



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: VISRAM, KARANJA & J. MOHAMMED, J.J.A)

CIVIL APPEAL NO. 271 OF 2012

BETWEEN

THE ATTORNEY GENERAL.....1ST APPELLANT

THE PUBLIC SERVICE COMMISSION.....2ND APPELLANT

AND

CRISPINUS NGAYO MUSUNDI.....RESPONDENT

(An appeal from the Award of the Industrial Court of Kenya at Nairobi (Mukunya, J.) dated 1st July, 2011

in

Industrial Cause No. 120 (N) of 2009)

JUDGMENT OF THE COURT

This is an appeal from the decision of the former Industrial Court, now known as the Employment and Labour Relations Court. Being a first appeal, the Court of Appeal is enjoined to revisit the evidence presented before the court below afresh, analyse it in order to arrive at its own independent conclusion bearing in mind that it did not see or hear the witnesses as they testified. See **Seascape Ltd vs. Development Finance Company of Kenya Ltd [2009] KLR 384.**

Crispinus Ngayo Musundi (the respondent) was employed by the Public Service Commission (the 2nd appellant) sometime in March, 1982. He acted in various capacities and was ultimately appointed as a District Accountant in the then Ministry of Finance. A routine inspection was carried out by the said ministry in its various district treasuries sometime in November, 2003. The inspection unearthed financial mismanagement and irregularities at the Lugari District Treasury which were attributed to the respondent. By a letter dated 19th January, 2004 the Accountant General informed the respondent, who at the material time acted as the District Accountant at Luagri District Treasury, of the same and gave particulars of the said irregularities. It is instructive to note that not only was the respondent asked to respond to the issues raised therein, but the Accountant General also by the said letter recommended disciplinary action to be taken against him.

As a result, on 2nd June, 2004 the respondent was called upon to show cause why he should not be dismissed on grounds of gross misconduct. Upon considering the respondent's explanation, the disciplinary committee found it to be unsatisfactory and went ahead to interdict the respondent. While the respondent was on interdiction, he was once again cited for financial mismanagement this time around at his current station, the Teso District Treasury. He was later suspended vide a letter dated 1st August, 2006. Eventually, on 5th June, 2006 he was informed of the 2nd appellant's decision to dismiss him from service with effect from 31st June, 2006. As expected the respondent appealed against the said decision, which appeal was dismissed by the 2nd appellant.

Convinced that the 2nd appellant had not followed due process in terminating his services, the respondent filed suit in the Industrial Court. He claimed that he was neither informed of the charges against him, if any, nor heard before his dismissal. In his view, his termination was actuated by malice. He also considered it to be unfair because the whole disciplinary process was not conducted expeditiously. Besides, there was no reason to warrant his dismissal. He sought *inter alia*-

- ***A declaration that the claimant's dismissal from government service was wrong, unfair and unlawful.***
- ***A declaration that the decision to dismiss claimant was too harsh and extreme in the circumstances of the case and the same be set aside.***
- ***An order that the claimant be reinstated back into employment at his then scale and service.***
- ***The claimant be paid all his unpaid salary and allowances for the period he has been out of service.***

In the alternative: -

- ***The claimant's dismissal be set aside and be substituted with a normal termination.***
- ***An order do issue that the claimant be paid all his terminal benefits or pension and entitlements in lump sum and monthly pension as would be due to him in a normal termination under his scheme of service and age being:-***

a) Lump sum pension payment Kshs. 717,770.10/=

b) Unpaid outstanding Housing &

Medical allowance Kshs. 123,695/=

c) 60 days leave committed (sic)

for cash..... Kshs. 33,770/=

Total.....Kshs. 875,235/=

In response, the 2nd appellant maintained that the respondent's dismissal was justified taking into account his conduct. His interdiction, suspension and dismissal were in accordance with the 2nd appellant's regulations. According to the appellants', the respondent was given an opportunity to be heard and his explanation was taken into consideration.

The trial court in an award dated 1st July, 2011 found in favour of the respondent. The court held that the respondent was wrongfully terminated principally because he was not given an oral hearing before his dismissal. Noting that there were valid reasons for the respondent's dismissal, the trial court substituted the summary dismissal with what it termed as normal termination. It also granted the respondent 3 months' salary as compensation for the wrongful termination; and terminal benefits as prayed aggregating to Kshs. 875,235/=.

It is that decision that has provoked the appeal which is predicated on the grounds that the learned Judge

erred in law and fact by –

- ***Misconstruing the procedure for dismissal in the Service Commissions Act hence, arriving at a wrong decision.***
- ***Failing to appreciate that the statutory procedure for disciplining public officers was prescribed by the Service Commissions Act.***
- ***Failing to appreciate that the respondent had been accorded an opportunity to defend himself yet he had tendered written representation.***
- ***Applying the provisions of the current Employment Act which was not in force at the time the cause of action arose.***
- ***Finding that there was a breach of due process.***
- ***Awarding damages to the respondent despite finding that he had misappropriated public funds.***

Mr. Onyiso appeared together with Ms. Oyugi for the appellants while Mrs. Namada appeared for the respondent. The appeal was disposed of by way of written submissions as well as oral highlights.

It was submitted that the respondent's dismissal was justified. The appellants reiterated that he was dismissed for gross misconduct arising from misappropriation of funds. In the appellants' opinion, there was evidence that money was lost at the Lugari District Treasury and the respondent in his evidence confirmed the same. At the material time he was in charge of the said District Treasury. In that regard, the appellants relied on the sentiments of the Canadian court in **Michael Dowling vs. Workplace Safety and Insurance Board** [2004] CAN LII 436 thus,

“It can be seen that the core question for determination is whether an employee has engaged in misconduct that is incompatible with the fundamental terms of employment relationship. The rationale for the standard is that the sanction imposed for misconduct is to be proportional- dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship. This is a factual inquiry to be determined by a contextual examination of the nature and circumstances of the misconduct.”

As far as the appellants were concerned, the respondent was given an opportunity to be heard. Elaborating further, the appellants maintained that the respondent was furnished with the details of the charge facing him; he was later served with a notice to show cause to which he was given an opportunity to respond. He did give a written explanation which was considered by the relevant departmental committee which was appointed to investigate the issue. In any event, Legal Notice No. 32 of 1998 had removed the requirement for oral hearings at the Public Service Commission. (The Legal Notice was the Public Service Commission Regulations, 2005 which repealed the initial Regulations). The respondent's written defence was sufficient.

The trial court was faulted for substituting its verdict with that of the 2nd appellant. Buttressing this line of argument, reliance was placed in the South African case of **Nampak Corrugated Wadeville vs. Khoza** (JA 14/98) [1998] ZALAC 24 wherein it was held,

“A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable.”

Last but not least, the appellants felt that the respondent did not prove the special damages he had claimed. The Court was urged to allow the appeal.

For the respondents, it was argued that the Court has no reason to interfere with the trial court's decision. According to the respondent, the bone of contention was whether he was entitled to be heard before the decision to dismiss him was made. The right to be heard as envisaged under the rules of natural justice and the **Constitution** was an oral hearing wherein a party is given an opportunity to ask questions and challenge his/her accusers. The respondent argued that the Public Service Regulations could not take away such a right. The respondent's position was that it was fundamental for him to be given an oral hearing in light of the clarifications which were made by the District Accountant who replaced him at the Lugari District Treasury. If he had been given an oral hearing, the 2nd appellant would have come to a different decision.

All in all, learned counsel urged that the trial Judge had exercised his discretion properly in awarding damages. It is not in dispute that at the time the respondent was dismissed, the **Employment Act, 2007** had not come into force. It commenced on 2nd June, 2008 and as such, the said Act is not applicable in this case.

Nevertheless, the rules of natural justice require that a person should not be condemned unheard; that decisions affecting him/her should not be reached behind his/her back. The courts have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made. In **Onyango vs. Attorney General [1986-1989] EA 456**, Nyarangi, J.A asserted at page 460;

“A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right. If the principle of natural justice is violated, it matters not that the same decision would have been arrived at.”

The landmark decision of the House of Lords in **Ridge vs. Baldwin [1964] AC 40** clarified the law that the rules of natural justice, in particular right to fair hearing, (*audi alteram partem* rule) applied not only to bodies having a duty to act judicially but also to the bodies exercising administrative duties. In that case, Lord Hodson at page 132 identified three features of natural justice as:

- a) The right to be heard by an unbiased tribunal.***
- b) The right to have notice of charges of misconduct.***
- c) The right to be heard in answer to those charges.***

In this case, it is not in dispute that the 2nd appellant wrote a letter dated 19th February, 2004 to the respondent clearly setting out the charge facing him, *to wit*, financial mismanagement at the Lugari District Treasury. Equally, it is clear from the said letter that the details of the charge were set out therein. Therefore, the claim that the respondent was not informed of the charges against him ought to fail.

The crux of this appeal is whether the respondent's right to be heard entailed an oral hearing. In **R vs. Immigration Appeal Tribunal ex-parte Jones [1988] 1 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 Court of Appeal in **Kenya Revenue Authority vs. Menginya Salim Murgani [2010] eKLR** concurred with the above sentiments and adopted the same. Guided by the foregoing, the right to be heard need not be oral and can be through written representation. However, there ought to be compliance with

basic fairness procedures.

By the letter dated 19th January, 2004 the respondent was invited by the 2nd appellant to respond in writing to the charges therein. He responded in detail to each allegation through his letter dated 19th February, 2004. Even when he was called upon to show cause why he should not be dismissed on grounds of gross misconduct, the respondent was given an opportunity to respond in writing within 21 days which he did by a letter dated 29th June, 2004. Moreover, upon appealing against his dismissal by letter dated 4th July, 2007, the 2nd appellant considered the same and communicated its decision by a letter dated 10th June, 2008. It is therefore clear that the respondent was given an opportunity to defend himself.

The procedure adopted by the 2nd appellant conformed to **The Public Service Commission Regulations (repealed)** made pursuant to the **Service Commissions Act (repealed)** which was applicable. **Regulation 29(1)** provided:-

“All acts of misconduct by public officers shall be dealt with under this part as soon as possible after the time of their occurrence.”

Upon being cross-examined, the respondent did concede that there were financial irregularities during his tenure at Lugari District Treasury. It follows therefore that the dismissal was proportionate to his conduct which led to the total breakdown of his employment relationship with the 2nd appellant. The Canadian Supreme Court in **Mc Kinley vs. B.C. Tel [2001] 2 S.C.R 161** in discussing the standard to be employed in determining whether an employee’s misconduct (in that case dishonesty) gives rise to just cause for dismissal stated,

“[W]hether 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.”

With regard to the terminal benefits, **Regulation 28** of the **Public Service Commission Regulations, 2005 (repealed)** stipulated that,

“Subject to any law for the time being in force, a public officer who is dismissed shall forfeit all rights or claims to a pension, gratuity, annual allowance or other retiring award, and any rights or claims he enjoys in regard to leave or passages at the public expense.”

Consequently, the respondent was not entitled to the terminal benefits granted.

From the above analysis, it is clear that the respondent’s dismissal could not be termed as wrongful hence, the trial court erred in making such a finding. We are satisfied that this appeal has merit. We allow it with the result that the impugned judgment dated 1st of July, 2011 is hereby set aside, and the respondent’s claim filed before the Industrial Court on 19th March, 2009 is hereby dismissed.

On the issue of costs, given the circumstances of this case the order that commends itself to us is that each party should bear its own costs both here and in the court below.

Dated and delivered at Nairobi this 22nd day of September, 2017.

ALNASHIR VISRAM

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR