operational requirements of the employer; and

      iii. that the employment was terminated in accordance with fair procedure.

24. Section 43 of the *Employment Act* places the burden of proving reasons for termination in a claim of unfair termination upon the employer as follows:

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(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

25. The Court has re-evaluated the proceedings of the disciplinary committee held on 25th March 2014 at the Kirinyaga County Director's Office. The respondent denied the allegations raised against him. The allegations were supported by the statement of the victim and her mother.

26. The panel reached a finding that the testimony of the victim's mother was not challenged by the respondent and the decision of the panel was that the respondent was of immoral conduct and should

be interdicted for forcing B.M.N at his school to have sexual intercourse with him. The respondent responded to the appellant's letter of interdiction in a statement dated 30th April, 2014 denying the allegations and attached reports of medical examination conducted on the victim by Sagana - Kerugoya District Hospital and Murang'a District Hospital. The appellant conducted a disciplinary hearing on 13th April, 2015 and its finding was that the respondent did not challenge the evidence presented. That the medical examination noted white virginal discharge although they could not prove penetration. The Committee entered a verdict of guilty as charged against the respondent and dismissed him from service with effect from 12th May, 2015 via dismissal letter dated 13th August, 2015.

27. On analysis of the evidence, the trial court was of the view that the allegations in the criminal case and those leading to termination of the claimant from service were substantially similar and the respondent having been acquitted, the respondent had no valid reasons to dismiss the respondent from service on the same allegations. On this finding, the appellant has cited several judicial pronouncements of this Court to the effect that an acquittal does not render an employee immune from internal disciplinary proceedings. See Teachers Service Commission vs Joseph Wambugu Nderitu (supra). Also see Geoffrey Kiragu Njogu vs Public Service Commission & 2 Others [2015] eKLR and James Mugera Egati vs Public Service Commission of Kenya [2014] eKLR:

> "There is nothing in the public service commission regulations which suggest that disciplinary process is tied to criminal process that may rise form the same facts ..."

28. This Court in Teachers Service Commission v Joseph Wambugu Nderitu (supra) stated as follows:

> "This Court has crystalized the above position in a number of its own pronouncements. Waki JA in the case of the Hon. The Attorney General and another versus Maina Githinji & Another Nyeri Court of Appeal No. 21 of 2015 (UR) approved the reasoning of Okwengu JA in Judicial Service Commission versus Gladys Boss Shollei & Another (2014) eKLR, and the decision of the court in Kibe versus Attorney General Civil Appeal no. 164 of 2000.
>
> In the Judicial Service Commission case (supra) the following observations made by Okwengu JA.
>
> > "(61) the disciplinary process undertaken by the appellant was a quasi-judicial process as it involved the appellant in an adjudicatory function that required the appellant to ascertain facts and make a decision determining the respondent's legal rights in accordance with *the Constitution* and the *Judicial Service Act*, both of which provided for fair hearing. The disciplinary proceedings were anchored on a contractual relationship and the appellant was not empowered to provide penal sanctions. Notwithstanding the seriousness of the allegations made against the respondent, the disciplinary proceedings could not be treated like criminal proceedings, as the nature of the sanctions that could be applied in a criminal trial. Thus the learned judge misdirected himself, in holding that the disciplinary proceedings were quasi- criminal. The Criminal Procedure Code which is an Act providing for the procedure in criminal cases had absolutely no application in the disciplinary proceedings, and the learned judge erred in applying the provisions of the Criminal Procedure Code."

29. The appellant having conducted and concluded its disciplinary process and accorded the respondent an opportunity to be heard, we find that the appeal has merit and is bound to succeed. Having so found, we find that we need not interrogate the lawfulness or otherwise of the remedies accorded to the respondent by the ELRC. With the success of the appeal, they fall by the wayside.

30. The upshot is that we allow the appeal, set aside the orders made by the ELRC on July 21, 2017 and substitute therefor an order dismissing the respondent's claims before the ELRC.

31. On costs, the order that commends itself to us in view of the peculiar circumstances of this appeal is that each party will bear its own costs in this court and in the ELRC.

32. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 17TH DAY OF JANUARY, 2025.

JAMILA MOHAMMED

……………………………

JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed