



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT ELDORET
APPEAL NO. 2 OF 2017
(ORIGINALLY ELDORET HIGH COURT CIVIL APPEAL NO. 83 OF 2008)

KENYA FLOURSPAR LIMITED

APPELLANT

V

MOSES SEGITE

RESPONDENT

(Being an Appeal from the Judgment and Decree of Honourable W.N. NJAGE, Senior Principal Magistrate, dated and delivered on 29th day of July 2008 in ELDORET CMCC No. 1144 of 2002)

JUDGMENT

1. Moses Segite (Respondent) instituted legal proceedings against Kenya Fluorspar Company Ltd (Respondent) in the High Court in Eldoret High Court Civil Case No. 94 of 2000 alleging wrongful/breach of contract. The Respondent was seeking unpaid balances of dues amounting to Kshs 881,261/55
2. The suit was transferred for hearing and determination before the Magistrates' Court, and in a judgment delivered on 29 July 2008, the trial Court found that the Respondent had proved his case on a balance of probabilities and was entitled to Kshs 967,836/05 as balance of dues.
3. The Appellant being aggrieved filed a Memorandum of Appeal on 18 August 2008 listing some 9 Grounds, being
 1. THAT the learned Magistrate erred in law and in fact holding the Respondent had proved his case on a balance of probabilities when the case is in contrary.
 2. THAT the learned Magistrate erred in law and in fact in disregarding the evidence tendered by the Defendant.
 3. THAT the learned Magistrate erred in law and in fact in disregarding the submissions made and filed by the Appellant in arriving at judgment in the case.
 4. THAT the learned Magistrate erred in law and in fact in failing to take evidential proof that the Respondent had been duly paid his dues upon voluntary termination of the suit contract.
 5. THAT the learned Magistrate erred in law and in fact in awarding judgment of Kshs. 967,836.50 in favour of the Respondent.

6. THAT the learned Magistrate erred in law and in fact in arriving at a decision that was against the weight of evidence on record and weight of law.

7. THAT the learned Magistrate erred in law and in fact in failing to consider that the Respondent was duly and procedurally released from employment.

8. THAT the learned Magistrate erred in law and in fact in failing to take judicial notice that the suit redundancy scheme was lawful and not for malicious purposes.

9. THAT the learned Magistrate erred in law and in fact in awarding the Respondent excessive exemplary and general damages not proved by the Respondent before court.

4. On 3 March 2009, the High Court granted stay of execution pending appeal on condition that the decretal sum was deposited into a joint escrow account in a bank to be mutually agreed on by the counsels on record.

5. On 2 February 2016, the parties consented to the determination of the appeal based on the record and submissions to be filed.

6. The Appellant filed its submissions on 13 May 2016, while the Respondent filed his submissions on 27 June 2016.

7. When the appeal came up for directions before the High Court on 15 March 2017, the High Court, citing jurisdiction, directed that the Appeal be transferred to this Court.

8. This Court has given due consideration to the material before it including the submissions.

Role of this Court on appeal

9. The role of a first appellate Court was discussed in *Kamau v Mungai* (2006) 1 KLR 150 where it was held that this being a first appeal, it was the duty of the Court.... To re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard the witnesses and hence making due allowance for that.

Evaluation

10. It is not in dispute that the Respondent's employment contract was brought to an end on account of redundancy.

11. The dispute relates as to whether the redundancy was wrongful and what the Respondent was entitled to in terms of contractual agreement.

12. The Court will therefore look at each item of due(s)/reliefs sought by the Respondent and awarded by the trial Court against testimony presented and the documents produced in Court. But first, whether the redundancy was wrongful.

Wrongful redundancy

13. The Respondent in his testimony stated that in terms of the collective bargaining agreement in place between Kenya Quarry and Mines Workers Union and Kenya Fluorspar Company Ltd, prior consultations with the Union were required before declaration of redundancies and that no such consultations were held.

14. He also testified that he never agreed to the voluntary redundancy as contemplated by the collective bargaining agreement. He also stated that he did not know how he was chosen for redundancy (Last in First Out) as he was only 34 years old.

15. He further testified that the redundancy letter indicated that he would be paid 1 month pay in lieu of notice instead of the contractual 3 months as provided for in the collective bargaining agreement.

16. The Appellant did not lead any evidence during the hearing.

17. With the testimony from the Respondent, it was incumbent upon the Appellant to lead evidence to controvert the Respondent's testimony on prior consultations with the Union, compliance with the terms of the collective bargaining agreement, and that the Respondent consented to the voluntary redundancy.

18. In my view, therefore the trial Court did not err in finding that the Respondent had proved his case on *wrongful redundancy* on a balance of probabilities. Clearly, there was no demonstration that the terms of the collective bargaining agreement were satisfied. Grounds 1 and 2 of the Appeal therefore lack merit.

8 months' salary

19. The Respondent sought Kshs 54,320/- on account of 8 months' salary.

20. The record of the trial Court appear inconclusive as to what the 8 months' salary was for (period). The only reference to this head of claim in fact appears in cross examination.

21. The Respondent appears not to have laid an evidential basis for this head of claim, and therefore the trial Court was in error in allowing it.

Terminal benefits

22. Under this head of claim, the Respondent prayed for Kshs 641,655/-.

23. The Respondent's testimony was that in terms of clause 6(4) of the collective bargaining agreement (correct clause is 16(d)(iv) as read with 6(c)(iv), he was entitled to 30 days pay for each year of completed service and therefore he was seeking Kshs 728,227/50.

24. Clause 16(d)(iv) as read with clause 6(c)(iv) of the collective bargaining agreement supports the testimony by the Respondent that he was entitled to terminal benefits at the rate of 30 days for each completed year of service for employees who had served for more than 10 years.

25. The Respondent was employed by the Appellant effective 1 January 1982 until 1994, a period of about 12 years. At the time of separation, the Respondent was earning Kshs 5,955/- per month.

26. The terminal benefits schedule indicate the Respondent was paid Kshs 76,354/- as terminal benefits.

27. The Respondent's computation of terminal benefits as Kshs 641,655/- for the 12 or so years he served does not add mathematically, for he would have been entitled to terminal benefits roughly equivalent to 12 months wages (1 month per year).

28. The Appellant's computation appears mathematically correct, and therefore the trial Court's award of Kshs 728,277/50 was clearly erroneous.

Severance pay

29. At the material time, and under the statutory framework, severance pay (was)/is an entitlement due to an employee whose position is declared redundant, and therefore the trial Court may not be faulted for awarding Kshs 285,180/- sought as severance pay.

Terminal package of 6 months

30. Under this head, the Respondent sought Kshs 40,740/-.

31. The Court has not found any evidential foundation for this head of claim, and therefore the trial Court erred in awarding the same.

Pay in lieu of notice

32. The Respondent sought Kshs 20,370/- as 3 months' pay in lieu of notice.

33. In terms of clause 16(d)(i) of the collective bargaining agreement between the Appellant and Kenya Quarry and Mine Workers Union, termination on account of voluntary redundancy required 3 months' notice or pay in lieu of notice.

34. Although the termination letter indicated that the Respondent would be paid 1 month pay in lieu of notice, the schedule of dues show he was paid the equivalent of 3 months' salary in lieu of notice, being Kshs 17,620/25.

35. Nothing turns on this ground.

Accrued leave and travelling allowance

36. The Respondent pleaded an entitlement to Kshs 33,600/- under this head and the trial Court awarded the same. His evidence was that he was entitled to Kshs 1,600/-.

37. The Appellant paid the Respondent a total of Kshs 3,220/- on account of accrued leave travelling allowance.

38. Clause 12 of the collective bargaining agreement provide for a leave travelling allowance of Kshs 1,610/- for married employees.

39. No case was made for Kshs 33,600/- instead of Kshs 1,610/- and therefore this Court finds that the award was an error.

Baggage allowance

40. The dues paid to the Respondent included a baggage allowance of Kshs 5,000/- and therefore nothing turns on this point.

Conclusion and Orders

41. After re-evaluating the evidence before the trial Court, this Court will allow the appeal, set aside the trial Court judgment and find and hold that there was wrongful termination of employment through redundancy and award the Respondent

(a) Severance pay Kshs 285,180/-

42. Each party to bear own costs of the appeal.

Delivered, dated and signed in Eldoret on this 29th day of September 2017.

Radido Stephen

Judge

Appearances

For Appellant Nyaundi Tuiyott & Co. Advocates

For Respondent Kalya & Co. Advocates

Court Assistants Nixon/Dorcas