REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 313 OF 2009

KIAMBU UNITY FINANCE COOPERATIVE UNION LIMITED ……..…. ……APPELLANT

VERSUS

JOHN KANIARU KIMANI…….....……. RESPONDENT

(From the judgment of Mrs. Macharia, Principal Magistrate in Milimani CMCC No. 301 of 2005)

J U D G M E N T

On 29th November 2005 in the Senior Principle Magistrate Court at Kiambu, the Respondent commenced proceedings against the Appellant seeking:-

a. **A declaration that the defendant's action of terminating the plaintiff's employment without any terminal benefits was illegal and in breach of the terms of employment existing between the parties.**

b. **A declaration that the plaintiff's terminal benefits ought to have been calculated and paid under the redundancy terms applicable between the parties.**

c. **Kshs.929,680 as per paragraph 6 of the plaint with interest at court rates for the time the same ought to have been paid until payment.**

The Respondent was employed by the Appellant Company known as Kiambu Dairy & Pyrethrum Co-operative Union Limited. His employment was terminated on 21st January 2005 when the defendant undertook a staff restructuring program. The Appellant failed to pay his terminal dues as provided by the law. The Appellant denied the claim before the magistrate court. It is stated that the Respondent employment was terminated because he performed his duties negligently, carelessly, incompetently and improperly resulting in loses in the Appellant company.

Both parties testified before the Principle Magistrate who delivered her judgment on 28th May 2009. The court found that the Respondent terminal benefits ought to have been paid under the redundancy terms applicable. That holding triggered this appeal.

In a memorandum of appeal filed by the Appellant he advanced five grounds upon which it felt that the judgment of the learned magistrate was wrong. These are:-

1. **The learned trial magistrate erred in fact and in law by the way she weighed the evidence**

thereby arriving at an erroneous determination of the Respondents' monthly salary.

2. **The learned trial magistrate erred in fact and law by failing to address the actual meaning of redundancy as per the requirement of employment law and apply the same in the case before her for determination.**

3. **The learned trial magistrate erred in fact and law by relying on one clause in employment manual and ignoring or failing to address other clauses that demonstrated the unsustainability of the plaintiff's claim.**

4. **The learned trial magistrate erred in fact and law by failing to find that the terms of service that governed the claimants employment redundancy pay were an alternative of staff retirement gratuity under the stuff provident fund hence a retiring employee could not enjoy both.**

5. **The learned trial magistrate erred in fact and law by entering a judgment against the weight of evidence.**

At the hearing of this appeal, Miss Munga appearing for the Appellant and Miss Wambua appearing for the Respondent agreed to argue the appeal by way of written submissions. The written submissions were subsequently filed and exchanged.

The Appellant submitted that the Respondent was relieved of his duties in accordance with clause 29(b) of the Terms and Conditions of service for Management Staff of Kiambu Dairy & Pyrethrum Co-operative Union Ltd. They stated that the said clause is very clear on the mode of terminating a contract which does not require either the employee or the employer to justify their action. The Appellant submitted that it was within its rights as under the terms and conditions of service for management staff to terminate the Respondent employment on 21st January 2005.

The Appellant further submitted that the learned magistrate erred in holding that the Appellant contention that the words termination and redundancy at the same time were just but a matter of semantics without basis since they were two distinct clauses dealing with same situation. The Appellant stated that clause 27 provided for redundancy which provides that for an employee to be declared redundant, the Ministry of Labour has to be informed of the reason and the extent of the intended redundancy. The Appellant submitted there was no evidence on record to show the alleged redundancy.

He submitted that the evidence on record shows that he requested for his retirement benefits from the trustees of the Appellant vide a letter dated 1st February 2005. The letter stated that his employment had been terminated and therefore the Respondent was estopped from claiming for dues under redundancy after claiming from provident fund. The Appellant stated that the learned magistrate went against the general principles of law of contract and in particular the maxim of ***"maxims expression uniusest exclusion*** *and* ***expressun facet cessarefacitum*** *which* means the court cannot be asked to make an implication where there is already an express covenant. The Appellant also claims that the Respondent did not establish how he came to the conclusion that he was declared redundant.

The Respondent also submitted that he lost his job as a result of factors beyond his control. He stated that the Appellant had the information about the restructuring and ought to have informed the ministry of labour. He maintained that he lost his job as a result of restructuring, thus became redundant and was therefore entitled to terminal benefits which ought to have been calculated and paid under redundancy terms applicable under the law.

On the allegation that the Respondent requested for benefits both under redundancy and at the same time under providence fund, the Respondent submitted that he claimed for benefits under the redundancy terms only. The Respondent relied on the court of appeal decision in the case of **Van Leer East Africa Ltd Vs Baiba Dhidha Mjidho, Civil Appeal No. 86 of 2006** in which the court found the Appellant was made redundant and the provisions of Employment law applied.

I have carefully perused the record including the lower court pleadings and the judgment. I have also perused the written submissions before this court on the face of the grounds of appeal, all of which carefully analysed and considered all the above documents. The main issue raised in this appeal is ***whether or not the Trial Magistrate was entitled to arrive at the conclusions she did.***

The Respondent employment was terminated vide the letter dated 21st January 2005. The said letter stated in part***"Following a staff restructuring the Board of Directors has decided to terminate your employment with the union effective 21st January 2005…."*** The reason for termination in my view was the staff restructuring.

Section 2 of the **Employment Act, 2007** and the corresponding Section in the **Labour Relations Act, 2007** define redundancy as:

> **"the loss of employment, occupation , job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practices commonly known as abolition of office, job or occupation and loss of employment."**

A plain reading of the section shows that in a case of redundancy the loss of the job is involuntary and not the fault of the employee and it is done at the initiative of the employer. In this case the Appellant initiative was staff restructuring and as a result the Respondent's office was abolished. In my view the Respondent's employment termination was a declaration of redundancy.

The law recognizes redundancy as a valid mode of termination of employment subject to the following conditions which are set out in Section 40 of the **Employment Act, 2007**:

> a**) Where the employee is a member of a trade union, the employer notifies the union of which the employee is a member and the labour officer in charge of the area where the employee is employed, of the reasons for and the extent of the intended redundancy, not less than a month prior to the date of the intended date of termination on account of redundancy;**
>
> **b) Where the employee is not a member of a trade union, the employer notifies the employee personally in writing and the labour officer;**
>
> **c) The employer has, in the selection of employees to be declared redundant had due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;**
>
> **d) Where there is in existence a collective agreement between an employer and a trade union setting out terminal benefits payable upon redundancy; the employer has not placed the employee at a disadvantage for being or not being a member of the trade union;**
>
> **e) The employer has where leave is due to an employee who is declared redundant, paid off the leave in cash;**
>
> **f) The employer has paid an employee declared redundant not less than one month's notice or one month's wages in lieu of notice; and**
>
> **g) The employer has paid an employee declared redundant severance pay at the rate of not less than fifteen days' pay for each completed year of service.**

From the foregoing section, the law provides for two kinds of redundancy, that is sections 40 (a) and 40 (b). The two depends on whether the employee is or is not a member of a trade union.Where the employee is a member of a union, the notification is to the union and the local labour officer at least one

month before the effective redundancy date. Where the employee is not a member of the union, the notification must be in writing and to the employee and the local labour officer.

In the instant case, the Appellant notified the Respondent through the termination letter dated 21st January, 2005. The Respondent was therefore entitled to his redundancy dues under the law.

A careful examination of the grounds of appeal reveals that they are attacking the trial magistrate's conclusion that the Respondent's employment termination, amounted to declaring him redundant. The Appellant asserted that the trial magistrate erred in law and fact, that he weighed the evidence wrongly, that he failed to properly address the actual meaning of redundancy under the relevant law, that he failed to find that the terms of service that governed the Respondent's employment redundancy pay were not those under the alternative Staff Retirement Gratuity under the Staff Provident Fund which only applied in the alternative and finally, that the trial magistrate entered the targeted judgment against the weight of evidence.

It is clear however, that once this court arrives at the conclusion it has that the Respondents employment termination amounted to redundancy, then all the above grounds of appeal based on the opposite view, crumple.

The result is that this appeal has no merit. It is hereby dismissed with costs. Orders accordingly.

Dated and delivered at Nairobi this 5th day of March 2015.

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D A ONYANCHA

JUDGE