



Kuria v Kenya Broadcasting Corporation (Cause 801 of 2013)
[2015] KEELRC 1658 (KLR) (28 September 2015) (Judgment)
John Ng'ang'a Kuria v Kenya Broadcasting Corporation [2015] eKLR
Neutral citation: [2015] KEELRC 1658 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 801 OF 2013
NZIOKI WA MAKAU, J
SEPTEMBER 28, 2015

BETWEEN

JOHN NG'ANG'A KURIA CLAIMANT

AND

KENYA BROADCASTING CORPORATION RESPONDENT

JUDGMENT

1. The claimant filed his plaint on 25th September 2006 seeking resolution of the dispute he had with the Respondent. He averred that he was wrongfully dismissed on 1st November 2005 by the Managing Director of the Respondent and that the action of the MD was contrary to procedure, provisions, regulations and conditions of service set out in the *Kenya Broadcasting Corporation Act* cap 221 laws of Kenya and contrary to the principles of natural justice. The Claimant gave particulars of the breach and gave particulars of lost earnings being salary, house and medical allowance from June 2006 to May 2016 as well as loss of 80 days leave and pension making a total of Kshs. 20,896,664. The Claimant also sought damages for the unlawful manner of termination of his contract as well as damages for the oppressive and unconstitutional actions of the Managing Director. He thus sought a declaration that his dismissal and/or retirement from service was unlawful and contrary to the procedure, provisions and terms of the Kenya Broadcasting Act and the Kenya Broadcasting Corporation Salaries, Terms and Conditions of Service (1980); general damages for pain, suffering and mental anguish; exemplary damages; damages for loss of promotional opportunity; costs of the suit and interest
2. The suit was defended and the respondent filed a defence on 25th October 2006. In the defence the Respondent averred that the Claimant was retired from its employment and that the retirement was lawful and made in accordance with the procedure, regulations and conditions of service governing the plaintiff's employment. The Respondent averred that it retired the Claimant due to his incompetence in performance of his duties in accordance with the regulations and after giving him a hearing in



accordance with the rules of natural justice. The Respondent denied that the Claimant had lost any earnings or opportunities or any loss at all. The Respondent applied for leave to file an amended defence and counterclaim and the same was allowed. An amended defence and counterclaim was filed on 17th April 2008. In it, the Respondent averred that at the time of retirement the Claimant owed it Kshs. 62,622.80 being the difference between the liabilities the Claimant had of Kshs. 302,622.80 and the dues the Claimant was entitled to of Kshs 240,000/- being the 3 months notice due. The Respondent thus sought the payment of Kshs. 62,622.80 plus interest and costs. The Claimant filed a reply to amended defence and defence to counterclaim on 7th May 2008. He denied that he had any liabilities to the defendant giving rise to a claim of Kshs. 302,622.80 which he termed as fictitious. A re-amended defence and counterclaim was filed to include words that had been omitted on the amended defence and counterclaim seeking entry of judgment against the Claimant for the sums sought.

3. On th May 2013 the Waweru J. transferred the suit to this Court for hearing and determination. In a considered Ruling he held that the trial should proceed before this Court in terms of the provisions of Section 22 of the 6th Schedule of *the Constitution* of Kenya. The Claimant sought leave to amend the claim and leave was granted on 3rd July 2013. The amended plaint was filed on 4th July 2013 and the key amendment was the particulars of lost earnings which the Claimant placed at Kshs. 73,719,706.60 due to new workings on the salary, house and medical allowances. The Claimant sought orders to compel production of certain documents he had sought in respect of the claim.
4. On th July 2014 the Claimant filed a list of documents pursuant to the records availed by the Respondent among them were copies of memos, letters, minutes of various meetings, requests for quotations and Local Purchase Orders. On 1st October 2014, the parties proposed that the Court determines the suit on the basis of pleadings, affidavits, documents filed and submissions made by the parties.
5. The claimant filed submissions 2nd December 2014 and after giving the Respondent many opportunities to to file submissions, the Respondent finally filed submissions on 11th August 2015.
6. The genesis of the claim before Court was the termination of the contract of service on 1st November 2005. The Claimant submitted that the sending of the Claimant on compulsory leave on 13th July 2005 was unlawful and wrong. The Claimant sought in his claim a declaration that the dismissal and/or retirement was unlawful and contrary to the procedure and the provisions of the Kenya Broadcasting Corporation Salaries Terms and Conditions of Service (1989) and contrary to natural justice. He sought a sum of Kshs. 73,719,706.60 or such sum as the Court may direct to be payable to be calculated, general damages for pain suffering and mental anguish, exemplary damages, damages for loss of promotional opportunity, costs of the suit as well as interest on the sums from date of filing suit till payment in full. In the Claimant's written statement filed on 18th May 2011, he stated that he was a devoted, dedicated and committed employee of the Respondent and its antecedents. He joined the Voice of Kenya (then a department in the Ministry of Information & Broadcasting) before the department was converted into a parastatal under the Kenya Broadcasting Act cap 221 Laws of Kenya into the Kenya Broadcasting Corporation. The Claimant was sent on compulsory leave on 13th July 2005. In the letter sending him on compulsory leave, he was informed that his performance had been found unsatisfactory and in particular, the Managing Director conveyed displeasure at the performance of the Claimant who was then Manager Technical Services in regard to the ongoing rehabilitation of the Respondent's technical facilities. The Claimant was to hand over to Mr. Samuel Otieno. The Claimant was later given notice on 18th October 2005 that the Board intended to terminate the Claimant's services on account of failure to provide adequate professional advice to the Respondent leading to lack of capacity to transmit quality signal. Various weaknesses were noted on the letter and the Claimant was given a chance to defend himself within 7 days. The Claimant



responded via a letter he penned and in it defended himself and gave a detailed response. His services were terminated on 1st November 2005 and the letter in part read that he was being compulsorily terminated as per Section 1.26 of the Respondent's Terms and Conditions of service. He was to be paid three months' basic pay being salary in lieu of notice, 2 months salary to cater for travelling and transportation and pension contribution benefits as per the pensions regulations in force at the time. The Claimant submitted that the compulsory retirement in the public interest was contrary to the procedure set out in the Corporation's terms and conditions of service. The Claimant submitted that there was no preliminary investigation conducted, there was no procedure followed as he was not given a statement of the charge he was to answer to as required under the regulations and there was no committee set up by the Managing Director to probe the allegations made and make a report to the Board. The Claimant submitted that the failure to adhere to the provisions of the process set out made the termination of the Claimant's services void ab initio. The Claimant's case was that the Board flouted procedure in purporting to sanction the action taken by the Managing Director sending the Claimant on compulsory leave and terminating his services without following the set down disciplinary process. The Claimant submitted that the procurement of parts or supplies was initiated by the user department and the technical department's role was to generate specification. He submitted that the procurement that was impugned by the Managing Director was the work of the Tender Committee and that he could not be blamed for the bungling of the process as the omission of VAT was as a result of error of Supplies Division. The Claimant submitted that the specifications for the switcher were done prior to his becoming the Manager Technical Services. Regarding the cameras, he submitted that at the material time he was Assistant Manager Technical Services – Radio. Regarding weak broadcast signals, the Claimant submitted that the issue had been raised with the Permanent Secretary Ministry of Information & Broadcasting and the poor quality of signals was attributed to archaic equipment used by the Respondent and the reliance on Telkom Kenya to carry the signal. He submitted that the failure to carry quality signal was an endemic and systemic failure on the part of the Respondent. He submitted that verbal cautions, where issued, would not be recorded and were for any offence adjudged to be one that did not warrant no more than a verbal caution by a superior officer. The Claimant relied on the case of Kenya Ports Authority v Silas Obengele [2005] eKLR where the Court of Appeal held that the employee was not given a hearing and that the need for a hearing was entrenched in a statutory regulation. The Claimant also relied on the case of Gideon K. Mutindi & 2 Others v Kenya Railways Corporation [2014] eKLR where Ongaya J. held that procedural fairness has to be adhered to and held that the termination was unfair as there was want of compliance with the stipulated procedure and for want of valid reasons to justify the termination. The Claimant cited the case of Francis Waithaka Ngokonyo & 2 Others v Telkom Kenya Limited [2013] eKLR where Havelock J. held that in the event there was unlawful termination the Claimant would be entitled to be awarded benefits, salaries and allowances accruing from the unlawful termination. The Claimant thus submitted that he was entitled to the prayers sought in his memorandum of claim but abandoned his prayer for general and exemplary damages.

7. The Respondent's submissions were to the effect that it was uncontested that the Claimant was its employee from the date he was given a letter of appointment on 7th August 1990 till his retirement on 1st November 2005 when he was compulsorily retired. The Respondent submitted that at the time of retirement the Claimant was Manager Technical Services Department. The Respondent submitted that the responsibilities of the Claimant in that position were to inter alia, run and maintain the Respondent's entire radio and television network, sourcing and implementing new technologies and representing the government of Kenya in International Telecommunications Union matters. The Respondent submitted that the Claimant's advancement in that position was based on his education and long working experience with the Respondent and it was therefore expected that he would be able to perform his duties diligently and to discharge his responsibilities effectively. The



Respondent submitted that over time, the Claimant's performance as Manager Technical Services was unsatisfactory and he was verbally asked to improve and that he failed to do so and as a result was sent on compulsory leave vide a letter dated 13th July 2005 pending deliberations on his poor performance by the Board of Directors. It was submitted that the decision to send him on compulsory leave was made by the Respondent's Managing Director and thereafter the Board was notified of the decision. The Board of Directors met on 27th July 2005 and deliberated the Claimant's performance and after the meeting it was decided that the Claimant be informed of the Respondent's intention to terminate his services and of his right to defend himself. The Managing Director issued a letter dated 18th October 2008 informing the Claimant of the intention of the Board to terminate his services and sought an explanation. In the letter the Board specifically noted the following weaknesses on the part of the Claimant in performance of his job.

- i. Providing insufficient advice on procurement of spares for the various television transmission stations in the country
 - ii. Providing misleading information to suppliers where the VAT component was omitted
 - iii. Giving wrong professional advice relating to the purchase of new switcher which would not be installed for more than a year due to absence of a cabling network
 - iv. Giving false information to the tendering committee in relation to cameras which were to be supplied from South Africa
8. The Respondent further submitted that the Claimant responded to this letter vide his letter of 26th October 2005 and that he admitted responsibility for all the matters raised in the letter of 18th October 2005 and that the Board of Directors had a board meeting and proceeded to terminate the Plaintiff under Section 1.26 of the Kenya Broadcasting Corporation Salaries, Terms and Conditions of Service. The Respondent submitted that the Claimant was notified of the reasons for his termination and was paid three months basic pay in lieu of notice, two month's salary to cater for travel and transportation and his pension dues were also paid. The Respondent submitted that there was nothing unlawful or wrong in retiring the Claimant from his employment and that the decision was made in accordance with the procedure, regulations and conditions of service governing his employment. The Respondent submitted that the Claimant's services were terminated in accordance with Section 1.26 of the terms & conditions of service and it was expected that the Claimant would be aware of the clear distinction between the dismissal or compulsory retirement in the interest of the Respondent and termination in accordance with the provisions of an employee's agreement or letter of appointment or on attaining the normal retiring age of 55 years or by compulsory retirement under the '50 year' retirement rule by decision of the Board. The Respondent submitted that Violet Arika in her written witness statement had clearly stated that the Claimant's shortcomings were too critical for the Respondent to continue retaining him as the Manager Technical Services hence the exercise of the option to retire him compulsorily. The Respondent submitted that in opting to retire the Claimant the Respondent avoided dismissing the Claimant from employment and instead took the option that allowed the Claimant to obtain all his privileges and retirement benefits he was entitled to. The Respondent submitted that the retirement was under Section 1.26 (c) and not 1.26(d) as that made provision for loss of all benefits one was entitled to including pension. The Respondent relied on the case of *Mohamed Ghias Qureshi & Anor. v Paramount Bank Ltd* [2000] eKLR where Kasanga Mulwa J. held that notwithstanding a provision on a contract of permanent employment, this would not disentitle the employer from terminating the employee's contract on reasonable notice. The Respondent submitted that the decision to retire the Claimant was made in accordance with the Salaries Terms and Conditions of Service 1989 and was therefore lawful and in compliance with the



provisions of Sections 43 and 45 of the *Employment Act*. The Respondent submitted that the reasons related to the Claimant's conduct, capacity, compatibility and performance and that the Respondent acted in accordance with justice and equity. The Respondent submitted that the Claimant's claim for an award of 73,719,706.60 or any other alternative sum was unmerited. The Respondent submitted that the Claimant's expectation to service until retirement was not to be as a consequence of the Claimant's own actions. The Respondent relied on the case of *Bachitter Singh Chase v Barclays Bank of Kenya* [1990] eKLR where the Court held that permanent employment is not necessarily a lifetime appointment with status of irremovability. The Respondent submitted that anticipatory earnings could not be awarded and relied on the case of *D.K. Njagi Marete v Teachers Service Commission* [2013] eKLR and the cases of *Paul Muhoro Kihara v Barclays Bank of Kenya* [2004], eKLR *Muthuri v National Industrial Credit Bank Ltd* [2003] eKLR and *Joseph Karanja Wainaina v National Bank of Kenya on reasonable notice*. The Respondent submitted that the Claimant's case be dismissed and judgment be entered for it in the counterclaim to the extent of Kshs. 62,622.80 overpaid to the Claimant. The Respondent submitted that the Court do award it costs.

9. The Claimant's case was one of unlawful termination. It is uncontested that the Respondent's Managing Director issued a letter sending the Claimant on compulsory leave in July 2005 and subsequently a letter communicating the accusations he was to respond to. He was subsequently terminated from employment. The Claimant asserts this was unlawful and the Respondent asserts there was good cause to terminate. The Respondent seeks by way of counter claim monies it states it overpaid the Claimant on the salary in lieu of notice and travel dues.

The Respondent's Terms and Conditions of Service 1989 under Section 12(a) and (c) provide as follows:-

If it is considered, having regard to every report available with regard to an employee, that it is desirable in the public interest that service of such an employee should be terminated on grounds which cannot be suitably dealt with by the procedure laid down in any other provision of this section of the Regulations, the employee will be notified in writing of the specific complaints by reason of which termination of his service is contemplated together with any substance of any report or part thereof that is detrimental to him. If after the employee has been given opportunity of showing cause why his service should not be terminated, it is still considered that his service should be terminated, action will be taken to terminate his service or recommend to the Board that it be terminated as the case may be.

- (c) Any employee terminated under this Regulation will receive the notice period and such other entitlements as are prescribed in these Regulations for his category of appointment. (Notice periods are shown in Staff Regulations (B)).

10. The termination of the Claimant was communicated by the letter of 1st November 2005 whose essence is captured above. The Claimant was suspended in July 2005 and was given notice of intention to terminate his services vide the letter of 18th October 2005. In that letter, the Claimant was given a litany of charges he was to respond to, the essence of which was that the Claimant had provided insufficient advice on procurement of spares for the various television transmission stations in the country; provided misleading information to suppliers where the VAT component was omitted; gave wrong professional advice relating to the purchase of new switcher which would not be installed for more than a year due to absence of a cabling network and finally, gave false information to the tendering committee in relation to cameras which were to be supplied from South Africa. To each of these allegations the Claimant responded by his letter of 26th October 2005. Nowhere in the letter did I discern any admission of wrongdoing by the Claimant. He only adverted to not being aware of the VAT



element being included in computations sent to his office and after the issue was raised in regard to the VAT element he sought inclusion of the same in the list sent by the central supplies office. In all the reasons for which the Claimant was terminated were to my mind not sufficient cause for a termination in the public interest. What public interest was being protected when the person(s) who had caused the wrong equipment to be acquired were not the Claimant? By assuming the office he had assumed, he did not by inference assume all liabilities that could attach to previous office holders. He was not responsible for poor signal broadcasts as this was pointed out to be the fault of the machinery in use and the medium used to transmit. The Claimant was entitled to procedural fairness. As held by Ongaya J. in the case of Gideon K. Mutindi & 2 Others v Kenya Railways Corporation, procedural fairness has to be adhered to and in my view the termination of the Claimant herein was unfair as there was want of compliance with the stipulated procedure. I have not discerned any valid reasons to justify the termination.

11. The upshot of the foregoing is that the Claimant was not accorded the safeguards under Section 41 of the *Employment Act* nor was he accorded the safeguards under the Respondent's terms and conditions of service. I thus will award him 12 months compensation of Kshs. 1,272,000/- based on his monthly salary of pay of Kshs. 106,000/-. The counterclaim is hereby dismissed as it was not proved. The Claimant will also have costs of the suit.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2015

NZIOKI WA MAKAU

JUDGE

