



Ngige v Green Pencils Limited (Employment and Labour Relations Cause 943 of 2017) [2024] KEELRC 823 (KLR) (18 April 2024) (Judgment)

Neutral citation: [2024] KEELRC 823 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 943 OF 2017**

MN NDUMA, J

APRIL 18, 2024

BETWEEN

SAMMY KIMANI NGIGE CLAIMANT

AND

GREEN PENCILS LIMITED RESPONDENT

JUDGMENT

1. The claimant filed suit on 18/5/2017. The facts of the suit as adduced by the claimant may be summarized that the claimant was on 15/5/2012 employed by the respondent as a factory manager. The respondent was a pencil manufacturing company. That the claimant was to be paid a monthly salary of Kshs. 70,000/=.
2. That the claimant began working and was not paid salary for a period of ten (10) months. That the claimant kept demanding payment while the respondent kept giving false promises about the salary payment.
3. That on 9/8/2014, the managing director of the respondent called a meeting with its employees in which the services of the claimant were terminated verbally without any reason given. That the claimant sought explanation which was not given.
4. The claimant reported a dispute to the Kenya Union of Commercial Food and Allied Workers who wrote a letter to the respondent dated 2/9/2014, seeking settlement of the matter. The matter was however not resolved.
5. Claimant states that he was not granted annual leave despite request, was not paid in lieu of termination notice, was not paid arrear salary and service pay upon termination.
6. The claimant prays for judgement against the respondent for:-
 - a. Kshs. 988,076/= being unpaid arrear salary for a period of ten (10) months



- b. Damages for unlawful termination.
 - c. Service pay and or gratuity
 - d. Interest and costs.
7. Under cross-examination claimant said that he was partly paid instalments while he worked via Mpesa. That the director of the claimant was called Anthony Kingori and he is the one who sacked the claimant.
 8. The claimant denied that he was a business partner of the respondent. Claimant denied that he was entitled to and was paid commission for sales realized by him. The claimant denied sexually abusing staff as alleged by the respondent or at all. The claimant denied stealing pencils from the factory as alleged by the respondent or at all. The claimant prays to be awarded as prayed.
 9. The claimant produced Mpesa statements in which is shown payments made from time to time by Anthony Ndungu to the claimant.
 10. The claimant said these were part payments of his salary which was never paid in full. The statement is for the period 1/7/2012 to 31/08/2014. The claimant prays to be awarded accordingly.
 11. The claimant called one Kenneth Gachoka Mwaniki in support of his case. CW2, said that he was a jua kali artisan and worked for different companies. That he worked with the claimant for the respondent but the director of the company was one Anthony Karori. That the claimant was the manager of the company and is the one who recruited employees. Under cross-examination CW2 said that the claimant and himself were employed by the respondent. CW2 said that he was also aware of another company called Echo Pencil owned by one Dorris thereso. CW2 said he was employed at Echo pencil by one Patrick Ngige Mwangi. That the claimant asked CW2 and other employees to join the respondent, a new company and then relocated to Juja factory. That they lived in the company premises.
 12. That the claimant had set up the company and was their manager. CW2 said he was not aware of the agreement between the claimant and director Anthony Keron. CW2 said he did not know whether the claimant was paid salary or commission as an agent. CW2 said he was paid a salary. That his work was to load pencils under supervision of the claimant, who was to manage. CW2 said he was not there when the claimant left employment and was not aware of the circumstances under which the claimant left employment.
 13. CW2 said he left the employment of the respondent before the respondent. CW2 insisted he did not know the arrangement between the claimant and the respondent.

Defence and counter claim

14. The respondent filed statement of defence and counter claim in which the respondent denies the claim by the claimant and counter claims damages in the sum Kshs. 11,000,000 in respect of 300,000 pencils alleged to have been stolen by the claimant worth Kshs. 9,000,000/= and 400,000 sub-standard pencil worth Kshs. 2,000,000/= provided by the claimant to the respondent. The respondent counter claims interest and costs of the counter claim.
15. RW1 Anthony Ndungu Kirori testified for the respondent that he met the claimant sometimes in the year 2012 and the claimant was introduced to him by one Davis Sayianka, a co-director in a company called Eco-pencil Limited. RW1 stated that Davis had confined in him that Eco-pencils Limited was on the verge of being auctioned and that he wanted RW1 to assist in payment of debts of Eco-pencils Limited.



16. Davis further promised to supply 250,000 pencils per month to the respondent but they failed to meet their bargain. That Davis requested that Eco-pencils limited and the respondent Green Pencils Limited to partner so that the demand could be met. That the partnership between the two companies was started with the aim to increase production of pencils to 100,000 per month and to provide 250,000 pencils in three months. RW1 relocated the respondent to Juja due to the merger as bigger space was required.
17. That Mr. Ndugu Kirori was to make the pencils and Davis was to create the market for the respondent. That the employees who moved from Eco-pencils were to be paid by Davis from the proceeds of the orders sold. That Davis was to be paid a commission of Kshs. 1.30/= per pencil for every order brought and sold and the claimant was to receive a commission of Kshs. 0.70/= per pencil for every order brought and sold.
18. That contrary to expectations, the claimant only brought orders for about 50,000 pencils that were sold amounting to Kshs. 35,000/= as per the commission agreed upon.
19. RW1 further said, he had received complaints from female employees that the claimant was demanding sexual favours from them in order to continue working in the respondent's company.
20. That RW1 called for a meeting for purpose of reprimanding and warning the claimant against sexual harassment of female employees.
21. Further, other meetings were called to reprimand the claimant for production of sub-standard pencils and selling the same at a cost of Kshs. 10/= each while the production cost was Kshs. 17/= per pencil occasioning massive loss to the company.
22. RW1 added that the meetings held did not improve the situation and RW1 was compelled to separate with Davis and his team and he gave notice that he would be moving back to his earlier premises and continue with business as a sole proprietor.
23. RW1 said that in the course of his relocation he found out that 300,000 piece of pencils worth Kshs. 9,000,000/= were missing from the store and upon investigations it became apparent that the claimant had stolen the pencils and he reported the matter to Juja Police Station.
24. That the claimant disappeared to avoid arrest and RW1 did not know his whereabouts until RW1 received a letter of demand dated 2/9/2014. That the demand by the claimant was ill conceived and false.
25. That the claimant was not an employee but a common agent and was paid commission on orders sold by him. That the respondent does not owe the claimant any monies claimed. The claim is false and it be dismissed.
26. That the claimant be held accountable for the counter claim of Kshs. 11,000,000/= and judgement be entered accordingly.
27. RW1 added that in terms of the agreement between himself and the claimant, the claimant was to be paid Kshs. 0.70/= for every pencil order sourced for and sold by the claimant. That for the first 6 to 8 months, no pay would be paid to anyone as the team tried to raise stock to 1,000,000 pencils before embarking on sale of the same.
28. That despite that agreement RW1 paid for the claimant's upkeep and rent as evidenced from Mpesa payments attached to the statement of claim and others paid to him in cash. That amounts paid to the claimant were to be recovered from sales realized.



29. That the respondent suffered loss and damage occasioned by the claimant in the sum of Kshs. 11,000,000/= and the respondent be awarded accordingly.
30. RW1 reiterated his stance under cross-examination.

Determination

31. The parties filed submissions which the court has carefully considered together with evidence adduced by CW1, CW2 and RW1. The issues for determination are:
 - a. Whether the claim has any merit.
 - b. Whether the counter claim has any merit.
 - c. What reliefs are the claimant and the respondent entitled to.
32. In terms of section 107 and 108 of the *Evidence Act* Cap 80 Laws of Kenya, the claimant has the burden of establishing his claim on a balance of probability whereas the respondent has the burden of establishing the counter claim on a balance of probability.
33. The claimant did not provide any employment contract between himself and the respondent. The claimant came across as a sophisticated director of a pencil manufacturing company who negotiated a production agreement with RW1. The agreement negotiated between the claimant for Eco-pencil Limited and RW1 for Green pencils Limited was not placed before court. A key player in that merger transaction one Davis Sayianka Kereso was not involved in the dispute and was for unexplained reasons not called as a witness in this matter.
34. The suit is dependent on the say so of CW1, who claims that he was an employee of the respondent and held the position of factory manager of the merged business whereas RW1 insisted that himself and claimant were business partners vide their respective pencil production companies and that they had negotiated a merger and relocation for survival purposes and growth of their mutual business.
35. That the objective of the merged business were not realized. That meanwhile RW1 provided monetary support to the claimant vide occasional Mpesa and cash payments he does not deny.
36. That the claimant disappeared upon being faced with accusations of theft and poor quality production of pencils and sexual harassment.
37. That the claimant was never an employee of the respondent and is owed no salary by the respondent.
38. That the claimant in any event owes the respondent Kshs. 11,000,000/= arising from theft of pencils stolen from the factory by the claimant and supply of substandard pencils by the claimant.
39. A careful analysis of the claim by Mr. Sammy Kirori Ngige has led to the inevitable conclusion that the claimant has failed to prove on a balance of probability that he was an employee of the respondent in the position of factory manager earning a monthly salary of Kshs. 70,000/= per month. The Mpesa statement produced by the claimant does not reveal a single monthly payment of Kshs. 70,000/= from the respondent. The court does not believe that a sophisticated person like the claimant would accept to be employed in the position of a factory managers without the terms being spelt out in a written contract.
40. The court does not equally believe that the claimant could await for a period of ten (10) months to receive his monthly salary. The claimant did not produce a single demand letter for payment of his salary in the period 2012 to 2014 that he was associated with the respondent.



41. To the contrary, the court finds that the claimant, one Davis and RW1 entered into a pencil production effort vide their two respective companies Green pencil limited and Eco-pencil limited which venture did not succeed.
42. The respondent has equally failed to prove that the claimant was involved in theft of pencils worth Kshs. 9,000,000/= and production of sub-standard pencils worth Kenya shillings 2,000,000/=.
43. It is the finding by the court that the claim, by the claimant and the counter claim by the respondent are fruits of imagination and conjecture upon the fall out by the two partners in their ambitious venture of pencils production.
44. Accordingly the main suit and the counter claim have both failed for lack of prove and merit and are dismissed.
45. Each party to meet their own costs of the suit.

DATED AT NAIROBI THIS 18TH DAY OF APRIL, 2024.

MATHEWS NDERI NDUMA

JUDGE

Appearance:

Ms. Kouna for claimant

Mr. Njengo for respondent

Mr. Kemboi, Court Assistant

