REPUBLIC OF KENYA

Court of Appeal at Nyeri

Civil Appeal 65 of 2008

NYERI FARMERS SACCO LTD.....APPELLANT

AND

ROSALINDA NYACHOMBA & 39 OTHERS.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya at Nyeri (Khamoni, J.) dated 7th November, 2006

in

H.C.C.C. NO. 170 OF 2001)

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CONSOLIDATED WITH

H.C.C.C. NO. 154 OF 2002)

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JUDGMENT OF THE COURT

The main issue in this appeal which is the first and most likely the last appeal preferred from the judgment of Khamoni J (as he then was) dated and delivered on 7th day of November, 2006, in respect of **High Court Civil Case Nos. 170 of 2001** and **145 of 2002** which were in this Court, consolidated and heard together, is whether the provisions of ***Section 2*** of the **Trade Disputes Act Chapter 234**, Laws of Kenya as pertains to redundancy and the definition of the word redundancy as spelt out in the **Employment Act 2007** applies to this case where the termination of work in respect of all the respondents except one was, as contained in their letters of termination, on the basis of the prevailing economic hardships that made it difficult for the appellant to maintain the respondents any longer in its payroll. And even in respect of that one respondent, that issue would still arise as even in her case, her alleged letter of voluntary retirement was in effect solicited and she says it was written not on her own volition and her letter accepting that alleged voluntary retirement is also basically in the same tune as the other letters. The other question is as to whether, if it is accepted that the respondents should have been declared redundant, would that declaration cover the period they worked for another body namely **Nyeri District Corporative Union** which is alleged to have been the parent union of their immediate employer **Nyeri Farmers Sacco Limited**, the appellant in this appeal which is the employer that terminated their services.

Both the appellants in the High Court Civil Case No. 170 of 2001 and those in Civil Case No. 145 of

2002, were originally employees of Nyeri District Co-operative Union. Later, during their services, it apparently became necessary to have the banking section of the Co-operative Union operate separately and independently. The banking section was therefore incorporated as a limited liability body namely **Nyeri Farmers Sacco Society Limited**, the appellant herein.

Having come into existence, the appellant then employed each of the respondents. In order that this judgment may be understood, we reproduce below a sample of a letter of appointment of the respondents which is in effect a replica of all other letters of appointment issued to each respondent on their appointment by the appellant. That letter reads as follows:

"LETTER OF APPOINTMENT

To……..

1. *Subject to your acceptance of the terms of this letter you are hereby appointed as ……..with effect from 1st October, 1998 on permanent basis.*

The salary attached to your post is at the rate of Kshs……. In the scale of Job Group……..

This appointment can be terminated by either side at any time by giving three (3) months notice or one month's salary in lieu of notice except in the case of gross incompetence, dishonest (sic) or misconduct when you are liable to instant dismissal.

You will be entitled to ……..days leave for each full year of 12 months to be taken not later than 3 months after the end of the year unless the employer directs otherwise.

You are liable for a transfer to any part of Nyeri and to any section at the discretion of the employer.

If you are transferred from your area of operation (Branch) you will be entitled to a house allowance as spelt out in the terms and conditions of service in force.

Your incremental date will be ……..every year.

Your staff gratuity accumulated upto 30.9.98 with Nyeri D.C. Union Ltd has properly been secured on the Co-operative Merchants Bank PROVIDENT FUND SCHEME to the tune of Kshs ……..

***GENERAL MANAGER**"*

That letter had at the bottom of it, after the General Manager's signature a clause which required the appointee to accept the appointment subject to the terms of that letter.

All the respondents accepted those appointments and were hence employees of the appellant. In a letter dated 29th June, 2001, and addressed to each of the respondents in Civil Case No. 170 of 2001, by the appellant through its General Manager one ***J.W. Karuiru***, the appellant terminated the services of the respondents with effect from 1st July, 2001. Their last working day was 30th June, 2001. A similar letter dated 30th March, 2002 was later addressed to the respondents in respect of High Court Civil Case Number 145 of 2002. Thus the action taken against the two sets of respondents was the same except that as to the respondents in H.C.C. No. 170 of 2001, the termination took place with effect from 1st July, 2001 whereas as regards the respondents in H.C.C.C No. 145 of 2002 the termination took place with effect from 30th March, 2002, the date of the letter. This difference in date of termination perhaps explains the reason why different cases were brought against the same appellant by different sets of employees but on the same claim. Again, a sample of such letter of termination will suffice; it stated as follows: -

"……..

REF: TERMINATION OF SERVICE:

Due to the prevailing economic hardships that are being experienced in the co-operatives everywhere in the country, and much more specifically within Nyeri District, Nyeri Farmers Sacco ltd. Cannot afford to maintain you any longer in its payroll.

You are thus hereby given notice to prepare and handover your duties/office to your Branch Manager/Section Head. You should be ready to leave the Sacco employment on 30.6.2001 after the close of the business. Nyeri Farmers Sacco Ltd. will pay you one month salary in lieu of notice and any other dues accrued.

On behalf of Nyeri Farmers Sacco Society Ltd. And Management committee members, may I take this opportunity to sincerely thank you for all the years you have rendered service to this organization. Through your diligence, obedience, and trustworthiness the Sacco has been able to prosper to what it is today.

We wish you success and God's blessing in all your future endeavours.

Yours faithfully,

J.W. KARUIRU,
GENERAL MANAGER*"*

The respondents felt aggrieved by those letters. Those whose services were terminated effectively on 30th June, 2001 and thus ceased working on 1st July, 2001 filed Civil Case No. 170 of 2001 and those who ceased working on 31st March, 2002, i.e those informed to hand over on the afternoon of 30th March, 2002 filed Civil Case No. 145 of 2002. Both cases were filed through the same firm of advocates namely Orowe & Company Advocates. The prayers in both cases were the same and these were: -

"(a) A declaration that the termination of the plaintiffs employment amounted to redundancy.

(b) Severance pay for redundancy pursuant to clause 20 of the terms of conditions of service and the issuance of certificate of service for all the years worked.

(c) Unpaid leave arrears based on the last salary earned.

(e) Costs and interest at court rates on (b) and (c) from July 2001 until payments in full."

The appellant filed defences to both suits. The two defences were also in effect the same. On the two issues we have identified above, the appellants defences were in each case contained in paragraphs 5, 6, 7, 8, 9, 10 and 11 and were, in summary, that the appellant admitted that each of the respondents in each case was employed by it with effect from 1st October, 1998; that it admitted terminating the services of the respondents in respect of Civil Case No. 170 of 2001 on 1st July, 2001 and those in respect of civil case No. 145 of 2002 were terminated on 30th March, 2002; that it denied that such termination culminated into redundancy as defined under ***Section 2*** of the Trade Disputes Act as such terminations were not occasioned by involuntary means; services were not superfluous; there was no job abolition neither was there Kenyanization of the business; that each employment was terminated in accordance with the terms of the individual contract signed by each respondent; that they were under no duty to observe any of the redundancy provisions; that there were no provisions of any terms and conditions of service requiring them to pay any severance pay to the respondents and that each respondent was paid all his/her dues relevant to his/her period of employment with the appellant and which payment each acknowledged in full and in discharge of the appellant and each respondent was issued with a certificate of service and thus claims for all unpaid leave allowances and/or any other payments were denied. The

respondents filed reply to those defences.

After all the procedural aspects were surmounted, the matter was set down for hearing before Khamoni J.(as he then was). The respondents called one witness and the appellant also called one witness. For some unclear reason, the parties' advocates did not make their final submissions which were to be made in writing but were apparently not made. The learned Judge, in a lengthy judgment delivered on 7th November, 2006, allowed the respondents' claims and gave judgment in favour of the respondents with costs of the suit. In doing so, the learned judge addressed himself thus: -

"The term redundancy" as I have already explained is much wider than the meaning being given to it by the defendant and the first part of section 2 of the Trade Disputes Act being avoided by the Defendant bears me witness. Moreover in these two cases there is no doubt that the loss of employment was by involuntary means through no fault of the plaintiffs and it involved termination of employment at the initiative of the Defendant.

All these convince me that what the Defence did when terminating employment of the plaintiffs amounted to "redundancy" and I do hereby so declare."

The learned Judge then ordered the appellant to pay severance pay pursuant to clause 20 of the terms and conditions of service, a copy of which was found to be a valid document it being that the appellant, though maintaining that there were no terms and conditions of service existing, did refer to terms and conditions of service in the respondents letters of appointment and yet never produced one at the time of hearing the matter. The learned Judge thereafter continued with his judgment and stated further as follows: -

"and the period of service for each plaintiff for that purpose to include and be made to include the time she/he was employed by Nyeri District Co-operative Union before she/he was taken over as employee of the Defendant. That period be added to the period for employment each plaintiff was directly employed by the Defendant."

He then gave directions on how the unpaid leave arrears in respect of each respondent was to be made and held that retirement by ***Jane W. Mwangi*** which was alleged to be voluntary be deemed as termination of her employment by the appellant under redundancy clause as it was the employer who had induced her to write the alleged letter of voluntary retirement.

The above decision is what triggered the appeal before us based on seven grounds of appeal which are in brief that the learned judge erred in law and in fact in holding that the respondents termination of employment amounted to "*redundancy*" as defined under ***Section 2*** of the **Trade Disputes Act Chapter 234** Laws of Kenya; that he erred in holding that the term "*redundancy*" as is under ***Section 2*** of the Trade Disputes Act are not exhaustive and have hidden meaning necessitating examples to be given in defining the word; that he erred in issuing a blanket judgment in favour of all respondents whereas each and every respondent did not prove their cases and erred in finding that all respondents were employees of the appellant; that the learned judge erred in disregarding the evidence on record that all employees of the appellant were paid all their dues, the receipt for which they acknowledged and thus fully discharged the appellant; that the learned judge erred in failing to consider the case of voluntary retirement of Jane Wanjiru Mwangi which was different from the other cases; that the learned judge erred in law by awarding the respondents unpaid leave arrears whereas none of the respondents proved his/her claim for this head; that the claims were not specifically pleaded and certainly not pleaded with particularity and lastly they challenged the document relied on by the respondents as "*Terms and conditions of service*" whereas there were no basis for such reliance.

Mr. Kabira Kioni, the learned counsel for the appellant addressed us at length on those grounds. His address in effect mainly emphasized the grounds of appeal set out above, except that of unpaid leave, and urged us to allow the appeal. Ms. Omenta, the learned counsel for the respondents, also in our view mainly supported the judgment of the trial court, opposed the appeal and urged us to dismiss it.

As we have stated at the offset of this judgment, the main issue in this appeal is the interpretation of the word "*redundancy*" and whether it did apply in the matter before us. We will deal with that first and thereafter discuss whether the order of the court, proper or not proper, should have been extended to cover the period before the actual existence of the appellant as a limited liability society. In discussing all these, we will be duty bound to consider also whether the alleged document referred to by the respondents as "*Terms and conditions of service*" should have been relied upon by the trial court and also whether the learned judge of the High Court properly directed himself in respect of the case of Jane Wanjiru Mwangi who allegedly retired voluntarily.

The letter terminating the services of each respondent cited herein above is in our view plainly clear that the services of the respondents were terminated.

"due to the prevailing economic hardships that are being experienced in the co-operatives everywhere in the country and much more specifically within Nyeri District, Nyeri Farmers Sacco Ltd cannot afford to maintain you any longer in its payroll."

That letter leaves no doubt that the services of the respondents were being terminated not on account of their fault nor on account of their voluntary retirement or even ill health, but on account of the employer not being able to continue employing them. In fact, as the learned Judge rightly points out in his judgment, the continued employment or the termination of the respondents' services had been an item of agenda of the appellants Management Committee Meetings, the first one held on 25th May, 2001 and the second meeting held on 25th June, 2001. In the meeting held on 25th May, 2001, it was discussed as Minute No. 30/5/2001 – AOB. We reproduce the deliberations in respect of that minute as we feel that it brings out the real issue in contention here. It reads:

"MIN. 30/5/2001 – AOB

(1) **STAFF RETIREMENT:**

The meeting was informed that for the last two years, the volume of work in the Sacco has continued to decline and this ends up affecting the Sacco income.

At the same time, the Sacco is spending around Kshs.4 million per month on staff salaries which is one of the greatest expenditure in the Sacco at present. There is thus a great need to reduce the work force in the Sacco so as to reduce expenditure on staff.

A number of steps may be followed on the staff retrenchment. These include:

(a) **VOLUNTARY RETIRMENT**

Staff who may opt to retire should be requested to do so. After deliberations, it was resolved that a letter should be written to all staff informing them of the same. The deadline of the same should be 30th June, 2001.

(b) **The executive was further instructed to follow the other steps and identify staff who fall under the following categories:-**

(i) **Staff with 50 years and over.**

(ii) **Academic qualifications staff who are below form 4 academic standard and those without certificates i.e had failed in their form 4. They should be identified and proceed for early retirement as quickly as possible."**

At the next meeting of 25th June, 2001 about one month later, vide Minute No. 28/6/2001 the same staff retirement issue was reported to the committee and that is when it was reported that following the action

taken as per the previous minute No. 30/5/2001, only Jane W. Mwangi opted to retire. We think that is the reason why the learned Judge felt that Jane was induced to retire and the minutes bear him out. It was at that meeting of 25th June, 2001 that the idea of retiring the respondents was resolved. Thus the main reason for terminating the services of the respondents was certainly not because of their ages, lack of education etc, as the appellants' witness said in evidence. It was because there was need to retrench the staff as a result of economic hardships and the decision on which staff were to be removed was only a way to go about removing them, in an attempt to avoid the usual required procedure of first come first out as is done in respect of redundancy. In the minutes above, the word "*retrenchment*" is used. Indeed even Jane Mwangi only succumbed to pressure and nothing more.

The only witness called by the appellant, ***Simon Mwaguku Gichangi*** (DW1) confirmed in his evidence-in-chief, that Minute No. 30/5/2001 decided on the reduction of the staff and Min. No. 28/6/2001 contained deliberations in the manner in which the staff were to be reduced. He produced the two minutes as different exhibits 2 and 3. In cross-examination, this witness stated: -

"*I said there was a bloated staff and work for record there was downsizing. According to the defendant that is not redundancy. I have produced D Exhibited 2. Minute 30/5/2001 page 4 heading staff, retrenchment. I am not aware that means redundancy."*

What is "redundancy" in law. ***Section 2*** of the **Employment Act, 2007** in **Act No. 11 of 2007** defines redundancy as follows: -

"redundancy" means the loss of employment, occupation, job or career by involuntary means through no fault of an employee, involving termination of employment at the initiative of the employer, where the services of an employee are superfluous and the practice commonly known as abolition of office, job or occupation and loss of employment."

This is the definition as stated in **Employment Act 2007** which was not in existence at the time the respondents' employments were terminated. At that time the word "*redundancy*" was not defined in the **Employmen**t **Act Chapter 226 Laws of Kenya**. However, this definition clearly states that "*redundancy*" is loss of employment, or job by involuntary means through no fault of the employee, involving termination of employment at the initiative of the employer where services of an employee are superfluous. At the relevant time **Trade Disputes Act, Chapter 234** Laws of Kenya was operative. ***Section 2*** of that Act defines "*redundancy*" in similar terms but making four additions for explanation purposes. It defines it as follows: -

"redundancy" means the loss of employment, occupation, job or career by involuntary means through no fault of an employee involving termination of employment at the initiative of the employer where services of an employee are superfluous, and the practice commonly known as abolition of office, job or occupation and loss of employment due to the Kenyanization of a business, but it does not include any such loss of employment by a domestic servant.

We agree with the learned Judge that the latter part of that definition is more or less setting out matters not included in the definition of redundancy. The main definition is clearly loss of employment initiated by an employer through no fault of the employee on grounds that in our view are what happened here and the introductory part of every letter of termination clearly states. In the case of **Tobias Ongany Auma & Others vs. Kenya Airways Co-operation, Civil Case No. 4434 of 1992** the High Court stated: -

"Thus redundancy means involuntary and permanent loss of employment caused by an excess of manpower. The situation can be brought about by many factors such as change in the method of working, reorganization and technological changes direct economic conditions etc."

Although this case is only of persuasive authority, we do agree with it. The economic hardships experienced by the appellant as spelt out in their letters to the respondents resulted in excess manpower which was discussed by its management committee and a resolution made to have it reduced. In our view, the learned Judge was perfectly entitled to find and to declare as he did that what the appellant did when

terminating the employment of the respondents amounted to redundancy. It could not have been normal termination under the contract of service where one month's notice would suffice as the appellants did it for the sole purpose of reducing staff whereas those affected did not have do anything to cause that reaction.

As we have stated above, we also agree that the case of Jane Mwangi was an induced retirement and she got trapped in a scheme that had been worked out as a means of reducing staff. She suffered the same fate as the others and that cannot be treated separately.

The next issue is as to whether the learned Judge was entitled to rely on the terms and conditions of service that was produced by the respondents for purposes of determining the payment that the respondents were entitled to receive. The learned Judge discussed the document that was produced by the respondents in HCCC No. 170 of 2001 and was headed "*Terms and conditions of service*." He considered the appellant's objections to the document and the contents of the appellant's letter to some of the respondents which referred to "terms and conditions of service" and having analysed and evaluated the evidence pertaining to that document, he concluded: -

"I will therefore take it that such terms and conditions of service existed at the time termination of employment of plaintiffs was effected."

We have anxiously considered this aspect of the case. The appellant said in evidence that no such document existed and disowned the document produced by the respondents and headed "*Terms and conditions of service*." Appellants say such a document only came into existence in March, 2006. In his evidence in chief Simon Gichangi says on that document: -

"At time defendant came into existence there were not terms and conditions of service.

Looking at P.E at P.131 was never approved. It was just a proposal. As an employee of the defendant I am not bound by these terms and conditions.

Plaintiff No. 25 in case 170 was among the people who proposed those terms. It was only in March this year that terms and conditions of service by employees of the defendant were approved."

However, in cross-examination, the same witness accepted that Document 3 in case No. 170 as a letter of appointment and it referred to terms and conditions of service and that was in 1998 when that letter was written. After saying he did not know whether house allowance of employees was 25% of one's salary or not, he then conceded that he had not produced the terms and conditions of service he said were introduced in March 2006. Faced with that situation on matters of fact, the learned Judge was in our view perfectly entitled to accept that the document "*Terms and conditions of service*" produced as exhibit by the respondents was a document that existed and was the one the appellant referred to in its letter of appointment to various respondents. We also agree the copy of that document in the record was not dated as Mr. Kioni rightly points out but the letters of appointment referred to the then existing terms and conditions of service for the staff and one would not have expected the respondents to produce the original signed and dated one as that would have remained with the appellant. We agree, though the procedure of issuing notice to produce these documents should have been followed failing which a copy could have been produced by the respondents but two things stand out. These are first, that the document was not objected to when it was produced. Second is that the appellant never produced the document they referred to in the letters of appointments to the respondents. Thus the court had to ask itself where is that document? The respondents produced what they said was the document and the appellant did not object to its production. We cannot fault the Judge for relying on that document and particularly in referring to clause 20 of that document.

From what we have stated above, this appeal cannot stand on the issues of redundancy and as to the allegations that the learned Judge erred in relying on the document that was before him headed "*Terms and conditions of service,*" we have no reasons to intervene and interfere with the judgment on those aspects.

However, one aspect of the learned Judge's judgment is disturbing and we will now discuss it. The learned Judge in his last order stated: -

"Consequently the Defendant is ordered to pay severance pay for"Redundancy" pursuant to clause 20 of the Terms and Conditions of service referred to earlier in this judgment and the period of service for each plaintiff for that purpose to include and be made to include the time she/he was employed by Nyeri District Co-operative Union before she/he was taken over as employee of the Defendant. That period be added to the period of employment each plaintiff was directly employed by the Defendant."

We find it difficult to appreciate this part of the order. It is not in dispute that before they were employed by the appellant, all respondents were employees of the parent Sacco, Nyeri District Co-operative Union. The appellant came into existence in 1998 as a result of the recommendations by the Government. However, when it came into existence, the appellant was floated as an independent entity with powers to sue and be sued on its own right. The letters of appointment issued to the respondents demonstrate beyond peradventure that it was employing the respondents as an independent body. Those letters, a sample of which we have reproduced above do not state anywhere the that respondents' employment by the Co-operative Union was in any way being continued. Indeed at the end of these letters there is a notice as follows: -

"Your staff gratuity accumulated upto 30/9/98 with Nyeri D.C. Union Ltd has properly been secured in the Co-operative Merchant Bank Provident Fund Scheme to the tune of Kshs. ……."

That demonstrated that the respondents had severed links with Nyeri District Co-operative Union and their staff gratuity accumulated while they were serving as employees of that Union had been secured in a bank. In that scenario, where would Nyeri D.C. Union, get extra money to meet that expenditure? As we said the letters of appointment do not subordinate their appointments to their previous employment. Further, Nyeri District Co-operative Union was not a party to the suit that was before the Court and never knew any order would be made in that suit that would affect it.

In our view, this aspect of the case which we note was decided without any considered reasons on record, would attract our intervention. We would interfere with that aspect as there are no sound reasons to buttress it.

In conclusion, the learned Judge's judgment to the effect that the appellant is ordered to pay severance pay for redundancy pursuant to clause 20 of the "*Terms and Conditions of Service*" annexed to the record together with the other judgment on calculation of leave arrears and judgment in respect of Jane W. Mwangi will all stand and the appeal to that extent is dismissed. The order directing that such payments of severance pay should include and be made to include the time respondents were employed by Nyeri District Co-operative Union before each of them was taken over as employee of the appellant is set aside. Only to that extent does the appeal succeed. Otherwise it is dismissed as stated above. The appellant will have one third (1/3) of the costs of this appeal.

Dated and delivered at Nyeri this 13th day of December, 2012.

J.W. ONYANGO OTIENO

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JUDGE OFAPPEAL

WANJIRU KARANJA

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JUDGE OF APPEAL

D.K. MARAGA

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JUDGE OF APPEAL

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

DEPUTY REGISTRAR