



REPUBLIC OF KENYA

EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

APPEAL NO. 3 OF 2015

(Before Hon. Justice Hellen S. Wasilwa on 29th June, 2015)

DAVID G. WARWATHE.....1ST APPLICANT

JOSEPH KIRAI NDUNGU2ND APPLICANT

VERSUS

KIAMBU UNITY FINANCE CO-OPERATIVE UNION LIMITED.....RESPONDENT

RULING

1. This case was initially filed at the Milimani Chief Magistrate's Court as case No. 3092/2006. This case was heard and judgment delivered by A. O. Muchelule (Chief Magistrate) as he then was who gave orders dismissing the Plaintiff's case with costs.

The Plaintiffs begin dissatisfied with the judgment of Hon. Muchelule (as he then was) preferred an appeal to the High Court Nairobi which was registered as Civil Appeal No. 123/2009. On 17/2/2015, Hon. Justice R.E. Aburili ordered this file transferred to this court for determination based on jurisdictional considerations.

Plaintiffs' case

2. The brief facts of the Appellants case are that they were employed by the Respondent on 18/9/1989 and 2/1/1992 respectively as Savings Clerk and Auditor earning monthly gross salary of 72,679/= and 53,883/= respectively.

They stated that on 30/10/2004, the Defendant without any lawful cause terminated their services but failed to pay their terminal benefits as provided for by the Employment Act and the existing terms and conditions of service for the Defendants Management Staff.

3. The Plaintiffs averred that the said dismissal was unjustified, wrongful and in total breach of the terms of employing existing between the parties.

4. The Plaintiffs further averred that they were terminated on trumped up allegations whereas the real reason for the termination was that the Respondents no longer required their services as a result of some ongoing re-structuring in the company but failing to declare the Plaintiffs redundant so as to avoid the benefits accruing therefrom.

5. The Plaintiffs contended that they were never given any warnings and were condemned unheard. They

therefore sought orders for payment of their dues as particularized in the Plaint being as follows:

6. 1st Claimant

1. *Severance pay at 30 days for every year worked = 1,090,185/=*
2. *House allowance for 3 months = 53,298/=*
3. *Entertainment allowance for 3 months = 15,000/=*
4. *Medical allowance for 3 months = 7,500/=*
5. *Responsibility allowance for 3 months = 9,000/=*

TOTAL = 1,174,983/=

7. 2nd Claimant

1. *Severance pay at 30 days for every year worked i.e.*

= 53,883 x 13 = 700,479/=

2. *House allowance for 3 months = 37,185/=*
3. *Entertainment allowance for 3 months = 9,000/=*
4. *Medical allowance for 3 months = 6,000/=*
5. *Responsibility allowance for 3 months = 7,500/=*

TOTAL = 760,164/=

8. Both Plaintiffs also claimed for general damages for wrongful dismissal.

Respondent's case

9. In their defence, the Applicants averred that the Plaintiffs employment was lawfully terminated as per the provisions of the Employment Act Chapter 226 Laws of Kenya and other relevant employment laws and the Union.

10. The Defendants further aver that the Respondents never suffered any losses particularized as they were paid all their terminal dues in full.

11. In their evidence in court, the Defendants HR Manager told court that the Plaintiffs were discharged under Clause 59 B and 29 (B) respectively after being given 3 months notice or 3 months salary in lieu and were also paid their provident fund dues. He avers that they were not terminated through redundancy and that the Defendants owe them nothing.

12. In cross examination the DW1 averred that they were terminated after a board decision for being disloyal. When the minutes of the board were put to him, he admitted that the issue of the Plaintiffs termination was not indicated in the minutes. He also said that under clause 29(b) of the Staff Regulation, the Defendant was not obliged to give reasons for the discharge and so could not give particulars of the disloyalty.

Record of Appeal

13. From the record of appeal, the Appellants preferred the appeal on the following grounds:-

1. *That the learned trial Magistrate erred in both law and fact in holding that the Appellants were paid their dues under the contract of employment inspite of the weight of the evidence adduced.*
2. *That the learned trial Magistrate erred in both law and fact in failing to carefully consider the evidence and submissions by the Plaintiffs on the element of redundancy which was largely uncontrolled by the Defendant despite the weight of the said evidence and submissions.*

3. *That the learned Magistrate erred in both law and fact in dismissing the appellants claims despite the weight of the evidence adduced.*

Issues for determination

14. Having considered the evidence adduced by the parties in the lower court, the issues to determine are as follows:

1. *Whether the Appellants were entitled to any redundancy payments under the employment contract.*
2. *Whether the Appellants were paid their dues under the contract.*
3. *Whether the learned Magistrate erred in law and fact in dismissing the Appellants claim.*
4. *What evidence to grant in the circumstances.*

15. The letter terminating the Appellants from employment read as follows:

“Mr. David Gichuhi Warwathe

P.O. Box 268

Kiambu

Dear Sir

RE: TERMINATION OF EMPLOYMENT

The Board meeting of 26/10/04 resolved to terminate your employment with the Union for having been disloyal to it as your employer. Accordingly, this is to notify you that your employment with this Union ends on 30/10/04.

You are hereby requested to clear with the Union Chief Assistant in respect to your terminal dues and any obligations you owe the Union.

You shall hand over any Union Assets in your possession to Mr. Moses Kiarie.

Yours faithfully,

For and on behalf of Kiambu Dairy and Pyrethrum Co-Operative Union Limited signed.

Charles Muguku Thuo

General Manager

Cc: Chief Accountant

Human Resource Manager

Personal File “

The letter to the 2nd Appellant was also couched in similar terms.

16. The reason therefore given in that letters for the termination was disloyalty to the Respondents. The

minutes of even date i.e. of 26/10/04 were exhibited in court and they never addressed this issue. That being the case, was the termination lawful?.

17. The Appellants attached the Respondents Terms and Conditions of Service for management Staff. (Page (9), Clause 29 deals with termination of employment, clause 29(a) with retirement and Clause 29(b) with resignation or discharge.

Clause 29(b) reads as follows”

“An employee may resign by giving three months notice of intention to terminate his/her employment with the Co-Operative Union to the General Manager or to the Chairman in case of the General Manager or pay three months basic salary in lieu of such notice. An employee service may be terminated by the Union at any time by three months’ notice in writing given by the General Manager/Chairman or payment of three months basic pay in lieu of notice (emphasis is mine).”

18. It is apparent that the Respondents terms and conditions of service allowed termination after giving the three months notice.

Under Section 16 of the Employment Act Chapter 226 (now repealed):

“Either of the parties to a contract of service to which paragraph (ii) or (iii) of Section 5 (5), or the provision thereto, of Section 15 applies, may terminate the contract without notice upon payment to the other party of the wages or salary which would have been earned by that other party or be paid by him, as the case may be in respect of the period of notice required to be give under the corresponding provision of that subsection”.

19. It is therefore clear that under the repealed law, only notice was required and in this, the Appellants were duly given and also paid. However the reasons given of terming the Appellants as being disloyal was in bad test given that this reason was not true and no evidence of the disloyalty was advanced by the Respondents. It was not mandatory that the Respondent’s give reasons for termination but when they chose to give reasons they were obliged to give valid reasons. Given that the reason advanced is smacked with falsehood, the termination was unfair and wrongful.

20. The 2nd issue is redundancy: the Appellants have averred that they were to be declared redundant because of the restructuring process. This assertion however is not backed by any evidence and so I leave it at that and only find that the termination was done after due notice.

21. On payments due, the Appellants had indicated to court that they were paid only their pension contributions and not the employer contribution. This is against clause 28 of the Terms and Conditions of service which stipulates how the same was to be calculated. The Appellants had serviced the Respondents for 15 and 12 years respectively and were entitled to 100% payment of employer contributions.

22. I therefore find for Appellants in terms of this appeal that they be paid employer contribution to the provident fund.

23. Having also found that the termination was unfair or wrongful for reasons that non -existent reasons were given for the termination which reasons amount to a defamation for the Appellants character. I also order that the Appellants be paid as follows:

1st Claimant – 6 months salary = 72,679 x 6 = 436,074/=

2nd Claimant – 6 months salary = 53,883 x 6 = 323,298/=

Less statutory deductions

The appeal therefore succeeded in the above terms. The Respondents will met costs of this appeal

Read in open Court this 29th day of June, 2015

HON. LADY JUSTICE HELLEN WASILWA

JUDGE

In the presence of:

Miss Minde holding brief for Miss Wachaiga for Appellants – Present

No appearance for Respondent- Present