Nairobi Academy (Holdings) Limited v Angar (Miscellaneous Application E004 of 2023) [2023] KEELRC 1469 (KLR) (15 June 2023) (Ruling)

Neutral citation: [2023] KEELRC 1469 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

MISCELLANEOUS APPLICATION E004 OF 2023

BOM MANANI, J

JUNE 15, 2023

BETWEEN

NAIROBI ACADEMY (HOLDINGS) LIMITED ..... APPLICANT

AND

PAUL AGWENGE ANGAR ..... RESPONDENT

RULING

Introduction

1. The application before me is dated 9th January 2023. By it, the Applicant seeks to have an arbitral award rendered on 31st October 2022 set aside. The application is brought under, inter alia, section 35 of the *Arbitration Act*, 1995.

2. The Respondent has opposed the application. It is the Respondent's view that the application does not meet the threshold for setting aside an arbitral award that has been rendered pursuant to arbitration proceedings under the *Arbitration Act*.

Background

3. The dispute arose from a decision by the Applicant to close the employment relation between the parties. Aggrieved by the decision, the Respondent referred the matter to arbitration in line with the dispute resolution clause in the contract of service.

4. Clause 15 of the contract as reproduced in the arbitral award provides as follows:-

> "''Any dispute arising from this agreement shall as much as possible be resolved through negotiations but if the parties fail to agree the matter shall be referred to an arbitrator to be appointed by Law Society of Kenya whose findings shall be final and binding on both parties.''

5. The Respondent invoked this clause to refer the dispute to arbitration. The record shows that the President of the Law Society of Kenya appointed David Njuguna Njoroge to arbitrate on the dispute.

6. The parties filed their respective pleadings and documents before the Arbitrator upon which the matter was determined. From inception, the Applicant objected to the Arbitrator's jurisdiction to entertain the dispute on the grounds that the matter had already been resolved through negotiations and a binding agreement executed between the parties.

7. From the record, the parties expressed their views on the issue before the Arbitrator. In his ruling, the Arbitrator overruled the objection. He found that there was no settlement of the dispute through negotiations. Consequently, he held that the matter was properly before him.

8. The Arbitrator went ahead to declare the Applicant's decision to terminate the Respondent's contract of employment as unlawful. He made an award of ksh 1,866,455.80 in favour of the Respondent. He also ordered the Applicant to issue the Respondent with a Certificate of Service.

9. Aggrieved by this award, the Applicant has moved to this court by way of this application seeking that the arbitral award be set aside. The grounds relied on to attack the arbitral award are that the Arbitrator: acted without regard for the rules of natural justice; disregarded the principle of equality of arms; acted contrary to public policy, justice and morality; acted without jurisdiction; and facilitated unjust enrichment of the Respondent.

Analysis

10. Section 32 A of the *Arbitration Act* speaks to the intent of the law that an arbitral award be binding on the parties and be final. Unless set aside on the grounds contemplated under the Act, the award is definitive and not appealable (see*Anne Mumbi Hinga v Victoria Njoki Gathara* [2009] eKLR). The only avenue for nullifying such decision is as contemplated under section 35 as read with section 37 of the Act.

11. The grounds for setting aside an award are indicated as the following;-

    a. That a party to the arbitration agreement was under some incapacity; or

    b. The arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, the laws of Kenya; or

    c. The party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

    d. The arbitral award deals with a dispute not contemplated by or not falling within the terms of the reference to arbitration or contains decisions on matters beyond the scope of the reference to arbitration....; or

    e. The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless that agreement was in conflict with a provision of the *Arbitration Act* from which the parties cannot derogate; or failing such agreement, was not in accordance with the Act; or

    f. The making of the award was induced or affected by fraud, bribery, undue influence or corruption.

    g. The subject-matter of the dispute is not capable of settlement by arbitration under the law of Kenya; or

h. The award is in conflict with the public policy of Kenya.

12. For an Applicant to succeed in upsetting an arbitral award, he must establish one or more of the above grounds. Absent this, the court must refrain from interfering with the award.

13. The reasons for which the Applicant has invoked the court's jurisdiction to set aside the impugned arbitral award are not expressly included in the grounds in paragraph 11 above. However, they are arguably implied in a number of those grounds.

14. The main ground for assailing the legitimacy of the award is that the parties had already negotiated and resolved the dispute. Therefore, the matter was not available for re-evaluation by the Arbitrator. In advancing this argument, the Applicant has placed reliance on the arbitration clause in the employment contract.

15. As correctly pointed out by the Applicant, the clause has a two tier procedure for dispute resolution. First, the parties to the agreement are required to attempt to resolve whatever dispute that has arisen in relation to the contract through negotiations. It is only when negotiations have failed that the parties are entitled to escalate the matter to arbitration by an Arbitrator appointed by the Law Society of Kenya.

16. The Applicant's contention is that the parties resolved the dispute between them at the first stage of the dispute resolution procedure as per the arbitration clause. This being the case, the matter was not supposed to have been escalated to the second stage of dispute resolution that requires the involvement of an Arbitrator. To the extent that the Respondent placed the matter before an Arbitrator after it had been resolved through negotiations, this was in contravention of the arbitration agreement.

17. Further, the Applicant's contention is that the matter having been processed through negotiations, nothing was left for escalation to the second stage of dispute resolution under the arbitration clause. In this context, the Arbitrator could not have properly assumed jurisdiction over the matter. The matter having been closed at the negotiation stage, the stage at which the Arbitrator would have been involved was foreclosed. Therefore, and to the extent that the Arbitrator overlooked this reality and acted on the dispute, he acted in excess of his jurisdiction.

18. The Applicant contends that the Arbitrator declined and or ignored to consider the question of jurisdiction as is required in law. The Applicant suggests that had the Arbitrator considered the matter either before hearing the cause or in the course of the hearing, he would have terminated the proceedings before him.

19. The legal position on whether the court can interfere with a finding of fact by an Arbitrator is as expressed in the decision of *DB Shapriya and Co Ltd v Bish International BV* (2) (2003)2 EA 404 quoted with approval in the Court of Appeal decision of *Nairobi Golf Hotels Ltd v Linotic Floor Company Ltd* [2015] eKLR. In the matter the court expressed itself as follows:-

> " Courts cannot interfere with findings of fact by an arbitrator. A mistake of fact or law is not a ground for setting aside or remitting an award for further consideration on the grounds of misconduct.
>
> The Court's intervention is limited to errors of law which are apparent on the face of the award."

20. Whether the disputants negotiated the dispute between them and reached a settlement prior to the Respondent referring the matter to arbitration is a matter of fact that required evaluation of evidence placed before the Arbitrator. The Applicant has taken the position that the parties indeed negotiated

and settled the matter. To support this position, the Applicant relies on the document dated 9th March 2017 signed by the Respondent (annexure FMK3) by which the Respondent was paid ksh 59,795.55 comprising salary for the thirteen days worked in February 2017. The document bears the following phrase on the execution page:-

> "''I Paul A. Angas ID no 10645880 accept the above statement and attached cheque in settlement thereof.
>
> I do not have any claims against the company.
>
> Signature:.....(Employee)
>
> Date:.....
>
> Signature:.....(Employer)
>
> Date:....." Emphasis added by underlining.

21. On the other hand, the Respondent denies having entered into negotiations with the Applicant in respect of the matter which yielded the alleged settlement. According to the Respondent, the Applicant's management agreed to settle his salary for the 13 days he had worked in February 2017. However, the Applicant required the Respondent to sign an acknowledgment of the said payment. According to the Respondent, the Applicant assured him that signing the payment voucher did not mean waiving his right to other terminal dues under the applicable employment law regime. The Respondent states that it is in this context that he signed the instrument dated 9th March 2017.

22. The record before me demonstrates that the parties expressed their contrasting positions on the effect of the impugned payment voucher before the Arbitrator. On its part, the Applicant raised the issue through its Notice of Preliminary Objection dated 5th March 2021, submissions dated 12th May 2021 and Response to Statement of Claim. Importantly, the Applicant tendered evidence on its position on the matter through the witness statement by F.M. Kirugu besides placing the voucher before the Arbitrator. On the other hand, the Respondent's position on the issue was expressed through his Statement of Claim and final submissions to the Arbitrator.

23. The Arbitrator's decision dated 31st October 2022 shows that one of the issues that he considered at length was the objection to his jurisdiction to entertain the case. At paragraphs 30 and 31 of the award, the Arbitrator expressed himself as follows:-

> "''The Tribunal has carefully considered the rival submissions on the issue. The document at hand is to the effect of payment of ksh 59,795.55 to the Claimant. At the bottom, it has a sentence ''I do not have any claim against the company'' duly signed by the parties. The Tribunal finds and holds that this does not amount to a conciliation or agreement nor can it waive and or relinquish the rights of the Claimant to pursue any other claims or rights.
>
> Further, jurisdiction is everything, this Arbitral Tribunal was duly appointed as per the dictates of the arbitration clause in the employment contract. I thus hereby find and hold that I have the requisite jurisdiction to hear and determine the dispute relating to the contract of employment between the Claimant and the Respondent that was not resolved amicably.''

24. From the above excerpts, it is clear to me that the issue of the effect of the payment voucher on the claim before the Arbitrator was not just raised by the parties but was also considered and determined by the Arbitrator. The Arbitrator rejected the Applicant's argument that the voucher was evidence

of negotiations having taken place between the parties and settled all aspects of the dispute between them. Accordingly, the Arbitrator reached the conclusion that the dispute was not resolved through negotiations as asserted by the Applicant. It is only after making this pronouncement that the Arbitrator proceeded to consider the other issues that he had framed for consideration.

25. Having regard to the foregoing, it is clear to me that the assertion by the Applicant that the Arbitrator did not consider the import of the payment voucher on his jurisdiction to entertain the case is erroneous. It also clear to me that the Arbitrator having arrived at the conclusion that the parties did not resolve the dispute through negotiations, he was entitled to assume jurisdiction over the matter as per the second tier of the arbitration clause in the contract of employment between them. The assertion by the Applicant that the Arbitrator did not have jurisdiction over the dispute is therefore erroneous.

26. As pointed out earlier, the Arbitrator made a finding of fact that the document placed before him did not establish the fact of resolution of the matter through negotiations. The Arbitrator having reached this finding of fact, the court has no jurisdiction to arrive at a contrary view on the matter in terms of the pronouncement in *DB Shapriya and Co Ltd v Bish International BV* (2) (2003)2 EA 404 which was adopted with approval by the Court of Appeal in *Nairobi Golf Hotels Ltd v Linotic Floor Company Ltd* [2015] eKLR.

27. It does not matter that as the court hearing the objections proceedings, I may hold a different view from that of the Arbitrator. That alone is no basis for interfering with the arbitral award. To substitute the Arbitrator's view with that of the court outside the permissible boundaries set under the Arbitration Act will be an attempt at sitting on appeal on the arbitral award. This is a matter that the law does not permit.

28. This position was expressed in *Mahican Investments Limited & 3 others v Giovanni Gaida & 80 others* [2005] eKLR when the court indicated as follows:-

> "''A court will not interfere with the decision of an Arbitration even if it is apparently a misinterpretation of a contract, as this is the role of the Arbitrator. To interfere would place the court in the position of a Court of Appeal, which the whole intent of the Act is to avoid. The purpose of the Act is to bring finality to the disputes between the parties."

29. Having observed as above, a critical look at the document that the Applicant relies on to argue that there was a negotiated settlement of the entire dispute leaves some doubts as to the accuracy of the position expressed by the Applicant. The first sentence in the execution page of the document states thus, ''I Paul A. Angas ID no 10645880 accept the above statement and attached cheque in settlement thereof. The plain meaning of the statement is that the Respondent was acknowledging payments as per and in settlement of the computations contained in the preceding section of the document. The computations in the document related to salary for the Respondent for 13 days worked in February 2017. Beyond this, the document makes no reference to anything else. Immediately after is another statement expressed thus, ''I do not have any claims against the company''.

30. In view of the content of the first statement, what did the Respondent exactly mean when he said in the second statement that he had no claims against the company? Did he, by this second statement, mean that he had received the sum of ksh 59,795.55 in resolution of the entire of his terminal benefits or was the statement only intended to acknowledge and release the Applicant from any further claims in respect of the Respondent's salary for the period under review and which the document spoke to? I raise these questions to demonstrate how the two statements, read together, are capable of varied interpretations. The manner in which the instrument was drawn was ambivalent.

31. Having regard to the foregoing, I think that the Arbitrator was in any event justified in arriving at his own conclusion on the meaning of the document, a meaning which the Applicant understandably thinks differently about. Had the document been drawn in unambiguous terms, these varied interpretations would have been avoided.

32. It has been emphasized times without number that a discharge voucher executed between parties is a contract that has capacity to close the issue under consideration. However, whether this is the effect of a voucher executed between parties is a matter of interpretation to be considered on a case by case basis. Consequently, the mere presence of a voucher executed between parties in respect of a matter is no conclusive proof of the matter having been closed.

33. Indeed, this position was expressed by the Court of Appeal in *Thomas De La Rue (K) Ltd v David Opondo Omutelema* [2013] eKLR when the court indicated as follows:-

> "".....a discharge voucher per se cannot absolve an employer from statutory obligation and ..... it cannot preclude the Industrial Court from enquiring into the fairness of a termination. That is however, as far as we are prepared to go. The court has, in each and every case, to make a determination, if the issue is raised, whether the discharge voucher was freely and willingly executed when the employee was seized of all the relevant information and knowledge."

34. The position taken by the Applicant, both before the Arbitrator and this court, appears to be that as long as the Respondent is shown to have executed the voucher in question, he was thereby excluded from pursuing any other claims against the Applicant. Nothing can be further from the truth. The question whether the voucher had the effect of fully resolving the dispute between the parties is a matter that ought to be determined having regard to various factors such as the information and knowledge that was available to the employee at the time of signing the voucher. In this case, the Arbitrator, for reasons that he considered appropriate, elected to hold that the voucher did not close the matter between the parties.

35. The final matter I need to address on the voucher relates to the submission by counsel for the Applicant that the Respondent has never denied that the document settled the matter between the parties. This submission is obviously misleading.

36. At paragraph 7 of the Respondent's Statement of Claim filed before the Arbitrator, he addressed the question of the payments made to him under the voucher. He stated that the voucher he executed pursuant to the payments did not waive his right to pursue terminal benefits. He stated that the voucher was intended to acknowledge the payments as opposed to waiving his right to pursue his terminal benefits.

37. Apart from the foregoing, the Respondent addressed the matter in his final submissions to the Arbitrator dated 31st January 2022. It is therefore incorrect for the Applicant's counsel to submit that the Respondent has never challenged the assertion that the voucher resolved the dispute between the parties.

38. The other challenge raised against the arbitral award is that it was rendered outside the Arbitrator's terms of reference under the arbitration agreement. This argument is premised on the primary argument that the Arbitrator acted without jurisdiction having assumed jurisdiction on a matter that was already resolved and therefore in contravention of the arbitration clause in the contract of employment.

39. However, as I have demonstrated, the Arbitrator having reached the conclusion that the matter had not been resolved through negotiations was entitled to adjudicate on the dispute under the arbitration clause. To that extent, he acted in line within the terms of reference under the arbitration agreement.

40. The other ground of attack to the arbitral award relates to whether the decision was made in contravention of public policy, justice and morality. The Applicant argues that since the Respondent had been paid some money pursuant to an alleged settlement between the parties, it will be unjust to permit him to lodge a second claim without discounting what has already been paid. To do so would be permitting double payment. It will be countenancing unjust enrichment. This, in effect violates public policy that forbids unjust enrichment.

41. To determine whether the award is contrary to public policy, I need to consider whether it is against the law. I have carefully studied the decision with this object in mind. I note that the first award was in respect of the Respondent's pay for two months in lieu of notice to terminate the contract of employment. In making this award, the Arbitrator considered that the termination clause in the contract between the parties provided for a termination notice of three months or payment of an amount equivalent to the employee's salary for two months in lieu of notice. Having this in mind, the Arbitrator concluded that the Respondent's prayer for two months' pay in lieu of notice was not inconsistent with the termination clause in the contract. To the extent that the award for pay in lieu of notice was premised on the parties' contract, it cannot be suggested that it was in contravention of public policy.

42. The second award was compensation for unfair termination that is equivalent to the Respondent's exit salary for eight months. In making this award, the Arbitrator sought guidance from section 49 of the *Employment Act*. This provision in the Employment Act permits an award of compensation equivalent to an employee's salary for up to twelve months. The award by the Arbitrator on this item falls within the parameters set by the *Employment Act*. In the absence of any other law to guide him in the assessment of the quantum of compensation for unfair termination, the Arbitrator was justified to resort to the *Employment Act* in this respect. Consequently, to the extent that this award is not inconsistent with the law, it is not contrary to public policy.

43. Finally the Arbitrator ordered the Applicant to reimburse the Respondent costs incurred in prosecuting the cause. As a matter of law, costs follow the event meaning that the successful party should be awarded costs absent compelling reasons to the contrary. In this context, the Arbitrator's award on costs was in accordance with the known and accepted principles of law on costs. It is therefore not contrary to public policy.

44. The Applicant has also asserted that to the extent that the Arbitrator made a compensatory award to the Respondent without discounting the amount paid to the Respondent under the voucher, this was unconscionable and amounted to unjust enrichment. I have looked at the items settled under the voucher. It is clear to me that the money paid under the instrument covered the Respondent's salary for the 13 days he had worked in February 2017. It does not appear to me that by awarding the Respondent salary in lieu of notice and compensation for unfair termination in addition to what he had received to cover his salary for the time actually worked, the Arbitrator occasioned double payment. I do not see how this decision contravened the law or public policy. In any event, this is expressly sanctioned under section 49 of the *Employment Act* which the Arbitrator appears to have heavily relied on to render his decision.

45. The final issue addressed by the Applicant relates to whether the Arbitrator acted in a biased manner and failed to accord the Applicant a fair hearing. The Applicant argues that the Arbitrator failed to

consider its evidence showing that the parties had settled the dispute before the Respondent moved to arbitration.

46. At the outset, it must be emphasized that the mere failure by an adjudicator to agree with the position taken by a party to a dispute does not imply bias on the part of the adjudicator. There must be evidence of conduct on the part of the adjudicator that stirs the feeling in a reasonable bystander of preferential treatment accorded by the adjudicator to one of the parties.

47. In *Kaplana H. Rawal v Judicial Service Commission & 2 others* [2016] eKLR the Court of Appeal quoting with approval the decision in *R. v. S.* (R.D.) [1977] 3 SCR 484 expressed itself on the issue as follows:-

> "The apprehension of bias must be a reasonable one held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. The test is what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. This test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and appraised also of the fact that impartiality is one of the duties the judges swear to uphold. The reasonable person should also be taken to be aware of the social reality that forms the background to a particular case, such as societal awareness and acknowledgement of the prevalence of racism or gender bias in a particular community. The jurisprudence indicates that a real likelihood or probability of bias must be demonstrated and that a mere suspicion is not enough. The existence of a reasonable apprehension of bias depends entirely on the facts. The threshold for such a finding is high and the onus of demonstrating bias lies with the person who is alleging its existence."

48. As indicated in the above decision, the burden of proof of bias is on the party alleging its existence. And the standard of proof is high. It is not sufficient to refer to rejection of one's case without more as evidence of bias.

49. As demonstrated earlier, the fact that parties to a dispute have a pre-existing document purporting to settle the matter in dispute does not necessarily mean that the matter is resolved. Depending on the content and design of the instrument, the parties can still seek to re-open the matter. Therefore, the fact that a voucher signed by the parties was placed before the Arbitrator did not exclude him from examining the instrument in order to determine whether it had closed the matter. The fact that the Arbitrator held that the instrument did not close the case contrary to the expectations of the Applicant is not of itself evidence of bias. As a matter of fact, this court has examined the instrument and arrived at the conclusion that it was ambivalent. The accusation of bias against the Arbitrator is therefore not well founded.

Determination

50. The upshot of the foregoing analysis is that the application before me does not meet the threshold for setting aside the impugned arbitral award.

51. Accordingly, it is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 15TH DAY OF JUNE, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Applicant

.....for the Respondent

ORDER

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI