



Nyambu v Kenya Kazi Services Ltd (Employment and Labour Relations Cause 389 of 2018) [2023] KEELRC 3357 (KLR) (18 December 2023) (Judgment)

Neutral citation: [2023] KEELRC 3357 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 389 OF 2018
BOM MANANI, J
DECEMBER 18, 2023**

BETWEEN

LUCY VENESSAH NYAMBU CLAIMANT

AND

KENYA KAZI SERVICES LTD RESPONDENT

JUDGMENT

Background

1. The parties to this action had an employment relation spanning between July 2007 and October 2016 when it was allegedly terminated after the Claimant proceeded on unpaid study leave for one year.
2. In June 2016, the Claimant received an offer from the University of Warwick to pursue graduate studies in the field of Cyber Security and Management. The one year fulltime study program was to run between 3rd October 2016 and early October 2017.
3. Since the Claimant was in fulltime employment with the Respondent, she applied for study leave in order to be able to pursue the further studies. The application was tendered vide her email to the Respondent dated 5th September 2016.
4. The record shows that the Claimant requested for a salaried study leave. In addition, she requested for financial assistance in order to meet her financial obligations whilst in Britain.
5. In response, the Respondent asked her to fill a Training Request Form. The Claimant completed the form and submitted it.
6. The record shows that the Claimant's first and second line managers signed the aforesaid form on 29th September 2016 recommending her request for approval by the Respondent. It would appear that based on this recommendation, the Claimant left the workplace and country for Britain to pursue her studies.



7. On 6th October 2016, the Respondent wrote to the Claimant approving her request. However, the approval was conditional on the Claimant not earning: salary; annual leave; and superannuation benefits for the duration of her studies. Further, she was notified that her re-absorption into employment would be conditional on availability of a suitable vacancy for her upon successful completion of her studies.
8. After the Claimant completed her studies in September 2017, she wrote to the Respondent requesting for reinstatement to her position. However, the Respondent declined the request. According to the Respondent, there was no suitable vacancy for the Claimant at the time.
9. It is this decision that triggered the filing of this action. The Claimant contends that she had legitimate expectation that she would be taken back to her previous position once she cleared her studies.
10. She contends that the Respondent had previously allowed other members of staff to proceed on study leave and absorbed them back into employment after their studies. Consequently, she expected to be accorded similar treatment. In the premises, she contends that the decision not to reinstate her back into employment was discriminatory.
11. The Claimant argues that since the Respondent contends that her position was lost whilst she was away on study leave, it (the Respondent) ought to have released her from employment in accordance with the law on redundancy. However, this was not done. Consequently, she prays for the various reliefs in the Statement of Claim.
12. On its part, the Respondent contends that approval of the Claimant's study leave was on the understanding that she would only be re-absorbed into employment if there was a suitable vacancy for her. According to the Respondent, such vacancy was not available when the Claimant returned from her studies in October 2017. Thus, it was not possible to take her back.
13. The Respondent denies that the Claimant was a victim of redundancy. According to the Respondent, the reason why the Claimant's position was lost is because it was filled by another employee after she (the Claimant) left for her studies. As such, this was not a case of redundancy.

Issues for Determination

14. The pleadings and evidence on record yield the following issues for determination:-
 - a. Whether the employment contract between the parties was unlawfully terminated by the Respondent or whether it was lawfully terminated through the voluntary actions of the parties.
 - b. Whether the loss of the Claimant's position was on account of redundancy.
 - c. Whether the parties are entitled to the reliefs that they seek through their respective pleadings.

Analysis

15. The imbalance of power between employees and employers presents the possibility of employers manipulating employment contracts to the disadvantage of employees. Owing to this reality, the content of these contracts is not entirely left to the wishes of the parties under the guise of freedom of contract.
16. The State, through interventionist legislation provides minimum terms and conditions of engagement between the parties below which they may not negotiate. For instance, they (the parties) cannot agree that the employee will be remunerated below the minimum wage in the prevailing Wages Order.



17. Despite this interventionist approach, it is generally acknowledged that the general principles of the law of contract still apply to employment contracts. Consequently and subject to the restrictions that have been prescribed by legislation, parties to an employment relation still enjoy the freedom to agree on how to manage it.
18. For instance, they may agree to mutually discharge the relation, whether conditionally or unconditionally. Similarly, they are at liberty to discharge the relation either permanently or temporarily subject to an agreement to re-engage at a future date on the same or similar or even entirely new terms.
19. This truism is best captured in the observation by Lord Justice Moore in *Globe Motors Inc & Others v TRW Lucas Variety Electric Steering Ltd & Others* [2016] EWCA Civ 396 when he observed as follows:-

“The parties are therefore free to include terms regulating the manner in which the contract can be varied, but just as they can create obligations at will, so also can they discharge or vary them, at any rate where to do so would not affect the rights of third parties.”
20. In the instant case, the parties had an indefinite term contract of service which commenced on 17th July 2007. The contract was still in force when the Claimant decided to pursue further studies in 2016.
21. The evidence on record shows that the Claimant applied for and was admitted to pursue an advanced degree course in cyber security at the University of Warwick in Britain. According to the letter of offer by the University, the degree course was to run for one year from October 2016 to October 2017. It was to be offered on fulltime basis.
22. Faced with these circumstances, the Claimant wrote to the Respondent requesting for a salaried study leave. The evidence on record shows that the Respondent asked the Claimant to fill a Training Request Form.
23. The Claimant complied with the request and submitted the Training Request Form. The record shows that on 19th September 2016, the Claimant’s first and second line managers recommended her request for approval by the Respondent. They did so by appending their signatures on the Training Request Form.
24. The email correspondence on record show that the Claimant’s request for salaried study leave elicited a series of discussions with the management leaning towards granting her unpaid leave. Alternately, it was suggested that the Claimant be allowed to access her gratuity for the years that she had served the Respondent so that she can utilize the funds to ameliorate her financial requirements.
25. It appears that after the Claimant’s line managers recommended her request for study leave, she (the Claimant) left the workplace and proceeded for her studies. However, it is apparent that by this time, the Respondent was yet to approve her request. The request had only received the recommendation of her line managers pending approval by the Respondent.
26. The evidence on record shows that the Respondent eventually approved the Claimant’s request through its letter dated 6th October 2016. However, the approval was conditional.
27. The letter stated as follows:-

“This letter is in reference to your email dated 1st September 2016 in which you had requested our office to grant you one year study leave effective 3rd October 2016. This is



to allow [you to] undertake a course in MSc. Cyber Security and Management at Warwick University.

We are glad to inform you that your request for study leave has been granted. Kindly note that the leave shall be unpaid with the following conditions:-

- i. No monthly salary payable during the period.
- ii. The period shall not earn any leave or superannuation benefits.

You will be absorbed back into employment subject to availability of suitable vacancy upon successful completion of your studies.

We wish [you] all the best in your studies.”

28. The record shows that the Claimant acknowledged the Respondent’s letter dated 6th October 2016. She endorsed the Respondent’s conditional approval of her request and backdated the endorsement to 7th October 2016.

29. On 29th September 2017, the Claimant wrote to the Respondent informing the latter that she had now cleared her studies and wished to be reinstated back to her position. The email reads in part as follows:-

“ I am pleased to inform you that I have completed my studies in the United Kingdom and will be travelling back early next month. I was awarded a scholarship to study MSc. Cyber Security and Management at the University of Warwick by the British High Commission. As such, I was given a one year study leave to pursue my studies. Please find attached my leave offer.

I am writing to follow up on my reinstatement after studies. Looking forward to your positive feedback.

Lucy Venessah Nyambu”

30. In reaction, the Respondent wrote to the Claimant in the following terms:-

“Dear Lucy,

I have reviewed your file and discussed with Kibe and wish to clarify the way forward.

It was agreed that any reinstatement to employment after your studies was subject to a suitable vacancy being available for you.

I have spoken with Kibe and he would like to meet with you to assess if there is a suitable vacancy available for you. If there is such a role then you will be required to apply [a]fresh and we will enter into a new employment relationship. If not, then you will receive communication as such.

Kibe will be in touch with you.

Regards,

Farah”

31. The record shows that the Claimant reacted to this email in the following terms:-

“Dear Farah,



Thank you for your feedback. I am travelling back on Friday and will be available from Monday next week.”

32. The record shows that after this email, the parties exchanged a series of other emails on the matter. Subsequently, the Respondent informed the Claimant that it (the Respondent) had failed to get a suitable position for her. As a result, it (the Respondent) was not in a position to re-absorb the Claimant.
33. The Claimant argues that the Respondent’s decision was illegal. In her view, the Respondent was under obligation to re-absorb her into employment.
34. According to the Claimant, this was not the first time that the Respondent had granted an employee study leave. The Claimant contends that the Respondent had previously permitted employees to proceed on study leave and absorbed them back into employment once they completed their studies. As a result, she had legitimate expectation that she would receive the same treatment. As such, by the Respondent refusing to re-absorb her into employment, it (the Respondent) had subjected her to differential treatment in violation of anti-discrimination laws.
35. The evidence on record demonstrates that although the parties had an indefinite employment relation, they entered into an arrangement by which the contract was to be temporarily halted to enable the Claimant pursue her further studies. This halting of the contract was executed through the Respondent’s letter to the Claimant dated 6th October 2016. By this letter, the Respondent offered to allow the Claimant to proceed on the one year study leave subject to several condition including: that the duration for which she was absent would not be remunerable; the period would not earn leave and superannuation benefits; and that her re-absorption into employment would be depended on availability of a suitable vacancy for her.
36. The Claimant endorsed the letter on 7th October 2016 signifying her acceptance of the terms of her release. One of the terms of her release was that her contract of service was being temporarily halted to be renewed conditional on availability of a suitable vacancy for her.
37. This temporary halting of the contract constituted a temporary discharge of the contract. Once the discharge took effect, the parties were to resume the relation only if there was a suitable vacancy for the Claimant.
38. The Claimant did not challenge the conditions for her release as set out in the Respondent’s letter of 6th October 2016. Instead, she endorsed them on 7th October 2016 by signing the letter.
39. As a matter of fact, the Claimant’s email of 29th September 2017 demonstrates that she understood that the effect of accepting the conditions in the Respondent’s aforesaid letter was to temporarily discharge the contract between the parties and revive it only if a suitable vacancy was available for her. Otherwise, it would be difficult to explain why she was asking the Respondent to process her “reinstatement” upon conclusion of her studies.
40. The parties voluntarily agreed to temporarily halt and or discharge their contract to enable the Claimant take up her further training for one year. A term of the agreement was that the Claimant’s re-absorption into employment would be conditional upon a suitable vacancy being available when and if she requested for reinstatement.
41. The letter of 6th October 2016 did not obligate the Respondent to unconditionally re-absorb the Claimant upon completion of her studies. If this had been the intention of the parties, it should have



- been explicitly expressed in the letter. In such case, it would not have been open to the Respondent to plead inability to re-absorb the Claimant once she lodged her request for reinstatement.
42. I agree with the observations in *Nancy W. Ngatia v Kenya Ports Authority* [2016] eKLR that a conditional study leave can result in the discharge of a contract of employment. It all depends on the construction of the instrument by which the study leave is granted. In the instant case, the fact that the Respondent expressly stated in its letter of approval of the Claimant's request that her resumption of duty was depended on availability of a suitable vacancy for her meant that the Claimant's contract of service had been discharged and was only going to be revived if there was a suitable vacancy for her.
 43. Having regard to the circumstances of this case, the Claimant cannot contend that she had legitimate expectation that her contract would be reinstated upon her return. The promise to re-absorb her was not unconditional. Her reinstatement into employment was subject to availability of a suitable vacancy at the time that she was to make the request. As the Respondent communicated, that vacancy was not available when the Claimant lodged her request for reinstatement.
 44. Further, although the Claimant alleged that the Respondent had previously facilitated other employees to proceed on study leave and absorbed them back into employment thereafter, she did not provide evidence to support this contention. As such, there was no proof that the Respondent had established this practice so as to arouse the Claimant's expectation that her case would be handled in the same way.
 45. The Claimant also suggested that the Respondent encouraged her to apply for the further studies. As such, she legitimately expected to be retained in employment once she cleared the studies. However, she did not provide evidence to support this assertion.
 46. As was observed in *Teresa Carlo Omondi Vs Transparency International Kenya* (2017) eKLR, the concept of legitimate expectation applies to confer a benefit only if the party who is invoking it to claim the benefit is able to demonstrate that the other party had, through past practice or express promise, aroused his expectation that he would receive the benefit. In the instant case, the Respondent did not make any unconditional express promise to the Claimant that it will re-absorb her into her position once she completed her studies. Similarly, there is no evidence that the Respondent had developed a practice of absorbing back employees who had been released on study leave once they completed the studies.
 47. The Claimant cannot rely on her line managers' recommendations for approval of her request to assert that the Respondent had unconditionally approved her study leave as at 19th September 2016. The line managers' recommendations did not amount to an approval of the Claimant's request. The approval lay with the Respondent. This approval was communicated to the Claimant through the Respondent's letter dated 6th October 2016. It (the approval) was subject to the various conditions in the said letter.
 48. Once the offer was made by the Respondent as aforesaid, it was for the Claimant to either accept or reject it. When she appended her signature on the instrument on 7th October 2016, she accepted it together with the accompanying conditions.
 49. Although the Claimant asserted that at the time of signing acceptance of the letter dated 6th October 2016 she was in a state of bereavement and was therefore not clear minded, this argument is not convincing. There was no pressure on the Claimant to sign the impugned letter at the time that she did. She had the option of suspending her decision on the letter until a later date when she was in a proper frame of mind to attend to it.
 50. As indicated earlier in this judgment, parties to a contract (including a contract of service) have the freedom to vary the terms of their engagement as they wish so long as they do not go outside the



boundaries that the law has set. They can elect to suspend implementation of the contract or even temporarily halt or discharge it subject to re-engagement at a later date on agreed terms.

51. As long as the parties are not acting under coercion, undue influence, mistake or misrepresentation, they are bound by the terms of whatever they have agreed on. The court has no power to require them to revise the terms of their agreement except as mandated by law.
52. The Claimant contends that since the Respondent asserts that her position was no longer available at the time she sought to resume duty, then it must be considered to have been declared redundant. Consequently, the Respondent ought to have processed her release in accordance with the law on redundancy.
53. This argument is unsound. There is evidence that when the Claimant left for further studies, her position was taken over by another employee. Therefore, her position was not rendered superfluous. The position did not disappear due to operational requirements at the workplace so as to occasion a redundancy. The Claimant gave it up in order to pursue further studies. As such, this was not a case of redundancy.

Determination

54. In the ultimate, I reach the conclusion that by accepting the conditions for study leave as issued in the Respondent's letter dated 6th October 2016, the Claimant agreed to the discharge of her contract of service with the Respondent for the duration of her study leave. She further agreed to the resumption of the engagement only if there was a suitable vacancy for her within the Respondent's establishment.
55. I further reach the conclusion that upon the parties temporarily discharging their contract of service as aforesaid, the Respondent was under no obligation to re-engage the Claimant except if there was a suitable vacancy for her.
56. In the premises, the Respondent was entitled to decline the Claimant's request for re-engagement if there was no suitable vacancy for her at the point of her request to be reinstated.
57. Consequently, I arrive at the conclusion that by declining to re-absorb the Claimant on account of absence of a suitable vacancy for her, the Respondent did not breach the arrangement between the parties.
58. As a result, I find that the Claimant's case against the Respondent is devoid of merit.
59. The suit is thus dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 18TH DAY OF DECEMBER, 2023

B. O. M. MANANI

JUDGE

In the presence of:

..... for the Claimant

.....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

