Kasuni v Fidelity Security Limited (Appeal E154 of 2022)
[2024] KEELRC 13542 (KLR) (27 November 2024) (Judgment)

Neutral citation: [2024] KEELRC 13542 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

APPEAL E154 OF 2022

DKN MARETE, J

NOVEMBER 27, 2024

BETWEEN

JOSHUA MWANGANGI KASUNI ..... APPELLANT

AND

FIDELITY SECURITY LIMITED ..... RESPONDENT

JUDGMENT

1. This matter comes to court by way of a Memorandum of Appeal dated 9th September, 2022. It comes out thus;

    1. The Learned Magistrate erred in law and fact in failing to consider the Appellant's evidence and especially the fact that the termination of the Appellant's employment was on account of redundancy.

    2. The Learned Magistrate erred in law and fact in failing to find that the termination of the Appellant's employment was unfair as the Respondent failed to follow due process before terminating the Appellant's employment on account of redundancy.

    3. The Learned Magistrate erred in law and fact in failing to properly analyze the evidence on record and applicable law thereby arriving at a wrong conclusion.

    4. The learned Magistrate erred in law and fact in failing to properly analyze the Appellant's claims.

    5. The learned Magistrate erred in law and fact in dismissing the Appellant's claim.

    Reasons wherefore;

    The Appellant prays that the Appeal be allowed and the judgment and Degree of the Honourable Magistrate delivered on 25th August 2022 be set aside and instead judgement

be entered in favour of the Appellant in Milimani MCELRC No. E889 of 2021 as prayed in the suit.

2. The Appellant in his written submission dated 2nd November, 2023 submits that the Learned Magistrate erred in law and in fact in failing to find that the termination of the Appellant's employment was unfair as the Respondent failed follow due process before terminating the Appellant's employment on account of redundancy

3. It is his case that in March 2020, at the onset of the Covid-19 Pandemic, the Appellant was laid off and given Kshs.20,000.00 which was deemed cushion money by the Respondent. There was no mention of termination but this was as a result of reduced business as a consequence of the Covid-19 onset.

4. The Appellant submits that reduced work has been defined as redundancy and seeks to rely on the authority of *Abigael Jepkosgei Yator & Another v China Honan International Co. Limited* (2018) eKLR where this was enunciated.

5. The Appellant further seeks to rely on the authority of Section 2 of the *Employment Act*, 2007 which defines redundancy as;

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

6. The Appellant further seeks to rely on the authority of *Peris Njeri Kinyanjui v Kobo Safaris Limited* (2016) eKLR where the court held thus;

> " It is clear from the testimony of the Respondent itself, even though no reason was given in the letter of termination to the Claimant, that her employment and that of her 14 colleagues were terminated for operational reasons due to the financial constraints the Respondent was experiencing at the time. It is without a doubt that the termination amounted to a declaration of redundancy within the meaning of Section 2 of the *Employment Act* 2007."

7. Therefore, the Respondent's action in terminating the employment of the Appellant in the circumstances amounted to redundancy and no more. It was unfair in that the Respondent failed to observe due process before terminating the Appellant's employment on account of redundancy.

8,. The Appellant again submits a breach of Section 40 of the *Employment Act*, 2007 on redundancy as follows;

> The Provisions of Section 40(1) of the *Employment Act* are couched in mandatory terms and must be strictly followed by an employer seeking to terminate employees on account of redundancy. This was emphasized in the decision in the case of *Hesborn Ngaruiya Waigi v Equitorial Commercial Bank Limited* (2013) eKLR where the court held that
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> > "Where redundancy is declared by an employer, the procedure to follow is as set out under the provision s of Section 40 of the *Employment Act* and where not followed, any termination as a result will be deemed unprocedural and unfair. Any termination of an employee following a declaration of redundancy must be based on the law otherwise the same becomes wrong and if the grounds used to identify the affected employees are not as per the law, the same becomes unfair."

9. The Respondent on the other hand and in her written submissions dated 11th March, 2024 posits as follows;

> It is the Appellant's case that he was unfairly/unlawfully terminated from his employment by the Respondent on account of redundancy. It is the Respondent's case that the Appellant was not unfairly terminated for reasons that during the COVID-19 pandemic, the Respondent's business was gravely affected and vide a letter dated 3rd April, 2021, it offered the Claimant a sum of Kshs.20,000.00 which covered his notice pay and all allowances under the Appellant's employment contract. This was not disputed by the Appellant.
>
> Owing to the harsh effects of the pandemic, the Respondent through a discharge letter offered the Appellant Kshs.20,000.00 inclusive of his notice pay and other allowances owed to the Appellant and that the Appellant's salary and any outstanding dues to be paid on a pro rata basis up to the last working day.

10. The Appellant signed the afore-stated discharge contract which clearly indicated that its signing is on a voluntary basis and that upon payment of the dues therein, there would be no claim by either party against the other. At the trial court, the Appellant confirmed signing the discharge voucher and even identified his own signature and National Identity Card Number to which he voluntarily appended on the discharge contract. The discharge signified a voluntary and mutual separation between the Claimant and Respondent and not a termination by way of redundancy. The fact of the mutual separation is confirmed by the wording of the Discharge Letter which read in part that;-

> "In view of the above, the difficult operating environment, the rapid spread of the disease and the uncertainty as when the disease will have been contained and return to normalcy experienced; the management has held various consultative meetings with the Guards Representative.

11. The Respondent in buttressing her case sought to rely on the authority of *Sheila Kiplangat v Uniliver Tea Kenya Limited* [2022] eKLR where the court cited with approval the Court of Appeal decision in *Costal Bottlers Limited v Kimathi Mithika* [2018] eKLR where the court in determining whether or not a settlement agreement or discharge voucher bars a party thereto from making further claim, held thus:-

> "In our minds, it is clear that the parties had agreed that Payment of the amount stated in the settlement Agreement would absolve the appellant from any further claims under the contract of employment and even in relation to the respondents' termination. It is instructive to note that the respondent never denied signing the said agreement or questioned the veracity of the agreement. Further, from the record, we do not discern any misrepresentation on the import of the said agreement or incapacity on the respondent's part at the time he executed the same. It did not matter that the amount thereunder would be deemed as adequate. As it stood, the agreement was a binding contract between the parties...
>
> All the ELRC was required to do was to give effect to the intention of the parties as discerned from the settlement agreement. ...Giving effect to the parties' intention meant that the ELRC could not entertain the suit filed by the respondent. This is because the respondent had waived his rights to make any further claim in relation to his relationship with the appellant"

12. Again, the authority of *Trinity Prime Investment Limited v Lion of Kenya Insurance Company Limited* [2015] eKLR where in interrogating the import of a discharge letter, the court held as follows;

> " The execution of a discharge voucher we agree with the Learned Judge, the constituted a complete contract. Even if payment by it was less than the total loss sum, the appellant accepted it because he wanted payment quickly and execution of the voucher was free of misrepresentation, fraud or other . . ."

13. The Respondent's case overwhelms that of the Appellant. It is not in dispute the Appellant on exit signed a discharge note with the Respondent. This note or discharge absolved the Respondent of any claim or liability against him in the future. It was the settlement agreed on by the parties and on their voluntary will. The circumstances of the situation on the ground also speaks volumes on the position of the parties in the employment relationship.

14. The Appellant cannot therefore be heard or seen to craft a case of redundancy and wish to prompt this in its favour. This is overtaken by events of the discharge signed inter partes.

15. I am therefore inclined to dismiss the appeal with order that each part bears their costs of the same.

DELIVERED, DATED AND SIGNED THIS 27TH DAY OF NOVEMBER 2024.

D. K. NJAGI MARETE

JUDGE

Appearances:

Miss Kangethe instructed by Kangethe Waitere & Co. Advocates for the Appellant.

Miss Nyakoa instructed by Kisilu Wandati & Company Advocates for the Respondent.