

IN THE HIGH COURT OF UGANDA AT KAMPALA

CIVIL DIVISION

HCCA NO. 144 OF 2016

KAWOOYA KIGONGO SAMUEL TWAHA.....APPELLANT

V

ATTORNEY GENERAL AND JUDICIAL SERVICE COMMISSION

**BEFORE HON. LADY JUSTICES H. WOLAYO; LYDIA MUGAMBE SSALLI;
PATRICIA BASAZA- WASSWA**

JUDGMENT

The appellant appealed the decision of the Judicial Service Commission (JSC) dated 16th April 2015 on six grounds of appeal that we will revert to later in the judgment.

He was self represented while the respondents were represented by Mr. Madete SSA from Attorney General's Chambers.

It is trite law that the duty of the first appellate court is to re-evaluate the evidence adduced in the trial court and draw its own conclusions on issues of fact and law while bearing in mind that the trial court had an opportunity to observe the demeanour of witnesses. **Father Narsensio Begumisa v Eric Tibegaga SCCA. No. 17 of 2002** refers.

The appellant appeared before the JSC tribunal on 10.2.2014 charged with one count of absenteeism and abscondment from duty without reasonable excuse contrary to regulations 23 (d) and 31 of the Judicial Service Commission Regulations. It was alleged that the appellant, while working as a magistrate grade two at Kasangati in 2012, absented himself and absconded from his duty station without permission and despite several communications, neglected or failed to preside over the court.

The charge sheet was preceded by a letter dated 26.4.2013 by the Ag. Chief registrar addressed to the appellant stopping payment of his salary and reporting him to the Secretary Judicial Service Commission.

After written representations by both Mr. Kaali for the JSC and the appellant in person , the tribunal determined that the appellant absconded from duty and he was retired in public interest.

The Respondent's case

The case against the appellant presented through Mr. Muwata, Registrar of the High Court on complaint on oath, was that the appellant was posted to Kasangati court on 1.9.2012 but by 17.6.2013, he had worked for two weeks only.

It was the respondent's case that while the appellant claimed to be a student at Law Development Centre, he had never secured official leave from the Judicial Service Commission.

Furthermore, that in 2006 while stationed at Luwero chief magistrate's court, the appellant absconded from duty.

The Appellant's case.

From the various correspondences on record, it was the appellant's case that as a magistrate grade two, he successfully undertook a Bachelor of Laws degree and was to join Law Development Centre. This was in response to the Judiciary policy to professionalize the bench. The LDC course was to start on 23.9.2013 according to the letter dated 5.9.2013 written by the applicant.

It was the appellant's case that his transfer from Mukono chief magistrate's court to Kasangati court was to enable him pursue his studies at LDC .

By letter dated 6.7.2012, the chief registrar transferred the appellant from Mukono magisterial area to Kasangati court in Nabweru magisterial area and required the appellant to report to the duty station on 1.9.2012. The reason for the transfer was '*in the interest of service*'. therefore, there is no truth in the appellant's assertion that he was transferred to Kasangati court to enable him study.

It is on record that the appellant did not seek permission to go for studies until 5.6.2013 when he wrote to the chief registrar for permission to undertake studies at LDC. In his letter, the appellant states as follows:

‘This is in the best interest of the Judiciary Policy of professionalization of the Bench as well as in conformity with regulation No. 24 of Statutory instrument No. 87 of 2005 in view of need to seek leave from you, the chief registrar or JSC. I was admitted and the course is starting on 23.9.2013’

We find that this letter is not a request for ‘study leave’ but for permission to study which are two different things. Study leave means the officer is officially away from the duty station (civil service definition) while permission means the officer’s superior is aware that the officer is undertaking studies but on the understanding basis that he puts in time at work.

It is not disputed that the appellant was transferred to Kasangati court on 6.7.2012 however, he only worked for two weeks between that date and 17.6.2013 when the chief registrar formally interdicted him.

We wish to note that the letter of transfer did say that the transfer took effect on 1.9.2012 when he was to report. This means the period he was absent from Kasangati court was from 1.9.2012 to 17.6.2013 when he was interdicted.

In his letter dated 2.7.2013, the appellant does not specifically respond to the period under question but states he made a formal application for leave to the JSC by a letter dated 5.6.2013. The belated formal application for study leave does not help the appellant because he had already absented himself from work for a period of approximately ten months if the period between 6.7.2012 and 1.9.2012 is left out.

His responses to the JSC in letters dated 2.7.2013 and 6.6.2014 with respect to this specific allegation is unsatisfactory. He makes vague references to his Bachelor of Laws Uganda Christian University 2012 but does not avail a copy. That he graduated in 2012 means that he ceased to have a legitimate reason for his absence from work between September 2012 to June 2013.

Moreover, if he was expecting to join Law Development Centre **on 23.9.2013**, studies for a diploma in legal practice could not have been a reason for his absence from station between **September 2012 and June 2013**.

The JSC tribunal properly found that the appellant was absent from the station without reasonable excuse.

Regulation 23 (d) of the JSC regulations proscribes that :

A judicial officer commits an offence against discipline if he or she does all or any of the following:

Is a habitual late comer or absents or absconds from duty without reasonable excuse'

We find that by being absent from Kasangati court for nearly ten months, the appellant absented himself from duty contrary to regulation 23(d) of JSC regulations.

We note that regulation 23 (d) proscribes three different types of conduct: latecomer or absenteeism, or abscondment'.

Osborn's Law Dictionary 8th edition defines 'abscond' in these terms:

'to go away secretly, to evade the jurisdiction'.

Cambridge Advanced Learners Dictionary 3rd edition defines abscond in similar terms:

'to go away suddenly and secretly in order to escape from somewhere'.

It seems to us that abscondment denotes someone running away after wrong doing.

With respect to 'absenteeism, Cambridge Learners Dictionary defines it in the following terms:

'Not in a place where you are supposed to be e.g. place of work or school.'

There is therefore a difference between absenteeism and absconding.

We are fortified in this reasoning by the elaborate procedure prescribed for absconding in regulation 24.

Procedure on an officer absconds from duty(regulation 24)

Regulation 24 of the JSC regulations gives the procedure where an officer absconds from duty. The chief registrar is under an obligation to either notify the officer of the absconding within fourteen days from date of absence or call upon the officer to explain his absence from duty within fourteen days.

Where the officer fails to respond to the notice or call to explain absence, the chief registrar shall immediately stop payment of salary and report to the Secretary JSC the absconding.

As the first appellate court, we are empowered to make our own findings of fact and substitute the findings of the trial court. (**Fr. Narsension Begumisa. supra**)

We therefore find that the evidence on record shows that the appellant was absent from the duty station without reasonable excuse but he did not abscond from duty as his whereabouts were known to the authorities and he had not run away from some wrongdoing. For example, on 21.9.2011, the appellant wrote to the chief registrar requesting for transfer to Nabweru chief magistrate's court for security reasons and also because he was to join Law Development Centre shortly. On 2.7.2012, the chief registrar transferred him to Kasangati court in Nabweru chief magistrate's court. On 5.6.2013 he requested the chief registrar for permission to undertake studies at Law Development Centre.

While the tribunal rightly found that the appellant was absent from duty, it erred when it found that the appellant had absconded from duty. However, this did not occasion a miscarriage of justice as the tribunal rightly found that he was absent from duty without reasonable excuse.

We now turn to the grounds of appeal.

Ground six

The Commission erred in law when it failed to evaluate the evidence before it i.e, desire to contest 2006 election, taking his child to court in 2006, laughing in court on one occasion, quarrelling with the prosecutor, failure to apply for leave

Grounds one

The Commission erred in law and fact when it gave a biased predetermined decision which manifested ill treatment of the appellant.

Ground two

The Commission occasioned a miscarriage of justice when it influenced the responses and answers to the commission during the hearing.

Ground three

The Commission misdirected itself when it took a wrong procedure at the trial where the appellant was advised on what to say leading to a wrong decision

Ground four

The Commission erred in law when it gave the appellant only five minutes which affected the appellant's right to be heard and lack of communication of some of the letters of the appellant.

These five grounds raise procedural matters that do not go to substance. In his submissions, the appellant mentioned that the JSC was a prosecutor and judge in his own cause . I find no merit in this statement because the complainant was the chief registrar .

Under ground two, three and four, the record shows that the commission relied on written representations from both sides .

We find no merit in the five grounds of appeal.

Ground five

The Commission erred in law and fact when it punished the appellant with a harsh and unconscionable punishment of a dismissal when the conduct complained of does not involve moral turpitude , he is a first offender and has served 19 years as a judicial officer.

Counsel for the respondent submitted that the punishment was appropriate because the appellant received numerous warnings prior to his suspension and that the absenteeism occurred in 2006 when he was in Luwero court and in 2012 in Kasangati.

The tribunal relied on the appellant's absence from duty station of Kasangati to find him culpable. It is for this reason that we did not go into evidence that touched on the appellant's conduct in 2006. Moreover, he was not charged with this specific misconduct.

On account of his absence from the station without permission or authority, the tribunal retired him in public interest.

Prescribed penalties

Regulation 31(1) empowers the commission to impose any of eleven penalties as follows:

Dismissal, suspension, reduction in rank, a written undertaking not to repeat the misconduct, reduction in salary, stoppage of increments, deferment of increments, severe reprimand, reprimand, compensation, and recovery of cost of damage caused by default or negligence.

Section 31(2) stipulates that nothing in the regulations shall limit the powers of the commission to retire a judicial officer from the service in public interest.

The tribunal retired the appellant in public interest as a penalty. It has been held by the **Supreme Court Criminal Appeal No. 10 of 1995 Kyalimpa Edward v Uganda (unreported)** that the practice is that sentencing is in the discretion of the trial court and the appellate court will not normally interfere with the discretion of the sentencing court unless the sentence is illegal or the court is satisfied that the sentence imposed by the trial court is manifestly so excessive as to amount to an injustice.

Although the instant appeal is a civil matter, the above principle is of persuasive authority. We find that the penalty was within the powers of the tribunal nor was it excessive in the circumstances.

We observe that on 16.5.2015, the chief registrar wrote to the appellant citing JSC Minute No. 44 (46) 2015 in which the commission directed that the appellant be dismissed from service.

The effect of dismissal is that the appellant would lose all benefits.

We find this an excessive punishment especially as the tribunal had recommended a lesser punishment. As we have found that the penalty to retire in public interest is appropriate, we uphold that penalty and set aside the penalty of dismissal.

In the result, the appeal fails on grounds one, two, three, four and six.

However, the appeal partially succeeds on ground five to the extent that we have set aside the punishment of dismissal.

We accordingly make the following orders:

1. The appellant shall retire in public interest with all his benefits.
2. Each party will bear its own costs

DATED AT KAMPALA THIS 12TH DAY OF JULY 2017

HON. LADY JUSTICE H. WOLAYO

HON. LADY JUSTICE L. MUGAMBE SSALLI

HON. LADY JUSTICE P. BASAZA WASSWA