



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, KIAGE & MURGOR. JJ.A.)

CIVIL APPEAL NO. 212 OF 2010
BETWEEN

RAPHAEL KURIA KIWARA.....APPELLANT

VERSUS

THE HON. ATTORNEY GENERAL.....RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya (Osiero, J.) dated 20th June, 2006

in

H.C.C.C. No. 1047 of 2001)

JUDGMENT OF THE COURT

INTRODUCTION

1. This judgment relates to the appellant's claim for general and exemplary damages for alleged unlawful dismissal from the public service in August 2000. The High Court (Osiero, J.) held that the appellant's claim had no merit and dismissed it with costs, thus triggering an appeal to this Court.

THE APPELLANTS CLAIM BEFORE THE HIGH COURT

2. In his plaint, the appellant, who was an Under Secretary in the Ministry of Agriculture and Livestock Development, claimed that on 19th August 1996 he was sent on compulsory leave; on 5th March, 1997 he was interdicted; on 30th September 1997 together with others was arraigned before the Chief Magistrates' Court at Nairobi on a charge of neglect of duties contrary to **Section 128** of the **Penal Code**; and on 7th May 1999 the appellant was acquitted of the said charges. Despite his acquittal, on 15th August, 2000 the Public Service Commission dismissed him from public service.

3. The appellant claimed that the charges preferred against him were unlawful and his prosecution was malicious. He set out the particulars thereof. He alleged, *inter alia*, that no reasons were given for his compulsory leave; that he was not given any hearing before or after commencement of the criminal proceedings; that the actions of the Permanent Secretary were accentuated by malice and personal vendetta; and that the respondent's conduct was contrary to the Public Service Commission Act and rules of natural justice.

4. The appellant also claimed that he was defamed by the unlawful criminal charges and claimed general and exemplary damages.

THE RESPONDENTS DEFENCE

5. The respondent, through one **Sarah Luti**, the Human Resource Officer, and **Michael Bwire**, the Chief Accountant in the said ministry, testified that the appellant was dismissed because of issuing and signing Authority to Incur Expenses without matching budgetary provision to the tune of over Kshs.34 million. Prior to his dismissal, he was informed of the charges against him and asked to show cause why he should not be dismissed from public service. The appellant responded in writing, which explanation was considered by the Public Service Commission but found unsatisfactory. The Public Service Commission dismissed him; the appellant who then preferred an administrative appeal, but the appeal was also dismissed.

THE HIGH COURTS DECISION

6. Dismissing the appellant's claim, the learned judge analysed the provisions of **Regulation 40** under the **Service Commissions Act** which states as follows:

"40 (1) If an authorized Officer, after having considered every report in his possession with regard to a public officer, is of the opinion that it is desirable in the public interest that the service of the public officer should be terminated on the grounds which cannot suitably be dealt with under any other provisions of those Regulations, he shall notify the public officer, in writing specifying the complaints by reason his dismissal is contemplated together with the substance of any report or part thereof that is detrimental to the public officer.

(2) If after giving the public officer an opportunity of showing cause why he should not be dismissed from public service, he shall forward to the commission the report or the case, the public officer's reply and his own recommendation and the commission shall decide whether the public officer should be dismissed."

7. The learned judge then held as follows:

"In the instant case, the plaintiff was informed by the letter dated 20^h April 2000 about his contemplated dismissal.

He was also in that letter informed of all the complaints against him which necessitated that he shows cause why he should not be dismissed. He was given an opportunity to reply to those charges against him and he replied denying the charges. The authorized officer having decided that the plaintiff should be dismissed forwarded to the commission the charges against the plaintiff, the plaintiff's reply and his recommendation.

From the correspondences between the public officer and his authorized officer and all the materials before me, I am satisfied that there was compliance and observation of Regulation 40 as required by the Act and the plaintiff was afforded opportunity to reply to the complaints against him.

As I had stated earlier, the decision to dismiss the plaintiff lies with the commission and the commission in the exercise of its functions under the Constitution shall not be subject to the direction or control of any other person or authority. Its decision can only be challenged if the authorized officer, when forwarding the report on the case, the public officer's reply and his own recommendation fails to observe the correct procedure as provided for under Regulation 40 as laid down in the Act. The Commission had reached the decision to dismiss the plaintiff independently and its decision was communicated to the plaintiff. This was after the Commission had considered the charges against the plaintiff, his reply and the recommendations of the authorized officer as well as materials availed together with the report."

8. Aggrieved by the aforesaid decision, the appellant preferred an appeal to this Court. In his memorandum of appeal, the appellant stated that the learned judge misdirected himself in proceeding on the basis that his case was a challenge on the power of the Public Service Commission to effect dismissal of public servants, whereas the appellant's case was that in view of his acquittal in the criminal case, the subsequent interdiction, suspension and eventual dismissal was wrong in law and that the learned judge erred in believing the evidence of the respondent without any proof at all.

9. The Respondent filed written submissions on 4th May, 2016 but his representative did not attend Court when the appeal came up for hearing on 24th September, 2018. For the appellant, learned counsel, **Mr. Mutiso**, made oral submissions.

10. In his brief submissions, Mr. Mutiso argued that the primary issue for determination before the High Court was whether the decision to terminate the appellant's services was right, in view of the fact that he had been acquitted of the criminal charges that had been preferred against him, given that they were the same ones that were relied upon by his employer to mete out the disciplinary action of dismissal. Counsel further argued that the two witnesses who testified on behalf of the respondent joined the Ministry of Agriculture and Livestock Development long after the occurrence of the events that led to the appellant's dismissal. Counsel's view was that their evidence was at best hearsay.

12. Lastly, counsel faulted the learned judge for failing to indicate the amount he would have awarded the appellant, if he had succeeded in his suit. He urged us to set aside the High Court's judgment; assess the quantum of damages payable to the appellant and order payment thereof. He also sought costs of the appeal.

13. In his written submissions, the respondent raised three substantive issues. The first one was that the suit was time barred; secondly, the dismissal was justified; and thirdly, the appellant was not entitled to any damages.

14. On the first issue, it was submitted that the appellant was acquitted of the criminal charges on 7th May, 1999. The plaint was filed on 22nd June 2001 without any leave of the court. The suit was therefore time barred, in terms of **Section 3(1)** of the **Public Authorities Limitation Act** which states as follows:

"No proceedings founded on tort shall be brought against the government or local authority after the end of twelve months from the date on which the cause of action accrued."

15. On the second issue, the respondent submitted that the learned judge correctly interpreted **Regulation 40**; in that the appellant was notified of the complaints against him; was granted opportunity to show cause why he should not be dismissed from public service; the Principal Secretary forwarded his recommendation to the Public Service Commission, which eventually decided that the appellant be

dismissed from public service.

16. Lastly, the respondent submitted that general and exemplary damages are not awardable in employment matters where a party is alleging unlawful dismissal from employment. In support of this contention, he cited **ALFRED J. GITHINJI v MUMIAS SUGAR COMPANY LIMITED, Civil Appeal No. 194 of 1991** and **RONALD KIMATU NGELI v UKULIMA SACCO SOCIETY LTD, Civil Appeal No. 277 of 2009**.

ANALYSIS OF THE EVIDENCE & DETERMINATION

17. We shall start by considering whether the appellant's suit was time barred. We note from the proceedings that during the hearing of the suit before the High Court, on 12th October, 2005 one **Mr. Chahali**, who appeared for the respondent, raised the issue of limitation. He told the Court:

"The plaintiff has in paragraph 8 claimed damages for false imprisonment and malicious prosecution and the two causes of action are barred by limitation under Section 3(1) of Public Authorities Limitation Act Cap 39 and also the claim for defamation. Section 20 Defamation Act Cap 36."

The record further shows that the appellant's counsel conceded that objection. The record reads as follows:

"Mr. Mutiso: (to that we concede the claim we filed out of time)."

We think the objection was merited and the concession was therefore in order. Our task is therefore limited to a consideration of whether the appellant's dismissal was in accordance with the law.

18. The plaint as filed before the High Court seeks judgment for:

- "(a) General and exemplary damages.**
- (b) Costs of the suit.**
- (c) Such or further relief as this Honourable Court may deem fit."**

It does not contain any prayer for special damages; yet under paragraph 16 it is pleaded as follows:

- "16. The plaintiff will contend that as a result he suffered the following pecuniary loss:**
- (a) Half salary of Kshs.9932.50 p.m. for the period of interdiction.**
 - (b) Full salary of Kshs.19,865/- p.m. for the period of suspension**
 - (c) House allowance for the period Kshs.31,722/-**
 - (d) Lost income"**

19. Mr. Mutiso submitted that the appellant, having been acquitted of the criminal charges, and having presented to the concerned Permanent Secretary copies of the proceedings and judgment, ought to have been reinstated to his employment. Instead, the Permanent Secretary wrote to the appellant, notifying him that he would be surcharged for the amount of money that was the subject of the criminal case. He was then required to show cause why he should not be surcharged.

20. Counsel submitted that all the events post the appellant's acquittal amounted to a retrial and were in violation of **Section 25(3)** and **26(3)** of the **Service Commissions Act** (now repealed) which provide as follows:

"25(3) Where a public officer has been acquitted of a criminal charge such public officer shall not be dismissed or otherwise punished on any charge upon which he has been acquitted, provided that nothing in this regulation shall prevent an authorized officer from dismissing or otherwise punishing, after consultations with the Attorney General, such public officer on any other charge arising out of his conduct in the matter unless the charge raises substantially the same issues as those on which he has been acquitted.

26(3) No punishment shall be inflicted on any public officer which would be contrary to any law."

21. By a letter dated 20th April, 2000, the Permanent Secretary requested the appellant to respond to various queries and allegations, most of which were similar to the ones that had been raised in the criminal case. The appellant did so. That notwithstanding, by a letter dated 15th August, 2000 the Public Service Commission dismissed the appellant **"on account of gross misconduct"** with effect from 20th April, 2000. The appellant argued that the dismissal amounted to double jeopardy and was contrary to **regulations 25(3)** and **26(3)** aforesaid.

22. In **Criminal Case No. 2458 of 1997**, the appellant together with five others were jointly charged with neglect of official duty by signing

and issuing excess Authority to Incur Expenditure (A.I.E.s) totalling to over Kshs.538 million. In the letter dated 26th January, 2000 and the subsequent one of 20th April, 2000, the Permanent Secretary accused the appellant of being party to the issue of several A.I.E.s in a manner that he knew was contrary to the laid down accounting procedures and regulations. It was further alleged that the appellant did not seek the Accounting Officer's authority to issue the A.I.E.s. For the deliberate violation of laid down accounting procedures and regulations, the ministry intended to surcharge the appellant for the substantial expense unlawfully incurred, unless he showed sufficient cause why such disciplinary action could not be taken.

23. What this Court must determine is whether the proviso to **regulation 25(3)** (supra) was sufficient to justify the respondent's action of dismissing the appellant from employment following his acquittal over similar criminal charges. A close examination of the particulars that were cited by the Permanent Secretary in his letter dated 20th April, 2000 as the reason for the appellant's suspension and ultimate dismissal reveal that they are not the exact ones for which he had been charged and acquitted of. They may be classified as **"other charge, arising out of his conduct in the matter."** The charges raised therein cannot be said to be substantially the same issues as those on which he had been acquitted. They are related but not substantially the same.

24. Under that repealed regulation, nothing prevents an authorized officer from dismissing a public officer previously acquitted of a criminal charge on any other charge arising out of his conduct in the matter, **"unless the charge raises substantially the same issues as those on which he has been acquitted."**

25. Apart from irregular authorization of A.I.E.'s, the Permanent Secretary also accused the appellant of misappropriation of public funds; acting in deliberate violation of laid down accounting regulations and procedures; and defiance of lawful instructions from the Accounting Officer. All the above amounted to gross misconduct, according to the Permanent Secretary. The Public Service Commission, having reviewed the case, agreed with the Permanent Secretary and dismissed the appellant.

26. In our view therefore, we do not agree that the appellant's dismissal was in violation of **regulations 25(3)**. This Court has had occasion to consider the application of a similar regulation in a number of cases. In **JAMES MUGERA IGATI v PUBLIC SERVICE COMMISSION OF KENYA [2014] eKLR**, the claimant was interdicted and subsequently charged with the offence of making a document without authority. Following his acquittal, the claimant forwarded the court decision to his employer and requested for lifting of the interdiction. Instead, the respondent asked the claimant to show cause why he could not be disciplined for gross misconduct. His explanation was not accepted and was dismissed with loss of all his benefits.

27. The claimant made an administrative appeal under the **Public Service Commission Regulations 2005**, retracing the history of the criminal matter and its relation to the disciplinary process. He contended that the allegations against him had been dealt with by a court of competent jurisdiction and the employer was bound to accept the decision. The claimant's appeal was rejected. He then filed a suit in the Industrial Court challenging his dismissal. Dismissing the suit, the Court (Rika, J.) held, *inter alia*, that the Public Service Commission was not bound by the outcome of the criminal proceedings. The learned judge held:

"The claimant appears to confuse the disciplinary process, which is properly a private process between an employer and its employee, whose aim is to ensure the employer's business is not harmed by delinquent employee behavior, with a criminal trial which is a public process where prosecution is carried out by the State and is purposed on securing the safety of the general population, and on maintenance of social order."

28. In **GEOFFREY KIRAGU NJOGU v PUBLIC SERVICE COMMISSION & 2 OTHERS [2015] eKLR**, this Court affirmed the position taken by Rika, J. in the above cited decision.

29. In **KIBE v ATTORNEY GENERAL (Civil Appeal No. 164 of 2000)** this Court held that acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer. The Court explained the rationale as follows:

"The reason for this is straight forward; a criminal trial and internal disciplinary proceedings initiated by an employer against an employee are two distinct processes with different procedural and standard of proof requirements. While an employer may rely on the outcome of a criminal trial against an employee to make its decision on that employee, going against the outcome does not by itself render the employer's decision wrongful or unfair."

30. While we agree with the appellant's counsel's submissions that the learned judge seemed to have misconstrued the appellant's case to be a challenge on the power of the Public Service Commission to effect a dismissal of a public servant, we do not agree that the appellant's acquittal of the criminal charges aforesaid rendered his subsequent interdiction, suspension and eventual dismissal wrongful, which is the gravamen of this appeal.

31. Consequently, we hereby dismiss the appeal in its entirety. Each party shall bear his own costs.

Dated and delivered at Nairobi 7th day of December, 2018.

D.K. MUSINGA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR