Ngei v Viljoen & 2 others (Civil Appeal 325 of 2019)
[2023] KECA 851 (KLR) (7 July 2023) (Judgment)

Neutral citation: [2023] KECA 851 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 325 OF 2019

HM OKWENGU, HA OMONDI & JM MATIVO, JJA

JULY 7, 2023

BETWEEN

JAMES MUCHENE NGEI ..... APPELLANT

AND

STEPHEN VILJOEN ..... 1ST RESPONDENT

IVOR MATHEE ..... 2ND RESPONDENT

BOC KENYA LIMITED ..... 3RD RESPONDENT

(Being an Appeal against the entire Judgment and Decree from the Employment and Labour Relations Court at Nairobi (Abuodha, J.) dated 13th July 2018 in Cause No. 2211 of 2012)

JUDGMENT

1. The events leading to this appeal begun when the appellant, being the claimant in Nairobi ELRC No 2211 of 2012 filed a suit on June 5, 2006 against the respondents, alleging unlawful summary dismissal and breach of contract. He sought a declaration that the failure to carry out the mandatory disciplinary inquiry as set out in the 3rd respondent's Disciplinary Code of 1999 rendered the termination null and void. He also sought to be paid the benefits from the month of February 2001 and all subsequent months, pending hearing of the Disciplinary Inquiry, and a sum of Kshs 94,618,383/=, being the equivalent of his salaries and benefits due up to his retirement age of 60 years. In addition he sought two alternative reliefs, namely motor vehicle, credit balances on the motor vehicle purchase and maintenance accounts, pay for outstanding leave, interest and costs.

2. In defence, the respondents denied liability, maintaining that the appellant was served with a notice to attend a disciplinary hearing and was ultimately summarily dismissed for insubordination; and that the appellant's terminal dues were computed but that the appellant failed to collect them. The respondents filed a counterclaim to the effect that at the point of termination of his services, the appellant owed the

3rd respondent a total of Kshs 2,111,180/-, made up of Kshs 69,226/- comprising debit balances on his Vehicle Running Account and his Furniture Account; and a further Kshs 2,049,960/- in respect of a loan the appellant had requested from the 3rd respondent to enable him buy a house.

3. In his decision the learned trial judge held that under the repealed *Employment Act* cap 226, it lacked jurisdiction to question the validity of reasons for terminating the appellant's services; ordered that the appellant be paid 3 months' salary *in lieu* of notice; and dismissed the respondents' counterclaim for lack of evidence. The trial court directed that each party bears its own costs.

4. The appellant traces his sojourn from a letter dated October 28, 1996, when BOC Kenya Ltd, the 3rd respondent appointed him as Financial Controller; and that his appointment was subject to probation and confirmation thereafter; that he served the 3rd respondent with diligence and distinction and by February 1999 he had been identified as the most suitable and qualified Kenyan to hold the post of Managing Director upon retirement of the then Managing Director. However, in contravention of the Kenyanization policy of the Government the 1st and 2nd respondents seconded Stephen Viljoen, the 1st respondent as Managing Director for two years.

5. That the Immigration Department refused to issue the 1st respondent with a work permit and insisted that the incumbent who was a Kenyan remain so upon retirement.

6. According to the appellant, representations were made to the government that the appellant would be trained to succeed the incumbent, which according to the appellant made the government allow the 1st respondent to act as the 3rd respondent's Managing Director for two years.

7. Further and according to the appellant, contrary to the said representation that were made that he would be made Managing Director, the 3rd respondent's chairman wrote a letter to immigration accusing the claimant of unspecified offences leading to his summary dismissal and according to the appellant this was intended to pave way for the 1st respondent to become Managing Director.

8. The appellant further states that he had heard other Kenyans were being interviewed for position of Managing Director, and that the 3rd respondent offered to second him to South Africa for further training but failed to make a commitment that he would be Managing Director upon his return or even retain his position as Financial Controller leading the appellant to refuse the said secondment.

9. The appellant further alleged that the 1st respondent maliciously frustrated him leading to his summary dismissal on February 9, 2001; that in the course of his employment as Financial Controller, he came across several instances of financial impropriety which he questioned and refused to sanction; he discovered that the 1st respondent as Managing Director destroyed a competitor known as Global Cases, in circumstances that bordered on criminality and became subject of police investigations leading to prosecution of the 1st respondent, and that in order to punish the appellant for cooperating with the investigations and to destroy his credibility the 1st respondent went ahead to push for a flawed disciplinary proceeding which was carried out on a date not communicated to the appellant.

10. It was the appellant's contention that his terms and conditions of service were governed by his letter of employment dated October 28, 1996, and the 3rd respondent's disciplinary code of 1999 which stipulated inter alia that, the appellant's services could not be terminated until a disciplinary inquiry was held in which he had attended and participated in the appointment of the chairman and that any disciplinary action would meet the requirement of procedural and substantive fairness. The appellant therefore claims that his termination was null and void and seeks for compensation.

11. The appellant stated that he had worked for the respondent on two intervals and that on the second appointment the 3rd respondent called him to join and work in England. The appellant left service in

1992, on the basis of summary dismissal, but was recalled to rejoin; and upon his second appointment he insisted that the respondent put safeguards for human resource, for example, not being dismissed without due process.

12. That he was then accused of sending a rude email to the Managing Director; and on February 5, 2001, he was given a letter to appear before the Disciplinary Committee as well as a suspension notice. The appellant pointed out that he was never shown the rude email nor given any complaint, and that he wrote a letter to the chair of the Board about the suspension but never got a response but instead got a dismissal letter. The appellant avers that the dismissal was contrary to the respondents Human Resource Policy and Manual.

13. The appellant admitted being invited to a disciplinary hearing on February 5, 2002 but declined to attend as he was unprepared for the inquiry and asked for more time. He maintained that he had paid all his liabilities to the respondent before leaving; he ought to have been subjected to the Disciplinary Procedure; and was entitled to 3 months' notice of termination or payment in lieu.

14. The respondents admitted that the appellant was at one time identified as a possible future candidate alongside others for post of Managing Director, but he was ultimately not considered suitable for such future post and his candidature eliminated; that the 3rd respondent was not obliged to appoint anyone to any post within the organization; and that the termination clause contained in his letter of appointment, was factored in computing his terminal dues.

15. The respondent maintained that the applicant was dismissed for insubordination, for writing a demeaning letter to the Managing Director and copying the same to others. That the appellant was served with a notice to attend a disciplinary hearing, instead the appellant sent a letter dated February 7, 2001 saying he was not prepared, so a decision was made to summarily dismiss him. The respondent further stated that the appellant's terminal dues were computed but that the appellant failed to collect the same.

16. The matter proceeded to hearing with each side calling witnesses. *Vide* a judgment dated July 13, 2018, the trial court having carefully considered the parties' pleadings, testimony, and evidence on record, held that the suit was filed when the applicable employment legislation was the repealed *Employment Act* cap 226, which had no provision for unfair termination as is provided for in the current Act.

17. The court noted that under the repealed Act an employee could be dismissed and/or terminated without giving reasons. The court also noted that under the repealed Act, and unless agreed to the contrary, the quantum of damages payable was equivalent to the sum of money which would have been paid *in lieu* of notice.

18. The trial court further noted that there was no provision in the respondents Human Resource Manual and Policy that entitled the appellant to seek the heads of compensation he was seeking, and that further the court had no power to order that the termination was unfair as the appellant had admitted that he was invited to attend the disciplinary inquiry but declined to do so.

19. In the circumstances, the court found it lacked jurisdiction to question the validity of reasons for terminating the appellant's services and made an order that the appellant be paid 3 months' salary *in lieu* of notice. The court also dismissed the respondents' counterclaim as no evidence was led to prove the same.

20. The appellant aggrieved by the decision of the trial court filed its memorandum of appeal challenging the judgment of the High Court on 38 grounds of appeal, but which have been condensed, and we need not reproduce them as some are replicate of each other. In describing the judgment by the trial court as scanty, the appellant is convinced that the remarks made by the trial judge that the

pleadings were unnecessarily lengthy thus making it difficult for the trial court to effectively summarize the facts in dispute, are a demonstration that the trial judge neither read the pleadings, nor did he understand the issues that were for determination; and the learned judge ignored the evidence on how notice on termination of employment was negotiated, preferring to impose what was provided by the *Employment Act* instead of considering what was contractually settled by the parties. In support of this proposition the appellant refers to the case of *Miss Nduta Mbile v John Gachau Gitonga* Civil Appeal No 299 of 2015. It is his contention that these consequences are so grave as to warrant the judgment being set aside, and reference is made to the decisions in *Kenpipe Co-operative Savings and Credit Society Ltd v Daniel Githinji Waiganjo* Civil Appeal No 2023 of 2015; that if this was the problem the trial court faced, then the learned Judge ought to have invoked rule 14 (7) of the *Employment and Labour Relations Court Rules (2016)* to obtain clarification from him; and the learned Judge ignored the 2nd respondent's amended defence filed on June 19, 2006, which was basically an admission to the claim.

21. The appellant also submits that the issue regarding the court's lack of jurisdiction was not raised at the trial, and the finding occasioned injustice. He relied on *Maithene Malindi Enterprises Ltd v Kaniki Karisa Kaniki and 2 Others* Civil Appeal No 68 of 2016; and in any event, that holding was misplaced and contradicted the rest of the decision where the judge issued awards, thus effectively presiding over the matter; and ignored the provisions of section 17 and section 5 (4b) of the repealed *Employment Act* Cap 226, which placed a duty on an employer to give reasons for dismissal-reference is made to the case of *Josiah Wanjohi v National Bank* Cause No 1109 of 2014; and the learned Judge failed to apply provisions of Cap 226 which were favourable to the appellant.

22. The appellant also laments that he had merely sought a declaration that he was still an employee of the 3rd respondent, pending the hearing of a disciplinary inquiry, yet the trial court delved into the nature and merits of the allegations made against him, an exercise which ought to have been reserved for the disciplinary hearing. Drawing from the case of *Farah Gullet Awad vs. CMC Motors Group Ltd*, CA No 206 of 2015, the applicant also urged us to interfere with the costs awarded, on grounds that no reasons were given for the no show position on costs, and although awarding of costs is a discretionary exercise, it cannot be exercised in silence, and there is nothing to suggest that the decision on costs was exercised judiciously.

23. In opposing the appeal, the respondent reiterates that the suit was grounded on the repealed *Employment Act* which did not provide for a trial court to inquire into the procedure or validity of reasons for dismissal of an employee. On this limb, we are referred to the decision in *Ombonya vs. Gailey Roberts* [1974] EA, 522.

24. That no amendments were made to the pleadings, and parties remained bound by those pleadings; the appellant admitted being subjected to disciplinary proceedings which he snubbed; and the judge was duly guided by the appropriate provisions of Cap 226 in considering that the applicant's termination was due to his gross misconduct and insubordination, thus disentitling him to any compensation. In this regard reference is made to the case of *Walter Muse Anyanje v Hilton (K) Ltd and Anor* CA No 269 of 2003 which stated that there can be no award of general damages made to an employee in respect of suits based on termination of services since the party is bound by the notice set in the contract; and the award made in favour of the appellant was fair. Further, that it would be unfair to import the provisions of the *Employment Act* 2007 which were not in existence at the time.

25. This being a first appeal as has been reiterated in several decisions of this court, it is this court's primary duty to evaluate the evidence on the record in order to come to its own independent conclusion on the evidence and the law, as per rule 31 in the *Court of Appeal Rules 2022*. This duty has been reiterated in *Abok James Odera t/a A.J. Odera & Associates vs. John Patrick Machira t/a Machira & Company Advocates* [2013] eKLR.

26. In our view from grounds 1- 4 of the memorandum of appeal, the main issues are whether the trial court had jurisdiction to award the appellant the compensation and other reliefs that had been sought. The crux of the appellant's case is that the learned judge erred in holding that the court lacked jurisdiction to hear and determine the case yet it proceeded to determine the issues touching the grounds of the appellant's dismissal. It is the appellant's argument that lack of jurisdiction was never raised and that the judgment amounted to a denial of justice to him.

27. It is not in contention that the applicable law at the time the suit was filed was the *Employment Act* Cap 226, (since repealed by the *Employment Act* of 2007). Section 50 of the repealed Act provided as follows:

> 50. Courts to be guided in determining a complaint or suit under this Act involving wrongful dismissal or unfair termination of the employment of an employee, the Industrial Court shall be guided by the provisions of section 49

28. It is also not in contention that the *Employment Act* Cap 226(repealed) did not have a provision for compensation for unfair termination of service as is in the current Act. Our reading of section 49 of the repealed Act clearly confirms this. It is also not in contention that at the time of filing suit in the High court in the year 2001, the *Employment Act* 2007 had not come into effect. The *Employment Act* of 2007 has a provision for compensation for unfair termination but it did not apply to the instant case as it could not apply retrospectively.

29. What we understand from the record is that the trial court did not in any way state that the employer did not need to give a reason for termination- indeed that would run counter section 43 (1) and (2) of the *repealed* Act, rather that under the repealed Act, there was no provision for compensation for unlawful termination. Further, that the court lacked the jurisdiction to question the validity of the termination because the appellant admitted being invited to disciplinary proceedings and snubbing the invite.

30. The appellant argues that cap 226 section 5 (4b) requires in mandatory terms the employer to provide reasons for dismissal of employees. A look at the repealed statute reveals no such provision as stated by the appellant. As a matter of fact section 47 (1) of the repealed Act provides for intervention by a Labour Officer in the first instance in the following terms:

> 1. Where an employee has been summarily dismissed or his employer has unfairly terminated his employment without justification, the employee may, within three months of the date of dismissal, present a complaint to a labour officer and the complaint shall be dealt with as a complaint lodged under section 87

31. From the evidence on record, this was never done by the appellant. This court agrees with the findings of the trial judge that the quantum of damages payable would be the sum of monies which would have been paid in lieu of notice as per section 49 (1) of the repealed Act.

32. The rest of the grounds in this Court's assessment would be baseless as it is clear that under the repealed statute the trial court did not have the power to award under the heads of damages sought by the appellant.

33. Finally, as regards the issue of costs in the High Court. This court is alive to the fact that as per section 27 of the *Civil Procedure Act*, costs follow the event. Notwithstanding the provisions of section 27 above, costs are generally a matter within the discretion of the court. (see James Koskei Chirchir vs. Chairman Board of Governors Eldoret Polytechnic [2011] eKLR.

34. This court notes that the trial court did not explain why it denied the appellant costs yet his claim partially succeeded. The appellant argues that costs follow the event, unless there is compelling evidence on how the successful party could have avoided the legal process. We take note that there was no explanation given for ordering that each party bears its own costs, and we are of the considered view the trial judge erred in denying the appellant costs. We therefore set aside the order on costs and substitute thereto an order awarding the appellant half the costs of the suit as he only partially succeeded.

35. The upshot of the above is that except for the issue of costs the appeal fails and is dismissed. The appellant having succeeded on the issue of costs we award him 25 percent of costs in the appeal.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

H. A. OMONDI

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JUDGE OF APPEAL

J. MATIVO

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR