



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CIVIL APPEAL 50 OF 2018

(Before Hon. Justice Hellen S. Wasilwa on 8th October, 2020)

JACOB BUHUNGI ELAKI.....APPELLANT

VERSUS

ATTORNEY GENERAL.....RESPONDENT

(Being an appeal from the Judgment of the Honourable Muketi (Mrs.)

Acting Senior Principal Magistrate delivered on 28th June 2007

in Nairobi CMCC 7177 of 2004)

JUDGMENT

1. In the year 2000, the government introduced a staff retrenchment programme in order to reduce its wage bill and the work force in the civil service. Unfortunately, the Appellant was one of those affected as he received a letter on 31/8/2000 informing him that he had been selected under the programme and that he should vacate his office by 1/9/2000. He challenged this decision by lodging two appeals to the Public Service Commission and the Permanent Secretary, Ministry of Finance and Planning.

2. Dissatisfied by the outcome, the Appellant filed Nairobi HCCC 1947 of 2001 which was later transferred to Milimani Chief Magistrates' Court and redesignated as Nairobi CMCC 7177 of 2004.

3. The case was heard but the suit was dismissed by the trial Court in its judgment delivered on 28/6/2007 because the evidence on record had failed to establish a case for illegality of the Appellant's early retirement by the Public Service Commission.

4. Consequently, the Appellant lodged this appeal to challenge the decision of the trial Court delivered on 28/6/2007 on the following grounds:-

a. The Learned Magistrate erred and failed to decide the issues in the case which had been framed and were before her.

b. The Learned Magistrate erred in holding that because the Government had adopted a policy to retrench its employees including the Appellant then it was legal.

c. The Learned Magistrate failed to determine whether the retrenchment was provided for in law and in the contract of employment between the Plaintiff and the Government and in the other terms and conditions under which the Plaintiff was employed including the Civil Service Code of Regulations.

d. The Learned Magistrate erred in failing to determine and consider whether the said retrenchment was in fact not a redundancy under the then Employment Act Cap 226, Laws of Kenya and for which the Appellant was entitled to redundancy benefits.

e. The Learned Magistrate in failing to assess and determine the damages and benefits if any the Appellant would have been entitled to had she found that his services with the Government had been unlawfully and illegally terminated.

5. He therefore sought the following reliefs from this Court:-

a. This appeal be allowed and lie (sic) of an order dismissing the Appellant's suit be substituted an order declaring that the Appellant's retirement from the Public Service was wrongful and illegal.

b. The Appellant be awarded such sum of money as compensation for the illegal and wrongful termination of employment as may be reasonable in the circumstances.

c. The costs of this appeal and in the Court below be awarded to the Appellant.

6. By consent, the appeal was dispensed with by way of written submissions with both parties filing their submissions. The Respondent opposed the appeal through his submissions.

The Appellant's Submissions

7. In his submissions, the Appellant gave a background of the matter before he filed this appeal. He also referred this Court to the cases of **Peter Baiye Gichohi & Another & Others vs the Honourable Attorney General; Nakuru HCC 395 of 2001 [2012] eKLR** and **James Nyangiye & Others vs the Honourable Attorney General; Cause 550 of 2013 [2015] eKLR** where civil servants had challenged their retrenchment under the retrenchment programme, and submitted that he ought to be awarded as follows

a. Golden handshake of Kshs. 40,000.00.

b. Six months' salary in lieu of notice under the Civil Service Regulation of Kshs. 37,350.00.

c. Fifteen days salary for each year worked for 21 years under Section 16A (I) (f) of the Employment Act of Kshs. 65,362.50.

d. Four months' salary as aggravated and exemplary damages of Kshs. 24,900.00.

e. A declaration that the Appellant being permanent and pensionable be paid lump sum of his monthly pension from time of confirmation in employment to the date of payment of such pension and thereafter to receive monthly pension and arrears from the date of retirement for life and thereafter to his dependents for five years in terms of the pension rules and regulations applicable.

f. The amounts to be paid to the Appellant under (a), (b), (c) and (e) to be paid with interests at Court rates from the time of confirmation of employment i.e on attaining two years of service, till payment in full.

g. The amount to be paid under paragraphs (d) above to be paid with interest at Court rates from the date of retrenchment i.e 1st September 2000 until payment in full.

h. The costs of this appeal and the court below to be awarded to the Appellant.

8. In light of the above, the Appellant urged this Court to allow the appeal, set aside the judgment of 28/6/2007 and substitute the same by entering judgment in terms of the prayers listed above.

The Respondent's Submissions

9. This being a first appeal, the Respondent submits that this Court has the role of evaluating, re-assessing and re-analyzing the extracts on record and determine whether the conclusion reached by the trial Court was sound.

10. He contends that the Appellant's suit was premature and offended the principle of exhaustion of remedies. He submits that at the time the Appellant was instituting the suit, the second appeal had not been determined as he had admitted during cross-examination. He relied on the case of **Republic Vs Kenya Urban Roads Authority & 2 Others ex parte Cytonn Investments Management Limited [2017] eKLR** where the Court held:-

“Therefore, where there is an alternative remedy and procedure available for the resolution of the dispute, like in this case where the Liaison Committee exists to receive and consider the dispute between and among the parties hereto, that remedy ought to be pursued and the procedure adhered to”.

11. The Respondent submits that this Court is not bound by the decisions in Nakuru HCC No. 395 of 2001, Nairobi HCC No. 1649 of 2001 and Industrial Cause 550 of 2013 as they were not test suits to the Appellant's case in the trial Court and which they were not a party to. It is his position that the Appellant is seeking to have this Court enforce judgments and orders of another Court by provoking an improper procedure, hence an abuse of the Court process. He has relied on the cases of **Daniel Otieno Migore Vs South Nyanza Sugar Co. Limited [2018] eKLR** and **Independent Electoral and Boundaries Commission & Another vs. Stephen Mutinda Mule & 3 Others [2014] eKLR** where the respective Courts observed that the evidence adduced must be in consonance with the pleadings and any evidence that varies from the pleadings must be disregarded.

12. The Respondent submits that the Appellant's retrenchment was in accordance with the applicable law in force at the time, particularly, section 16A of the Repealed Employment Act, Cap 226.

13. For instance, since the Appellant was not a member of a trade union, he was notified of his retrenchment vide the letter dated 31/8/2000. No evidence was adduced to the contrary. The Claimant was also given an opportunity to appeal the decision which appeal was dismissed.
14. He lodged a second appeal which had been pending by the time of filing the suit. Additionally, before the retrenchment exercise was commenced, assessment on targeted employees was done and a proposal forwarded to a committee, which made recommendations on who was to be retrenched and forwarded to the Public Service Commission, by dint of Regulation 20 of the Public Service Regulations under the Service Commission Act, Cap 185 (Repealed).
15. Finally, he urged this Court to dismiss the Appeal with costs.
16. I have examined all the submissions of the Parties and the record of appeal as submitted before this Court. This being a first appeal in this matter, this Court has a duty to reexamine the evidence afresh and make a determination.
17. From the evidence before Court, the Appellant was employed in the Public Service Commission of Kenya in 1977 as a Clerical Officer and was to retire at age 55 years. He could be subjected to an early retirement at age 50 years.
18. However, when he was 47 years old, he was retrenched by the Public Service Commission with effect from 1/10/2000. The letter notifying him of the retrenchment was dated 28/8/2000.
19. The Appellant averred that before the retrenchment exercise, there was some staff performance assessment done by one William who was not the Appellant's supervisor and with whom the Appellant had serious personal differences.
20. The Appellant also indicated that by virtue of his employment, there was provision for forced retirement. The Appellant therefore contends that the termination of his employment was illegal and wrongful and against the terms of his employment.
21. The Respondent denied any wrong doing in the termination of the Appellant.
22. When the trial Magistrate considered this Claim, she made a finding that there was no wrong doing on the part of the Respondent and so dismissed the Appellant's Claim.
23. Having considered the above evidence, the only issue for this Court's determination is whether the termination of the Appellant was fair and legal. From the evidence of the Appellant he was selected for retrenchment by the Respondent and informed of the same vide a letter dated 28/8/2000. The termination was with effect from 1/10/2000.
24. Under the repealed Employment Act, (Cap 224 Laws of Kenya), Section 16A states as follows:-
1. **"A contract of service shall not be terminated on account of redundancy unless the following conditions have been complied with:-**
 - a. **the union of which the employee is a member and the Labour Officer in charge of the area where the employee is employed shall be notified of the reasons for, and the extent of, the intended redundancy;**
 - b. **the employer shall have due regard to seniority in time and to the skill, ability and reliability of each employee of the particular class of employees affected by the redundancy;**
 - c. **no employee shall be placed at a disadvantage for being or not being a member of the trade union;**
 - d. **any leave due to any employee who is declared redundant shall be paid off in cash;**
 - e. **an employee declared redundant shall be entitled to one month's notice or one month's wages in lieu of notice;**
 - f. **an employee declared redundant shall be entitled to severance pay at the rate of not less than 15 days pay for each completed year of service as severance pay".**
25. It was therefore mandatory under the law before any redundancy could occur, what is provided above had to subsist. Notice period of one month was mandatory and consideration of seniority and then a payment to be made.
26. In case of the Appellant, he was given ample notice as required by law. The Appellant has not submitted that he was not given due consideration in terms of 1st in 1st out and neither has he explained what redundancy package he was paid for this Court to assess whether he was paid according to law or not.
27. Infact even the documents he seeks to rely on in this case have not been attached including even the termination letter.
28. This Court finds it difficult in the circumstances to assess whether the termination was fair or not in absence of the requisite documentation. In the circumstances, I find the Appeal without merit and I dismiss it accordingly.
29. There will be no order as to costs.

Dated and delivered in Chambers via zoom this 8th day of October, 2020.

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Kioko for Respondent – Present

Keyonzo for Appellant – Present