Ndubi v County Assembly of Nyamira (Civil Appeal 75 of 2018)
[2023] KECA 172 (KLR) (17 February 2023) (Judgment)

Neutral citation: [2023] KECA 172 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPEAL 75 OF 2018

K M'INOTI, S OLE KANTAI & F TUIYOTT, JJA

FEBRUARY 17, 2023

BETWEEN

ALFRED MINCHA NDUBI ..... APPELLANT

AND

COUNTY ASSEMBLY OF NYAMIRA ..... RESPONDENT

(Appeal from the judgment and decree of the Employment & Labour Relations Court at Kisumu (Onyango, J.) dated 3rd May 2018 in ELRCC No. 62 of 2014)

JUDGMENT

1. On or about 28th March 2014, the appellant, Alfred Mincha Ndubi, lodged a claim in the Employment and Labour Relations Court at Kisumu against the respondent, County Assembly of Nyamira, seeking the following reliefs:

    i. An order of mandatory injunction to compel the respondent to instal and allow the appellant to discharge the duties of Sergeant at Arms;

    ii. Payment of the appellant's salary and allowances from the date of appointment as Sergeant at Arms to the date of installation;

    iii. General damages; and

    iv. Costs and interest.

2. In the claim the appellant pleaded that the respondent appointed him Sergeant at Arms by a letter dated 19th November 2013 and directed him to report to duty on 1st December 2013. However, upon reporting, the respondent turned him away and asked him to wait for further communication. Subsequent letters from the appellant inquiring when he should report to duty went unanswered. By a letter dated 24th January 2014, the respondent invited the appellant for a meeting on 28th January

2014 at which the appellant was questioned about a pending criminal case where he was charged with assaulting one Thaddeus Nyabaro Mumanyi, a member of the respondent's County Assembly.

3. The appellant declined to discuss matters pending in court and thereafter, despite written demand, the respondent refused to allow him to assume his office.

4. In its response to the claim, the respondent denied the appellant's claim and pleaded that it offered the appellant employment subject to undergoing vetting in accordance with its terms, conditions and procedures for employment. The respondent further pleaded that when the appellant was invited for vetting by the County Assembly Service Board, he declined to answer questions, thus bringing the meeting to an abrupt end. The respondent laid blame squarely on the appellant for his failure to take up the employment.

5. Onyango, J. heard the dispute in which the appellant testified on his own behalf whilst the respondent called one witness, a legal officer in the office of the Speaker. By a judgment dated 3rd May 2018, the subject of this appeal, the learned judge dismissed the appellant's claim but directed each party to bear its own costs. The learned judge found that the respondent was not responsible for the appellant's arrest and prosecution for a criminal offence on the very day he reported to duty; that upon refusing to respond to questions by the County Service Board the respondent declined to clear the appellant to take up his appointment and that the mandatory injunction sought by the appellant amounted to an order for reinstatement. After considering the factors set out in section 49(4) of the *Employment Act* as regards the remedy of reinstatement, the learned judge declined to issue the mandatory injunction, reasoning as follows:

> " The claimant herein had not started performing the functions of his office as Sergeant at Arms at the time of his arrest. He had only just reported for duty and was undergoing orientation. The person he is alleged to have assaulted was a member of the County Assembly in which he was appointed Sergeant at Arms.
>
> I have considered the circumstances under which the claimant's employment with the respondent ceased, his conduct that contributed to those circumstances, the fact that he had not taken up the functions of his office before his arrest, and the nature of the criminal charges against him.
>
> The respondent is not responsible for what befell the claimant. I do not find the remedy of mandatory injunction appropriate in the circumstances of this case and I decline to grant the same."

6. Regarding the claim for salary and allowances, the learned judge found that the appellant did not perform the functions of the office and therefore had not rendered any services to the respondent for which he would be entitled to payment. Lastly on the claim for damages, the learned judge concluded that having found that the respondent was not responsible for the appellant's predicaments, there was no basis for payment of general damages.

7. The appellant was aggrieved and lodged this appeal founded on a whopping 28 grounds of appeal which are a blatant violation of rule 88(1) of the Court of Appeal Rules, 2022 (previously rule 86(1)) in that they are not concise but instead, are a prolixious and argumentative narrative. To demonstrate how underserved such a surfeit of grounds of appeal was, in his written submissions, the appellant pursued only two grounds, in which he contended that the learned judge erred by holding that he was not an employee of the respondent and by denying him the remedies he had sought. I must echo what

the Court stated in *Nasri Ibrahim v. IEBC & 2 Others* [2018] eKLR regarding drafting of grounds of appeal:

> "We must reiterate that counsel must strive to make drafting of grounds of appeal an art, not an exercise in verbosity, repetition, or empty rhetoric...A surfeit of prolixious grounds of appeal do not in any way enhance the chances of success of an appeal. If they achieve anything, it is only to obfuscate the real issues in dispute, vex and irritate the opposite parties, waste valuable judicial time, and increase costs."

8. Turning to the two grounds of appeal, the appellant submitted on the first ground that he was an employee of the respondent having been given by the respondent a letter of appointment dated 19th November 2013. He further submitted that he reported on duty on 2nd December since 1st December was a Sunday and started orientation before he was arrested by the police and charged with a criminal offence and subsequently acquitted. The appellant contended that the contract of employment came into being immediately he accepted the offer of employment and that he reported to duty as directed by the respondent. Even after he was arrested, charged, and released on bail, the appellant argued that he attended work but the respondent refused to allow him to assume his office and failed to respond to his letters.

9. It was the appellant's further submission that his letter of appointment did not indicate that he was to be subjected to any vetting and that the letter summoning him before the County Assembly Public Service Board did not disclose the agenda. In his view, the contention that he was to be vetted was an afterthought.

10. On the second ground of appeal, the appellant submitted that the trial court erred by holding that the respondent was not responsible for the appellant's situation and therefore was not liable to pay salary, allowance and general damages. He contended that the respondent prevented him from assuming his office and that there was no justification for that because he was subsequently acquitted in the criminal case. As an alternative, the appellant submitted that he was entitled to an award of one month's salary in lieu of notice because the respondent terminated his contract of employment whilst he was still on probation. He further submitted that he was entitled to his salary and allowances for six months.

11. Although duly notified, the respondent neither filed its written submissions, nor appeared for the virtual hearing of the appeal.

12. I have carefully considered this first appeal. I bear in mind that our duty in such a first appeal is to analyse, evaluate, assess and weigh all the evidence and arrive at our own independent conclusions. In so doing, we must bear in mind that unlike the trial court, we did not see or hear the two witnesses as they testified. (See *Seascapes Ltd. v. Development Finance Co. of Kenya Ltd.* [2009] KLR, 384).

13. On the first ground of appeal, I am satisfied that contrary to what the appellant submitted, the learned judge did not hold that there was no contract of employment between him and the respondent. If the learned judge had found, as contended by the appellant, that there was no contract of employment between the parties, she could not have invoked section 49(4) of the *Employment Act* and addressed in detail the merit of the appellant's claim for a mandatory injunction which she rightly found to amount to a prayer for reinstatement. That the learned judge undertook that exercise shows that she found that there was a contract of employment. It is axiomatic that a person cannot be reinstated to an employment that he did not hold. I am satisfied that the appellant has completely misapprehended the conclusion by the learned judge.

14. The learned judge dismissed the appellant's claim for reinstatement on its merit, not because there was no contract of employment. The evidence on record shows that after receiving his letter of appointment, the appellant was requested to report to duty on 1st December, 2014, which turned out to be a Sunday. He reported the next day, and whilst in the process of undergoing orientation, he was arrested by the police and subsequently charged with a criminal offence. It was alleged that the appellant had assaulted a member of the County Assembly where he was to serve as a Sergeant at Arms. The appellant was subsequently released on bail and reported to work, but the respondent refused to take him in. Subsequently the respondent invited the appellant to a meeting and he was questioned about the criminal charges, but the appellant declined to respond to the questions, thus bringing the meeting to an abrupt end.

15. From the appellant's letter of employment, he was to be on probation for a period of 6 months. From the evidence, he did not work for the respondent even for one day, because he was arrested by the police the very day he reported and subsequently refused to respond to queries by the employer, about his arrest and criminal prosecution. After considering the factors set out in section 49(4) as regards reinstatement, the learned judge found that the appellant was not entitled to reinstatement.

16. Looking at the evidence on record which shows that the appellant was on probation, that he was arrested on the first day of reporting to work, and that subsequently he refused to respond to queries regarding his arrest and prosecution for alleged assaulting a member of the County Assembly where he was to work, I cannot fault the learned judge's conclusion. Among the factors to be taken into consideration under section 49 (4) of the *Employment Act* before the court can issue an order of reinstatement include the circumstances under which the termination took place, the appellant's contribution to the termination, the practicability of reinstatement, the appellant's length of service to the respondent, the conduct of the appellant which caused or contributed to the termination, and the common law principal that reinstatement is not available except in exceptional circumstances. When properly considered in this case, all those factors weighed heavily against the appellant and in my view, the learned judge came to the correct conclusion.

17. I am however satisfied that the respondent's contention as regards vetting of the appellant has no merit. Under the *County Governments Act*, the County Public Service Board has power to vet an applicant for employment in the County Government. By normal order of things, the vetting takes place before the offer of employment, and not after. It is a misnomer to offer employment to an employee, request him to report to work, then purport to subject him to vetting, beyond what is expected during the period of probation. The appellant's letter of appointment did not advert to any vetting once he reported to duty. All that the letter stated was that the appellant was to be on probation for a period of six months. Nevertheless, it should be borne in mind that under section 59(4)(f) of the *County Governments Act*, the County Public Service Board is empowered to investigate on its own initiative or upon complaint made by any person or group of persons, violation of any values and principles of devolution. It would be in this remit that the Service Board was entitled to invite the appellant to explain his arrest and the criminal prosecution he was facing. Had the appellant not taken a belligerent stand, the inquiry would obviously have had to be conducted within the limits of the sub judice rule.

18. On the second ground of appeal on remedies, once the trial court properly found that the respondent was not at fault in the circumstances of this appeal, there was no basis upon which it could have issued an order for compensation. The appellant could not blame the respondent because he was literally the author of his own misfortune. The alternative submission made by the appellant regarding payment based on probation cannot be entertained at this stage of appeal. That was not the case put before the trial court, the parties did not address the issue, and the learned judge did not consider it. It is too late in the day to introduce it for the first time at the appeal stage.

19. For the foregoing reasons, I do not find any merit in the appeal and I would dismiss it with the order that each party bears its own costs in the trial court and in this Court.

JUDGMENT OF KANTAI, JA

1. I have had the benefit of seeing in draft the Judgment of my brother M'Inoti, JA. I am in full agreement with the reasoning and conclusion made.

2. The appellant was arrested on the very day he was reporting to work having been offered employment by the respondent. It was alleged that he had assaulted an officer who worked for the respondent. He was charged in a criminal court and could not take up the employment he had been offered by the respondent. In those circumstances the trial Judge was right to dismiss the suit. The appeal has no merit and should be dismissed.

JUDGMENT OF TUIYOTT, JA

1. I have had the advantage of reading in draft the judgment of M'Inoti, JA, with which I am in full agreement and have nothing useful to add.

DATED AND DELIVERED AT KISUMU THIS 17TH DAY OF FEBRUARY, 2023.

K. M'INOTI

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JUDGE OF APPEAL

S. ole KANTAI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR