Murenga v Principal Secretary, Treasury & another (Civil Appeal 170 of 2019) [2025] KECA 7 (KLR) (10 January 2025) (Judgment)

Neutral citation: [2025] KECA 7 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 170 OF 2019

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

JANUARY 10, 2025

BETWEEN

CLEMENT ERNEST OPIYO MURENGA ..... APPELLANT

AND

PRINCIPAL SECRETARY, TREASURY ..... 1ST RESPONDENT

COMMISSIONER OF CUSTOMS KENYA REVENUE AUTHORITY .... 2ND RESPONDENT

(Being an appeal from the Judgment of the Employment and Labour Relations Court at Kisumu (Nduma, J.) dated 29th May, 2019 in ELRC PETITION NO. 10 OF 2015)

JUDGMENT

1. The appellant brought a petition before the Employment and Labour Relations Court (ELRC) sitting at Kisumu, seeking the following orders against the respondents herein:

    a. A declaration that the petitioner's rights under Articles 47(1) and (2), 50(1), 28, 25(a), 41(1) and 35(2) have been breached and violated by the respondents.

    b. An order for compensation for lost salary and other benefits going with the job from February 1981 to the date the petitioner was to retire from service.

    c. Damages.

    d. And such other orders as the Honourable Court shall deem just.

2. In his petition dated 27th March, 2014, the appellant stated that he was employed by the East African Community in 1975, which was absorbed by the Ministry of Finance when the Community collapsed. At the time, the petitioner was stationed at the Customs Department in Jomo Kenyatta International Airport (JKIA) and his Reporting Officer was the Principal Collector, one Mr. Musyoka. However,

in August 1981, he was charged with the offence of making a customs entry without authority at Madaraka Law Courts in Criminal Case No 12467 of 1981, Republic v Clement Opiyo Murega & Another, and was immediately interdicted and put on half pay.

3. On 21st December, 1983, he was acquitted of the charge as the court found that he had no case to answer. He registered his acquittal with his Reporting Officer and expected his interdiction to be lifted and for him to resume getting his full salary. Thereafter, he claims that he made several visits to his Reporting Officer, enquiring about his status as he was financially constrained, only to be told that the matter had been forwarded to Forodha House, which was the Customs Head Office. In desperation, he says he broke protocol and went directly to the Head Office to enquire the status of his position. He was told that his personal file number could not be found. He then sought help from Treasury and the Public Service Commission (PSC) in vain.

4. Later, the appellant reported the matter to the Commission on Administrative Justice and it was then that he learnt that he was accused of deserting duty, by a letter dated 15th March, 1985. According to him, the letter was addressed to the wrong address and copied to the wrong officer as the appellant was stationed in the Customs Department and had never worked in the Pensions Office in Treasury. Additionally, the appellant stated that he never requested for, nor was he ever granted leave in November, 1984; and he never received the alleged dismissal letter dated 29th May, 1985.

5. Upon confronting the Customs Department on the matter, he was referred to Treasury as the body handling disciplinary matters. On enquiry with Treasury, he was told that all matters regarding Customs Department were taken over by the Commissioner of Customs when Kenya Revenue Authority (KRA) was established in 1996.

6. The appellant stated that for many years, he had been tossed around between the two respondents and his case had not been handled expeditiously and efficiently and was, thus, procedurally unfair. Further, the respondents had never given him written reasons for their actions contrary to Article 47(1) and (2) of the *Constitution*. In this regard, the appellant asserted that he was accused of desertion and dismissed from employment without a hearing or the respondents taking reasonable steps to trace his whereabouts, contrary to Article 50(1) of the *Constitution*.

7. He further claimed that upon his acquittal in December 1983, his payment of half salary continued for over a year without being given reasons for such action; and the same was later stopped in March 1985. He described this action as degrading and inhuman as it was contrary to Articles 28, 25(a) and 41(1) of the *Constitution*. Lastly, he claimed that his personal file number PF104807 contained misleading information, that he was dismissed from employment as a result of desertion from duty; which information is injurious to his image and must be corrected or deleted in accordance with Article 35(2) of the *Constitution*.

8. Opposing the petition, the 1st respondent filed a replying affidavit sworn by Dr. Kamau Thugge, the then Principal Secretary of the National Treasury, on 28th September, 2018. He deposed as follows.

9. The appellant's services were transferred to the Ministry of Finance with effect from 1st July, 1977, upon the breakup of the East African Community. However, the appellant applied and was granted his annual leave from 26th November, 1984, to 31st December, 1984. He failed to resume duty upon the expiry of his leave on diverse dates between 2nd January, 1985, and 15th March, 1985; which action forced the 1st respondent to promptly stop his salary with effect from 1st March, 1985, upon which time the appellant's whereabouts was still unknown. He was issued with a show cause letter as to why he should not be dismissed from service on account of absence from duty without permission and/or leave, dated 15th March, 1985. The letter was sent vide registered mail to his last known

address. He failed to attend and his case was tabled before the Ministerial Advisory Committee, which recommended that he be dismissed from service in accordance with the prevailing service regulations with effect from 2nd January, 1985, owing to his failure to respond to the show cause letter in time and prolonged absence from duty without lawful authority. The appellant's dismissal was communicated to him vide a letter dated 29th May, 1985.

10. Later, via a letter dated 3rd November, 1992, the appellant lodged an appeal against his dismissal to the PSC, seven (7) years after his dismissal. The PSC dismissed his appeal upon due process and informed the appellant accordingly. The appellant lodged a second appeal to the PSC on 7th April, 2004, twelve (12) years after the first appeal. Again, the PSC dismissed his appeal for lack of merit and failure to justify his unauthorized absence from duty.

11. Dr. Thugge stated that the appellant's appeals before the PSC were made out of time and he miserably failed to justify the unreasonable delay and/or proffer any cogent reason for the delay in filing the appeals. Thereafter, the PSC directed that the matter be closed and the appellant was informed accordingly. Nonetheless, the appellant continued to make spirited attempts to have the matter revived; first, through the then Public Complaints Standing Committee, and later by writing directly to the Ministry, against which formal responses were sent to him highlighting the above-mentioned facts.

12. Dr. Thugge further stated that the appellant was indeed interdicted in 1981 on account of gross misconduct, but he was later reinstated on 5th October, 1984. This necessitated his transfer and/or posting from the Customs Department and he was placed on a final warning that any future reports of misconduct on his part would render him liable to severe disciplinary action including dismissal from service without any further reference. According to Dr. Thugge, the appellant's petition was misconceived and an abuse of the court process as his fundamental rights and freedoms were not breached in any manner.

13. On its part, the 2nd respondent also opposed the petition through a replying affidavit sworn by May Migizi Magomere, the Supervisor, Employee Relations, Human Resource Department, on 24th October, 2014. She deposed as follows.

14. The appellant was absorbed and appointed in the Ministry of Finance and Planning, following the breakup of the East African Community. Thereafter, he was dismissed from employment with effect from 2nd January, 1985, by the Ministry of Finance and Planning. By the time of his appointment and dismissal, the Commissioner of Customs was under the Ministry of Finance and Planning and not the KRA.

15. She stated that the KRA was formed in 1995, whereupon the Customs and Excise Department was then brought under it (KRA). Therefore, since the decision to dismiss the appellant was arrived at in 1985 at a time when the KRA was not in existence, he was not an employee of the KRA and has never been in the employment of KRA. Hence, the 2nd respondent had no role and was never involved in the issues raised by the appellant. In the premise, she stated that the appellant should have known that the only body which could reinstate him at the time was the PSC and not his former Reporting Officer.

16. She further stated that when the 2nd respondent took over the Customs and Excise Department in 1995, all employees who had been dismissed and those who had disciplinary issues with the Customs and Excise Department under the Ministry of Finance, were not absorbed and/or offered employment with the KRA.

17. Lastly, she denied that the appellant had been following up his matter with the 2nd respondent as alleged; and that the only time it dealt with his matter was when it received a letter from the Commission of Administrative Justice dated 20th July, 2012, and a response was duly done vide a letter

dated 28th July, 2012. She stated that the said letter is self-explanatory in that the appellant's case was under the Ministry of Finance and he was advised to follow up his matter with the said Ministry.

18. Responding to the 1st respondent's replying affidavit, the appellant reiterated that he never applied for, nor was he ever granted leave as alleged. In any event, the appellant argued that Dr. Thugge never exhibited the leave application form from him or a copy of the letter approving his leave. He also reiterated that he never deserted duty as alleged as he used to report once a month to his Reporting Officer.

19. The appellant further denied ever receiving the letter dated 5th October, 1984, lifting his interdiction as the procedure then was that three copies of such letter would be issued and the employee had to acknowledge receipt by signing a copy of the letter but the annexed copy shows that it was not endorsed by the Commissioner of Customs as having been received. He alleged that he did not receive the said letter until he saw Dr. Thugge's replying affidavit. He further denied that it was not true that his whereabouts were unknown since he used to report once every month to his Reporting Officer, whilst awaiting the outcome of the lifting of his interdiction and was at the time residing at the Customs Staff Houses at Eastleigh Nairobi with his workmates. He also denied ever receiving the show cause letter dated 15th March, 1985, and the dismissal letter dated 29th May, 1985; as the former was wrongly addressed and the latter appears to have been written and received by the Ministry itself on 30th April, 1985. He alleged his letters of appeal simply sought to know why his half salary payment was stopped and he never received the dismissal letter until he complained to the Commission of Administrative Justice. Therefore, he could not have appealed on something he was not aware of.

20. Additionally, the appellant stated that there was no proof that his matter was tabled before the Ministerial Advisory Committee since the record, through his Affidavit dated 30th April, 2008, shows that he requested the Ministry for a copy thereof but it was unable to avail the minutes of the Ministerial Human Resource Advisory Committee meeting. Lastly, he stated that Dr. Thugge did not give an explanation as to why: it was necessary to issue two dismissal letters dated 29th May, 1985, and 11th March, 2004; there was delay in forwarding the appellant's case to the PSC; and Ministry did not have the appellant's confidential file as the same was kept by Commissioner of Customs since he was an employee of Customs Department. He alleged that the letter annexure marked as "KT-6" was not genuine as there is no such thing as "DREPUBLIC OF KENYA".

21. Upon consideration of the matter, the learned judge first took note that a notice of motion dated 4th August, 2015, had initially been filed by the 2nd respondent, for orders that the matter be dismissed on the ground that the appellant never took action with respect to his dismissal until 27th March, 2014, when he filed his petition; which was 29 years and 3 months after his dismissal. Therefore, the petition was time barred. Maureen Onyango, J. granted the order of dismissal of the petition as prayed. However, by a judgment dated 20th July, 2017, this Court found that the matter raised constitutional violations which are continuing in nature and therefore the appellant was not time barred. The court also found that the retired Constitution and the present Constitution did not specify a limitation period within which a constitutional petition ought to be filed.

22. Secondly, the learned Judge coined one issue of determination which was whether the appellant had proved on a balance of probabilities, that his constitutional rights had been violated and continued to be violated by the respondents in the manner set out in the petition. The learned Judge concluded that the appellant had failed to prove his case on a balance of probabilities. He disbelieved the appellant's narrative that he was not given due process, and, instead found it more probable that the 1st respondent's narrative was truthful that the appellant had been dismissed after due process including an appellate process.

23. Aggrieved by the decision of the court, the appellant filed a Notice of Appeal dated 23rd May, 2019, and a Memorandum of Appeal dated 14th August, 2019, in which he raised nine (9) grounds of appeal. These are that the learned judge erred:

    1. In law and fact by framing issues and determining the case in respect of the 1st respondent alone and without making a finding in respect of the 2nd respondent.

    2. In law in coming to the conclusions about posting of a letter to show cause why the petitioner should not be dismissed without first dealing with the crucial issue in the petition of whether the petitioner requested and was granted leave in November 1984.

    3. In law and in fact in coming to the conclusion that the petitioner took leave between 26th November, 1984 to 31st December, 1984 without production by the respondents of the leave application form.

    4. In law and in fact in concluding that the petitioner was dismissed with effect from 2nd January, 1985 following a sitting of the Ministerial Advisory Committee when the respondents were unable to provide minutes of such sitting.

    5. By misdirecting himself on the interpretation of sections 107 and 108 of the *Evidence Act* in holding that the burden of proof was upon the petitioner to prove that he never applied for and was never granted leave.

    6. In law in failing to hold that the petitioner was dismissed twice and the implication of the dismissals.

    7. In law and fact in holding that the interdiction was lifted and the petitioner was given final warning without considering that such letter, if indeed given to the petitioner would have been in possession of the 2nd respondent.

    8. In law and in fact by relying on secondary evidence instead of primary evidence in arriving at the conclusion that the petitioner appealed against dismissal on the ground of ill health.

    9. By misdirecting himself in law in holding that the petitioner failed to adduce any evidence as to his employment status.

24. Consequently, the appellant prayed that the appeal be allowed with costs; and judgment be entered for him as prayed in the petition.

25. During the virtual hearing of the appeal, learned counsel, Mr. Juma appeared for the appellant, whereas there was no representation for both the 1st and 2nd respondents. The appellant and the 2nd respondent filed written submissions, whereas the 1st respondent did not file written submissions. The appellant relied entirely on his submissions, while the court indicated that since the 2nd respondent filed submissions, it would rely on the same.

26. The appellant condensed his grounds of appeal into six issues of determination namely:

    a. Whether the interdiction on the petitioner was ever lifted, and if so, was the petitioner notified of the same.

    b. Did the petitioner apply for leave, and if so, was the leave granted.

    c. Was the petitioner served with the notice to show cause letter.

    d. Was the petitioner heard before he was dismissed.

e. Whether the respondents violated the rights of the petitioner as alleged in the petition.

f. Whether the petitioner is entitled to the reliefs sought.

27. The appellant argued that he was interdicted and placed on half pay pending the outcome of a criminal case, which was eventually resolved in his favor. Despite this, he was not reinstated, and his half salary was stopped. He denied ever receiving the reinstatement letter dated October 8, 1984, noting that it lacked proper acknowledgment. He also denied applying for or being granted leave in November 1984, arguing that the respondents failed to produce evidence such as a leave application or approval letter. Furthermore, the appellant claimed he never received the notice to show cause and stated that the respondents provided no proof that it was delivered to him or the relevant authorities.

28. The appellant contended that there was no evidence his dismissal was discussed by the Ministerial Advisory Committee, as the minutes of the alleged meeting were not provided. He only received the dismissal letter in 2012 after filing a complaint. Additionally, he argued that he was not given an opportunity to appear before a committee or panel to defend himself, which violated his procedural rights. He claimed breaches of his constitutional rights, including fair administrative action, fair hearing, dignity, and labor rights. He questioned why he would abscond duty after being reinstated and demanded repayment of his withheld half salary.

29. The appellant further argued that the burden of proof lay with the respondents, who failed to provide sufficient evidence regarding the leave application and the notice to show cause. He suggested the letter to show cause was likely uncollected if it was sent at all. He also denied lodging appeals in 1992 and 2004, stating that he only became aware of relevant events in 2012 when some records surfaced.

30. Finally, the appellant claimed he suffered significant financial and career losses, including withheld salaries, benefits, and lost opportunities to work until retirement at age 60. He estimated his total losses at Kshs. 50,000,000 and requested damages, costs, and any other relief deemed appropriate by the court.

31. Opposing the appeal, the 2nd respondent relied on its replying affidavit dated 24th October, 2014, and its written submissions at the High Court dated and filed on 9th February, 2015. Further, the 2nd respondent coined one issue for determination namely whether the appellant was employed by the Customs and Excise Office at the Commencement of the Act to be qualified for secondment to the KRA.

32. The 2nd respondent argued that the Kenya Revenue Authority (KRA), established in 1995, was not involved in the appellant's dismissal, which occurred in 1985 before KRA's creation. It explained that under section 22(4) of the KRA Act, public officers employed under specified laws at the Act's commencement could be seconded to KRA, but the appellant failed to provide evidence of his secondment or employment with KRA. The 2nd respondent emphasized that only the Public Service Commission (PSC) had the authority to reinstate the appellant, not the Customs and Excise Department or KRA. It further noted that the appellant never pursued the matter with KRA, which only became aware of the issue in 2012 through a letter from the Commission on Administrative Justice. Finally, the 2nd respondent supported the trial court's finding that the appellant was not its employee and that any liability rested solely with the 1st respondent.

33. This is a first appeal. The standard of review is de novo: we are required to review issues of both facts and law afresh and come to our own independent conclusions. We are, however, obligated to bear in mind that the trial judge had the advantage of seeing and assessing the demeanor of witnesses. (See *Selle v Associated Motor Boat Co. Limited* (1968) EA 123). In addition, this Court must be cognizant of the

fact that it should not interfere with the findings of fact by the trial court unless they were based on no evidence or on a misapprehension of the evidence or the trial judge is shown demonstrably to have acted on wrong principles in reaching his findings. (See *Jabane v Olenja* (1968) KLR 661).

34. Having considered the pleadings in the record of appeal, the judgment of the trial court, the appellant's grounds of appeal and the rival submissions of the parties, the sole issue for determination is whether the learned Judge was correct in dismissing the appellant's petition for having failed to establish his case on a balance of probabilities. All the grounds raised by the appellant are factors that the Court will weigh in determining that transcendental question.

35. As the learned Judge correctly framed, this appeal turns on the question whether a fact-finder believes the appellant's narrative – that he was never reinstated to work after he was acquitted of the criminal charges he faced; and was summarily fired, in abstentia, and without any due process at all – or the 1st respondent's version – that the appellant was reinstated to work and that he subsequently asked for leave to be off-work but absconded from work thereafter; and failed to show up for the hearing of his disciplinary cases leading to his dismissal.

36. In his analysis, the learned Judge was satisfied that the following facts were compelling evidence in favour of the 1st respondent:

    a. A letter dated 15th March, 1985, was sent to Mr. C.E. Murenga Opiyo by registered post to P.O. Box 45, Port Victoria Kisumu by Mr. J.O. Otweyo for Permanent Secretary/Treasury, asking the petitioner to show cause why he should not be dismissed for deserting work since he took leave between 26th November, 1984, to 31st December, 1984.

    b. The 1st respondent wrote a letter dated 29th May, 1985, dismissing the petitioner from work with effect from 2nd January, 1985, following a sitting of the Ministerial Advisory Committee.

37. The learned judge was also satisfied by the letter dated 5th October, 1984, which lifted the appellant's interdiction; and the letter dated 31st January, 1985, which stopped his salary upon failure to return to work, after he had been transferred from his previous post to the Pensions Department to replace Mr. N. Mwaniki, effective 26th November, 1984. He was also satisfied that the appellant had asked for leave which was granted; but that he never returned to work thereafter.

38. The learned judge was also satisfied that the appellant had appealed against the dismissal proffering ill health as the reason for his desertion of duties. His appeal, and a subsequent one which was filed much later (after 18 years), was duly dismissed.

39. Drawing from the above facts, the learned judge was satisfied that the appellant did not establish that he had been unprocedurally terminated or that the reason that led to his dismissal from work was invalid. He found that the appellant was dismissed from work following a sitting of the Advisory Committee and was satisfied that he had exhausted the interim appellate procedures, even though the same was concluded upon inordinate delay on the part of the appellant and respondents in equal measure.

40. Therefore, the learned Judge found that, in the circumstances, the appellant had failed to discharge the onus placed on him of proving his case on a balance of probabilities. It was his view that respondents ably rebutted the evidence tendered by the appellant. On the other hand, the appellant did not adduce any evidence as to his employment status with other employers or otherwise, since he left the employment of the respondents. He also did not satisfactorily establish the allegations of damage suffered as a result of separation with the respondents. For these reasons, the learned judge was satisfied that the appellant's dismissal from employment by the 1st respondent was lawful and fair; and the

alleged violations of the *Constitution*, retrospectively lacked merit and dismissed the entire petition for want of proof.

41. Upon close consideration of the record, we find no reason to fault the learned Judge's reasoning. It was the appellant's onus to prove on a balance of probabilities that he was dismissed from work without due process. However, all the documents which were produced by the 1st respondent tended to prove the opposite. The five letters produced by the 1st respondent showed the following:

    a. That his interdiction following his acquittal was effected and communicated to him vide a letter dated 05/10/1984;

    b. That upon his transfer to the Chief Personnel's Office, the appellant requested for leave which was granted. His leave commenced on 26/11/84. He was to report back to work on 31/12/84. However, by 31/01/1985, he had not yet reported prompting an officer acting on behalf of the Principal Pensions Officer to report his absconding and advising that the appellant's salary be stopped. This was vide the letter dated 31/01/1985.

    c. Subsequently, a show-cause letter dated 15/03/1985 was sent to the appellant by registered mail to his last known address.

    d. There was no response to the show-cause letter; and the appellant did not report back to work leading to the dismissal letter dated 25/05/1985.

    e. A letter dated 24/09/2003 informed the appellant that his appeal to the Ministerial Advisory Committee has been dismissed for two reasons: unreasonable delay (of 18 years) in lodging the appeal; and on the substantive grounds that the Committee disbelieved the appellant's narrative that physical indisposition prevented him from reporting to work.

    f. A letter dated 11/03/2004 informed the appellant that his final appeal to the Public Service Commission was unsuccessful.

42. The appellant's response to these series of letters which, pieced together, reconstruct the history of his employment and procedural termination, is that they are all fake and have been manufactured by the 1st respondent to defeat his claim. However, this bald claim by the appellant is implausible. We think so for at least five reasons. First of all, we are impressed by the internal logic and consistency of the letters. They reference each other, and seem to be, prima facie, credible. Nothing other than the say-so of the appellant demonstrates that they were manufactured specifically to defeat the appellant's claim. Second, it is noteworthy that although the appellant admits that he had received these letters from the Commission on the Administration of Justice earlier, he did not disclose their existence in his petition. Third, the letters describe appeals lodged by the appellant after his dismissal albeit belatedly. The appellant admits that he sent the letters but denies that they were appeals. He claims that he was merely following up on his half-salary. Again, in his petition he did not disclose the existence of these letters he had sent to his former employer. Fourth, even after being prompted by the replying affidavit of Dr. Thugge about the existence of these appeal letters he sent, the appellant does not annex them to his further affidavit in which he denies their purport. He merely, again baldly, claims that he was following up on his half-salary. If this was so, nothing would have been easier than to display them for the trial court to come to its own conclusions. Finally, if the appellant truly believed that all the documentary proof attached to the replying affidavit of Dr. Thugge were forgeries, he ought to have used one of the existing tools for impugning them like causing the cross-examination of the deponent. The appellant took no step whatsoever.

43. The upshot is that, in our view, the trial court was eminently entitled to disbelieve the appellant's narrative; and, conversely, to believe the 1st respondent's narrative on a balance of probabilities. As aforesaid, on a balance of probabilities, the 1st respondent demonstrated that it had subjected the appellant to due process but that the 1st appellant at first did not respond to the show-cause letter; and when he finally sought to explain his long absence from work, the proffered explanation was incredulous. We, therefore, find no merit in the appeal herein and we dismiss it with costs.

44. Orders accordingly.

DATED AND DELIVERED AT KISUMU THIS 10TH DAY OF JANUARY, 2025.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

SIGNED

DEPUTY REGISTRAR