Mutahi v British Army Training Unit Kenya (Cause 242 of 2016)
[2017] KEELRC 152 (KLR) (15 December 2017) (Judgment)

Joseph Kairu Mutahi v British Army Training Unit Kenya [2017] eKLR

Neutral citation: [2017] KEELRC 152 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NYERI

CAUSE 242 OF 2016

B ONGAYA, J

DECEMBER 15, 2017

BETWEEN

JOSEPH KAIRU MUTAHI ..... CLAIMANT

AND

BRITISH ARMY TRAINING UNIT KENYA ..... RESPONDENT

JUDGMENT

1. The claimant filed the memorandum of claim on 04.11.2016 through Chweya & Company Advocates. The claimant prayed for judgment against the respondent for:

    a) Payment of Kshs.7,334,982.00 being Kshs.1,474,416.00 for compensation for unlawful dismissal; Kshs.5,897,664.00 being 50% gratuity as per clause 50(d) of standing order 103; supervisory allowance as per standing order 103 between October 2008 and November 2015 being 10% of basic salary per month making 86 months x Kshs. 12, 286 thus Kshs.1,056,664.00, and one month pay in lieu of notice Kshs.122,868.00.

    b) Costs of the claim.

    c) Interest on (a) and (b) above.

2. It is not disputed that the claimant was working either as a casual worker or ad hoc worker between 1984 and 2002 with the Kings Owns Scottish Regiment amongst other battalions. He was employed indefinitely on 01.10.2002 and served at Laikipia Air Base (East) – LAB (E) at Kshs. 122, 868.00. The claimant served and was deployed at various BATUK Campus including Nanyuki Airstrip, Nanyuki Show ground, Turaco farm and Laikipia Airbase (LAB).

3. It is not in dispute that on 14.07.2016 the claimant was terminated from employment and his rights of appeal were explained to him. He appealed against the termination and on 18.07.2016. He was

informed that his appeal had not been upheld but the termination was upheld. Further there is no dispute that on 24.08.2016 the claimant was issued with a certificate of service. On 10.08.2016, the respondent deposited a sum of Kshs. 1, 216,630.00 in the claimant's bank account but a break down or pay slip was not provided.

4. The claimant's case is that he was not accorded a fair hearing throughout the disciplinary proceedings including at the appeal stage. Thus, the reasons for termination were not established as per section 43 of the *Employment Act*, 2007 because he never saw and cross-examined his accusers.

5. The respondent filed the response on 16.01.2017 through Hamilton Harrison & Mathews Advocates. The respondent prayed that the suit be dismissed with costs to the respondent.

6. The respondent's case is that it became aware of allegations of sexual harassment by the claimant of certain female employees subsequent to which investigatory hearings were conducted in which 24 witnesses as well as the claimant made representations. The respondent then resolved to institute disciplinary proceedings against the claimant on account of alleged sexual harassment, intimidation, and, abusive and insulting behaviour at the workplace. The respondent states that the disciplinary process was undertaken in accordance with internal policies and procedures. The claimant was suspended and then his employment terminated at the end of the disciplinary process. The claimant's conduct, it was pleaded, amounted to a just cause for the termination per section 44 of the Employment Act, 2007. Further, the respondent had been fair because the claimant had been paid in lieu of notice and he had not lost his gratuity.

7. The respondent's further case was that the claimant was not entitled to cross-examine witnesses as a disciplinary proceeding under the employment law was not a quasi-judicial investigation into the allegations of misconduct entailing confrontation and cross examination of witnesses. Further, the respondent had complied with section 45 of the Employment Act, 2007 and all provisions of the Act. The reasons for termination were indicated in the termination letter dated 14.07.2016.

8. The 1st issue for determination is whether the termination of the claimant's employment was unfair.

9. The claimant was suspended from workplace by the letter dated 24.02.2016 due to alleged sexual harassment in the workplace. That was stated to be in accordance with the respondent's Standing Order (SO) 103 paragraphs 32-33, Equity & Diversity policy and the Kenyan *Employment Act.* The allegation was said to constitute gross misconduct. The claimant issued his letter dated 25.02.2016 referring to the respondent's letter of 24.02.2016 and he requested to know the complainants, the nature of complain and that the union representatives be allowed to appear at the disciplinary meeting. The respondent addressed to the claimant the letter of 03.03.2016. The letter stated that the reason for suspension was due to several allegations of sexual harassment and intimidation. The suspension had been imposed pending investigations and did not imply any guilt, and, full pay would be made throughout the suspension period. Further, since disciplinary process was not yet on, union representation was not necessary and further, the disciplinary process being internal, external representation was disallowed. The claimant was invited for an investigatory hearing to be held on 15.03.2016 but which was cancelled as per the letter dated 15.03.2016. By the letter of 29.03.2016, the hearing was rescheduled for 31.03.2016 and the claimant was invited to attend. The letter stated that the same was investigatory and not disciplinary hearing so that the claimant was not entitled to attend accompanied by a union representative. However, he was advised that he could attend accompanied with a work colleague.

10. By the letter dated 25.05.2016, the claimant was invited to attend a disciplinary hearing on 03.06.2016. It was notified that the allegations were of a serious nature, constituting gross misconduct, and could result in the termination of the contract of employment between the parties. A show-cause letter

also dated 25.05.2016 was issued stating that at the disciplinary hearing the question of disciplinary action against the claimant would be considered with regard to sexual harassment, intimidation, and, abusive and insulting behaviour in the workplace. Once again it was notified that the allegations were serious and constituted gross misconduct that may result in the termination of the contract of employment. The respondent also issued a further letter dated 25.05.2016 scheduling the disciplinary hearing on 03.06.2016, repeating the three grounds of alleged misconduct, and advising that the claimant could appear at the hearing with a work colleague of his choice but that he was not entitled to legal representation at that stage.

11. The claimant wrote on 31.05.2016 demanding provision of documents per SO 103 paragraphs 126, 127 and 128 before 03.06.2016. The respondent had written the letter of 31.05.2016 which in his letter of 31.05.2016 the claimant had stated that he had received on 30.05.2016. In that letter of 31.05.2016, the respondent had stated that it was not in breach of the cited provisions of the standing orders thus, "We have provided you with all the required documentation, together with a full copy of the Investigation Hearing. The names of the witnesses have been redacted in order to protect their identity prior to the Disciplinary Hearing taking place. Should the need arise, we will provide the full details to the Labour and Industrial Relations Court." Further, the letter repeated that the disciplinary process was internal and the claimant could only opt to be accompanied by a work colleague and not a union representative. He was entitled to bring his witnesses.

12. The disciplinary hearing appears not to have taken place on 03.06.2016 but was rescheduled to 10.06.2016 as per the respondent's letter of 03.06.2016. The terms on a person to accompany the claimant at the hearing expressly remained the same.

13. The claimant by the letter dated 03.06.2016 confirmed that he had received 22 investigatory hearing statements out of 24 and he requested to be provided with the other 2 statements.

14. The disciplinary hearing was subsequently held on 10.06.2016 and the record of the proceedings was filed by the claimant. The claimant confirmed that he had gone through the 22 investigatory statements as was provided and further confirmed that he was agreeable that copies of the remaining 2 statements that had not been provided would be provided during the proceedings. The record concludes that the claimant's defence was that the allegations were a conspiracy. The claimant denied all allegations in the witness statements. The respondent's presiding officer informed the claimant that the witnesses against him would only be examined and cross-examined at the labour court.

15. By the letter dated 14.07.2016, the claimant's contract of employment with the respondent was terminated effective 14.07.2016 on account of sexual harassment, intimidation, and abuse and insulting behaviour in the work place.

16. First the court returns that the respondent complied with provisions of its SO 103 paragraphs 126 and 127 because the claimant was given a show-cause notice and provided with the investigatory statements prior to the disciplinary hearing.

17. Second, the court has reviewed the record of the investigatory hearing. It was recorded that some female employees had recorded statements whose common thread was that the claimant had made inappropriate sexually orientated comments to them. Further, in almost all cases for the male and female complainants, it was said that the claimant had threatened the victims that their contracts of employment would be terminated if they failed to comply with the claimant's demands or instructions. Further, it was recorded that there was no evidence that the statements had been made in collusion or in an organised witch hunt against the claimant. It was concluded that all allegations when substantiated or proven, would establish a culture of intimidation, fear and harassment of staff by the claimant. Disciplinary action was recommended in view of the long term intimidation and abuse of staff by the

claimant as was suggested by the investigatory hearing. At the end of the investigatory hearing, the court returns that it was clear that a disciplinary hearing would be necessary towards proving, substantiating or establishing the allegations and therefore the claimant's culpability or otherwise.

18. Under section 47(5) of the *Employment Act*, 2007 as read with section 43 of the Act, the respondent bears the burden to prove the grounds for termination. It is clear that the disciplinary process was meant to verify the reasons for termination as recommended in the preliminarily investigatory hearing's report. SO 103 (128) on the conduct of hearings provides that, after an investigatory hearing, a presiding officer presides over the subsequent disciplinary hearing and although there is no right to be accompanied, any request will be acceded to. It is further provided that the presiding officer will conduct the disciplinary hearing ensuring that the Locally Engaged Civilian (LEC) is permitted to hear the statements and ask questions of the submitting individual. First, the presiding officer denied the claimant appearance accompanied with a trade union representative as envisaged in section 43 of the Act and, generally as per SO 103 (128). RW testified that the claimant was not a member of the union. The claimant did not show that he was a member of the union. Thus, in the court's opinion, his demands to appear with a union representative were largely unfounded and the court returns as much. Second, the presiding officer did not permit the claimant to ask the complainants questions as per provisions of SO 103 (128). The presiding officer promised that the complainants would be available for questioning in court but throughout the hearing, that promise was not honoured. As urged for the respondent in the evidence by the respondent's witness (RW) at the preliminary investigatory hearing, it was necessary that the names of the complainants be held in confidence and be redacted in the ensuing preliminary investigatory report because at that stage there was no decision arrived at by the respondent for the claimant to defend himself. The non-disclosure and confidential preliminary investigation would serve the obvious purpose of maintaining harmony amongst the employees especially the complainants and the suspect if the complaints or allegations are found baseless and therefore not requiring escalation to the disciplinary hearing. However, once a decision to proceed to disciplinary proceedings was arrived at, it is the opinion of the court that the benefits of such confidentiality at the preliminary inquiry became overridden with the need to afford the suspected officer or employee due process including the principles of natural justice as was envisaged in SO 103 (128).

19. Up to the close of the respondent's case in court, the identities of the complainants was at large and the claimant had not tested the veracity of the allegations by way of asking the complainants such relevant questions as he desired and requested to do. In the circumstances of this case and taking into account the nature of allegations which were based on the oral evidence of the claimant and the complainants as well as taking into account SO 103 (128) the court returns that the claimant had a valid case that it was necessary that he cross-examines the complainants.

20. Indeed, the preliminary investigatory report recommended that the allegations if they were to be true had to be proved and substantiated during the disciplinary hearing. The record of the disciplinary hearing does not show how the presiding officer resolved the words and position of the complainants as per their statement and the words and position by the claimant denying the allegations. In the opinion of the court and as per SO 103 (128), it was only by allowing the claimant to ask the complainants such relevant and material questions that the allegations would be resolved one way or the other as far as the claimant's culpability was concerned. In any event, RW testified that he could not tell the names of the persons who made the unsigned investigatory statements and which he had signed or endorsed his signature at the end of each statement. That RW did not know the identity of the makers of the investigatory statements encourages the court to return that the investigatory statements were fictitious as the makers were mysterious or ghostly. RW confirmed that the claimant could equally not tell the identity of the complainants.

21. While making those findings, the court has considered whether the respondent had instituted a workplace sexual harassment policy as provided in section 6 of the Employment Act, 2007. Throughout the hearing there was no reference to existence of such policy and it was not clear whatever constituted sexual harassment in the respondent's workplace. Further, the measures the respondent had instituted for discouraging, preventing, reporting, investigating, and punishing sexual harassment as envisaged in section 6 of the Act was not referred to or shown to be in existence. It was not also shown that the respondent had brought to the attention of the claimant or its other staff the existence and provisions of such respondent's workplace sexual harassment policy. The court notes that SO 103 (34) (i) prescribe sexual harassment as a gross misconduct but the court finds that such prescription fell short of the mandatory workplace sexual harassment policy as prescribed in section 6 of the Employment Act, 2007. Accordingly, the court returns that it has been established that the respondent has not instituted a workplace sexual harassment policy as provided for in section 6 of the Act, and, accordingly, the respondent is hereby directed to comply by establishing and filing the policy in that regard and not later than 01.05.2018 and thereafter the matter to be mentioned on a convenient date to confirm compliance.

22. While making that directive, the court has taken into account the mandatory provisions of subsection 6(2) of the Act. Needless to state, the court returns that the respondent failed to establish that the claimant was guilty of sexual harassment as defined in subsection 6(1) of the Act and further, the respondent purported not to disclose the names of the complainants for purposes of investigatory hearing, and, disciplinary hearing. The court returns that the non-disclosure was in the obvious contravention of subsection 6 (3) (b) (v) of the Act. In terms of subsection 6(3) (v) of the Act, the court's opinion is that the preliminary investigatory proceedings and the disciplinary proceedings where sexual harassment is alleged could be confidential but the employee against whom the allegations are made together with the investigating officer or the presiding officer would be entitled to know the identity of the complainants towards ends of justice, as appropriate, in such cases. In the instant case, even the investigating officer, RW, testified that he could not tell the identities of the complainants and which leads the court to finding that the investigatory and disciplinary proceedings fell short of due process and the reason for termination had not been established as at the time of termination.

23. Accordingly, to answer the 1st issue for determination the court returns that the termination of the claimant's employment was unfair for want of a fair and valid reason as provided in section 47(5) as read with section 43 of the Act; and for want of due process entailing cross-examination of witnesses or complainants as per SO 103 (128) and as envisaged in subsection 6(3) (b) (v) of the Act.

24. The 2nd issue for determination is whether the claimant is entitled to the remedies as prayed for. The court makes findings as follows:

    a) Prior to the disciplinary case, the claimant had a clean record of service and he was a dependable employee. For example, on 25.10.2008, Capt. M M Stevenson wrote thus, "3. To summarise Mr M is a first rate Camp Supervisor, who whilst being loyal to his masters (BATUK), strikes an excellent balance in ensuring that those accommodated at Turaco are best served. I would unequivocally recommend that future deployed units use fully his vast experience and at all stages engage him on matters concerning the LEC and infrastructure issues of Turaco." The court has considered the long service on ad hoc basis or casual basis from 1984 to 2002 and thereafter till termination on permanent terms of service and without a break. The court has further considered that the claimant desired to continue in employment and did not contribute to his termination. Accordingly, the court returns that justice will be served by awarding the claimant the maximum compensation under section 49(1) (c) of the Employment Act, 2007 making Kshs.1, 474, 416.00 as prayed for.

b) The claimant has prayed for supervisory allowance as per SO 103 clause 62 between October 2008 and November 2015 at Kshs. 1,056, 664.00. The claimant testified that he served as a supervisor over the period but he was not paid the allowance. He testified that he had been paid the allowance in February and March 2016 but prior to November 2015 the respondent had failed to pay the allowance. The claimant testified that the payment had started at the end of November 2015. The claimant relied upon the job description dated July 2013 which designated him as the LAB (E) FMA supervisor. The respondent's witness (RW) was Major Michael John Ferreington, the respondent's head of human resource since 2013. It was his testimony that the claimant had been on the Industrial Grading System which was reviewed with the consequence that the claimant earned higher than his new grading but he had been allowed to retain the higher salary. Since he was already earning 50% higher than his new grade, RW testified that the allowance could not be paid. First, the court finds that the claimant has not established that he was a supervisor throughout the period from 2009 as was claimed but beginning July 2013. The court has further considered the evidence by RW that the claimant was a Foreman, a position higher than that of a supervisor, but which contradicted the respondent's admission in submissions that the claimant was paid supervisory allowance of Kshs. 12, 286.80 for February 2016 and Kshs. 24, 572.00 per January pay slip for January 2016 and December 2016. The court returns that by the respondent's own action to pay the supervisory allowance, the claimant was entitled to the allowance but the respondent had failed to pay. As submitted for the claimant, he is awarded the allowance at 10% of Kshs.122, 863 per month for 29 months starting July 2013 per the job description which designated him as a supervisor to November 2015 during which he was entitled to the allowance but it was not paid making Kshs. 356, 317.00.

c) The claimant has prayed for Kshs. 5, 897, 664.00 being 50% gratuity as per clause 50(d) of standing order 103. The clause provides that all periods of casual service shall not be reckoned for gratuity purposes but LECs whose contracts have been converted to define or indefinite status will be entitled to have 50% of their previous casual service reckoned for purposes of gratuity payments. The court finds that there was no dispute that the claimant's casual or ad hoc service (starting 1984) converted to indefinite service in 2002. Further, the court has considered clause 51 thereof which states that LECs who have broken service and who are entitled to terminal benefits when they cease employment may have all their paid periods of service aggregated. The respondent pleaded that the claimant served on ad hoc basis from 1984 to 2002 when his service converted to continuous indefinite basis from 2002 till termination. The claimant testified that for that period he was on casual service. The court returns that on balance of probability, it has been established that from 1984 to 2002 the claimant served the respondent on casual basis or ad hoc basis, whatever the difference, but which the court returns that it may not exist at all. That service was converted to continuous indefinite service in 2012 and the court returns that the conversion satisfied the provisions of clause 50(d) of SO 103. The claimant is awarded 50% of 122, 868 for 19 years of casual service making Kshs.1, 167,246.00 as submitted for the claimant.

25. In conclusion, judgment is hereby entered for the claimant against the respondent for:

1) The respondent to pay the claimant Kshs.2,997,979.00 by 01.02.2018 failing interest at court rates to be payable thereon from the date of this judgment till full payment.

2) The directive for the respondent to comply by establishing, issuing, filing, and serving the workplace sexual harassment policy in strict compliance with section 6 of the Employment

Act, 2007 being not later than 01.05.2018 and thereafter the matter to be mentioned before the court on a convenient date to confirm compliance.

3) The respondent to pay the claimant's costs of the suit.

SIGNED, DATED AND DELIVERED IN COURT AT NYERI THIS FRIDAY, 15TH DECEMBER, 2017.

BYRAM ONGAYA

JUDGE