



**Judicial Service Commission v Onyango (Civil Appeal  
230 of 2019) [2024] KECA 478 (KLR) (9 May 2024) (Judgment)**

Neutral citation: [2024] KECA 478 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 230 OF 2019  
SG KAIRU, F TUIYOTT & GWN MACHARIA, JJA  
MAY 9, 2024**

**BETWEEN**

**JUDICIAL SERVICE COMMISSION ..... APPELLANT**

**AND**

**CLEMENT ODUOR ONYANGO ..... RESPONDENT**

*(An appeal from the judgment of the Employment and Labour Relations Court at Nairobi (Wasilwa, J.) delivered on 30th April 2019 in ELRC Cause No. 884 of 2014)*

**JUDGMENT**

1. In this appeal, the appellant, Judicial Service Commission (JSC), has challenged a judgement delivered on 30<sup>th</sup> April 2019 in which the Employment and Labour Relations Court (ELRC) (Wasilwa, J.) found that the respondent, Clement Oduor Onyango, was unfairly and unjustifiably terminated from employment and awarded him Kshs. 2,352,000.00 being the equivalent of 12 months' salary as compensation in addition to Kshs. 219,000.00 being one month salary in lieu of notice and costs of the suit.
2. The respondent's claim before the trial court as pleaded in his Statement of Claim was that he was offered an appointment for the position of Chief Facilities Officer by a letter dated 16<sup>th</sup> September 2013 "following a rigorous competitive selection process which was carried out at the auspices" of the appellant; that he duly accepted the offer after which he resigned from his position at Safaricom Limited in order to take up the new appointment; and that on 2<sup>nd</sup> December 2013 he was shocked to receive communication from the appellant that his appointment had been revoked. He averred that there was a valid contract which the appellant, "a creature of *the Constitution* of Kenya" breached. It was on that basis that he sought the reliefs that were ultimately granted.
3. In his testimony, the respondent stated that in 2013, he learnt of the existence of a vacancy in the Judiciary when he received a telephone call from an administrator who introduced herself as Susan



who enquired from him whether “he would be interested in a function in facilities management”. He reiterated the plea in his claim that he went through “a vigorous competitive process” although he was not aware whether he was the only candidate; that he was interviewed by the Chief Registrar of the Judiciary and thereafter got an offer of appointment dated 16<sup>th</sup> September 2013 from the Director of Human Resources and Administration, Dismus O. Obondo, in which he was offered “an appointment as the Chief Facilities Officer on temporary terms of service for a period of twelve (12) months with effect from the date” he would “report to the Principal Facilities Manager for deployment”.

4. The letter of offer of appointment stipulated that the respondent would earn a salary of Kshs. 105,000.00 per month; house allowance of Kshs. 35,000 per month; transport allowance of Kshs. 16,000 per month; responsibility allowance of Kshs. 10,000 per month; extraneous allowance of Kshs. 30,000 per month and leave allowance of Kshs. 23,000 per annum. Other benefits would include medical insurance cover for himself and spouse and for children and group personal accident cover.
5. The respondent accepted the offer by his letter dated 22<sup>nd</sup> September 2013 and indicated that he would take up the employment from 1<sup>st</sup> November 2013. By his letter dated 26<sup>th</sup> September 2013, the respondent resigned from Safaricom Ltd where he had been employed as a Systems Engineer since August 2013. The resignation from Safaricom was to take effect on 30<sup>th</sup> September 2013.
6. On 1<sup>st</sup> November 2013, he reported to the Judiciary to commence his employment but was asked to go home to await communication as to where and when he would begin his duties. He was shocked to receive a letter dated 2<sup>nd</sup> December 2013 from the Director of Human Resources and Administration, Dismus O. Obondo informing him that the appellant had at its meeting held on 20<sup>th</sup> November 2013 deliberated “on the matter concerning [his] employment and revoked [his] appointment.”
7. It was on that basis that the respondent initiated his claim before the Industrial Court on 27<sup>th</sup> May 2014, the predecessor to ELRC, asserting that he was unfairly terminated from employment. He sought:
  - a. A Declaration that the termination of the Claimant's Appointment was illegal, wrongful and unlawful.
  - b. Certificate of Service under section 51 of the *Employment Act*.
  - c. Terminal benefits and dues accrued as follows:
    - i. Salary (per month) Kshs 105,000 x 12 = 1,260,000/-
    - ii. House allowance (per month) Kshs 35,000 x 12 = 420,000/-
    - iii. Transport allowance (per month) Kshs 16,000 x 12= 192,000/-
    - iv. Responsibility allowance (per month)Kshs 10,000 x 12= 120,000/-
    - v. Extraneous allowance (per month) Kshs 30,000 x 12 = 360,000/-
    - vi. Leave allowance (per annum) Kshs 23,000 x 1 = 23,000/-
    - vii. Opportunity costs Kshs 3,000,000/-Total Kshs 5, 375, 000/-
8. In response to the claim, JSC asserted that there has never been an employer/employee relationship between it and the respondent; it denied issuing the respondent with the purported offer of appointment; it averred that there was no vacancy declared or advertisement for the position and neither was there a competitive selection or recruitment.



9. In his testimony of behalf of JSC, Peter Bunde, the Assistant Director of Human Resource Department at the Judiciary stated that the position of Chief Facilities Officer to which the respondent was purportedly appointed is non-existent in the cadres of service of the JSC or of the Judiciary; that under Article 172 of *the Constitution*, the *Judicial Service Act*, 2011 and the Regulations thereunder, the process of declaring vacancies and recruitment of staff is set out and that the letter of offer dated 16th September 2013, which was not issued by JSC, was irregular and could not create the relationship of employer and employee between JSC and the respondent; that that letter was issued to the respondent by the former Director of Human Resource and Administration Mr. Dismus Obondo “in his own capacity”; that there has to be a formalized process of recruitment before such a letter is issued and the appointment must be sanctioned by the JSC; that at its meeting held on 5th December 2013, JSC adopted recommendations made by its Human Resource Management Committee on 20th November 2013 and rejected the request for employment of the respondent as the appointment was irregular.
10. Having considered the evidence and submissions, the learned Judge of the ELRC in the impugned judgment framed three issues, namely, whether there was an employment contract between the parties; if so, whether JSC breached the same; and whether the Respondent is entitled to the remedies that he sought.
11. In concluding that it had been established that there was an employment contract between the parties, the learned Judge noted that the author of the letter of offer of appointment did not indicate that that letter was written following any competitive recruitment process nor did it indicate that it was issued on behalf of JSC which “has the sole responsibility and power under *the Constitution* to hire and fire staff employed to serve in the Judiciary”; that “that notwithstanding, the letter of offer was written by an authorized officer” who was employed by JSC as its Director of Human Resources and that the respondent as an outsider had no knowledge that the Director of Human Resources had no authority to make the offer; and that the HR Director “can be assumed to have had the authority and power to undertake activities which are reasonable in the performance and discharge of his functions.”; and that as an agent, his actions bind his principal, the JSC, and that a third party like the respondent cannot be required to verify each employee’s authority before entering into a contract.
12. The Judge went on to hold that an employment contract having been established, JSC could only terminate it in accordance with Section 41 of the *Employment Act*; that the respondent was neither given notice to terminate the contract and neither was he given an opportunity to explain his case. He was awarded one month salary in lieu of notice in the amount of Kshs. 219,000.00; leave allowance for one year, Kshs. 23,000.00 and an equivalent of twelve months salary as compensation  $-12 \times 196,000.00 = 2,352,000.00$ ; a total award of Kshs. 2,594,000.00. Hence the present appeal.
13. Based on the memorandum of appeal and the submissions by learned counsel Mrs. Maina for the appellant and Mr. Kimani Wachira, learned counsel for the respondent, which we have duly considered, the overarching issue in the appeal is whether there was a valid contract of employment between the parties. If so, whether the termination was justifiable and if so, the remedies.
14. As correctly pleaded by the respondent in its Statement of Claim, the appellant “is a creature of *the Constitution* of Kenya 2010.” It is established under Article 171 and its functions under Article 172 include appointment and removal from office of judicial staff and other staff of the judiciary “in the manner prescribed by an Act of Parliament”. Under Article 172(2), JSC is commanded that in performing its functions, it “shall be guided” by “competitiveness and transparent process of appointment of judicial officers and other staff of the judiciary”.
15. The Act of Parliament enacted pursuant to Article 172 of *the Constitution*, and which makes provision for judicial services and administration of the Judiciary is the *Judicial Service Act*. Section 32 of that Act



as read with the Third Schedule to the Act, deals with, among other things, appointment of judicial officers and staff and requires, under Part III, paragraphs 8 and 9, for the Chairperson of the JSC to be informed of all vacancies which concern it and for “applications for appointment to vacancies shall be invited by public advertisement” unless JSC is satisfied that the vacancy should be filled by the appointment or reappointment of a public officer held against the establishment of the Judicial Service or by the continued employment of a public officer on temporary terms.

16. As submitted by counsel for the appellant, the averment by the respondent in his Statement of Claim that his appointment followed “a rigorous competitive selection process which was carried out at the auspices” of the appellant is not supported by the evidence. As already noted, the respondent’s testimony in that regard, was that he received a telephone call from an administrator who introduced herself as Susan and who enquired from him whether “he would be interested in a function in facilities management”. He stated further that he was interviewed by the Chief Registrar of the Judiciary and thereafter got an offer of appointment letter dated 16<sup>th</sup> September 2013 from the Director of Human Resources and Administration, Dismus O. Obondo. He went on to state that he was not aware whether he was the only candidate.
17. Clearly, based on the respondent’s own testimony there was no advertisement for the position and there is nothing to support his claim of having undergone “a vigorous competitive process” to secure the offer of appointment. The way the respondent was invited for the position and the process through which he was “recruited” is one that should have given him pause, considering, as he should have, that the Judiciary is not a private entity but a public institution. The process of his recruitment and appointment was neither competitive nor transparent, as the law requires, and his purported offer of employment was irregular.
18. In our view, the learned Judge of the ELRC whilst correctly observing that there was no competitive recruitment process in this case, failed to consider the afore-stated constitutional and statutory provisions governing employment of staff in the Judiciary. In the learned Judge’s earlier decision in the case of Agnes Wanjiku & 10 others vs. Chief Registrar of the Judiciary [2017] eKLR the learned Judge had found that as the claimants in that case had “never” gone “through any competitive process of recruitment”, “their serving within the judiciary cannot be equated to any appointment”. Although that decision was cited before her, it appears to have escaped the attention of the learned Judge. Reference was also made to the decision in Okiya Omtatah Okoiti vs. The Selection Panel for the National Land Commission & 3 others [2019] eKLR, where the learned Judge had pronounced, in the context of the process of selection and nomination of commissioners of the National Land Commission that “an employment process starts from the advertisement process to the shortlisting onto the interview and finally selection process. The processes must therefore be above board”.
19. Where, as here, a statute empowers a public body such as the appellant to exercise statutory authority and prescribes the manner in which such authority is to be exercised, the body must adhere to that process strictly, in accordance with the statutory prescription. The “process” of recruitment of the respondent in the present case was in violation of statutory provisions and could not, in our view, result in a valid employment contract.
20. Whereas one might empathise with the respondent for having left his short-lived position in Safaricom Limited for what he must have considered to be a more promising one in the Judiciary, the Director of Human Resources had no power to recruit the respondent and his purported recruitment of the respondent was invalid. On the other hand, the Act and its Schedule are public documents and anyone seeking employment as a judicial officer or staff is expected to know that applications for employment to vacancies in the public body must be by public advertisement followed by a competitive and



transplant process. The respondent can only have himself to blame for submitting to an overtly opaque and unlawful recruitment.

21. The trial court resorted to “the law of agency” in finding that an employment contract between the parties had been established. In that regard, the Judge stated:

“Under the law of agency, I would say that Mr Opondo (sic) who penned off the appointment letter was an agent of the Judicial Service Commission having been employed by the Judicial Service Commission as the Director, Human Resource and Administration.

In the circumstances, as an agent, his actions bind his principal (JSC) in a contractual relationship with a third party (the Claimant).. This is referred to as “apparent authority” as third parties like the Claimant herein cannot be required to verify each employees authority before entering a contract. In fact. Mr Obonyo wrote the letter of offer on the letterhead of the Judiciary and signed it off as the Director of Human Resource and administration and even copied the same to the Chief Registrar of the Judiciary as a sign that he had all the authority to write the letter as he did.”

22. Apart from the fact that the matter of ‘agency’ was not pleaded and no evidence was led on it, the Judge appears to have regarded the Judiciary and the JSC as one and the same institution without due regard to the constitutional and statutory underpinning and mandate of the JSC. The question whether JSC delegated its statutory power of recruitment and appointment of staff is one of fact that would have required interrogation and could not be assumed. If anything, there was evidence that Mr. Obonyo was indeed dismissed from employment for transgressing into the powers of recruitment of JSC, which negates any suggestion that he had authority of recruitment in the first place.

23. All in all, we are satisfied and hold that the purported recruitment of the respondent undertaken contrary to constitutional and statutory provisions is invalid and of no effect and the learned Judge of the ELRC erred in concluding that there was a valid contract of employment between the parties. Consequently, it follows that the reliefs granted by the trial court in favour of the respondent had no basis.

24. The appeal succeeds. The judgment of the ELRC delivered on 30<sup>th</sup> April 2019 is hereby set aside and substituted with an order dismissing the respondent’s suit before the ELRC with costs. The appellant will have the costs of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF MAY 2024.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**F. TUIYOTT**

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**JUDGE OF APPEAL**

**G.W. NGENYE-MACHARIA**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.



Signed

**DEPUTY REGISTRAR**

