



REPUBLIC OF KENYA
IN THE COURT OF APPEAL
AT NYERI
(CORAM: VISRAM, KOOME & OTIENO-ODEK, JJ.A.)
CIVIL APPEAL NO. 6 OF 2014

BETWEEN

JOHN MAINA WARUIAPPELLANT

AND

OTHAYA BOYS' HIGH SCHOOL RESPONDENT

(Appeal against the Ruling of the Industrial Court of Kenya at Nyeri (Abuodha, J.)

dated 3rd October, 2013

in

Nyeri Industrial Court Case No. 1 of 2013)

JUDGMENT OF THE COURT

1. The pertinent facts in this appeal are similar to **Civil Appeal No. 7 of 2014** (*Samuel Wambugu Mwangi –vs- Othaya Boys’ High School*). The submissions made by the parties are more or less the same and hence the judgment in this appeal is similar to the judgment in Civil Appeal No. 7 of 2014.
2. The appellant in this case filed a statement of claim against the respondent in the Industrial Court at Nyeri averring that at all material times he was an employee of the respondent in the capacity of cleaner and canteen attendant. He was employed on 8th September, 2010 , as a canteen attendant and was given additional duty of cleaning the school dispensary. The appellant states he was earning Kshs. 6,000/= per month. The appellant in his claim states that he diligently discharged his duties until 3rd August, 2011 when the principal of the respondent school, Mr. D. M. Muriithi, verbally interdicted him and terminated his employment.
3. The appellant at paragraph 12 of his statement of claim states that he reported his dismissal to his union Kudhehia and through a letter dated 6th October, 2011 and a reminder dated 10th November, 2011 the respondent school was instructed to pay the appellant his terminal dues. The Ministry of Labour Headquarters instructed the Nyeri District Labour Office to call for a conciliatory meeting.
4. The appellant’s claim before the Industrial Court against the respondent is for lost salary and

- house allowance from the time of unlawful termination and terminal dues; Kshs. 200,000/= for psychological stress and economic hardships that the claimant and his family have been subjected to.
5. The proceedings before the Industrial Court relevant to this appeal were as follows: On 18th February, 2013, the matter was mentioned before the learned Judge (Abuodha, J.) to see if settlement had been reached by the parties. The parties were directed to appear before the District Labour Office in Nyeri to attempt conciliation and file a report. On 14th March, 2013, the learned Judge ordered that the local representative of the claimant's union (Kudhehia), Mr. Gatere, to appear before the court to explain/brief the court on what attempts the Union had made to resolve the instant dispute. On 21st May, 2013, the court recorded that the parties having negotiated and settled the matter amicably it was ordered that by consent the claimant to be paid by the respondent the sum of Kshs. 52,693/= as agreed in the letter dated 18th April, 2013 and filed in court on 7th May, 2013 in full and final settlement of the claim herein.
 6. By Notice of Motion dated 17th July, 2013, the appellant in this case moved the Industrial Court seeking Kshs. 200,000/= as compensation for unlawful dismissal of his services by the respondent. He also sought Kshs. 30,000/= as costs of the suit.
 7. The Motion came before the honourable Judge (Aboudha, J.) on 3rd October, 2013, who made the following order which is the subject of this appeal:

“This matter having been settled by consent of the parties, the court sees no reason to reopen the same and Notice of Motion dated 17th July, 2013 is hereby dismissed with costs”.

8. Aggrieved by the dismissal of the Motion, the appellant has moved to this Court citing various grounds in his memorandum of appeal. The main ground of appeal is that the learned Judge erred in dismissing the Notice of Motion with costs without a fair hearing and further, the respondent never gave any credible reason why the appellant deserved to be dismissed from employment.
9. At the hearing of the appeal, the appellant acted in person while the respondent was represented by learned State Counsel, Mr. Muthuri A.N.
10. The appellant in his submissions stated that the report of the conciliator did not indicate that he was seeking compensation for unlawful termination of employment. He further submitted that the consent filed in court was done without his knowledge and signature and it was not binding upon him. It was submitted that he raised these issues before the learned Judge who referred the matter to the conciliator but the conciliator indicated that the appellant was not entitled to any more monies.
11. Counsel for the respondent adopted the submissions made in a related Civil Appeal No. 6 of 2014. It was submitted that a consent dated 23rd May, 2013, was duly signed by Kudhehia as the Union representing the appellant and the State for the respondent; that the consent was filed and adopted as the award of the Industrial Court. It was submitted that at no time did the appellant raise the issue that the consent was made by fraud or mistake. That money due and owing to the appellant as per the consent filed in court had been paid. The respondent cited the case of ***Kenya Commercial Bank Limited – vs- Benjoh Amalgamated Limited & Another, - Civil Appeal No. 276 of 1997***, in support of its submissions.
12. We have considered the record of appeal and examined the ruling made by the learned Judge on 3rd October, 2013. The main issue in this appeal is whether the learned Judge erred in dismissing the Notice of Motion dated 17th July, 2013, on the basis that the dispute between the parties had been settled by consent. It is the appellant's case that the consent filed and recorded before the Industrial Court is not valid since he was not personally present in the conciliation meeting and he never personally signed the consent. In addition, it is the appellant's case that the consent is not valid as it does not address the issue of his compensation for the unlawful termination of his employment.
13. On record, the proceedings before the learned Judge on 21st May, 2013, clearly indicated that the parties had negotiated and reached agreement in full and final settlement of the claim. The Industrial Court is part of the Superior Courts in Kenya and it is a court of record. We have no

reason to doubt the record of proceedings held on 21st May, 2013. On the said 21st May, 2013, the appellant was represented before court by Mr. Gatene, an officer of Kudhehia. The issue in this appeal is whether the consent as recorded on 21st May, 2013, can be set aside and the parties allowed to litigate afresh.

14. **Section 22** of the **Industrial Court Act**, 2011 provides that:

“In any proceedings before the Court or a subordinate industrial court, a party to the proceedings may act in person or be represented by an advocate, an office bearer or official of the party’s trade union or employer’s organization and if the party is a juristic person, by a director or an employee specifically authorized for that purpose.”

15. Under the **Labour Relations Act**, a claimant can be duly represented by his Union. In this case, the appellant was represented by his Union, Kudhehia. At paragraph 10 of his Statement of Claim, the appellant reported the dispute he had with the respondent to his Union. In the entire proceedings before the conciliator and the Industrial Court, the appellant was represented by the Union. It is our considered view that the appellant having chosen to be represented by his Union is bound by the actions of the Union. We find and hold that the consent recorded before the learned Judge on 21st May, 2013 is valid and binding upon the appellant.

16. Circumstances under which a consent judgment may be interfered with were considered in the case of ***Brooke Bond Liebig (T) Limited – vs- Maliya -(1975) E.A. 266***. It was stated that prima facie, any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action and those claiming under them and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the court or if the consent was given without sufficient material facts or in misapprehension or ignorance of material facts or in general for a reason which would enable the court to set aside an agreement. In the instant appeal, the appellant has not alleged fraud, collusion or any of the reasons that can justify the setting aside of the consent order made on 21st May, 2013. The Notice of Motion and record before the learned Judge does not disclose facts that prove any of the grounds for setting aside a consent judgment. We note that the appellant was represented by his Union and we further note that the appellant received payment pursuant to the consent judgment. A consent order has contractual effect upon the parties. It is our considered view this conduct of receiving money pursuant to the consent judgment operates as an estoppel against the appellant and prevents him from challenging the terms of the consent.

17. We note that in the memorandum of appeal, the appellant asks this Court to order compensation to be paid to him for unlawful termination of employment and psychological stress and hardship. The issue before us is whether the learned Judge erred in law in dismissing the Notice of Motion dated 17th July, 2013. The issue of compensation is a matter of fact that was compromised by the consent made by the parties before the industrial court. The consent shows that it was in full and final settlement of the entire claim between the parties.

18. In totality, we find that this appeal has no merit as the appellant was ably represented by his Union and the consent order recorded on 21st May, 2013 binds the appellant; no ground for setting aside a consent order was laid before the learned Judge; and the appellant is also estopped from denying the terms of the consent judgment. This appeal is dismissed with costs to the respondent.

Dated and delivered at Nyeri this 18th day of June, 2014.

ALNASHIR VISRAM

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JUDGE OF APPEAL

MARTHA KOOME

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR