Mumira v Oshwal Education and Relief Board (Cause 97 of 2018)
[2022] KEELRC 12944 (KLR) (26 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12944 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 97 OF 2018

JK GAKERI, J

OCTOBER 26, 2022

BETWEEN

PAULINE WANJIRU MUMIRA ..... CLAIMANT

AND

OSHWAL EDUCATION AND RELIEF BOARD ..... RESPONDENT

JUDGMENT

1. The Claimant initiated this suit by a Statement of Claim filed on February 1, 2018 claiming unfair termination of employment by the Respondent.

2. The Claimant avers that she was employed by the respondent effective March 1, 2016 as a Personal Assistant to the Executive for a period of 2 years at an annual gross salary of Kshs.960,000/=. The contract was terminable by one month written notice by either party.

3. The Claimant further avers that by a letter dated August 10, 2017, the Respondent purported to terminate the Claimant's employment on account of redundancy. The termination was effective September 10, 2017, 6 months prior to the end of the contract.

4. That a further email advised her that her last day of work would be September 5, 2017.

5. It is the Claimant's case that the termination of employment was unfair for want of notice of the impending re-organization, reasons for termination selection criteria and no opportunity to be heard.

6. That the termination of employment was malicious and discriminatory.

7. It is the Claimant's case that she discharged her duties diligently and suffered loss and damages by reason of termination of employment.

8. The Claimant prays for;

    i. A declaration that the termination of the Claimant's employment was lawful.

ii. Damages for breach of contract Kshs.586,500/=

iii. Damages for unfair dismissal Kshs.586,500/=

iv. Damages for unlawful dismissal Kshs.586,500/=

v. Interest on (ii), (iii) and (iv) at court rates from 10th August, 2017

vi. Costs of the claim.

Respondent's case

9. The Respondent filed a Statement of Response dated March 22, 2018 denying all the allegations by the Claimant save that the Claimant was its employee.

10. It avers that the Clause 18.3 of the Employment contract dated 2February 9, 2016 allowed either party to terminate the contract by one (1) month notice or pay in lieu of notice, which clause the Respondent relied upon to terminate the contract.

11. That prior to the letter, the Respondent consulted the Claimant and discussed the impending restructuring of the organisation and informed the Claimant that she would be affected by the redundancy.

12. That the Respondent paid the Claimant's dues but the Claimant declined to collect the cheque and certificate of service.

13. It is the Respondent's case that the termination of employment was not unfair as the decision to declare her redundant had been communicated to her and was neither malicious nor discriminatory.

14. That the restructuring rendered the Claimant's position superfluous and the provisions of section 40 of the *Employment Act* were complied with in that it notified the Claimant in writing and the labour officer and had a meeting with the Claimant before the termination letter, applied the prescribed criteria, gave one (1) months' notice and prepared the Claimant's cheque which she did not pick.

15. The Respondent prays for dismissal of the suit with costs.

16. The Claimant filed a Reply to the Respondent's statement of response stating that the Respondent held no meeting with her to discuss the redundancy and that she collected her final dues and the certificate of service.

Claimant's evidence

17. On cross-examination, the Claimant testified that she was the Personal Assistant (PA) to the Director of Education, Mr. Bandet and the only Personal Assistant in the Department of Education.

18. That she was unaware of the termination until she reported from leave on August 14, 2017 but was aware of termination of the Director of Education. It was her evidence that her services were still needed.

19. The witness confirmed that the reason for termination was given as redundancy since the position of Personal Assistant had been abolished. That one (1) month notice of termination was given and the letter was copied to the Labour Officer that she was not a member of the union.

20. The Claimant confirmed that she had 10 leave days, outstanding salary for August and September, was paid and signed the form on 6th September, 2017.

21. The witness testified that she had no evidence that a Personal Assistant had been recruited after she had left the Respondent's employment.

22. It was her testimony that the recommendation letter given by the Respondent had no evidence of malice or discrimination and was given in good faith.

23. On re-examination, the witness confirmed that she collected her terminal dues on September 6, 2016 and no meeting took place about abolishing the office of Personal Assistant.

Respondent's evidence

24. RWI, Brian Odhiambo testified on cross-examination that he was employed by the Respondent in January 2021.

25. It was his testimony that prior to the information about the redundancy being communicated to the Claimant, no meeting with the Claimant or a general notice to staff had been given. That it was explained in the termination letter.

26. The witness stated that he had no evidence that a copy of the termination letter was sent to the Labour Officer or was actually received. He testified that the Claimant received the letter on 14th August, 2017 but was released earlier.

27. On re-examination, RWI testified that the position of Personal Assistant was abolished as the Executive was also terminated from employment when a new board was inaugurated in May 2017.

Claimant's submissions

28. The Claimant submits that the Respondent did not abide by the provisions of section 40 of the *Employment Act* on redundancy.

29. Reliance is made on the decisions in *Caroline Wanjiru Luzze V Nestle Equatorial Africa Region Ltd* (2016) eKLR and *Kenya Airways Ltd V Aviation and Allied Workers Union Kenya & 3 others* to urge that the employer must give the required notices failing which the redundancy becomes unlawful.

30. The decisions in *Hesbon Ngaruiya Waigi V Equitorial Commerce Bank Ltd* (2013) eKLR and *Francis Kamau V Lee Construction* (2014) eKLR are cited to urge that the conditions prescribed by section 40 of the *Employment Act* are mandatory and non-compliance renders the purported redundancy an unfair termination of employment.

31. Reliance also made on the sentiments of Maraga JA (as he then was) in Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & 3 others (supra) on the essence of consultations in a redundancy.

32. As regards breach of contract, it is urged that because the Claimant's contract was for a fixed term of 2 years, she had a legitimate expectation that employment would last for the duration but was terminated 6 months earlier and claims damages for breach of contract. The decision in *Donas Lombom V Civicon Ltd* (2016) eKLR, where the court awarded salary for the expired period of the contract is relied upon to reinforce the submission.

33. The court is urged to grant the prayers sought.

Respondent's submissions

34. The Respondent identifies three issue for determination; breach of contract, termination and the reliefs sought.

35. As regards breach of contract, it is submitted the contract dated February 29, 2016 had a termination clause and either party could invoke it. That the termination letter dated August 10, 2017 gave the required one (1) month notice and the reason was given. That no breach of contract was committed.

36. The decision in *Samuel Chacha Mwita V Kenya Medical Research Institute* (2014) eKLR is relied upon as is the decision in *Tobias Ongaya Auma & 5 others V Kenya Airways*.

37. The Respondent urges that the termination of employment was in accordance with the terms of the contract.

38. As to whether termination was fair, it is submitted that the Respondent fulfilled the requirements of section 40 of the *Employment Act* as a notice was given and was copied to the Labour Office and there was no requirement to have prior meetings or consultations before an employee was declared redundant.

39. The decision in *Africa Nazarene University V David Muteru & 103 others* (2017) eKLR is relied upon to urge that no notice is required under sub-section 40 (1) (f) of the Act.

40. Further, it is urged that the law does not require pre-redundancy consultations. The decision in Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & 3 others (supra) is relied upon as is the New Zealand decision in *Auraki Corporations Ltd V Collin Keith MC Gavin* CA 2 OF 1997 (1998) 2 NZLR 278.

41. It is submitted that the system provides for Post-redundancy consultations and was the business of the Claimant. At any rate, the Claimant neither objected to nor sought negotiations. That negotiations may be initiated by either party.

42. The Respondent further submits that the reason for termination was clearly spelt out. The decision in Tobias Ongaya Auma & 5 others V Kenya Airways Ltd (supra) is relied upon to urge that the employer has the discretion to make the decision whether a redundancy is justified, as it is a commercial decision.

43. The decision in *Pure Circle (K) Ltd V Paul K. Koech & 12 others* (2018) eKLR is relied upon to urge that if the conditions prescribed by section 40 (1) are complied with, the redundancy passes muster. That no evidence was adduced to show that the Claimant was released earlier or that another person was employed.

44. As to whether the Claimant is entitled to the reliefs sought, the Respondent relies on the sentiments of Nduma J. in *Kennedy Maina Mirera V Barclays Bank of Kenya Ltd* (2018) eKLR on the requirements of section 47(5) of the *Employment Act*.

45. The court is urged to dismiss the suit with costs.

Determination

46. The issues for determination are;

    i. Whether the Claimant was declared redundant or was unfairly terminated from employment by the Respondent.

    ii. Whether the Claimant is entitled to the reliefs sought.

47. As to whether the Claimant was declared redundant or unlawfully terminated, the starting point are the provisions of section 2 of the *Employment Act*, 2007 which define redundancy to mean

> " 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 practices commonly known as abolition of office, job or occupation and loss of employment.

48. Section 40 of the Act on the other hand, provides the legislative framework for separation through redundancy. Section 40 (1) of the Employment enumerates the seven (7) conditions to be complied with for a redundancy to pass muster. These conditions are mandatory.

49. In *Freight In Time Ltd V Rosebell Wambui Munene* (2018) eKLR, the Court of Appeal expressed itself as follows;

> " In addition, section 40 (1) of the *Employment Act* prohibits in mandatory tone, the termination of a contact of service on account of redundancy unless the employer complied with the following seven conditions namely;
>
> a. If the employee to be declared redundant is a member of a union, the employer must notify the union and the local labour officer of the reasons and the extent of the redundancy at least one month before the date when the redundancy is to take effect;
>
> b. If the employee is not a member of the union, the employer must notify the employee personally in writing together with the labour officer;
>
> c. In determining the employees to be declared redundant, the employer must consider seniority in time, skill, ability, reliability of the employees;
>
> d. Where the terminal benefits payable upon redundancy are set under a collective agreement, the employer shall not place an employee at a disadvantage on account of being or not being a member of a trade union;
>
> e. The employer must pay the employee any leave due in cash;
>
> f. The employer must pay the employee at least one month's notice or one month's wage in lieu of notice; and
>
> g. The employer must pay the employee severance pay at the rate of not less than 15 days for each completed year of service."

50. As regards the burden of proof, in *Barclays Bank of Kenya Ltd V Gladys Muthoni & 20 others* (2018) eKLR, the Court of Appeal expressed itself as follows;

> " There is a heavy burden of proof placed upon the employer to justify any termination of employment."

51. Needless to emphasize, the provisions of section 45 of the *Employment Act* apply to redundancies as "no employer shall terminate the employment of an employee unfairly".

52. As a form of termination of contract of service, redundancy must pass the substantive justification and procedural fairness test. (see Kenya Airways Ltd V Aviation & Allied Workers Union Kenya & 3 others

(supra) as well as the sentiments of the court in Auraki Corporation Ltd V Collin Keith Mc Gavin CA 2 of 1997 (1998) 2 NZLR 278.

53. However, unlike in ordinary termination of employment where the employee may have been a contributor to the ensuing consequences, in a redundancy, the employee is innocent. It is initiated and executed at the behest of the employer as it is a matter of commercial judgement by the employer.

54. As regards notice to the union or the employee (section 40 (1) (b)) and the Labour Officer in either case, the notice must be in writing and explain the reasons for and extent of the redundancy at least one (1) month before the date of the intended termination.

> " The requirement to issue a separate notice to the Labour Officer, simultaneously with the termination notice is mandatory." (See Freight In Time V Rosebell Munene (supra))

55. Failure to issue the two notices renders the purported redundancy unlawful.

56. In the instant case, the Claimant confirmed on cross-examination that she saw the termination letter on August 14, 2017 when she reported from leave. The notice was dated August 10, 2017 and effective on the same date. Although the Claimant did not contest the duration, which must be at least one month, in this case, it was less as the Respondent did not demonstrate that the letter was received on the same day.

57. Be that as it may, although the copy of the letter on record indicates that it was copied to the County Labour Officer, Nairobi, the Respondent led no evidence that it was in fact delivered and received.

58. More significantly, the alleged redundancy notice has neither the reason nor the extent of the redundancy and thus falls short of the requirements of the provisions of section 40 (1) (a) of the *Employment Act*.

59. For the foregoing reasons, it is the finding of the court that the Respondent did not comply with the provisions of the *Employment Act* and the notice of redundancy dated August 20, 2017 was ineffectual.

60. As regards consultations on the impending redundancy and contrary to the Respondent's submissions that consultations are not a legal imperative, they indeed are.

61. In Kenya Airways Ltd V Aviation & Allied Workers Union & 3 others (supra), Maraga JA (as he then was) and Murgor JA made a strong case for consultations between the employer and the employees or the union where employees are members of a union. Maraga JA (as he then was) was persuaded that consultations were implicit in the law.

62. In Barclays Bank of Kenya Ltd V Gladys Muthoni & 20 others (supra) the Court of Appeal was unambiguous that

> " In the end, we are persuaded that the dicta of Maraga and Murgor JJ.A regarding consultations prior to declaration of redundancy resonate with our Constitution and international laws which have been domesticated by dint of Article 2 (6) of *the Constitution*."

63. Article 13 of Recommendation No. 166 of the ILO Convention No. 158 – *Termination of Employment* is explicit on consultation before redundancy can be effected. The employer is required to engage the trade union if the employees are members or the employees directly.

64. Instructively, the letter dated August 10, 2017 makes no reference to consultations and the Claimant testified that none took place. But more poignantly, the letter is not a notice of a proposed or impending redundancy but a notice that the Claimant's position of Personal Assistant had been abolished.

Evidently, there was no need for any consultations. The Claimant was faced with a fiat accompli. The letter is unequivocal that "your position has therefore been abolished."

65. In sum, the decision had already been made and the Claimant's fate sealed.

66. More, significantly, the Respondent tendered no evidence of a redundancy. Apart from the letter, there is no shred of evidence of a restructuring or re-organisation. Neither the old nor the new structure of the organization was availed for comparison. It does not appear as if there was any criteria as required by section 40 (1) (c) of the Act as the redundancy affected only one person.

67. The letter dated 10th August, 2017 appears to have been a termination letter disguised as a redundancy notice.

68. As explained in Hesbon Ngaruiya Waigi V Equatorial Commercial Bank (2013) eKLR, failure to comply with the provisions of section 40 (1) of the *Employment Act* constitutes the purported redundancy an unfair termination of employment.

69. Finally, to its credit, the Respondent complied with the provisions of section 40 (e) and (g) on leave and severance pay.

70. For the above stated reasons, the court is satisfied that the Claimant has on balance of probability demonstrated that termination of her employment contract by the Respondent on account of redundancy was unfair for non-compliance with the provisions of section 40 (1) of the *Employment Act*.

71. Before delving into the reliefs sought, it is essential to determine the import of the settlement agreement/discharge voucher on record.

72. It is common ground that the Claimant signed a settlement agreement/discharge voucher on September 6, 2017.

73. The prevailing jurisprudence on settlement agreement/discharge vouchers executed by employees is underpinned on the principle that the employment relationship is a contract between willing parties and the duty of the court is to give effect to the intention of the parties as discerned from the settlement agreement or discharge voucher in question. The decision in *Damondar Jihabhai & Co. Ltd and Another V Eustace Sisal Estate Ltd* (1967) EA 153 is often cited for this proposition.

74. In the words of Sir Charles Newbold P.

> " The function of courts is to enforce and give effect to the intention of the parties as expressed in their agreement . . ."

75. In *Krystalline Salt Ltd V Kwekwe Mwakele & 67 others* (2017) eKLR, the Court of Appeal stated;

> " . . . it is important to bear in mind that in Kenya, employment is governed by the general law of contract as much as by the principles of common law now enacted and regulated by the *Employment Act* and other related statutes. In that sense employment is seen as an individual relationship negotiated between the employee and the employer according to their needs."

76. Having established the basis of the Jurisprudence on settlement agreement/discharge vouchers, I now proceed to examine their import and enforceability.

77. In *Coastal Bottlers Ltd V Kimanthi Mithika* (2018) eKLR, the Court of Appeal expressed itself ad follows;

> " Whether or not a settlement agreement or a discharge voucher bars a party thereto from making further claims depends on the circumstances of each case. A court faced with such an issue, in our view should address its mind firstly, on the import of such a discharge/ agreement; and secondly, whether the same was voluntarily executed by the concerned parties."

78. Similar sentiments were expressed in *Thomas De La Rue (K) Ltd V David Opondo Omutelema* (2013) eKLR where the Court of Appeal stated as follows;

> " The court has, in each and every case to make a determination, if the issues is raised, whether the discharge voucher was freely and willingly executed when the employee was seized of all the relevant information and knowledge."

79. The court is bound and guided by these sentiments.

80. The import of a settlement agreement/discharge voucher was explained by the Court of Appeal in Trinity Prime Investments Ltd V Lion of Kenya Insurance Co. Ltd (2015) eKLR as follows;

> " The execution of the discharge voucher, we agree with the learned judge 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. The appellant was fully discharged."

81. It is not in dispute that other than tabulating the Claimant's entitlements such as salary for September for the days worked and August, leave and severance pay, the settlement agreement read in part.

> " Please find below your final dues computed as follows.
>
> Please receive cheque No. 017591 dated 6th September, 2017 for Kshs. 143,355.30 being full and final dues . . .
>
> Signed
>
> Mrs Joyce Kanuri Mwangi
>
> Human Resource Manager
>
> I Pauline Wanjiru Mumira of ID 13218325 acknowledge that I have received my final dues as stated above and have no further claim with the company.
>
> Signature: Signed Date: 6thSeptember, 2017

82. The Claimant inserted her full name, ID card number, date and signature.

83. On cross-examination, the Claimant confirmed that she had 10 leave days outstanding and payment for them was included as was the salary for August 10 days in September and severance pay. She confirmed having signed the document on 6th September, 2017.

84. By this settlement agreement, it would appear that the parties had agreed that payment of the amount of Kshs.143,355.30 would discharge the respondent from any further claims under the contract of employment and the termination on account of redundancy.

85. The Claimant did not contest the authenticity of the agreement or adduce evidence that its contents were misrepresented or she signed the same under duress or undue influence, made a mistake or could not understand its import.

86. This position finds support in the sentiments of *Moses Gichuhi Gateru V Njuka Consolidated Co. Ltd* (2019) eKLR where Nzioki Wa Makau stated

> "A contract can only be vitiated on the grounds of coercion, mistake or fraud duress, misrepresentation, undue influence or illegality . . . I do not discern any intention for the Claimant not to be bound by the discharge he executed . . ."

87. For the above stated reasons, it is the finding of the court that settlement agreement dated September 6, 2017 and executed by the parties thereto on even date was a binding agreement between the Claimant and the Respondent and which discharged the Respondent from further liability to the Claimant in relation to the contract of employment and separation.

88. That the Claimant waived her rights to pursue other claims against the Respondent. This position finds support in the common law principle that that which is created by agreement may be extinguished by agreement encapsulated by the maxim eodem modo quo oritur, eodem modo disolvitur.

89. The mutual promises between the parties constitute consideration for the contract often referred to as a bilateral discharge of contract.

90. Having found that the settlement agreement dated September 6, 2017 was a legally binding agreement between the parties, the Claimant waived her rights to pursue further claims against the Respondent.

91. In the circumstances, the Claimant's suit against the Respondent is unsustainable. It therefore follows that the Claimant is not entitled to the reliefs sought.

92. In the end, the Claimant's suit herein is unmerited and is accordingly dismissed.

93. Parties to bear own costs.

94. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 26TH DAY OF OCTOBER 2022

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE