



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 5 OF 2018

(Being a Partial Appeal against the Ruling and Order of the HIV and AIDS Tribunal Delivered by Hon. Jotham O. Arwa, the Tribunal's Chairman, on 27th April 2018 in HAT Case No.007 of 2017 at Nairobi)

AVERY (EAST AFRICA) LIMITED.....APPELLANT

- VERSUS -

JMM.....1ST RESPONDENT

AGA KHAN HOSPITAL.....2ND RESPONDENT

(Before Hon. Justice Byram Ongaya on Thursday 12th July, 2018)

JUDGMENT

The appellant filed a memorandum of appeal on 28.05.2018 through Muthaura Mugambi Ayugi & Njonjo Advocates. The appellant being partially dissatisfied with the ruling and order by the HIV and AIDS Tribunal made on 27.04.2018 partially appealed upon the following grounds:

- 1) That the Tribunal erred in law and fact in returning the finding that the HIV and AIDS Tribunal had jurisdiction to adjudicate over the claim for severance pay for unfair termination despite the express provisions of section 12 of the Employment and Labour Relations Court Act, Chapter 234A of the Laws of Kenya.
- 2) That the Tribunal erred in law and fact by failing to appreciate and find that the 1st respondent's claim for severance pay against the appellant was statute barred under section 90 of the Employment Act, 2007.
- 3) That the Tribunal erred in law and fact in dismissing the appellant's preliminary objection despite making a finding that it has no jurisdiction to hear and determine questions of alleged violation of constitutional rights.
- 4) That the Tribunal misconstrued and misapplied the rationale and finding as set out in the case of **Law Society of Kenya Nairobi Branch –Versus- Malindi Law Society & Others [2017]eKLR** in dismissing the appellant's preliminary objection.
- 5) The Tribunal misdirected itself in giving consideration to irrelevant matters and or failed to give consideration to relevant matters in arriving at its decision.
- 6) That the Tribunal failed to appreciate and consider the submissions and arguments, and the authorities filed by the appellant, which failure has occasioned a miscarriage of justice.
- 7) As a consequence of the foregoing, the Tribunal erred in dismissing the appellant's preliminary objection.

The appellant prayed for:

- a) The partial appeal is allowed.
- b) The ruling made by the HIV and AIDS Tribunal on 27.04.2018 is partially overturned and the 1st respondent's claim as against the appellant be dismissed with costs.
- c) The costs of the appeal and of the proceedings before the HIV and AIDS Tribunal be borne by the 1st respondent.

d) Such other orders be made to meet the ends of justice as the Honourable Court may deem appropriate.

The circumstances leading to the appeal are as follows.

The 1st respondent filed a statement of claim before the Tribunal being HAT Case No. 007 of 2017. The appellant was named as the 2nd respondent and the 2nd respondent herein was as well the named 1st respondent in the statement of claim. It was the claimant's case that he was employed by the appellant. Further on 12.09.2011 the claimant developed an unknown mental illness and the employer, now the appellant, sent him to the 2nd respondent hospital for a medical check up. It was the claimant's case that the hospital then took advantage of the situation and proceeded to conduct a HIV test on the claimant without the claimant's consent. It was the claimant's case that the hospital then disclosed to the appellant the outcome of the HIV test without explaining to the claimant the relevance of the test. Further, it was the claimant's case that the appellant terminated his contract of employment on 06.12.2011 by hoodwinking him to sign an already prepared resignation letter and the claimant alleged that the appellant had taken that action based on the medical report provided by the 2nd respondent, the hospital, which disclosed that the claimant was HIV positive. The claimant averred that he was thereby stigmatized and discriminated amongst his colleagues, suffered psychological harm and lowering his dignity and self-esteem. It was the claimant's case that he was not capable of giving his consent for the HIV testing and further that he had no alternative person to give the consent on his behalf to the appellant.

Further, it was his case that on 25.05.2015 the hospital gave him the said medical report which was almost 4 years after having disclosed the said results to the 2nd respondent – and he alleged discriminate testing of HIV status without his consent or knowledge contrary to section 14(1) (c) of the HIV and AIDS Prevention and Control Act; degrading and dehumanising conduct by sharing his HIV status with his then employer without his consent contrary to Article 28 of the Constitution of Kenya 2010; violation of the right to privacy; violation of doctor – patient confidentiality. The claimant prayed for judgment against the appellant and the 2nd respondent herein, jointly and severally, for:

- a) Severance pay for unfair termination.
- b) Exemplary damages.
- c) General damages.
- d) A public apology by them to the claimant.
- e) Costs of the suit.
- f) Any other or further remedy that the Court shall deem fit to grant.

The hospital filed the preliminary objection dated 09.11.2017 opposing the hearing of the suit (through Menezes & Partners) upon the following grounds:

- a) That the claim was statutorily time barred and the Honourable Tribunal has no jurisdiction to hear, entertain and determine the matters in question herein by virtue of section 4(2) of the Limitation of Actions Act.
- b) That under order 32 of the Civil Procedure Act, Cap. 21 of the Laws of Kenya the claimant has no legal capacity to file the suit by virtue of his mental disability as admitted in his statement of claim and the same ought to be struck out as provided for under order 32 of the Civil Procedure Act.
- c) That consequentially in view of the foregoing the claim as filed by the claimant herein is incompetent, fatally defective and the same should be struck out.
- d) That the suit was an abuse of the Honourable Tribunal's trial process and should be struck out with costs to the 1st respondent.

The appellant also filed a preliminary objection on 10.11.2017 that the claim be dismissed with costs upon the following grounds:

- a) By reason of section 12 of the Employment and Labour Relations Court Act, the Tribunal lacked jurisdiction to adjudicate over the claim for severance pay for unfair termination.
- b) The claim for severance pay was statute barred under section 90 of the Employment Act, 2007.
- c) The tribunal lacked jurisdiction in view of Article 165(3) (b) of the Constitution of Kenya and in particular questions of alleged violation of constitutional rights claimed by the claimant being alleged discrimination contrary to Article 27 of the Constitution; alleged degrading and dehumanising conduct contrary to Article 28 of the Constitution; and alleged violation of the right to privacy contrary to Article 31 of the Constitution.
- d) The entire claim or suit as against the appellant (therein 2nd respondent) is bad in law, untenable and consequently should be dismissed with costs.

The 2nd respondent in the appeal, the hospital, supported the appeal and did not file submissions.

The appellant and the 1st respondent filed the submissions to support their respective positions. The 1st respondent filed submissions through Dome & Kedogo & Company Advocates. The Court has considered the material on record and the submissions made for the appellant and the 1st respondent.

The **1st issue** for determination is whether the Tribunal had jurisdiction to entertain, hear and determine the claims and prayer for severance pay in view of section 12 of the Employment and Labour Relations Court Act, Cap.234B. The section vests in the Employment and Labour Relations Court the exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of the Act or any other written law which extends jurisdiction to the Court relating employment and labour relations including disputes relating to or arising out of employment between an employer and an employee. It is submitted for the appellant that the issue of severance pay for unfair termination is between an employer and employee and falls within the jurisdiction of the Court and not the Tribunal.

It was submitted for the 1st respondent that the Court, per section 12(5) of the Act has jurisdiction to hear and determine appeals arising from decisions of the Registrar of Trade Unions; and decisions of any other local tribunal or commission as may be prescribed under any written law. Further the HIV and AIDS Tribunal was one such local tribunal contemplated under section 12(5) of the Act and all appeals arising from decisions of the Tribunal would go to the Court.

Under section 26 of the HIV and AIDS Prevention and Control Act, the tribunal shall have jurisdiction:

- a) to hear and determine complaints arising out of any breach of the provisions of the Act;
- b) to hear and determine any matter or appeal as may be made to it pursuant to the provisions of the Act; and
- c) to perform such other functions as may be conferred upon it by the Act or any other written law being in force.

The Tribunal in deciding the preliminary objection referred to the Court of Appeal holding in **Law Society of Kenya Nairobi Branch – Versus- Malindi Law Society & Others [2017]eKLR** that Parliament could by legislation confer jurisdiction, functions, and powers on the courts or local tribunals established under Article 169(1) and as envisaged in Article 169(2) of the Constitution. The Tribunal then held thus, **“Accordingly we hold that Parliament properly conferred jurisdiction upon this tribunal to deal with matters that would ordinarily be dealt with by the ELR Courts.”** The Court has considered that finding and returns that the Honourable Tribunal erred as there is no provision in the HIV and AIDS Prevention and Control Act that confers the Tribunal with jurisdiction to hear and determine the disputes in employment and labour relations matters as envisaged in section 12 of the Employment and Labour Relations Court Act, Cap.234B as read with Article 162(2) (a) and 165(3) and (5) of the Constitution. There being no provision for such jurisdiction and an appeal to the Court from decisions of the Tribunal, the Court returns that it was misconceived to be submitted for the 1st respondent that the Tribunal’s decision was appealable to the Court. The Court returns that the right to appeal and the authority to hear and determine the appeal must be conferred by written law and in this case, it has not been shown that the Tribunal’s decisions were appealable to the Employment and Labour Relations Court – and the Court will return to this issue on the procedural propriety of the present appeal later in this judgment. Thus, the Court returns that the 1st ground of appeal would succeed.

The **2nd issue** for determination is whether the claim and prayer for severance pay and unfair termination were time barred under section 90 of the Employment Act, 2007. The tribunal found that the 3 years of limitation under the section started running on 25.05.2015 when the claimant was given the medical report in issue. The Court finds that the Tribunal erred because the claimant became aware of his dismissal on 06.12.2011 when he signed, in his own pleadings, **“...an already prepared resignation letter.”** The Court finds that for a cause of action alleging unfair termination and payment of severance pay, the same must have accrued on 06.12.2011 and as at 16.10.2017 when the suit was filed before the Tribunal, such cause of action was clearly time barred under section 90 of the Act. As submitted for the appellant, the Court is bound and follows the Court of Appeal holding in **Attorney General & Another –Versus- Andrew Maina Githinji & Another [2016]eKLR** that such suits that are time barred would be liable to being struck out.

The **3rd issue** for determination is whether the Tribunal had the jurisdiction to determine the alleged violations of fundamental rights and freedoms. The Court follows the holding in **Royal Media Services –Versus- Attorney General & 6 Others[2015]eKLR** (Mumbi Ngugi J) that only the High Court and Courts of similar status (being the Employment and Labour Relations Court, and, the Environment and Land Court) currently have the jurisdiction to hear and determine matters of violation of fundamental rights and freedoms in the Bill of Rights. In terms of Article 10, the Tribunal would be entitled to uphold the principles and values of national governance as enumerated but the ultimate duty to interpret the Constitution for enforcement of the rights and freedoms in the Bill of Rights would vest in the Courts as held in the cited case.

The Court returns to the procedural manner the present appeal is before the Court. The 1st respondent did not raise objection as to whether the appellant was entitled to move the Court by way of an appeal. The parties have not cited a provision of written law that provides that appeals from decisions of the Tribunal may be made to this Court and as per section 12(5) of the Employment and Labour Relations Court Act, Cap.234B. Thus it would be that the appeal as filed was procedurally irregular for want of procedural propriety. It could be that the appellant would have moved the Court by way of judicial review or such other appropriate original process. The Court has been guided by Article 159 (2) (b) and (d) that justice shall not be delayed; and justice shall be administered without undue regard to procedural technicalities; and that the respondents raised no objections. In such circumstances, the Court will determine the matter on merits but each party will bear own costs of the proceedings. In so doing, the Court considers that in any event, the matter would have come to the Court as per section 12 (5) the Employment and Labour Relations Court Act, Cap.234B and no party appears to have been prejudiced by the procedural irregularity.

In conclusion the appeal is hereby determined with orders as follows:

- a) The declaration that the Tribunal does not have jurisdiction to hear and determine the questions of alleged violation of constitutional rights as claimed by the claimant being alleged discrimination contrary to Article 27 of the Constitution; alleged degrading and dehumanising conduct contrary to Article 28 of the Constitution; and alleged violation of the right to privacy contrary to Article 31 of the Constitution.
- b) The declaration that the Tribunal lacked jurisdiction to entertain, hear and determine the claims and prayer for severance pay in view of section 12 of the Employment and Labour Relations Court Act, Cap.234B as read with Article 162 (2) (a).
- c) The declaration that the claim and prayer for severance pay and unfair termination were time barred under section 90 of the Employment Act, 2007.
- d) The declaration that the Court was irregularly moved by way of an appeal but for provisions of Article 159(2) (b) and (d) of the Constitution.
- e) Each party shall bear own costs of the proceedings.

Signed, dated and delivered in court at **Nairobi** this **Thursday 12th July, 2018**.

BYRAM ONGAYA

JUDGE