



Kinuu & another v Text Book Centre Limited (Employment and Labour Relations Cause E189 of 2021) [2024] KEELRC 1056 (KLR) (9 May 2024) (Judgment)

Neutral citation: [2024] KEELRC 1056 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE E189 OF 2021**

MN NDUMA, J

MAY 9, 2024

BETWEEN

ISAACK KINUU 1ST CLAIMANT

WINFRED KANAIRI IMAANA 2ND CLAIMANT

AND

TEXT BOOK CENTRE LIMITED RESPONDENT

JUDGMENT

1. The two claimants filed suit on 3/3/2021 seeking the following reliefs: -
 - i. A declaration that the termination of the claimants’ employment was unfair, unlawful and wrongful.
 - ii. A declaration that the respondents published defamatory remarks maligning the repute and character of the claimants
 - iii. Balance of the contract period (15 years) for the 1st claimant Kshs.108,000,000/=.
 - iv. Balance of the contract period (18 years) for the 2nd claimant Kshs.64,800,000/=
 - v. General damages for unfair termination for the 1st claimant at Kshs.600,000 *12 months Kshs.7,200,000/=
 - vi. General damages for unfair termination for the 2nd claimant at Kshs.300,000 *12 months Kshs.3,600,000/=
 - vii. Exemplary damages for defamation for each of the claimants.
 - viii. Certificate of service
 - ix. The costs of this suit plus interest thereon from the date of filing the suit at court rates.



- x. Any other relief as this court would deem fair, just and expedient.
2. The two claimants testified as CW1 and CW2 respectively and relied on witness statements duly filed before court as their evidence in chief.
3. CW1 stated that he was employed by the respondent by a contract dated 5/10/2019 as Head of Internal Audit, Risk and Compliance on a permanent and pensionable basis at a monthly salary of Kshs.600,000/= and other benefits.
4. That on 8/12/2020 CW1 was called over to the office of the Managing Director of the respondent to go over the hand over notice of an employee who had resigned and was working under CW1's supervision.
5. Upon completion of the review, the Managing Director and Head of Human Resource questioned CW1 on whether he had a romantic and or sexual relationship with the 2nd claimant.
6. CW1 said he was utterly shocked by the enquiry and he denied the allegations. The two insisted on their allegations against CW1 and the Managing Director told CW1 that he had discussed the matter with the Chairman of the Board and Board of Directors of the respondent and they had directed CW1 should resign from employment.
7. CW1 declined the invitation to resign based on fictitious allegations. That the Managing Director produced a written letter of resignation and demanded that CW1 should sign it. CW1 requested to call his lawyer but the Managing Director refused. CW1 said he was coerced to sign the letter of resignation since at that time he had been locked out of the respondent's servers and that all the company emails and shared drives were already blocked.
8. That the Managing Director said if CW1 did not resign he was going to make his work life a living hell by instituting and maintaining sexual harassment allegation against CW1 including against the 2nd claimant.
9. CW1 said he succumbed and unwillingly signed the letter of resignation. The letter of resignation was accepted and CW1 was cleared out of the employment. The MD then sent an email to all the staff amounting to over 300 stating that he had received reports of inappropriate behavior between CW1 and CW2.
10. That this maligned the reputation of both CW1 and CW2 who was also forced to resign in a similar manner and had been confronted with similar allegation of having a sexual relationship with CW1 who was her supervisor.
11. CW2 gave similar testimony as CW1 and told the court that she was accused at a meeting with the MD of having a sexual relationship with CW1 and was handed a letter of resignation to sign.
12. CW2 said that she was pressured to resign. That emails were circulated to 300 staff about the alleged false sexual relationship she had with the CW1 and was coerced to resign. CW2 said she was greatly humiliated and defamed. That she had just lost her husband and the false news reached her relatives including her in-laws. That she suffered pain and anguish as a result. CW2 told the court that she held the position of loss prevention and security manager from which she was forced to resign effective 8th December 2020 by a letter of the same date. CW2 earned Kshs.300,000/= per month.
13. CW1 and CW2 claim damages for defamation and compensation for the unlawful and unfair constructive dismissal.
14. Under cross-examination CW1 and CW2 stated that the letter sent to 300 staff referred to their resignation and to inappropriate behavior which had already been leaked to the staff. CW1 and CW2



- said they had a clean record of work for the period they served the respondent. That they suffered loss and damage as a result of the unlawful conduct by the respondent.
15. CW2 said a colleague asked her if she had an affair with CW1 after the message was circulated. CW2 said she got a lot of calls from friends and in-laws to her anguish and embarrassment. CW2 denied she had any affair with CW1 who was her supervisor.
 16. RW1 Robert Oliech testified for the respondent. He told court that he joined the company in August 2020. That he recalled the day when the 1st and 2nd claimants left work. That he received an email from the MD informing the staff of the resignations. RW1 said his interpretation of the email is that CW1 and CW2 may have been involved in some unspecified inappropriate behaviour that does not conform to the company's core values including integrity, empowerment and respect.
 17. RW1 said that to date he did not know the details surrounding the resignation of CW1 and CW2 or the perceived inappropriate behaviour.
 18. RW1 said that it is not unusual for staff to receive an email communicating resignation or termination of employees especially those in the management.
 19. That the email was sent to staff and so was confidential,

Determinaton

20. The parties filed written submissions which the court has carefully considered together with the testimony by CW1, CW2 and RW1.
21. CW1 and CW2 adduced credible and consistent evidence that they were summoned by the MD of the respondent to his office in succession on 8th December 2020 in the presence of the Human Resource Manager. The MD accused each one of them of having inappropriate sexual relationship with each other in violation of company policy. The MD informed them that the Board had been informed of the matter and the Board had directed the MD to ask CW1 and CW2 to resign.
22. The MD told CW1 that he would make the work life of CW1 hell if he did not resign. That he could pursue disciplinary action against CW1 and CW2 for the alleged sexual affair. That the MD presented CW1 and CW2 with already prepared letters of resignation and demanded each one of them to sign the same.
23. CW1 and CW2 testified that meanwhile they had been cut off from the company email and so they felt they had no alternative but to sign the letter of resignation.
24. That upon signing the letters of resignation, the MD circulated to over 300 staff one email stating that CW1 and CW2 had resigned from office for having been involved in inappropriate conduct. CW1 and CW2 said that they suffered loss and damage as a result of the forced resignation which amounted to constructive dismissal and that they were defamed and humiliated in the eyes of 300 staff. That the false information was leaked to the staff and same reached family and friends to their great humiliation, pain and suffering.
25. The respondent did not adduce any evidence to contradict the evidence adduced by CW1 and CW2. RW1 was not involved in the constructive dismissal of the claimants and so offered no evidence at all to counter their testimony.
26. The court finds that CW1 and CW2 have proved on a balance of probability that they were both coerced by the MD of the respondent who was their supervisor to sign letters of resignation contrary to their will. CW1 and CW2 have proved that the respondent unlawfully constructively dismissed



CW1 and CW2 from their employment. The court finds that the conduct by the MD of circulating an inappropriate email regarding the claimants to 300 staff was an aggravating factor in the humiliating dismissal of the claimants. The evidence tendered by the claimants is not sufficient to prove a claim for defamation but will be taken into account in assessing compensation for the unlawful and unfair dismissal of the claimants in violation of section 36, 41, 43 and 45 of the Employment Act, 2007.

27. The respondent had no valid reason to constructively dismiss the claimants from employment. The respondent did not follow any fair procedure in forcefully causing the termination of the contracts of employment of the claimants.
28. The claimants have discharged the onus placed upon them to prove constructive dismissal in terms of section 107 and 108 of the Evidence Act, Cap 80 Laws of Kenya. The evidence they tendered was wholly uncontroverted.
29. In the case of Board of Trustee Meru Diocese Kirimere Parish versus Dorcas Wanja Bore [2021] eKLR it was held that mere denial of facts in the pleadings does not suffice to controvert facts adduced if no witness is called to contradict the evidence tendered before court. This was the case in the present matter. RW1 did not contradict the compelling evidence tendered by CW1 and CW2.
30. The court has relied on the case of Western Excavating Tile Limited versus Sharp [1978] 2KLR 344 where Lord Deming defined constructive dismissal thus:

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct."

31. The conduct by MD in this case as described in this matter fits the bill and amounted to constructive dismissal of the claimants actualized by the forced signing of pre- prepared letters of resignation.
32. In the final analysis, the court finds that the respondent constructively dismissed the claimants. They both are entitled to compensation in terms of section 49(1)(c) and 4 of the Employment Act 2007. In this regard both held permanent and pensionable positions with the respondent. CW1 had a balance of 15 years to retirement whereas CW2 had a balance of 18 years to retirement.
33. CW1 was employed on 5/10/2019 and had served the respondent in a senior position for a period of one year. The 2nd claimant was employed on 26/11/2019 and had also served the respondent in a senior position for a period of one year. As already said, the demeaning manner in which the MD handled both claimants were a great violation of their dignity and decency. In addition to the job loss the duo suffered pain, anguish and public ridicule in the eyes of over 300 staff and their immediate friends and relatives to whom the sad events of 8/12/2020 reached.
33. The two were not given certificates of service to help in getting alternative jobs. The two were not paid in lieu of notice nor were they compensated for the sudden job loss. The two were hounded out of the work place as pariahs. The two lost great prospects of career advancement to retirement. The court has considered the Supreme Court case of Kenfreight (EA) Limited versus Benson K. Nguli in which the court stated: -

"The Act does provide for a number of remedies for unlawful and wrongful termination under section 49 and it is up to the Judge to exercise discretion to determine whether to allow any or all of the remedies provided thereunder. To us, it does not matter how the



termination was done, provided the same were challenged in a court of law and where a court found the same to be unfair or unlawful, section 49 applies.”

34. In the present case, having considered the similar circumstances under which the claimants served and were terminated, the court awards each one of the claimants the equivalent of six (6) monthly salary in compensation for the unlawful and unfair termination of employment.
35. The claimants did not plead for payment of notice pay and we have taken this into account in the computation of compensation to the claimant. The award translates to Kshs.3,600,000/= for the 1st claimant and Kshs.1,800,000/= for the 2nd claimant in compensation.
36. The award is payable with interest at court rates from date of judgment till payment in full.
37. The respondent to provide certificate of service for the claimants within 30 days of judgment.
38. The respondent to pay costs of the suit with respect to both claimants.
39. For the avoidance of doubt, other remedies sought by the claimants in respect of defamation are disallowed for lack of merit.

DATED AT NAIROBI THIS 9TH DAY OF MAY, 2024.

Mathews Nderi Nduma

JUDGE

Appearance:

Mr. Omwanza for claimant

Mr. Wandati for respondent

Mr. Kemboi, Court Assistant

