Kiambu Unity Finance Co-operative Union Ltd v Warwathe & another (Civil Appeal 246 of 2018) [2024] KECA 663 (KLR) (14 June 2024) (Judgment)

Neutral citation: [2024] KECA 663 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 246 OF 2018

K M'INOTI, HM OKWENGU & JM MATIVO, JJA

JUNE 14, 2024

BETWEEN

KIAMBU UNITY FINANCE CO-OPERATIVE UNION LTD ..... APPELLANT

AND

DAVID G. WARWATHE ..... 1ST RESPONDENT

JOSEPH KIRAI NDUNG'U ..... 2ND RESPONDENT

(Appeal from the judgement and decree of the Employment & Labour Relations Court of Kenya at Nairobi (Wasilwa, J.) dated 29th June 2015inELRCA No. 3 of 2015)

JUDGMENT

1. The is yet another appeal raising the question whether the *Employment Act*, 2007 (the 2007 Act) can be applied retrospectively to a contract of employment entered into and terminated before the 2007 Act came into force. On an appeal from the decision of the Chief Magistrates Court in Nairobi, the Employment and Labour Relations Court (ELRC) did exactly that. As is patently clear, this is a second appeal which is restricted to issues of law only. (See Kenya Breweries Ltd. v Godfrey Odoyo [2010] eKLR).

2. By way of background, the appellant, Kiambu Unity Finance Co-operative Union Ltd, employed the two respondents initially as savings clerks and ultimately as internal auditors. The 1st respondent, David G. Warwathe was employed on 18th September 1989 and at the material time was earning a monthly gross salary of Kshs 72,679 whilst the 2nd respondent, Joseph Kirai Ndung'u, was employed on 2nd January 1992, earning Kshs 53,883.

3. On 30th October 2004, the appellant dismissed the two respondents on the ground that they were disloyal. As a result, the respondents lodged a claim in the Chief Magistrates Court (the trial court) alleging that their dismissal was wrongful and unjustified. They pleaded that the reasons given by

the appellant for their dismissal were fictitious; that the real reason was redundancy arising from restructuring, but the appellant was not willing to pay for the redundancy; and that they had been denied a fair hearing. The 1st respondent claimed Kshs 1,174,983 made up of severance pay, house allowance, entertainment allowance, medical allowance and responsibility allowance while the 2nd respondent claimed Kshs 760, 164 under the same heads. The respondents also claimed general damages for the alleged wrongful dismissal.

4. In its defence, the appellant admitted having employed and terminated the respondents' employment, but denied that the termination was wrongful or illegal. The appellant further pleaded that the termination was lawful under the *Employment Act* Cap 226, which was the applicable law at the material time.

5. After hearing the claim, the trial court found no merit in it and dismissed the same with costs. The trial court found that the *Employment Act* Cap 226 was the applicable law; that the employment contract between the appellant and the respondents had a termination clause; that even if the respondents' dismissal was unlawful, the recoverable damages were as provided in the termination clause; and that the appellant had indeed paid both respondents salary in lieu of notice in accordance with the termination clause.

6. The respondents were aggrieved and appealed to the ELRC on three grounds, which we reproduce here verbatim:

    i. that the learned trial magistrate erred in both law and fact in holding that the appellants were paid their dues under the contract of employment in spite of the weight of the evidence adduced;

    ii. that learned trial magistrate erred in both law and fact in failing to carefully consider the evidence and submissions by the plaintiffs on the element of redundancy which was largely uncontroverted by the defendant despite the weight of the said evidence and submissions; and

    iii. that the learned magistrate erred in both law and fact in dismissing the appellants' claims, despite the weight of evidence adduced.

    After hearing the appeal, the ELRC framed four issues for determination as follows:

        i. whether the appellants were entitled to any redundancy payments under the employment contract;

        ii. whether the appellants were paid their dues under the contract;

        iii. whether the learned magistrate erred in law and fact in dismissing the appellants' claim; and

        iv. what evidence (sic) to grant in the circumstances."

7. By the judgment dated 29th June 2015 (erroneously headed "Ruling"), the ELRC (Wasilwa, J.) allowed the appeal with costs. On the first issue the ELRC found that redundancy was not proved. On the second issue, the court found that the appellant paid the respondents in lieu of notice per the contract of employment. However, the reasons given by the appellant for termination of employment were not true and amounted to defamation of character, which rendered the termination wrongful and unfair. On the third and fourth issues, the court held that the respondents were entitled to 100% of the appellant's contribution towards their pension and ultimately awarded each of the respondents 6 months' salary with the 1st respondent receiving Kshs 436,074 and the 2nd respondent Kshs 323,298.

8. The appellant was aggrieved and lodged this second appeal, faulting the ELRC, primarily on the grounds that the court erred by relying on principles of unfair termination provided for in the 2007 Act which principles did not apply under the *Employment Act* cap 226; by making an award under section 9 of the 2007 Act whilst that Act was not applicable; and by holding that the appellant had not paid the respondents their dues under the contract of employment.

9. Expounding on those grounds, the appellant submitted that the dispute before the court was to be determined under the repealed *Employment Act* and not the 2007 Act and that the first appellate court erred by importing and applying principles of unfair termination under sections 43 and 45 of the 2007 Act. It was contended that the repealed Act did not have any provision equivalent to sections 43 and 45 of the repealed Act and did not require any of the parties to give reasons for termination of employment. The appellant further submitted that by dint of section 16 of the repealed Act, the measure of damages for wrongful termination was the agreed period of notice in the contract of employment. The appellant relied on the decisions in Rift Valley Textiles v. Edward Onyango Oganda [1994] eKLR and Peter Opollo v. Board of Governors, Kisumu Polytechnic College & Another [2010] eKLR, to support these propositions.

10. Next, the appellant submitted that the award of 6 months' salary to each of the respondents was not prayed for and was not based on the applicable law. It was contended that the ELRC merely appropriated and applied section 49 of the 2007 Act, which empowers the court to award compensation not exceeding 12 months' salary.

11. Lastly on payment of the respondents' dues, the appellant submitted that there was clear evidence of payment on record which the ELRC ignored. That evidence, it was contended, showed that the appellant paid to the 1st respondent Kshs. 1,117,082.65 of which the appellant's contribution to the pension was Kshs 574,335.00. As for the 2nd respondent, he was paid Kshs 1,005, 406.00, of which Kshs 518,457 was the appellant's contribution to his pension. For the foregoing reasons, the appellant urges the Court to allow the appeal with costs.

12. The respondents opposed the appeal on the basis of written submissions dated 11th February 2019. They submitted that they had pleaded and prayed for damages for unfair and wrongful dismissal and that the learned judge properly exercised her discretion in awarding damages after finding that the appellant had no valid reasons for the termination. The respondents justified the award of 6 months' salary as having been made under section 15 of the Trade Disputes Act, cap 234.

13. It was further contended that the ELRC did not base its award on any particular law and that it was speculative for the appellant to suggest that the award was based on the 2007 Act. Lastly, the respondents submitted that the court did not err in ordering the appellant to pay its contribution to the provident fund because no evidence of payment was adduced.

14. We have anxiously considered the record of appeal, the judgment the ELRC, the submissions of the parties and the authorities they relied on. In our estimation, this appeal turns on whether the learned judge applied the law that at the material time governed the dispute.

15. It is worth reiterating that the contracts of employment between the appellant and the two respondents were entered into on 18th September 1989 and 2nd January 1992. The employments were terminated on 30th October 2004. At the time the contracts of employment were entered into, the applicable law was the *Employment Act*, cap 226, which was repealed by the 2007 Act. The 2007 Act came into operation on 2nd June 2008, some three years and eight months after the termination of the contracts of employment. The 2007 did not have any provisions providing for its retrospective application. (See Kenya Tea Development Agency Ltd v. Lee Kimathi, CA No. 267 of 2017). Indeed, the 2007

Act, having created new rights, obligations and liabilities which did not exist under the contract of employment regulated by the *Employment Act*, cap. 226, could not apply retrospectively (See Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd & 2 Others [2012] eKLR).

16. As correctly stated by the Chief Magistrates Court, under section 16 of the *Employment Act* cap 226, any party to an employment contract could terminate the employment so long as such party followed the procedure agreed upon by the parties. See Ombonya v. Gailey & Roberts Ltd [1974] E.A. 523, Central Bank of Kenya v Nkabu [2002] 1 EA 166, Alfred Githinji v Mumias Sugar Co. Ltd, CA No. 194 of 2001; and Rift Valley Textiles Ltd v Edward Onyango Oganda [1994] eKLR. The contract of employment between the appellant and the respondents had a common clause 29(b) headed "termination of employment", which provided:

> " An employee may resign by giving three months' notice of intention to terminate his/her employment with the Co- operative Union to the general manager or to the chairman in case of (absence of the) general manager or pay three months' basic salary in lieu of such notice. An employee's service may be terminated by the Union at any time by three months' notice in writing given by the general manager/chairman or payment of three months' basic salary in lieu of notice." Emphasis added.

17. Under section 16 of the repealed Act read together with the above clause, the reasons for termination of employment were not relevant so long as the party terminating gave three months' notice or paid three months' salary in lieu of notice. The appellant paid the notice period and it was clearly a misdirection for ELRC to enter into an unnecessary evaluation of the genuineness or otherwise of the reasons for termination in a contract of employment governed by the *Employment Act* cap 226.

18. The respondent contend that the award of salary of 6 months was within the discretion of the learned judge and that the learned judge did not indicate that she was applying the provisions of the 2007 Act. With due respect, the learned judge could not exercise discretion contrary to the express provisions of the *Employment Act* cap 226, which was the applicable law. Exercise of discretion by the court arises where the law offers a latitude of choices for the court to choose from, depending on the particular circumstance of the case. (See Nanyuki Equator Sacco Co-operative Society Ltd v Nyeri Sacco Society & another [2006] eKLR. In this case, the repealed Act was clear enough that either party could terminate the contract of employment so long as they gave the requisite notice or paid the requisite salary in lieu of notice. The appellant did exactly that and the learned judge did not have discretion to make an award contrary to the express provisions of the law, under the guise of exercise of discretion.

19. As regards the argument that the learned judge did not state that the award was based on the 2007 Act, it simply begs the question: then on what was it based? If the award was not based on the repealed Act, which was the applicable law, then it cannot be justified. On our part, we have no illusion that indeed the award was based on the principle of compensation for wrongful or unfair termination provided for in sections 43 and 45 of the 2007 Act. Those principles had no application in this dispute, which ante-dated the 2007 Act.

20. The respondents further submit that the award of compensation was based on section 15 of the Trade Disputes Act. This argument, unfortunately, is akin to the proverbial drowning man clutching at straws. Before its repeal by the *Labour Relations Act*, 2007, the Trade Disputes Act applied to matters that were referred to the former Industrial Court by the Minister or by the parties to a dispute. The dispute in this appeal did not originate from the former Industrial Court, but from a judgment of the Chief Magistrates Court. But even if we assume, for the sake of it, that the ELRC is the successor of the Industrial Court, the Trade Disputes Act could not be applied in this matter because by dint of section 14(7) of the Trade Disputes Act, the Industrial Court had jurisdiction in a dispute under the

Act only upon a written application made to it jointly by the parties to a trade dispute or upon the Minister referring a trade dispute to it. It was only in such disputes that the Industrial Court could award the remedies provided in the Trade Disputes Act. Accordingly, having filed their dispute in the Chief Magistrates Court and having failed to comply with the provisions of the Trade Disputes Act, the respondents cannot now purport to invoke section 15 of the Trade Disputes Act which was relevant only to disputes in the Industrial Court that satisfied the two conditions we have mentioned. The respondent's argument in this respect has absolutely no merit.

21. The last issue relates to whether the ELRC ignored the evidence on record as regards payment of the appellant's contribution to the respondent's pension. As we pointed out at the beginning of this judgment, in a second appeal this Court deals only with matters of law. However, there is an important exception which was stated as follows in Kenya Breweries Ltd. v Godfrey Odoyo, (supra):

> " In a second appeal however, such as this one before us, we have to resist the temptation of delving into matters of facts. This Court, on second appeal, confines itself to matters of law unless it is shown that the two courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse." (Emphasis added).

22. In this particular appeal, the appellant's contention is that the ELRC completely failed to consider glaring evidence that showed the appellant had already paid to the respondents its contribution to the provident fund. The record shows that indeed the appellant produced among its documents at trial, documents that showed payment of Cheque No. 002755 for Kshs. 982,022.65 to the 1st respondent on 23rd may 2005. There is also evidence of how the amount was calculated and included the appellant's contribution to the 1st respondent's pension. Similar evidence shows payment on the same date of Cheque No. 002756 for Kshs. 781,237.50 to the 2nd respondent, which amount included the appellant's contribution to his pension.

23. This was relevant evidence which was clearly on record and the ELRC did not consider it. That makes the decision unjust and perverse as it results in double payment to the respondents. This failure to consider relevant evidence justifies our interference with the judgment on this second appeal.

24. For all the foregoing reasons, we are satisfied that this appeal is merited and must be allowed. Accordingly, we allow the same, set aside the judgment of the ELRC dated 29th June 2015 and substitute therefor an order dismissing the respondents' Appeal No. 3 of 2015. The appellant will have costs of the appeal both in the ELRC and in this Court. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JUNE 2024.

H. M. OKWENGU

JUDGE OF APPEAL

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K. M'INOTI

JUDGE OF APPEAL

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J. MATIVO

JUDGE OF APPEAL

I certify that this is a true copy of the original

SIGNED

DEPUTY REGISTRAR