



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: MUSINGA, GATEMBU & MURGOR, JJA.)

CIVIL APPEALS NO(S). 26 & 27 OF 2012

IN THE MATTER OF SECTION 84 (1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS UNDER SECTION 77 (9) (10) OF THE CONSTITUTION OF KENYA

BETWEEN

BETT FRANCIS BARNGETUNY FIRST APPELLANT

CONSTANTINE SIMATI SECOND APPELLANT

AND

THE TEACHERS SERVICE COMMISSION..... FIRST RESPONDENT

THE TEACHERS SERVICE

APPEAL TRIBUNAL.....SECOND RESPONDENT

(Appeals arising from the Judgments of the High Court of Kenya at Eldoret (Azangalala, J.) dated 15th March, 2011

in

PETITION CAUSE NOS. 1 OF 2010 & 628 OF 2006)

JUDGMENT OF THE COURT

Background

1. The legal principles and the issues for determination in these two appeals are the same. That is why counsel in Civil Appeal No. 27 of 2012 adopted the submissions made in Civil Appeal No. 26 of 2012.

Consequently, although these two appeals were not consolidated, counsel agreed that the Court could therefore render one judgment in respect of the two appeals.

2. **Bett Francis Barngetuny**, the appellant in Civil Appeal No. 26 of 2012, and **Constantine Simati**, the appellant in Civil Appeal No. 27 of 2012, were teachers in the employment of the 1st respondent before their services were terminated. They instituted proceedings in the High Court of Kenya at Eldoret challenging their dismissal and sought among other reliefs, unconditional reinstatement to their respective positions. Their claims were however dismissed by the High court, hence these appeals to this Court.

The Pleadings By Bett Francis Barngetuny

3. Bett Francis Barngetuny, (hereinafter '**Bett**'), filed a petition against the respondents, brought under **section 84 (1)** of the repealed **Constitution of Kenya**. In July, 1995, Bett was employed by the Teachers Service Commission (TSC) as a P1 Teacher. On 22nd March, 2002 Bett received a notice of interdiction from the District Education Officer, Uasin Gishu, informing him that his employer was intending to remove his name from the register of teachers on the ground that on 28th April, 1998 he had carnal knowledge of one of his pupils, **HJK**, at Chepkongony Primary School.

4. Bett was invited to make a written statement to the TSC within 21 days from the date of receipt of the interdiction notice, which he did.

5. Prior to the service of the notice of interdiction, the police had instituted criminal proceedings against Bett, *to wit*, **Criminal Case No. 1541 of 1998**, before the Senior Principal Magistrate's Court at Eldoret, where he had been charged with rape of the said girl, contrary to **section 140** of the **Penal Code**.

6. Sometimes in October, 2002, Bett was served with a hearing notice requiring him to appear before TSC on 29th October, 2012 for the disciplinary proceedings. On the same day Bett was required to attend court for hearing of the criminal case. He alleged that he was therefore unable to attend the disciplinary proceedings; although the record shows that he attended.

7. Following conclusion of the disciplinary proceedings, on 16th November, 2002, Bett received a letter dated 29th October, 2002 from TSC dismissing him from the teaching service due to his breach of **section 7 (b)** of the **Teachers Service Commission Act** and **regulation 70 (2) (a)** of the **Regulations for Teachers**, in that he had carnal knowledge of his pupil, **HJK**.

8. As at the date of receipt of the dismissal letter, the criminal case was still ongoing. Judgment therein was delivered on 19th January, 2004 when Bett was acquitted of the charge of rape.

9. Following the dismissal, Bett attempted to lodge an appeal before the Teachers Service Appeals Tribunal (the Tribunal) but the Tribunal declined to hear the appeal on the ground that it had no jurisdiction to consider it, given that Bett had only been dismissed from employment and not removed from the register of Teachers.

10. Subsequent to his acquittal of the rape charge, Bett wrote severally to TSC requesting for reinstatement. Vide a letter dated 8th July, 2008, TSC informed him that his case was discussed by the TSC/KNUT Sub- Consultative Committee on 27th February, 2008 where the Commission's decision to dismiss him was upheld.

11. The appellant claimed in his suit that he was not given a fair hearing before his dismissal, that he was not given a fair opportunity to defend himself, that he was not afforded an opportunity to cross examine witnesses and that he was dismissed before the criminal case against him was finalized.

12. The High Court, (Azangalala, J., as he then was) held that the record showed that Bett had appeared before TSC on 29th October, 2002 and made his representations and therefore he had been given an

opportunity to be heard. The court further held that where a teacher is dismissed but not removed from the register of teachers the Tribunal has no jurisdiction to handle any appeal. He cited the provisions of **regulation 66 (7) (b)** of the **Code of Regulations for Teachers**.

The pleadings by Constantine Simati

13. The background to the claim by Constantine Simati (Simati) was that by a letter of interdiction dated 13th June, 2000, he was informed of intention by the TSC to remove and/or dismiss him from his employment. Two allegations had been made against him, namely, that he was not of good moral character, having sodomised three male students, and that he had given the same students alcohol before he committed the said indecent acts. Simati was invited to respond to the said allegations within 21 days of the date of the letter, which he did; denying the said allegations.

14. The disciplinary case went a step further when Simati was severally invited to attend hearings, which culminated in a decision to dismiss him from his services. That decision was arrived at on 21st November, 2001.

15. Simati challenged the decision to dismiss him saying that the Chairman of the Commission was outrightly hostile and biased against him, that he was not allowed to defend himself, that he was not allowed to cross examine witnesses and that he was not allowed to present his witnesses.

16. Simati appealed to the Tribunal. He contended that he was entitled to receive all benefits pending the hearing and disposal of his appeal, but that TSC had stopped paying him in November, 2001. The Tribunal summarily declined to consider the appeal as it had no jurisdiction to do so.

17. In his petition dated 5th May, 2006 brought under **sections 77 (9) (10)** and **74** of the repealed constitution, Simati sought a declaration that his right to a fair hearing had been violated, a declaration that he had been discriminated against, and an order for reinstatement to his employment, amongst other prayers.

18. The petition was opposed by both respondents. They contended that due process under the Teachers Service Commission Act and the Code of Regulations for Teachers had been followed and the dismissal was therefore lawful.

The Tribunal contended that it had no jurisdiction to entertain the appeal since Simati had been dismissed from employment and not removed from the register of teachers. The High Court, upon hearing the petition, dismissed it and upheld the respondent's findings, thus precipitating this appeal.

The Appeals

19. The two appeals, filed through **M/s. Gicheru & Company Advocates**, raise exactly the same grounds of appeal. The appellants contended, *inter alia*, that the learned judge erred in law in: failing to appreciate that the process leading to the appellants' dismissal was flawed, biased and unconstitutional, that the appellants were not given a fair hearing, that the Tribunal was hostile and biased, holding that the Tribunal had no jurisdiction to consider the appellants' appeals and in failing to grant the reliefs sought.

20. **Mr. Mathai** appeared for the appellant in appeal No. 26 of 2012 while **Miss Kosgei** appeared for the appellant in appeal No. 27 of 2012. Mr. Mathai submitted that his client was not accorded his constitutional rights. He faulted the respondents for violating **Articles 22, 23, 24** and **25** of the **Constitution of Kenya, 2010**. However, we believe that this line of submission was misplaced because the petitions had been filed under the repealed Constitution of Kenya.

21. Regarding the notice inviting Bett to appear before the District Education Officer's Office, Uasin Gishu District on 29th October, 2002, Mr. Mathai submitted that the same was dated 21st October, 2002 and therefore unreasonably short. Further, on the same day Bett was required to appear before the Chief

Magistrate's Court for hearing of his criminal case. In his view, the rule of natural justice that requires a person to be given an opportunity to be heard before a prejudicial action is taken against him was violated. In that regard, counsel cited this Court's decision in **CHARLES MBEMBE OLOO V KENYA POSTS & TELECOMMUNICATIONS CORPORATION, [1982-88] 1 KAR** where the Court reiterated the principle of natural justice of granting a fair opportunity to an employee to contradict a statement that may be prejudicial to him before determining his disciplinary case.

22. Mr. Mathai further faulted the High Court for holding that the Tribunal had no jurisdiction to hear the appeal. He contended that there is no distinction between dismissal and removal from the teachers register.

23. **Miss Kosgei** for Simati adopted Mr. Mathai's submissions. She however clarified that no criminal proceedings were preferred against Simati. According to counsel, Simati had a legitimate expectation that he would be tried criminally before his interdiction, which was not the case.

24. In response, **Mr. Anyuor**, holding brief for **Mr. Sitima** for the respondents, submitted that the appellants were granted a fair hearing before their dismissal. He cited **section 9** of the **Teachers Service Commission Act** and **regulation 66** of the **Code of Regulations for Teachers**.

25. Regarding Bett, counsel submitted that he was lawfully interdicted following investigations conducted by Teacher's Service Commission on the alleged rape incident. The appellant was given an opportunity to tender a statement of defence, which he did, after which he was invited to a hearing of the disciplinary case at the office of the District Education Officer, Uasin Gishu District, on 29th October, 2002. That office is just a few metres from the Chief Magistrate's Court, Eldoret, where Bett was appearing in the criminal case. He therefore managed to attend to both matters.

26. Counsel referred this Court to the proceedings of the disciplinary case which showed that on the material day, that is 29th October, 2002 Bett was not only in attendance but also testified under oath. TSC also heard the complainant, her father, the school headmaster and the PTA Chairman before arriving at its decision to dismiss the teacher. Following that decision, Bett unsuccessfully appealed to the Teacher's Service Commission after his acquittal of the charge of rape. Kenya National Union of Teachers (KNUT) also made an appeal on his behalf. TSC/KNUT sub-Consultative Committee held discussions on the matter, but the decision to dismiss Bett was upheld. According to TSC, the teacher had committed professional misconduct. There was sufficient evidence that Bett was accorded a fair hearing, Mr. Anyuor submitted.

27. Regarding Bett's appeal to the Tribunal, counsel submitted that the Tribunal could only hear the appeal if the teacher had been struck off the teachers' register, in this case he had merely been dismissed from his employment with the Teachers Service Commission. He cited the provisions of **regulation 66 (7) (b)** of the **Code of Regulations for Teachers**.

28. As earlier stated, Mr. Anyuor adopted the above submissions in respect of Simati's appeal. Counsel added that the standard of proof in disciplinary cases between an employer and an employee is lower than in criminal cases, which is always beyond any reasonable doubt.

Determination

29. Although the memorandum of appeal in each of these appeals consists of a 20 grounds of appeal, most of which are unnecessarily repeated, in our view, the substantive issues for determination are whether the appellants' constitutional right to a fair trial was violated by TSC, in other words, whether the process that was adopted by TSC in conducting the disciplinary proceedings against both Bett and Simati was fair. The other substantive issue is whether the Tribunal had jurisdiction to hear and determine the appellants' appeals from the decisions of TSC to dismiss them from employment.

30. In the petitions, it was alleged that **sections 74, 77 (9) and (10)** of the **repealed Constitution of Kenya** had been contravened. **Section 74** was about protection from inhuman treatment. The appellants

argued that TSC had subjected them to inhuman and degrading treatment. **Section 77 (9) and (10)** provides as follows:

“77(9) A court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time.

(10) Except with the agreement of all the parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public.”

31. The right to a fair trial as provided for under the repealed constitution is now stipulated under **Articles 25 (c) and 50 (1) and (2)**, of the **Constitution of Kenya, 2010**, although the latter applies only to an accused person in criminal cases. In **JUDICIAL SERVICE COMMISSION VS GLADYS BOSS SHOLLEI & ANOTHER [2014] eKLR** this Court held that:

“... the right to a fair hearing under Article 50 (1) of the Constitution encompasses several aspects. These include, the individual being informed of the case against him/her; the individual being given an opportunity to present his/her side of the story or challenge the case against him/her; and the individual having the benefit of a public hearing before a court or other independent and impartial body.”

In his petition, Bett alleged that he was not given a fair hearing for several reasons: firstly, because on the day he was scheduled to attend the disciplinary case at the District Education Officer’s Office he was attending the criminal case and thus was not afforded an opportunity to cross examine the complainant and tender his defence. That allegation was baseless. The record showed that the appellant actually attended the hearing, testified and cross examined the complainant.

32. Secondly, Bett alleged that no proceedings were taken and no judgment was written embodying what was said before the tribunal, and thirdly, he was denied copies of the proceedings and judgment for appeal purposes.

33. Lastly, Bett complained that in conducting the disciplinary proceedings, Teachers Service Commission failed to adhere to all the provisions of the Teachers Service Commission Act.

34. In determining whether the appellant’s constitutional right to a fair trial was violated, Azangalala, J. (as he then was), cited the well-known case of **HYPOLITO CASSIANI DE SOUZA V CHAIRMAN, MEMBERS OF TANGA TOWN COUNCIL [1961] E. A. 77** which summarized the general principles that should guide statutory, domestic or administrative tribunals sitting in a *quasi-judicial* capacity. The learned judge observed, and in our view rightly so, that all the principles enunciated in the aforesaid decision are incorporated in the Code of Regulations for Teachers.

35. We have carefully considered the provision of **regulation 66** which provides for the process that leads to removal of a teacher from the register of teachers. The process starts with service of a notice of interdiction, and **sub-regulation (2)** thereof stipulates the grounds upon which such notice may be issued. Such grounds **include**, where it comes to the knowledge of the Commission or its agent and it is alleged that a registered teacher should be removed from the register because he/she is not of good moral character.

36. The allegations that had been made against both appellants herein related to their moral character, that is rape and sodomy of their pupils. They were very serious allegations. Investigations were conducted as stipulated under **regulation 66 (3)**. The teachers and the pupils concerned, among others, recorded their respective statements.

37. The teachers were then afforded opportunity to prepare and present their respective defences, which they did. **Regulation 66 (4) (a)** requires the commission to afford the teacher “adequate time for the preparation and presentation of his/her defence and the opportunity of being heard in person.” What amounts to “adequate time” is not defined by the Regulations. In the circumstances, “adequate time” has to be construed in the context of each case. Bett was given a 7 days’ notice while Simati was given about 14 days’ notice. When the appellants appeared before the Commission, none of them complained that they had not been afforded adequate time to prepare their defences.

38. Each of the appellants appeared in person before the disciplinary panel and defended themselves. Their evidence was considered before a decision was arrived at. It cannot therefore be argued that the appellants were denied an opportunity to defend themselves. In the Nigerian Supreme Court decision, **B. A. IMONIKHE V UNITY BANK PLC S. C. 68 of 2001** that was cited by this Court in **JUDICIAL SERVICE COMMISSION V GLADYS BOSS SHOLLEI & ANOTHER (supra)**, it was held that:

“Accusing an employee of misconduct, etc by way of a query and allowing the employee to answer the query, and the employee answers it before a decision is taken satisfied the requirement of fair hearing or natural justice. The appellant was given a fair hearing since he answered the queries before he was dismissed.”

39. Under **regulation 66 (4) (b)**, the commission in its conduct of disciplinary proceedings is required to act on general evidence or statements relating to the character and conduct of a teacher and is not bound to receive and consider only evidence admissible in a court of law. We are satisfied that substantively TSC conducted the disciplinary proceedings in accordance with the rules of natural justice and as prescribed under the Code of Regulations for Teachers.

40. As regards the jurisdiction of the Tribunal, **regulation 66 (7) (b) (i)** states as follows:

“In accordance with section 10 of the Act, where the Commission has determined not to register a teacher or that the name of a teacher be removed from the register-

(i) a teacher aggrieved by the commission’s refusal to register or to remove him/her from the Register may within twenty-eight days of that notice, appeal to the Teachers Service Appeals Tribunal, established under section 11 of the Act. A copy of such notice of appeal must be served to the Commission.”

41. It is thus abundantly clear that, it is only a teacher who has been refused registration or whose name has been removed from the register who can appeal to the Tribunal. In making its determination in a disciplinary case in accordance with **regulation 66 (4)**, the Commission may find a teacher guilty of the allegations levelled against him/her and order the teacher’s dismissal and further, it may also remove the teacher’s name from the register.

Dismissal is therefore not the same as removal of a teacher from the register.

42. When Simati’s advocate wrote to the Tribunal on 22nd July, 2005 after summary rejection of the intended appeal, the Chairman of the Tribunal, vide his letter dated 17th August, 2005, responded and stated, *inter alia*:

“Constantine Simati, on his own admission, stated that he was dismissed by the Teachers Service Commission. He did not say he was removed from the Register of teachers. It is a trite law the two are not the same under the provisions of the Teachers Service Commission Act. Similarly the Teachers Service Commission Appeals Tribunal (TSAT) has no jurisdiction over dismissal cases.”

43. In view of the foregoing, the High Court cannot be faulted for its holding that the Tribunal lacked jurisdiction to entertain the intended appeals. The words of Nyarangi, J.A in **OWNERS OF THE MOTOR VESSEL “LILLIAN S” V CALTEX OIL COMPANY (KENYA) LIMITED [1989] KLR**

1. as regards jurisdiction are apt:

“Jurisdiction is everything. Without it a court has no power to make one more step. ... A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

44. As to whether Bett, having been acquitted of the rape charge by a court of competent jurisdiction, he ought to have been reinstated, the learned judge delivered himself thus:

“In my view, however, the 1st respondent was not bound to take the same position which the regular court took. It is illustrative that the 1st respondent was acting in its quasi-judicial capacity. It was not bound to strictly apply the law of evidence and procedural rules which bind the regular court. The standard of proof before the 1st respondent is not also that of proof beyond reasonable doubt which the regular court was bound to apply.”

45. We entirely agree with the learned judge. As we have stated earlier, TSC is empowered to interdict a teacher if it is reasonably alleged that the teacher is not of good moral character. In conducting the disciplinary proceedings thereafter, TSC acts on general evidence or statements relating to the character or conduct of the teacher concerned. Disciplinary proceedings by an employer cannot be equated to criminal proceedings before a court of law. The degree of proof required is certainly different and the objectives of these two types of proceedings are distinct from each other. In **SINHA AND GENERAL MEDICAL COUNCIL (Neutral citation number [2009] EWCA cir 80)** the Court of Appeal (Civil Division) in London observed that:

“Criminal proceedings are designed to establish guilt or innocence of a member of the public with a view to punishment by society if the verdict is guilty, and acquittal if the verdict is not guilty. Proceedings before a professional body are designed to establish whether or not professional men and women have fallen below the standards expected of their profession; whether or not the professionals concerned should remain members of the profession concerned and if so, on what terms.”

46. In the instant cases, TSC was probing the moral allegations of sodomy and rape that had been brought against the appellants. On the other hand, in the criminal case that was brought against Bett by the State, the prosecution was required to prove beyond any reasonable doubt that Bett had actually raped a pupil. In criminal cases, if any doubt arises, the benefit thereof has to be given to the accused and that results to an acquittal.

47. If an employer has conducted disciplinary proceedings fairly in accordance with statutory or laid down regulations, a court of law should exercise great caution before it interferes with the employer's findings. In the South African case of **NAMPAK CORRUGATED WADEVILLE V KHOZA (JA 14/98) [1998] ZALAC 24**, it was held that:

“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.”

48. Having considered all the issues raised by all the parties before the High Court, we are unable to fault the learned judge's findings at all. Consequently, we find no merit in these appeals and accordingly dismiss them with costs to the respondents.

DATED and delivered at Eldoret this 10th day of December, 2015.

D. K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU FCIArb

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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