



**Okemwa v Public Service Commission (Civil Appeal 151 of 2018)
[2023] KECA 1074 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KECA 1074 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL 151 OF 2018
J MOHAMMED, F TUIYOTT & JM NGUGI, JJA
SEPTEMBER 22, 2023**

BETWEEN

JOB KENYANYA OKEMWA APPELLANT

AND

THE PUBLIC SERVICE COMMISSION RESPONDENT

(Appeal from the Judgment of the Employment and Labour Relations Court of Kenya at Kisumu (Mathew Nduma, J.) Dated 4th October, 2018 in KSM. ELRC Case No. 199 of 2015)

JUDGMENT

JUDGMENT OF TUIYOTT JA

1. The core issue here is answered by a short decision.
2. Through a statement of claim dated 17th June, 2014 Job Kenyanya Okwemwa, the appellant, took out proceedings against the Public Service Commission (PSC), the respondent, at the now defunct Industrial Court at Nairobi. The matter was transferred to the Employment and Labour Relations Court (ELRC) at Kisumu and assigned cause No. 199 of 2015.
3. The court record of the ELRC shows that the claimant's case was heard on 23rd February, 2017 when the appellant testified and was cross-examined. The case of PSC was then reserved for 29th June, 2017 when Avisa Kiguhi Herold, a Human Resource Management Officer with the Commission testified. Hearing of both witnesses was by Maureen Onyango J. who, for some reason not revealed in the proceedings, did not write the judgment. The duty fell to Mathew N. Nduma J who rendered a decision on 4th October, 2018.
4. The judgment aggrieves the appellant who raises three grounds of appeal asserting that the learned Judge made a fundamental error in;
 1. Writing judgment on a matter that he was not the trial judge.



2. Failing to forward the court file to the trial court for judgment and instead took it to himself and dismissed the claimant's claim without perusing and considering the evidence adduced by the claimant.
3. In failing to peruse the claimant's evidence and submissions on record and erroneously dismissed the claimant's claim."
5. The respondent neither filed submissions in response to the appeal nor appeared at plenary hearing notwithstanding service.
6. In the body of the Judgment, N. Nduma, J. observed;
 - "15. The claimant did not tender any oral evidence in this matter. No witness statement was adopted in this matter as testimony by the claimant.
 16. The claimant has failed to tender any evidence to impeach the charges and disciplinary process taken against him."
7. It is readily apparent that the appellant's grievance is not a trifle because he tendered oral evidence before Hon. Onyango, J. on 23rd February, 2017. It is understandable that N. Nduma, J. mistakenly labored under the impression that no oral evidence was tendered because he is not the Judge who took the oral evidence.
8. I have had to reflect on the appropriate order to propose given this set of affairs. As a first appeal court, we could reevaluate all the evidence that was tendered including the documentary testimony and draw our own conclusions. But what that does is to deprive parties the benefit of a complete analysis of the evidence by the trial court before subjecting it to an appeal. This could abridge a party's right to fair hearing.
9. In the end I propose that the judgment of N. Nduma J. of 4th October 2018 be set aside. Aware that much judicial time would be saved if a judgment was rendered at once by the Judge who took all the evidence, I would further propose that this matter be remitted back to Onyango J. If for some reason the learned Judge is unable to complete the task then the matter be placed before another Judge other than N. Nduma, J who may elect to determine the matter from all the evidence on record or to order *de novo* hearing. For purposes of expediting the completion of this matter, it should be placed before the Presiding Judge of the ELRC for giving of directions in accordance with the decision of this Court. Last, I propose that each party bears its own costs in respect to this appeal.

CONCURRING JUDGMENT OF JAMILA MOHAMMED, J.A.

I have had the benefit of reading in draft, the judgment of my brother, F. Tuiyott, J.A. I entirely agree with the reasoning and conclusion arrived thereat and have nothing useful to add.

JUDGMENT OF JOEL NGUGI, JA

I concur with the Judgment of my brother Tuiyott, JA, which I considered in draft, and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 22ND DAY OF SEPTEMBER, 2023.

F. TUIYOTT

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JUDGE OF APPEAL



JAMILA MOHAMMED

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JUDGE OF APPEAL

JOEL NGUGI

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JUDGE OF APPEAL

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

SIGNED

DEPUTY REGISTRAR

