



**Ogana v David Engineering Limited (Cause 591 of 2019)
[2023] KEELRC 33 (KLR) (19 January 2023) (Judgment)**

Neutral citation: [2023] KEELRC 33 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 591 OF 2019
L NDOLO, J
JANUARY 19, 2023**

BETWEEN

DENNIS ODHIAMBO OGANA CLAIMANT

AND

DAVID ENGINEERING LIMITED RESPONDENT

JUDGMENT

1. In his Statement of Claim dated July 12, 2019, the Claimant seeks the following remedies:
 - a) Unpaid dues.....Kshs 580,734
 - b) One months' notice pay.....206,000
 - c) Unlawful deductions.....141,870
 - d) 12 months' salary in compensation.....1,236,000
 - e) Punitive and aggravated damages
 - f) Certificate of service
 - g) Costs
2. The Respondent filed a Memorandum of Reply dated May 5, 2021.
3. The matter proceeded to full trial where the Claimant testified on his own behalf. The Respondent called its Human Resources Manager, Gilbert Meo. At the time of writing this judgment, only the Claimant had filed final submissions.



The Claimant's Case

4. The Claimant states that he was employed by the Respondent as an Assistant Workshop Supervisor, earning a monthly salary of Kshs 103,000 effective August 23, 2007.
5. The Claimant worked for the Respondent until March 6, 2019, when his employment was terminated. He terms the termination as unjustifiable and unfair.
6. The Claimant's case is that the Respondent breached the employment contract in that:
 - a) The Respondent failed to provide the Claimant with reasonable notice prior to the termination;
 - b) The Respondent failed to provide the Claimant with adequate compensation in lieu of the termination;
 - c) The Respondent failed to pay the Claimant his outstanding dues;
 - d) The Respondent withheld compensation owed to the Claimant;
 - e) The Respondent did not have any just cause to terminate the Claimant's employment.

The Respondent's Case

7. In its Memorandum of Reply dated April 19, 2019, the Respondent admits having employed the Claimant but gives the monthly salary as Kshs 44,400 as at August 23, 2007.
8. The Respondent denies terminating the Claimant's employment unlawfully or unfairly on March 6, 2019 and states that the Claimant himself voluntarily resigned by letter dated February 22, 2019.
9. The Respondent goes on to state that the Claimant was given notice, reasons for termination and a chance to be heard on the allegations levelled against him. The Respondent adds that the Claimant was paid all outstanding salaries.
10. The Respondent maintains that the Claimant's employment was terminated fairly on account of misconduct, particulars being that the Claimant was operating an entity known as Quafab Enterprises, whose business was similar to that of the Respondent.
11. The Respondent accuses the Claimant of breaching the contract of employment by reporting to work late, negligently performing the duties delegated to him and operating a business that was in competition with the Respondent's business.
12. The Respondent adds that the Claimant had a history of incompetence, negligence, disrespect and lack of commitment.

Findings and Determination

13. There are two (2) issues for determination in this case:
 - a. Whether the Claimant has made out a case of unlawful termination of employment;
 - b. Whether the Claimant is entitled to the remedies sought.



Unlawful Termination

14. In its defence to the Claimant's claim, the Respondent states that the Claimant himself resigned from employment but at the same time admits that the Claimant was dismissed for gross misconduct.
15. In his testimony before the Court, the Claimant stated that his attempt to resign from employment was rejected by the Respondent and he therefore continued working.
16. The Claimant produced a letter dated February 20, 2019 addressed to him by the Respondent as follows:

“Dear Sir

Re: Dismissal on Account of Conflict of Interest

The above matter refers.

Further reference is made to our letter dated January 19, 2019.

It has been established that you are a joint owner of a registered company called Quafab Enterprises.

That the said company deals with, among other business, fabrication of roof ventilators and pressed steel tanks. These are exactly the works that you are employed by David Engineering Ltd to work on as a supervisor.

Apart from obvious conflict of interest, which impedes your work performance, you have established yourself as a direct competitor to/of David Engineering Limited. (See attached the social media advertisement of your company).

In these circumstances your employment with this company is untenable and therefore:

- 1) Your suspension from duty that was imposed on you on February 19, 2019 is hereby lifted; and
- 2) You are hereby summarily dismissed on grounds of gross misconduct arising from your conflict of interest and working against the interest of and in competition against your employer.

Consequently, you are hereby directed to handover and clear with the management by surrendering any item/tool of the company that is within your possession.

After clearance, anything due to you will be processed and sent to your account.

You are advised that your last day of duty is February 20, 2019.

Yours Faithfully

For: David Engineering Limited

(Signed) (Signed)

Gary Bangera Priti Bangera

Director Director”



17. The Respondent's witness, Gibert Meo confirmed that the Claimant's employment came to an end by way of summary dismissal.
18. The letter dated February 20, 2019 accuses the Claimant of conflict of interest and working against the interests of and in competition with the Respondent.
19. In support of its case, the Respondent filed a search certificate dated April 15, 2021 showing the Claimant as a co-proprietor of a business by the name 'Quafab Enterprises' whose nature of business was disclosed as 'supply of building materials.'
20. While it is true that the Claimant was indeed a co-proprietor of Quafab Enterprises, no evidence was led to support the allegation that he had engaged in business that was in competition with his employer. Further, the allegations disclosed in the dismissal letter were not presented to the Claimant for his response.
21. In the final submissions filed on behalf of the Respondent, reference was made to the decision in *Pius Machafu Isindu v Lavington Security Guards Limited* [2017] eKLR where the Court of Appeal stated as follows:

“ There can be no doubt that the [Employment] Act, which was enacted in 2007, places heavy legal obligations on employers in matters of summary dismissal for breach of employment contract and unfair termination involving breach of statutory law. The employer must prove the reasons for termination/dismissal (section 43); prove the reasons are valid and fair (section 45); prove that the grounds are justified (section 47(5)), amongst other provisions. A mandatory and elaborate process is then set up under section 41 requiring notification and hearing before termination.”
22. In the present case, the Respondent made no effort to notify the Claimant of the allegations levelled against him, prior to the termination. According to the evidence on record, the Claimant was suspended on February 19, 2019 and the following day, being February 20, 2019, he was dismissed. There was no semblance of a disciplinary process as required by law and the allegations against the Claimant were not proved.
23. It follows therefore that the Claimant's dismissal was wrongful and unfair. Consequently, the Claimant is entitled to compensation.

Remedies

24. Flowing from the foregoing findings, I award the Claimant six (6) months' salary in compensation. In arriving at this award, I have considered the Claimant's long service but also his negative employment record as documented.
25. I further award the Claimant two (2) months' salary in lieu of notice as provided in his letter of appointment.
26. There is evidence that the Claimant was paid his outstanding salary arrears and this claim is therefore misplaced and is disallowed.
27. The Claimant did not lead evidence to support his claim for unlawful deductions in the sum of Kshs 141,864. This claim therefore fails and is disallowed.
28. No basis was laid for the claim for punitive and aggravated damages, which also fails and is dismissed.
29. Finally, I enter judgment in favour of the Claimant as follows:



- a. 6 months' salary in compensation.....Kshs 618,000
- b. 2 months' salary in lieu of notice.....206,000
- Total.....824,000

30. This amount will attract interest at court rates from the date of judgment until payment in full.

31. The Claimant is also entitled to a certificate of service plus costs of the case.

32. Orders accordingly.

DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF JANUARY 2023

LINNET NDOLO

JUDGE

Appearance:

Ms. Kisiangani h/b for Mr. Waiganjo for the Claimant

Ms. Wanyama h/b for Mr. Walubengo for the Respondent

