



REPUBLIC OF KENYA



KENYA LAW
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**Kunga v Audio Visuals Control Systems (Cause 299 of 2019)
[2023] KEELRC 119 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 119 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 299 OF 2019
MN NDUMA, J
JANUARY 26, 2023**

BETWEEN

JOEL STEPHEN OKELO KUNGA CLAIMANT

AND

AUDIO VISUALS CONTROL SYSTEMS RESPONDENT

JUDGMENT

1. The claimant filed suit on May 9, 2019 seeking the following reliefs:-
 - (i) Equivalent of twelve (12 month's salary in compensation for unlawful and unfair termination.
 - (ii) One month salary in lieu of notice.
 - (iii) Payment in lieu of leave days not taken in 7 years.
 - (iv) Payment of gratuity.
2. C.W.1 testified that he was employed by the respondent as an accountant on 1st September, 2011 at a monthly salary of Kshs 92,650. That he served diligently for a period of 8 years until March 25, 2019, when the respondent unlawfully terminated his employment without notice.
3. C.W.1 produced the letter of employment in support of his case and a letter of demand dated 10th April, 2019.
4. C.W.1 testified that he did not get any letter of termination. That he was called to the boardroom and told by one of the Directors to relinquish any equipment he had and go away.
5. That he had no warning letter for a period of 8 years. C.W.1 denied that he absconded duty stating that he was chased from the premises. The claimant stated that he learnt that one Director had trust issues with him.



6. C.W.1 said he earned Kshs 92,650 per month. C.W.1 denied having disclosed any confidential information to a 3rd party as alleged or at all. That the letter produced by the respondent was written after he had already been dismissed verbally. C.W.1 said he had no knowledge of the reason for termination when it happened.
7. C.W.1 said he got no opportunity to respond to alleged trust issues because he was not aware of them.
8. C.W.1 said the respondent tried to conduct a disciplinary hearing after it had already dismissed him verbally from employment. C.W.1 said he went to his rural home upon dismissal. C.W.1 testified that the respondent called him while he was at home and he requested them to share the allegations on email. That he never got reasons for dismissal to-date. C.W.1 said he responded to the email and informed the respondent, that he was in rural areas and could not attend disciplinary hearing. C.W.1 said he had just started a fresh two years contract, upon renewal. C.W.1 said he had National Social Security Fund contributions made for him. That he went on leave for only a few days. That the respondent was very busy and they worked throughout the year. C.W.1 said he never took 21 days annual leave at any one time. That the company closed on 24th December and they would resume either on 2nd or 3rd January, of the following year.
9. C.W.1 said he was verbally dismissed on March 25, 2019 and got an email to attend a hearing on April 1, 2019. C.W.1 said he had informed the respondent that he would be available on April 10, 2019. The hearing did not take place.
10. C.W.1 prays to be awarded accordingly.
11. R.W.1 Mariam Issa testified that he was the Human Resource Manager of the respondent. He relied on a witness statement dated March 6, 2019 and produced exhibits '1' to '7' in support of the respondent's case.
12. The respondent had filed a statement of defence to the claim and counterclaim dated June 6, 2019 in which it prayed that the suit against it be dismissed and judgment be entered in its favour for breach of contract by the claimant and the Court award General damages to it for breach of contract and loss of business.
13. R.W.1 testified that the claimant was employed by the respondent as finance and administrative officer and later on as an accountant from 1st March, 2013 upto April 10, 2019.
14. That the claimant willfully declined to participate in an internal disciplinary process for breach of contract and absconded from duty.
15. That the respondent did not dismiss the claimant from employment. That the claimant was accused of breach of contract of confidentiality leading to loss of trust in his integrity by the respondent. That the claimant was bound by the non-disclosure agreement clause of his employment contract that he had breached and failed to attend a disciplinary hearing to explain his case.
16. That the suit be dismissed and the counter-claim be allowed accordingly.
17. R.W.1 produced the contract of employment between the claimant and the respondent and an email dated April 1, 2019 in which the claimant referred to a meeting held in the Director's office on March 25, 2019 at 10 a.m. in the presence of the Director Mr. Sauf Sangrar and Mr. Ceaser Mendez and Human Resource Mariam Issa where the claimant was informed that the company was letting him go as a strategy because one of the directors had trust issues with claimant's role as the accountant. The claimant had stated in the email that he was asked to leave the company premises without being



- advised what the next course of action was. The claimant also stated that he did not fully understand the decision made or issue at hand and was not given an opportunity to respond to the same.
18. R.W.1 also produced an email dated April 3, 2019, in which the respondent wrote to the claimant inviting the claimant to a meeting to discuss any misunderstandings and nature of accusations against the claimant. The respondent wished to give the claimant a chance to defend against the claims.
 19. R.W.1 testified further that the respondent requested the claimant to advise if he would be available for the hearing sooner than the April 10, 2019 as a delay may lead to more speculation on the case.
 20. R.W.1 stated that the claimant responded to the email on the same dated April 3, 2019 stating that he had already been dismissed verbally in the presence of the directors and that the respondent only wished to further validate what happened on that day. The claimant stated that he did not trust the process and requested the respondent to,

“Kindly feel free to share the accusations against me in the event that we cannot meet on the April 10, 2019.”
 21. R.W.1 stated that the claimant did not attend the disciplinary hearing at all.
 22. The issues for determination are:-
 - (i) Whether the claimant was verbally dismissed or he absconded work.
 - (ii) If the claimant was dismissed verbally whether the respondent had valid reason to do so and if it followed a fair procedure in the circumstances of the case.
 - (iii) What reliefs if any, is the claimant entitled to?
 23. Upon a careful analysis of the testimony by C.W.1 and that by R.W.1, it is apparent that, up to the time of going to Court, the claimant was not aware of the actual allegations made against him and by which director. The respondent, did not frame any charges against the claimant with a notice to show cause why he should not be dismissed from employment.
 24. From the email correspondence produced by the respondent itself, it is not denied that the claimant was summoned by the directors on March 25, 2019. The respondent did not expressly deny in the subsequent email that it had verbally informed the claimant to leave the company as a strategy for lack of trust. It is clear from the correspondence between March 25, 2019, when the respondent attempted to recall the claimant to the office for a meeting to discuss any “misunderstanding and nature of accusations,” no formal charges had been made against the claimant though clearly he had been made to leave the premises and not to come back to work.
 25. The Court agrees with the testimony by the claimant that the respondent was in hindsight trying to cleanse the unlawful and unfair process of verbal dismissal it had already meted on the claimant.
 26. Before this Court we do not have to date the actual reason why the respondent intended to conduct a disciplinary hearing against the claimant. The Court does not believe the discredited version told by R.W.1 that the claimant absconded work. The emails produced by the respondent support the narrative by the claimant and discredit the version told by the respondent.
 27. Accordingly, the Court finds that the respondent verbally dismissed the claimant from employment in violation of Sections 36, 41, 43, and 45 of the *Employment Act*, 2007. The respondent did not prove it had a valid reason to verbally dismiss the claimant from work. The Court finds that the claimant did not abscond from duty but was unlawfully and unfairly dismissed from employment.



28. Accordingly, the claimant is, entitled to payment in lieu of one months' notice and compensation for the unlawful and unfair dismissal in terms of Section 49(1) (c) and 4 of the Act.
29. The claimant failed to prove that he had not taken leave for the seven years he had worked. The claim in this respect lacks merit and is dismissed.
30. The claimant also testified that the respondent paid National Social Security Fund on his behalf and the contract of employment before Court did not provide for payment of gratuity upon conclusion of the contract. The claim for payment of gratuity is thus dismissed.
31. The Court awards the claimant Kshs 92,650 in lieu of one month notice.
32. With regard to compensation, the claimant had served the respondent for a period of eight years though on two (2) terms contract which were renewed.
33. The claimant lost his employment unlawfully and was not compensated for the loss. The claimant did not contribute to the loss of employment and he suffered loss and damage. The claimant had served the respondent for a period of 8 years with a clean record. He lost good career prospects to his loss and detriment. The claimant was not paid any terminal benefits upon dismissal.
34. The Court has considered the case of *Kenya Ports Authority –vs- Festus Kipkorir Kiprotich* [2014] eKLR and other facts above and awards the claimant the equivalent of eight (8) months' salary in compensation for the unlawful and unfair dismissal in the sum of Kshs 741,200.
35. In the final analysis, judgment is entered in favour of the claimant against the respondent as follows:-
 - (i) Kshs 92,650 in lieu of notice.
 - (ii) Kshs 741,200 in compensation.
Total award 833,850.
 - (iii) Interest at Court rates from date of judgment till payment in full.
 - (iv) Costs of the suit.
36. The counterclaim lacks merit and is dismissed in its entirety.

DATED AND DELIVERED AT NAIROBI(VIRTUALLY) THIS 26TH DAY OF JANUARY, 2023.

MATHEWS NDERI NDUMA

JUDGE

Appearances

Mr. Ojienda for claimant

Mr. Mogire for Respondent

Mr. Ekale – Court Assistant

