



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, H. OKWENGU & J. MOHAMMED, J.J.A)

CIVIL APPEAL NO 54 OF 2015

BETWEEN

JULIUS MASIVA OBUGA.....APPELLANT

AND

KENYA BROADCASTING CORPORATION.....RESPONDENT

(An appeal from the judgment of the High Court at Eldoret (**Nambuye, J**) dated 3rd November 2004 in HCCC No 35 of 1995)

JUDGMENT OF J. MOHAMMED JA

Background

1. **Julius Masiva Obuga** (the appellant), was the unsuccessful plaintiff in the High Court in **HCCC No. 35 of 1995** where he had sued the **Kenya Broadcasting Corporation** (the respondent), claiming general damages for unlawful dismissal, payment of pension arrears, full terminal benefits, costs and interest arising out of his employment by the respondent as a Senior Technical Operator.

2. The appellant's claim as can be gleaned from the amended plaint filed on 22nd March, 1993 is that the appellant was the employee of the respondent in the capacity of Senior Technical Operator; that on or about 13th October, 1989 the respondent purported to terminate the appellant's services with the respondent in complete and total disregard of the law and regulations governing the appellant's contract with the respondent; that on 16th February, 1987, the appellant earned promotion to job group K and was entitled to all dues and benefits under the grade in conformity with his terms of service; that he had consequently suffered loss and damages; that he did not wish to retire at the age of 50 years and did not therefore make any voluntary application to that effect; that his retirement was improper and irregular as the Kenya Broadcasting and Corporation Act (the Act) became operational on 19th February, 1989; and that the appellant's retirement should have been under the respondent corporation and not the Public Service Commission. The appellant prayed for general damages for unlawful dismissal and or retirement/termination; payment of pension arrears at the right scale and or orders that the appellant's employment with the respondent subsists, unpaid increment arrears; full terminal benefits, costs and interest.

3. In support of his claim, the appellant testified that he joined the Voice of Kenya as Junior Technical Operator in 1966; that he was posted to Eldoret in 1982 and continued to work there until 1987 when he was promoted to the position of Senior Technical Operator; that after the respondent was created by statute, he continued to work at the respondent corporation; that he had no documentary evidence to prove his promotion as his documents were destroyed in a fire during the 1992 clashes; that he attempted to procure copies of these documents and went to the respondent's offices when he was given a letter, dated 13th October 1989, by the respondent's Managing Director from the Permanent Secretary, Ministry of Information and Broadcasting (the Ministry) informing him that he had been retired by the Public Service Commission under the 50 year rule; that thereafter, he unsuccessfully tried to secure payment of his pension, which was eventually paid at the reduced amount of \$2,820 per annum instead of the rate of \$6,996 per annum.

4. It was the appellant's further claim that he was entitled to be paid at the rate of Job Group L as he had worked at Job Group L from 16th February, 1987 to 19th February, 1989. He contended that he did not apply to retire at the age of 50 years of age and that he ought to have retired on 18th August 1994 when he attained the age of 55 years.

5. The suit was opposed by the respondent vide an amended defence filed on 10th May, 1993 in which the respondent denied that the appellant was its employee as alleged, that without prejudice to the denial, the appellant was an employee of the Public Service Commission under the Ministry and was merely attached to the service of the respondent for a period of 273 days between 1st February to 31st August,

1989; that there was evidence that the appellant applied to retire from the Civil Service under the 50 year rule, and was allowed to do so; that having not been an employee, the appellant could not have benefitted from the respondent's retirement scheme.

Further, that since the respondent came into operation on 18th February, 1989 it could not have been involved in the alleged denial of promotion, increments, dues and benefits to the appellant which allegedly occurred before it came into existence; and that if the appellant suffered damage at all (which the respondent denied) the respondent denied responsibility thereof.

6. Zachary Ogenche Ochakku (Zachary) who was at the material time working with the respondent as the Assistant Manager, Personnel Management gave evidence in support of the respondent's defence. **Zachary** admitted that the respondent corporation took over staff from the former Voice of Kenya as outlined in Section 16 of the Act and that, the name of the appellant was not among the employees who were seconded to the respondent. Zachary maintained that the Government had power to terminate the services of staff who were seconded to it, and under section 17 of the Act, the respondent offered employment to staff from the defunct Voice of Kenya; that the respondent however did not offer the appellant employment as he was not among the staff members who had been seconded to the respondent corporation.

In Zachary's view, the respondent did not owe the appellant anything, and any claim by the appellant, ought to have been directed to the Ministry or the Attorney General.

7. In a long and considered judgment, the trial court found that the evidence showed that the appellant had been upgraded to job group H and it was at this job group that he retired; that the appellant expressed a desire to retire from the public service at the age of 50 years, through communication from him to the Ministry. In addition, the appellant's job group was never upgraded and he could therefore not have suffered any loss of increments nor was he entitled to pension at a higher rate than what was due to him under job group H. For these reasons, the court dismissed the suit with costs to the respondent.

8. Being aggrieved, the appellant filed this appeal against the entire judgment of the trial court. In the memorandum of appeal, the appellant faults the trial court for: failing to appreciate the fact that employees of the Voice of Kenya automatically became employees of the respondent corporation; failing to analyze the documentary evidence tendered before the court by the plaintiff; failing to analyze the provisions of the Act, failing to sign the judgment; failing to find for the appellant despite the record showing that the appellant had worked for the respondent for the period of 273 days immediately after the enactment of the Act.

Submissions

9. At the hearing of the appeal, the appellant appeared in person while the respondent was represented by learned counsel, **Mr. Elijah Moguna**. The appellant relied on his written submissions. In brief, the appellant's submissions were that he adduced oral evidence and supported this with documentary evidence and that his evidence was not challenged by the respondent. He claimed that his evidence established that he was employed by the defunct Voice of Kenya, and after the enactment of the Act, his services were transferred to the respondent and it was on this basis that he worked for the respondent for a period of 273 days. Based on this, he argued that he should not to have been retired on the basis of the Scheme of Service of Public Service Commission.

10. The appellant also took issue with the judgment rendered against him for not being signed either by **Nambuye J** (as she then was) who wrote it, or by **Gacheche J** who delivered it. Based on this, he contended that there is no judgment on record, and urged this Court to make its finding based on the evidence tendered, set aside the judgment of the trial Court and find in the appellant's favour.

11. The respondent on its part filed written submissions which were orally highlighted. Counsel for the respondent submitted that the trial court analyzed the evidence adduced by both the appellant and the respondent and reached the right conclusion. Counsel maintained that the appellant was never an employee of the respondent, but had been employed by the Ministry and remained so until his retirement; that while the Act provided for secondment of former employees of the Ministry attached to voice of Kenya, it was not an automatic process as it was subject to sections 16 and 17 of the Act; that since there was no evidence that the respondent sought employment or absorption by the respondent, he was at all times an employee of the Ministry who paid his salary and benefits, and under whose scheme he eventually retired.

12. It was the respondent's further submission that the appellant was at job group H when he retired; that he had requested to retire early and the same was acceded to; that he had not been offered employment by the respondent nor was his name among those released to the respondent as former employees of the Ministry working at the Voice of Kenya; that he received his pension as a civil servant on retirement; that he had utilized all his leave days; that he had no evidence of promotion to job group K or L; that his pension was calculated on the basis that he was in job group H; and that he never requested to join the respondent's pension or retirement scheme; that in any case the pension scheme came into operation in 1991 and was therefore non-existent when the appellant left service. Counsel relied on Section 54(8) of the Act which provides as follows:-

“Unless the Board otherwise directs and subject to part iv. All persons who are members of the staff of the Voice of Kenya immediately before the coming into operation of this Act, shall be members of staff of the corporation if they so desire and shall be deemed to have been appointed under this Act.”

13. It was the respondent's further submission that the Government had power to determine the appellant's employment; that under section 16(2) of the Act the Government had the power to terminate employment of officers seconded to the respondent; and that the Government had power to second and terminate employment of its officers.

Determination

14. I have considered the record, the submissions by counsel, the authorities cited and the law cognizant of the Court's duty to re-evaluate the evidence tendered before the High Court and arrive at its own conclusions as outlined by this Court in **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR (Civil Appeal No. 161 of 1999)**.

15. The main issue that arises for determination is whether or not, upon the creation of the respondent corporation, the appellant became an employee of the respondent corporation, his terms of service and the circumstances under which the appellant's employment came to an end.

16. The appellant outlined various benefits that he had been earning as a member of staff of the Voice of Kenya and later, he claimed, of the respondent. He however had no evidence of the promotions he claimed to have attained, and in his testimony, claimed that his documents evidencing his promotions had been burnt during the clashes that occurred in his home area in 1992. During cross-examination, he admitted that he did not attempt to get copies of these documents from the Ministry, and did not summon anyone from the Ministry to testify and corroborate his account.

17. The respondent on its part produced various documents including the appellant's personnel files. These files contained various letters which were considered by the trial judge who took the trouble to reproduce them in full in the impugned judgment. These letters reveal that the appellant, despite working for the respondent until his retirement in August 1989, did not contribute to the pension scheme created by the Act. In his testimony, the appellant conceded that his pension was paid by the Public Service Commission.

18. Further, the documents established that the appellant did indicate his intention to retire from the public service upon attaining the age of 50 years, and further, that he asked for a designation of his grade to enable him earn a reasonable pension. His pleas for re-designation were not successful in view of a letter to him from the Permanent Secretary in the Ministry dated 23rd September 1987 indicating that there was no vacancy in a higher grade for which he could be considered.

19. The appellant took up his plea with the Director of Personnel Management at the office of the President claiming that the Permanent Secretary in the Ministry had misunderstood his request as what he sought was in fact a correction of the records to show that he should be placed in job group K. This letter was forwarded to the Director of Broadcasting at the Voice of Kenya with a request to confirm if the appellant had been correctly graded. This letter was responded to by a **B. N. Muinde** who stated that the appellant was correctly graded in the Ministry as a Senior Technical Operator in Job Group H.

20. There was also evidence that the appellant sought early retirement at the age of 50 years. The trial court reproduced a letter dated 15th February 1989 which was addressed to the appellant, referring to his previous request to retire under the 50 year Rule and informing him that his request had been approved. This was followed by various correspondences between the appellant and the Permanent Secretary in the Ministry all of which indicate that the appellant intended to retire at the age of 50 years.

21. On consideration of these facts it is clear that the appellant expressed his intention to retire upon attaining the age of 50 years. He took deliberate steps to ensure that he would retire at what he termed as a reasonable pension and that is the reason he had appealed for re-designation of his job group so that he could earn a higher pension. The complaint that he was retired without his consent is therefore baseless, and the appeal fails on that score.

22. Among the documents produced in court is the letter to which I have referred to above where it was confirmed that he appellant was correctly graded. I therefore agree with the trial court that the appellant's assertion that he had no intention of retiring at the age of 50 nor did he wish to retire under the 50 years Rule is contrary to the documentation produced in court, which proved that he did in fact take steps in various occasions to take early retirement.

23. The appellant complained that the trial court placed great reliance on the documentation provided by the respondent and disregarded any of the documents he produced. I have noted that he stated in his evidence in chief that **"... In 1992, I was a victim of clashes and my letter of promotion was burnt. I have an abstract to this effect"**. He produced an abstract, but the abstract did not detail specifically which documents were lost in the fire. Thus, his assertions remain unproven, and as the aphorism goes, he who asserts must prove. This is encapsulated in sections 107, 108 and 109 of the Evidence Act which provides that:

"107.

(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108.

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.

109.

The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person."

24. In view of the fact that the appellant did not attempt to secure copies of these documents, the only documentary evidence that was available was what was produced in court by the respondent. These documents produced by the respondent controverted the appellant's version of events and we find no fault in the trial court relying on them. Moreover the appellant did not raise any issues with respect to their veracity or admissibility.

25. As to whether the appellant was an employee of the respondent, the correspondence between the appellant and the Ministry revealed

that the appellant was under the authority of the Permanent Secretary. The appellant claims that since his retirement was to take effect on 1st September 1989, and the respondent was created in 1989 when he was still working for the respondent, he should have been retired under the respondent's scheme of service. I do not agree. To resolve this question, I have examined relevant portions of Sections 16 and 17 of the Act, which I reproduce hereunder for clarity:

Officers seconded from Government service.

Cap.189.

16. (1) The Corporation shall, subject to this section, employ such public officers as may be seconded by the Government.

(2) The Government may at any time determine the secondment of any public officer who has been seconded to the service of the Corporation under the provisions of this section, and the Corporation may request the Government to determine the secondment of any such officer:

...

Officers of employment with Corporation.

7 of 1990, Sch.

17. (1) The Corporation shall, within a period of two years and six months from the date of commencement of this Act, offer to every officer seconded to the Corporation from the service of the Government, and whose secondment has not been terminated under subsection (2) of section 16, employment by the Corporation from such date upon such terms and conditions as may be specified in the offer.

26. From the above provisions, it is evident that the laid down process was that former employees of Voice of Kenya were to be employees of the respondent corporation if they were offered employment by the corporation and the offer of employment was accepted within six (6) months of the letter of offer. The evidence on record is that the appellant left the civil service before secondment to the respondent corporation was done and before an offer of employment was made to him by the respondent corporation.

27. Considering these provisions of the law alongside the correspondence from the appellant and the officials of the Ministry, I reach the inescapable conclusion that the appellant was not an employee of the respondent, at the time of his election to retire from the public service at the age of 50 years. That being the case, he was not entitled to benefit from the respondent's pension scheme, a scheme that by his own admission, he never made any contributions to. Further, from the record, the respondent's pension or retirement scheme became operational in 1991 whereas the appellant was employed by the Public Service Commission until 31st October, 1989. This ground of appeal therefore fails.

28. The final ground upon which the appellant would have us upset the judgment of the trial court is on the basis that the judgment was not signed. I have perused the original record and have confirmed that the handwritten judgment was indeed signed by Nambuye J. (as she then was) who wrote the judgment and by Gacheche J. who read the judgment. Accordingly, nothing turns on this ground of appeal. In the result, this appeal is devoid of merit. I would dismiss the appeal and order each party to bear their own costs.

JUDGMENT OF H. OKWENGU, JA.

I have read the draft Judgment of my sister Mohammed, JA. The facts relating to this appeal are well captured in the Judgment. I fully concur with the reasoning of my sister Judge. The Learned Judge of the High Court properly considered the issues and came to the correct decision. In the circumstances, the orders of the Court shall be as proposed by Mohammed, JA.

This Judgment has been delivered in accordance with Rule 32(3) of the Court of Appeal Rules Githinji, JA having ceased to hold office by virtue of retirement from service.

Dated and delivered at Kisumu this 30th day of December, 2019.

J. MOHAMMED

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JUDGE OF APPEAL

HANNAH OKWENGU

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR