Judicial Service Commission & another v Muraya (Civil Appeal 421 of 2017) [2019] KECA 891 (KLR) (8 March 2019) (Judgment)

Judicial Service Commission & another v Francis Gitau Muraya [2019] eKLR

Neutral citation: [2019] KECA 891 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 421 OF 2017

RN NAMBUYE, DK MUSINGA & K M'INOTI, JJA

MARCH 8, 2019

BETWEEN

JUDICIAL SERVICE COMMISSION ..... 1ST APPELLANT

REGISTRAR OF THE HIGH COURT ..... 2ND APPELLANT

AND

FRANCIS GITAU MURAYA ..... RESPONDENT

(Appeal from the judgment and decree of the Employment & Labour Relations Court at Nairobi (Mbaru,J.) dated 20th July 2017 in ELRCC. No. 508 of 2014)

JUDGMENT

1. In this appeal the appellants, the Judicial Service Commission and the Registrar of the High Court are challenging the judgment of the Employment & Labour Relations Court (Mbaru, J.), which found that they had unfairly dismissed the respondent, Francis Gitau Muraya, from employment, and awarded him 3 months gross salary earned as at 6th December 2011 and one month's gross pay in lieu of notice.

2. The appellants employed the respondent as a clerical officer on temporary terms on 2nd November 1979 and confirmed his employment into the permanent and pensionable establishment on 2nd May 1990. By a letter dated 4th June 2009, the appellants dismissed the respondent from employment for desertion with effect from 16th January. On 7th December 2009 the respondent appealed against his dismissal. By a letter dated 18th May 2010, the appellants advised the respondent that they had considered his first appeal against dismissal on account of gross misconduct and found it without merit. They advised him of his right to lodge a second appeal.

3. It is noteworthy that the respondent was dismissed on grounds of desertion, but the letter of 18th May 2010 suggested that the appellants had considered the respondent's appeal against dismissal on grounds of misconduct. However, having noticed the anomaly, on 4th January 2011, the appellants wrote to the respondent and notified him that there was a mistake in the letter of 18th May 2010 and that his appeal was against dismissal for desertion and not gross misconduct as stated in the letter. They accordingly advised him to "treat our earlier letter as amended".

4. The respondent then filed an application for judicial review in the High Court (Misc. App. No. 329 of 2010) and on 19th May 2011 obtained an order of certiorari quashing the decision of the appellants to dismiss him from employment and an order of prohibition restraining the appellants from taking other measures to implement his dismissal.

5. In compliance with the court order, on 10th August 2011, the appellants reinstated the appellant and paid him all his outstanding dues. However, by a letter dated the next day, 11th August 2011, the appellants suspended the appellant from employment on grounds of serious breach of conduct by a judicial officer involving allegations of consuming alcohol during working hours, demanding and receiving payment from litigants to purportedly induce magistrates to decide in their favour, failure to take official instructions and to carry out assigned tasks, being disrespectful and using harsh and abusive language to his superiors, absenteeism and desertion of duty. The respondent was invited to show cause, within 21 days, why disciplinary action should not be taken against him.

6. The respondent replied vide an undated letter, which was received by the appellants on 5th September 2011 and contended that the grounds for his suspension were the same as those dealt with in the judicial review application. It appears from the record that the respondent appeared before a disciplinary committee on 12th September 2011, which was not satisfied with his response. Accordingly, on 13th September 2011, the appellants advised the respondent to answer each and every allegation against him within 14 days, which the respondent did vide a letter dated 15th September 2011. By a further letter dated 14th November 2011, the appellants invited the respondent to appear before the disciplinary committee on 18th November 2011. The respondent was heard as scheduled, after which, by a letter dated 6th December 2011, the appellants dismissed him from employment, without any benefits, for gross misconduct. The effective date of the dismissal was 15th August 2011 and the respondent was advised of his right of appeal.

7. The respondent did not file the appeal and instead filed a claim in the Employment & Labour Relations Court, seeking among other reliefs a declaration that his dismissal was unlawful, an order for reinstatement into service without loss of benefits or status, and any other or further relief as the court may deem fit. As we earlier adverted, after hearing the dispute the learned judge found in favour of the respondent and granted the orders that we have set out earlier in this judgment. It rejected his prayer for reinstatement on the ground that he had already attained the age of retirement. The appellants were aggrieved and filed this appeal founded on 8 grounds of appeal, but which in fact raises only two issues, namely whether the respondent was afforded a fair hearing and whether the learned judge erred by making erroneous and contradictory findings.

8. By way of prelude, Mr. Issa, learned counsel for the appellants, submitted that Article 172(1) (c) of the *Constitution* vests in the 1st appellant the mandate to receive and investigate complaints and to remove or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary as provided by an Act of Parliament. Counsel contended that the Act of Parliament contemplated by the Constitution is the Judicial Service Act, which provides the framework for appointment, discipline and removal of registrars, magistrates and other judicial officers. He went, at great length, into the provisions of the Third Schedule of the Act and the regulations made under the Act to demonstrate

that discipline is the mandate of the 1st appellant and that a comprehensive disciplinary mechanism is provided by the Act.

9. Turning to the first broad ground of appeal, counsel submitted that it was erroneous for the learned judge to hold that the respondent's dismissal was procedurally unfair. He contended that the appellants informed the respondent in advance and in details all the charges that were levelled against him and that he was subsequently heard by the disciplinary committee on the charges. In addition, it was contended, the respondent was also given the reasons for his dismissal. Relying on the judgment in *Judicial Service Commission v. Gladys Boss Shollei & Another* [2014] eKLR, counsel submitted that all the requirements of a fair hearing were satisfied, adding that from the statement of claim and his testimony, the respondent in fact never claimed to have been denied a fair hearing. The appellants also cited the decision of this Court in *Geoffrey Kiragu Njogu v. Public Service Commission & 2 Others* [2015] eKLR and submitted that the respondent could not be heard to claim that he had been denied a fair hearing when he had declined to exercise his right of appeal.

10. It was the appellants' further submission that the test for determining whether a dismissal is fair or unfair depends on whether it was reasonable, in the circumstances of the case, for the employer to dismiss the employee. Where it is found that the dismissal was reasonable, the court cannot interfere even if it felt that it could not have dismissed the respondent, if it were the employer. In support of that proposition the appellants relied on the judgment of the Employment and Labour Relations Court in *Sarah Wanyaga Muchiri v. Henry Kathii & Another* [2014] eKLR as well as that of the Labour Appeal Court of South Africa in *Nampak Corrugated Wadeville v. KhoZa* [1998] ZALA 24.

11. Turning to the second ground of appeal, the appellants submitted that the learned judge misapprehended the evidence on record and made an award that was contradictory to the findings. It was contended that although the learned judge held that the respondent was heard by the disciplinary committee on 12th September 2011 and dismissed on 13th September 2011 for failure to give satisfactory response to the allegations against him, the evidence on record is that the respondent was heard on 18th November 2011 and dismissed on 6th December 2011 after full consideration of his representations.

12. The appellants further contended that having found that the allegations against the respondent were grave enough to warrant summary dismissal and that the respondent had not offered a sufficient response, the learned judge erred by holding that the appellants had unlawfully dismissed the respondent and by awarding him compensation. It was submitted that the award of compensation was made by improper exercise of discretion in view of the learned judge's findings and therefore warranted interference by this Court. The appellants also attacked the award of compensation on the grounds that the learned judge did not give any justification for the three months gross salary, which amounted to failure to consider relevant factors, further justifying interference by this Court. In support of that submission the appellants relied on the decision of this Court in *United States International University v. Eric Rading Outa* [2016] eKLR.

13. The respondent, who appeared in person, relied on his written submissions which he highlighted before us. He maintained that the appellants did not afford him a fair hearing and that his claim in the trial court was that they had mistreated him and conducted the hearing leading to his dismissal unfairly. He adverted to the background leading to the filing of the judicial review application, which he emphasised quashed his dismissal. He contended that the appellants could not subject him to a disciplinary process on the same issues that were the subject of the judicial review application and that the appellants did not afford him a fair hearing because they invited him for the hearing of his second appeal, whereas he had not filed such an appeal.

14. The respondent further urged us to uphold the findings of the trial court that his dismissal was unfair for failure to comply with the mandatory procedural safeguards provided by section 41 of the *Employment Act*. On the same vein, the respondent submitted that there was no contradiction in the judgment of the court below because failure to observe the requirements of sections 41 and 45 of the *Employment Act* renders a summary dismissal unfair. He relied on the judgment of this Court in *Kenya Union of Commercial Food & Allied Workers v. Meru Farmers Sacco Ltd* [2013] eKLR in support of that proposition.

15. As regards the award of compensation, the respondent submitted that it was justified because the trial court found his dismissal to have been unfair. For the foregoing reasons the respondent urged us to dismiss the appeal with costs.

16. We have carefully considered the record of appeal, the judgment of the trial court, the memorandum of appeal, the submissions by the parties and the authorities that they relied upon. Being a first appeal, we are enjoined to review the evidence before the trial court, evaluate and analyse it and reach our own independent conclusions. In discharging that task we must however proceed with circumspection, appreciating that, unlike the trial court, we did not see or hear the witnesses. We are therefore only entitled to interfere with its findings if they are not supported by the evidence on record or, taking the matter as a whole, no tribunal, properly applying its mind, would have reached such conclusions. *Selle v. Associated Motor Boat Company Ltd*, (1968) EA 123.

17. The substance of the respondent's claim in the trial court was that he was unfairly dismissed from his employment. Both from the claim and his testimony, his complaint was that he was dismissed upon the same grounds that had been quashed by the High Court in the judicial review application; that the appellants invited him for a disciplinary hearing to hear and determine his second appeal, whilst he had not filed such an appeal, and on the whole, that the appellants had mistreated him because the charges against him were fabricated. None of the parties raised or addressed the issue of compliance or non-compliance with section 41 of the *Employment Act*. That provision has two limbs; the first entitles the employee to reasons for intended dismissal, in a language that he understands, and a hearing in the presence of another employee of his choice or representative of a union, while the second limb demands a consideration of the representations by the employee. Those issues needed to be specifically raised or otherwise addressed by the parties before they could form the basis of the court's decision. (See *Odd Jobs v. Mubea* [1970] EA 476). Yet those unpleaded and unaddressed issues are what the learned judge ultimately relied upon to determine the claim. On page 11 of the judgment the learned judge concluded thus:

> "I find the dismissal of the claimant vide the notice dated 6th December 2011 was procedurally unfair. I find no justification as to why the respondent failed to comply with the mandatory provisions of section 41 of the *Employment Act*, 2007."

18. Again, even assuming that the learned judge was entitled to make the findings she did, which we do not think she was, the leaned judge did not specify which of the requirements of section 41 of the Employment Act the appellants had failed to comply with, leaving the entire matter to conjecture and speculation. As regards the reasons for the intended dismissal, the three-page letter of 11th August 2011 gave the respondent, in English, details of each and every allegation against him. The respondent was given 21 days to respond to the allegations and even after he failed to respond adequately, the appellants, vide the letter dated 13th September 2011, gave him a further 14 days to answer each of the charges, which he did, before he was heard on 18th November 2011. Regarding the presence or absence of an employee of the respondent's choice at the hearing, the issue was neither raised nor addressed by any of the parties, thus raising the question how the learned judge could have decided the issue one way or

the other. Lastly, on whether the appellants considered the respondent's representations, a conclusion that they did not would be difficult to sustain in view of the learned judge's express finding that the charges against the respondent were grave and that he had failed to address them.

19. We also agree with the appellants' submissions that in reaching her conclusions on the dismissal of the respondent, the learned judge misapprehended the evidence that was before her. The learned judge expressed herself thus, on the issue:

> "In this case, the respondent does not clarify what transpired at the disciplinary hearing held on 12th September 2011 when the claimant was invited to the hearing. What is apparent is that an advance (sic) decision was taken and which led to the dismissal of the claimant from employment."

20. Contrary to what the learned judge stated, the evidence shows that the respondent appeared before the disciplinary committee on 12th September 2011 but his response was found to be inadequate, as a result of which he was given another 14 days to answer each allegation and the disciplinary hearing ultimately took place on 18th November 2011. It is not correct, as the learned judge suggests, that the respondent's dismissal was based on the proceedings of 12th September 2011. This is a clear misapprehension of the evidence for which this Court is entitled to interfere with the conclusions reached by the trial court.

21. We do not think much turns on the respondent's claim that he was denied a fair hearing because he was invited for a hearing of his second appeal, whilst he had not filed such an appeal. This is clearly a red herring and a desperate attempt to capitalize on an obvious typological error. The appellants' letter in question was in the following terms:

> "Following your appearance before the Judicial Service Commission Committee on Disciplinary Cases for Paralegal Staff on 12th September 2011 for the hearing of your second appeal against dismissal, the Committee observed that your response to the Hon the Chief Justice show cause letter Ref No, 8995 dated 11th August, 2011 did not answer to the particular charges forwarded to you.
>
> The Committee therefore resolved that you answer to each of the charges point by point within fourteen (14) days from the date hereof. A copy of the show cause letter dated 11th August 2011 detailing the charges is enclosed for your ease of reference."
>
> (Emphasis added)

22. We do not see how, in the circumstances of this appeal, the respondent could have been misled or prejudiced by the reference in the letter to a second appeal. He knew that the hearing that had been scheduled on 12th September 2011 was in respect of his suspension and intended dismissal communicated in the letter of 11th August 2011. He was also informed in express terms that he was expected to respond to the charges in the letter of 11th August 2011, a copy of which was supplied to him. In those circumstances, it is crystal clear that the respondent knew that what was to be heard were the charges in the letter of 11th August 2011 and not a second appeal, which could not have arisen as of that date, because he had not yet been dismissed.

23. The respondent also contended before us, as he did before the trial court, that the appellants could not dismiss him on the same charges that had formed the basis of his successful judicial review application. The learned judge found that the judicial review application succeeded on procedural issues and not on merit and concluded that there was no bar to the appellants initiating fresh disciplinary proceedings.

In the absence of a cross-appeal against that finding, we have no basis to delve further into the issue. (See *East African Portland Cement Co. Ltd v. Ishmael Otieno Odingo*, CA. No. 13 of 2016).

24. In our view the learned judge was also at error in failing to justify the award of three months compensation. Under section 49 of the Employment Act, the court is entitled to award a maximum of 12 months gross monthly salary, but in making the award, it is supposed to take into account the factors set out in section 49(4), such as the wishes of the employee, the length of service, the circumstances under which the termination took place, including the extent to which the employee contributed to the termination, among others. The learned judge did not advert to any of the above factors, thus making the appellant's contention that the award was arbitrary difficult to ignore.

25. Ultimately we have come to the conclusion that this appeal has merit. We accordingly allow the same, set aside the award and decree of the Employment and Labour Relations Court dated 20th July 2011 and substitute therefor an order dismissing Cause No. 508 of 2014. Each party shall bear its own cots. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MARCH, 2019.

R. N. NAMBUYE

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JUDGE OF APPEAL

D. K. MUSINGA

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

Deputy Registrar