REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL NO. 15 OF 2017

(Before Hon. Lady Justice Maureen Onyango)

ROBINSON MUKIGI MUCHOKI.....APPELLANT

VERSUS

TEACHERS SERVICE COMMISSION.....RESPONDENT

(Being an appeal from the judgment of the Chief Magistrate's Court, Milimani Commercial Courts at Nairobi delivered by Hon. Kandet on the 18th February 2011, in Civil Case No. 6348 of 2006)

JUDGMENT

Facts of the Case

The Appellant was employed by the respondent as a graduate technical teacher and deployed to [particulars withheld]. The respondent then received allegations that the appellant had carnal knowledge of his student by the name of CNK and attempted to help her procure an abortion. The respondent, in exercise of its mandate commenced its investigation which led to the appellant being interdicted and thereafter disciplinary process ensued, leading to the appellant's dismissal from service on account of his admission that he impregnated a student and attempted to procure an abortion.

The decision aggrieved the appellant who then proceeded to file a Judicial Review Miscellaneous Application No. 737 of 2003 before the High Court at Nairobi seeking *inter alia* orders of certiorari to quash the respondent's decision of 22nd April 2003 on the ground *inter alia* that; the respondent breached the Rules of Natural Justice by failing to accord him audience. Upon hearing the application the Judge in finding that the dismissal was justified held that *"Yes, although it may appear that defendant was not afforded an opportunity to be heard, he was the author his own misfortune. Having admitted that he impregnated the student and committed himself to taking responsibility, it follows therefore that the plaintiff was in breach of the defendant's code of conduct and regulation..."*

Following this decision, the appellant moved the Chief Magistrates Court seeking to challenge his dismissal on the ground that he was not afforded a fair hearing pursuant to the provisions of section 6 of the Teachers Service Commission Act. The court in a judgment dated 18th February 2011 dismissed the suit. Like in the High Court judgment, the trial Court held that the plaintiff voluntarily wrote the letter admitting to being involved in impregnating one CNK, a student at [particulars withheld]. In other words, he had a relationship with the student. The trial Court further held that, the plaintiff did not tell the court what was wrong with the decision to dismiss him.

It is this decision that the appellant is appealing against.

The Appeal herein was originally filed in the High Court in High Court Civil Appeal No. 131 of 2011. However, the same was transferred to this Court pursuant to the directions issued by the Njuguna J. on 31st October 2017.

In the Memorandum of Appeal, the appellant raises the following grounds of appeal:

1. That the learned Magistrate erred in law and in fact in finding that the Plaintiff had not established a *prima facie* case on a balance of probability.

2. That the learned Magistrate erred in law and in fact in finding that the Appellant's dismissal from employment was justifiable.

3. That the learned Magistrate erred in law and in fact in finding that the prayers that the Appellant prayed for in the case before him where (sic) similar to the ones he prayed for in JR Miscellaneous Application No. 737 of 2003.

4. That the learned Magistrate erred in law and in fact in finding that the Appellant was in breach of the Respondent's Code of Regulations.

5. That the learned Magistrate erred in law and in fact in finding that the Appellant had not quantified his claims.

The Respondent opposed the appeal vide its Notice of Grounds of Affirming the Lower Court's judgment. It contends that the decision was rightfully grounded by the principle of *stare decisis*, the matter is *res judicata* and that this Court lacks the jurisdiction to hear and determine an appeal from a decision of a court of concurrent jurisdiction.

The appeal was disposed of by way of written submissions.

The Appellant submitted that the Lower Court considered the Appellant's admission to allegations levied against him which had been obtained under duress, an assertion which was never controverted by the Respondent. The Appellant relies on Section 107(1) of the Evidence Act, Order 6 Rule 9 of the Civil Procedure Rules and the case of ***Hellen Wangari Wangechi vs. Carumera Muthoni Gathua [2015] eKLR*** wherein the Court defined what amounted to duress.

The Appellant further submitted that the Respondent never gave him a fair hearing which evidence was not controverted. He relied on the cases of ***Mary Chemweno Kiptui vs. Kenya Pipeline Company Limited [2014] eKLR*** and ***Kenya Union of Commercial Allied Workers vs. Meru North Farmers Sacco Limited*** **Cause No. 74 of 2013**. The Appellant further submits that the fact that he filed a Judicial Review, which was dismissed does not imply his right was dissolved. In addition, he submits, the reliefs sought were different. He sought reinstatement in the Judicial Review Application and sought damages in the lower court.

The Respondent submits that the Claimant was accorded a fair hearing by the Board of Governors of [particulars withheld] and later by the Disciplinary Committee of the Respondent and was thereafter dismissed on account of his own admission as to impregnating his student, a fact which was reiterated during trial. The respondent relies on the case of ***Kennedy Maina Mirera vs. Barclays Bank of Kenya*** **Limited [2018] eKLR**. The Respondent further submitted that the Appellant did not give a valid reason why the Lower Court should have departed from the principle of *stare decisis*.

Analysis and Determination

This being a first appeal, this court is bound to re-evaluate the evidence and make its findings. The Appellant's case was dismissed by the lower court on grounds that the matter was *res judicata* as the High Court had made a decision on the same issue in Judicial Review Miscellaneous Application No. 737 of 2003. Section 7 of the Civil Procedure Act which provides:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Further, the Court in the case of ***Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR***

"The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;

(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

In his Chamber Summons Application, the Appellant sought the following Order:

"*That leave be granted to apply for orders of judicial review to remove into the High Court for purposes of quashing the decision dated 22nd April 2003 made by the Respondent pursuant to disciplinary case no 622/95/25 and the Respondent be compelled to accord the Applicant a hearing by reviewing the said disciplinary case."*

The application was premised on the ground that the Respondent breached the principles of natural justice as it did not accord the Appellant audience and that the Respondent had acted *ultra vires* the Teacher Service Commission Code of Regulations. The Court held that although the Appellant may have been denied the opportunity to be heard, he was the author of his own misfortune since he delayed his appeal. The Court was of the opinion that the right to be heard could only have accrued to the Appellant if he had properly and timeously moved the Court. The Court further held that the Application would still have been dismissed since it concerned the relationship between an employer and an employee. In the Court's opinion, the Appellant ought to have commenced proceedings by way of a Plaint seeking the appropriate damages for the breach of his employment contract.

It would seem that the Appellant followed this advice as he filed the suit whose decision he is now appealing against, seeking damages on the ground that he was not accorded a hearing by the Respondent before he was terminated. The issue that formed the basis of the JR Application is the same issue that formed the subject matter of the Appellant's claim in the Lower Court. It is immaterial that the Appellant sought different reliefs in each case as it arose out the same facts and the parties were the same. The matter is *res judicata* and the Lower Court was right in holding as it did as it was bound by the principle of *stare decisis*. The option for recourse for the Appellant would have been an appeal against the High Court's decision to the Court of Appeal.

Even if the matter had been found not to have been *res judicata*, the Appellant testified upon cross examination that:

"*During the first hearing, only two witnesses were present. I was however asked questions… on the letter I wrote under duress. I made a letter to Kangema Police Station over the letter. I cannot recall the OB number."*

From the evidence in record, it is parent that the Appellant was heard. Further, the Appellant admitted that he wrote the letter confirming the allegations made against him which formed the basis of his dismissal. He stated that the same was made under duress but failed to provide evidence to prove this fact. I therefore agree with the finding of the Learned Magistrate in the lower court that the termination of the claimant's employment was justified. It is also important to note that the Respondent was denied audience in the Judicial Review proceedings and the judgment was made without the participation of the Respondent and was still dismissed without the respondent's defence.

Lastly, the Appellant sought damages for the unpaid salary from the time of interdiction, to the time of dismissal and three months salary in lieu of notice. The Appellant admitted that he was interdicted on half salary as such he was not entitled to the same. Further, despite the fact that the parties have relied on the provisions of the Employment Act 2007, the relevant Act is the Employment Act, Cap 226 (Repealed) since the appellant was dismissed before 2007. At that time, employers could dismiss an employee without notice. As such, the Appellant was not entitled to notice or pay in lieu of notice as he was summary dismissed.

I find the appeal without merit and dismiss the same.

Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 2ND DAY OF AUGUST 2019

MAUREEN ONYANGO

JUDGE