Njenga v Kenya Women Finance Trust (Civil Appeal 300 of 2017)
[2023] KECA 1144 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KECA 1144 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 300 OF 2017

W KARANJA, J MOHAMMED & KI LAIBUTA, JJA

SEPTEMBER 22, 2023

BETWEEN

JOYCE KABURA NJENGA ..... APPELLANT

AND

KENYA WOMEN FINANCE TRUST ..... RESPONDENT

(An appeal from the judgment and decree of the Industrial Court of Kenya at Nairobi (Nzioka Wa Makau, J.)dated 1st October 2015INICC No. 1390 of 2013)

JUDGMENT

1. This is a first appeal from the judgment of the Industrial Court now the Employment and Labour Relations Court (the ELRC) sitting at Nairobi where Nzioka Wa Makau, J. dismissed the suit filed by the appellant.

2. Rule 31 of the *rules of this Court* requires that, on a first appeal, we re- appraise and re-evaluate the evidence and come to our own conclusions of fact. It was held of that mandate in the case of *Peters v Sunday Post* [1958] EA 424:

> "It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who has had the advantage of seeing and hearing the witness."

3. The appellant, Joyce Kabura Njenga, claimed in the Memorandum of Claim that she was employed by Kenya Women Finance Trust, (the respondent) on 4th June 2012 for an initial probation period of 6 months, which was to be extended to a period of 9 months. Subject to agreement.

   Upon confirmation, the contract was to run for three (3) years, renewable by mutual agreement of the parties.

4. The appellant stated that she worked diligently for the entire probation period, and that there was no notice to terminate her probation as was stipulated under the termination clause in the contract; that, upon expiry of her probation period on 4th December 2012, and without notice of termination or extension as per the contract, she assumed that the 3 year contract was impliedly confirmed; that she was terminated on 31st December 2013 beyond the probation period; and that at the time, her monthly salary was Kshs.217,375.00. She claimed terminal benefits, including loss of earnings for three years when her contract was to expire and 12 months compensation, all amounting to Ksh.7,825,500.00

5. In a Memorandum of Reply filed by the respondent , it denied the claim and details of what the respondent considered to be breaches of her terms of employment by the appellant. Facts leading to the termination of employment were stated to include failure on the part of the appellant to perform her work; being absent from work; insubordination; and being a non-performer. It was stated that the appellant had been invited to attend an appraisal which she failed to attend, and that her salary was Kshs.154,900.00 per month.

6. The matter proceeded to hearing in the ELRC where both the appellant and the respondent were heard and directed to file written submissions. Upon considering the whole case, the learned Judge found that the termination of the appellant's employment was fair. The suit therefore failed and the appellant was dismissed.

7. The appellant challenges those findings in the memorandum of appeal where 8 grounds of appeal are set out to the effect that the Judge erred in law and fact: in failing to consider that the termination of the appellant was unlawful and unfair as she was not given a fair appraisal by the respondent; by making a finding that the respondent exercised its prerogative to terminate and acted fairly because of the appellant's failure to co-operate without any evidence of non-co-operation; and by failing to hold that the probation period had lapsed and without notice of extension of the notice of the appellant's employment with the respondent had been automatically confirmed. Further, that the learned Judge erred by making a finding that the appellant's suit is unmerited; by not considering the appellant's evidence of the conduct of her supervisor who unilaterally decided the appellant's fate by declining to confirm the appellant; in failing to properly evaluate the evidence before him and reached a conclusion that was wrong and unsupported by evidence and law; by failing to find that the contractual provisions that bound the parties were applicable to the circumstances of the appellant as far as the probation period was concerned; and in dismissing the appellant's case.

8. We are urged to allow the appeal and, in the event, grant the prayers in the Statement of Claim filed in the ELRC.

Submissions by counsel

9. When the appeal came up for hearing before us, learned counsel, Ms. Purity Makori appeared for the appellant while learned counsel, Ms. Apolot appeared for the respondent. Both counsel had filed written submissions which they both adopted. Counsel for the appellant submitted that, according to the respondent's evidence, the appellant was terminated in accordance with her employment contract, which provided for probation; that the appellant's termination of employment was not because she was not qualified for the job, but because she had a disagreement with her employer on her rating; that the appellant was subjected to unfair labour practices; that the learned trial Judge failed to appreciate the evidence before him and proceeded to make an assumption that the appellant refused to sign the appraisal form; and that the respondent did not accord her fair labour practices and that, therefore, termination of her employment had no basis whatsoever.

10. Counsel further submitted that Article 41(1) of the *Constitution* provides that every person has the right to fair labour practices; that the evidence presented before the trial court did not accord the appellant fair labour practices, and that she was dismissed when she failed to agree with her supervisor, and that she continued to work way past her probation and was not on probation at the time when she was dismissed.

11. Opposing the appeal, counsel for the respondent submitted that the appellant served her probationary term until she was lawfully dismissed on 28th December 2012. Further, that through her letter of appointment dated 4th June 2012, she was employed as an insurance manager, and was to work under probation for 6 months. Counsel submitted that the appellant reported for duty on 20th June 2012 and, as such, her probation was scheduled to end on 20th December 2012, but ended on 28th December 2012 with an eight (8) day delay that was occasioned by the appellant who, upon realizing that she was not going to be confirmed due to her misconduct and general performance, resorted to frustrating the appraisal, which was a crucial process in her termination. It was further submitted that the reason why the appellant was not confirmed was due to her insubordination and poor performance. Counsel enumerated various incidents of failure in performance of duty by the appellant, and submitted that there was substantive justice. Counsel urged us to dismiss the appeal.

Determination

12. We have carefully considered the record of appeal, submissions by counsel, the authorities cited and the law. We discern the following issues for determination:

    i. whether the appellant was on probation at the date of termination;

    ii. whether the appellant's termination was wrongful, unfair or unlawful; and

    iii. whether the appellant is entitled to the reliefs sought.

13. It is not in dispute that the parties entered into a contract of employment on 4th June 2012. Similarly, it is common ground that Clause 8 of the Contract of Employment provided that the appellant was to be on probation for a period of 6 months, which could be extended to a period of 9 months subject to agreement. In particular, the clause read as follows:

> " You will be on probation for 6 months. However the Company with your agreement may also extend this probation period by not more than nine (9) months and your confirmation of employment will depend on:
>
> a). satisfactory reports being obtained from suitable referees named by you, who will be approached after you have accepted appointment with us,
>
> b. Satisfactory vetting report as provided by the organization's consultants,
>
> c. Satisfactory performance progress during the probationary period and
>
> d. The discretion of the Management of the Company."

14. Like the learned Judge of the ELRC, we find that the appellant was scheduled to be appraised as her employment depended on satisfactory reports. From the record, we note that the appraisal forms forwarded to the appellant to complete were almost blank and not filled by her as she was required to. From the record, the objective of the appraisal was to rate her performance, which was material to her confirmation upon completion of her probation period.

15. The provisions of section 42 of the *Employment Act* applied in this particular circumstance. The said provision stipulates in part as follows:

> "42 (1) The provisions of section 41 shall not apply where a termination of employment terminates a probationary contract.
>
> (2) ...
>
> (3) ...
>
> (4) A party to a contract for a probationary period may terminate the contract by giving not less than seven days' notice of termination of the contract, or by payment, by the employer to the employee, of seven days' wages in lieu of notice."

16. It follows therefore that the appellant's contract was determined through termination on 28th December 2012, eight days after the end of the 6-month probation period. The contract of employment provided that, during the probation period, the notice period was one month or payment of one month's salary in lieu of such notice. We find that the letter dated 28th December 2012 terminating the appellant's employment adequately provided for the appellant as contemplated under Section 42(4) of the *Employment Act*. We therefore find that the learned Judge did not err when he found that the appellant having been subsequently called for a meeting to discuss her appraisal and her refusal to sign the same would explain the delay for the eight days in giving her the termination letter eight days later indicating the respondent's intention not to confirm her contract. It was the respondent's contention that the appraisal process was for the purpose of enabling the respondent to determine whether to confirm her employment or to terminate it.

17. The letter dated 28th December 2012 terminating the appellant's employment indicated that, after the performance appraisal, discussions between the appellant with her supervisor, a decision had been made not to confirm her appointment. The appellant was paid her final dues, which comprised days worked up to 31st December 2012, outstanding leave and 1 month's salary in lieu of notice.

18. Having expressed ourselves as herein above, was the period of notice as provided for in the respondent's letter dated 28th December 2012 sufficient? To answer that question, we have to bear in mind that section 42(4) of the *Employment Act* provides for the minimum period of 7 days' notice of termination which can be enhanced by the parties or the ELRC. Our position is fortified by section 26(2) of the *Employment Act*, which provides that:

> "Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgment award or order of the Industrial Court are more favourable to an employee than the terms provided in this Part and Part VI, then such favourable terms and conditions of service shall apply."

19. This Court, while addressing itself to the import of the aforementioned provision in *Kenya Tea Growers Association v Kenya Plantation & Agricultural Workers Union* - Civil Appeal No. 207 of 2017 (unreported) stated as follows:

> "We find that the above provision not only allows parties to a CBA to agree on terms that are more favourable than the minimum terms and conditions of employment set out by the EA and Wages Order but also empowers the ELRC to issue such favourable terms."

20. The thread running through the appellant's grounds of appeal is that the respondent failed to follow procedural fairness which is required of an employer before terminating the services of an employee. We disagree. From the record, the respondent invited the appellant several times to attend at her appraisal regarding her performance, which the appellant declined and failed to participate or co-operate with. To our mind, failure to participate in the appraisal in performance of her duties led to the respondent terminating the appellant's contract.

21. The learned Judge found that the appellant was not entitled to the relief sought and, having lost on that score, her termination was not unlawful. We agree with those finding. In the circumstances, the appellant's appeal has no merit and we hereby dismiss it with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2023

W. KARANJA

.....

JUDGE OF APPEAL

JAMILA MOHAMMED

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR