Moi Teaching & Referral Hospital Board v Onditi (Civil Appeal 57 of 2019) [2023] KECA 652 (KLR) (26 May 2023) (Judgment)

Neutral citation: [2023] KECA 652 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT ELDORET

CIVIL APPEAL 57 OF 2019

PO KIAGE, M NGUGI & F TUIYOTT, JJA

MAY 26, 2023

BETWEEN

MOI TEACHING & REFERRAL HOSPITAL BOARD ..... APPELLANT

AND

DR ELIAS ONDITI ..... RESPONDENT

(Being an appeal from the judgement of the High Court of Kenya at Eldoret (D.K. Kemei, J.) dated 28th November, 2018 in Civil Appeal No. 129 of 2009)

JUDGMENT

1. Despite raising a fairly straightforward issue, the dispute that is the subject of this appeal has engaged the parties and the courts for almost two decades.

2. The respondent, Dr. Elias Onditi, was at all times material to the matter a senior lecturer at the Faculty of Health Sciences, Moi University pursuant to an appointment made onJanuary 30, 1990. In addition to his teaching and research work, he was allowed by Moi University to offer, on an honorary basis, clinical duties to Eldoret District Hospital, later renamed the Moi Teaching and Referral Hospital (hereafter 'the hospital'), the present appellant. On December 6, 2004, the Director of the appellant issued a notice barring the respondent from carrying out his duties at the hospital, which according to the respondent, necessarily included the duty by the respondent to offer service to Moi University by conducting teaching and research programmes.

3. The respondent accordingly filed Civil Suit No. 39 of 2005 before the Chief Magistrate's Court in Eldoret. His claim before the Magistrate's Court was that the notice by the appellant was invalid, actuated by ill will and in violation of Clause 6 (b) of Legal Notice No. 78 of 12th June, 1998. This Legal Notice obliged the appellant to avail the hospital as a teaching facility for Moi University. The respondent further contended that the appellant, not being his employer, cannot purport to bar him from discharging his teaching and research duties at the hospital while he remained a lecturer at the

Faculty of Health Sciences, Moi University as this would not only inhibit him in discharging his duties but also violate Clause 6 (b) of the said Legal Notice No. 78 of June 12, 1998.

4. The respondent accordingly sought the following orders from the court:

    a. An order of declaration that the Notice dated December 6, 2004was issued in violation of clause 6 (b) of Legal Notice No. 78 of June 12, 1998and in violation of the rules of natural justice and is therefore null and void.

    b. An injunction to restrain the respondent from obstructing the appellant from carrying out his duties as lecturer Moi University at the Moi Teaching and Referral Hospital.

5. While the appellant denied the respondent's claim, it admitted that he was not its employee. It was its case that pursuant to the tacit understanding entered into between the appellant and the respondent's employer, the respondent was under an obligation to offer other clinical services to the appellant, which, in its view, created a contractual relationship between the appellant and the respondent. It was its case further that it issued the notice as the respondent abdicated his duties to the appellant; that he was in breach of the tacit agreement between the respondent's employer and the appellant; and that he was misusing the appellant's facility and was acting in contravention of the Hippocratic Oath.

6. The trial court found in favour of the appellant, and the respondent appealed to the High Court. In its decision, the first appellate court found that the notice dated December 6, 2004 was in violation of the rules of natural justice and was therefore null and void, which it so declared, and set aside the trial court's orders. It further restrained the appellant from obstructing the respondent from carrying on his duties at the hospital as a lecturer at Moi University.

7. Aggrieved by this decision, the appellant filed the present appeal in which it raised some thirteen grounds of appeal in the memorandum of appeal dated March 21, 2019. At the hearing of the appeal before us, its learned counsel, Ms. Chesoo, indicated that she was abandoning the grounds of appeal in the memorandum of appeal as they raised matters of fact, which are outside the remit of this court on a second appeal. She submitted that the only issue of law raised in the appeal is whether the notice to the respondent was issued within the law.

8. The appellant filed submissions dated June 8, 2022which Ms. Chesoo highlighted before us. It was its submission that on January 30, 1990, the respondent was accorded an appointment at the hospital where he was required to undertake disparate duties of research and provisions of clinical services. He had, however, for a period of over six months, absconded his duties, prompting the appellant to warn him several times. It had eventually issued him with a notice barring him from accessing the radiology department at the hospital.

9. The appellant relied on the case of *Litha Malimba v Sun International Management Limited and others* JR1594/18(2021) and *Moi Teaching and Reffereal Hospital v James Kipkonga Kendagor* [2019] eKLR to submit that it was justified in issuing the notice dated December 6, 2004 as the respondent had failed to offer clinical services to the general public. It was its contention further that the first appellate court had erred in holding that the notice it had issued to the respondent was in violation of the rules of natural justice.

10. In highlighting these submissions before us, Ms. Chesoo further noted that the cause of action in this matter arose in 2004, and the judgment of the trial court was delivered on April 30, 2009. She conceded, therefore, that the *Constitution* of Kenya 2010 and the *Fair Administrative Actions Act* were not applicable as they did not apply retrospectively. The applicable law, then, was the *former Constitution*, the *Trade Dispute Act*, cap 234, the *Employment Act* cap. 226 both repealed, and Legal Notice No. 78 of 1998.

11. Ms. Chesoo submitted further that the respondent had conceded in paragraph 25 of his submissions that the appellant had statutory mandate over him. It was her submission that at the time that the notice dated 6th December 2004 was issued, the law in operation, unlike the current Act No. 11 of 2007, did not provide a procedure for termination.

12. Ms. Chesoo submitted that under section 17 of *cap 226*, (repealed) the appellant was empowered to take action against the respondent, which it did, on grounds of absenteeism, because the respondent had absconded. It was her submission that the first appellate court having found that the respondent was under a duty to offer clinical services as it did, it was an error in law for it to state that there was a need for a hearing to be done before the disciplinary action was taken. Her submission was that the requirement for disciplinary action was not within the law then. The appellant had acted within its powers and had properly issued the letter suspending the respondent from accessing its facilities.

13. The respondent filed written submissions dated 10th June, 2022 which were highlighted by his counsel, Mr. Mwetich. It was the respondent's submission that the first appellate court properly considered the facts and the law from the evidence tendered before arriving at its decision. Further, that non-compliance with the rules of natural justice enshrined in article 47(1) of the *Constitution* of Kenya and section 4 of the *Fair Administrative Action Act* No. 4 of 2015 by a party in a position of authority is a proper basis for a court to dismiss a purported decision made by such a party.

14. The respondent submitted further that under the law, it is required that where there are clear procedures to be followed by a governing body in a disciplinary action, they ought to be followed to the letter. Should there be no clear procedures, then it is the mandate of the body to formulate the procedures to be followed in disciplinary proceedings. The respondent cited in support the case of *Judge of the High Court and another v Ng'uni*(2007)2 EACA 201 and *The State (Irish Pharmaceutical Union) v Employment Appeal Tribunal* (1987) ILRM 36.

15. The respondent submitted that in this case, the appellant issued a notice which adversely affected the respondent but he was not given a right to be heard. It was his submission that the appellant has failed to demonstrate that it followed the right procedures and accorded the respondent a fair hearing as was held in the case of *Republic v National Land Commission & 2 others ex parte Archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kahawa West)* [2018] eKLR.

16. Regarding the appellant's claim that he had breached the Hippocratic Oath, the respondent submitted that the Oath is taken to guide physicians in their line of duty and courts are not expressly bound by the law to consider the Oath as a mandatory guide in making its decisions. He submitted that the Oath is discretionary and is applied on a case by case basis. His submission was that as correctly observed by the High Court, the existence of the Hippocratic Oath cannot sanctify the appellant's disregard of the rules of natural justice.

17. In relation to Legal Notice No. 78 of 1998, the respondent submitted that it established Moi Teaching and Referral Hospital Board as a state corporation. Having been born out of the said Notice, the appellant was bound to abide by the rules and regulations set out in the Notice as a statutory instrument created to guide its operation. Support for this submission was sought in the case of *County Government of Nyeri & another v Cecilia Wangechi Ndungu* [2015] eKLR. His submission was that the appellant is mandated to exercise oversight over its doctors in order to ensure that they offer clinical services to its patients. The provision manifests a level of responsibility from which the appellant could institute disciplinary proceedings against a doctor in its facility and thus the decision of the High Court in interpretation of the statute should not be faulted.

18. In highlighting these submissions, Mr. Mwetich submitted that rules of natural justice have been in existence from time immemorial. It was his submission that all employers in any public body, including the appellant, are required to adhere to rules of natural justice.

19. This is a second appeal. Accordingly, this court's remit is limited to a consideration of matters of law. As was held in *Kenya Breweries Limited v Godfrey Odoyo* [2010] eKLR cited with approval in *Stanley N. Muriithi & another v Bernard Munene Ithiga* [2016] eKLR:

> "In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse."

20. It appears to me that the present appeal raises a fairly narrow point of law. From the record, it was common ground that the respondent was not an employee of the appellant. He was an employee of Moi University. Under Legal Notice No.78 of 1998 and the letter dated June 14, 1990however, he was required to provide clinical services at the hospital. The High Court found that under clause 5(3) of the Legal Notice, the appellant, as part of its mandate to promote the general welfare of patients, had the mandate to take disciplinary action against the respondent.

21. However, while it was alleged in the notice dated December 6, 2004that the respondent had absconded duty, the court made a finding of fact that, on the evidence adduced before the trial court, the respondent had not absconded duty. It further found that the appellant had failed to demonstrate that it had given the respondent an opportunity to be heard before it issued the notice barring him from accessing the hospital facilities.

22. It was conceded by learned counsel for the appellant, Ms. Chesoo, that the only issue of law raised in this appeal is whether the notice to the respondent dated 6th December 2004 was issued in accordance with the law. As further observed by Ms. Chesoo, as the cause of action arose in 2004 and the decision of the trial court was rendered in 2009, the *Constitution* of Kenya 2010 and the *Fair Administrative Action Act* 2015 did not apply.

23. Submissions were made to the effect that the law applicable to this matter was the former Constitution, the *Trade Dispute Act*, cap 234, the *Employment Act* cap. 226 (both repealed) and Legal Notice No. 78 of 1998. The legislation, however, would only be applicable where there was an employee-employer relationship. Since the parties are in agreement that there was no employer- employee relationship between the appellant and the respondent, the submissions with respect to the applicable law do not advance the appellant's appeal in any way. For the same reason, the authorities cited in support of the appeal, which relate to disputes involving employers and employees, are not relevant to the issue at hand.

24. Nonetheless, as submitted by counsel for the respondent, rules of natural justice did not become part of our law with the 2010 Constitution, or the *Fair Administrative Actions Act.* They have always been part of our law. The respondent was entitled to appropriate notice and to be heard before the appellant took action terminating his access to the hospital. As the first appellate court found, the appellant did not accord the respondent an opportunity to be heard on the allegations of absenteeism made against him before it issued its notice. The rules of natural justice require that a person is heard before adverse action is taken against him. The appellant was entitled to an opportunity to answer the allegations that would deny him an opportunity to access the appellant's facilities in accordance with Legal Notice and the letter dated June 14, 1990.

25. With regard to the duty to accord a party likely to be affected by a decision a hearing, *Halsbury's Laws of England*, 5th Edition Vol. 61 page 545 at para 640 states:

> " The audi alteram partem rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet."

26. It may well be that the appellant had good reasons, related to the respondent's alleged absenteeism from duty, to terminate his access to the hospital. However, the fact that it did not accord him a hearing, as held by the first appellate court, renders its decision null and void. As was held in *Onyango Oloo v Attorney General* [1986-1989] EA 456:

> " A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at... ...
>
> In the course of decision making, the Rules of Natural Justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responding officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the Rules apply depends on the particular nature of the proceedings."

27. I accordingly find no reason to interfere with the decision of the first appellate court. I would therefore dismiss the appellant's appeal, but with an order that each party shall bear its own costs of the appeal.

JUDGMENT OF KIAGE, JA

I have had the advantage of reading in draft the judgment of Mumbi Ngugi, JA with which I agree, and have nothing useful to add.

As Tuiyott, JA also agrees, the appeal shall be disposed of as proposed by Mumbi Ngugi, JA.

JUDGMENT OF TUIYOTT, JA

I have had the advantage of reading in draft the judgment of **Mumbi Ngugi, JA,** with which I am in full agreement and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 26TH DAY OF MAY, 2023

MUMBI NGUGI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

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

SIGNED

DEPUTY REGISTRAR.