



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL NO. 5 OF 2017

(Before Hon. Justice Mathews N. Nduma)

JOSEPH MAOSA BISONGA.....CLAIMANT

VERSUS

LAKE BASIN DEVELOPMENT AUTHORITY.....RESPONDENT

J U D G M E N T

1. The appeal is against the Judgment of the then Chief Magistrate Kisumu Hon. Ong'udi (Mrs) delivered on 16th May, 2007.
2. The crux of the appeal is that the learned Magistrate erred in law and fact in dismissing the appellant's case against the weight of evidence.
3. That the Magistrate did not make a proper assessment of the evidence on record thereby leading to a miscarriage of justice.
4. That the Magistrate erred in failing to find that though the retrenchment was a Government exercise, the correct procedure as per guidelines in circular was not followed in identifying the appellant as one of those to be retrenched.
5. The Learned Magistrate also erred in failing to make assessment as to quantum of damage that would be payable to the appellant.
6. The Learned Magistrate erred also in not reinstating the appellant to his job with full pay.
7. Finally, the Learned Magistrate erred in law and fact in allowing the counter claim by the Respondent in the face of the unlawful dismissal of the Appellant by the Respondent.

Facts of the Case

8. The Appellant was employed by the Respondent on 11th February, 1997 as an accountant. By a letter dated 24th June, 2002, the Managing Director, one Mr. George Ochieng included the Appellant as one of the employees to be retrenched.
9. The retrenchment was pursuant to a circular dated 7th November, 1995 ref. no. 13/19 A which authorized National Steering Committee of the Civil Service Reform Programme and provided responsibilities and procedures of retrenchment and safety net proposals.
10. A further circular dated 23rd June, 2000 ref. no. OP/3/19A laid down the steps and sequence of retrenchments.
11. The Appellant stated that the Respondent did not follow the retrenchment steps and sequences set out in the circulars. That the selection of the Appellant for retrenchment was therefore unlawful and unfair.
12. The Appellant, in the amended plaint claimed salary arrears for July 2002 to date of filing suit and in the alternative reinstatement.
13. The Appellant also sought a permanent injunction restraining the Respondent from removing him from the payroll or in any manner interfering with his duties. Furthermore the Appellant sought an injunction restraining the Respondent from evicting him from the residential house allocated to him by the Respondent being Kanyakwar Block C/6.
14. The Claimant claimed damages for loss and damages suffered.
15. Interim orders were issued pending the hearing and determination of the suit.

16. In its defence, the Respondent stated that the Appellant was sent on early retirement vide a letter to the P.S Ministry of Agriculture and Rural Development dated 24th June, 2002. The Appellant had therefore ceased being an employee of the Respondent with effect from 28th June, 2002.

17. That the Appellant was served with final notice to vacate the Respondent's premises before 16th August, 2002.

18. That the Appellant had simultaneously filed HCCC 20 of 2002 on the same subject matter. The Respondent sought the suit to be dismissed on this ground.

19. The Respondent further urged that the court lacked jurisdiction to order specific performance of a contract of employment. That only damages would be available to the Appellant, if at all the case had merit which was denied. Amended defence and counter claim was allowed vide a ruling delivered by the learned Magistrate on 17th August, 2005.

20. The Respondent stated that the name of the Appellant had been inadvertently left out in the original list of retrenchees. However he was retrenched together with others on 30th June, 2002. That he was unlawfully staying in the Respondent's premises since then and had refused to vacate. That the retrenchment was procedural and lawful. That the committee charged with selection mandate had identified the Appellant for retrenchment. That the Rules and procedures issued by the government were followed in the retrenchment process.

21. The Respondent counter claimed rent for the house occupied by the Appellant at a commercial rate of Kshs.7,000 per month from the date he ceased being a staff member and vacation notice issued.

Determination

22. The court has carefully considered the entire record of appeal. This being a first appeal, the court may relook, the evidence afresh and determine the issues of law and fact arising therefrom. The court may however, only depart from the finding of the Learned Magistrate on the principles set out in the case of **Sumaria and Another Vs. Allied Industries Limited (2007) KLR** as follows:-

“Being a first appeal, the court was obliged to consider the evidence, re-evaluate it and make its own conclusion bearing in mind that the Court of Appeal would not normally interfere with a finding of fact by the trial court unless it was based on misapprehension of the evidence or that the judge has shown demonstrably to have acted on wrong principle in reaching the finding he did”

23. The court is satisfied that the Learned Magistrate considered all the relevant facts placed before her and applied the law on retrenchment properly.

24. The Learned Magistrate did not err in reaching the finding of fact that the Appellant, had been identified for retrenchment properly by the committee that was mandated to perform the task in terms of the Government circulars issued to kick start and guide the process.

25. The Appellant worked in the marketing section and in terms of the letter by the Managing Director dated 24th June, 2002 all staff in the department were retrenched. The Learned Magistrate found correctly that the Appellant was not discriminated in this exercise therefore. The Magistrate found that the Appellant had not pleaded any malice in the amended plaint and had failed to prove discrimination on any ground before court.

26. It is the court's considered view and finding that the Learned Magistrate did not err in dismissing the claim for unlawful dismissal. The Appellant enjoyed interim orders during the pendency of the case and was paid salary though not working for a period of 5 years as at the time judgment was delivered.

27. The Learned Magistrate allowed the counter claim and awarded the Respondent unpaid rentals at the rate of Kshs.4,000 per month amounting to Kshs.360,000 for the period July 2002 to 31st May, 2007. This was a correct finding by the Learned Magistrate and the court has no reason to interfere with it.

28. In the final analysis, the Appeal is dismissed with no order as to costs.

Dated and Signed in Kisumu this 12th day of July, 2018

Mathews N. Nduma

Judge

Appearances

L. G. Menezes & Co. Advocates for the Appellant

Mr. Yogo for Respondent

Chrispo – Court Clerk