Mwangi v SGS Kenya Limited (Cause 1022 of 2017)
[2024] KEELRC 13564 (KLR) (19 December 2024) (Judgment)

Neutral citation: [2024] KEELRC 13564 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1022 OF 2017

L NDOLO, J

DECEMBER 19, 2024

BETWEEN

HELLEN WANJIRU MWANGI ..... CLAIMANT

AND

SGS KENYA LIMITED ..... RESPONDENT

JUDGMENT

Introduction

1. By a Memorandum of Claim dated 30th May 2017 and amended on 20th August 2021, the Claimant proceeds against the Respondent, seeking relief for unlawful and unfair termination of employment. The Respondent filed a Response dated 11th July 2017, to which the Claimant responded on 6th August 2018.

2. At the trial, the Claimant testified on her own behalf and the Respondent called its Human Resource Manager, Nelly Indimuli. Both parties also filed written submissions.

The Claimant's Case

3. The Claimant states that she was employed by the Respondent in the position of Assistant Human Resource and Payroll Administrator, from 20th May 2015 until 23rd February 2017, when her employment was terminated. At the time of separation, the Claimant earned a monthly salary of Kshs. 243,970.52

4. The Claimant claims that the Respondent terminated her employment to avoid granting her paid maternity leave. She states that her immediate supervisor called her to a meeting where she was accused of failure to respond to emails, an allegation the Claimant denies. The Claimant further claims that the Respondent made it impossible for her to perform her duties.

5. The Claimant lays a claim of unlawful and unfair termination and therefore claims the following:

a. 1 month's salary in lieu of notice.....Kshs. 243,970.52

b. 12 months' salary in compensation.....2,927,646.24

c. Annual bonus as per company regulations

d. Costs plus interest

The Respondent's Case

6. In its Response dated 11th July 2017, the Respondent denies the Claimant's claim that her employment was unlawfully terminated. The Respondent states that on 30th January 2017, the Claimant was issued with a notice to show cause, to which she duly responded.

7. The Claimant is said to have notified the Respondent of her intention to proceed on maternity leave, on 6th February 2017, after the disciplinary process had started. The Respondent alleges that the Claimant's notice, regarding her maternity leave, was mischievous and calculated to forestall the disciplinary process, pointing out that the maternity leave notice was served two months in advance.

8. The Respondent's case is that the Claimant's employment was lawfully terminated, upon the Claimant being given prior opportunity to defend herself.

9. With regard to the Claimant's claim that the Respondent prevented her from performing her duties, the Respondent states that as soon the Claimant was issued with a notice to show cause on 30th January 2017, her access to the office share point was restricted, to preserve valuable information, and to avoid compromising investigations.

Findings and Determination

10. There are two (2) issues for determination in this case:

a. Whether the termination of the Claimant's employment was lawful and fair;

b. Whether the Claimant is entitled to the remedies sought.

The Termination

11. The Claimant's employment was terminated by letter dated 23rd February 2017, stating as follows:

> " Dear Hellen
>
> Summary Dismissal
>
> We refer to the two show cause letters to you dated 31st January 2017 and 9th February 2017, your response to the same, and the disciplinary hearing held on 15th February 2017 thereafter at SGS offices in Nairobi.
>
> Upon evaluating the above, you exposed the organisation to financial, legal and reputation risk through negligence in performing your role which amounts to gross misconduct. Under the *Employment Act* (Cap 226), Section 44 (c); an employer is entitled to terminate an employee's employment, "if an employee wilfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty under his contract to have performed carefully and properly."
>
> Consequently, the company is terminating your employment effective 23rd February 2017. Your final dues will be calculated as follows:

1. Salary up to and including 23rd February 2017

2. Any leave days accrued and not taken

3. Less any monies owed to the company

You are hereby advised to handover all Company property in your possession to your Manager, upon which your terminal dues will be paid. Enclosed is a clearance form. Kindly clear with the relevant offices, and return to us so as to enable us process your dues.

You will be issued with a Certificate of Service and be paid your final dues considering all monies owing or owed to you by the Company.

Yours faithfully

SGS KENYA LIMITED

(signed) (signed)

Albert G Stockell Kezie Karuoro-Kihara

Managing Director Sub Regional HR Manager"

12. As per this letter, the Claimant's employment was terminated on account of negligence in the performance of her duties. The particulars of this allegation as contained in the parties' pleadings, supporting documents and testimony, are that the Claimant had, on several occasions, failed to update the payroll, causing delay in payment of employee salaries and irregular payment of salaries to exited employees. In addition, the Claimant had removed a serving member of staff from the payroll.

13. During cross examination by Counsel for the Respondent, the Claimant was taken through several such incidents, which she confirmed as having occurred. In her responses to the show cause letters and in her testimony before the Court, the Claimant attributed the foregoing lapses to lack of timely information from team members.

14. She was however unable to explain why she did not obtain the required information from the share point, to which she had access. Further, she admitted that removal of a serving member of staff from the payroll was an error on her part. In addition, the Claimant conceded having caused delay in renewal of employee contracts and processing of Kenya Airport Authority passes.

15. In determining whether a termination of employment was lawful and fair, the Court is required to inquire into the validity of the reason advanced by the employer and the procedure adopted in executing the termination.

16. With regard to the reason or substantive justification for termination, Section 43 of the *Employment Act* places the following burden on the employer:

43.

(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.

(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.

17. In applying this provision, the role of the Court is not to replace the employer's decision with its own. Put another way, the Court does not ask what action it would have taken had it been in the employer's position; all the Court is required to determine is whether the action taken by the employer, against the employee, is one that a reasonable employer, faced with similar circumstances, would have taken.

18. This is what is referred to as the 'reasonable responses test' whose beacons were established by Lord Denning in British Leyland v Swift (1981) IRLR 91 as follows:

> "The correct test is; was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, the dismissal was unfair, but if a reasonable employer might reasonably have dismissed him, the dismissal was fair. It must be remembered in all these cases that there is a band of reasonableness, within which an employer might reasonably take one view; another quite reasonably takes a different view. One would quite reasonably dismiss the man. The other quite reasonably keeps him on. Both views may be quite reasonable. If it was reasonable to dismiss him, then the dismissal must be upheld as fair even though some other employer may not have dismissed him."

19. In its decision in Reuben Ikatwa & 17 others v Commanding Officer British Army Training Unit Kenya & another [2017] eKLR the Court of Appeal adopted the following excerpt from Halsbury's Laws of England, 4th Edition, Vol. 16(1B) para 642:

> "In adjudicating on the reasonableness of the employer's conduct, an employment tribunal must not simply substitute its own views for those of the employer and decide whether it would have dismissed on those facts; it must make a wider inquiry to determine whether a reasonable employer could have decided to dismiss on those facts. The basis of this approach (the range of reasonable responses test) is that in many cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view; the function of a tribunal as an industrial jury is to determine whether in the particular circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within the band, the dismissal is fair; but if the dismissal falls outside the band, it is unfair."

20. In the persuasive South African decision in Nampak Corrugated Wadeville v Khza (JA 14/98) it was held that:

> "A court should...not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable."

21. In the case now before me, it is not in contest that the Claimant had occasioned several lapses relating to critical administrative functions, including payroll updates. Evidently, these lapses exposed the Respondent to financial loss and potential liabilities. It is my finding therefore that the Respondent had a valid reason for terminating the Claimant's employment.

22. That settled, the next question is whether in executing the termination, the Claimant was availed the following procedural dictates set out in Section 41 of the *Employment Act*:

41.

(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing the employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.

23. The Claimant was issued with two show cause letters, to which she responded. In addition, she attended a disciplinary hearing. The Court however noted the very short period (48 hours) within which the Claimant was required to respond to the show cause letters.

24. Additionally, the Respondent did not issue the Claimant with a formal disciplinary hearing invitation, setting out the charges she was to face. According to the evidence on record, she was invited verbally on the morning of 15th February 2017 and was required to attend the hearing instantly.

25. In her written submissions dated 30th August 2024, the Claimant cites the decision in David Wanjau Muhoro v Ol Pajeta Ranching Ltd [2014] eKLR where the requirements of fair hearing were summarised as follows:

> " The principle of fair hearing requires the Employee has sufficient opportunity to prepare. This entails:The right to sufficient time to prepare...The right to fully understand the charges...The right to documentation..."

26. The Claimant further refers to the decision in Patrick Abuya v Institute of Certified Public Accountants of Kenya (ICPAK) [2015] eKLR where it was held that:

> " Procedural fairness requires not only an advance and reasonable notice of the steps to be taken but time to the employee to prepare psychologically as such employee is always under the threat of losing a livelihood."

27. In light of the rushed and informal manner in which the Claimant was taken through the disciplinary process, the only conclusion to make is that the procedural fairness dictates of Section 41 of the *Employment Act* were compromised. I therefore find and hold that the termination of the Claimant's employment was procedurally unfair.

Remedies

28. Consequently, I award the Claimant three (3) months' salary in compensation. In arriving at this award, I have taken into account the Claimant length of service tempered with the finding that there was a valid reason for the termination of her employment.

29. I further award the Claimant one (1) month's salary in lieu of notice.

30. The claim for annual bonus was not proved and is dismissed.

31. Finally, I enter judgment in favour of the Claimant as follows:

a. 3 months' salary in compensation.....Kshs. 731,913

b. 1 month's salary in lieu of notice.....243,971

Total.....975,884

32. This amount will be subject to statutory deductions and will attract interest at court rates from the date of judgment until payment in full.

33. The Claimant will have the costs of the case.

34. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF DECEMBER 2024

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JUDGE

Appearance:

Ms. Mideva for the Claimant

Mr. Rabut for the Respondent