Nyachae v Kenya Orient Insurance Limited (Civil Appeal 169 of 2018)
[2023] KECA 136 (KLR) (10 February 2023) (Judgment)

Neutral citation: [2023] KECA 136 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAKURU

CIVIL APPEAL 169 OF 2018

FA OCHIENG, LA ACHODE & WK KORIR, JJA

FEBRUARY 10, 2023

BETWEEN

BONIFACE MOMANYI NYACHAE ..... APPELLANT

AND

KENYA ORIENT INSURANCE LIMITED ..... RESPONDENT

(Being an appeal from the judgment and decree of the Employment and Labour Relations Court at Kericho (Marete J.) delivered on 23rd July 2018) IN Kericho ELRC Cause No. 21 of 2018)

JUDGMENT

1. Boniface Momanyi Nyachae the appellant herein was employed by the Kenya Orient Insurance Limited (KOIL) as an assistant legal officer, through a letter dated March 16, 2016. According to the letter, the appellant's employment commenced on April 4, 2016, with a monthly basic salary of fifty thousand shillings (Kshs 50,000/-) inclusive of house allowance.

2. On August 9, 2016, the appellant failed to show up at work and on August 16, 2016, he resigned from his position without due notice. Thereafter, the appellant filed a memorandum of claim against the respondent dated February 19, 2018 and subsequently amended on June 4, 2018, alleging that the respondent had not only withheld his final benefits and certificate of service but had also discriminated against him based on sex during his employment. He alleged that his female colleagues were paid on a higher scale than he was.

3. The dispute was heard and determined by Marete J on July 23, 2018. The judge found that the appellant had failed to prove the claim of discrimination and held that the appellant was the author of his own misfortune in the allegations and claim of nonpayment as well as failure to collect his certificate of service. Consequentially, the suit was dismissed, and each party was ordered to bear its own costs.

4. Being dissatisfied with the court's judgment and decree the appellant lodged a memorandum of appeal dated September 17, 2018 identifying two main grounds of appeal. It was his contention that the trial

judge erred in law and in fact first, by failing to hold that the appellant was discriminated against by the respondent, contrary to section 5 of the *Employment Act* and articles 27, 28 and 41 of the *Constitution*, by failing to order the respondent to issue him with a certificate of service, contrary to section 51 of the *Employment Act*.

5. The appeal was canvassed by way of written submissions. M/s Ongori Auta Advocates appearing for the appellant, filed submissions dated October 24, 2022 in which it is urged that the trial court wrongly shifted the burden of proof to the appellant, contrary to the provision of section 5 of the *Employment Act*. Counsel asserts that the appellant had made a *prima facie* case of discrimination and that the burden of proof should have then shifted to the respondent, but the court wrongly applied section 107 of the *Evidence Act*, placing the burden on the appellant. Counsel further submits that section 51 of the *Employment Act* entitles the appellant to a certificate of service upon termination of employment, a relief which the trial court wrongly denied him and which this court ought to grant.

6. In response, M/s Peter Karanja, counsel for the respondent, filed submissions dated October 27, 2022, urging that the salaries paid to the respondent's employees were all within their salary bands. Counsel contends that the appellant failed to show a disparity in the pay for his job group, nor did he show that the difference in pay between him and the other employees was due to discrimination of any kind. Additionally, counsel contends that the onus of proving discrimination fell squarely on the appellant and he failed to discharge this burden. To buttress this contention counsel cites the case of *Barclays Bank of Kenya Ltd & Another v Gladys Muthoni & 20 Others (2018) eKLR*.

7. Regarding the certificate of service, counsel for the respondent submits that the appellant failed to present evidence to show that the respondent had withheld the appellant's certificate of service. He argues that the appellant failed to comply with the requirement to go to his former workplace, sign for and collect the certificate of service and therefore, this claim is not only preposterous, it is a mere gamble. In the end, counsel prays that the appeal be dismissed with costs.

8. We have considered the record of appeal, the rival submissions, the authorities cited and the law, and in our view, the main issues for determination in this appeal are:

    i. Whether the appellant was subjected to discrimination based on sex and social origin, and

    ii. Whether the respondent is entitled to the reliefs sought.

9. This being the first appeal, this court reevaluate the evidence on the record to reach its own conclusion on the evidence and the law in accordance with rule 29(1) (a) of the *Court of Appeal Rules* and as set out in *Selle & another v Associated Motorboat Co Ltd of Kenya & others [1968] EA 123*, wherein it was stated:

> " An appeal to this court from a trial by the High Court is by way of a re-trial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally. (*Abdul Hameed Saif v Ali Mohamed Sholan (1955), 22 EACA 270*."

10. On whether the appellant was subjected to discrimination based on sex and social origin, the trial court found that the appellant had failed to discharge the onus of proof of the claim. The trial court

concluded as follows: “the claimant’s case of discrimination is therefore superfluous, and I find as such.”

11. Article 27 of the *Constitution* guarantees that every person is entitled to equality and freedom from discrimination. This provision precludes discrimination against anyone on the basis of sex, race, and social origin among others and is reiterated in section 5 of the *Employment Act* as follows;

    1. .....

    2. An employer shall promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice.

    3. No employer shall discriminate directly or indirectly, against an employee or prospective employee or harass an employee or prospective employee—

        a. on grounds of race, colour, sex, language, religion, political or other opinion, nationality, ethnic or social origin, disability, pregnancy, mental status or HIV status;

        b. in respect of recruitment, training, promotion, terms and conditions of employment, termination of employment or other matters arising out of the employment.

    4. .....

    5. An employer shall pay his employees equal remuneration for work of equal value.

    6. An employer who contravenes the provision of the section commits an offence.

    7. In any proceedings where a contravention of this section is alleged, the employer shall bear the burden of proving that the discrimination did not take place as alleged, and that the discriminatory act or omission is not based on any of the grounds specified in this section.

12. The appellant alleges that the respondent subjected him to discrimination on the basis of sex and social origin and that his female colleagues were paid a higher salary than he was. Specifically, that a female colleague in the same position as he was, performing similar duties and possessing same qualifications but hired about 8 months earlier, was paid over ten thousand shillings (Kshs 10,000/-) more than the appellant without justification. He also submitted that other female legal officers earned upward of one hundred and fifty shillings (Kshs 150,000/-) while he earned fifty thousand shilling only (Kshs 50,000/-). He asserts that this disparity in pay is proof of discrimination based on sex and social origin.

13. It is not disputed that the appellant voluntarily entered into an employment contract with the respondent on March 16, 2016, agreeing to be paid a gross salary of fifty thousand shillings (Kshs 50,000/-). According to the respondent’s salary band, an assistant legal officer falls under KOIL G3 and is entitled to a salary band between thirty thousand shillings (Kshs 30,000/-) to seventy-five thousand shillings (Kshs 75,000/-). Furthermore, the respondent produced evidence indicating that the female assistant legal officer entered into a contract with the respondent on July 6, 2015, for a salary of sixty thousand shillings (Kshs 60,000/-). It is on this disparity that the appellant claims there was discrimination. Pertaining to the other employees it is indicated that they entered into contracts unrelated to that of the appellant and therefore are not relevant, or comparable to this application.

14. The respondent on the other hand refutes the claims that it discriminated against the appellant and asserts that the disparity in pay of their employees was solely based on negotiations with the employees and in accordance with the company’s salary bands. The respondent asserts that the appellant failed to prove the allegations of disparity.

15. The appellant's assertion regarding the issue of discrimination is hinged on the evidentiary burden and who bears it in the circumstance. As noted above, section 5 (7) of the *Employment Act* places the burden of disproving discrimination on the employer. The crux of that provision is that once an employee has made out a prima facie case of discrimination, the burden then shifts to the employer to disprove the allegation. A *prima facie* case is one in which a court properly directing itself would conclude on the evidence presented that there exists a right which has been infringed. Only then can the burden shift to the respondent to disprove the allegation.

16. The appellant claims that the learned trial judge applied the wrong provision of law, which ultimately placed the burden of proving discrimination on the appellant rather than on the respondent.

    Record indicates that the learned judge applied section 107 of the *Evidence Act*, which provides as follows;

    i. "Whoever desires any court to give judgement as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.

    ii. When a person is bound. To prove the existence of any fact it is said that the burden of proof lies on that person.

17. As aforementioned, section 5 (7) requires a claimant to make a case worthy of determination before the respondent can bear the burden to disprove the claim. Applying section 107 of the *Evidence Act* does not take away from this provision, because it only requires the claimant to state the factual basis for a legal claim. In essence, the claimant bears the burden to set out prima facie, the claim upon which the burden shifts to the respondent to disprove the allegation. It is our view therefore, that the learned judge did not misappropriate the law.

18. As to the substance of discrimination, aside from stating the obvious contractual differences, the appellant has not set out any components of the alleged discrimination, other than the fact that he is a man, and the other employee is a woman. The other female employees mentioned by the appellant have been proved to be employed in different capacities subject to different salary bands, hence are not comparable. Further, on discrimination based on social origin, the appellant did not demonstrate that any discrimination may have occurred based on these characteristics. All the appellant did was state a claim but failed prove it. It is not enough to just make a blanket claim without making a proper showing of the claim.

19. Accordingly, therefore, we find that the appellant failed to show any prima facie case of discrimination against him based on social origin and/or sex.

20. Secondly, regarding the appellant's certificate of service, the appellant faults the trial judge for failing to order the respondent to issue him with one. The law on this issue is well pronounced. Section 51(1) of the *Employment Act* provides as follows;

    > "An employer shall issue to an employee a certificate of service upon termination of his employment, unless the employment has continued for a period less than four consecutive weeks."

21. The appellant alleged that the respondent refused and, or neglected to issue him with a certificate of service upon his departure from the company even though he had worked there for over four (4) consecutive months. The respondent refuted this claim and asserted that it had reached out to the appellant, instructing him on the procedural requirements to obtain the certificate that is, visit the

respondent's office, sign for, and collect the certificate. This assertion was neither denied nor rebutted by the appellant.

22. It seems to this court that the respondent is willing and ready to hand over the certificate if not for the appellant's own refusal to attend at the respondent's offices. It is our finding therefore, that the learned judge rightfully held that the appellant was responsible for his own woes in respect to the certificate of service.

23. The upshot of our analysis is that this appeal lacks merit and is accordingly dismissed with costs to the respondent.

DATED AND DELIVERED AT NAKURU THIS 10TH DAY OF FEBRUARY, 2023.

F OCHIENG

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JUDGE OF APPEAL

L ACHODE

.....

JUDGE OF APPEAL

W KORIR

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original

Signed

DEPUTY REGISTRAR