Teachers Service Commission v Kitonyo (Civil Appeal E020 of 2020) [2023] KECA 481 (KLR) (12 May 2023) (Judgment)

Neutral citation: [2023] KECA 481 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL E020 OF 2020

P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA

MAY 12, 2023

BETWEEN

TEACHERS SERVICE COMMISSION ..... APPELLANT

AND

JUSTINE NGUMA KITONYO ..... RESPONDENT

(Being an appeal from the Judgement of the Employment & Labour Relations Court of Kenya at Mombasa (Hon. Linnet Ndolo, J) dated 27th July, 2020 in Mombasa ELRC Cause No. 188 of 2017)

JUDGMENT

1. The suit before the trial court, from which this appeal arises, was commenced by way of memorandum of claim dated March 6, 2017 by the respondent herein. According to the claim, the respondent was employed by the appellant as a teacher from January 2, 2008 till August 30, 2011.

2. Following allegations of defilement of a pupil (hereinafter referred to as "the Victim") who was later found dead, the respondent was arrested, charged and arraigned in court on a charge of murder contrary to section 203 as read with 204 of the *Penal Code*. Consequently, the respondent was interdicted and later dismissed from employment. The cause of action arose from that dismissal.

3. According to the respondent, notwithstanding the fact that the medical examination of the Victim revealed that she was not defiled, he was arraigned before the High Court Malindi on September 27, 2010 and charged with her murder. It was his evidence that after pleading not guilty to the offence, he remained in custody until April 3, 2013 when he was convicted of the offence and sentenced to death. He however appealed the conviction and sentence and his appeal was allowed on November 11, 2016 and his conviction was set aside and the death sentence quashed. Upon his release, in February, 2017, he was informed at the appellant's office, when he went to inquire about his resumption of duty, that

he had been dismissed from his employment. He was then given a dismissal letter dated August 30, 2011 and another one dated May 26, 2011 which deferred his disciplinary hearing.

4. According to the respondent, notwithstanding the fact that the appellant was aware of his criminal case, since some of the appellant's officials attended and gave evidence at the trial, he was never accorded an opportunity of being heard before he was dismissed hence his dismissal was unlawful and unfair. He therefore sought a declaration to that effect; an order for reinstatement; one month's salary *in lieu* of notice; salary for 25 years up to retirement; 12 months in compensation; certificate of service; costs and interest.

5. On the part of the appellant, a memorandum of defence was filed in which it was admitted that the respondent was its employee from December, 2007. According to the respondent, following the allegations of defilement of the Victim by the respondent, an investigation was commenced and statements were taken. On April 29, 2010, the School Management Committee recommended that the respondent be interdicted and the respondent was issued with an interdiction letter and invited to respond to the allegations which he did in writing. However, following the death of the Victim in mysterious circumstances in August, 2010 after recording several statements, the respondent was invited for a disciplinary hearing on May 26, 2011 but due to the absence of the respondent the said proceedings were deferred to August 30, 2011 when 9 witnesses were present. On that day it was observed that the respondent was in police custody in respect of the allegations of the murder. However, the Victim had recorded consistent statements and the witnesses confirmed the statements they had made during the investigations.

6. Upon the evaluation of the written and oral evidence as well as the respondent's statement, the Disciplinary Panel arrived at the decision that the respondent was guilty of breach of the Code of Regulations for Teachers and was accordingly dismissed.

7. It was the appellant's position that it acted within the confines of the law, the principles of natural justice and public interest and that its decision was lawful and fair. It was its case that its mandate was restricted to professional culpability and that any action taken by the police or the court could not diminish its statutory mandate.

8. Upon considering the evidence before her, the Learned Trial Judge found that in claims arising from termination of employment, time begins to run from the point the employee is notified of the termination. Since there was uncontroverted evidence from the Respondent, that he did not receive the letter of termination until February, 2017 when he visited the Appellant's office, the Claim that was filed March 7, 2017 was well within time.

9. The Learned Judge found that the Respondent was neither present nor was he represented during the disciplinary proceedings contrary to Section 41 of the *Employment Act*; that the statements recorded from the witnesses were mainly hearsay and had material inconsistencies; that the witnesses merely confirmed their recorded statements without being subjected to questioning by the Respondent or his representative; that the Respondent's defence that he was not present at the time the victim was defiled and that he was framed was not considered in the disciplinary proceedings; and that the medical examination report whose contents did not tally with the victim's account was not considered.

10. Based on the decision in *Reuben Ikatwa & 17 Others v. Commanding Officer British Army Training Unit Kenya & Another* [2017] eKLR in which *Halsbury's Laws of England*, 4th Edition, Vol. 16(1b) paragraph 642 was cited, the Learned Judge found that the only question was whether the Respondent acted reasonably and she answered the question in the negative. In her view, an employer who literally sits on its own, ignores all evidence that does not support its case and condemns an employee unheard cannot be said to have acted reasonably. She accordingly found that the termination was wrongful and

unfair. Due to time lapse and the change in the Respondent's position, the Learned Trial Judge found the remedy of reinstatement inappropriate. She however awarded the Respondent 12 months' salary in compensation in the sum of Kshs 270,554/-, one month's salary in lieu of notice in the sum of Kshs 22,554/- but disallowed the claim for salary up to retirement. She also awarded the costs and interests as well as a certificate of service.

11. At the hearing which was hosted *vide* virtual platform, Learned Counsel, Mr Mulaku held brief for Mr Munyasa for the Appellant while Ms Kiptoo appeared for the Respondent.

12. In its submissions, the Appellant summarised its case in the following grounds: -

    a. Whether the trial Court erred in failing to evaluate the evidence in its totality and to consider the submissions by the appellant?

    b. Whether the trial Court failed to appreciate the extenuating circumstances of the case in holding that the Claimant was condemned unheard?

    c. Whether the trial Court erred in relying on a medical examination report irregularly produced and whose authenticity could not be ascertained?

    d. Whether the Respondent is entitled to the maximum of 12 months' salary award?

13. On the first ground, it was submitted that the Respondent's dismissal was based on a valid, compelling and lawful reason that he had breached the Code of Conduct for Teachers by having carnal knowledge of his own pupil. These allegations, it was submitted, were established through the investigation panel and the disciplinary panel (quasi- judicial tribunal), which the School Management Committee (SMC) set in motion to establish the veracity of the allegations.

14. It was further submitted that based on both the burden and standard of proof required in employment disputes, the Appellant had reason to believe the evidence presented before its disciplinary panel and such belief was justifiable in the circumstances. Reliance was placed on *Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 Others* [2019] eKLR, *Bamburi Cement Limited vs. William Kilonzi* [2016] eKLR and *Halsbury's Laws of England*, 4th Edition, Vol. 16(1B) para 642 and it was contended that the evidence presented before the disciplinary panel did point to the probability that indeed the Respondent had carnal knowledge of the victim as her statements and those of other witnesses squarely placed him where the incident was alleged to have happened with an opportunity to commit the act. In this regard the Court was urged to rely on *TSC v Joseph Okoth Opiyo* (2014) eKLR.

15. It was therefore the Appellant's submission that based on the evidence, it did discharge the burden of proof required in employment law and the trial Court erred in holding that the Appellant had no proper and valid reason to dismiss the Respondent.

16. Further, the Appellant submitted that trial Court erred in relying on unproved facts and making findings that were not supported by the evidence on record to find in favour of the Respondent. The sum effect of the above findings, it was submitted, was that the trial Court substituted its own 'reasonable grounds' for those of the Appellant contrary to this Court's decision in *CFC Stanbic Bank Limited v Danson Mwashako Mwakuwona* [2015] eKLR.

17. On whether the trial judge erred in finding that the Respondent was not afforded an opportunity to be heard, while appreciating that Section 41 of the *Employment Act* contemplates the employer affording the employee an opportunity to make representations, preferably accompanied by a colleague or trade union representative, it was submitted that the Appellant complied with the provisions of the said Section. According to the Appellant, the Respondent was issued with an interdiction letter explaining

the reasons for his interdiction, asked to make a written response which he did and was then invited for an oral hearing. However, the Respondent was unable to appear at the oral hearing as he was in lawful custody having been charged with the murder of the Victim.

18. While conceding that the Respondent was not heard in person by the disciplinary panel, it was contended that such failure was informed by the extenuating circumstances that were not of the Appellant's doing, and the trial Court failed to take judicial notice of the circumstances and to appreciate that due process was followed to the best of the Appellant's ability. Nevertheless, it was the Appellant's position that the Respondent's failure to make his representations before the disciplinary panel, in person, did not render the process unfair because the Respondent had been furnished with the details of the charge he faced in the interdiction letter and was given an opportunity to respond which he did and his response was duly considered by the disciplinary panel. before it arrived at t he decision to dismiss him. In this regard the Appellant relied on the case of *Kenya Revenue Authority v Menginya Salim Murgani Nairobi* [2010] eKLR, Nairobi Civil Appeal No 121 of 2017. *Jacob Oriando Ochanda v Kenya Hospital Association Ltd t/a Nairobi Hospital* [2019] eKLR and *Kenya Ports Authority v Fadhil Juma Kisuwa* [2017 eKLR to the effect that while an employer was required to hear and consider any representations by an employee, the necessity of an oral hearing depends on the on the subject and nature of the dispute as well as the whole circumstances of the particular case.

19. The Appellant thus submitted that taking into account the particular circumstances of the instant case, it was only proper to conduct the hearing through consideration of the Respondent's and witness written statements. According to the Appellant, even without the oral hearing, the Respondent was accorded a fair hearing and the opportunity to be heard in compliance with the provisions of the *Employment Act*, 2007 and the principles of fair administrative action.

20. On reliance on a medical examination by the Learned Trial Judge, it was submitted that the trial Court erred by taking into consideration extraneous factors contrary to Section 43(2) of the *Employment Act*. In the first instant, the Appellant was not privy to the impugned m e d i c a l document. The document was only produced at the trial in the Superior Court by the Respondent but it was never produced as part of his defence in his response to the Appellant's interdiction letter. Secondly, the trial Court erred in relying upon a report whose origin and authenticity could not be ascertained and was produced by the Respondent who was neither the maker nor an expert in the medical field and no basis was given for its production by the Respondent contrary to Section 33 of the *Evidence Act*. Reliance was placed on *Sibo Makovo v R* (1997) eKLR, *R v Julius Karisa Charo* (2005) eKLR and *Kenneth Mwenda Mutugi v R* (2019) eKLR.

21. Based on the above, it was submitted that the trial judge erred by taking into account a report of no probative value on which basis the Appellant was condemned.

22. On whether the Respondent was entitled to the maximum 12 months' salary award, the Appellant's case was that under Section 49 of the *Employment Act*, the court exercises judicial discretion and though an appellate Court cannot idly interfere with a discretionary award handed by a trial court, a trial court in exercising judicial discretion it bears the burden of accounting for its decision and in order to discharge this burden, it ought to explain the basis of their decision. Reference was made to the Supreme Court in its decision in *Kenfreight (E.A) Limited v Benson K Nguti* [2019] eKLR and *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A.

23. It was submitted that Section 49(4) of the *Employment Act* has offered a catalogue for factors to put into consideration when making such an award, and they range from the wishes of the employee, his contribution to the termination, length of service to alternative employment opportunities. In support of this position reference was made to the Supreme Court decision in *Kenfreight (E.A) Limited v*

Benson K Nguti Nairobi SCPET 37 of 2018 and *Ol Paieta Ranching Ltd v David Wanjau Muhoro* [2017] eKLR. It was submitted that in this case, the trial court did not record any analysis of the factors considered in arriving at the maximum award of 12 months' salary.

24. In view of the foregoing, we were urged to allow the appeal with costs to the Appellant.

25. On behalf of the Respondent it was submitted that it is not in dispute that the Appellant dismissed the Respondent on 30th August, 2011 and that the letter of termination was not served on the Respondent. It was not until the Respondent was released from lawful custody that he learnt of the dismissal. Accordingly, the Respondent did not participate in the disciplinary proceedings. According to the Respondent, Section 45 of the *Employment Act* provides that the termination of employment is deemed unfair if the employer fails to prove that the reason for termination was valid and fair and that the procedure followed in reaching at the decision to terminate was fair.

26. In this case it was submitted that the Appellant's witness admitted that the medical report confirmed that the victim's hymen was intact and that the Appellant never considered the medical evidence, which evidence the witness was aware of, in making the decision to dismiss the Respondent. The Appellant only relied on the statements recorded by witnesses. In support of the submissions the Respondent relied on *Sammy Gatimu Karanja v Teachers Service Commission* [2016] eKLR.

27. In the Respondent's submission, in terms of Section 41 of the *Employment Act*, the Respondent was not accorded a chance to respond to the allegations save for the letter of interdiction in which the Appellant indicated that before determining the case, the Respondent would be given an opportunity to be heard in person. From the letter of interdiction, it was submitted that it was the procedure of the Appellant to hold oral disciplinary proceedings and from the response to the same, the Respondent was anticipating an oral disciplinary hearing. Though the oral hearing took place, the Appellant was not aware of the same and did not attend and the Appellant was aware of the reason why the Respondent did not attend. However, the Appellant made no effort to have the Respondent respond to the witness statements it obtained.

28. Regarding the 12 months' compensation, it was submitted that an award under section 49 of the *Employment Act* is at the discretion of the court, as long as the court gives its reasons. In this case the Learned Trial Judge gave her reasons for reaching at that decision being the length of service and the violation of the law by the Appellant. Having done so, it was submitted that the said award ought not to be interfered with.

29. Accordingly, it was submitted that the appeal lacks merit and we were urged to dismiss it in its entirety.

Analysis and Determination

30. We have considered the issues raised in this appeal. This being the first appeal, this Court's mandate as re-affirmed in *Abok James Odera t/a A. J. Odera & Associates vs. John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR is:

> "...to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

31. We have set out the respective cases for the parties at the beginning of this judgement. In summary, at the time the disciplinary proceedings were taking place, the Respondent was held in a lawful custody, a fact which was well within the knowledge of the Appellant. When the matter came up on 26th May, 2011, the hearing was deferred to another date due to the absence of the Respondent. That deferred

date was to be notified to the Respondent. By deferring the matter, it is clear that the Appellant intended that the hearing takes place in the presence of the Respondent. However, on August 30, 2011, the deferred date, the Appellant proceeded with the hearing notwithstanding that the Appellant was, due to reasons beyond his control, absent. Apart from that, as rightly submitted by the Appellant, in the letter interdicting the Respondent dated May 3, 2010, was stated that the Respondent would be "given an opportunity of being heard by the Commission in person" before his case was determined.

32. Whereas this Court in *Kenya Revenue Authority v Menginya Salim Murgani* Civil Appeal No 108 of 2009, rightly held that oral hearing is not necessary in all disciplinary cases, the Court in *Girado Othieno Mahaja v Khafulu Khatwala & Another* [1983] KLR 553 clarified that:

> " If the minister began hearing evidence in pursuance of the procedure whether prescribed or not, then he must finish the case in the same manner. Once he embarks on hearing one side then it is his duty to hear the other and a failure to do so would amount to an error..."

33. It is our view that if the disciplinary body represents to the person facing disciplinary proceedings that he would be afforded an opportunity to appear in person, the failure to afford such an opportunity renders those proceedings procedurally infirm and cannot be justified by contending that the same decision would have been arrived at even if such an opportunity had been afforded. As was held by this Court in *Onyango Oloo vs. 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 since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at..."

34. In light of the foregoing, we find no reason to fault the finding by the Learned Trial Judge that the Respondent was not afforded an opportunity of being heard.

35. As regards the allegations that the Learned Judge relied in irrelevant evidence, we find that based on the concession by the Appellant's own witness regarding the manner in which the disciplinary proceedings were conducted, nothing turns on that issue. In any case the so called irrelevant evidence relating to the medical examination of the Victim was admittedly availed to the Appellant and the Appellant was aware of the same at the time of its determination. Accordingly, the Learned Trial Judge was right in her finding that the Appellant failed to take it into account in arriving at its determination. The Respondent who was already in custody and was never informed of the disciplinary proceedings, not have been expected to avail the same during the said proceedings as the Appellant contended. In any case, the Appellant having set into motion a process in which the Respondent was denied an opportunity of being heard cannot be heard to claim that it was unaware of the Respondent's defence.

36. As for the compensation, it is true that that the award of 12 months' salary amounting to Kshs 270,554/ = was the maximum awardable. In awarding the said maximum, the Learned Judge stated that it was due to the Respondent's length of service and the Respondent's violation of the law in handling the case. Whereas we appreciate the fact that award in compensation is an exercise of discretion, Section 49(4) of the *Employment Act* sets out some of the factors to be considered in making the award as the wishes of the employee, his contribution to the termination, length of service and alternative employment opportunities. In this case the Court appreciated that the Respondent had moved on and had secured alternative employment. We are of the view that compensation can only result from a wrong act committed by the respondent to a claim and therefore the mere fact that the Court finds the conduct of that respondent wrongful cannot justify a maximum award. The wrongful act must be accompanied by some aggravating factors in order to justify that kind of award. In those circumstances, it is our view that the award of the prescribed maximum was not justified. We are guided by the views

expressed in *Ol Pajeta Ranching Ltd v David Wanjau Muhoro* [2017] eKLR in which the Court delivered itself as follows:

> " The compensation awarded to the respondent under this head was the maximum awardable, that is to say, 12 month's pay. The trial judge did not at all attempt to justify or explain why the respondent was entitled to the maximum award. Yes, the trial Judge may have been exercising discretion in making the award. However, such exercise should not he capricious or whimsical. It should he exercised on some sound judicial principles. We would have expected the Judge to exercise such discretion based on the aforesaid parameters. In the absence of any reasons justifying the maximum award, we are inclined to believe that the trial Judge in considering the award took into account irrelevant considerations and or failed to take into account relevant considerations which then invites our intervention."

37. Accordingly, we allow the appeal in respect of the compensation and substitute the salary for 12 months awarded with 6 months' salary. Accordingly, the award under that head is hereby reduced to Kshs 135,324.00. Save for that, the appeal is otherwise dismissed.

38. There will be no order as to the costs of this appeal.

39. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 12TH DAY OF MAY 2023.

P. NYAMWEYA

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JUDGE OF APPEAL

J. LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR