BATUK Unit Kenya v Mutahi (Civil Appeal 214 of 2018) [2023] KECA 1417 (KLR) (24 November 2023) (Judgment)

Neutral citation: [2023] KECA 1417 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NYERI

CIVIL APPEAL 214 OF 2018

W KARANJA, LK KIMARU & AO MUCHELULE, JJA

NOVEMBER 24, 2023

BETWEEN

BATUK UNIT KENYA .... APPELLANT

AND

JOSEPH KAIRU MUTAHI .... RESPONDENT

(Being an appeal from the judgment and decree of the ELRC Court at Nyeri (B.Ongaya. J.) dated 15th December 2017 in ELRC Case No. 242 of 2016)

JUDGMENT

1. Joseph Kairu Mutahi (the respondent) worked as a casual worker for the [Particulars Withheld] Unit (xxxx) (The Applicant) based in Kenya between 1984 and 2002 and was later employed permanently on 1st October, 2002 as FMA supervisor of [Particulars Withheld] Base (xxxx) (xxx(E) earning a gross salary of Ksh.122,868. He had worked at various xxxx camps including [Particulars Withheld airstrip, [Particulars Withheld] Showground, [Particulars Withheld] farm, and [Particulars Withheld] Airbase(lab).

2. He worked until the 24th February, 2016 when he was suspended from work on allegations of sexual harassment and intimidation at the workplace. He was again suspended on 3rd March, 2016 for the same reason and this led to his invitation for an investigatory hearing on 15th March, 2016 which did not, take place. He acknowledges having attended the disciplinary hearing on 10th June, 2016, and on the 14th July, 2016, he was terminated from employment. His terminal dues amounting to Ksh.1,216,630 was deposited in his account on 10th August, 2016 and he was issued with a certificate of service on 24th August, 2016.

3. Aggrieved by his termination, he moved to Court by way of a memorandum of claim dated 4th November, 2016. He claimed that he was not accorded a fair hearing, leading to his unprocedural and

unlawful termination from employment contrary to the proviso to section 49 of the *Employment Act* No. 11 of 2007. He prayed for:

a. General damages, emoluments, contingencies for unfair and unlawful dismissal,(gross salary of Ksh.122,868*12 months=1,474,416)

b. Supervisory allowance as per standing order 103 between October 2008 and November 2015 being 10% of the basic salary per month (=86 months *12,286=1,056,664)

c. Unpaid gratuity as per clause 50(d) of standing order 103=Ksh.5,897,664.

d. One month pay in lieu of notice, Ksh.122,868.00

Total Ksh.8,551,612

e. Less Ksh.1,216,630 paid making a total of Ksh.7,334,982

4. In response to the memorandum of claim dated, 13 January, 2017, the appellant averred that the respondent was a casual labourer at diverse times from 1984 to 2002 and then from 2002 until when he was terminated. It denied the respondent's claim that he was the FMA supervisor of [Particulars Withheld] Base (E) (xxx(E). It, however, admitted that the respondent was suspended from duty on 24th February, 2016 and he was invited to a disciplinary hearing which he attended. The witnesses' identities were not revealed due to the sensitivity of the matter. The disciplinary hearing was for allegations of sexual harassment, intimidation, and abusive and insulting behaviour at the workplace, which conduct qualified for summary dismissal under section 44 of the *Employment Act*. According to the appellant, the reasons for termination were given and the respondent was not entitled to cross-examine the witnesses.

5. It was the appellant's response that the respondent was not entitled to the reliefs sought, nor was he entitled to a 50% gratuity under clause 50(d) of the standing order 103 which did not apply to him since prior to 2002, as he was a non-contractual casual employee engaged on an ad- hoc basis.

6. Additionally, it was averred that the respondent was paid his supervisory allowance which is a discretionary allowance, for the months of January and February 2016 as provided by clause 73 of Standing Order 103. Further to the respondent's claim, it was stated that the witnesses at the disciplinary hearing provided a basis for the decision made and that the respondent's claim did not disclose a cause of action and, therefore, prayed that the claim be dismissed.

7. The matter proceeded by way of viva voce evidence and written submissions. In the end, learned Judge held that the respondent's termination from employment was unfair for want of a fair and valid reason as provided in section 47(5) as read with section 43 of the Act and for want of due process entailing cross-examination of witnesses or complainants.

8. In regard to compensation, the court found that from the evidence presented before the court, the respondent was a reliable and dependable employee and he was, therefore, awarded the maximum compensation under section 49(1)(C) of the *Employment Act*, a sum of Ksh.1,474,416.00. It was held that the respondent had proved his claim on a balance of probability and he was, therefore, awarded 50% of his basic pay Ksh.122,868 for 19 years on casual service totalling Ksh.1,167,246.00. Additionally, the respondent was awarded the following reliefs:-

i. The respondent (appellant herein) is to pay the claimant Ksh.2,997,979.00 by 1st February, 2018 failing which interest at court rates to be payable thereon from the date of this judgment till full payment.

ii. The directive for the respondent to comply by establishing, issuing, filing, and serving the workplace sexual harassment policy is strict compliance with section 6 of the *Employment Act* being not later than 1st May, 2018 and thereafter the matter to be mentioned before the court on a convenient date to confirm compliance. He was also awarded costs of the suit.

9. Being aggrieved by the said orders, the appellant preferred an appeal to this Court on grounds:

> That the learned Judge erred in fact and law: in finding that the termination of the respondent's employment was unfair for want of fair and valid reasons on the basis that the appellant did not have a sexual harassment policy that strictly complied with section 6 of the *Employment act*; placing undue weight to the non-disclosure of the identities of the victims and witnesses of the sexual harassment disciplinary charges faced by the respondent; finding that the respondent's right to due process and the right to natural justice outweighed the duty of the appellant to protect the identities of the complainants; and finding that the termination of the respondent's employment was unfair for want of due process entailing the cross-examination of witnesses or complainants as per the standing order (SO) 103(128) and as envisaged in subsection 6(3)(b)(v) of the *employment act*; finding that the respondent was not aware of the complaints against him for not having been given an opportunity to cross-examine the complainants.

10. During the plenary hearing of the appeal on 28th November, 2022, learned counsel Mr. Ondieki was present for the appellant while Mr. Chweya appeared for the respondent. Both counsel informed the Court that they would rely on their written submissions and opted not to make any oral submissions.

11. In the written submissions dated 13th July, 2022 counsel for the appellant consolidated the grounds of appeal to three issues for determination which are:

    i. Whether the learned Judge erred in finding that the appellant does not have a sexual harassment policy when this issue was not pleaded;

    ii. Whether the learned Judge erred in finding that the termination of the respondent's employment did not follow due process as the respondent was not allowed to cross-examine the complainants;

    iii. Whether the learned Judge erred in finding that the respondent's termination was unfair for want of a fair or valid reason for termination.

    Relying on this Court's decision in *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR, counsel for the appellant submitted that the issue of having a workplace sexual harassment policy was not raised by either party until the same was raised in the respondent's submissions dated 10th November, 2017, therefore, the learned Judge erred, since parties were bound by their pleadings.

12. On whether the respondent was entitled to cross-examine witnesses during the disciplinary hearing, it was argued that cross-examination was not necessary nor was it unfair or contrary to natural justice. It is further argued that the names of the witnesses could not be disclosed over concerns of intimidation and it was entitled to such a discretion. A thorough investigatory hearing was conducted and all the witness statements were shared with the respondent to enable him prepare for the disciplinary hearing. Learned counsel argued that there is no absolute right for an employee to cross-examine witnesses as part of disciplinary proceedings and entreated this Court to so hold.

13. On the third issue, it was urged that the appellant received numerous allegations of sexual harassment, bullying, intimidation, threatening and inappropriate behaviour in the workplace, and an officer was appointed to conduct the investigations. Upon conclusion of the same, a decision was made that the respondent be subjected to the disciplinary hearing which ultimately led to his suspension from duties. The respondent was issued with an explanatory notice dated 25th May, 2016 explaining why he should attend court; a show cause notice dated 25th May, 2016 giving further details of the disciplinary hearing and a disciplinary hearing scheduled for 3rd June which was postponed to 10th June, 2016. The respondent was also informed of his right to have a fellow colleague present during the hearing. The respondent was terminated for sexual harassment, intimidation, and abusive behaviour at the workplace and this Court should, therefore, allow this appeal and set aside the judgment entered in favour of the respondent.

14. In opposing the appeal, counsel for the respondent filed his submissions dated 18th July, 2022. It is argued that the appellant had failed to comply with section 6(2) of the *Employment Act* which provided that an employer with more than twenty employees was to have a policy statement on sexual harassment and that the issue flowed from the memorandum of claim and that in its submissions it urged the court to consider what amounted to sexual harassment and, therefore, the learned Judge was right to hold that clause 34(i) of the standing order 103 fell short of the mandatory workplace sexual harassment policy.

15. On whether due process was followed in the termination of his employment, it is submitted that standing order 103(128) provided for the due process wherein an investigatory hearing officer was to investigate and report back his findings, then the deciding officer would preside over any subsequent disciplinary hearing. Contrary to the appellant's policy, the respondent was not allowed to cross-examine any witness and neither did he know who his accusers were.

16. Lastly on whether the termination was fair or a valid reason was given, it was submitted that having contravened section 6(3)(b)(v) of the *Employment Act* and standing order 103(128), the appellant had not proved that the abuses, or insults were directed to the employer or person placed in authority, and, therefore in the absence of proper mechanisms on sexual harassment policy, fairness was not guaranteed. For these reasons, we are urged to dismiss the appeal with costs for lack of merit.

17. As we proceed to consider the three consolidated grounds of appeal, we are cognizant of our duty on a first appeal. We are obliged to subject the entire evidence and the judgment to a fresh and exhaustive examination to reach our own conclusions. We have to remind ourselves that we did not have the opportunity to see and hear the witnesses who testified during the trial. See *Abok James Odera & Associates v John Patrick Machira t/a Machira & Company Advocates* [2013] eKLR.

18. On the ground on sexual harassment policy, whereas the respondent submitted that it had pleaded the same in its memorandum of claim, the appellant argued that the same was introduced in the submissions.

19. We have considered the record of appeal in its entirety along with the submissions by both parties. It is not in dispute from the pleadings that the respondent was terminated from his employment on allegations of sexual harassment. We have gone through the record and there are many letters written by the Locally Employed Civilians (LEC) who alleged that between various periods of time, they were harassed by the respondent. It was on account of those complaints that the respondent was investigated.

20. Section 6(2) of the *Employment Act* provides that an employer who employs twenty or more employees shall after consulting with the employees or their representatives if any, issue a policy statement on

sexual harassment. The appellant claims that the issue of having a sexual harassment policy was not pleaded. We have gone through the memorandum of claim and the reliefs being sought are in regard to gratuity and compensation. The respondent submitted that it was raised in its written submissions before the ERLC. We have also gone through the submissions and find that the respondent had framed the issues to be determined as whether his termination was unfair and unlawful and whether he was entitled to any relief. In *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 Others* (*supra*), this Court cited the decision in *Adetown Oladeji(NIG) Ltd. v Nigeria Breweries PLC*, S.C. 91/2002 in which it was observed as follows:

> "it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averment of the pleadings goes to no issue and must be discharged...
>
> In fact that parties are not allowed to depart from their pleadings is on the authorities basic as this enables the parties to prepare their evidence on the issues as joined and avoid surprises by which no opportunity is given to the other party to meet the new situation."

Further, in *Raila Amolo Odinga & another v IEBC & 2 others* (2017) eKLR the Supreme Court of Kenya quoted with approval the following excerpt from the decision of the Supreme Court of India in *Arikala Narasa Reddy v Venkata Ram Reddy Reddygari & another*, Civil Appeal Nos. 5710-5711 of 2012[2014] 2S.C.R. where it was held as follows:

> " In the absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings." [Emphasis added]

21. We do find that the respondent did not raise the issue of the appellant not having a sexual harassment policy even though it is provided by section 6 of the *Employment Act*. Though the respondent submitted that the issue of sexual harassment is captured in clause 34 of the standing order, the same is only provided as rules and it does not amount to a pleading in any of the parties' pleadings filed in court for determination. None of the parties sought that the issue be determined and if there was a need then the respondent ought to have pleaded the same to enable the appellant to have had the opportunity to respond on the same. The learned Judge, therefore, erred when he ordered the appellant to comply by establishing, issuing, filing, and serving the workplace sexual harassment policy in strict compliance with section 6 of the *Employment Act*.

22. Turning to the next ground on whether there was an error that the termination of the respondent from employment did not follow due process, we are guided by the parties' pleadings, responses, and documents. The respondent in his memorandum of claim and statement indicated that he was employed as a casual worker between the year 1984 and 2002 when he was employed indefinitely on 1st October, 2002 as an FMA supervisor. The appellant did not deny employing the respondent. From the year 2002, he worked without any complaint until the months of February and March 2016 when he was suspended from work on allegations of sexual harassment. He was invited for an investigatory hearing which though postponed finally took off on 10th June, 2016. The respondent was advised

to appear with a work colleague of his choice but he was not entitled to legal representation at that stage. On the other hand, the respondent requested to be provided with documents as provided in the appellant's standing order (SO) 103 paragraphs 126,127 and 128. In response, the appellant informed him that it was not in breach of any cited provision and informed that the names of the witnesses had been concealed and if there was a need to have them then the same would be provided once in court. Standing order 103(128) which provides the appellant's internal disciplinary mechanism provides as follows:

> " in case of gross misconduct, an investigatory hearing will precede any disciplinary action. An investigatory hearing officer will be nominated by the Hr Ukbc to carry out the investigatory hearing process and report back his / her findings to the Hr Ukbc delegated member of the CLO. The deciding officer will preside over any subsequent disciplinary hearing(s). Although there are no rights to be accompanied during the investigatory hearing process any request thereto will be acceded to. The deciding officer will conduct the disciplinary hearing ensuring that the charged LEC is permitted to hear statements and ask questions of the submitting individual.
>
> Following the hearing phase of the disciplinary hearing an adjournment is to be called prior to any decision being made. The role of the individual who accompanies the LEC will be one of support and witness, they will have no role in disciplinary hearing other than supportive one."[Emphasis added]

23. We do agree with the learned Judge's findings that the appellant complied with part of the provision of SO 103 by giving the respondent the notice to show cause and it is for the reason that the respondent requested to have all the statements of the complainants. The respondent was investigated and there was a disciplinary hearing which the respondent attended. The clause above indicates that one was allowed to attend the disciplinary hearing with his witness who was required to be a colleague.

24. The deciding officer was required to allow the respondent to ask questions of the submitting individual at the disciplinary hearing which was not the case here. The appellant contended that the respondent would be allowed to cross-examine the witnesses in court. The record is clear that only the human resource officer testified in court. The appellant did not avail the witnesses it talked about during the disciplinary hearing.

25. Additionally, Section 6(3)(b)(v) of the *Employment Act* provides that an employer will not disclose the name of a complainant or the circumstances related to the complaint to any person except where disclosure is necessary for the purpose of investigating the complaint or taking disciplinary measures in relation thereto. However, SO 103 of the appellant's own internal rules provides that the respondent was required to question, this would only happen at the disciplinary part when the people who alleged the respondent had sexually harassed them were availed to give their evidence, then the respondent would be entitled to question them.

26. We have gone through the record and confirmed that the respondent was supplied the 22 out of the 24 statements that had been recorded against him and which formed the basis of the allegations against him. He expressed his desire to cross-examine the authors of the said statements, but he was told that the witnesses would be availed in court during the hearing for purposes of cross-examination. The witnesses were nonetheless not availed. It is clear that the respondent was not given the opportunity to question his accusers at any point. The veracity of the statements used to terminate his long career was never tested. There was no proof that the said statements had been made by actual persons who had genuine grievances against him. The possibility that the entire process could have been choreographed by malicious persons who wanted the respondent sacked was, therefore, not ruled out.

27. The rules of natural justice apply at any level where a person's fundamental rights are likely to be violated. The respondent was put through a process that was to determine whether his right to earn a livelihood would be taken away from him, yet he was not given an opportunity to face his accusers at the disciplinary hearing.

28. The decision to terminate him was arrived at in total disregard of his right to due process. In view of this, we are persuaded that the reason for the termination was not proved to be valid. We further find that the process followed to arrive at that decision was un procedural and unfair. We find no fault with the learned Judge's decision. Accordingly, we find this appeal to be devoid of merit and dismiss it accordingly. On the issue of costs, as we have found merit in the ground that the learned Judge should not have made the finding he made on the sexual harassment policy, although this will not impact the outcome of the appeal, there being no appeal on the amount of damages awarded, and costs being at the discretion of the court, we order that the respondent is awarded 75% of the costs of this appeal.

DATED AND DELIVERED AT NYERI THIS 24TH DAY OF NOVEMBER, 2023

W. KARANJA

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR