



**Ongeta v Del Monte Kenya Ltd (Cause 597 of 2019)
[2024] KEELRC 760 (KLR) (11 April 2024) (Judgment)**

Neutral citation: [2024] KEELRC 760 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 597 OF 2019
BOM MANANI, J
APRIL 11, 2024**

BETWEEN

BENARD KINANGA ONGETA CLAIMANT

AND

DEL MONTE KENYA LTD RESPONDENT

JUDGMENT

Introduction

1. The parties to this action had an employment relationship from 1994 to September 2016 when it was terminated. Whilst the Claimant accuses the Respondent of having terminated the contract irregularly and without lawful cause, the latter contends that the Claimant was dismissed from employment after it was discovered that he had colluded with another employee to swindle job seekers.

Claimant's Case

2. The Claimant averred that he was employed by the Respondent as a Senior Clerk on 1st June 1994. He stated that he rose through the ranks until the time that his contract was terminated in September 2016.
3. He averred that sometime in June 2016, two ladies who were unknown to him visited his house to inquire about one Caroline Kawira. They allegedly told him that Caroline had promised to assist them to secure employment with the Respondent if they paid for the service. She (Caroline Kawira) had allegedly told them that she was the Claimant's wife and that she was able to use her position to influence their securing of job opportunities with the Respondent.
4. The Claimant asserted that the two told him that they had paid the said Caroline Kawira money to secure the jobs. However, the latter had not kept her part of the bargain to secure the jobs. As such, they had allegedly come for a refund of their money.



5. The Claimant stated that he told the strangers that the Respondent does not hire employees through agents. As such, if they had paid any money to Caroline Kawira, they should consider themselves as victims of fraud and report the incident to the police so that the matter is addressed.
6. The Claimant stated that after this encounter, he reported the incident to the police. However, he did not follow up on the matter. And neither did he raise the issue with his immediate supervisor.
7. The Claimant stated that in August 2016, he received an inquiry from the Respondent's internal audit team regarding whether he was aware of the job scam at the workplace. The auditors allegedly asked him whether he was aware of allegations that some people had been paying Caroline Kawira in order for her to purportedly secure for them employment with the Respondent.
8. The Claimant averred that he informed the auditors that he was not aware of the alleged scam. He allegedly told the auditors that the only information he had relating to Caroline Kawira with regard to solicitation for money in exchange for jobs related to the two strangers who had visited his house in June 2016.
9. However and according to him, he had reported the incident to the police although no action had been taken in respect of the report. As such, he had not followed up the matter.
10. The Claimant averred that he was taken aback when he was issued with a notice to show cause on 2nd September 2016 requiring him to justify why his contract of service should not be terminated for alleged collusion and bribery in respect of the alleged job scam and purported misinformation to the Respondent's auditors. He contended that despite the short duration given to him to respond to the accusations, he managed to offer his response.
11. He averred that in his response, he provided the auditors with all the information that was within his knowledge on the matter. He indicated that he told the auditors that he had advised the two strangers to report their grievance to the police for further assistance. He denied having misled the auditors on any issue that they raised with him.
12. The Claimant averred that he was subsequently summoned for a disciplinary hearing where-after he was issued with a letter terminating his employment. He stated that he was not given a copy of the auditors' report either before, during or after the disciplinary session. He also contended that no witnesses were called by the Respondent to affirm its allegations against him. He further averred that the Respondent did not provide him with the opportunity to challenge its findings on appeal.

Respondent's Case

13. On its part, the Respondent admitted that the two had an employment relationship from 1994 to September 2016 when it was terminated. It (the Respondent) accused the Claimant of having misled its auditors that he did not know Caroline Kawira only to later own up that he knew her. Further, the Respondent accused the Claimant of having failed to raise the suspected job scam with its management when he was confronted by the two strangers in June 2016.
14. The Respondent produced the Claimant's mobile money (MPESA) statements which showed that at some point, he sent or received money from the said Caroline Kawira. Based on this evidence and the fact that the Claimant had attempted to conceal his knowledge of the said Kawira, it (the Respondent) strongly believed that the two (Caroline Kawira and the Claimant) had been jointly involved in the scam.
15. The Respondent stated that when these matters came to the fore, it commissioned an internal audit which confirmed that indeed Caroline Kawira had been illegally soliciting for payments from job



seekers in exchange for purported promises for jobs with it. That there was evidence to suggest that the Claimant may have been involved in the scheme.

16. The Respondent averred that when the Claimant was asked about the scam, he denied knowledge of it. Further, he allegedly denied knowledge of the said Kariwa. As a result, he was issued with a notice to show cause.
17. The Respondent contended that the Claimant's response to the show cause was unconvincing. As such he was invited to a disciplinary hearing where-after he was dismissed from employment.
18. The Respondent stated that the Claimant was afforded a fair hearing. As such, the decision to terminate his contract of service was procedurally fair.

Issues for Determination

19. After analyzing the pleadings and evidence on record, I am of the view that the following are the issues that require resolution in the cause:-
 - a. Whether the Respondent had substantive grounds to terminate the Claimant's contract of service and whether the termination was in accordance with fair procedure.
 - b. Whether the parties are entitled to the reliefs that they seek through their respective pleadings.
20. The evidence produced by the Respondent shows that there were electronic money transactions between the Claimant and Caroline Kawira which date back to 2014. This is despite the two initially denying that they knew each other. These transactions were not cogently accounted for by the Claimant.
21. In the face of the complaints by job seekers that Caroline Kawira had been used as a conduit to channel bribe money to secure job opportunities, it is apparent that the Respondent had genuine reason to believe that the exchange of money between Kawira and the Claimant may have been in furtherance of the job scam. This is more so in view of the initial attempt by the two to deny knowledge of each other. This appears to have been an attempt at concealing the scam. It is noteworthy that the two only changed their version of the story after the MPESA statements demonstrated that they indeed had some money transaction between them.
22. Section 41 of the *Employment Act* requires that before an employer terminates the contract of service for an employee, he must have valid grounds to justify his decision. However, section 43 of the Act provides that all that the employer requires in order to establish the presence of a valid ground to dismiss the employee is to demonstrate that he had a genuine belief that the ground to terminate the employee's contract exists (Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR).
23. In effect, the employer need not have infallible evidence pointing to existence of the alleged infraction. All that he requires is a reasonable basis to entertain a genuine belief that the ground exists.
24. The standard of proof in this respect is one of a balance of probabilities (Kenya Revenue Authority v Reuwel Waithaka Gitahi & 2 others [2019] eKLR). In other words, if the obtaining circumstances justify the employer's conclusion that it was more probable than not that the employee was guilty of the infraction in question, then the court should sustain the decision to terminate the contract of service.
25. In the instant case, I am of the view that there was sufficient material before the Respondent's disciplinary panel to trigger a genuine belief that the Claimant was involved in the job scam. The fact that both the Claimant and the culprit, one Kawira tried to initially deny knowledge of each other



- speaks volumes about their attempts to conceal the scam. They only owned up to knowing each other when evidence relating to their mobile money transactions was exposed.
26. Even after this exposure, neither of them gave a cogent account for the transactions in the face of their initial denial of knowing each other. In the premises, I arrive at the conclusion that the Respondent had genuine reason to believe that the Respondent was involved in the scam.
 27. However, the fact of involvement in the scam was not sufficient to terminate the Claimant's contract. As sections 41 and 45 of the *Employment Act* demand, the Respondent was obligated to ensure due process in releasing the Claimant from employment.
 28. The provisions of section 41 and 45 of the *Employment Act* on due process amplify the constitutional right to fair labour practice that is entrenched under article 41 of *the Constitution* of Kenya 2010. The above provisions also amplify the right to fair administrative action that is entrenched under article 47 of *the Constitution* of Kenya 2010. The latter right is further operationalized under the *Fair Administrative Action Act*.
 29. Section 4 of the *Fair Administrative Action Act* obligates a decision maker to supply the person who is likely to be affected by the decision the information, materials and evidence that are to be relied upon in making it (the decision). Thus, the Respondent was obligated to provide the Claimant with all information regarding the alleged infraction by him before it subjected him to the disciplinary hearing.
 30. In both his Statement of Claim and evidence, the Claimant maintained that he was not supplied with the investigation report which the Respondent relied on to reach its decision to terminate his contract. The Respondent did not provide cogent evidence to demonstrate the contrary. Therefore, the court arrives at the conclusion that the Respondent did not provide the Claimant with this critical document.
 31. The Respondent's failure to provide the Claimant with this report infringed the latter's right to due process. Without the report, it was not possible for the Claimant to verify the Respondent's assertions regarding its preliminary findings. Therefore, the Claimant was considerably denied the opportunity to adequately prepare his response to the accusations that faced him. In the premises, the court arrives at the conclusion that the process that resulted in the decision to terminate the Claimant's contract was procedurally flawed.
 32. Having found as above, I find that the Claimant is entitled to compensation, albeit nominally, to vindicate his right to due process. It is so ordered.
 33. As regards the Respondent, its sole prayer was that the suit be dismissed with costs. Having reached the conclusion that the Claimant is entitled to compensation for unfair termination of his employment, the request by the Respondent cannot issue.

Final Orders

34. In the final analysis, I find and declare that although the Respondent had substantive grounds to terminate the Claimant's employment, the decision to terminate the contract was not processed in accordance with fair procedure.
35. As a result, the decision is declared unlawful.
36. Having regard to the fact that the Respondent had valid reasons to terminate the contract of service between the parties and that the decision has been faulted only on account of procedure, I am disinclined to award the Claimant substantial damages as compensation for unfair termination of his contract. This is because the Claimant's conduct substantially contributed to the decision to terminate



his employment. In the premises, I award him compensation that is equivalent to his gross salary for three (3) months, that is to say Ksh. 86,659.00 x 3 = Ksh. 259,977.00.

37. This amount attracts interest at court rates from the date of this decision.
38. This award is subject to the applicable statutory deductions.
39. The Claimant shall have half costs of the action.

DATED, SIGNED AND DELIVERED ON THE 11TH DAY OF APRIL, 2024

B. O. M. MANANI

JUDGE

In the presence of:

.....for the Claimant

.....for the Respondent

Order

In light of the directions issued on 12th July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with Rule 28 (3) of the ELRC Procedure Rules which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

B. O. M MANANI

