



**Ogesa v Fenesi Management Limited (Cause 749 of 2018)
[2024] KEELRC 190 (KLR) (12 February 2024) (Judgment)**

Neutral citation: [2024] KEELRC 190 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 749 OF 2018
JK GAKERI, J
FEBRUARY 12, 2024**

BETWEEN

LEAH NAFULA OGESA CLAIMANT

AND

FENESI MANAGEMENT LIMITED RESPONDENT

JUDGMENT

1. The Claimant commenced this suit on 18th May, 2018 alleging unfair termination of employment, non-payment of terminal dues and denial of certificate of service.
2. The Claimant prays for;
 - a. A declaration that the Respondent violated her rights and wrongfully terminated her services.
 - b. Damages for wrongful and unfair termination of service.
 - c. Terminal dues and benefits Kshs.1,316,666.60 comprising;
 - i. 19 days salary for December 2017, Kshs.63,333.30.
 - ii. 16 outstanding leave days Kshs.53,333.30
 - iii. 12 months compensation Kshs.1,200,000.00.
 - d. Costs of the suit.

Claimant's case

3. The Claimant avers that she joined the Respondent on 3rd June, 2014 at a monthly salary of Kshs.80,000/= which later rose to Kshs.100,000/= in March 2016.



4. It is the Claimant's case that she resumed duty on 19th December, 2017 from sick-off, saw Rev. Kwasi about a cheque that required signature, later came across Mr. Onyango along the office corridors at 12.00 and at 12.30, Mr. Onyango came to her office and wanted to see some payment files which he was shown and directed the Claimant to remove all wage payment vouchers for audit on the following day.
5. That on the same afternoon, Mr. Onyango sent a lady to the Claimant's office to scan the vouchers.
6. It is the Claimant's case that Mr. Onyango retrieved more files from the store and the Claimant's office and Mr. Onyango left for the Boardroom where Mr. Gitoho and Rev. Kwasi were. That the Claimant was subsequently summoned to the Boardroom where Mr. Gitoho accused her of withholding company information without providing details and theft. That Mr. Gitoho shouted at the Claimant with clenched fist, threw his phone at the Claimant and it landed on the desk and made abusive remarks.
7. It is the Claimant's case that she pleaded with the directors to terminate her services as opposed to harassing her and excused herself from the Boardroom. That, at Mr. Gitoho's request, she handed over office keys to him including the password.
8. That Mr. Gitoho left the boardroom with orders that the Claimant writes a resignation letter and be escorted to remove her personal items and the request to do the letter later was rebutted and could only leave after resignation.
9. The Claimant avers that she went to the reception desk and wrote a one sentence resignation letter while standing and submitted the same and found Mr. Onyango in her office searching for documents.
10. That after the Claimant had removed her flash disk from the computer, Mr. Onyango grabbed it and confiscated it and pushed the Claimant out of the office and requested the guards to throw her out of the premises, who hesitated and Mr. Onyango called for reinforcement who also declined to effect the orders by which time the Claimant's husband had arrived to take her home.
11. That on being asked why he was harassing the Claimant, Mr. Onyango walked away and left the premises.
12. It is the Claimant's case that Mr. Onyango mistreated her by denying her access to her office to collect personal items, physically manhandled and assaulted her as reported to the police at the Spring Valley Police Station.

Respondent's case

13. In its Statement of Response filed on 28th February, 2020, the Respondent denies the Claimant's allegations and avers that it dispatched the Claimant's Certificate of Service to her postal address.
14. It admits that the Claimant was its Accountant from June 2014 and she was summoned to the boardroom to explain the company's spending but was very defensive and opted to resign rather than respond to queries.
15. It denies having forced the Claimant to resign. That the Claimant wrote the letter of resignation under no duress and signed it in the presence of Mr. Onyango and other staff.
16. That the resignation was a surprise to the directors but was accepted.
17. That the Claimant handed over the resignation letter to the board in the boardroom and was escorted to retrieve her personal belongings from her office.
18. That Mr. Onyango restrained the Claimant from destroying documents in her office.



19. As regards the USB flash disk, the Respondent avers that it appeared to have the Respondent's information and the Claimant had refused to leave the office without it and called an unknown person to come to the office.
20. That Mr. Onyango copied all the information belonging to the Respondent and deleted the rest and returned the flash disk to the Claimant.
21. That Mr. Onyango closed the office door after the Claimant had exited and later went through the drawers to retrieve any personal items but only found KRA returns, phone charger and two books which the Claimant declined.
22. The Respondent prays for dismissal of the Claimant's suit with costs.

Claimant's evidence

23. Documentary evidence on record shows that the Claimant had sick-off from 11th December, 2017 to 13th December, 2017 due to resume on 14th December, 2017.
24. It is also evident that the Claimant reported the incident to the police under OB 26/19/12/17.
25. The report states that the Claimant told the police that she tendered her resignation at around 1700 hours after she was accused of stealing from the Respondent and Mr. Gitoho had thrown a phone at the Claimant and Mr. Onyango physically harassed her as she was retrieving personal items from the office and denied her sufficient time to do so.
26. Puzzlingly, the Claimant was untruthful about her sick leave as the same covered 3 days only but according to her, it was from 11th to 18th December, 2017.
27. The witness confirmed that Mr. Gitoho threw a phone at her and it landed on the table and they were sitting next to each other.
28. It was her testimony that the Respondent's director ordered her to write a resignation letter and was prevented from collecting her personal items and reported the same to Spring Valley Police Station.
29. The witness confirmed that the resignation letter did not state that she was compelled to resign.
30. The witness maintained that Mr. Gitoho had thrown a phone at her and Mr. Onyango physically harassed her though she did not state how.
31. The Claimant admitted that she did not tell the police about the alleged assault and detention in the boardroom.
32. As regards the CCTV footage, the Claimant confirmed that none of the images revealed her alleged removal from the office by Mr. Onyango.
33. That the Claimant only appeared on page 6 with her husband and Mr. Onyango is seen walking away.
34. That her resignation letter took effect immediately and she did not pay the one month's salary.
35. On re-examination, the witness testified that the police came to the scene on 19th December, 2017.
36. That the abstract report contained the alleged harassment by Mr. Onyango.
37. That Mr. Onyango pushed the Claimant out of the seat, and when the Claimant went out, he took the office keys, locked the office and later came with her personal items which the Claimant refused to collect.



38. CWII, Mr. Daniel Olilo confirmed, on cross-examination that he reached the Respondent's office at 19.55 pm and the police also arrived.
39. That the matter was reported to the police on the same day and the complaint was recorded at 20.10.
40. That he was not there when the Claimant resigned but found her and Mr. Onyango shouting at each other.
41. That the abstract report made no reference to the alleged detention.
42. The witness testified that he is the one who called the police.

Respondent's evidence

43. Mr. Allan Onyango, the Respondent's director confirmed that the Claimant was called to the boardroom to clarify undisclosed information, after a labour audit had been conducted.
44. That the Claimant emptied the desks in her office in the presence of the witness. He admitted having taken the flash disk and withheld it and admitted that there was a misunderstanding between him and the Claimant.
45. That he stood at the door beckoning the Claimant but did not push her out of the office.
46. The witness stated that the Claimant offered her resignation in the boardroom without duress and was not manhandled physically and her personal items were deposited at the reception when she refused to pick them.
47. The witness confirmed that the Claimant was not paid as she resigned without notice.
48. On re-examination, the witness testified that the Claimant had worked for 19 days and had 11 days leave.
49. That the Claimant had previously made an offer to resign and the directors deliberated the same and advised her not to do so.
50. That the witness prevented one Carol from typing out the resignation letter.
51. The witness denied having physically harassed the Claimant. That he did not touch or push her out of the office.

Claimant's submissions

52. The Claimant's counsel submitted on several issues including;
 - i. Whether termination of the Claimant's employment by the Respondent was wrongful and unlawful.
 - ii. Withholding of terminal dues and
 - iii. Whether the Respondent's conduct contravenes the provisions of the *Employment and Labour Relations Court Act*, 2011.
53. Counsel submitted that the circumstances in which the Claimant resigned revealed that the Claimant was constructively dismissed in that the meeting in the Respondent's boardroom was hostile as the Claimant was accused of theft, and a phone was thrown to her direction and was forced to resign from employment and Mr. Onyango was present when the letter was written to ensure that Mr. Gitoho's directions were complied with.



54. According to counsel, the fact that Respondent did not disclose the clarifications it was seeking from the Claimant, reinforces the submission that the resignation was involuntary.
55. Counsel submitted that what transpired in the Respondent's boardroom was a witch-hunt of the Claimant over unsubstantiated theft and the board intended to dismiss the Claimant from employment.
56. Reliance was made to the sentiments of the court in *Wilber Opiyo Ogot V Wells Fargo Ltd (2022) eKLR*, *Robert Indiazzi V Tembo Sacco Ltd (2018) eKLR* and *Edwin Beiti Kipchumba V National Bank of Kenya Ltd (2018) eKLR* on constructive dismissal to urge that the events on 19th December, 2017 in the Respondent's boardroom show that the Respondent's behaviour undermined the trust and confidence between them so much so that the Claimant would not reasonably be expected to continue in employment.
57. Counsel submitted that Mr. Onyango's conduct on that day of locking himself in the Claimant's office, grabbing of the flash disk from the Claimant, calling for reinforcement to eject the Claimant, lends credence to the fact the resignation was not voluntary.
58. Counsel urged the court to find that termination of the Claimant's employment was unlawful.
59. As regards terminal benefits and dues, counsel urged that the Claimant was entitled to the reliefs sought in that the Respondent made no claim against the Claimant or file a Counter-claim.

Respondent's submissions

60. Counsel for the Respondent submitted on termination of the Claimant's employment, entitlements of the Claimant and Respondent and costs.
61. As to whether termination of the Claimant's employment was unlawful, counsel cited Section 47(5) of the *Employment Act, 2007* to urge that the Claimant had not discharged the burden of proof of establishing unfair termination of employment.
62. Counsel submitted that the Claimant resigned voluntarily in that the board questioned her on 19th December, 2017 on some discrepancies and she volunteered to resign and had threatened to do so previously and drafted the handwritten letter without coercion and handed it over to the directors.
63. That the letter is silent on the alleged duress and was thus a unilateral decision.
64. Counsel further submitted that the Claimant's evidence was weak and of little probative value due to contradictions and inconsistencies as the Claimant had no independent evidence and did not call the receptionist to testify or the security guards who were present.
65. Counsel urged that CWII was not present when the Claimant resigned or was allegedly harassed by Mr. Onyango.
66. According to counsel, the evidence on Mr. Gitoho was contradictory.
67. That the police OB Report had no indication of manhandling of the Claimant or forced resignation.
68. Counsel submitted that the Claimant resigned before the alleged harassment by the Respondent and only sought reliefs for termination not harassment.
69. Reliance was made on the sentiments of the court in *Cyrus Maina Gakuru V Republic (2016) eKLR* on contradictory and suspect evidence.



70. Reliance was also made on the decisions in *Edward Machuka Nyamora V Kenya Animal Genetic Resource Centre (2018) eKLR*, *Isaac Andove Musis V Board of Management (BOM) Flax Mixed Day/Boarding Primary School & another (2018) eKLR* to urge that the Claimant's resignation was voluntary.
71. Finally, the decisions in *Nicholus Kipkemoi Korir V Hatari Security Guards Ltd (2016) eKLR* and *David K. Cheruiyot V Barclay Bank of Kenya Ltd (2015) eKLR* were relied upon to urge that the Claimant bore the burden of proof and had chosen to resign.
72. On the reliefs sought, counsel submitted that the Claimant was not entitled to any.
73. As to whether the Respondent had any entitlement, counsel submitted that the Respondent set off what it was owed by the Claimant against her final dues as her resignation was immediate, thus without notice.
74. That she had worked for 7 days and was entitled to payment for only 9 days.

Findings and determination

75. The issues for determination are;
 - i. Whether the Claimant's resignation was actuated by duress and thus an unfair termination of employment.
 - ii. Whether the Claimant is entitled to the reliefs sought.
76. As regards the first issue, it is common ground that the Claimant was an employee of the Respondent, serving as its accountant from June 2014 and did so until 19th December, 2017 when she tendered a resignation letter of even date allegedly under duress exerted by the Respondent's directors, principally, Mr. Gitoho and Mr. Onyango.

Resignation

77. From the evidence on record, it is discernible that on the afternoon of 19th December, 2017, the Respondent's board of directors comprising Rev. Kwasi, Mr. Gitoho and Mr. Onyango had a meeting in the boardroom whose agenda was not disclosed nor the list of its attendees or minutes. Evidence reveals that the board summoned the Claimant allegedly for certain clarifications which the Respondent did not disclose.
78. Although RWI testified that the Respondent was conducting a Labour Audit, he did not testify as to what it entailed or what they wanted to find out and why the Claimant's presence was necessary.
79. The Claimant maintains that she was forced to resign and had been accused of having stolen from the Respondent and singles out Mr. Gitoho's conduct in the boardroom of accusing her of withholding company's unspecified information and throwing of phone at her which landed on the table near her.
80. RWI's evidence make no reference to the accusations levelled against the Claimant by Mr. Gitoho nor the throwing of the phone in her direction.
81. Curiously, the witness did not deny or contradict the Claimant's evidence on Mr. Gitoho's conduct.
82. In fact, the written statement by Mr. Onyango makes no mention of Mr. Gitoho or Rev. Kwasi or their contribution to the discussion.



83. The evidence makes no reference to the circumstances that culminated in the resignation of the Claimant.
84. The Claimant's written statement is clear that when she sought a break to cool down, Mr. Gitoho shouted at her telling her that she would not go and asked for her office keys which she handed over to Mr. Onyango, evidence Mr. Onyango's statement does not make reference to or deny, including the request for passwords for accounts and payroll.
85. The Claimant's testimony is that Mr. Gitoho directed that she writes a resignation letter and be escorted to her office to collect personal effects and her request to write the letter freely later was denied and had to do so before leaving the premises.
86. Both Mr. Onyango and the Claimant agree that the resignation letter was drafted at the reception in the presence of Mr. Onyango, who told the court that he directed one Carol, the receptionist, not to type the letter as requested by the Claimant.
87. It is decipherable that the Respondent's board of directors, principally Mr. Gitoho and Mr. Onyango wanted the Claimant to resign and had to do so expeditiously.
88. If indeed the Claimant offered to resign voluntarily, why did she have to do a one line letter at the reception in the presence of Mr. Onyango? Why was she not accorded time to do so freely after the meeting as requested?
89. RWT's evidence that the Claimant offered to resign as opposed to providing information is evidently not believable. Having confirmed on cross-examination that he did not indicate the nature of information the Claimant was required to provide, how or the issues being discussed, and the Claimant was still an employee of the Respondent, it is difficult to surmise that the Claimant chose to resign.
90. The retort that the Claimant was aware of the issues cannot avail the witness.
91. The Respondent's board was purportedly conducting a labour audit yet there is no documentary evidence that there was a meeting on that day or what transpired.
92. The only outcome appear to have been the Claimant's resignation from employment.
93. Contrary to the Respondent's counsel's submission that the Claimant's evidence was weak and of little probative value, the Respondent's evidence too falls in the same category. For instance, for unexplained reasons, the Respondent neither called Rev. Kwasi nor Mr. Gitoho to testify on its behalf. Mr. Gitoho's evidence would have reinforced and buttressed the Respondent's case significantly as Mr. Onyango did not controvert the allegations made against Mr. Gitoho.
94. Similarly, Mr. Onyango's evidence confirms some of the allegations made by the Claimant such as he took the flash disk from the Claimant and refused to hand it back and acknowledges that he may have "collided with" the Claimant on his way to close the door behind the Claimant, the alleged manhandling of the Claimant. It is an acknowledgment that there was physical contact between the Claimant and the director as he endeavoured to ensure that she left the office.
95. It beats logic how a director of a company and an employee of the opposite sex should "collide" at the work place and after working hours.
96. The Claimant's resignation letter dated 19th December, 2017 leaves no doubt that it was written in a hurry and the Claimant had no opportunity to type it herself or have it typed as the Respondent's director would not allow it. This perhaps explains the dearth of details on the reasons for resignation. This does not discount the circumstances in which it was written.



97. Similarly, if the Claimant had offered to resign and did so voluntarily, why did she have to be escorted to collect personal items from her office?
98. Mr. Onyango admitted having instructed the security guards to eject the Claimant from office.
99. Finally, it is not in contest that the Claimant's husband came to the Respondent's office and called the police and the incident was reported at the Spring Valley Police Station on the same day at 2010 hours under OB No. 26/19/12/17.
100. The report makes reference to the resignation at 1700 hours and the accusations the directors made against the Claimant.
101. It states that Mr. Gitoho had thrown his phone in the direction of the Claimant and Mr. Onyango physically harassed her when she went to collect her personal effects.
102. The report is signed by PC NO. 96031.
103. Although the Claimant did not avail the report she made to the police, the abstract provides a snap shot of what transpired at the Respondent's office on the afternoon and evening of 19th December, 2017.
104. Contrary to the Respondent's counsel's argument that the resignation and harassment of the Claimant were independent of each other, that was not the case. It was a continuum. The discussion in the boardroom that afternoon was the proximate cause of everything that happened that afternoon and evening.
105. For the foregoing reasons, it is the finding of the court that the Claimant has on a balance of probabilities demonstrated that her resignation on 19th December, 2017 was on account of the Respondent's coercion or duress.
106. The Claimant's evidence is clear that the circumstances in which she wrote the one sentence resignation letter were far from palatable for the purpose as she could not access her office to do it and the same was being awaited for by the board and one of them was present to ensure that the letter was written at the reception.
107. The court is satisfied that this was a forced resignation and amounted to an unfair termination of employment within the meaning of Section 45 of the [Employment Act](#), 2007 as the Claimant did not exercise free agency.
108. Significantly, the Respondent did not avail any evidence to prove that the Claimant resigned in protest as evidence on record does not endear itself to the assertion that the resignation was a voluntary decision executed voluntarily.
109. In the court's view, the Claimant has discharged the burden of proof under Section 47(5) of the [Employment Act](#), 2007 as emphasized by Abuodha J. in *Nicholus Kipkemoi Korir V Hatari Security Guards Ltd (Supra)*.
110. Finally, on this issue, although the Claimant did not seek reliefs for the alleged harassment, the evidence on record leaves no doubt that the manner in which the Respondent's directors handled the Claimant on 19th December, 2017 bordered harassment.
111. RWI did not deny that the Claimant was accused of withholding unspecified company information and of theft and the subsequent treatment bears testimony.
112. The resignation per se would not have necessitated police intervention or report as it is a clear civil matter.



113. From the evidence on record, it is perceptible that the manner in which Mr. Onyango handled the Claimant was far from civil.

Reliefs

114. Having found that the Claimant's resignation amounted to an unfair termination of employment, the Claimant is entitled to various reliefs as follows;

a. Declaration

115. Having found as above, it is hereby declared that the Respondent violated the Claimant's rights and unlawfully terminated her employment.

b. Terminal dues and benefits

i. 19 days salary for December 2017

116. The Respondent adduced no evidence to show that it paid the Claimant for the days worked in December 2017.

117. Contrary to the Respondent's submission that the Claimant worked for lesser number of days, and was in sick-off for 3 days, she was still an employee of the Respondent and is entitled to the salary for 19 days as claimed.

ii. 16 outstanding leave days

118. The Respondent tendered no evidence to contradict this prayer and confirmed that it did not pay the Claimant anything after resignation.

The prayer is merited and is awarded.

c. 12 months compensation for wrongful termination of services

119. Having found that termination of the Claimant's employment was unfair, the Claimant is entitled to the relief under Section 49(1)(c) of the [Employment Act](#), 2007 having regard to the relevant factors enumerated under Section 49(4) of the Act as follows;

- i. The Claimant was an employee of the Respondent for about 3 years and 5¹/₂ months which is relatively short.
- ii. The Claimant had no record of misconduct or warning letter.
- iii. The Claimant did not express her wish to remain in employment or request the board to reconsider the issue.
- iv. The Claimant contributed to the termination of employment.

120. In the circumstances, the court is satisfied that the equivalent of 3 months gross salary is fair, Kshs.300,000/=.

121. In the upshot, judgement is entered in favour of the Claimant against the Respondent as follows;

- a. Declaration that the Respondent violated the Claimant's rights and wrongfully terminated her services.
- b. 19 days salary for December 2017.



- c. 16 outstanding leave days.
- d. Equivalent of 3 months' gross salary.
- e. Costs of this suit.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 12TH DAY OF FEBRUARY 2024

DR. JACOB GAKERI

JUDGE

ORDER

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

