



**Chief Officer - Department of Education, Culture & Social Services & another v Sonye
(Appeal E047 of 2024) [2025] KEELRC 239 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELRC 239 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU
APPEAL E047 OF 2024
JK GAKERI, J
JANUARY 30, 2025**

BETWEEN

**CHIEF OFFICER - DEPARTMENT OF EDUCATION, CULTURE & SOCIAL
SERVICES 1ST APPELLANT**

COUNTY GOVERNMENT OF MIGORI 2ND APPELLANT

AND

ONYANYA SAMUEL SONYE RESPONDENT

JUDGMENT

1. This is an appeal from the judgment of C. N. C. Oruo, Principal Magistrate dated 6th August, 2024 at Rongo, where the learned trial Magistrate entered judgment in favour of the respondent.
2. The brief facts of the case are that the respondent was an employee of the 2nd appellant following his release by the Teachers Service Commission and was deployed as the Sub-County Education Officer, Rongo vide letter dated 4th August, 2015.
3. It is common ground that by letter dated 23rd May, 2019, the 2nd appellant requested all Sub-County Education Officers to make follow ups of all sponsored students who had not submitted results to the Department of Education, Sports, Culture, Gender & Social Services.
4. On the basis of this letter the respondent wrote a letter dated 28th May, 2019 addressed to the Principal Agoro Sare High School, signed by self demanding refund of excess fees amounting to Kshs.99,393.00 less Kshs.4,500.00.
5. The respondent delivered the letter but was untruthful as to what actually transpired as he was arrested at the intigation of the Principal who thought he was an imposter and thus fraudulent. These are facts he did not disclose. Indeed, he denied having been arrested by the police.



6. Suffice it that the 2nd appellant's displeasure with the respondents conduct culminated in his interdiction and summary dismissal which was subsequently rescinded by the County Public Service Board.
7. The respondent challenged the interdiction, summary dismissal and sought withheld salary from June 2019 to June 2020, unpaid salary from June 2020 to October 2020 reinstatement as Education Officer and expunction of falsified records from his file and compensation for inconvenience occasioned by the respondents actions and did not pray for costs.
8. The appellants defended the suit contending that the disciplinary process it undertook was fair, just and lawful. It denied the respondent's allegations in toto and sought dismissal of the suit with costs.
9. The learned trial Magistrate found the interdiction and dismissal wrongful and awarded the respondent 12 months compensation Kshs.661,800.00, declaration that interdiction and dismissal, were unlawful, reinstatement of the respondent as Education Officer and the same be effected on the 2nd appellants pay roll, right to appeal and costs.

This is the determination appealed against.

10. The appellants Memorandum of Appeal lists 10 grounds of appeal which may be condensed into 6 as follows:

That the trial Magistrate erred in law and fact by: -

1. Failing to consider and appreciate the totality of the evidence adduced and relied upon by the appellants.
2. Rendering a judgment that did not meet the requirements of Order 21 rule 4 of the Civil Procedure Rules.
3. Failing to consider the Appellants grounds of objection that the dispute was pending determination before the County Public Service Board.
4. Failing to mention or refer to the appellant's submissions.
5. Failing to appreciate that the respondents dismissal from employment was fair.
6. Failing to find in favour of the appellants.

Appellant's submissions

11. Relying on the sentiments of the Court in *MwanaSokoni V Kenya Bus Ltd* [1985] KLR 931 and *Mbogo & Another V Shah* [1968] E. A. 98, the appellants submit that the Court has jurisdiction to review the evidence availed by the parties and make a finding overturning the decision of the trial Court.
12. The appellants further submit that the respondent's employment was terminated in accordance with the provisions of the *Employment Act* as he was guilty of gross misconduct as he had been to the school and demanded a refund of school fees and due procedure was followed.
13. Reliance was also made on *Kenya Union of Commercial Food & Allied Workers V Meru North Farmers Sacco Ltd* [2013] eKLR and *Postal Corporation of Kenya V Andrew K. Tanui* [2019] eKLR to urge that all procedural requirements were complied with.
14. Sentiments of the Court in *South Nyanza Sugar Co. Ltd V Omwando Omwando* [2011] KIHIC 2313 (KLR) were cited to urge that a judgment of a Court must meet the prescribed criteria.



15. That the respondent was reinstated but demoted as a punishment and salary decreased.
16. The appellants' argue that the trial court had no jurisdiction as the matter was pending before the Public Service Board and thus an alternative remedy had not been exhausted.
17. The appellants submit that the respondent did not discharge the burden of proof as the suit was premature.
18. Reliance was made on the sentiments of the Court in *Pius Machafu Isindu V Lavington Security Guards Ltd* [2017] eKLR and *Postal Corporation of Kenya V Andrew K. Tanui (Supra)* to reinforce the submission.

Respondent's submissions

19. According to the respondent the only issue for determination is whether the judgment of the trial court was merited and it was as the court relied on the evidence before it and the provisions of Section 45 of the *Employment Act* were complied with as the respondent was acting as an agent of the appellants and acted in good faith and the excess funds were refundable to the appellants.
20. According to the respondent, the interdiction was malicious and the reinstatement vindicated the respondent and urges the court to uphold the judgment of the trial court.
21. I have considered the appeal, submissions by the parties and the authorities relied on. This being a first appeal the courts role is to re-evaluate and reconsider the evidence a fresh and make a determination.
22. In a nutshell the first appellate court conducts a retrial.
23. In *Gitobu Imanyara & 2 Others V Attorney General* [2016] eKLR, the Court of Appeal stated:

An appeal to this court from a trial by the High Court is by way of a re-trial and the principles 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”.
24. See also *Abok James Odera t/a A. J. Odera & Associates V John Patrick Machira t/a Machira and Co. Advocates* [2013] eKLR, *Selle & Another V Associated Motor Boat Co. Ltd* [1968] E. A. 123 and *MwanaSokoni V Kenya Bus Services Ltd (Supra)* among others.
25. In his evidence-in-chief, the respondent maintained that he was maliciously interdicted and dismissed and having been reinstated he was seeking the correct terms of service.
26. On cross-examination, the respondent admitted that he was reinstated and was heard after filing the instant suit but had no minutes of the hearing. That his salary was reduced as he was demoted and had not complained about the salary.
27. It was his evidence that the summary dismissal was lifted and a reprimand imposed.
28. The respondent admitted having signed the letter dated 28th May, 2019 and denied having been arrested or booked at Oyugis Police Station. That his salary reduced from Kshs.55,000.00 to Kshs.42,000.00 and was being paid vide voucher.
29. It was his evidence that he was challenging the dismissal process, and was reinstated on poor terms of service and had not highlighted the documents to be expunged from his file.



30. According to RWI, MR. Christopher Odhiambo Bware, the respondent's salary decreased after reinstatement and the same was communicated to him and was demoted after he was found guilty of an offence. Though the allegations did not contravene Chapter VI of *the Constitution* of Kenya and although the respondent's salary was not stopped, promotion was withheld.

The appellants raised several issues that require determination.

31. This appeal, however, turns on whether the trial court ought to have heard and determined the matter before it.

32. As regards the court's jurisdiction to entertain the respondents case in light of internal dispute resolution procedures that were pending, it is clear that the appellants lodged an objection and the respondent admitted on cross examination that he had appealed to the Public Service Commission, but then changed his evidence and stated that he had applied for review not an appeal.

33. From the record, it is clear to the court, although the respondent alleges to have applied to the PSC for review, copies of the letter on record shows that, the respondent applied for a review by the County Public Service Board, and the application was heard and the dismissal was substituted with other sanctions.

34. The Principles that govern exhaustion of internal reliefs before invoking the court's jurisdiction are well settled and there is a catena of decisions on the issue.

35. In *Speaker of the National Assembly V James Njenga Karume* [1992] eKLR, the Court of Appeal laid it bare that:

...In our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. We observe without expressing a concluded view that order 53 of the Civil Procedure Rules cannot oust clear constitutional and statutory provisions”.

36. The Court expressed similar sentiments in *Republic V National Environment Management Authority Ex Parte Sound Equipment* [2011] eKLR and *Secretary County Service Board & Another V Hulbhai Gedi Abdille* [2017] eKLR.

37. Section 77 of the County Government Act provide for appeals to the Public Service Commission by any person dissatisfied or affected by a decision made by the County Public Service Board or a person in exercise or purported exercise of disciplinary control against any County Public Officer.

38. Relatedly, Section 9 of the *Fair Administrative Action Act* has detailed provisions on the doctrine of exhaustion of remedies. Significantly, Section 9 of the Act is couched in mandatory terms but provides for exceptions.

39. The doctrine of exhaustion of remedies does not deny a potential litigant the constitutionally ordained right to seek judicial redress. It merely postpones it as other mechanisms are brought to bear on the dispute as held in *William Odhiambo Ramogi & 3 Others V Attorney General & 4 Others; Muslims for Human Rights & 2 Others (Interested Parties)* [2020] eKLR where the Court stated:

40. The question of exhaustion of administrative remedies arises when a litigant aggrieved by an agency's action, seeks redress from a court of law on an action without pursuing available remedies before the agency itself. The exhaustion doctrine serves the purpose of ensuring that there is postponement of



judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside the courts”

41. In *Geoffrey Muthinja & Another V Samuel Muguna & 1756 Others* [2015] eKLR, the Court of Appeal held that:

It is imperative that where a dispute resolution mechanism exist outside courts, the same be exhausted before the jurisdiction of the Court is invoked. Courts ought to be the fora of last resort and not the first part of call the moment a storm brews within churches, as is bound to happen...”

43. In this case, it is clear that the respondent was summarily dismissed from employment by the respondent after being taken through a disciplinary process.
44. Copies of minutes of the County Human Resource Advisory Committee meeting held on 31st October, 2019 reveal that it recommended dismissal of the respondent from employment.
45. This is further evidenced by a copy of a letter from the County Secretary, Mr. O. O. Oluoch to the Secretary/CEO, Migori County Public Service Board dated 9th March, 2020.
46. Strangely, the appellants did not file a copy of the dismissal letter and by January, 2020, the respondent was still awaiting the outcome of the disciplinary process and had already written to the appellant and his counsel did another letter dated 6th February, 2020.
47. From the contents of the letter dated 2nd October, 2020 from the Office of the County Public Service Board, the respondent applied for a review of the decision and was heard by the Board on 19th August, 2020 and the summary dismissal was lifted and other penalties imposed as already mentioned.
48. Evidently, the respondent instituted this case long before he had been notified of the outcome of the disciplinary process and the same is decipherable from his original plaint dated 17th March, 2020 which was subsequently amended on 7th July, 2020 when he prayed for unconditional reinstatement for wrongful dismissal.
49. Intriguingly, the amended statement of claim makes no reference to the date of dismissal from employment and sought an injunction to restrain the respondents from taking any further disciplinary actions against him.
50. Clearly, the respondent was by his amended statement of claim intimating that the disciplinary process was still on-going.
51. The respondents pleadings prove beyond peradventure that the suit was filed long before the disciplinary process was concluded and the outcome communicated to him.
52. Granted that the appellants took unreasonably long to communicate the outcome, the better option for the respondent would have been to seek orders to compel the respondents to communicate the outcome of the disciplinary process since the respondent had not exhausted internal dispute resolution processes, including the statutorily ordained appeal to the Public Service Commission (PSC).
53. The statement of claim was further amended on 18th October, 2021 to accommodate the lifting of the summary dismissal.
54. Buzzlingly, the Further amended statement of claim like its predecessor made no reference to the date of summary dismissal.



55. Ultimately, the respondent's suit before the trial court was a hodge podge of amendments which would have been obviated had the trial court deferred to the internal process that were on-going as ordained by law as not exceptional circumstances had been demonstrated.
56. The doctrine of exhaustion of remedies dictated that the trial Court defers to the internal dispute resolution processes by striking out the respondent's suit on account of having been filed pre-maturely or stayed it to await conclusion of the on-going internal dispute resolution mechanisms.
57. In the end the respondent succeeded in having the best of both worlds in circumstances in which it ought not to have happened. The general principles on when an appellate court may interfere with the exercise of discretionary power of a trial court are now well settled.
58. In *Mbogo & Another V Shah* [1968] EA 93, the Court expressed itself as follows:

... I think it is well settled that this Court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion”.

Sir Charles Newbold P stated as follows:

An appellate court will not interfere with the exercise of the trial court's discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matter and as a result arrived at a decision that was erroneous or unless it is manifest from the case as whole that the court has been clearly wrong in the exercise of judicial discretion and that as a result there has been misjustice”.

The court is bound by these sentiments.

59. In its judgment, the trial court found that termination of the respondent's employment and preceding interdiction were wrongful and awarded maxim compensation of Kshs.661,800.00.
60. The trial court further found that the respondent's half salary had been paid, Kshs.294,208.00, reinstated the respondent to his position as Education Officer and awarded costs of the suit.
61. In the court's view, having proceeded with the respondent's suit in circumstances in which it ought not to have done so, the trial court failed to take into consideration the reality that internal dispute resolution processes were at an advanced stage and no case had been made for the court's interference with the process.
62. The appellants should have been accorded the opportunity to conclude the process and if dissatisfied the respondent would have had the liberty to take the next course of action.
63. Clearly, the trial court ignored the doctrine of exhaustion to the detriment of the appellants, as no compensation was due to the respondent on account that although he was summarily dismissed, the dismissal was subsequently lifted and unpaid half salary was paid.
64. Section 49(1)(c) of the *Employment Act* only applies where a termination of employment or dismissal has taken place and the employment relationship between the parties has ended.
65. In court's view, the trial court's decision to hear the matter prior to the conclusion of the internal dispute resolution mechanisms occasioned misjustice to the appellants.



66. The court is satisfied that a case for interference with the exercise of discretion by the trial court has been made.
67. In the upshot the orders that commend themselves are:
- a. The appeal is allowed.
 - b. The judgment in Rongo Employment and Labour Relations Court No. 1 of 2020 dated 4th August, 2024 is set aside in its entirety.
 - c. Parties shall bear their own costs of this appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU ON THIS 30TH DAY OF JANUARY, 2025.

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

