Mobutu v BGP Kenya Limited (Cause 1952 of 2015)
[2020] KEELRC 1172 (KLR) (8 May 2020) (Judgment)

James Okal Mobutu v BGP Kenya Limited [2020] eKLR

Neutral citation: [2020] KEELRC 1172 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1952 OF 2015

S RADIDO, J

MAY 8, 2020

BETWEEN

JAMES OKAL MOBUTU ..... CLAIMANT

AND

BGP KENYA LIMITED ..... RESPONDENT

JUDGMENT

1. James O. Mobutu (Claimant) sued BGP Kenya Ltd (Respondent) on 3 November 2015 alleging that the termination of his employment on 8 October 2015 was unfair. The Claimant also alleged breach of contract.

2. The Respondent filed a Response on 19 November 2015 in which it contended that the termination of the Claimant's employment was on account of operational reasons and was fair.

3. Pursuant to leave granted by the Court, the Claimant filed an Amended Statement of Claim on 12 June 2019.

4. The Respondent did not amend its Response. The parties also failed to file Agreed Statement of Issues as directed.

5. The Cause was heard on 28 October 2019, 13 November 2019 and 30 January 2020.

6. The Claimant and the Respondent's Administration and Human Resources Supervisor testified (they also adopted their witness statements and produced exhibits).

7. The Claimant filed his submissions on 11 March 2020 (should have been filed by 21 February 2020) while the Respondent filed its submissions on 9 April 2020 (through email).

8. The Court has considered the pleadings, evidence and the submissions and condensed the Issues arising for determination, as examined hereunder.

Disclaimer/Discharge

9. The Claimant signed an undertaking on 9 October 2015 upon receipt of terminal dues that he would not make further claims against the Respondent.

10. In its submissions, the Respondent asserted that the Claimant was estopped from pursuing any further claims and that the court action was consequently an abuse of the court process.

11. The signing of discharge(s)/disclaimers before an employee is paid terminal dues has been the subject of vociferous debate and the legal implication of these discharges/disclaimer(s) has been the subject of different interpretation(s) and applications by this Court differently constituted. The Court of Appeal has also had occasion to consider the legal significance of the discharge (vouchers).

12. The Court in Albert Otsiola Sidawa v Laminate Tube Industries Ltd (2018) eKLR held, relying on section 35(4) of the *Employment Act*, 2007 that such a discharge could not negate an employee's right to question the lawfulness of the termination of employment

13. In Steve Mutua Munga v Homegrown (K) Limited & 2 Ors (2013) eKLR, the Court held that a discharge/disclaimer served as a lawful and binding contract between the parties and a party could not go back against the agreement.

14. In Thomas De La Rue (K) Ltd v David Opondo Omutelema (2013) eKLR, the Court of Appeal stated concerning discharge vouchers/disclaimers

> We would agree with the trial court that a discharge voucher per se cannot absolve an employer from statutory obligation and that it cannot preclude the Industrial Court from inquiring 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.

15. Addressing the validity of a settlement agreement in Coastal Bottlers Limited v Kimathi Mithika (2018) eKLR, the Court of Appeal stated that

> 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.....

and went on to find

> 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 respondent's 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 inadequate. As it stood, the agreement was a binding contract between the parties.

16. What emerges from the Court of Appeal jurisprudence is that a discharge/disclaimer is a binding agreement and each case should be considered on its (own) facts, and where a party wants to resile from such agreement, he should set out such facts as would exempt the case from the general legal contractual principles. Such facts may include coercion, misrepresentation or fraud.

17. In the present case, the Claimant was merely content with asserting that he was coerced and/or harassed into signing the discharge without giving any particulars or identities of the said persons or where and when such coercion happened.

18. This Court is bound by the law as stated by the Court of Appeal despite its harsh effects on employment relationships where the primary consideration is always fair labour practices within the context of unequal bargaining power between a dismissed employee and the employer.

19. The Court will therefore find that the Claimant waived his right to pursue the Respondent in respect of the separation.

20. The Court will, however, proceed to examine the Claimant's case on the basis that it is wrong in applying the law on discharges as set out by the Court of Appeal.

Unfair termination of employment on account of redundancy?

21. The reason given by the Respondent in the letter dated 8 October 2015 informing the Claimant of the termination of his employment was section 40 of the *Employment Act*, 2007 and clause 13 of the employment contract.

22. The above-stated section prescribes the conditions appertaining to termination of employment on account of operational reasons/redundancy.

23. Assuming that there were valid and fair operational reasons to terminate, the Respondent was under a statutory burden to issue a written notification of termination of employment 1-month in advance to both the Claimant and the local Labour Officer.

24. The Respondent's witness admitted in cross-examination that the Labour Officer was not notified of the termination of the Claimant's employment on account of redundancy.

25. The Claimant was on his part notified 1-month in advance of the intended termination of his employment on account of redundancy but opted to leave immediately.

26. The Court of Appeal in (see Thomas De La Rue (K) Ltd v David Opondo Omutelema (2013) eKLR held that the written notice to both the employee and Labour Officer were mandatory. The Respondent did not give or prove that it gave a required notification to the Labour Officer.

27. Consequently, the Court would have found on the state of evidence that the termination of the Claimant's employment on account of redundancy was unfair for failure to comply with the peremptory conditions outlined in section 40 of the *Employment Act*, 2007

28. With the conclusion, the Court would not see the need to examine whether the Respondent had valid and fair operational reasons to terminate the Claimant's employment.

Breach of contract

Breach of 1st contract

29. The Claimant served the Respondent under two distinct contracts. The first contract ran its course and lapsed before a new contract was entered into.

30. The Claimant still claimed pay in lieu of notice, compensation and general damages under the first (lapsed) contract.

31. Considering that the prior contract expired by effluxion of time, the Claimant would not have been entitled to and he did not prove that he was entitled to pay in lieu of notice, compensation and/or general damages.

Medical expenses

32. The Claimant sought for Kshs 250,000/- which he said was unpaid medical expenses.

33. This head of the claim was in the nature of special damages.

34. The Court has looked at the Claimant's contracts dated 10 June 2013 and 26 August 2014. The contracts provided that the Claimant would be entitled to free medical treatment at the crew clinic if illness arose from or resulted from employment stress.

35. The contract(s) appeared to limit the Respondent's liability for the Claimant's medical treatment.

36. However, under the Employment (Medical Treatment) Rules, 1977, the employer is under an obligation to cater to the medical treatment of an employee if the illness or injury occurs during the employment period.

37. The Claimant produced several receipts for medical treatment from Guru Nanak Hospital, Health Matters Medical Centre, Plaza X-Ray Services, Jaramogi Oginga Odinga Teaching & Referral Hospital, and Ruaraka Uhai Neema Hospital among others.

38. In terms of the Medical Treatment Rules, the Respondent should have catered for the medical expenses, and the Court would have held that the Respondent should reimburse the same to the Claimant.

Unpaid educational training expenses

39. On account of educational training expenses, the Claimant claimed Kshs 332,500/- incurred as part of a Master's degree program at Jomo Kenyatta University of Agriculture and Technology. To support the head of the claim, the Claimant cited clause 10 of the employment contract.

40. The said clause provided

    Prior to engagement, the employee will undertake the following training and examination, to company satisfaction and at company cost:

    Inductions

    Training.

41. The training the Claimant undertook at Jomo Kenyatta University of Agriculture and Technology was after the commencement of employment. The Claimant did not prove that the Respondent requested or authorised the education endeavour.

42. The Court would have concluded that the Respondent cannot be liable for the fees and costs.

Underpayments

43. The Claimant also alleged that he had agreed with the Respondent that he would be paid Kshs 330,000/- which was the salary he was earning at his previous employment before joining the Respondent. To demonstrate the agreement, the Claimant produced and referred to emails of 11 June 2013 and 15 September 2013.

44. The Respondent assured the Claimant in the email of 15 September 2013 that his salary would be increased to Kshs 330,000/- from Kshs 250,000/- after completion of 3-months' probation. The increase was not effected.

45. In the view of the Court, the emails comprised a promise and would not amount to the Court varying or modifying the parties' contract as urged by the Respondent.

46. The Court would have found that the Respondent was in breach of contract by not increasing the salary after the 3-months' probation.

47. Since the contract was to run for 1-year, the Court was minded to find that the Claimant was underpaid for 7 months by Kshs 560,000/-.

Service pay

48. The Claimant served the Respondent under 2 distinct contracts. He sought for service pay under both contracts.

49. The contract dated 26 August 2014 indicated that the Claimant's remuneration would be subject to statutory deductions.

50. A copy of payslip filed in Court by the Claimant on 23 January 2019 show that he was a contributor to the National Social Security Fund.

51. Pursuant to section 35(5) & (6) of the *Employment Act*, 2007, the Claimant was not eligible for statutory service pay.

Lost earnings

52. The Claimant's second contract was prematurely terminated with 11 months to run and therefore he sought Kshs 3,080,000/- being lost earnings/income.

53. The Court can do no better than endorse the legal principle outlined by the Supreme Court of Uganda in Bank of Uganda v Tinkamanyire (2008) UGSC 21 that

> The contention that an employee whose contract of employment is terminated prematurely or illegally should be compensated for the remainder of the years or period when they would have retired is unattainable in law.

Compensation

54. In terms of compensation, considering that Claimant had served the Respondent for about 2 years cumulatively and he had 11 months remaining on the second contract, the Court would have awarded the equivalent of 6 months gross salary as compensation.

55. Considering those factors, the Court would have been of the view that the equivalent of 6 months gross wages as compensation would be fair and appropriate (gross salary was Kshs 280,000/-).

Pay in lieu of notice

56. The Claimant was given a 1-month notice of termination but opted to leave immediately. This head of relief is not available to him.

Discrimination

57. Although alleging racial discrimination, the Claimant did not prove such discrimination to the required standard.

58. Regrettably, this Court finds that the Claimant was estopped from pursuing the claims herein based on the discharge.

Conclusion and Orders

59. From the foregoing, the Court finds and declares that Claimant was estopped from pursuing the claims on the basis of the discharge signed on 9 October 2015.

60. The Cause is dismissed with an order that each party bears own costs.

61. It is regretted that this Judgment could not be delivered as earlier scheduled on 17 April 2020 due to the declaration of COVID19 pandemic.

DATED, SIGNED AND DELIVERED THROUGH VIDEO/EMAIL IN NAIROBI ON THIS 8TH DAY OF MAY 2020.

RADIDO STEPHEN

JUDGE

Appearances

For Claimant Mr. Okongo instructed by Beniah Okongo & Co. Advocates

For Respondent Mr. Agwara instructed by Prof. Albert Mumma & Co. Advocates

Court Assistant Lindsey/Judy Maina