Kanoti v Donane Nutrica Africa Overseas (Cause 1509 of 2018)
[2022] KEELRC 12979 (KLR) (25 October 2022) (Judgment)

Neutral citation: [2022] KEELRC 12979 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1509 OF 2018

JK GAKERI, J

OCTOBER 25, 2022

BETWEEN

RACHEAL KANOTI ..... CLAIMANT

AND

DONANE NUTRICA AFRICA OVERSEAS ..... RESPONDENT

JUDGMENT

1. The claimant commenced this suit by a statement of claim filed on November 8, 2018. It is the claimant case that he was an employee of the respondent from June 8, 2012 and would be posted in Kenya from June 1, 2012 at Kshs 4,140,000/= per year.

2. The claimant avers that he reported to Eelco Weber, the General Manager of English Speaking Danone Nutrica Africa & Oversees and his employment was not a fixed term contract though terminable by 2 months notice.

3. That article 13 of the contract stated that she was entitled to end of service pay. That having worked since April 24, 2009 for Laborex Kenya seconded to the respondent, the date of April 24, 2009 would be used in the computation of possible end of service payment.

4. The claimant avers that she resigned by giving the respondent the requisite 2 months notice.

5. It is the claimant's case that she was not paid end of service pay as provided by article 13 of the employment contract causing her substantial loss.

6. The claimant prays for;

    a. The total payment of end of service pay set out in article 13 of the employment contract since April 24, 2009 as the starting date of employment contract.

    b. Interest on (a) above since September 7, 2018 at court rates.

c. Costs of this suit.

Respondent's Case

7. In its response dated January 24, 2019 and filed on even date, the respondent denies that the claimant was entitled to end of service pay under the contract of employment.

8. That the claimant was paid all her terminal dues as per the contract of employment i.e salary for the days worked in August, 2018, net of statutory deductions as evidenced by a copy of the payslip on record.

9. It is the respondent's case that article 13 of the employment uses the term "possible" and thus created no obligation on the respondent to pay end of service pay.

10. That the claimant was a member of the National Social Security Fund (NSSF) and the jubilee insurance pension scheme and the respondent contributed to both schemes.

11. The respondent prays for dismissal of the claimant's case with costs.

Evidence

12. Neither of the parties adduced oral evidence in support of the allegations made. Parties agreed to proceed by way of the documents on record and written submissions.

Claimant's Submissions

13. According to the claimant, the issue for determination is whether the claimant was entitled to end of service pay as provided by article 13 of the employment contract.

14. It is submitted that parties are bound by the terms of their contract and courts of law cannot re-write the same. That their duty is to interpret the contract as agreed upon by the parties.

15. The decision in *Five Forty Aviation Ltd v Erwan Lanoe* (2019) eKLR, where the Court of Appeal applied the holding in *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* (2017) eKLR is relied upon to buttress the submission.

16. Reliance is also made on the decisions in *Jiwaji v Jiwaji* (1968) EA 547 and *Areva T & D India Ltd v Priority Electrical Engineers & another* (2012) eKLR.

17. Similarly, article 41 of the *Constitution* of Kenya, 2010 is relied upon to urge that the law guarantees the right to the fair labour practice of fair remuneration and reasonable working conditions.

18. That section 26 of the *Constitution* of Kenya, 2010 provides the minimum conditions of employment.

19. It is urged that attempts by respondent to interpret the contract in the context of the minimum conditions of employment as provided under part v and vi of the *Employment Act* is inconsistent with the provisions of section 26(2) of the Act.

20. That the *Employment Act* does not provide that employees who are members of other insurance schemes are not entitled to end of year service.

21. That the contract makes no reference to redundancy.

22. The claimant further submits that the words "possible end of service pay" are very broad and should be construed broadly to avail the claimant all benefits under an employment contract and a contrary construction would violate article 41 of the *Constitution*.

23. It is the claimant's argument that the respondent's Human Resource Policy, 2014 cannot override a contract entered into in 2012 and in any case the claimant did not sign the manual. That the manual did not vary the claimant's contract of employment as variations of contracts can only be made after consultation with the employee and the claimant was not consulted as provided by section 10(5) of the *Employment Act*, 2007.

24. The decision in *Rodgers Sultani Bwosi v G4S Security Services Kenya Ltd* (2017) eKLR is relied upon to reinforce the submission.

25. The court is urged to award Kshs 7,759,237.05 as end of service pay.

Respondent's Submissions

26. The respondent submits that the claim for end of service pay under article 13 is not guaranteed by reason of use of the term "possible."

27. The respondent identifies the same issue as the claimant namely entitlement to end of service pay.

28. The respondent relies on section 35 of the *Employment Act* to urge that service pay was only payable to persons whose services had been terminated in accordance with the provisions of the Act. Section 35(6) of the Act is relied upon to urge that an employee who is a member of a registered pension scheme does not qualify for service pay.

29. It is the respondent's case that the terms of service pay must be fixed by the law or contract and the clause 13 of the employment contract is silent on the rate of payment.

30. That the word "possible" in article B shows that there were special circumstances under which the claimant would be entitled to end of service pay and the same are not enumerated by the provisions of the *Employment Act*.

31. The respondent relies on *Black's Law Dictionary* in the definition of the term "possible."

32. Reliance is also made on the decision in *Euromac International Ltd v Shandong Taikai Power Engineering Co Ltd* (2012) 93 KLR for the proposition that the meaning given to the wording of a contract is that which reasonable person would give having regard to the background knowledge available to the parties.

33. According to the respondent, the phrase 'possible end of service pay' meant that the same was not a guaranteed entitlement to the claimant and applied in certain circumstances.

34. That construction of the clause in its ordinary sense does not amount to re-writing of the contract.

35. The respondent relies on the decisions in *Next Generation Communications Ltd v George M. Kirungaru* (2019) eKLR, *Nahashon Maina & 5 others v Central Park Hotel* (2021) eKLR and *Osota Paul Osiemo v Intersecurity Services Ltd* (2021) eKLR to urge that service pay is not payable to employees who are members of the NSSF and employee remitted contributions regularly.

Analysis And Determination

36. The only issue for determination in this case is whether the claimant is entitled to end of service pay under article 13 of the employment contract dated June 8, 2012.

37. It is common ground that the claimant was an employee of the respondent from April 24, 2009 though initially it was a secondment from Laborex Kenya to the respondent.

38. From the records on file, the claimant gave a 2 month's notice of resignation effect August 2, 2018 and her last working day was September 7, 2018 having utilized outstanding 14 leave days as part of the notice.

39. The resignation letter dated August 1, 2018 was acknowledged by letter dated September 13, 2018 which acknowledged some discussion between the writer and the claimant on August 31st.

40. The last payout was Kshs 78,376.13.

41. Article 5 of the claimant's contract of employment provided for pension and healthcare insurance as follows;

> " DBN Africa & Overseas will ensure that you are registered with the local compulsory social security regimes and notably compulsory basic regimes for employees.
>
> You will also be registered to the DBN Africa and Overseas Pension Plan and Medical and Life Insurance.
>
> Unemployment Protection: You will be affiliated to the Kenyan unemployment contributions system based on your basic salary."

42. This clause lays it bare that the claimant's social security requirements were not only provided for, but enhanced to ensure that she had the necessary safety net in the event of loss of employment.

43. Article 13 of the contract provided as follows;

> " As you have been working since April 24, 2009 with Laborex Kenya seconded to Dodane, we will use April 24, 2009 as starting date only for calculation of possible "end of service payment."

44. In the courts view, and contrary to the respondent's submissions, the "possible end of service payment" does not appear to be the service pay provided by section 35(5) of the *Employment Act* or the severance payable under section 40 (1) (g) of the *Employment Act*, in cases of redundancies. These are statutorily prescribed payments and the respondent cannot be deemed not to have been aware of Kenya's employment law which the contract of employment makes reference to.

45. Since the contractual document has no definitions clause, the phrase 'end of service payment' cannot be accorded a definition in the context of the provisions of the *Employment Act*. In other words, it is neither service pay nor severance pay.

46. The claimant relies on the provisions of section 26(2) of the *Employment Act* which provide as follows;

> Where the terms and conditions of a contract of service are regulated by any regulations, as agreed in any collective agreement or contract between the parties or enacted by any other written law, decreed by any judgement award or order of the Industrial Court are more favourable to an employee, than the terms provided in this part or part vi, then such favourable terms and conditions of service shall apply.

47. The court is in agreement with the submissions by the claimant that interpreting the employment contract in the context of the minimum conditions would be restrictive. At any rate, it is undeniable that there was no contractually defined or agreed upon 'end of service payment' in this case.

48. It is unclear what the employer meant by this clause but the payment appears to have been over and above the prescribed minimalist payments, something analogous to gratuity or some other amount

payable to an employee at the discretion of the employer and dependent upon variables determined by the employer.

49. As will become clear shortly, such a payment is enforceable strictly as a term of the contract and it is the duty of the party alleging entitlement to the payment to demonstrate the same.

50. On construction of terms of a contract, both parties relied on the well settled principles of law that the duty of courts of law is to interpret contracts as agreed upon by parties not to re-write them and are thus bound to give effect to the intentions of the parties (See *Damondar Jihabhai & Co Ltd & another v Eustace Sisal Estates Ltd* (1967) EA 153).

51. This position is underpinned on the general principle of freedom of contract.

52. As a general rule, the basic rule of interpretation of contracts in the ordinary or natural meaning rule applicable in statutory construction as well. The rule or principle was well captured in *Euromec International Ltd v Shandong Taikai Power Engineering Co Ltd* (supra) as follows;

> "... Contractual interpretation is in essence simply ascertaining the meaning that a contractual document would convey to a reasonable person having all the background knowledge that would have been available to the parties ..."

53. According to the respondent, the natural and ordinary meaning of the phrase "possible end of service payment" is that the payment referred to was not guaranteed by the employer.

54. The claimant on the other hand assumes that it is another service pay and has quantified the amount being claimed but in the submissions contrary to the well settled principle of law, that submissions are neither pleadings nor evidence.

55. The claimant cannot camouflage the fact that she is claiming some undefined and unquantified sum from the respondent.

56. According to *Black's Law Dictionary* 10th Edition, the term 'possible' means

> "... capable of existing or happening; feasible, in another sense the word denotes extreme improbability, without excluding the idea of feasibility. It is also sometimes equivalent to practicable or reasonable ..."

57. The gravamen of this case is whether the respondent imposed upon itself an obligation to make an 'end of service payment' to the claimant?

58. A plain reading of article 13 of the employment contact between the parties would appear to suggest that there was no obligation on the part of the respondent to make an 'end of service payment' to the claimant.

59. Regrettably, the claimant made no reference to a practice or custom by the respondent of making 'end of service payments' to employees where the separation was consensual or voluntary. Evidence of a custom usage or practice by the respondent would have given clause 13 the necessary context and grounding irrespective of the use of the term "possible" (See *Kenfreight EA Ltd v Benson K. Nguti* (2016) eKLR).

60. Surprisingly, the respondent's human resource policy, 2014 makes no reference to 'end of service payment.'

61. Would interpreting article 13 contra proferentes (using the contra proferentem rule) rendered the respondent liable to make the 'end of service pay'? In the absence of further evidence, the court is of the view that it would not.

62. Finally, and as adverted to elsewhere in this judgement, the claimant prays to this court to award an unspecified and unquantified sum of money, a species of special damages without availing the necessary particulars.

63. The statement of claim makes no reference to the amount claimed or sought. The claimant purports to remedy the omission through submissions. "It is now trite law special damages must first be pleaded and then strictly proved . . ." (See *Coast Bus Services Ltd v Murunga & another* CA No 192 of 1992).

64. Relatedly, it is also well settled that parties are bound by their pleadings. (See *Independent Electoral & Boundaries Commission & another v Stephen Mutinda Mule & 3 others* (2014) eKLR where the Court of Appeal cited with approval the sentiments of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) v Nigeria Breweries PLC* SC 91/2002.

65. The upshot of the foregoing is that the court finds that the claimant has on a balance of probability failed to establish that she was entitled to the "end of service payment" referred to by article 13 of the employment contract dated June 8, 2012.

66. As a consequence, the suit herein is dismissed.

67. Parties to bear own costs.

68. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 25TH 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