



IN THE COURT OF APPEAL

AT KISUMU

(CORAM: MARAGA, AZANGALALA & KANTAI, JJ.A)

CIVIL APPEAL NO. 8 OF 2014

BETWEEN

TEACHERS SERVICE COMMISSION.....APPELLANT

AND

JOSEPH OKOTH OPIYO.....RESPONDENT

(An Appeal from the Judgment of the Industrial Court of Kenya at Kisumu (Wasilwa, J.)

dated 25th September, 2013

in

INDUSTRIAL COURT CAUSE NO. 03 OF 2012)

JUDGMENT OF THE COURT

1. JOSEPH OKOTH OPIYO (the respondent) was at the material time a teacher employed by the Teachers Service Commission (the appellant) and posted to Obugi-Nam Primary School. On an allegation that on 25th May, 2010 he had carnal knowledge of one of his former pupils, C A O, of Nyalunya RC Primary School, who was a standard six pupil at that school, the matter was reported to the District Education Officer (the DEO) and after investigations and a disciplinary hearing he was, on 11th October, 2011 dismissed from service.

2. Aggrieved by that dismissal, the respondent filed a claim in the Industrial Court contending: that his dismissal was illegal as there was no sufficient evidence to prove the allegation of immoral behavior against him; that he was not accorded an opportunity to defend himself; and that there were procedural flaws in the hearing of the complaint against him. In the circumstances, he prayed for a declaration that his dismissal was unlawful and therefore null and void; reinstatement; payment of arrears of salary from the date of interdiction to the date of reinstatement or in the alternative payment of Kes.6,063,624/= being salary upto his retirement age; exemplary damages; costs of the suit; interest; and any other relief that the court could deem fit to grant to him.

3. In response to that claim, the appellant filed a memorandum of defence in which it averred that the respondent was lawfully dismissed for immoral conduct. It further stated that upon receipt of a complaint

that the respondent had had carnal knowledge of his pupil, on 28th October 2010, the DEO Nyakach caused investigations to be carried out and an Institutional Assessment Report prepared. Upon perusing that report and noting that a *prima facie* case had been made out against the respondent, on 24th November 2010, the DEO interdicted him and on further investigations the appellant served him with an amended interdiction letter dated 16th June 2011. The interdiction letter gave the respondent 21 days to prepare his defence. Thereafter a Disciplinary Panel was set up which conducted its hearing on 11th October, 2011 at which both the complainant and the respondent were given an opportunity to present their cases and call witnesses. On that Panel's recommendation, the appellant found that the case against the respondent had been established and accordingly dismissed him.

4. After hearing the claim, the Industrial Court held that the respondent's dismissal was unlawful for procedural impropriety and ordered his immediate reinstatement and payment of arrears of salary from the date of interdiction to the date of reinstatement as well as the costs of the suit. This appeal is against that decision.

5. The thrust of the appellant's nine grounds of appeal is that the learned Judge erred in failing to appreciate that the claim of professional misconduct against the appellant had been proved; that the respondent was accorded ample opportunity to present his case; and that there was no basis for ordering the respondent's reinstatement and payment of arrears of salary.

6. In presenting the appeal before us, Mr. Sitima, learned counsel for the appellant, faulted the learned Judge for ignoring the evidence on record that the respondent had indeed defiled his pupil and instead dwelt on procedural technicalities. He said the complainant testified that the respondent indeed had carnal knowledge of her on 25th May, 2010. That evidence was not challenged and instead it was corroborated by two of the complainant's fellow students who said on that day they left the complainant with the respondent in his house. The respondent himself admitted that the complainant indeed went to his house on that date, according to him, to beg for Kes.10/=, which he gave her, to enable her buy a hospital card. He further stated that she again went to his house subsequently and he gave her 40/= for transport.

7. Mr. Sitima further submitted that the learned Judge failed to appreciate that no school committee could be involved in the investigation of the respondent's case because the respondent had been transferred from Nyaluga to Obugi-Nam Primary School leaving the complainant in Nyaluga Primary School. With the case of immoral conduct against the respondent having been established, counsel submitted that the relationship between the appellant and the respondent had irretrievably broken down and the order for reinstatement was therefore unwarranted. Counsel argued that this was not a case of say misappropriation of funds but one of a predator preying upon his flock. Reinstating him was, as it were, unleashing him to other students. In counsel's view, even if the respondent's dismissal was unlawful, which it was not, damages would have sufficed. He concluded that the payment of arrears of salary for more than twelve months violated **Section 49 (1) (c)** of the Employment Act. He referred us to several authorities and urged us to allow this appeal.

8. In response, Mr. Onyango, learned counsel for the respondent, dismissed this appeal as completely unmeritorious. He submitted that the learned trial Judge having found that there was doubt if the claim of immoral behavior had been established against the respondent and in view of the RW1's admission that the laid down disciplinary procedure was not followed as no school committee or Quality Assessment Committee were set up to hear respondent's case, the learned Judge was justified in finding that the respondent's dismissal was unlawful. And that being the case, it followed that pursuant to **Section 12** of the Industrial Court Act and **Section 49** of the Employment Act, reinstatement and payment of arrears of salary were axiomatic reliefs that the court had to award to the respondent. With those submissions counsel urged us to dismiss this appeal with costs.

9. In a short rejoinder, Mr. Sitima, submitted that it is not in every case that a school committee should be set up. In this case there were two schools involved and neither school committee could have investigated the respondent's case. He said that the case of Telecom Kenya that the respondent relied on

is distinguishable because the court in that case considered only one criterion. In this case the fact that the girls' guardian had been compromised is no evidence in support of the respondent's case. He urged us to consider the welfare of the girl child and allow this appeal.

10. This being an industrial relations case, **Section 17(2)** of the **Industrial Court Act** limits our consideration in such appeals to only points of law. It provides that appeals from the Industrial Court decisions like this one "*shall lie only on matters of law.*" On the principle enunciated by the predecessor of this Court in the celebrated case of **Selle & Another v. Associated Motor Boat Co. Ltd & Others [1968] EA 123 at 126** and has since religiously been followed in subsequent cases including **Mwanasokoni v. Kenya Bus Services Ltd, [1985] KLR 931**, we can only interfere with the trial Judge's findings if the same are not based on evidence or they are based on a misapprehension of the evidence on record or if the trial court is shown to have acted on wrong principles.

11. Pursuant to this limitation, we have considered the above submissions by counsel for the parties and read the record of appeal. We would like to start with the learned Judge's finding that given the contradictions in the appellants' case, there was doubt if the respondent was guilty of the misconduct he was accused of and that as the laid down procedure was not adhered to, "*it was actually immaterial whether there is proof of the misconduct.*"

12. The learned Judge's statement that as the laid down procedure was not adhered to, "*it was actually immaterial whether there is proof of the misconduct*", was with respect unfortunate. The basis of the case against the respondent was the alleged misconduct. The first obligation of learned Judge was therefore to determine whether or not that allegation had been proved. It was after that determination that she would go into the allegations of procedural impropriety.

13. On the evidence on record, we are satisfied that the appellant established the allegation of misconduct against the respondent.

14. In matters of sexual immorality, it is not easy to get eyewitness evidence as such acts are committed behind closed doors. Such cases are, in most cases, proved by circumstantial evidence of opportunity to commit the same. In this case, two of the complainant's fellow students said that on the material day they left the complainant with the respondent in his house. The respondent himself admitted in his letter dated 9th December, 2012; before the Quality Assurance & Standard Assessment Committee; before the TSC Disciplinary Panel; and before the trial court that the complainant indeed went to his house with two other girls on the material date and that the two girls left him with the complainant. He claimed that she stayed for about 10 minutes, according to him, to beg for Kes.10/=, which he gave her, to enable her buy a hospital card. He further stated that she again went to his house subsequently and he gave her 40/= for transport and that she passed by his house on other occasions. So, the respondent had a perfect opportunity of having carnal knowledge of the complainant. That is not all. In her testimony in court, the complainant stated that the respondent had carnal knowledge of her on 25th May 2010, which is the date when her fellow pupils left her with the complainant in his house. In the circumstances, we find that the learned Judge's conclusion that there was doubt if the appellant had carnal knowledge of the complainant is not based on the evidence on record. We now turn to the issue of procedure.

15. The learned Judge quite correctly gave premium to the procedure followed in the dismissal of the respondent in this case. **Section 45(2)(c)** of the Employment Act 2001 outlaws termination of employment without following fair procedure. It asserts that "*[a] termination of employment by an employer is unfair if the employer fails to prove that the employment was terminated in accordance with fair procedure.*" Under this provision, the burden is on the employer to prove that he terminated the services of the employee in accordance with fair procedure. Under subsection (5) of the above Section, "*the procedure adopted by the employer in reaching the decision to dismiss the employee, the communication of that decision to the employee and the handling of any appeal against the decision*" are among the factors the court has to take into consideration in determining the propriety of the dismissal.

16. Was fair procedure followed in this case? To answer this question, we wish to start our consideration on the hearing by the school committees of complaints such as the one made against the respondent. The

respondent contended that the failure to set up a school committee to investigate his case as required by the Teachers Service Commission (TSC) Code of Conduct is proof that he was not given a proper hearing. The appellant on the other hand argued that as the respondent had been transferred to another school different from the one in which the pupil was, no school committee had jurisdiction to entertain the complaint against the respondent in this case.

17. We live in this country and there are matters we can take judicial notice of. Our primary schools cater for large numbers of pupils. On the other hand there are limited places in our secondary schools. So primary school teachers are pressed to secure for their pupils places in secondary schools by preparing the students well to pass the secondary school entrance examinations.

18. Studies as we know them, are rigorous undertakings. In the present computer and internet technology with all manner of allurements and distractions, our children, given an alternative, would hardly wish to be taken through the rigmarole of the examinations syllabi though they always desire to obtain high grades.

19. With that apathy in such competitive atmosphere, there are bound to be complaints against teachers by pupils who for example resent disciplinary measures taken by teachers against them if they fail to do their homework or do it diligently. In our view therefore, the purpose of setting up school committees to investigate complaints against teachers is to sift such complaints, dismiss frivolous ones and report to the authorities the ones shown to be prima facie cases worth reporting. That is as it should be otherwise the TSC will be inundated with complaints it cannot practically handle and a good number of teachers will, for long periods, literally camp outside the TSC offices waiting for complaints against them to be heard instead of being in classes.

20. Our understanding of the TSC Code of Conduct on disciplinary matters is that the school committees mandated to investigate complaints against teachers are those of the schools where the teachers concerned are, at the material time, serving and in which the complainant pupils are enrolled. Any other school committee will have no authority or no jurisdiction to investigate such complaints.

21. In this case, at the time of the alleged defilement, the respondent had been transferred from Nyalugato Obugi-Nam Primary School leaving the complainant in Nyaluga Primary School. If the school committee of either of these schools purported to hold any disciplinary proceedings, an issue of jurisdiction would have been raised. In the circumstances, we agree with counsel for the appellant that neither of these two schools' committees had jurisdiction to investigate the complaint.

22. We have gone into such elaborate detail to show the role of school committees as a system set up to sift through the numerous complaints against teachers and that in any particular case, failure to set up a school committee like in this case is not necessarily prejudicial if the teacher concerned is afforded a reasonable opportunity of being heard before any adverse action is taken against him or her. We now wish to consider if the respondent was accorded a reasonable opportunity of preparing his defence and if he was actually given a hearing.

23. In this case, the record shows that upon receipt of the complaint against the respondent, the Nyakach District Education Officer (the DEO) instructed the Quality Assurance & Standards Office to investigate the matter. In its investigations, on 28th November, 2010, the committee of the Quality Assurance & Standards Office interviewed the complainant and her guardian and the respondent and gave a report recommending disciplinary action to be taken against the respondent. It should be made clear that the role of the committee of Quality Assurance & Standards Office was investigative.

24. Based on the Quality Assurance & Standards Office Committee's report, the DEO interdicted the respondent on 24th January, 2011 as TSC further investigated the matter. After further investigations, TSC issued the respondent with an amended interdiction letter dated 16th June, 2011. Those interdiction letters gave the respondent a period of 21 days to state his defence to TSC in writing which he did. It is after receiving the respondent's written defence that TSC set up a Disciplinary Panel of 24 Commissioners which held a hearing on 11th October, 2011 at which the respondent testified but he never called any

witnesses. The complainant and her witnesses testified and the respondent was accorded ample opportunity to cross-examine and did cross-examine them. The unanimous decision of that Panel was that the respondent had indeed had carnal knowledge of the complainant as claimed. On the Panel's recommendations, the respondent was dismissed from the service of TSC.

25. Aggrieved by that decision, as we have stated, the respondent then filed the claim in the Industrial Court alleging that his dismissal was illegal as there was no sufficient evidence to prove the allegation of immoral behavior against him; that he was not accorded an opportunity to defend himself; and that there were procedural flaws in the hearing of the complaint against him.

26. We have already found that there was evidence to establish the allegation of immoral conduct against the respondent. On the claim that There was not accorded an opportunity to defend himself, the respondent's testified before the trial Judge that contrary to the TSC Code of Conduct, no school committee or Quality Assurance & Standard Assessment Committee were set up to hear respondent's case; that he went to the TSC Disciplinary Panel with two witnesses but those witnesses were not heard; that there was no medical report to prove that the pupil had been defiled and that no complaint was lodged with the police. He also claimed that the pupil's guardian's attempt to blackmail him to pay her Kes.20,000/= for her to withdraw the complaint was evidence that the claim was baseless. In cross-examination, however, he conceded that he appeared before the Quality Assurance & Standard Assessment Committee and made a statement.

27. There is nothing in the Quality Assurance & Standard Assessment Committee's report or the TSC Disciplinary Panel's proceedings that the respondent had witnesses he wished to call but he was denied an opportunity to call them. He gave no reason why the two bodies refused him an opportunity to call his witnesses. It is instructive that in the trial court where the respondent was represented by counsel, he never called any witnesses. As we stated recently in the case of **Patrick Opati v. Kenya Revenue Authority, Kisumu CA No. 88 of 2010 (unreported)** quoting with approval the English case of **R v. Immigration Appeal Tribunal (Ex-parte Jones) [1988] 1WLR 477 at p. 481,**

“...the 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.”

28. In this case, it is common knowledge that the procedure, which was required to be followed was the one laid down in the TSC Code of Conduct. As we have stated, other than not being interviewed by any school committee and we have stated why that did not happen, we find that fair procedure according to the TSC Code of Conduct was followed. Before he was dismissed, the respondent was accorded a fair hearing before the Committee of the Quality Assurance & Standards Assessment Office and before the TSC Disciplinary Panel. In the circumstances, we find that there was no evidence to support the learned Judge's conclusion that there was procedural impropriety in the disciplinary proceedings against the respondent. Consequently, we have no option but to interfere with the learned Judge's decision.

29. This being our view of the matter, we do not need to go into the issues of reinstatement and/or the arrears the learned trial Judge directed to be paid to the respondent. We therefore allow this appeal and set aside the orders of reinstatement and payment of arrears of salary with costs to the appellant.

DATED and Delivered at Kisumu this 10TH day of DECEMBER, 2014

D.K. MARAGA

.....

JUDGE OF APPEAL

F. AZANGALALA

.....

JUDGE OF APPEAL

S. ole KANTAI

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR