



**Omwamba v Panaff Logistics Limited (Cause E279 of 2023)
[2024] KEELRC 13369 (KLR) (6 December 2024) (Judgment)**

Neutral citation: [2024] KEELRC 13369 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E279 OF 2023
SC RUTTO, J
DECEMBER 6, 2024**

BETWEEN

MERCYLINE OMWAMBA CLAIMANT

AND

PANAFF LOGISTICS LIMITED RESPONDENT

JUDGMENT

1. Through a Memorandum of Claim filed on 6th April 2023, the Claimant avers that she was employed by the Respondent with effect from 15th September 2022 and was earning a net salary of Kshs 70,000.00. It is apparent that the employment relationship was short-lived seeing that the Claimant was issued with a letter of termination on 31st January 2023.
2. It is the Claimant's case that she carried out her duties with utmost precision, diligence, discipline and loyalty which the Respondent ignored and opted to dismiss her unfairly. Consequently, the Claimant has sought declaratory reliefs against the Respondent and the sum of Kshs 1,400,000.00 being compensation for unfair termination, salary for January 2023 and notice pay. The Claimant further seeks general damages for discrimination, harassment and unfair labour practices as well as the costs of the suit plus interest. She further prays for an order compelling the Respondent to release her certificate of service.
3. The Respondent countered the Claim through its Response dated 17th May 2023. In its defense, the Respondent avers that the Claimant accessed the company's main email address without authorization and copied a list containing the names of its debtors. She thereafter forwarded the said information to her Gmail account.
4. The Respondent further avers that the Claimant admitted to undertaking a parallel business in competition with the Respondent. It is the Respondent's contention that the letter of summary dismissal discloses the reason for the Claimant's dismissal from employment. That further, the



Claimant was paid all her dues for every month that she worked. On this account, the Respondent has asked the court to dismiss the Claimant's claim with costs.

5. The matter proceeded for hearing on 8th and 29th July 2024, during which both parties called oral evidence.

Claimant's Case

6. The Claimant testified in support of her case and at the outset, she sought to adopt her witness statement and the list and bundle of documents filed alongside her Statement of Claim to constitute her evidence in chief.
7. It was the Claimant's testimony that on or about 24th January 2023, the Respondent falsely accused her of being in "unauthorized" possession of unnamed "vital" company documents vide a show cause letter dated 24th January 2023. She was then forcefully commanded to respond in writing instantly as the Respondent's director went through her personal WhatsApp and email handles to her consternation.
8. The Claimant averred that even after issuing a self-explanatory response despite the acute hostility, the Respondent sent her home on the spot and neither considered her written response nor accorded her a hearing, fair or otherwise. She was handed a summary dismissal letter on 31st January 2023 without the option of Appeal.
9. It was her further testimony that during her service, the Respondent failed to give her proper orientation of the company's policies, procedures and work instructions leaving her to learn the processes on her own albeit with serious difficulties.
10. She further cited the Respondent for not issuing her with a written contract 3 months after joining its employment as well as pay slips disclosing her gross salary and deductions.
11. The Claimant further stated that upon her unfair termination, the Respondent ignored and or refused to tabulate and pay her lawfully earned terminal benefits and to issue her with a certificate of service
12. According to the Claimant, the Respondent's actions of dismissing her without attaching any valid reasons thereof, not according her a fair hearing, denying her a right to appeal, going through her personal email and WhatsApp, failing to issue her a written contract, failing to give her pay slips, withholding her terminal benefits and certificate of service amounts to discrimination, harassment and unfair termination in blatant disregard of fair labour practices.
13. That she has suffered great loss and damage due to the Respondent's unfair termination, discrimination and harassment and she is entitled to damages, compensation for unfair termination, terminal benefits and certificate of service.

Respondent's Case

14. The Respondent called oral evidence through Mr. Collins Otieno who testified as RW1. At the outset, RW1 identified himself as the Respondent's Business Development Manager and similarly, he adopted his witness statement to constitute his evidence in chief. He further produced the list and bundle of documents filed on behalf of the Respondent as exhibits before court.
15. RW1 told the Court that when applying for her job, the Claimant sent the Respondent her curriculum vitae (CV) in which she indicated that she had the relevant competence and experience that made her the best candidate for the position she had applied for.



16. According to her CV and her explanation during the interview, the Claimant indicated that she had performed the same role she was applying for at the Respondent company in her previous employer.
17. According to RW1, based on the Claimant's experience she only needed induction and guidance from time to time.
18. RW1 further stated that it was company procedure to have frequent meetings every fortnight among the staff and occasionally with the Managing Director. During these meetings, they would discuss challenges, issues arising and any queries in the company. After the meetings, guidance would be given on the way forward where necessary. That during these meetings, members of staff were also allowed to air any grievances or concerns they had.
19. According to RW1, at no point did the Claimant ever raise a complaint either verbally or in writing of unfair employment terms or any form of discrimination against her while working with the Respondent company.
20. He further averred that the Claimant's salary was paid on time for the period she worked for the Respondent company and statutory deductions were also remitted to the relevant government bodies.
21. RW1 further averred that on 22nd January 2023, the Claimant accessed the company's main email address without authorization and copied a list containing the names of the Respondent's debtors with the amount owed to the Respondent. She thereafter forwarded the said information to her personal Gmail account.
22. It was RW1's assertion that the Claimant copied the list of service providers, key clients, their addresses, telephone numbers and emails of the Respondent without proper authorization for unknown intent. He contended that this was contrary to the Respondent company's policy.
23. RW1 further stated that the Claimant was given an opportunity to explain her unauthorized actions on 24th January 2023 and was advised to bring a witness of her choice to corroborate her statement. She decided to defend herself.
24. The Claimant sent her response on the same day admitting to undertaking a parallel business in competition with the Respondent company. In RW1's view, this action amounted to conflict of interest which the Claimant failed to disclose.
25. RW1 further averred that the Claimant went on to transact privately with the Respondent's clients and invoiced them separately as a private agent thus, channeling company revenue to herself.
26. That one instance of conflict of interest arose from the fact that the Claimant engaged in a transaction with a client whom the Respondent company had sent a quotation hence making the company lose business.
27. RW1 further stated that the Respondent also noted that when the Claimant applied for a job at the company, her CV indicated that her previous employer was Butoyi Freight Forwarders. However, the company she explained that she used to work with when doing her own transactions, was Skyway Forwarders Limited.
28. That after considering the Claimant's response, the Respondent summarily dismissed the Claimant on 31st January 2023.
29. She was allocated a clearance date on 12th February 2023 and on 9th February 2023, she requested him (RW1) to reschedule her date for clearance as she had an engagement in Mombasa. He allowed her



request. The Claimant never showed up for clearance with the Respondent company and instead, they were served with the pleadings in this matter.

30. RW1 was categorical that the Claimant's employment contract was never terminated unfairly and that the same was informed by her gross misconduct.

Submissions

31. Upon close of the hearing, the court issued directions on the filing of written submissions. On the Claimant's part, it was submitted that in the absence of a hearing, her termination was unfair for want of procedure stipulated under section 41 of the *Employment Act*.
32. As to the reasons for her termination, it was the Claimant's position that in the absence of her making oral representations, the reasons cannot be valid. It was the Claimant's position that the Respondent squandered the opportunity to prove that the reason for termination was valid and fair.
33. On its part, the Respondent submits that it strictly adhered to due procedure and accorded the Claimant a fair hearing despite her gruesome actions. In support of its submissions, the Respondent placed reliance on the case of Cooperative Bank of Kenya Limited v Yator [2021] KECA (95) (KLR).
34. On the same note, it was submitted that the existence of the correspondence between the Claimant and the Respondent in itself amounts to a fair hearing. To this end, the court was invited to consider the determination in the case of Kenya Revenue Authority v Menginya Salim Murgani (2010) eKLR.
35. The Respondent further posited that the reasons for the termination were valid and were carefully laid down in the Claimant's dismissal letter. That the dismissal was entirely as a result of the Claimant's actions which jointly and severally constitute gross misconduct as provided for under Section 44(4) (c) and (d) of the *Employment Act*.

Analysis and Determination

36. I have considered the issues raised in the pleadings as well as the documentary evidence on record and in my view, the following issues stand out for determination:-
 - i. Whether the Respondent has proved that there was a valid and fair reason to terminate the Claimant's employment;
 - ii. Whether the Claimant was subjected to a fair process prior to termination of her employment;
 - iii. Is the Claimant entitled to the reliefs sought?

Valid and fair reason?

37. As can be discerned from the letter of summary dismissal, the Claimant was terminated from the Respondent's employment on grounds that she copied vital company information without due process and authorization. It was also stated that the Claimant had acknowledged undertaking a parallel business in competition with the Respondent company. The Respondent termed this as a direct conflict of interest.

Still on the same issue, the Claimant was accused of having access to information on the company platform that an entity by the name Zetin Solar Technology had sought a quote from the Respondent company and instead of disqualifying herself from the transaction or directing the client to channel the business to the company, she opted to do the business privately.



38. Section 43(1) of the *Employment Act* (Act) mandates an employer to prove the reasons for termination and failure to do so, such termination is deemed to be unfair. Further to that, an employer is mandated under section 45 (2) (a) and (b) of the Act to prove that the reason for the termination is valid, fair and related to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer.
39. It is apparent from the record that the reasons contained in the letter of summary dismissal flowed from the Claimant's show cause letter dated 24th January 2023.
40. Responding to the allegations contained in the show cause letter, the Claimant stated that she forwarded the emails from clients with frequent enquiries so that she could refer to them during her free time at home. According to her, she wanted to learn and look for business at the same time and she did not have any ill motive in doing so.
41. At the outset, it is notable that the Respondent did not tender evidence that the Claimant had forwarded the emails to an authorized third party besides her personal email account.
42. As such, in my estimation, this was not a valid and fair reason to terminate the Claimant's employment.
43. With respect to the second accusation on conflict of interest, the Claimant stated in her response to the show cause letter, that a shipment belonging to a former client was shipped to a warehouse under her account and upon arrival in Nairobi, she was contacted to collect the shipment. That the client who had allegedly gone behind her back to procure the shipment, authorized her to proceed and collect the same.
44. In support of its case, the Respondent exhibited a copy of its quotation to Zetin Solar Technology prepared by David Owino. Further exhibited, was a copy of an invoice and receipt both dated 19th January 2023 issued by Skyway Forwarders Ltd with the Claimant being listed as the agent.
45. What is apparent from the foregoing is that the Respondent had expressed interest in a potential business with Zetin Solar Technology. As it turned out, the Claimant undertook the business with Zetin Solar Technology as an agent, but under a different company called Skyway Forwarders Ltd.
46. Fundamentally, this amounted to conflict of interest on the part of the Claimant as she had the option of doing the same business under the Respondent who was her employer, yet opted to transact under another company with competing interests against the Respondent. This resulted in the other company (Skyway Forwarders Ltd) benefiting from the same business the Respondent had shown interest in. No doubt, this was to the detriment of the Respondent.
47. Under Section 43(2) of the Act, the reason or reasons for termination of an employee are matters that the employer at the time of termination genuinely believed to exist, and which caused the employer to terminate the services of the employee. In this respect, the standard of proof is on a balance of probability as opposed to, beyond reasonable doubt. (See the case of *Kenya Revenue Authority v Reuvel Waitaha Gitahi & 2 others* (2019) eKLR)
48. In view of the foregoing, it can very well be said that by her own conduct, the Claimant led the Respondent to genuinely believe that she was not acting in its best interests as its sales agent.
49. In the circumstances, the court finds that the Respondent has established to the requisite standard, that it had a valid and fair reason to terminate the Claimant's employment on account of her conduct.
50. Having found as much, was the Claimant subjected to a fair process prior to being terminated from employment?



Fair process?

51. Section 45(2) (c) of the Act, requires an employer to prove that an employee's termination from employment was undertaken in accordance with fair procedure. The specific requirements constituting fair process are set out under section 41(1) of the Act. These entail notification and hearing. Specifically, an employer is required to notify the employee of the allegations he or she is required to respond to and thereafter grant him or her the opportunity to make representations in response to the said allegations, in the presence of a fellow employee or shop floor union representative of his own choice. (See the case of *National Bank of Kenya v Anthony Njue John* [2019] eKLR).
52. It is common ground that the Claimant was issued with a show cause letter dated 24th January 2023. She tendered her response to the show cause letter on the same day.
53. What followed after the Claimant's response to the show cause letter was the letter summarily dismissing the Claimant from employment.
54. As such, there is no evidence that the Claimant was given an opportunity to make her representations in an oral hearing.
55. My interpretation of section 41 of the Act is that an employer is enjoined to conduct an oral hearing. I say so because under the same statutory provision, an employee is entitled to have another employee or a shop floor union representative of his choice present when he or she is making their representations. Logically, this can only be achieved through an oral hearing.
56. What's more, the Claimant was being faced with the imminent loss of her career and source of livelihood. Therefore, regardless of the transgressions levelled against her, it was only fair that the Respondent grants the Claimant an opportunity to defend herself as envisaged under section 41 of the Act.
57. All in all, in my view, the Claimant was not accorded a fair hearing in the circumstances as the Respondent did not fulfill the spirit of section 41 of the Act in terminating her employment.
58. In the end, despite the Respondent having a valid and fair reason to terminate the Claimant from employment, failed to act in accordance with the requirements of a fair process as contemplated under section 41 of the Act.
59. The total sum of my consideration is that the Claimant's termination from employment was not lawful.

Reliefs?

60. As the Court has found that the Claimant's termination from employment was not in accordance with a fair process, she is awarded one (1) month's salary in lieu of notice and compensatory damages equivalent to one (1) month of her gross salary. This award has considered the length of the employment relationship which was considerably short as well as the Claimant's contribution to the termination of her employment.
61. The Claimant is further awarded salary for the month of January 2023 there being no evidence that the same was paid out to her.
62. The damages for discrimination and harassment are declined as the Claimant did not demonstrate the manner in which the Respondent treated her differently and less favourably than her counterparts,



who were similarly situated. With respect to the Claimant's claims of harassment, the Court has pronounced itself accordingly in determining whether the Claimant was subjected to a fair process.

Orders

- 63. In the final analysis, Judgment is entered in favour of the Claimant against the Respondent and she is awarded: -
 - a. One (1) month's salary in lieu of notice being the sum of Kshs 70,000.00.
 - b. Compensatory damages in the sum of Kshs 70,000.00, being equivalent to one (1) month of her gross salary.
 - c. Salary for the month of January 2023 being the sum of Kshs 70,000.00.
 - d. The total award is Kshs 210,000.00. For the avoidance of doubt, the said sum shall be paid in net upon the Respondent effecting statutory deductions.
 - e. Interest on the amount in (d) at court rates from the date of Judgment until payment in full.
- 64. The Claimant shall also have the costs of the suit.
- 65. As the employment relationship has not been disputed, the Respondent shall issue the Claimant with a certificate of service within 30 days from the date of this judgment.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF DECEMBER, 2024.

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STELLA RUTTO

JUDGE

In the presence of:

For the Claimant Mr. Ochieng

For the Respondent Mr. Otieno

Court Assistant Millicent

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 had 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.

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STELLA RUTTO

JUDGE

