IN THE COURT OF APPEAL

AT NYERI

(CORAM: WAKI, NAMBUYE & KIAGE, JJ.A)

CIVIL APPEAL NO. 53 OF 2014

BETWEEN

TEACHERS SERVICE COMMISSION……. APPELLANT

AND

JOSEPH WAMBUGU NDERITU……..RESPONDENT

(*An appeal from the judgment and decree of the Industrial Court of Kenya (Abuodha, J) dated 16th May, 2014*

in

Nyeri Industrial Court Cause No. 62 of 2013)

****

JUDGMENT OF THE COURT

This is a first appeal arising from the judgment of ***Abuodha, J***. delivered at Nyeri on the 16th day of May, 2014.

The background to this appeal is that the respondent **JOSEPH WAMBUGU NDERITU**, a teacher by profession was absorbed into the appellant's employment as a P1 teacher in the year 1992. His first posting was within Narok District where he was deployed at various primary schools before being transferred to Laikipia District (as it was then called) in the same capacity. His last tour station in Laikipia District was[particulars withheld] Primary school, where **A N M (A)** was one of his pupils then in class eight (8) in the year 2010. **A** made allegations against the respondent that he had carnal knowledge of her on the 3rd day of July, 2010 in the staff room as a result of which she conceived.

It was not until the month of November of the same year 2010 that she divulged the fact of her being pregnant to her mother **C N M** (**C**). On receipt of this information, C reported the matter to **A's** class teacher on 21st November 2010, then to the Deputy School head **MR. PAUL MWANGI MACHARIA** (**PAUL**) on 1st December 2010, and lastly to the headmaster **GEORGE MUCHIRI WANGOMBE** (**George**) on 7th January, 2011. The school administration through **George** reported the incident to the Laikipia District Education Officer who mandated **George** to convene the school's full management committee (SMC) to investigate the allegations and report back to him for necessary action. The school's management committee convened on the 12th day of January 2011, heard both sides, and made findings

that on the evidence adduced before it the respondent had breached regulation 66 of their code of conduct by having carnal knowledge of his own pupil. This finding prompted the District Education Officer Laikipia to issue the respondent with a letter of interdiction dated the 28th day of January 2011 giving details of professional misconduct levelled against him.

The appellant invited the respondent to respond to the accusations levelled against him in the letter of interdiction to which the respondent responded vide his letter of 12th February, 2011. Upon weighing the two versions together the appellant arrived at the conclusion that a case had been made out for breach of its code of conduct for its employees. It mandated the District Education Officer Laikipia to set up a Tribunal to conduct disciplinary proceedings against the respondent.

The tribunal scheduled its meeting for the 14th day of June 2011 and invited the respondent to participate in the said proceedings vide the DEO'S letter dated the 19th May 2011. Both sides attended the tribunal proceedings and were heard. The tribunal deliberated over the matter and arrived at the conclusion that the respondent had breached the appellants' code of conduct by having carnal knowledge of his own pupil and accordingly dismissed him from the appellant's employment effective from the date of interdiction. He had ninety (90) days within which to appeal against his dismissal in accordance with the regulation although this was not indicated in the dismissal letter. Simultaneously with the dismissal letter he was given another letter giving him 28 days to show cause why he should not be removed from the appellants register for teachers.

The respondent neither appealed against his dismissal nor showed cause why he should not be removed from the appellant's register of teachers. The explanation he gave later on for this inaction was that neither of the two letters reached him as they had been directed to a wrong address. He only came to learn of their existence when he called on the appellant seeking the lifting of his interdiction after he had been acquitted in the criminal proceedings. Meanwhile, the time for raising an appeal against his dismissal or showing cause why he should not be removed from the appellant's register for teachers had run out on him.

When the appellant failed to rescind both decisions the respondent moved to the Industrial Court and presented a claim dated the 11th day of June 2013 seeking the courts' intervention to have the said dismissal and the removal from the register of teachers, reversed and/or rescinded, on the grounds that both decisions were unfair and wrongful, reinstatement back to his former teaching position and payment to him of the consolidated unpaid salary from the date of interdiction in February 2011 to the date of reinstatement.

The appellant responded to the claims vide its defence and counter claim dated the 23rd day of August, 2013. In summary, the appellant admitted that there had existed an employer/employee relationship between it and the respondent since 1992 but which relationship, had been terminated following the respondent's breach of the TSC Act Cap 212, Laws of Kenya; the Labour Laws, the Code of Regulations for teachers 2005 revised edition, the teachers service ethics published as legal notice No. 137 of 2003 and administrative circulars issued from time to time, all to which the respondent's employment with the appellant was subject.

The appellant continued to aver that following the above mentioned breach, the appellant set in motion a fair, regular, procedural and lawful disciplinary process through the school management committee and a tribunal before which both sides were afforded an opportunity to call witnesses and cross examine those called by their opponents at the conclusion of which the respondent never raised any complaint as to the manner in which the said proceedings were conducted.

The appellant averred further that they were not bound by the favourable outcome of the criminal proceedings against the respondent as the criminal proceedings had been instigated and preferred as defilement leading to pregnancy within the provisions of the Penal Code, Sexual Offences Act and the Police Act, which were inherently different from the professional misconduct, disciplinary procedures initiated by the appellant against the respondent on account of carnal knowledge of a pupil pursuant to the

provisions of the appellant's professional code of conduct.

The appellant continued to aver further that the favourable outcome of the criminal proceedings against the respondent did not in any way diminish, impact or oust any administrative disciplinary action undertaken by the appellant against the respondent because first, the subject of the criminal proceedings was neither canvassed nor was it an issue in the appellant's disciplinary proceedings against the respondent. Secondly, **Section 9** of the repealed TSC Act Cap 212 exempted the appellant from the strict compliance with the rules of evidence and procedural technicalities in the discharge of its administrative disciplinary mandate.

Thirdly, the threshold for the standard of proof in criminal matters was not similar and/or comparable to the standard of proof in matters before tribunals exercising *quasi-judicial* functions such as the one constituted under the TSC Act to conduct disciplinary proceedings against the respondent. Fourthly, the rigors of a criminal trial are distinct from those undertaken with regard to professional misconduct, disciplinary proceedings. There is therefore no way these could have been used to salvage the respondent's contract of employment with the appellant which had not only irretrievably broken down but had also been fairly, lawfully, regularly and procedurally terminated.

In consequence thereof the appellant prayed for the dismissal of the respondent's claim against it and counterclaimed for the refund of Ksh. 4,364.30 as the salary paid to the respondent for the period not worked after his interdiction together with costs and interest from the date of judgment till payment in full.

Both sides tendered evidence before the Industrial Court. The respondent was the sole witness for his side, while **Anne**, **Catherine, Paul** and **George** respectively tendered evidence on behalf of the appellant. The learned Judge assessed, analyzed and evaluated the rival pleadings, evidence and submissions of both sides and found in favour of the respondent. The appellant was aggrieved. It is now before this Court raising nine (9) grounds of appeal which **Mr. Allan Sitima,** learned counsel for the appellant compressed the nine grounds into three. They are:- That the learned Judge erred in law:

1. **by failing to consider relevant evidence that had been adduced by the appellant;**

2. **in applying criminal law principles in a matter of contract of employment and in so doing failed to appreciate that the dispute before him related to employer – employee relationship largely requiring the court to consider the circumstances leading to the respondents dismissal *(sic*) service;**

3. **by granting orders to the respondent that were not tenable at law.**

With regard to ground one (1) **Mr. Sitima** submitted that the appellant discharged its obligation under **section 43(1)** of the **Employment Act** as it informed the respondent through its letter of interdiction about the matters it genuinely believed as forming the existence of the alleged breach of the code of conduct for teachers on account of him having had carnal knowledge of his own pupil. These matters were duly established through the two investigative forums that it set in motion to establish the veracity of those allegations, namely the school management committee (SMC) and the *quasi-judicial* tribunal whose findings were also tested on oath during the court proceedings through the witnesses who gave evidence on its behalf. Those witnesses who were not shaken in their cross-examination by the respondent thereby ousting the respondent's only defence of the failure of the DNA test findings to link him to the paternity of **A's** child, which evidence was availed long after the appellant had concluded its disciplinary proceedings against the respondent, against which no appeal was raised.

In **Mr. Sitima's** view, lack of any paternity link between the respondent and the said child did not oust the unchallenged evidence that the respondent had carnal knowledge of his own pupil contrary to the code of conduct, which carnal knowledge could exist independently of any resulting pregnancy.

To buttress the above argument, **Mr. Sitima** urged us to be persuaded by the words of the learned Judges

in **KISUMU CIVIL APPEAL NO. 8 OF 2014**, **TEACHERS SERVICE COMMISSION VERSUS JOSEPH OKOTH OPIYO**

> ***"that in matters of sexual immorality it is not easy to get eye witnesses evidence as such acts are committed behind closed doors and that such cases are in most cases proved by circumstantial evidence of opportunity to commit the same"***

With regard to ground 2, **Mr. Sitima** urged us to fault the learned Judge for employing the successful outcome of the criminal proceedings as a basis for finding in favour of the respondent. In doing so, argued **Mr. Sitima,** the learned Judge failed to note that the relationship between the appellant and the respondent was not governed by the criminal law regime under which the respondent was unsuccessfully prosecuted for the offence of defilement leading to pregnancy, but one of an employer – employee relationship specifically governed by the contents of the documents enumerated above pursuant to which the appellant disciplined the respondent for misconduct on account of immoral behavior. In this regard, **Mr. Sitima** urged us to find that had the learned Judge appraised himself properly of these distinctive legal positions, he would have arrived at the conclusion that the successful outcome of the criminal proceedings had little or no bearing at all on the appellant's mandate to discharge the respondent from its employment for breach of trust which had dealt a fatal blow to the employer/employee relationship such that it could not be salvaged by the favourable outcome of the criminal trial against him.

To buttress his argument in support of ground 2, **Mr. Sitima** urged us to be guided by **ELDORET ELECTION PETITION NO. 628 OF 2006 CONSTANTINE SIMATI VERSUS TSC *ex parte* ROBERT MUDAKI KAYUGIRA** for the proposition that the language in regulation **66(4)(b)** suggests that when considering disciplinary cases before it, the TSC is not bound by the strict rules of evidence and was not expected to conduct its proceedings as a court; **NAIROBI CIVIL APPEAL NO. 50 OF 2014 JUDICIAL SERVICE COMMISSION VERSUS GLADYS BOSS SHOLLEI & ANOTHER** for the proposition that criminal law should not be applied in disciplinary/professional proceedings.

In addition to the above, we were also invited to be persuaded by non-binding decisions emanating from the Industrial Court namely **INDUSTRIAL CASE NO. 1492 OF 2011 DAVID KEMEI VERSUS ENERGY REGULATORY COMMISSION [2013] eKLR**, **INDUSTRIAL CAUSE NO. 1415 OF 2011 CLEMENT MUTISO MULANDE VERSUS BRITISH AMERICAN INSURANCE COMPANY; INDUSTRIAL CAUSE NO. 15 OF 2013 JOSEPH WAMBUGU KIMANJU VERSUS ATTORNEY GENERAL [2013] eKLR,** and **ELDORET JR NO. 12 OF 2012 REPUBLIC VERSUS TEACHERS SERVICE COMMISSION EX-PARTE ROBERT MUDAKI KAYUGIRA** all of which re-echoed the principle that professional disciplinary proceedings are distinct from the criminal proceedings even if they emanate from the same set of circumstances.

With regard to the order on reinstatement, **Mr. Sitima** urged us to fault the learned trial Judge for his failure to find that the appellant's finding the respondent guilty of carnal knowledge of his own pupil through its disciplinary process, made the respondent's moral standing doubtful and therefore unsuitable for reinstatement in the appellant's employment.

Secondly, an order for reinstatement would not serve the best interests of securing and maintaining a good future employment relationship between the appellant and the respondent as the same was solely based on mutual trust.

Thirdly, the order of reinstatement granted by the learned trial Judge amounted to an order of specific performance, a remedy that is undesirable in a contractual obligation governed by private law. Fourthly, since the respondent's employment was solely secured by mutual trust, once the mutual trust was eroded by the respondent's misconduct, it could not be salvaged by a court of law.

Fifthly, the learned trial judge should have opted for an order for the payment of damages as a generally accepted alternative remedy for redressing breaches of contracts of personal service as opposed to an order for a specific performance of a contract of service which in effect turned such a contract of service into one of servitude which is not tenable in law. Lastly, interests of discipline amongst the appellant's

employees were likely to be compromised if the appellant was not allowed to deal firmly with cases of misconduct amongst its employees.

With regard to ground three (3), **Mr. Sitima** urged that payment of salary to the respondent from the date of interdiction to the date of reinstatement for a period of three (3) years should not have been ordered as the respondent neither worked nor offered any services to the appellant for the said period. Second, the appellant had sufficiently demonstrated that termination of the respondent's services with them was on account of a proven case of misconduct. Third, the decision was taken after the respondent had been given an opportunity of being heard on the allegations levelled against him, which representations were found ousted by the evidence tendered on behalf of the appellant. Fourth, the appellant had discharged the burden imposed on it both by the **Employment Act** and the **Public Service Commission Act** with regard to the action it took against the respondent.

In response to the appellant's submissions **Mr. J. Mwangi,** learned counsel for the respondent urged us to dismiss the appeal on the grounds that the same is without merit as the appellant had not pointed out the evidence the learned trial Judge failed to properly evaluate and consider. Second, the record was clear that the learned Judge had analyzed in great detail the evidence that had been tabled before him and arrived at the correct conclusion on the matter. Third, Anne had maintained throughout her testimony both before the two disciplinary forums and before court that the respondent was the only man she had had a sexual contact with and that the resulting pregnancy was his responsibility. The moment the DNA results failed to link the paternity of Anne's child to the respondent, the appellant's case was destroyed as the issue of the pregnancy could not practically be divorced from the alleged carnal knowledge of **A.** In **Mr. Mwangi's** view, the learned Judge was right in finding that the two were interdependent and none could stand in the absence of any other independent evidence adduced to support the claims of carnal knowledge.

In response to ground two, (2) **Mr. Mwangi** urged us to affirm the learned Judges findings that since the proceedings before the quasi-judicial tribunal were of such a nature that their possible consequence could possibly have deprived the respondent of his livelihood as it eventually did, the tribunal ought to have been cautious and ensured that the evidence it eventually relied upon to deprive the respondent of his livelihood was above average.

Second, the learned Judge was right in applying the proposition in **Mathew Kipchumba Koskei versus Baringo Teachers Sacco [2013] eKLR** as it stated the correct position on what an employer ought to do where it has initiated and conducted disciplinary proceedings on account of a misconduct which also has substantively been the subject of a criminal process for which the employee is subsequently exculpated. Third, the appellants' internal disciplinary procedures against the respondent had ignored substantive justice and were therefore not immune to challenge in a court of law.

In response to ground three (3) **Mr. Mwangi** urged us to affirm the remedies handed out in favour of the respondent as these were consequent upon the learned Judge's findings that the respondents' dismissal from his employment was both unfair and wrongful in terms of the provisions of **section 49** of the **Employment Act 2007.**

Second reinstatement of the respondent back to his former employment was in line with the provisions of **section 4** of the **Employment Act**. Third, the order on the payment of all benefits previously enjoyed by a reinstated employee together with entitlement to all other attendant upward evaluations for purposes of routine promotions and salary increments that other employees of his caliber and length of service had benefited from during the period he was in the cold on account of the reversed termination were well within the ambit of **Section 49(3)** of the **Employment Act**.

Four, the award of seven (7) month's salary compensation for unlawful termination was within the limitation of upto twelve (12) months compensation allowed for in **section 49 (1)(c)** of the **Employment Act**.

In response to Mr. **Mwangi**'s submission, Mr **Sitima** reiterated his earlier submission that the

respondents discipline case was commenced and determined within the confines of the law, principles and the doctrine of natural justice and was therefore regular, procedural and lawful. The respondent was subjected to a fair and elaborate disciplinary process for his act of professional misconduct before findings of guilt were made against him. He was also accorded adequate hearing at the various stages of the disciplinary process at the conclusion of which he raised no complaints of any unfair treatment. The findings of "guilty" that led to his dismissal from the teaching service and deregistration from the register for teachers were on a balance of probability well founded.

As this is a first appeal, it is our duty to analyze, re-assess and re-evaluate the evidence on record and reach our own conclusions in the matter. This mandate was put more appropriately in **Selle v Associated Motor Board Co. [1968] EA 123**, thus:

> **"An appeal to this Court from a trial by the High Court is by way of retrial and the princip0leas upon which this Court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally** (Abdul Hameed Saif vs. Ali Mohamed Sholan (1955), 22 E.A.C.A. 270)**.**

This Court further stated in **Jabane v Olenja [1986] KLR 664**, thus:

> **"More recently, however, this Court has held that it will not lightly differ from the findings of fact of a trial judge who had had the benefit of seeing and hearing all the witnesses and will only interfere with them if they are based on no evidence, or the judge is shown demonstrably to have acted on wrong principles in reaching the findings he did – see in particular** Ephantus Mwangi v Duncan Mwangi Wambugu **(1982-88) 1 KAR 278 and** Mwanasokoni v Kenya Bus Services **(1982-88) 1 KAR 870."**

In obedience to the above mandate, we have revisited the record and considered it in light of the rival arguments set out above. We find that the learned trial Judge identified two issues for determination, made observations, on the evidence before him which the appellant has invited us to fault, while the respondent has invited us to affirm. In our view, the issues that fall for our determination are the three set out above that both sides have made extensive submissions on.

On the mode of procedure adopted by the appellant in disciplining the respondent, the learned Judge made a finding that on the basis of the record before him the respondent had been accorded a fair hearing in accordance with the dictates of the law. We find no issue with that finding. It affirms the appellant's consistent assertion that the disciplinary process was fair as the respondent raised no complaint against it.

On the evidence relied upon by the appellant to dismiss the respondent from its employment, it was the learned Judge's finding that if the pregnancy was the critical evidence of the carnal knowledge then the DNA test results significantly destroyed this evidence the moment it turned out to be negative, such that it could not be relied upon by the appellant in support of its disciplinary process against the respondent in the absence of some other independent evidence implicating the respondent in the commission of the alleged professional misconduct on account of the alleged carnal knowledge of his own pupil. With respect to the learned Judge, we make no hesitation in stating that he misapprehended the facts before him. There were two disciplinary forums were undertaken by the appellant; the school management committee which was earlier in time, followed by the *quasi judicial* tribunal. We do not have the benefit of the SMC record save that there is no doubt that it is the deliberations and conclusions reached at this forum that led to setting up of the *quasi judicial* tribunal because a case of professional misconduct had been made out against the respondent. The record of the latter forum is before us. Its findings were basically twofold. First that the respondent had admitted being in the school on Saturday

the 3rd July 2010, the date the carnal knowledge of his pupil was alleged to have occurred. Second, that the respondent had not challenged the pupil's oral testimony as corroborated by her written statement that he had carnal knowledge of her in the teachers' staffroom and then threatened to kill her and prevent her from sitting the then impending KCPE exams if she disclosed the incident to anyone.

The above being the correct position, it is our finding that both disciplinary forums, that is, the school management committee **(SMC)** and the *quasi judicial* tribunal did not have the advantage of receiving, testing nor making findings on the evidence on the DNA negative test results. This is borne out by the content of the letter written to the appellant by Messrs Bwonwonga & Co. Advocates on behalf of the respondent which the learned Judge had before him dated the 17th day of December 2012. The content indicates clearly that the criminal case trial proceedings in which the DNA test results were tendered and on the basis of which the respondent was absolved from responsibility for the paternity of Anne's child were concluded on the 30th November, 2012. This was a period of one year five (5) months and two (2) weeks after the dismissal of the respondent from the appellant's employment. It was also long after the conclusion of the disciplinary proceedings against the respondent in terms of regulation 66 of the Code of Regulation for teachers. This regulation allowed the respondent ninety (90) days within which to appeal against his dismissal. The ninety (90) days lapsed on the 14th day of September, 2011. The twenty-eight (28) days accorded to the respondent to show cause why he should not be removed from the register for teachers had also lapsed way back on the 12th day of July 2011.

In view of the above findings, there is no way the evidence on the negative DNA test results could have operated to destroy the evidence on carnal knowledge of his own pupil believed by the dismissing tribunal as having been believable and unchallenged by the respondent. There was therefore no need to call for independent evidence to disprove that which was not capable of being disproved on account of it having been unchallenged. The appellant has all along been consistent both in its pleadings, evidence and submission, both in the court below and this court that carnal knowledge capable of satisfying professional misconduct of its teachers can exist independently of any resulting pregnancy.

In support of this assertion, the appellant relied on the provision of clause 9(1) of the Teachers Service Commission Code of Conduct and Ethics. It provides:-

> ***"A public officer shall not engage in any sexual activity with a student regardless of whether the student consents"***

The above provision supports the appellant's assertion that proof of any resulting pregnancy is not a pre-requisite for proving or disproving carnal knowledge with a student.

The appellant also relied on the case of **Teachers Service Commission versus Joseph Opiyo** (supra) for the holding that in matters of sexual immorality it is not easy to get eye witnesses evidence as such acts are usually committed behind closed doors and that such cases are in most cases proved by circumstantial evidence of opportunity to commit the same. Although the tribunal did not mention circumstantial evidence, its reliance on the testimony of the pupil as well as the admission of the respondent that he was in the school both on the date and the time the pupil alleged the carnal knowledge took place in the teachers' staffroom after the other students had been dismissed, satisfies the principle of circumstantial evidence on opportunity to commit the offence. It was an irresistible inference by the respondent's culpability. It stood un ousted as the issue of the negative DNA test results was nowhere to compete with it. We therefore agree with the appellant's assertion that the learned Judge fell into error when he introduced the evidence of the negative DNA test results and used it to oust the appellant's disciplinary process. The best the learned judge could have done if he strongly felt that this evidence was crucial should have been direct to the re-opening of the disciplinary process and the admission of this evidence for testing as to the impact of such evidence on the earlier decision reached, notwithstanding that the respondent had not sought to have the disciplinary proceedings reopened.

Further it is also our finding that since it is on the basis of the DNA test results that the learned Judge called for independent evidence and upon finding none on the record ruled that in the absence of

such evidence the pupil's allegations of carnal knowledge could not be justified as doing so would amount to an unjust condemnation of the respondent, our finding that once the evidence on the DNA test results stood ousted for its unavailability as at the time the decision to dismiss the respondent from the appellant's employment was taken, the evidence that the tribunal acted upon to so find was sound and safe as it had been tested on cross-examination by the respondent himself and had withstood the test.

As for the standard of proof that ought to have been applied by the learned Judge, we find that the learned Judge appreciated that it was true that proceedings before *quasi-judicial* tribunals are not expected to be at par with those before a court of law, but nevertheless ruled that where allegation before such a tribunal are serious in nature with a possible consequence that the outcome could deprive the person concerned of his livelihood then the quality of the evidence to prove such allegation must be above average. Further that in such circumstances, it behoves those tasked with the responsibility of determining such a dispute to do so with care and caution. No specific principle of law or case law was cited by the learned Judge as providing a basis for that reasoning.

The appellant has urged us to be guided by the case of Constatine Simati versus TSC ex parte Robert Mudaki Kayugira (supra) for the proposition that the language in regulation 66(4)(b) suggests that when considering disciplinary cases before it, the TSC is not bound by strict rules of evidence and was not expected to conduct its proceedings as a court. This is a decision of the court construing and applying the very provision under which the appellant undertook disciplinary proceedings against the respondent herein. We have on our own revisited the said regulation. We find that it was correctly construed.

Turning to the applicable principles of law, there is no doubt that the learned Judge relied on the decision of a court of cordinate jurisdiction in the case of **Mathew Kipchumba Koskei versus Baringo Teachers SACCO [2013] eKLR** for the holding that where the employer has initiated and concluded disciplinary proceedings on account of misconduct which also has substantially been subject of a criminal process in which the employee is exculpated or found innocent, the employer is entitled to set aside or rescind any punitive administrative decision he may have taken against such an employee and in addition to the above meet all remedies available in law to such an employee in order to restore him to the position he would have been in had the punitive administrative decision not been taken against him. The **Mathew Kipchumba case** (supra) was preferred amongst many others from the Industrial Court stating the contrary view. No reason was given by the learned Judge as to why he preferred the proposition in the ***Mathew kipchumba Koskei case*** (Supra) over those of ***Daniel Kamei*** (Supra) Clement ***Mutiso Muiinde*** (Supra) and ***Joseph Wambugu Kimanju*** (Supra) among numerous others on the same paint all of which re-echoed the principle that professional disciplinary proceedings are distinct from the criminal proceedings even if they emanate from the same set of circumstances.

This Court has crystalized the above position in a number of its own pronouncements. ***Waki JA*** in the case of the **Hon. The Attorney General and another versus Maina Githinji & Another** Nyeri Court of Appeal No. 21 of 2015 (UR) approved the reasoning of **Okwengu JA** in ***Judicial Service Commission versus Gladys Boss Shollei & Another*** (2014) eKLR, and the decision of the court in ***Kibe versus Attorney General Civil Appeal no. 164 of 2000.***

In the **Judicial Service Commission case** (supra) the following observations made by Okwengu JA.

> ***"(61) the disciplinary process undertaken by the appellant was a quasi-judicial process as it involved the appellant in an adjudicatory function that required the appellant to ascertain facts and make a decision determining the respondent's legal rights in accordance with the Constitution and the Judicial Service Act, both of which provided for fair hearing. The disciplinary proceedings were anchored on a contractual relationship and the appellant was not empowered to provide penal sanctions. Notwithstanding the seriousness of the allegations made against the respondent, the disciplinary proceedings could not be treated like criminal proceedings, as the nature of the sanctions that could be applied in a criminal trial. Thus the learned judge misdirected himself, in holding that the disciplinary proceedings were quasi-criminal. The Criminal Procedure Code which is an Act providing for the procedure in criminal cases had absolutely no application in the***

disciplinary proceedings, and the learned judge erred in applying the provisions of the Criminal Procedure Code."

In ***Kibe versus Attorney General Civil Appeal No. 164 of 2000*** approved by Waki JA in the ***Hon. Attorney General & Another*** *case* (supra) this Court was categorical that:

> ***"an acquittal in a criminal case does not automatically render an employee immune to disciplinary action by an employer for the reason that a criminal trial and an internal disciplinary proceeding initiated by an employer against an employee are two distinct processes with different procedures 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".***

Lastly in ***Geoffrey Kiragu Njogu versus Public Service Commission & 2 Others*** (2015) eKLR this Court approved the reasoning of the Industrial Court in ***James Mugera Egati versus Public Service Commission of Kenya*** (2014) eKLR where it is stated that *"**there is nothing in the Public Service Commission Regulations which suggest that disciplinary process is tied to criminal process that may arise from the same facts. There is no provision in the Public Service Commission Regulations which make it necessary for employers to follow police investigations, or findings or indeed criminal court decisions in resolving employment disputes. The Public Service Commission Regulations do not merge disciplinary processes with criminal trials-----"***

The above being the position, it is our view that this Court has made itself clear on the issue as to whether a successful outcome of a criminal process against an employee has primacy over an internal disciplinary process against such an employee arising from the same set of circumstances. The two processes are distinct from each other. The appellant having concluded its disciplinary process, accorded the respondent an internal opportunity to challenge them, which he failed to utilize and which had been fore-closed long before the pronouncement of the successful criminal decision. It is therefore our finding that the issue of the appellants concluded disciplinary process remain fore closed in the absence of any plea by the respondent that these be reopened for re-interrogation on account of the alleged new and damning evidence.

We therefore find that, the appellant was genuinely aggrieved. We find merit in this appeal which is bound to succeed. Having found that the appeal has merit and it is bound to succeed there is no need for us to interrogate the lawfulness or otherwise of the remedies accorded to the respondent by the learned judge. They must fall by the wayside with the success of the appeal.

In the result we allow the appellants appeal, set aside the orders made by the learned judge on 6th day of May 2014 and substitute therefor an order dismissing the respondent's claims before the Industrial Court.

As for costs, we find that due to the peculiar circumstances of this appeal, it is prudent to order that each party bears its own costs both here and in the court below.

Dated and delivered at Nyeri this 6th day of April, 2016.

P. N. WAKI

JUDGE OF APPEAL

R. N. NAMBUYE

JUDGE OF APPEAL

P. O. KIAGE

JUDGE OF APPEAL

I certify that this is a true

copy of the original

DEPUTY REGISTRAR