



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & KANTAI, J.J.A

CIVIL APPEAL NO. 186 OF 2018

BETWEEN

REUBEN WAMUKOTA SIKULU.....APPELLANT

AND

THE DIRECTOR OF HUMAN RESOURCE MANAGEMENT

MINISTRY OF DEVOLUTION AND PLANNING.....1ST RESPONDENT

THE PRINCIPAL SECRETARY

MINISTRY OF DEVOLUTION AND PLANNING.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

AND

THE PUBLIC SERVICE COMMISSION.....INTERESTED PARTY

*(An appeal from the judgment and decree of the Employment and Labour Relations Court (Nzioki wa Makau, J.) delivered on 5<sup>th</sup> December, 2017*

in

**E.L.R.C. Petition No. 30 of 2013)**

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**JUDGMENT OF THE COURT**

[1] The labour dispute that has escalated to this appeal emanates from the judgment and decree of the Employment and Labour Relations Court (ELRC) (Nzioka wa Makau, J.) dated 5<sup>th</sup> December, 2017. In a petition dated 1<sup>st</sup> August, 2013, **Reuben Wamukota Sikulu** (appellant) claimed that while working as an employee in public service under the **Ministry of Devolution and Planning** (formerly **Ministry of Local Government**) the 1<sup>st</sup> and 2<sup>nd</sup> respondents violated his right to, *inter alia*, fair administrative action by failing to take action expeditiously regarding his complaints of intimidation, frustration, mistreatment and victimization by his supervisor. That he was bypassed for promotion by his colleagues in 2011 although during the pendency of the petition, he was promoted to Job group ‘K’ on 11<sup>th</sup> February, 2016; that he was entitled to refund of school fees paid to **Masinde Muliro University** among other prayers.

[2] The respondents strenuously opposed the petition arguing that it did not disclose any cause of action for not pleading the particulars of breach of constitutional rights with precision. It was further alleged that the appellant was an indisciplined officer; that he failed to follow the procedure set under **Section 13(1)** of the Public Service Commission Regulations while applying for promotion. That the appellant failed to include the requisite appraisal forms and that the orders sought were inappropriate as they would interfere with government policy on delivery of efficient and quality services in line with the constitutional mandate vested on the respondents.

[3] After weighing the material before court, the learned Judge found that the appellant had indeed been promoted as per his prayers albeit in the course of the proceedings. The Judge noted that in the course of the petition, the appellant was promoted to Job Group K’ as per prayer

(h) which was therefore overtaken by events.

With regard to the other prayers seeking refund of school fees and related expenses, the Judge was not satisfied that the appellant had met evidential threshold of proving that he had incurred the expenses as he did not produce receipts for fees paid to **Masinde Muliro University** and that he also had failed to produce evidence that he was at work on the days he alleged his pay was deducted. The Judge also declined to grant an order expunging certain disciplinary letters from the appellant's personnel file. In all, the appellant's petition failed except that he was awarded costs as he had succeeded in getting a promotion which was a prayer in the petition.

[4] It is that decision that has provoked the instant appeal wherein the appellant complains that the learned Judge erred by: *failing to properly analyse the facts before him; failing to make a complete finding on the prayers sought; failing to properly exercise his jurisdiction; and shifting the burden of proof on the appellant.*

The appeal was disposed by written submissions and oral highlights made before us during the plenary hearing by the parties' respective counsel. **Mr. Bwire**, holding brief for **Mr. Kibungei**, appeared for the appellant while **Mr. Odhiambo** appeared for the 1<sup>st</sup>, 2<sup>nd</sup>, and 3<sup>rd</sup> respondents and the Interested Party.

[5] Standing on his feet to address us, **Mr. Bwire** learned counsel for the appellant relied on the written submissions dated 5<sup>th</sup> November, 2018 and in his brief address to us, he pointed out that the Judge failed to analyze the evidence that clearly demonstrated the appellant was a victim of unfair labour practices and that he was due for promotion in 2011 which he was denied on the grounds of indiscipline and yet he was not subjected to any disciplinary proceedings. Counsel faulted the Judge for failing to interrogate the appellant's complaints within the framework of unfair administrative actions and for that reason the matters remained unaddressed. On the issue of promotion, counsel urged that the ELRC had jurisdiction to grant prayers of promotion which was unfairly denied to the appellant. To bolster this argument counsel cited a previous decision by the same trial Judge in **E.D.K vs. K.U [2014] eKLR** where such orders were issued. Finally, on the burden of proof, it was counsel's assertion that it was upon the respondents to prove that the appellant was absent from duty as his subsequent promotion was a vindication that the allegations against him of indiscipline were untrue. It was the appellant's prayer that we re-analyze the evidence and allow the appeal with costs.

[6] The appeal was opposed by **Mr. Odhiambo** learned counsel for the respondents. He pointed out that the evidence contained in the replying affidavit sworn by **Mrs. Sally J Tanui**, the Acting Director of Human Resources, Ministry of Devolution and Planning clearly explained why the appellant was not promoted due to his poor record; that the appellant was asked to submit his Staff Performance Appraisal forms for the period 2011/2012 in order to be considered for promotion from Job Group 'J' to 'K' but failed to comply with that key requirement. Also, the appellant refused/neglected to respond to the allegations of absenteeism when invited to do so in accordance with **Section 36** of the **Public Officer Ethics Act 2009**. Regarding the appellant's assertion that the respondents be ordered to reimburse him for school fees paid at **Masinde Muliro University**, and personal expenses incurred during his official duties, as well as unpaid allowances, it was pointed out that the appellant had enrolled in the program without first obtaining approval from the Ministerial Training Committee; that the appellant conducted official duties without the necessary authorizations and that the allowances being claimed were not entitlements but are issued under the discretion of the Ministry and the nature of an officer's work. Counsel urged that the appeal be dismissed with costs.

[7] Being a first appeal, this Court is enjoined to approach the dispute as if it is conducting a fresh hearing, save for the fact that such a hearing is based on the recorded evidence of witnesses who testified before the trial court and the trial Judge may have had an advantage of seeing the demeanour of the witnesses. In particular, **Rule 29(1) (a)** of the rules of this Court provides that, on first appeal the court has the power to re-appraise the evidence in order to draw its own independent inferences of fact. **Sub-section (2)** provides: -

**“(2) Subject as aforesaid, the appellate court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Act on courts of original jurisdiction in respect of suits instituted therein.”**

See also **Sumaria & Another vs. Allied Industries Ltd [2007] 2 KLR**.

However, the instant appeal was determined on the basis of sworn affidavits, witness statements and documents produced although that does not lessen our responsibility as a 1<sup>st</sup> appellate court.

[8] That said, we have distilled the following two issues for our consideration that is: -

**(a) Whether the appellant was treated unfairly and/or discriminated against in the matter of promotion as alleged; and**

**(b) Whether the appellant was entitled to the prayers sought in the petition.**

On the first issue, the appellant's main contention is that he was subjected to differential treatment whereby the 1<sup>st</sup> respondent denied him a well-deserved promotion, which he was entitled to as of right. The appellant also stated that his colleagues were promoted from Job Group 'J' to 'K' in 2011 but he was by passed for no justifiable reasons. To this he wrote a letter dated 20<sup>th</sup> May, 2013 seeking an explanation as to why he had been passed over for promotion while his colleagues had been promoted. In a reply from **Mrs. Tanui** (Head of Human Resource) dated 28<sup>th</sup> May, 2013, the appellant's request for promotion was acknowledged but he was informed as follows: -

**“...It is true that you were due for promotion to the next grade in the year 2011. However, you were not recommended for the promotion along with others in your Department due to your bad track record of indiscipline, hence your promotion was not processed. For your promotion to be considered, you are required: (i) To have been appraised by your Head of Department and your duly signed PAS forms for the appraisal period of 2011/2012 received in the Director, HRM's office; (ii) To comply with our warning letter No 2008019087/(89) dated 2<sup>nd</sup> November 2012- forward your acknowledgement and confirmation as required**

*of you. Please take necessary action.”*

[9] A further circular from the Ministry issued on 13<sup>th</sup> July 2011, was produced in evidence that showed the conditions for promotion were *inter alia* stated in part as:-

***“The recent Performance Appraisal System (PAS) monitoring and evaluation exercise undertaken by the Ministry in the month of June 2011 revealed that most Ministries/Departments have not made production of annual performance Appraisal Reports mandatory for officers being promoted under delegated authority.***

***To harmonize the requirements for promotion both the Public Service Commission of Kenya and under delegated authority, it has been decided that with effect from the date of this circular, no promotion under delegated authority will be processed without taking into account the officers’ Performance Appraisal Reports in addition to fulfilling other requirements of the various schemes of service...”***

**Mrs. Tanui**, maintained in her affidavit evidence that matters of promotions were clearly governed by Ministry of Public Service policy, and there was no room for exercise of discretion. The Human Resource Department relied on the provisions of Regulation **E.27** of the **Public Service Code of Regulations 2006**, which guides the selection of candidates for promotion. It provides that regard should be given to merit and ability as reflected in work performance and results, as well as seniority, experience and official qualifications.

[10] We will consider the above explanation against the appellant’s incessant allegations of mistreatment by his supervisor one **Mr. Malombe**. The appellant alleged of fabricated falsehoods against him that created a hostile work environment which led to a violation of his constitutional rights including the right to reasonable working conditions as per the provisions of **Article 41(2)(b)** which provides that: -

***“Every worker has the right –to reasonable working conditions.”***

It was the appellant’s case that failure to promote him at the same time when his colleagues were promoted constituted discrimination contrary to **Section 5 (2)** of the **Employment Act 2007** which provides that:-

***“An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.”***

Further, **subsection (3) (b)** provides:

***“No employer shall discriminate directly or indirectly against an employee or prospective employee or harass an employee or prospective employee – In respect of recruitment, training, promotion terms and conditions of employment or other matters arising out of the employment.”***

[11] The appellant was vehement in his submissions, that the burden of proof was on the 1<sup>st</sup> and 2<sup>nd</sup> respondent as the employer to prove that they had not violated his rights. We agree that there is no requirement for employees who claim to have been discriminated against by their employers on whatever grounds, to strictly prove that they were indeed discriminated on those grounds. This is also supported by the provisions of **Section 5(6)** which states that: -

***“In any proceedings where a contravention of Section 5 (3) is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and the discriminatory act or omission is not based on any grounds specified in this Section.”***

Also a persuasive authority by the US Supreme Court explained the evidentiary threshold In **Reeves v. Sanderson Plumbing Products Inc.** **530 US. 138, 141 (June 12<sup>th</sup> 2000)** as follows:-

***“In appropriate circumstances, the trier of facts can reasonably infer from the falsity of the explanation that the employer is dissembling, to cover up discriminatory purpose. Such inference is consistent with the general principle of evidence law, that the fact finder is entitled to consider a party’s dishonesty about a material fact, as affirmative evidence of guilt. Moreover, once an employer’s justification has been eliminated, discrimination may well be the most alternative explanation, especially because the employer is in the best position, to put forth the actual reason for its decision.....thus, the Claimant’s prima facie case, combined with sufficient evidence to find that the employer’s asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated against the employee.”***

[12] What the employee is required to do is establish a *prima facie* case, through direct evidence or statistical proof, that he or she was discriminated against on any of the grounds set out in **Article 27(4)** of the constitution, which include; race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth. To establish a *prima facie* case, the appellant had a duty to demonstrate he qualified for the position he was denied; show that he suffered an adverse employment action as a result of the discrimination; must provide *prima facie* proof that other explanations by the employer are not contrived or without basis; that the real reason for denial of promotion was discriminatory and the reasons must bear unreasonableness or other types of malpractices which must be linked to the suffering endured by the employee. Once the employee establishes a *prima facie* case, the burden shifts to the employer, to show a legitimate explanation for refusing to grant the promotion. Where the employee has demonstrated a *prima facie* case, a presumption that the employer discriminated against the employee is raised. The employer must then articulate clear, specific, and non-discriminatory reason for denying the promotion.

[13] In the instant appeal, the 1<sup>st</sup> and 2<sup>nd</sup> respondents referred to the Ministry's policy which requires a serving officer to supply the Public Service Commission with a recommendation from their supervisor which must provide particulars of the officer's service history. The respondents produced evidence showing that the appellant had a history of misconduct and absenteeism which reflected poorly on his performance. This was a justification for being passed over for the promotion in 2011. In our view and we agree with the trial Judge on this, the appellant had a duty to provide evidence to show that by insisting that the appellant was to follow the laid down procedure when applying for promotion that the respondents were motivated by malice or pretext. We therefore agree with the learned Judge's finding that the respondents' actions in declining to promote the appellant were not actuated by malice. Our finding is also reinforced by the provisions of **Section 5(4)(a)** of the **Employment Act**, which states that: -

**“It is not discrimination to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job”.**

The appellant failed to meet the threshold for promotion as required under **Regulation E.27** of the **Public Service Code of Regulations** and the respondents were within their legal mandate to decline the promotion until there was compliance.

[14] We now come to the issue of remedies which the appellant asserts were within the court's jurisdiction to grant, but that the learned Judge failed to do so. It is relevant for us to reproduce the prayers sought by the appellant in the said petition as we carry out a re-evaluation of whether the Judge erred in the conclusions that he made. The prayers were: -

- (a) A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were jointly and/or severally in breach of the provisions of Articles 27 35, 41, 43, 47, 48 and 50 of the Constitution;*
- (b) Compensation and damages for violation of the appellant's constitutional rights;*
- (c) A declaration that the 1<sup>st</sup> and 2<sup>nd</sup> respondents were jointly and/or severally in breach of sections 3(b), 5, 12 ,15 and 75 of the Employment Act;*
- (d) An order that the alleged disciplinary conduct attributed to the petitioner by the respondents is unsubstantiated and in bad faith;*
- (e) A order that the alleged disciplinary processes (if any) as against the petitioner are overtaken by events by virtue of inordinate, inexcusable and unjustified delay on the respondents' part towards the petitioner;*
- (f) An order that the 1<sup>st</sup> and/or 2<sup>nd</sup> respondent offers an unreserved and acceptable written apology in favor of the petitioner for the various violations encountered by the petitioner in the course of his employment;*
- (g) an order that the petitioner's employment records as contained in the petitioner's personnel file maintained by the 1<sup>st</sup> respondent be corrected by the 1<sup>st</sup> and 2<sup>nd</sup> respondent to remove the information pointing to alleged disciplinary conduct relating to the petitioner;*
- (h) An order that the petitioner be promoted from Job group 'J' to 'K' with effect from 1<sup>st</sup> January 2011, or any other past date as the court may order;*
- (i) consequent to (g) above, an order that the petitioner's salary, remuneration and allowances be revised and paid to the petitioner with effect from the date of the promotion;*
- (j) An order that the petitioner be reimbursed for any lawful expenses incurred using his personal money for official duties;*
- (k) An order that the petitioner be reimbursed for school fees paid to Musinde Muliro University of Science and Technology, amounting Ksh 126,000 being fees paid for two semesters that the petitioner had undertaken towards studies approved by the Ministerial Training Committee;*
- (l) An order that the respondents refund any illegal and unjustified deductions amounting to Ksh 20,319.20 made from the petitioner's February 2011 salary; an order that the respondents jointly and/or severally restrained from making any illegal and unjustified deductions from the petitioner's salary;*
- (m) An order that the respondents and the Interested Party jointly and/or severally undertake not to victimize the petitioner in any way as a result of the petition;*
- (n) An order that the respondents be ordered jointly/ severally to ensure compliance with court orders within 90 days from the date of judgment or any timeline as the court may direct;*
- (o) Costs of the petition;*
- (p) Interest; and*
- (q) Any other orders that the court deems fit to grant.*

[15] The main remedy sought was compensation and damages for violation of the appellant's constitutional right to fair labour practices under **Article 41**, right to fair administrative action under **Article 47**, and right to access to justice under **Article 48** of the Constitution. The appellant's grievance was that the learned Judge had erred in failing to find that he had not been afforded a fair hearing in order to defend himself against the allegations of indiscipline; and hence prayers (h) and (i) remained unaddressed. It was uncontroverted that the appellant was issued with a warning letter dated 1<sup>st</sup> March, 2011 requesting him to show cause why disciplinary action should not be taken against him for absconding duty for seven (7) days. In his reply dated 2<sup>nd</sup> March, 2011 the appellant defended his actions citing hostile relationship between himself and his supervisor. However, he did not give any explanation why he was absent from duty without permission, prompting the Ministry to stop his salary as per the Public Service Code of Regulation and **Section 19 (c)** of the **Employment Act, 2007** which provides: -

**“(1) Notwithstanding section 17(1), an employer may deduct from the wages of his employee— an amount not exceeding one day’s wages in respect of each working day for the whole of which the employee, without leave or other lawful cause, absents himself from the premises of the employer or other place proper and appointed for the performance of his work.”**

[16] Another letter dated 14<sup>th</sup> September, 2012 accused the appellant of insubordination and urged him to present his defense within seven (7) days. In reply, the appellant wrote an apology letter to the Senior Deputy Secretary in an attempt to explain his misconduct. His reply was noted and a warning letter dated 2<sup>nd</sup> November 2012 was issued. As regards the allegations the respondents failed to carry out disciplinary action in order to ascertain the truthfulness of the allegations of misconduct leveled against the appellant, this contention is without basis as the evidence shows the appellant was accorded the opportunity to present his defense by way of notice to show cause. We find the trial Judge cannot be faulted for the finding that the appellant had been accorded an opportunity to be heard and therefore his rights to fair administrative action was not violated.

[17] The Judge also distinguished the case cited before him of; **E.D.K vs. K.U eKLR** which was to support the appellant's argument that, the ELRC has jurisdiction to order a promotion as a remedy. A careful reading of the said authority by the same trial Judge clarifies the issue particularly a pertinent paragraph where the Judge posited that: -

**“I cannot interpose between the Claimant and the Respondent on the contract of service and cannot thus order her promotion to the positions she has enumerated. Even if she was qualified the Court would be running afoul of the law if it were to order her appointment.”**

We see no error in the above statement that the court cannot substitute itself or assume the role of the employer, its duty is to correct errors and pronounce remedies as the case may be.

[18] This now brings us to the last issue; whether the petition as framed failed to provide the particulars of the alleged complaints, the manner of alleged infringements or the jurisdictional basis of the claims. This Court has, on numerous occasions, emphasized the importance of a party seeking a remedy to define the dispute to be decided by the court. Pleadings are central in litigation as they inform the other side of the specific issues to address in defence. This principle was established in the landmark case of **Anarita Karimi Njeru vs. Republic [1979] eKLR** as also restated in by this Court in **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 others [2013] eKLR** as follows: -

**“(42) Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorpe v Holdsworth (1876) 3 Ch. D. 637 at 639 holds true today:**

**“The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules...was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing.”**

[19] Having said that and considering this petition was predicated on **Articles 23, 27, 35 (2), 41, 43(1) (e) and (f), 47, 48 and 50** of the Constitution in its title, we find that the petition provided little or no particulars of the infringement of rights by the respondents and the actual damages suffered. For example, in paragraphs 14, 16, 17 and 20 of the petition, the appellant made sweeping allegations without offering any particulars or even evidence to show how he was entitled to the rights so claimed to have been violated; he alleged that he was guaranteed a right to have the records deleted from his file under **Article 35 (2)** of the Constitution but there was no evidence to demonstrate that he was entitled to this order. All in all, we find that the petition before ELRC did not meet the threshold established in the aforesaid cases.

We may also add that no evidence was produced to show what happened in the intervening period when the appellant was granted the promotion. The record is not clear whether he eventually complied with the set requirements under the Public Service Regulations or whatever considerations were made to grant him the promotion.

[20] For the aforesaid reasons we are satisfied that the learned Judge addressed himself to all the facts, the law and evidence placed before him before arriving at the conclusion as he did that since appellant had been granted the promotion that he sought from the respondents, he was only entitled to the costs of the suit as his other prayers were either overtaken by events or were not fit for granting. The appeal has no merit and is dismissed. This being an employment dispute and bearing in mind the relationship persist, we are reluctant to award costs and direct each party to bear their own costs.

*Dated and delivered at Nairobi this 7<sup>th</sup> day of February, 2020.*

**W. KARANJA**

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**JUDGE OF APPEAL**

**M. K. KOOME**

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**JUDGE OF APPEAL**

**S. ole KANTAI**

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**JUDGE OF APPEAL**

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

**DEPUTY REGISTRAR**