Judicial Service Commission v Sheikh Abubakar Bwanakai & Attorney General (Civil Appeal 39 of 2018) [2019] KECA 890 (KLR) (7 March 2019) (Judgment)

Judicial Service Commission v Sheikh Abubakar Bwanakai & another [2019] eKLR

Neutral citation: [2019] KECA 890 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MOMBASA

CIVIL APPEAL 39 OF 2018

ARM VISRAM, W KARANJA & F SICHALE, JJA

MARCH 7, 2019

BETWEEN

JUDICIAL SERVICE COMMISSION .... APPELLANT

AND

SHEIKH ABUBAKAR BWANAKAI .... 1ST RESPONDENT

THE HON. ATTORNEY GENERAL .... 2ND RESPONDENT

(An appeal from the Judgment of the Employment and Labour Relations Court at Mombasa (Rika, J.) dated 15th December, 2017 in Industrial Cause No. 365 of 2013.)

JUDGMENT

1. The Judicial Service Commission (the appellant) is challenging the Employment and Labour Relations Court's (Rika, J.) decision dated 15th December, 2017 which declared the 1st respondent's retirement in public interest as unfair. Basically, we are being invited to consider and/or clarify the import and scope of retirement of public officers on the ground of public interest as a special sanction available to public entities and more specifically, to the appellant.

2. Before delving into the appeal a synopsis of the pertinent facts which gave rise to the issue at hand is essential. Shiekh Abubabakar Bwanakai Abdallah (the 1st respondent) was employed by the appellant as a Kadhi on 13th February, 1995 and thereafter he served in that capacity in several stations around the country. Apparently, on 2nd August, 2004 while the 1st respondent was stationed at Kisumu law courts a section of the Muslim community living in Kisumu held demonstrations over his conduct as a Kadhi. The said demonstrations were also broadcasted by KTN, a local television network.

3. The aforementioned publicity elicited the intervention of the appellant who commissioned the Chief Kadhi to conduct investigations into the issue. Eventually, the Chief Kadhi prepared a report and

tendered the same to the appellant. It appears that the appellant adopted the Chief Kadhi's findings and called upon the 1st respondent to show cause why disciplinary action should not be taken against him on account of the offences enumerated in a notice to show cause dated 13th October, 2004. The charges against the 1st respondent ranged from indulging in sexual immorality by harassing Muslim women who appeared before him, corruption to poor public relations.

4. He was later interdicted from performing his judicial duties vide a letter dated 14th October, 2004. The interdiction took effect from 28th September, 2004 during which period he only received ½ of his salary. The 1st respondent denied the charges against him and even went a step further to provide letters of recommendations from various people attesting to his moral uprightness. Upon considering the 1st respondent's answer to the charges against him the appellant by a letter dated 18th April, 2005 terminated his services on grounds of gross misconduct. Subsequently, the 1st respondent appealed against his dismissal on 21st April, 2005.

5. In response to the said appeal, the appellant served the 1st respondent with a letter dated 8th June, 2005 which read in part as follows:

> " Re: Dismissal
>
> Please refer to your letter dated 21st April, 2005.
>
> I wish to convey the decision of the Judicial Service Commission at its meeting of 7th June, 2005 rescinding its earlier decision to dismiss you from the service on grounds of gross misconduct.
>
> The Commission further directed that you be and are hereby suspended from the exercise and functions of your office with effect from 28th September, 2004.
>
> During the period of suspension you will receive no salary. You should not leave your duty station without permission of the Senior Principal Magistrate ...
>
> Meanwhile, you are called upon to show cause why you should not be retired in the public interest for gross breach of discipline. The charges levelled against you were enumerated in the Chief Justice's show cause letter ... of 13th October, 2004."

6. In turn, the 1st respondent wrote to the appellant on 21st June, 2005 indicating his inability to respond to the aforementioned letter for the reason that Judicial Review Misc. Applic No. 40 of 2005 (judicial review suit) was pending before the High Court. The 1st respondent had filed the said suit seeking an order of certiorari to quash his earlier dismissal amongst other judicial review remedies.

7. Undeterred by the judicial review suit, the appellant by a letter dated 26th August, 2010 once again called on the 1st respondent to hand in his written response. The said letter conveyed the position taken by the appellant as follows:

> " Re: Notice ofRetirement In The Public Interest
>
> ...
>
> The court case you have filed against your employer cannot bar us from taking administrative action against you as this is an employment contract based on mutuality.

You are therefore accorded another opportunity to respond to our notice of retirement in the public interest dated 8th June, 2005 within twenty one (21) days, failure to which the contemplated action will be taken without further reference to you."

8. It seems that at the point of authoring the aforementioned letter, the appellant was not aware that the judicial review suit had been dismissed on 19th December, 2005. Nonetheless, the 1st respondent gave in and tendered his response to the second notice to show cause. In the end, the appellant under the hand of its secretary informed the 1st respondent of its decision in a letter dated 5th July, 2012 as herein under:

" Re: Lifting ofSuspension And Retirement inThe Public Interest

...

I wish to convey the decision of the Judicial Service Commission at it meeting held on 22nd June, 2012 that the interdiction and subsequent suspension imposed on you with effect from 28th September, 2004 be lifted and you be retired on grounds of Public Interest with effect from 22nd June, 2012.

The Commission further resolved that your salary be released up to 7th June, 2005 being the date the Judicial Service Commission meeting (sic) that placed you on suspension.

The period from 8th June, 2005 to the date of your retirement will not be compensated."

9. This time round the 1st respondent lodged an appeal against his retirement which appeal was dismissed by the appellant. This turn of events instigated the 1st respondent to file a suit at the ELRC which was anchored on the ground that his retirement was unfair. The gist of his claim was that since his appointment he had performed his duties without any complaint from the appellant and that the allegations against him were fabricated.

10. The appellant stood its ground and averred that since his employment numerous complaints had been levelled against the 1st respondent some of which led to his transfer from one station to another. The allegations in question were grave and went to the judiciary's reputation as a whole. In the circumstances, the 1st respondent's retirement was the best option. At the conclusion of the trial the learned Judge found that the decision to retire the 1st respondent was not based on valid reasons and fair procedure. It is on that basis that the learned Judge issued the following orders:

   a. It is declared retirement of the Claimant (1st respondent herein) in the public interest was wrongful and unfair.

   b. The 1st respondent (the appellant herein) shall pay to the Claimant: arrears of salary at Kshs.1,388,100; and the equivalent of 12 months' salary in compensation for unfair termination at Kshs.198,300 - total Kshs.1,586,400.

   c. The 1st respondent shall facilitate the Claimant in payment of pension.

   d. Interest granted on the arrears of salary at 14% per annum, from June 2005, till payment is made in full.

   e. Costs to the Claimant to be paid by the 1st respondent.

12. Aggrieved with the foregoing decision the appellant has preferred the appeal herein complaining that the learned Judge erred by-

   i. Failing to find that the 1st respondent's suit was res judicata in light of the judicial review suit.

ii. Finding that the 1st respondent's termination was not based on due process and valid grounds.

iii. Finding that the 1st respondent's retirement was unfair and/or otherwise misinterpreting and misapplying paragraph 27 of the Third Schedule to Judicial Service Act.

iv. Making determinations on issues which were not pleaded.

v. Granting an award for payment of salary arrears and 12 months compensation for unfair termination to the tune of Kshs.1, 388,100 and Kshs.1,586,400 respectively.

vi. Imposing interest on the salary arrears at the rate of 14% per annum effective from June, 2005 until payment in full.

13. Addressing us on the genesis of the dispute, Mr. Issa, learned counsel for the appellant, stated that the 1st respondent was initially terminated under the Service Commissions Act, Cap 185 (repealed) and subsequently, when the Judicial Service Act came into force, the appellant restarted the disciplinary process culminating in the retirement of the 1st respondent on grounds of public interest.

14. Moving on to the merits of the appeal, counsel submitted that the 1st respondent had not challenged the disciplinary procedure which led to his retirement in his pleadings. Therefore, in making a determination on that issue the learned Judge acted contrary to the principle that parties are bound by their pleadings. To bolster that line of argument, reference was made to the case of Nairobi City Council vs. Thabiti Enterprises Ltd. [1995-98] EA 231. As per the appellant, this ground alone is sufficient to set aside the impugned judgment.

15. On that very issue, Mr. Issa went on to state that there was no basis for the learned Judge to find that the procedure adopted by the appellant was flawed. Expounding further, he averred that it was not in dispute that the 1st respondent was informed of the charges against him and given an opportunity to respond to the same in writing. Contrary to the learned Judge's perception an oral disciplinary hearing is not mandatory and the procedure adopted by the appellant via correspondence sufficed.

16. Furthermore, Paragraph 23 of the Third Schedule to the Judicial Service Act is clear that the 1st respondent was not entitled to minutes or reports of the disciplinary process. As such, the learned Judge was wrong to hold that the 1st respondent's right of access to information was violated. In any event, there was no evidence that the 1st respondent had requested for such documents. Counsel went as far as attributing the delay in the disciplinary process to the 1st respondent who he stated at some point had refused/neglected to put in his response to the notice to show cause why he should not be discharged in public interest.

17. The appellant took issue with the learned Judge's holding that the judicial review suit had been disposed on technical grounds rather than on merit. Mr. Issa claimed that the judicial review suit had dealt with the issue of the 1st respondent's termination with finality. Moreover, by holding that the 1st respondent had not presented sufficient evidence to substantiate his claim, the learned Judge (GBM Kariuki, J., as he then was) essentially made a finding on the merits of the judicial review. In support of that proposition, counsel relied on the case of Salem Ahmed Hasson Zaidi vs. Faud Hussein Humeidan [1960] EA 92. Therefore, the ELRC suit was res judicata.

18. The appellant also asserted that the learned Judge disregarded the provisions of the Judicial Service Act and its disciplinary process while considering whether the 1st respondent's retirement was proper. Of relevance, was Paragraph 27 of the Third Schedule to the Judicial Service Act whose purport, Mr. Issa believed was misapprehended by the learned Judge who considered extraneous issues not contemplated

thereunder. Here counsel was referring to the letters of recommendation issued in favour of the 1st respondent.

19. As far as counsel was concerned, the appellant's power under Paragraph 27 of the Third Schedule was discretionary. All the appellant is required to do is to weigh the evidence before it as against public interest which approach was outlined by this Court in the case of Mwangi Mutahi Ruga vs. Municipal Council of Nyeri & Another [2014] eKLR. He maintained that the appellant had complied with Paragraph 27 to the letter and that looking at the evidence as a whole the appellant's decision was made in public interest.

20. In conclusion, Mr. Issa criticized the learned Judge for assessing and awarding damages in the manner he did. To him there was no justification for the amounts imposed on the appellant.

21. Responding to the allegation of unpleaded issues, Mr. Gichana, learned counsel for the 1st respondent, cited Articles 22(3)(b) & (d), 22(4) ,159(2) of the Constitution and Sections 1A & 1B of the Civil Procedure Act to buttress his position that rules of procedure as hand maidens of administration of justice should not impede on substantive justice. More so, taking into account that the pleadings in question were drafted by the 1st respondent who was then acting in person.

22. It appears that Mr. Gichana is a proponent of the school of thought which believes that the doctrine of res judicata is foreign in judicial review matters. His reason for taking such a stand was due to the nature of judicial review proceedings which are neither civil nor criminal in nature but sui generis.

23. Nonetheless, he was steadfast that the ELRC suit was not res judicata because firstly, the parties in the judicial review and ELRC suits sued and/or were sued in different capacities. The judicial review suit was instituted on behalf of the state while the ELRC suit was commenced by the 1st respondent in his own capacity. Secondly, the issue in dispute in the judicial review suit was not directly and substantially in issue in the ELRC suit. Thirdly, the judicial review suit was not determined on merits.

26. Counsel contended that the procedure adopted by the appellant was not in conformity with the law. In particular, the 1st respondent was not furnished with a report and/or minutes of the disciplinary proceedings. Procedural flaws were equally evident from the unreasonable and inexcusable delay of 8 years in concluding the disciplinary proceedings. The said delay left the 1st respondent in limbo as he could not seek alternative employment to mitigate his loss since he required to report weekly to the Chief Magistrate at Kisumu. Besides, the appellant was denied an oral hearing as prescribed by the Service Commissions Act. In the end, Mr. Gichana urged us to dismiss the appeal on the aforementioned grounds.

25. In a brief rejoinder, Mr. Issa submitted that the Service Commissions Act was not applicable since the disciplinary process had commenced all over again under the Judicial Service Act. Further, retirement under the Employment Act was distinct from retirement on the grounds of public interest under the Judicial Service Act.

26. We have considered the record, rival arguments put forth on behalf of the parties and the law. It is trite that our role as the first appellate court is to first, re-evaluate the evidence before the trial court and second, determine whether the conclusions reached by the learned trial Judge are to stand or not whilst being mindful to give reasons either way. In addition, we should be cognisant that we neither saw nor heard the witnesses testify. See J. S. M. v E. N. B. [2015] eKLR.

27. The essence of res judicata is to ensure that litigation comes to an end and to prevent a party from re-litigating over the same issue. This much was reiterated by the Supreme Court in the case of Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & Another [2016] eKLR as follows:

> " The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively."

It is also worth noting that contrary to Mr. Gachanga's submissions the doctrine of res judicata applies in respect of matters of all categories. See Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & Another (supra)

28. It is settled that for res judicata to be effectively raised and upheld on account of a former suit, the following elements as outlined under Section 7 of the Civil Procedure Act must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms:

> " a. The suit or issue was directly and substantially in issue in the former suit.
>
> b. That former suit was between the same parties or parties under whom they or any of them claim.
>
> c. Those parties were litigating under the same title.
>
> d. The issue was heard and finally determined in the former suit.
>
> e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

See this Court decision in Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR.

29. Applying the above principles to this case we find that the ELRC suit was not res judicata. We say so because the issue in dispute in the ELRC suit was not directly and substantially in issue in the judicial review suit. The judicial review suit was concerned with the 1st respondent's initial dismissal on grounds of gross misconduct while the ELRC suit focused on his subsequent retirement in public interest.

30. As a general rule a court ought not to make pronouncement on issues not raised in the pleadings filed by parties. Similarly, parties are bound by their pleadings. The rationale for this principle is to ensure that parties to a suit will know with certainty the points in issue between them, so that each may have full information on the case he/she has to meet and prepare appropriately. See this Court's decision in Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others [2014] eKLR.

31. The appellant's line of argument with respect to unpleaded issues was to the effect that the 1st respondent had not pleaded that the procedure adopted by the appellant which ultimately led to his retirement was flawed. Our view on this issue is that whenever an allegation of wrongful or unfair dismissal arises a court looks at not only the validity and justifiability of the reasons for termination but also interrogates procedural fairness. See Iyego Farmers Co-operative Sacco v Kenya Union of

Commercial Food and Allied Workers [2015] eKLR. Consequently, the learned Judge cannot be faulted for looking into the procedure adopted and the reasons for 1st respondent's retirement.

32. Moving onto the substantive merits of the appeal, it is not in dispute that the letter which rescinded the 1st respondent's initial dismissal and called upon him to show cause on why he should not be retired on grounds of public interest was issued on 7th June, 2005. It is also common ground that at that time the relevant law which prescribed retirement in public interest as a sanction available to a public entity was the Service Commissions Act and in particular, Regulation 28 of the Judicial Service Regulations thereunder.

33. However, by the time the appellant resolved to retire the 1st respondent on grounds of public interest on 22nd June, 2012 the Service Commissions Act had been amended by Section 49 of the Judicial Service Act which came into force on 22nd March, 2011. The effect of the said amendment was that the provisions of the Service Commissions Act ceased to apply to the appellant. Accordingly, Paragraph 27 of the Third Schedule to the Judicial Service Act was in force. Be that as it may, the said provision which is in pari materia with Regulation 28 of the Judicial Service Regulations stipulates:

> " 27
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> 1. If the Chief Justice, after having considered every report in their possession made with regard to an officer, is of the opinion that it is desirable in the public interest that the service of such officer should be terminated on grounds which cannot suitably be dealt with under any other provision of this Schedule, he shall notify the officer, in writing, specifying the complaints by reason of which their retirement is contemplated together with the substance of any report or part thereof that is detrimental to the officer.
>
> 2. If, after giving the officer an opportunity of showing cause why he should not be retired in the public interest, the Chief Justice is satisfied that the officer should be required to retire in the public interest, he shall lay before the Commission a report on the case, the officer's reply and their own recommendation, and the Commission shall decide whether the officer should be required to retire in the public interest."

34. Our reading of the above provision reveals that the power exercised thereunder by the Chief Justice and the appellant is discretionary. Equally, the provision stipulates the confines within which such discretion should be exercised.

35. Was the 1st respondent's retirement in line with Paragraph 27 of the Third Schedule? On the procedural aspect the learned Judge found that the 1st respondent's retirement did not conform to the above provision. This finding was based on the fact that the learned Judge was convinced that the 1st respondent was not only denied, an opportunity to be heard but also access to the reports relied on by the appellant in making its decision. He also held that the procedure outlined therein was not followed; and that the period taken to conclude the disciplinary proceedings was inordinate and inexcusable.

36. Having perused the record, we find that prior to the appellant making its decision to retire the 1st respondent, it complied with Paragraph 27 of the Third Schedule. The Chief Justice considered the report prepared by the Chief Kadhi as the basis of calling upon the 1st respondent to show cause as

evidenced in the letter dated 8th June, 2005. Thereafter, after the 1st respondent responded to the notice to show cause the matter was considered by the appellant. In our view, the fact that the 1st respondent was not called for an oral hearing by itself did not violate his right to a fair hearing.

37. Due process is a fundamental aspect of the rule of law. It is the right to a fair hearing. The right to a fair hearing is encapsulated in the audi alteram partem rule (no person should be condemned unheard) and founded on the well-established principles of natural justice. See Samsung Electronics East Africa Ltd vs. K M [2017] eKLR. The spirit behind the right to a fair hearing as aforesaid, is to give an employee an opportunity to dispute the employer's allegations.

38. We are satisfied that the 1st respondent was afforded an opportunity to be heard through the correspondences that were exchanged between the parties.

Our position is fortified by this Court's sentiments in Judicial Service Commission v Gilbert Mwangi Njuguna & Another [2019] eKLR:

> "In Kenya Revenue Authority v Menginya Salim Murgani [2010] eKLR, this Court expressed that fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters. Comparatively, in the Canadian case of Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817, it was held that "the lack of an oral hearing or notice of such a hearing did not constitute a violation of the requirement of procedural fairness. The opportunity to produce full and complete written documentation was sufficient. It cannot be said that an oral hearing is always necessary to ensure a fair hearing and consideration of the issues involved. The flexible nature of the duty of fairness recognizes that meaningful participation can occur in different ways in different situations."

39. Further, the proviso to Paragraph 23 of the Third Schedule to the Judicial Service Act dispels the notion that the 1st respondent right of access to information had been violated because he was not supplied with the minutes of the meetings held by the appellant in respect to the disciplinary process. The proviso reads:

> "
>
> "1. An officer in respect of whom disciplinary proceedings are to be held under this Part shall be entitled to receive a free copy of any documentary evidence relied on for the purpose of the proceedings, or to be allowed access to it.
>
> 2. The officer may also be given a copy of the evidence (including documents tendered in evidence) after the proceedings are closed, on payment of five shillings per page of each document tendered in evidence:
>
> Provided that they shall not be entitled to copies of office orders, minutes, reports or recorded reasons for decisions."
>
> [Emphasis added]

40. On the delay in concluding the disciplinary process, we find that the relevant period to be considered is from the time the 1st respondent's initial dismissal was rescinded and he was called upon to show cause why he should not be retired in public interest, that is from 8th June, 2005. In as much as there was delay in concluding the disciplinary process the 1st respondent cannot be absolved from contributing to the same. The record is clear that he had at first refused to respond to the second notice to show

cause. This led to the appellant to issue another notice upon the 1st respondent vide a letter dated 26th August, 2010 calling for his response.

41. As for the reasons for the 1st respondent's retirement, the letter dated 8th June, 2005 is clear that the same was on the basis of the charges he faced when he was initially dismissed. He was clear on the allegations against him at all material times even at the point of his retirement on grounds of public interest. Furthermore, these charges were substantiated on a balance of probabilities by the report prepared by the Chief Kadhi. Unlike the learned Judge, we find that the consideration of the letters of recommendation was not a requirement under Paragraph 27 of the Third Schedule. All the appellant was required to consider was the report by the Chief Kadhi, the 1st respondent's response and any recommendations made by the Chief Justice to determine whether it was in public interest to retire the 1st respondent. In doing so, the appellant exercised its discretion and we see no reason to interfere with the same.

42. Besides, the charges against the 1st respondent were grave and went to the root of his employment relationship with the appellant and justified the decision taken by the appellant. The Canadian Supreme Court in Mc Kinley v B.C.Tel. [2001] 2 S.C.R. 161 rendered itself on that issue as follows:

> "Whether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More Specifically the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could say, for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer."

43. All in all, we find that the 1st respondent's retirement was procedurally fair and based on valid reasons.

44. Last but not least, on damages granted we are guided by the case of Peter M. Kariuki v Attorney General [2014] eKLR where this Court observed that:

> "It is trite that this Court will be disinclined to disturb the findings of a trial judge as to the amount of damages merely because they think that if they had tried the case in the first instance they would have given a large sum. In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court should be convinced either that the judge acted upon some wrong principle of law, or that the amount awarded was so extremely high or so very small as to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the plaintiff is entitled."

45. Having found that the 1st respondent's retirement was in accordance with the law it follows therefore that there was no reason for the learned Judge to award damages and interest thereon as he did. Besides, both parties at the trial court conceded that the 1st respondent's salary which had been withheld during his interdiction, between 28th September 2004 and 8th June 2005, had since been released to him in line with his retirement letter.

46. In the end, we find that the appeal herein has merit and we hereby allow the same. We set aside the trial court's judgment dated 15th December, 2017 in its entirety and substitute the same with an order dismissing the 1st respondent's suit. This being an employment dispute we make no orders as to costs.

DATED AND DELIVERED AT MOMBASA THIS 7TH DAY OF MARCH, 2019

ALNASHIR VISRAM

JUDGE OF APPEAL

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W. KARANJA

JUDGE OF APPEAL

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F. SICHALE

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR