Mathai v Keroche Breweries Limited (Civil Appeal 20 of 2020)
[2024] KECA 1697 (KLR) (22 November 2024) (Judgment)

Neutral citation: [2024] KECA 1697 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 20 OF 2020

MA WARSAME, PO KIAGE & FA OCHIENG, JJA

NOVEMBER 22, 2024

BETWEEN

NICHOLUS MUCHIRI MATHAI ..... APPELLANT

AND

KEROCHE BREWERIES LIMITED ..... RESPONDENT

(An appeal from the judgment of the Employment and Labour Relations Court at Nakuru (Mbaru, J.) dated 21st November, 2019 in ELRC Cause No. 239 of 2017)

JUDGMENT

1. By his memorandum of appeal dated 3rd April 2020, the appellant Nicholus Muchiri Mathai expresses himself as appealing against the whole of the judgment of the Employment and Labour Relations Court at Nairobi (Mbaru, J.) dated 21st November 2019. It seems to us clear that he cannot be appealing against the whole of the said judgment but only a part or parts of it for, were that the case, he would also be rejecting the Kshs.6,125 for decree days; Kshs.102,375 for overtime and costs awarded to him. Indeed, our thinking is confirmed by his prayers that the impugned judgment be varied and not set aside.

2. The appellant had filed a memorandum of claim in the court below praying for, as against the respondent;

   (a) Kshs.28,000 for 21 outstanding leave days

   (b) Kshs.220,308 as overtime arrears for 800 hours

   c. Kshs.420,000 as 12 months compensation for wrongful termination

   d. Costs.

   He also made a general prayer for "further orders as the court shall deem fit."

3. The learned judge found as fact that the respondent had by a letter of employment dated 27th January hired the appellant as an Electrical Technician in its Engineering Department on a 2-year contract with effect from 27th January 2014. Even though the said employment was renewable, the appellant never received any letter renewing or extending his employment at the expiry of the contract. He, nevertheless, was retained on continuous employment until 3rd May 2016 which rendered his said employment a protected one pursuant to section 37 of the *Employment Act*.

4. On the said 3rd May 2016, the respondent wrote to the appellant notifying him that it was restructuring and the position of electrical technician had been declared redundant effective that date. He was requested to go on leave for 21 days and notified that his last day with the company would be 26th May 2016. The letter listed the final dues that would be paid to him as per the contract of employment as;

   Salary for the days worked in the month of May up to and including 26th 2016
   One month salary in lieu of notice30 days salary-severance pay on redundancy for the complete 2 years you have been with the Company21 leave days balance not takenAny other monies owed to you."

5. As the appellant admitted and confirmed in evidence that he had been informed by the respondent of the restructuring which was then formally communicated by the foresaid letter, the learned judge found that the ensuing termination of employment was justified for valid and procedural operational reasons as defined in section 45(2) of the *Employment Act*. The claim for unfair termination was accordingly dismissed.

6. The learned judge then rejected the appellant's claim for 21 days as owed leave and awarded a sum of Kshs.6,125 basing her decision on the provision of section 27(1)(b) of the *Employment Act* which entitled the appellant to 1¼ leave days for each month worked. She also awarded him overtime amounting to 78 days worked, which translated to Kshs.102,375 the same being based on his salary of Kshs.35,000 per month.

7. Dissatisfied with that decision, the appellant in the memorandum of appeal filed on his behalf by the firm of Wachira Wanjiru & Co. Advocates raises the following grounds of complaint;

   "1. By finding that the claimant worked for 4 months and awarding leave pay and overtime pay on the basis of 4 months worked.

   ...

   2. By awarding the appellant pro-rata leave of 1¾ leave days of each month.

   3. The learned judge erred in interpretation of law of section 28(1) (b) of the *Employment Act*, 2007.

   4. The learned judge erred in law and in fact by finding that termination of the appellant was fair and failing to award compensation.

   5. The learned judge misdirected herself and failed to account for the period of time that appellant worked from 27th January 2014."

8. At the hearing of the appeal, Mr. Annan appeared for the respondent but there was no appearance for or by the respondent despite service having been effected on its advocates on record on 11th April 2024.

9. As this is a first appeal, our duty is to subject the entire evidence to a fresh and exhaustive analysis and re-appraisal so as to draw our own independent inferences of fact. We do so mindful that, unlike the trial court, we did not have the advantage of hearing and observing the witnesses (in this case the

appellant, as he is the only one who testified) in live testimony, for which he must make due allowance. See Rule 31(1)(a) of the Court of Appeal Rules, 2022; Peters Vs. Sunday Times [1958] EA 424.

10. Having carefully considered the record with our jurisdictional remit in mind, it seems to us that the matters falling for our decision are quite straight-forward, namely;How much leave pay was the appellant entitled to?Was the appellant's termination unfair and calling for compensation

11. As we perceive the second issue to be the more substantive one, we propose to start with it. We must confess to having difficulty comprehending the basis for the appellant's criticism of the learned judge's finding that there was nothing unfair about his termination. The appellant admitted expressly that the respondent engaged him on its planned restructuring, then issued the letter formally communicating the declaration of his position redundant, and notifying him of the termination of his employment. The learned judge's reasoning on this aspect of the case in relevant part, and we find no fault in it, was as follows;

> Section 40 of the *Employment Act* 2007 allows an employer to terminate employment for operational reasons. Following restructuring, reorganisation or following a business decision to down-size operations, the employer is allowed to issue notice to employees and then issue personal notices to effected employees."

12. The learned judge then made reference, on her away to finding that the reasons for termination respondent gave were valid and procedural, to Africa Nazarene University Vs. David Mutevu & 103 Others [2017] eKLR the tenor whereof she summarized thus;

> Once the employee is made aware of the employer of the need to declare a redundancy due to an operational reason(s), whether in writing or orally, such notification is sufficient in law, the rationale is that a redundancy does not arise due to the fault of the employee and does not apply as a disciplinary measure but it follows the need to re-organize or restructure the business. This is defined under section 45(2) as operational reasons and is a valid reason for terminating employment."

13. We find, with respect, that the learned judge properly directed herself on the law and effect of redundancy. The same is never a disciplinary action against, and is not founded on any blame-worthiness on the part of, an employee. Rather, it is a response to the dictates of business which may militate against retaining employees in service. Those realities need not consist in an imminent threat of economic collapse. This accords with the dicta of Maraga, JA (as he then was) in Kenya Airways Ltd Vs. Aviation & Allied Workers Union Of Kenya & 3 Others [2014]eKLR relied on by the appellant;

> 23. In this case although the learned judge appreciated that besides financial distress redundancy can also arise in relocations of business or in mechanization of the modes of production as well as where technology can be employed to run a business more efficiently and/or profitably, he, however, focused on threat to the appellant's economic collapse only. Besides economic distress, redundancy can also arise where the employer finds that he can employ modern technology to run his business more efficiently and/or profitably. This is the crisp of the International Labour Organization's Recommendation No. 166--Termination of Employment of 1982 and the decision in the case of G.N. Hale & Son Ltd v. Wellington Caretakers IUW.4 In the latter, the New Zealand Court of Appeal rejected the lower court decision that redundancy must only be a commercial decision taken to ensure the ongoing viability of an employer and held that redundancy can be declared if the employer decides to reorganize his business and run it "more efficiently" and profitably. Locally, this view was echoed by this Court in the case of Kenya Airways Corporation Ltd v. Tobias Oganya Auma

& Others, 5 where it was held that the court has no jurisdiction to prevent an employer from restructuring or adopting modern technology so long as it observes all relevant regulations.

24. The decision to declare redundancy has to be that of the employer. In the above News Zealand case of G.N. Hale & Son Ltd, it was held that so long as the employer genuinely believed that there was a redundancy situation, then any dismissal was justified, and it was not for the court, or the union, to substitute their business judgment with that of the employer."

14. Given that state of the law, we are satisfied that the learned judge was wholly justified and did not err in holding, on this central issue, that the termination of the appellant's employment was not unfair as it was based on valid and procedural reasons consistent with the requirements of the relevant provisions of the *Employment Act*, 2007.

15. In the result, the claim for compensation cannot lie and we disallow this ground of appeal.

16. We now turn to the complaint that the learned judge in basing the award of leave pay on 4 months worked which translated to Kshs.6,125. The learned judge arrived at that figure by taking into account the provisions of section 28(1)(b) of the *Employment Act* 2007 which reads;

(b) where employment is terminated after the completion of two or more consecutive months of service during any twelve months' leave with full pay, in respect of each completed month of service in that period, to be taken consecutively."

17. We think, with respect, that the learned judge was within her rights to award the said amount notwithstanding that it was the minimum allowable. It was within her discretion and nothing has been placed before us to show that the said discretion was exercised perversely. We would accordingly reject this complaint as well.

18. Finally, the appellant faults the learned judge for awarding him "overtime hours for the 78 days at the salary of Kshs.35,000 all [being] Kshs.102,375." What the learned judge did was add up the appellant's overtime hours which amounted to 78 days. That would be working days, and it is clear they did not relate to the four months between January and 3rd May 2016 as the appellant supposes. It seems to us that 78 days as overtime pay as awarded by the judge was, far from being inadequate, quite generous on her part and we would not interfere with it.

19. The totality of our consideration of this matter is that the learned judge made a fair and just determination and we uphold the judgment and dismiss this appeal, but with no order as to costs.

Order accordingly.

DATED AND DELIVERED AT NAKURU THIS 22ND DAY OF NOVEMBER 2024.

M. WARSAME

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

F. OCHIENG

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR