Omosa v Teachers Service Commission (Judicial Review Miscellaneous Application 13 of 2022) [2023] KEELRC 79 (KLR) (23 January 2023) (Judgment)

Neutral citation: [2023] KEELRC 79 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

JUDICIAL REVIEW MISCELLANEOUS APPLICATION 13 OF 2022

AN MWAURE, J

JANUARY 23, 2023

BETWEEN

ELIAKIM OMOSA ..... APPLICANT

AND

TEACHERS SERVICE COMMISSION ..... RESPONDENT

JUDGMENT

1. Before Court for decision is the Chamber Summons application dated the 8th June 2022 seeking leave to commence judicial review proceedings against the Respondent, The Teachers Service Commission. The Application sought for the following orders;

    a. Spent

    b. Leave do issue for the Applicant to apply for an order of certiorari to review into the Honourable Court and quash the decision of the Respondent's Disciplinary Review Committee dated the 10th day of May, 2022.

    c. Leave to apply for an order of Mandamus to compel the Respondent to exonerate the Applicant and reinstate him to his previous teaching position with the Respondent

    d. Leave granted to operate as stay of the decision of the Respondent's Disciplinary Review Committee, dated the 10th day of May, 2022

    e. Costs of the Application

2. The Court gave directions on the disposal of the application on the 25/7/2022.

3. The application is supported by the grounds on the face of the application and supporting affidavit of the applicant. The brief factual background is that the Respondent interdicted the applicant on 12th October 2020.

4. That applicant was given a notice of 21 days to prepare his response and he replied by his statement of 29th October 2020.

5. He was invited for a disciplinary hearing on 10th September 2021 and the hearing happened on 14th October 2021 and the minutes of the said meeting were annexed thereto.

6. The commission found the applicant guilty of immoral behaviour and was dismissed vide their letter of 1st November 2021.

7. The applicant appealed the decisions by the letter of 20th December 2021 and meeting took place on 25th April 2022 and he was informed that decision to dismiss him was upheld. That was by their letter of 10th May 2022.

8. The facts are that the Commission following hearing of the applicant's disciplinary case on the 14/10/2021 made a decision to dismiss the Applicant from duty and remove his name from the Teachers Register. This decision was communicated to the Applicant on the 01/11/2021.

9. The Applicant afterwards Appealed for Review to the Respondent's Appeal's Committee which upheld the decision on the 10th May, 2022. This came after the criminal charges against the applicant touching on the allegations leading to his dismissal from his employment had been withdrawn under section 87 of the CPC and this was on 31st March 2021.

Applicant's Submissions

10. The Applicant submits that the Application for judicial review is merited. That he is challenging the process that led to the Respondent's decision, rather than the merits of the case. The Applicant relied on the case of Republic versus the Attorney General & 4 others ex parte Diamond Hashim Lalji and Ahmed Hasham Lalji 2014 eklr, in which the Court stated:

> "Judicial Review applications do not deal with the merits of the case but only with the process. In other words, Judicial Review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties, the Court would have no jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant.

11. The Applicant submits that the Respondent failed and /or ignored to convene a legally constituted panel to determine the Applicant's case before it, which resulted in the impugned decision that was delivered on the 1st day of November, 2021. That contrary to Regulation 151 (4) of the Teachers Service Commission Code of Regulation for Teachers, 2015 only 3 panellists were present during the hearing and delivery of the decision dated 1st day of November, 2021 which represents a miscarriage of justice.

12. The applicant also argues that the decision is flawed in law since the Respondent failed to provide sufficient notice for him to provide a suitable defence and/ or challenge the evidence, since he was only notified 48 hours prior to the hearing, rather than the requisite 7 days-notice, pursuant to Regulation 146(6) of the Teachers Service Commission Code of Regulations for Teachers, 2015.

13. The applicant also relied on the case of Raichand Khimji and Co versus Attorney General Civil Appeal No. 49 of 1972 EA which was quoted in Miscellaneous Application 288 of 2011; Reverend Daniel Muiruri Ndungu versus Attorney General and Another 2013, where the East African Court of Appeal held that the High Court' s supervisory powers over administrative and quasi -judicial tribunals are discretionary and should only be used in exceptional cases for instance if there has been a failure of justice or want of good faith. The applicant submits that there has been a failure of justice for want of good faith by the Respondent in dismissing the applicant from employment. That the disciplinary panel instituted to determine the applicant's case was inquorate and the Respondent failed to give the applicant appropriate time for him to file/lodge his defence.

14. The claimant has also submitted that the application is not time barred since the applicant made the application for review of the decision dated the 1st day of November, 2021, with the decision of the same being arrived at on the 10th day of May, 2022.

Respondent's Written Submission

15. The Respondent submits that the applicant was accorded a fair and just disciplinary hearing. It is argued that the Respondent's disciplinary committee after interrogating both oral and documentary evidence presented before it during the disciplinary hearing of the applicant held on 14th October, 2021 reached a decision that the applicant was guilty of the offence of immoral behaviour and thus was dismissed from service and his name removed from the register of teachers.

16. The Respondent further submitted that an order of mandamus is issued to compel a person who has failed to perform a duty to the detriment of a party. The Respondent says it properly discharged its duty under Article 237 and Article 53 of *the Constitution* by conducting a fair disciplinary process and denying the applicant another opportunity to sexually abuse learners by removing his name from the register of teachers.

17. That pursuant to Article 237 (2) of *the Constitution*, the Respondent has mandate to manage its employees which includes discipline. It will therefore be usurpation of that mandate if the Court grants the prayers sought. The Respondent relied on the case of Chrispus Ileli Kunuva versus County Government of Kitui and Another where Mbaru J stated that in 'In Employment and labour relations, the employer has the prerogative to deal with discipline of its employees by application of internal mechanisms, disciplinary measures or human resource management policies. Such prerogative can only be interfered with by the Court where there is apparent violation of *the constitution* or the law as held in the case of Mulwa Msanifu Kombo versus Kenya Airways Ltd and in Prof. Francis M Njeru versus Jomo Kenyatta University of Agriculture & Technology 2013 eKLR.

18. The Respondent further submitted that an order of Certiorari is untenable as the same is time barred pursuant to Order 53 (2) of the Civil Procedure Rules which provides that 'Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction, or other proceeding for the purposes of it being quashed unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the Appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

19. The Respondent contends that the applicant was dismissed on the 1st November, 2021 and the decision of 10th May, 2022 only upheld the dismissal. That in case the Court be inclined to quash the decision of 10th May, 2022, the dismissal of the 1st November, 2021 will still be in place and hence will be an order in vain.

Determination

20. After careful consideration of the exparte Chamber Summons dated the 8th June 2022, the statutory statement, verifying affidavit, supporting affidavit, the replying affidavit by the Respondent together with the rival submissions, the issue for determination is whether exparte applicant has met the threshold for a grant of the leave sought to commence judicial review proceedings and whether such leave should operate as stay of the decision to dismiss and deregister the Applicant from the Respondent's register.

21. In the case of Lady Justice Joyce N. Khaminwa v Judicial Service Commission & another [2014] eKLR Odunga J cited the case of Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK), where the Court stated:

> " Application for leave to apply for orders of judicial review are normally ex parte and such an application does restrict the Court to threshold issues namely whether the applicant has an arguable case, and whether if leave is granted, the same should operate as a stay. Whereas judicial review remedies are at the end of the day discretionary, that discretion is a judicial discretion and, for this reason a Court has to explain how the discretion, if any, was exercised so that all the parties are aware of the factors which led to the exercise of the Court's discretion. There should be an arguable case which without delving into the details could succeed and an arguable case is not ascertained by the Court by tossing a coin or waving a magic wand or raising a green flag, the ascertainment of an arguable case is an intellectual exercise in this fast growing area of the law and one has to consider without making any findings, the scope of the judicial review remedy sought, the grounds and the possible principles of administrative law involved and not forget the ever expanding frontiers of judicial review and perhaps give an applicant his day in Court instead of denying him.... Like the Biblical mustard seed which a man took and sowed in his field and which the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, judicial review stemmed from the doctrine of ultra vires and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. One can safely state that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of Donoghue vs. Stephenson in the last century. Although leave should not be granted as a matter of routine, where one is in doubt one has to consider the wise words of Megarry, J in the case of John vs. Rees [1970]. In the exercise of the discretion on whether or not to grant stay, the Court takes into account the needs of good administration."

22. Judicial review is applicable on public bodies acting in accordance with laws made by Parliament. It provides protection for individual against state power and ensure government public bodies and regulation are held to account. That is basically the applicability of judicial review. It is however not

used to challenge the substance or merits of a decision taken by a public authority. It is limited to ruling on whether the decisions was made following proper process.

23. The case before this Court it is evident the respondent investigated the allegations against the claimant and recommended interdiction for having illicit sex with his female student. He was then invited for a disciplinary hearing on 14th October 2021 and after the hearing he was dismissed on 1st November 2021. His letter inviting him to the disciplinary hearing was dated 10th September 2021. The Court finds he was given ample time to attend the hearing going by the documents on record. In the same letter he was advised to invite a witness of his choice and to take along any document.

24. After he was issued with the dismissal letter of 1st November 2021 he was well advised in details the reasons for his dismissal being immoral behaviour with a seventeen years old student. He appealed and his review was heard and decision to dismiss him was upheld on 24th April 2022. He was then informed of the said decision on 10th May 2022.

25. So far the Court is of the opinion the respondent did comply with the law and procedure provided in the law related to employment and in particular Section 41 and Section 45 of the *Employment Act*. They set out clearly the reason for dismissal and they followed the procedure of giving the employee an opportunity to be heard in the presence of a witness of his choice. If the employee choses not to call a witness that is his problem not the employer.

26. The respondent in support of the reason for termination provides that in section 22 of code of Ethics of Teachers (COCE) it is provided that a teacher shall not engage in sexual activity or exert pressure or even flirt with a student. That notwithstanding that a student has consented.

27. The claimant faults the respondent for failing to consider the judgment of the criminal case No 62/2020 which was withdrawn against him. The claimant was not acquitted but case was merely withdrawn against him. In any event the burden of proof of criminal case is different from the procedures of individual employers in disciplining their employees as per their code, policies and employment laws.

28. Also the claimant argues that at his disciplinary hearing only three panellists were present. He therefore submits that this is a miscarriage of justice. He however does not demonstrate how this is a miscarriage of justice and how many members should have been present for a fair hearing. This is a general complaint and is not substantiated.

29. In JR Misc Application No E159 of 2021 R versus Chief Magistrates Milimani Commercial Courts and 2 others the Court cited the case of HCJR No EO 87 of 2021, AAR versus Public Procurement Administrative Board, Secretary IEBC and Zamara Risk and Insurance Brokers Limited (Interested Parties) (Unreported) where the Court stated that:

> "I must reiterate that that judicial review remedies are discretionary and it is partly for this reason that a judicial review Court has been clothed with the discretion to interrogate, at a preliminary level, the intended application for prerogative orders. It is at that stage that, in exercise of its discretion, the review Court will weigh between 'the legitimate requirement of public authorities that they should be free to perform their proper functions on behalf of the public and the corresponding requirement that they should have due regard for the legitimate rights and interests of the individual and groups of individuals.' If upon examination of the material before it, the Court is persuaded that a case has been made out that on further interrogation the legitimate rights and interests of the individual or group of individuals may have been abrogated, it will intervene and exercise its discretion in favour of grant of leave to institute a substantive motion for judicial review reliefs. It follows that the

application for leave is not a mere procedural technicality that can be dispensed with at the whims of either the Court or an applicant. It is a material stage in the application of judicial review orders at which the discretion of this Honourable Court is called into question and which, for this very reason, cannot be taken away without an express provision of the law in that regard.'"

30. Further in the Court of Appeal in Secretary, County Public Service Board & another v Hulbhai Gedi Abdille [2017] eKLR held that 'Similarly, in the case of Republic v National Environment Management Authority exparte Sound Equipment Ltd, [2011] eKLR, this Court observed:-

> " .....Where there was an alternative remedy and especially where Parliament had provided a statutory appeal procedure, it is only in exceptional circumstances that an order for judicial review would be granted and that in determining whether an exception should be made and judicial review granted, it is necessary for the Court to look carefully at the suitability of the statutory appeal in the context of the particular case and ask itself what, in the context of the statutory powers, what was the real issue to be determined and whether the statutory appeal procedure was suitable to determine it...."

31. The application before Court has been brought under Order 53 (2) of the Civil Procedure Rules. The application therefore has to be in conformity to the timelines provided under the rule. It provides that:

> " Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction, or other proceeding for the purposes of its being quashed unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the Appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.

32. The Court will not deal much on when time began to run. It may well be time began after appeal was dismissed since the applicant had appealed decision and could not have filed suit until he knew the outcome of the appeal. The issue to interrogate thoroughly is whether this is a case for judicial review or not. Guided by case of Attorney General & another v Andrew Maina Githinji & another [2016] eKLR where Court held "in relation to the time when a cause of action accrues in employment issues 'the critical question to ask, which I will endeavour to answer, is this: 'What is a cause of action and when does it arise in a claim for unfair /wrongful termination" In doing so, I must re-emphasize two matters which are clear from the record. Firstly, there is no pretence by the respondents that their claim is based on any other law besides the *Employment Act*. That is why they went before the Employment and Labour Relations Court (formerly, the Industrial Court) to agitate reinstatement to their employment and to seek general damages for wrongful dismissal. There is no claim for malicious prosecution or general damages for that transgression. It was not a Judicial Review matter either. It is therefore the provisions of Part VI of the *Employment Act* which would fall for consideration to determine whether the termination was lawful. Secondly, there is no traverse to the pleadings by the Attorney General in his "Memorandum of Response" that the respondents were given an opportunity to appear before the Human Resource Committee of the employer when the decision to terminate their employment was made and that they appealed against the decision to the Public Service Commission which rejected the appeal, as it did a further Review sought by the respondents. On the respondents' own pleading, their

services were terminated on 2nd February 2010 when they were so notified. Parties are bound by their pleadings." Later on...Hon Judge stated

> "I have considerable sympathy for the reasoning in all the above cases which leads me to the conclusion that the cause of action in this case did not arise after the conclusion of the criminal case against the respondents. The respondents had a clear cause of action against the employer when they received their letters of dismissal on 2nd October 2010. They had all the facts which had been placed before them in the disciplinary proceedings and they could have filed legal proceedings if they felt aggrieved by that dismissal, but they did not.

33. Radido J in Erick Samuel Bwibo v Teachers Service Commission & 2 others [2021] eKLR held:

> " Lastly, although the Court appreciates that judicial review orders now have a constitutional anchor, judicial review orders are discretionary and may not even be granted where merited. More so where alternative remedies are available (see Kenya Revenue Authority & 2 Ors v Darasa Investments Limited (2018) eKLR. In the case of unfair termination of employment underpinned by general employment law, there are clear statutory provisions on how to challenge the termination with clear remedies set out under section 49 of the *Employment Act*, 2007. The applicant proposes to challenge his dismissal not through the manner outlined in the governing statutes of this Court but through the special vehicle of judicial review, long after the lapse of prescribed limitation under section 90 of the *Employment Act*, 2007."

34. At the core of the issue leading to the application before Court is whether the decision of the Respondent to dismiss the applicant was proper or legal. The application howsoever framed falls within the framework of the general Employment law and the governing statutes of this Court and the remedies as set out under section 49 of the *Employment Act*, 2007. An employer can dismiss an employee from his work in light of the Respondent's regulations and procedures and employment Laws as sufficiently covered under the governing statutes of this Court and that is what is at issue in the dispute. Employment of a person by a public body simpliciter does not elevate a dispute to a public law issue. It is therefore the court's view that the dispute ought not have been instituted by way of judicial review but rather as an ordinary claim.

35. The Court has considered the chamber summons application by the applicant dated 8th June 2022 and the replying affidavit, the rival submissions and the statutory laws and authorities and finds the application is not merited and so is dismissed and with no orders as to costs.

Dated, signed and delivered virtually at Nairobi this 23rd day of January 2023.

ANNA N. MWAURE

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.