



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

Mbuthia v Raa Limited (Petition 225 of 2021)
[2024] KEELRC 2681 (KLR) (30 October 2024) (Judgment)

Neutral citation: [2024] KEELRC 2681 (KLR)

REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 225 OF 2021
B ONGAYA, J
OCTOBER 30, 2024

BETWEEN

SYDNEY MBUTHIA PETITIONER

AND

RAA LIMITED RESPONDENT

JUDGMENT

1. The petitioner filed the Petition dated 21.11.2023 through the firm of N.A Owino & Company Advocates, seeking the following prayers:
 1. A declaration that the respondent's letters to the petitioner dated 06.05.2021, 07.05.2021 and 25.06.2021 are illegal, null and void ab initio for being in contravention of Articles 25(c), 28, 31, 41, 47, 48, 50 and 236 of *the Constitution* of Kenya, 2010.
 2. A declaration that there is no offence committed by the petitioner that warrants disciplinary action by the respondent.
 3. A declaration that the respondent infringed on the petitioner's fundamental rights guaranteed under Articles 25(c), 28, 31, 41, 47, 48, 50 and 236 of *the Constitution* of Kenya, 2010.
 4. A declaration that the respondent violated the provisions of Articles 10, 73, 23 and 236 of *the Constitution* of Kenya 2010.
 5. An order for judicial review by way of certiorari to bring to this Honourable Court for purposes of quashing the decision of the respondent contained in the letter of 25.06.2021.
 6. An order of prohibition and/or permanent injunction do issue to prohibit and permanently restrain the respondent from implementing the decision contained in the respondent's letter dated 25.06.2021 and/or from taking any adverse action pursuant to the said decision.



7. An order of judicial review by way of mandamus directing the respondent to reinstate the petitioner to his employment including the reinstatement of his salary and employment benefits.
Or in the alternative
 8. The respondent be ordered by this Honourable Court to pay the petitioner his terminal benefits as per his letter of contract which include;
 - a. Three months' salary in lieu of notice at Kshs. 121,199/= *3 =Kshs. 363,573/=.
 - b. Unpaid salary for 8 days from 1st – 8th May 2021 at the rate of Kshs. 121,199/= per month, totalling to Kshs. 32,317.60.
 - c. Leave for 13.5 days for the year ending March 2021 which is Kshs. 32,317/=.
 - d. Accrued leave days plus 3 from March and April 2021 at 15 days -Kshs. 60,596/=.
 - e. Monies unlawfully deducted from the petitioner's salary for the year 2019, Kshs. 727,146/= (half salary) 12 months.
 - f. Monies unlawfully deducted at half salary for the year 2020 (January to April 2020), Kshs. 605,955/=).
 - g. Certificate of service.
Total.....Kshs. 1,789,587/=
 9. General damages for breach of contract of the petitioner's rights guaranteed under Articles 25(c), 28, 31, 41, 47, 48 and 50 of the Constitution of Kenya 2010.
 10. Punitive and exemplary damages for constructive dismissal.
 11. Costs of the petition.
 12. Any other relief that this Honourable Court may deem fit and just to meet the ends of justice.
 13. Interest.
2. The petitioner, an accountant by profession, pleaded that he was employed by the respondent on 01.10.2013 and his contracts were renewed on a yearly basis. Both parties executed his last contract on 12.04.202.
 3. The petitioner's case was that on 04.05.2021, he was in an official zoom meeting with three of his bosses at the respondent's premises, to discuss how to pay salaries for April 2021 to staff. That one of the bosses, Mr. Paras (director) and the only one working from home during the meeting complained that the file the petitioner had presented to him was inappropriate in calculating payments to staff for leave days, Sundays and Public Holidays. This was despite the fact that the payment method used had been previously used without any complaints. The petitioner averred that while he was explaining the payment method, Mr. Paras started shouting at him, called him a thief and fraudster and abused him using obscene words. That seated at the boardroom, he subsequently used his phone number 0729xxxx to record Mr. Paras. That immediately thereafter, Mr. Abhinav Anand, Mr. Khelan Shah and Mr. Kenneth Karanja pounced on him, assaulted him and confiscated his personal phone. That Mr. Paras then ordered all the recorded information including abusive messages to be deleted from the petitioner's phone and threatened him. That he was then held hostage for over one hour until an officer from ICD Post came to the respondent's offices, interrogated him and told him he was a free man, as



- no law barred anybody from recording conversations. It was the petitioner's averment that when his phone was handed back to him, it had been flashed out and undergone factory reset.
4. The petitioner pleaded that following Mr. Paras' verbal instruction that the company terminates the petitioner's services, Mr. Anand told the petitioner to collect his money the following day after calculation of his terminal dues. He asserted that he handed in the computer and login password as requested but when he reported to collect his dues on 05.05.2021, he waited until 4:00 pm when he was told to resign but he refused. He noted that he was issued a notice to show cause letter on 06.05.2021, which he responded to by close of that day. That after he reported to work again on 07.05.2021 and continuously refused to resign, Mr. Anand promised to frustrate him. The petitioner averred that he went back to the office on 08.05.2021 and Mr. Anand informed him that his services with the company stood terminated. He urged that he has never received payment for his terminal benefits and that he reported his mistreatment, illegal threats and unfair termination of his services to the Labour Offices in Nairobi on 10.05.2021.
 5. The petitioner further pleaded that on 07.05.2021, the respondent had expressly invited him for disciplinary proceedings but the said letter was delivered late and he was not given a chance to have legal representation. That thereafter on 25.06.2021, he received a letter dismissing him for alleged gross misconduct and asking him to appeal the dismissal to the Chief Executive Officer (CEO). However, the said letter for dismissal was made in bad faith as the said CEO was the one who had ordered for his dismissal and the notice to show cause letter was also unjust.
 6. It was the petitioner's further case that following the respondent's aforementioned actions, the respondent violated his constitutional rights to a fair hearing, fair labour practices, access to justice and fair administrative action. He contended that the respondent's actions are ultra vires Articles 2, 10, 11, 229, 225(1)(a) (c) (d) and (g) of *the Constitution*. Furthermore, that he had legitimate expectation the respondent would afford him substantive and procedural fairness as provided under Articles 47 and 50 of *the Constitution*. He averred that the summary dismissal has detrimentally affected his reputation, job security and fulfilment and subjected him to public ridicule. In addition, that the respondent unjustifiably denying him the right to work has curtailed his human dignity as prescribed under Article 28 of *the Constitution*.
 7. The petitioner urged that the respondent had no justifiable prima facie case for taking disciplinary action such as dismissing him from employment. That his dismissal was premeditated by his superiors and then put in writing to cover for the illegal harassment, abuse, assault and oral dismissal.
 8. The respondent's response is dated 16.09.2021 and filed through Arwa and Change Advocates LLP. The respondent prays that the petitioner's suit be dismissed with costs and interest to the respondent as the Court may determine.
 9. The respondent averred that the petitioner's workmanship prior to April 2021 had been wanting. That the petitioner had severally been issued with show cause letters and warning letters that culminated in him being put on a three (3) months' performance improvement plan from 01.05.2021.
 10. The respondent's case was that the petitioner, during the course of the management meeting, started recording the online proceedings contrary to the respondent's policy and in further violation of the other employees' right to privacy. That subsequently, the petitioner was issued with a show cause letter dated 06.05.2021 to explain his actions. It averred that the petitioner then went absent from duty, called in sick on 10.05.2021 and its effort to trace him bore no fruits. The respondent wrote to the Labour Office to this effect. The respondent pleaded that later on 25.06.2021, it summarily dismissed the petitioner for absconding his duties from 05.05.2021 and for further failing to follow instructions pertaining to salary calculations.



11. The respondent denied having made any police report in relation to alleged events of 04.04.2021 and that it is a stranger to the letter dated 10.05.2021 allegedly sent to the petitioner. It asserted that the petitioner never responded to the show cause letter of 06.05.2021 and that the letter dated 07.05.2021 essentially invited him to a disciplinary hearing that was to take place on 21.05.2021. It averred that when the petitioner absconded work and further failed to attend the disciplinary hearing as scheduled, the only logical way it would have conveyed to him the news on his summary dismissal was by way of postage to his last known address. That upon dismissal, the petitioner was requested to clear with the respondent for his terminal dues to then be paid to him.
12. The respondent further denied that the disciplinary hearing panel included the CEO, pleading that company policy is that the CEO does not sit in the hearings and only receives notices of appeal then sets up a new panel of employees who were not part of the committee that heard the party in the first instance.
13. Without prejudice to its foregoing averments, the respondent urged as follows:
 - i. That sometime in March 2021, the respondent realised the petitioner, as its Chief Accountant, had started being negligent in the performance of his duties.
 - ii. That on 10.03.2021, the petitioner attended a disciplinary hearing to respond to allegations of bank reconciliations not having been done from September 2020. The Committee heard out the petitioner's responses and decided to issue him with a 1st warning.
 - iii. That on 19.03.2021, the petitioner was summoned to a second disciplinary hearing to respond to allegations of fraud and presenting inaccurate reports. The committee hearing the matter analysed all the evidence tendered and decided to issue the petitioner with a warning letter to that effect.
 - iv. That it is after the petitioner's workmanship failed to improve he was put on three (3) months' performance improvement plan on 01.05.2021 to enhance his workmanship.
14. It was the respondent's case that it had a valid reason to terminate the petitioner's services and that it followed due process in dismissing him. That therefore no claim for unfair termination of employment or violation of the petitioner's constitutional rights lies as against the respondent.
15. Parties agreed to canvass the petition by way of submissions and filed their respective submissions.
16. The Court has considered the material on record. The Court returns as follows.
17. To answer the 1st issue, the Court returns that by the pleadings on record the parties were in a contract of service. The respondent employed the petitioner as a Chief Accountant as pleaded.
18. To answer the 2nd issue, the contract of service was terminated by the letter dated 25.06.2021. The reasons for dismissal as per the letter included failure to follow instructions pertaining to salary calculations; illegally recording proceedings of a management meeting without consent of participants in breach of their privacy; and, absconding duty from 05.05.2021.
19. To answer the 3rd issue, the Court returns that, for want of evidence, it is impossible to determine whether the termination was unfair and whether the provisions of the Bill of Rights as alleged for the petitioner were violated or threatened for violation. Crucial issues of fact remain unanswered as surrounding the summary dismissal. The respondent denies that the petitioner responded to the show cause letter and that instead he absconded and the dismissal letter was posted to his last known address. The respondent's policy on recording official proceedings and the events of the material meeting at



which the recording took place required testimonies for the Court to be able to decide one way or the other. While parties filed witness statements and documents, they failed to call witnesses and instead recorded a consent to simply have the case decided upon the final submissions. It is therefore difficult to return and make a finding on whether the dismissal was unfair and whether fundamental freedoms and rights were violated as alleged for the petitioner.

20. While making that finding on want of evidence, the Court has revisited the record. On 25.05.2023 the respective Counsel for the parties confirmed the witnesses to be called and by consent the hearing was fixed for 12.07.2023 when the case could not be reached and re-fixed for hearing on 16.11.2023. On 16.11.2023 the parties' counsel applied and were allowed to file supplementary lists and copies of documents and the matter re-fixed for hearing on 19.12.2023 when parties had not fully complied with directions on exchange of documents and therefore, hearing was adjourned to 12.03.2024. On 12.03.2024 the hearing was adjourned to 11.06.2024 on account that Counsel for the petitioner had notified about her being unwell. On 11.06.2024 the Court was scheduled not to sit and on 22.05.2024 it was ordered that the Deputy Registrar notifies them that the hearing had been rescheduled for 17.07.2024. On 17.07.2024 the case was listed for hearing and following submissions by parties' respective Counsel to file submissions it was ordered. "By consent: 1) The petitioner to file and serve submissions by 01.09.2024 and the respondent by 01.10.2024. 2) Mention on 15.10.2024 at 9.30am or thereafter to fix date for judgment." It is clear that the witness statements were never adopted and witnesses were not examined and cross-examined to establish and reconcile the glaring factual differences in the parties' respective cases as pleaded and urged by Counsel in the submissions. Upon those considerations, it is returned that the petitioner has failed to establish the pleaded case by way of evidence, on a balance of probability. The parties' submissions referred to witnesses but in fact no witnesses had testified and documents on record could not resolve the disputed facts as per the pleaded respective cases. The petition will therefore fail. The Court has considered all circumstances of the case and each party will bear own costs of the proceedings.

In conclusion the petition is hereby dismissed with orders each party to bear own costs of the proceedings.

SIGNED, DATED AND DELIVERED BY VIDEO-LINK AND IN COURT AT NAIROBI THIS WEDNESDAY 30TH OCTOBER 2024.

BYRAM ONGAYA, PRINCIPAL JUDGE

