Odhiambo v Kisang & 3 others (Cause E089 of 2023)
[2025] KEELRC 436 (KLR) (19 February 2025) (Judgment)

Neutral citation: [2025] KEELRC 436 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

CAUSE E089 OF 2023

NZIOKI WA MAKAU, J

FEBRUARY 19, 2025

BETWEEN

DR. CHARLES OKECH ODHIAMBO ..... CLAIMANT

AND

DR. OBADIAH KISANG ..... 1ST RESPONDENT

MS. DORRIS MWARREY ..... 2ND RESPONDENT

MR. GILBERT KAMANGA ..... 3RD RESPONDENT

WORLD VISION KENYA ..... 4TH RESPONDENT

JUDGMENT

1. The Claimant initiated this action against the Respondents through a Memorandum of Claim filed on 2nd December 2023, citing wrongful termination and withholding of his dues as the primary issues in dispute. He sought the following remedies:

    a. Declaration that he was and is still an employee of the 4th Respondent up to the 30th November 2023.

    b. A declaration that the withholding of his dues is illegal and unfair.

    c. The Respondent be ordered to pay him his statutory entitlements and dues totalling Kshs 2,939,166.20 with interest at 30% with effect from the date of filing suit till the date of the judgment.

    d. General damages for defamation of character.

    e. Aggravated damages.

    f. Interest on (a), (b), (c), (d) and (e) from the date of filing suit until the date of the judgment.

g. Costs of the suit be borne by the Respondent.

2. The Claimant asserted that he first joined the 4th Respondent in January 2005 as a Food Security Coordinator in Turkana. He stated that due to his outstanding performance, he was promoted and transferred to Migori in October 2005 as a Programme Coordinator, overseeing water sanitation, child sponsorship, education, and food security. He further averred that in October 2007, he was transferred to Winam Area Development Programme in Kisumu East to address mismanagement issues that had eroded donor confidence. He contended that after two years, he was promoted to the position of Lake Region Livelihood Resilience Officer, Kisumu, where he oversaw 13 Area Development Programmes and mentored new officers. After this stint the, Claimant stated that he left the 4th Respondent's employment with a spotless record, before re-applying in 2017 and being rehired as a Project Manager overseeing projects spanning 7 African countries.

3. He asserted that his performance was stellar earning him a promotion to Senior Programme Manager in February 2022. However, from this point, he asserted that challenges soon began arising due to inadequate handover by his predecessor and persistent interference from the Programme Director, who frequently monitored and overturned his decisions. According to the Claimant, matters further escalated in June 2023 when, following mid-year staff performance reviews, the Programme Director sought to place him on a Performance Improvement Plan. He asserted that he objected to this, arguing that the alleged poor performance was due to systemic issues such as delayed procurement and high staff turnover. He affirmed that he suggested improvement measures but his suggestions were dismissed. The Claimant averred that relations with the Programme Director further deteriorated, and on 29th August 2023 he was served with a baseless notice to show cause, detailing accusations of sexual harassment, bribery and misconduct. After responding to the show cause, he contended that he was invited for a disciplinary hearing which he was unable to attend due to health complications and psychological distress. Thereafter the Claimant stated that he submitted his resignation, which was initially not accepted. However, he later found that his resignation had been accepted despite his withdrawal of it, and he was locked out of the 4th Respondent's systems. In conclusion he maintained that he was entitled to his outstanding dues and an apology for the malicious accusations levelled against him.

4. In reply the Respondents filed a Response to the Memorandum of Claim dated 8th February 2023, generally denying the allegations and inviting the Claimant to strict proof. They contended that his resistance to performance evaluation stemmed from a reluctance to be held accountable, emphasizing that such evaluations were standard organizational practice. The Respondents further asserted that the Claimant voluntarily resigned, and his resignation was duly accepted. Regarding the accusations of sexual harassment, they maintained that the allegations were true and that despite being given an opportunity to respond, the Claimant refused to attend the disciplinary hearing. With respect to the Claimant's final dues, the Respondents asserted that they had already been computed and disbursed.

5. The matter proceeded for hearing on various dates, during which the Claimant testified, and two witnesses provided testimony on behalf of the Respondents. Both parties subsequently filed written submissions.

Claimant's Submissions

6. The Claimant submits that the Respondents failed to prove that he was accorded a fair hearing. He asserts that the contradictions surrounding whether a disciplinary hearing took place were significant and material. In support of this position the Claimant maintains that no formal charges were framed, no proper hearing was conducted, and that a board meeting could not be repurposed into a disciplinary

hearing. He cites the case of David Wanjau Muhoro v Ol Pajeta Ranching Limited [2014] eKLR where the essential elements of a fair disciplinary process were outlined as follows:

> " First the right to sufficient time between the date of service to show cause and the date of hearing to prepare for the hearing, second the right to fully understand the charges. General charges such as dishonesty, fraud and fraudulent activities are vague and offer an employee no opportunity to respond intelligibly. Lastly, the employee has a right to documentation. The employee must be given the documents the employer intends to rely on at the hearing."

7. In further impugning the disciplinary process, the Claimant draws attention to sections 41, 43, 44, 45 and 47(5) of the *Employment Act* as well as the Court of Appeal case of Pius Machafu Isindu v Lavington Security Guards Limited [2017] eKLR, where the obligations placed on employers by the *Employment Act* in matters of summary dismissal were to prove that; the reasons for termination were valid and fair, the grounds were justified and there was compliance with the mandatory procedural requirements set out in section 41. In highlighting the shortfalls of the disciplinary process, including the Notice to Show Cause, the Claimant submits that:

   i. The Respondents failed to provide evidence to support allegations of sexual harassment, bribery, or the use of vulgar language.

   ii. The 1st Respondent in drafting the notice relied on malice, innuendo, ill motive and connivance with his supervisees.

   iii. The 2nd, 3rd and 4th Respondents violated labour laws by terminating his employment before the end of his contract.

   iv. Despite his withdrawal of resignation, the 2nd, 3rd and 4th Respondents still accepted the resignation and proceeded with a disciplinary hearing, suggesting a premeditated effort to victimize him.

8. Consequently, the Claimant asserts that the Respondents prevented him from attending the disciplinary hearings to present his defence, and violated the 45-day period within which accusations under the "code red" category should be addressed. Regarding his resignation the Claimant submits that it was improper for the Respondents to backdate a letter accepting his resignation after he had formally withdrawn it. He emphasizes that withdrawal of a resignation notice is permissible under special circumstances citing the Irish Employment Tribunal in UD 946/2007, Mcmanus v Brian Contractors, where an employee's letter withdrawing resignation was deemed binding after consideration of the context in which the resignation was offered. Moreover, he asserts that a resignation withdrawal is valid when communicated at the earliest opportunity or if the resignation was made in the heat of the moment. In support of this, he cites the case of Kwik-Fit [GB] Limited v Lineham [1992] IRLR 156 where it was held that if an employee resigns impulsively under pressure or humiliation, the employer has a duty to investigate the employee's true intentions before accepting the resignation. Reinforcing his position, the Claimant submits that a resignation letter alone does not constitute unequivocal evidence of an intention to terminate employment. He cites the decision in the Canadian Case [British Columbia [British Columbia] decision, Templeton v RBC Dominion Securities, Inc 2005, Carswell Nfld, 216 at Paragraph 46 where it was stated:

> " It is important to distinguish between a letter of resignation, and resignation. A resignation is the decision to terminate the relationship, or equally, a fact or circumstance which unequivocally reflects that decision. A letter of resignation is simply evidence-cogent

evidence of the Employee's decision to end the relationship. But it is no more than that; a letter of resignation is not in itself, the Employee's termination of employment."

9. In submitting that the Respondents were malicious, the Claimant highlights that he was only served with the backdated letter accepting his resignation on the same date that he submitted his withdrawal of resignation. He relies on the case of Edwin Beiti Kipchumba v National Bank of Kenya Limited [2018] eKLR, where the court upheld an employee's right to rescind resignation, finding that the employer's refusal to accept the withdrawal was due to the Respondent's directors being compromised and at the heart of the fraud under investigation by the CBK. On the issue of defamation, the Claimant submits that the Respondents' accusations labelling him fraudulent, corrupt and a sex molester were made without evidence and were therefore defamatory. He submits that these statements meet the legal threshold for defamation, which requires, that the words must tend to lower the person's reputation in the estimation of right-minded person, the words must refer to the person, the words must be malicious. In support of his argument, he cites the cases of Alnashir Visram v Standard Limited [2016] eKLR and Wycliffe A. Swanya v Toyota East Africa Ltd & another [2009] eKLR. Given the damage to his reputation, the Claimant submits that he is entitled to general damages of Kshs 20,000,000/- citing the case of *Richard B.O. Onsongo v Rose Ogendo Nyamunga, Joyce Oweya & Paul Ogendo (Civil Case 9 of 2014*) [2018] KEHC 8169 (KLR) (27 February 2018) (Judgment). Additionally, the Claimant submits that he is entitled to exemplary damages of Kshs 5,000,000/- based on the principle in Godfrey Julius Ndumba Mbogori & another v Nairobi City County [2018] eKLR that exemplary damages serve the purpose of deterrence and punishment. In conclusion, the Claimant urges the court to grant the reliefs sought in his claim.

Respondents' Submissions

10. In opposition to the claim the Respondents identify the following issues for determination:

    i. Whether the Claimant was wrongfully terminated from his employment or his Constitutional right to fair hearing was breached;

    ii. Whether the Claimant was defamed in the notice to show cause letter arising from complaints from a former employee, which letter was sent to him confidentially; and

    iii. Whether the Claimant should be awarded damages including aggravated damages.

11. On the first issue, the Respondents submit that there was no wrongful termination, as the Claimant voluntarily resigned. They contend that the termination of employment was initiated by the Claimant himself and was not due to any wrongful conduct on their part. In support of this position, they cite the decision in Edwin Beiti Kipchumba v National Bank of Kenya Limited [2018] eKLR as referenced in Kennedy Obala Oaga v Kenya Ports Authority [2018] eKLR, which held that resignation is a unilateral act by an employee and that the *Employment Act* does not prevent an employee from resigning at any stage of the disciplinary process. Additionally, the Respondents rely on *David K Cheruiyot v Barclays Bank of Kenya Limited (Cause 242 of 2011*) [2015] KEELRC 1164 (KLR) (Employment and Labour) (20 April 2015), where it was held that the Claimant was not entitled to the prayers sought having chosen to resign.

12. The Respondents maintain that they adhered to the requisite procedural steps as outlined in the employment contract and organizational policies. They assert that the notice to show cause was issued in response to serious breaches of the 4th Respondent's Code of Conduct, Adult Safeguarding Policy, Financial Fraud Policy, and Sexual Harassment Policy. Furthermore, the Respondents submit that despite responding to the notice to show cause, the Claimant repeatedly failed to attend disciplinary hearings. They highlight his absence from the hearing scheduled for 3rd September 2023 citing illness,

and his failure to attend the rescheduled hearing on 8th September 2023, without providing a valid explanation. The Respondents assert that the Claimant's actions were a deliberate attempt to evade accountability. They further submit that his decision to engage legal counsel in an effort to revive the disciplinary process after his resignation was akin to "closing the stable door after the horse had already bolted."

13. On the second issue, the Respondents submit that the claim of defamation is unfounded, as the notice to show cause does not meet the legal threshold for defamation. They emphasize that the letter was a private communication issued in the course of legitimate administrative functions and was devoid of malice. To establish the elements required to prove defamation, they refer to the decision in the case of Elisha Ochieng Odhiambo v Booker Ngesa Omole [2021] eKLR, which sets out the following requirements:

    a. The Claimant must demonstrate the defamatory nature of the matter complained of, in that it was uttered to someone else other than the defamed party and was published maliciously.

    b. The words must have the effect of lowering the claimant's reputation in the eyes of right-thinking members of society or causing them to be shunned or avoided.

    c. The statement must have been made with malice or reckless disregard for the truth.

14. The Respondents submit that by applying these principles to the present case, it is evident that the notice to show cause merely sought the Claimant's response to allegations and did not constitute a definitive assertion of guilt or wrongdoing. They reiterate that the letter was addressed solely to the Claimant and was not shared with any unauthorized third parties. To reinforce their position, the Respondents cite the case of Miguna Miguna v Standard Group Limited & 4 others [2017] eKLR, which held that a defamation claim requires proof that a defamatory statement was published or caused to be published by the defendant. Additionally, the Respondents submit that the use of the term "alleged" in the notice to show cause underscores the absence of malice, as it demonstrated that no definitive conclusions had been drawn against the Claimant.

15. On the final issue, the Respondents urge the court to consider the decision in George Ngige Njoroge v Attorney General [2018] eKLR, which held as follows:

> " Aggravated damages are awarded in actions where damages are at large. They are normally awarded in actions of defamation, intimidation, false imprisonment, malicious prosecution, and trespass to land, persons or goods. The matters that the court should take into account in awarding such damages include the Defendant's motive, conduct and manner of committing the tort. The court has to consider whether the Defendant acted with malevolence or spite or behaved in a high-handed manner."

16. The Respondents submit that since the Claimant has failed to prove defamation, he is not entitled to aggravated damages. They reiterate that the notice to show cause was a confidential internal document issued in adherence to procedural fairness. Furthermore, they maintain that they acted in good faith by accommodating the Claimant through repeated rescheduling of the disciplinary hearing. In light of the foregoing, the Respondents urge the court to dismiss the Claimant's case in its entirety.

17. The Court has considered the pleadings, testimony and submissions of the parties and the law in coming to this decision. The Claimant asserts he rescinded his resignation. In order to benefit from the latitude accorded to an employee who resigns out of duress or coercion then rescinds the resignation, certain criteria must be met. As held in the Irish Employment Tribunal in UD 946/2007, McManus v Brian McCarthy Contractors, a resignation can be rescinded taking into account the circumstances

under which the resignation was offered. In this case the Claimant asserts he resigned then rescinded the decision in a letter to the 4th Respondent. This recission was within the bounds in the Irish case. In my considered view, the circumstances of the resignation coupled with the impending disciplinary hearing take this resignation to the level where a Court can infer it was not voluntary or made with full intent to sever the employment relationship. The Claimant had been soul searching after the allegations against him were made. It would be hoped that the Respondents had gathered sufficient evidence of the allegations made against the Claimant. Given that he had been facing persistent interference with his docket, the decision to resign seems to have been off the cuff and made in the heat of the moment. Where an employee resigns impulsively under pressure or humiliation, the employer has a duty to investigate the employee's true intentions before accepting the resignation. That said, the Claimant seems to have suffered some mild depression for which he sought medical attention before he finally was let go when the disciplinary hearings never managed to take off. The resignation therefore in the Court's view was not voluntary and the recission did not take away from the Claimant the right to due process or the benefit of the repudiation.

18. The Claimant asserts he was defamed. The Court does not discern defamation as the contents of the letter making the accusations was not published to the world or even copied to persons who had no business being in the know. As such the claims on the said limb are dismissed. The Claimant did not prove any entitlement to aggravated damages and the only compensation he will recover are 3 months' salary as compensation – Kshs. 1,135,443.30 for the failure to hear the Claimant and for the obtuse acceptance of his resignation even after it was withdrawn. The 3 months take into account the Claimant has mitigated his losses and has even moved on to other engagements and is therefore not without recourse to earning a salary.

19. The Claimant was entitled to receive notice of termination which is one month – Kshs. 378,481.10 in addition to the withheld statutory dues amounting to Kshs. 704,000/- per his testimony whereat he indicated he had been paid part of his dues. The Claimant is also to be paid his gratuity accumulated per his August 2023 payslip – Kshs. 1,488,324.15 less any gratuity already paid out. If this sum has been settled in full the same shall be excluded from the computations of final dues.

20. The Claimant will also have costs of the suit and interest on the sums awarded from the date of this judgment till payment in full. The decretal sum is to be settled by the 4th Respondent to the exclusion of the 1st, 2nd and 3rd Respondents.

21. In the final analysis the Court enters judgment for the Claimant against the 4th Respondent for:-

    a. Unpaid terminal dues amounting to Kshs. 704,000/- less any sums paid subsequent to the Claimant testifying in Court.

    b. Unpaid gratuity if any.

    c. One month's salary as notice – Kshs. 378,481.10

    d. Compensation of 3 months' pay – Kshs. 1,135,443.30

    e. Cost of the suit

    f. Interest at court rates on the sums in a), b), c) and d) above from the date of judgment till payment in full.

    It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 19TH DAY OF FEBRUARY 2025

NZIOKI WA MAKAU, MCIARB.

JUDGE