



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, MAKHANDIA & OUKO, J.J.A)

CIVIL APPEAL NO. 75 OF 2016

BETWEEN

PARLIAMENTARY SERVICE COMMISSION APPELLANT

AND

CHRISTINE MWAMBUA RESPONDENT

(An appeal from the Judgment and Decree of the Employment and Labour Relations Court of Kenya at Nairobi (Maureen Onyango, J) dated 6th November, 2015 and delivered on 18th December, 2015 in Cause No. 824 of 2014)

JUDGMENT OF THE COURT

This appeal arises from the judgment of the Employment & Labour Relations Court (**ELRC**) (**Maureen Onyango, J.**) dated 6th November, 2015 in which the respondent's claim of unlawful and unfair retirement was allowed and an order of reinstatement to employment made.

We may relate the relevant facts briefly:

The respondent had a 30-year working career in the public service, 19 of them with the Parliamentary Service Commission (PSC) (**the appellant**) where she rose through the ranks to the post of Deputy Director at the appellant's Centre for Parliamentary Studies and Training (**CPST**). Her substantive post was Assistant Deputy Clerk. In all her years as a public servant, and especially with the appellant, the respondent never received any complaints about her work or faced any disciplinary proceedings. Indeed her annual staff appraisals were always exemplary.

But the year 2013 was different. Her newly employed boss as Director of CPST (since October 2012), Prof. Nyokabi Kamau, complained to the Clerk of the National Assembly on 2nd May, 2013 that the respondent was misconducting herself in her place of work. The Clerk wrote to the respondent on 29th May, 2013 leveling all manner of accusations against her including rudeness and insubordination to the Director; absence from or lateness to work; and incitement of junior staff. She was given seven days to show cause why disciplinary action should not be taken against her. Although no particulars of the misconduct were supplied, or the Regulations breached cited, the respondent responded to the accusations on 5th June, 2013 tracing her tribulations to the Director's '*prejudice, bias and intolerance*'. She asserted that the Director was mistreating, frustrating and demeaning her after learning that she had applied for the

same post of Director CPST; and also as Director, Legislative & Procedural Services, National Assembly and Senate, respectively. She proceeded to deny each and every allegation as listed by the Clerk, dismissing them as false. Nothing happened for the next one year after that response, except an attempt by the respondent on 26th June, 2013 to address an appeal to the Speaker of the National Assembly to intervene and investigate the hostility emanating from the Director which had caused her '*mental anguish, ill health and affected her passion for work*'.

The next communication she received was a bombshell. It was a letter from the Secretary PSC, dated 9th May, 2014 informing her that the PSC had met on 28th April, 2014 to consider a complaint of "*gross misconduct contrary to Regulation 25 (a), (b), (c) and (g) of the PSC Regulations 2002*". The acts of gross misconduct were listed as failure to perform lawful duty; contravention of regulations; disobedience and insubordination. She was retired forthwith in the interest of the service with full benefits, under Regulation 36. Five days later she was ordered to hand over the office keys and other PSC equipment in her possession.

By a letter dated 13th May, 2014, the respondent appealed to the appellant against her retirement asserting that she was never informed about the allegations that gave rise to the purported retirement; she was never given an opportunity to defend herself; and that there was no investigation carried out on the alleged misconduct. No response was received. The respondent read malice, bad faith and an intention to frustrate, humiliate, discriminate against her and subject her to extreme financial hardship since she had children in school and numerous loans to pay. She proceeded to the ELRC on 16th May, 2014 and filed her statement of claim.

The claim asserted that her retirement in the interest of the service was unlawful, unfair and unconstitutional hence null and void *ab initio*. She relied on the provisions of **Article 47** of the Constitution, **section 41** of the Employment Act and the PSC Regulations, 2002, all of which she asserted, were breached. She sought a declaration of nullification of her retirement and orders for, *inter alia*, reinstatement or in the alternative compensation in the sum of Sh.21.344 million commensurate with voluntary retirement; compensation for legitimate expectation; and issuance of a certificate of service.

In response, the appellant denied that the termination was unlawful, unconstitutional or against the rules of natural justice and put the respondent to strict proof. It claimed that there were numerous complaints levelled against the respondent which led to disciplinary proceedings considered at various levels of PSC culminating in a decision to retire her. It asserted that the respondent was given a chance to respond to the complaints and there was no breach of the Constitution or the PSC Regulations as alleged.

The trial court considered all the evidence placed before it, the submissions of counsel, as well as the law cited and made the following findings:

- i. "The Charges for which the respondent was retired in the interest of service had not been drawn to her attention before the retirement date.**
- ii. The respondent acted in breach of both the Employment Act, the PSC Regulations in respect of the procedure to be followed before termination of employment or retirement in the interest of service.**
- iii. The appellant's own Board of Senior Management observed that retirement of the respondent was too harsh.**
- iv. Both the appellant's Staff Welfare Advisory Committee and Senior Management Committee recommended severe reprimand as the appropriate remedy."**

The court proceeded to hold that the retirement of the respondent was unlawful and unfair for failure to comply with procedure and lacked proof of the grounds for termination. It ordered the reinstatement of the respondent to her position of Assistant Deputy Clerk with effect from 9th May, 2014 without loss of

benefits. The appellant was directed, if necessary, to transfer the respondent to any department other than the CPST. Additionally, the respondent would be deemed to have been in continuous service of the appellant without a break, and lastly, payment of all salary, allowances and benefits for the period the respondent had been out of employment was ordered.

The appellant was dissatisfied with that decision and moved to challenge it, raising 15 grounds of appeal. An attempt made by the appellant to have the decision of the trial court stayed was dismissed on 7th September, 2016 as unmeritorious. A further attempt made to this court for similar orders ended up being withdrawn and it is common ground that the respondent was reinstated to her employment in compliance with the decree of the trial court.

The appellant urged the appeal by way of written submissions and oral highlights while the respondent made oral submissions. Learned counsel for the appellant **Ms. Mercy Thanji** reduced the grounds of appeal to two main issues, namely:

- i. Whether the termination of employment was lawful.**
- ii. Whether reinstatement was the appropriate remedy.**

On the first issue, Ms. Thanji submitted that the disciplinary process was proper as it followed and complied with **Article 232** of the Constitution regarding the values and principles of public service; the Parliamentary Service Act which requires maintenance of the highest ethical standards; **Regulations 34, 35 and 36** of the PSC Regulations on the grounds and procedure for retirement on grounds of interest of the service; and **section 41** of the Employment Act giving the respondent an opportunity of being heard. In support of that submission, counsel cited the case of **Kenya Revenue Authority vs Menginya Salim Murgani [2010] eKLR** where this Court stated:-

"the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the matter before us and we are satisfied that it was a fair hearing. In the case of Local Government Board vs Arlidge [1915] A.C. 120, 132-133, Selvarajan vs Race Relations Board [1975] I WLR 1686, 1694, and in R vs Immigration Appeal Tribunal ex-parte Jones [1988] I WLR 477, 481 it was held:-

'the hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedure. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing.'

...Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made ..."

The cases of **Mumo Matemu vs Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR** and **Judicial Service Commission vs Gladys Boss Shollei & Another [2014] eKLR** were also cited in aid.

Counsel further observed that in the course of the disciplinary proceedings, the Board of Senior Management had considered two options: either to severely reprimand the respondent and deploy her to the Joint Service, or retire her in the interest of the service with full benefits on grounds of gross misconduct, and opted for the latter. She contended that the Employment Act takes precedence over the Regulations and that the Board of Management chose to be compassionate. As such, there was no summary dismissal as erroneously found by the trial court, she concluded.

On the second issue, Ms. Thanji contended that reinstatement is a measure of last resort and that the courts ought to exercise this remedy sparingly. That is because orders of specific performance of an employment contract may force two unwilling parties into an unsavoury contractual relationship. She

faulted the trial court for granting specific performance in an employment matter without any factual basis for it and contrary to the provisions of **sections 49 (3) and (4)** of the Employment Act . The case of **Kenya Airways Limited vs Aviation & Allied Workers Union Kenya & 3 Others [2014] eKLR** was cited for the proposition that reinstatement should not be given except in 'very special circumstances'.

According to counsel, the working relationship between the appellant and the respondent was untenable and therefore the remedy of reinstatement of the respondent to her former position as Assistant Deputy Clerk was not possible to implement because the position no longer existed. It was also not possible to transfer the respondent to a department where she will not work under the Director, Prof. Nyokabi Kamau, because the Director is responsible for training all staff in Parliamentary Service and the respondent will have to train under her tutelage. The only appropriate remedy, if the termination was found to have been unlawful, suggested counsel, would be an award of damages under **section 49 (1)** of the Employment Act. The case of **United States International University vs Eric Rading Outa [2016] eKLR** was cited in support of that submission.

In response to those submissions, learned counsel for the respondent **Mr. Magina**, instructed by M/s Ongoya & Wambola, Advocates, submitted that the appeal has been overtaken by events and is spent because the respondent was reinstated back on duty and therefore the appeal is academic since the decision of the trial court cannot now be reversed. He maintained that the termination was unlawful and that reinstatement was, in the circumstances of this case, the best remedy.

We have carefully considered this appeal in line with our duty, on a first appeal, to re-evaluate and re-assess the evidence on record to arrive at our own conclusions. Ordinarily we would defer to and give allowance for the findings of fact made by the court below on the basis of its assessment of the credibility of witnesses since it always has the advantage of seeing and hearing them, but this matter was not orally heard. We must therefore examine the affidavit and documentary records before us and feel free to depart from the findings of the trial court if they are based on no evidence, or were clearly based on wrong principles. See **Rahab Wangari Gatuna vs Muranga District Land Disputes Tribunal & 2 Others [2013] eKLR**.

We shall adopt and consider the two issues above urged before us by the appellant as we think they are dispositive of the appeal. First, the applicable law on the first issue is found in the Employment Act and the Parliamentary Service Commission.

The burden of proof in any complaint of unfair termination of employment or wrongful dismissal rests with the employee. But the burden of justifying the grounds for the termination or dismissal rests on the employer. That is **section 47 (5)** of the Employment Act. The following provisions of the Employment Act also cover the subject of termination of employment:-

“41. Notification and hearing before termination on grounds of misconduct:

1. Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

2. Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1), make.”

“45. Unfair termination

1. No employer shall terminate the employment of an employee unfairly.

2. A termination of employment by an employer is unfair if the employer fails to prove -

a. that the reason for the termination is valid;

b. that the reason for the termination is a fair reason -

i. related to the employee's conduct, capacity or compatibility; or

ii. based on the operational requirements of the employer; and

c. that the employment was terminated in accordance with fair procedure."

[Emphasis added].

There is no provision under the Employment Act relating to 'retirement' but retirement, as the trial court correctly observed, is one of the ways in which employment comes to an end, and is usually provided for in contracts of employment. In this case, it is covered in the PSC Regulations, 2002 which are binding on the parties. **Regulation 32** commands that '*all misconduct by employees under the Disciplinary Procedure shall be dealt with as soon as possible after the time of their occurrence*', while **Regulation 33** commands that copies of proceedings be availed to an employee undergoing disciplinary proceedings showing documentary evidence relied on. **Regulation 34 (4)** and **34 (5)** require the committee investigating an employee to inform her of the date of the investigation and that she shall be allowed, if the committee so determines, to appear before it to defend herself, and to cross examine any witnesses appearing before the committee. **Regulation 36** is about '*retirement in the interest of service*'. It is only applicable where termination is on "***grounds which cannot suitably be dealt with under any other provisions of the Regulations***". Even then, under regulation **36 (2)**, the employee must be given an opportunity to show cause why she should not be retired.

Looking at those provisions of the law and procedure and juxtaposing them with the facts of this case, one is left in no doubt that the appellant fell far too short in compliance. In the first place, the appellant appears to have been confused about the basis upon which it would proceed against the respondent. It started off as a case of '**Misconduct**' and that is why the letter dated 29th May, 2013 was served on the respondent. Specific acts of misconduct were alleged and denied on 5th June, 2013. They could only have been summarized from **Regulation 25**. Issues were joined by that denial and so, what should have followed, if the employer was not satisfied with the response, was a time table for investigations with the participation of the respondent. But it is common ground that the respondent was neither notified nor invited to appear before any investigative forum until she was served with the letter terminating her services. The excuse for such conduct was that it was not necessary to hear her, but clearly, it was against the provisions of the law and regulations cited above. There was particularly a blatant abuse of **Regulation 32** when a whole year went by before the respondent was served with the termination letter, after being kept in the dark.

To compound matters, the termination letter dated 9th May, 2014 gave the reason for termination as "**gross misconduct**" and listed four grounds. The grounds were never served on the respondent for her response before the decision was made. Now, 'gross misconduct' is one of the provisions under the Regulations upon which an employee may undergo disciplinary proceedings. It is in **Regulation 26** that various punishments are prescribed for it. It is not explained anywhere why the ultimate punishment of termination was resorted to when other modes of punishment were available for the infractions found to have been committed. Indeed, at some level, the appellant suggested a '*severe reprimand and re-deployment*' for punishment which would mean there was neither consistency nor unanimity in the manner the appellant chose to proceed. The respondent's letter dated 13th May, 2014 appealing against the termination was not denied, but nothing was said about it before she was ordered to return the appellant's property.

In sum, the thread that runs through the process leading to termination of the respondent's employment

was in breach of **Article 47 (1)** of the **Constitution** which requires that administrative action shall be expeditious, efficient, lawful and procedurally fair. We find no merit in the 1st issue raised by the appellant and reject it. We uphold the finding made by the trial court that the retirement of the respondent in the interest of the service was illogical and irredeemably tainted by breaches of the applicable law and Regulations.

Coming to the 2nd issue, it was within the discretion of the trial court to grant or refuse to grant the remedies sought by the respondent. Interference with such discretion can only be made on principles which have long been settled. Basically, it is when the trial court has misdirected itself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. See ***Mbogo & Another vs Shah (1968) EA 93.***

In making the order for reinstatement, the trial court expressed itself as follows:-

"Taking into account all the circumstances of this case I find the retirement of the Claimant to have been most illogical. She worked for the Respondent for more than 19 years with a record that is by and large clean save for the incident cited in 2009 for which she was cautioned. In spite of the Staff Welfare Advisory Committee and Senior Management Committee recommending that the Claimant be severely reprimanded and re-deployment, she was retired in the interest of the service. The reasons given by the Board for deviating from recommendations of the two Committees being that the Claimant may be eventually dismissed if not retired is without legal or factual grounding. Having not heard the case the Board had no grounds to go against the recommendations of the two Committees. The retirement in the public interest is a termination on disciplinary grounds. I find the retirement of the Claimant was unlawful and unfair for failure to comply with both procedure and to prove grounds for the termination. The only appropriate remedy in the circumstances is an order for reinstatement to her position of Assistant Deputy Clerk with effect from 9th May 2014 without loss of benefits and for her to be deemed for all intents and purposes as if she was in continuous service of the Respondent without a break. The Respondent is directed to transfer the Claimant to a department where she will not be required to work with Prof. Nyokabi Kamau, the Director, Centre for Parliamentary Studies and Training. I further order payment of all salary, allowances and benefits for the period the Claimant has been out of employment."

It is apparent that the trial court did not refer to any authority on the remedy of reinstatement, but Githinji, JA in the ***Kenya Airways case (supra)***, which was cited by the appellant, stated as follows:

"The remedy of reinstatement is discretionary. However the Industrial Court is required to be guided by factors stipulated in section 49 (4) of the EA which includes the practicability of reinstatement or re-engagement and the common law principle that specific performance in a contract for employment should not be ordered except in very exceptional circumstances. The court should also balance the interest of the employee with the interest of the employer..... The EA has enacted the common law principle that the remedy of reinstatement should not be given except in "very exceptional circumstances".

In that case, an order of reinstatement was reversed after the appellate court was unanimously satisfied that the redundancy procedure followed by Kenya Airways was lawful and fair to both parties.

It is urged before us by the appellant that the order of reinstatement is impossible to implement because the respondent's former employment position of Assistant Deputy Clerk has ceased to exist, and that Prof. Nyokabi Kamau who is responsible for training all staff in the Parliamentary Service will have to train the respondent. Those submissions, however, were not made before the trial court and it cannot therefore be faulted for failing to consider what was not before it. The court was clear in its findings that the termination of employment was most illogical, unlawful and unfair. We have affirmed that it indeed was. The court also considered the recommendations made by appellant's Staff Welfare and Senior

Management Committees that the punishment of reprimand and re-deployment be meted out to the respondent. If the recommendation had been adopted, it would have been possible to retain the respondent in employment even if it be in a different part of the organization. The appellant's own disciplinary organs were thus persuaded that the continued employment of the respondent was a tenable option in the circumstances. The trial court cannot therefore be faulted for swaying towards the same persuasion. Reinstatement was a feasible remedy, and in our finding, the discretion of the trial court was properly exercised. We have no basis or desire to replace it with our own discretion. In any event, the reinstatement is now a *fait accompli*.

With that finding, the second ground of appeal fails too, as does the entire appeal.

We order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 9th day of February, 2018.

P. N. WAKI

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JUDGE OF APPEAL

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

W. OUKO

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR