Mandela v Workinsights Limited (Cause E578 of 2022)
[2023] KEELRC 2023 (KLR) (31 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 2023 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE E578 OF 2022

SC RUTTO, J

JULY 31, 2023

BETWEEN

ROBERT MANDELA ..... CLAIMANT

AND

WORKINSIGHTS LIMITED ..... RESPONDENT

JUDGMENT

1. Through a Statement of Claim dated 15th August, 2022, the Claimant avers that he was engaged by the Respondent as a Sales Support Coordinator. He further states that he was unceremoniously and summarily dismissed without any warning or notice whatsoever and without any explained reasonable cause. He has further stated that the accusations levelled against him by the Respondent did not amount to gross misconduct. He avers that it was his expectation that he would serve his full contract term hence the Respondent's action offends the rules of natural justice and the doctrine of legitimate expectation. On account of the foregoing, the Claimant seeks against the Respondent the sum of Kshs 240,000.00 being one month's salary in lieu of notice and five month's compensation for loss of employment. He further seeks general damages, interest and costs of the suit.

2. The Respondent opposed the Claim through its Response dated 10th November, 2022, in which it avers that the Claimant was summarily dismissed based on serious complaints of mishandling client accounts and refusal to provide sales technical support to three major clients between the period covering 13th June, 2022 to 16th June, 2022. That the Respondent being a new startup providing personnel and sales team monitoring services to its clients, the unbecoming behaviour of the Claimant threatened to shut down its entire operations. The Respondent has thus denied offending the rules of natural justice and the doctrine of legitimate expectation. It avers that the Claimant's termination was justified and within the confines of the law. Consequently, the Respondent prays that the Claim be dismissed with costs.

3. The matter proceeded for hearing on 21st March, 2023, during which both sides called oral evidence.

Claimant's Case

4. The Claimant testified in support of his case and at the outset, sought to adopt his witness statement together with the documents filed with his Claim to constitute his evidence in chief.

5. It was the Claimant's testimony that he was an employee of the Respondent and not a Consultant. His job description entailed provision of technical support and assistance to clients using the Respondent's "app" by the name, Origamo and that required a lot of communication with the head/director of operations on any clarifications the clients would need from time to time.

6. The Claimant further stated that the Respondent dismissed him on account of gross misconduct and went ahead to attach an edited phone conversation as proof of the same. He further stated that the communication thread provided by the Respondent is partly redacted and lacks part of his responses hence is not factual and cannot be relied upon.

7. According to the Claimant, the accusation levelled against him did not amount to gross misconduct warranting summary dismissal. That furthermore, he was not issued with any warning letter and did not have previous mistakes. That at no time did he refuse to give technical support to any client and if at all it is true, the Respondent never communicated the same to him.

8. The Claimant further stated that the emails provided by the Respondent are dated 21st June, 2022, five days after his dismissal and none was brought to his attention before being dismissed. That it is clear that none of the clients was terminating their contracts as a result of dealing with him.

9. He further told the Court that he was not issued with a show cause letter nor taken through a disciplinary hearing.

10. The Claimant further stated that the Respondent's app had a lot of challenges and inefficiencies which strained performance of his duties. That the users were also not properly onboarded. In his view, he was being used as a scape goat and blamed for inefficiencies of the system.

11. He further averred that due to the sudden termination of his employment, he continues to suffer emotional and financial distress which has subjected him to pecuniary embarrassment since he is unable to meet his basic needs.

Respondent's Case

12. The Respondent called oral evidence through its Director of Operations, Mr. Dennis Kirigia who testified as RW1. Similarly, he asked the Court to adopt his witness statement to constitute his evidence in chief. He further produced the documents filed on behalf of the Respondent as exhibits before Court.

13. It was his evidence that the Respondent entered into a Consultancy Agreement with the Claimant who was an expert hence needed no training. The contract was for six months.

14. RW1 described the Claimant's behaviour as discourteous, rude and erratic. He went on to state that on 13th June, 2022, the Respondent received email communication from its client CROPCHEM Limited reporting that the Claimant had refused to provide technical support and moved to terminate their contract. Further, on 13th June, the Respondent received email communication from Insight Management Consultant, another major client, in which they raised a complaint that the Claimant had neglected to provide sale support services. That on 16th June, 2022, the Claimant had a heated and unprofessional exchange via WhatsApp messaging platform with Mr. Patrick of Orbit Limited in which the client threatened to cancel the service contract with the Respondent.

15. In view of the altercations with the Respondent's clients, he engaged the Claimant on 16th June, 2022 via email to try and remedy the unfolding negative situation, but the Claimant remained belligerent and unapologetic towards the complaints raised by the clients.

16. In view of the termination notices issued to the Respondent company by its key clients, they had to terminate the consultancy contract with the Claimant.

17. The Respondent paid the Claimant Kshs 22,800/= to cover the period of 17 days worked and a further Kshs 10,000/= to cover one week in lieu of notice. He acknowledged receipt of the terminal dues and countersigned on the face of the termination letter.

Submissions

18. The Claimant submitted that he was employed to work as an employee and not as a Consultant in that he worked from the Respondent's premises and was paid a monthly salary in addition to transport and telephone allowances. That he was further provided with a laptop (computer) and mobile phone handset all of which belonged to the Respondent.

19. The Claimant further submitted that he was unfairly terminated from employment as due process was not followed. That this was in contravention of Section 41 of the *Employment Act*. Placing reliance on the case of *Mwangi Odhiambo Dancun v Xfor Security Solutions Kenya Ltd* (2016) eKLR, it was the Claimant's further submission that the Respondent has failed to prove that his termination was founded on valid and fair grounds. Further relying on the case of *John Kisaka Masoni v Nzoia Sugar Co. Limited* (2016) eKLR, the Claimant submitted that the Respondent has failed to give sufficient proof for dismissing him from employment.

20. It was the Claimant's further submission that the WhatsApp communication and emails exhibited by the Respondent does not fall within the bracket of gross misconduct. That further, the purported emails from the Respondent's client, Insight Management Consultant, do not specifically mention that he neglected to provide support services. On this score, the Claimant invited the Court to consider the determination in the case of *Galgalo Jarso Jillo v Agricultural Finance Corporation* (2021) eKLR.

21. On its part, the Respondent submitted that there was no employment relationship between the parties as a result of the fact that parties willingly entered into a Consultancy Agreement. That the Claimant was engaged for his services as an expert. In support of this position, the Respondent cited the case of *Everett Aviation Limited v Kenya Revenue Authority (Through the Commissioner of Domestic taxes)* (20130 eKLR.

22. In further submission, the Respondent placed reliance on the case of *Kenneth Kimani Mburu v Kibe Muigai Holdings limited* (2014) eKLR and stated that the Claimant was fully aware of the nature of the agreement as he signed the same admittedly with absence of any duress or coercion.

23. The Respondent further submitted that it relied on paragraph 8(b) of the Consultancy Agreement in terminating the contract with the Claimant. That proper customer relations were an integral part of the Claimant's obligations in the Consultancy Agreement. That failure to execute that duty definitely amounts to gross misconduct especially when it is threatening to result in loss of business for the Respondent which at the time was a startup with three clients only.

24. The Respondent stated in further submission that Sections 41 and 45 of the *Employment Act* are not applicable in this matter by virtue of the fact that the agreement at the heart of the matter is a consultancy agreement and not a contract of employment.

Analysis and determination

25. Flowing from the pleadings on record, the evidentiary material placed before me as well as the rival submissions, I find the issues falling for the Court's determination as being: -

    a. Whether the Claimant was engaged as a Consultant or an employee of the Respondent;

    b. If an employee, was the Claimant's termination unfair and unlawful?

    c. Is the Claimant entitled to the reliefs sought?

Nature of engagement

26. The parties have taken opposing positions with regards to the nature of their engagement. Whereas the Claimant opines that he was an employee of the Respondent, the Respondent has disagreed and maintains that the Claimant was engaged as a Consultant. It is therefore imperative to review the evidence on record so as to ascertain the true nature of the parties' engagement.

27. Both parties exhibited a copy of an agreement titled "Consultancy Agreement" dated 28th April, 2022. In the said Agreement, the Claimant is identified as a Consultant and is described as much throughout the contract. The question thus, is whether the said agreement despite being titled "consultancy" can be construed as an employment contract?

28. Pursuant to Section 2 of the *Employment Act* an "employee" is defined to mean a person employed for wages or a salary and includes an apprentice and indentured learner. Underlined for emphasis

29. In distinguishing a Consultancy Agreement and an Employment Contract, the Court had this to say in the case of *Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited* [2014] eKLR: -

> "A Consultant performs work for another person, according to his own processes and methods. A Consultant is not subject to another's control, except to the extent admitted under the contract. The Court in determining the first question is not bound by the Parties' respective declarations on the character of these contracts, but should not disregard the Parties' intention.
>
> 41. Even with the hybrid wording in the contracts, the intention of the Parties, and the wording in large portions of the two agreements persuade the Court these were employer-employee relationships. A Consultant is paid a fee as confirmed by the Respondent's Witness Mr. Karabilo, not a salary. A Consultant is not eligible for Company benefits such as health insurance, which was extended by the Respondent to Mburu and three other members of his family. A Consultant would not normally be provided with the tools of work. The Respondent provided Mburu with the laptop, office facilities, and a phone. The Respondent provided the tools of work, and directed the Claimants in the performance of work. There were frequent meetings between the Parties during which Kibe Muigai kept demanding for specific outputs. He was emphatic the Claimants remained accountable to him. A Consultant would have the latitude to discharge his obligation according to his own processes and methods, which would include the ability to subcontract or hire own assistants. The evidence on record suggests all the persons working at the Hotel were engaged by the Respondent, and were paid by the Respondent largely through Debora. He remained in control of the undertaking. There was no evidence that the Claimants paid with-holding tax. Instead, the Respondent paid Mburu a 'net salary.' Instead, the Respondent paid Mburu a 'net salary.' It is the obligation of an employer to enforce statutory deductions

such as PAYE, NSSF and NHIF contributions. By paying 'net salary' the presumption would be that the Respondent had factored in this obligation. The fact that no evidence was presented showing payment of these employee deductions is not an indication that there was no employer-employee relationship."

30. Applying the above determination and the statutory definition of the term "employee" to the instant case, reveals the existence of an employment relationship rather than a consultancy engagement. I say so because first, clause 6 of the Consultancy Agreement provides that the Claimant was to be paid a "net salary" of Kshs 40,000.00. A consultant is not paid a salary. He or she is paid a fee. As was held in the case of Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited [supra], it is the obligation of an employer to enforce statutory deductions such as PAYE, NSSF and NHIF contributions and that by paying 'net salary' the presumption would be that the Respondent had factored in this obligation. I subscribe to this position. Indeed, this fact alone is persuasive to prove that the parties' engagement was in reality an employment relationship.

31. In addition to the foregoing, the Claimant testified that he used the Respondent's tools being a phone and a laptop, to perform his work. This position was refuted by the Respondent which averred that it only provided the Claimant with airtime. Be that as it may, it is worthy to note that the Claimant's letter of termination stated as follows:

> " Kindly ensure you handover any company property that was in your custody to your line manager."

32. Hence, if at all the Claimant was a Consultant, the question would be why would he be having the Respondent's property in his possession? This further supports the Claimant's position that he used the Respondent's property to perform his duties.

33. Further, the Claimant exhibited a document executed between himself and RW1. The said document provides for the job summary of a Sales Support Coordinator, the duties and responsibilities for the said position as well as the requirements and skills.

34. In the case of *Everret Aviation Limited v Kenya Revenue Authority (Through the Commissioner of Domestic Taxes)* [2013] eKLR the Court held that: -

> " There are also various tests to be employed when there is doubt whether a person is an employee. One of those tests is whether the person's duties are an integral part of the employer's business."

35. Bearing in mind the Claimant's job summary, as well as his duties and responsibilities, it is evident that his work cannot be termed as not forming an integral part of the Respondent company.

36. In addition to the foregoing, the Claimant was informed in his letter of termination to hand over company property in his custody to his line manager. If at all, he was a Consultant, why would the Claimant be having a line manager? This can only mean that he was working under the supervision and direct control of his line manager.

37. Therefore, the fact that the Agreement was titled a "Consultancy Agreement" does not automatically mean that the parties were not in an employment relationship. Rather, their conduct and manner of

engagement implied that they were in an employer employee relationship. As was rightly held by the Court in the case of *Kenneth Kimani Mburu & another v Kibe Muigai Holdings Limited* [*supra*]: -

> "The Court in determining the first question is not bound by the Parties' respective declarations on the character of these contracts..."

38. For the foregoing reasons, I find that there was an employment relationship between the Claimant and the Respondent hence their engagement fell within the ambit of the *Employment Act*, 2007.

39. Having found as much, I now move to determine whether the termination of the Claimant was unfair and unlawful.

Unfair and unlawful termination?

40. Pursuant to Sections 41, 43 and 45 of the *Employment Act* (Act), the termination of an employee's contract of service ought to satisfy two requirements, being substantive justification and procedural fairness. Whereas substantive justification entails proof of reasons, procedural fairness has to do with the process applied in effecting the employee's termination. I will start by considering substantive justification.

i.Substantive justification

41. The starting point in determining this question is Section 43(1) of the Act which requires an employer to prove the reasons for termination of an employee's contract of service and failure to do so, such termination is deemed to be unfair. Further along the *Act*, Section 45 (2) (a) and (b) provides that a termination of employment is unfair if the employer fails to prove: -

    a. that the reason for the termination is valid;

    b. that the reason for the termination is a fair reason-

        i. related to the employees conduct, capacity or compatibility; or

        ii. based on the operational requirements of the employer; ...

42. From the record, the Claimant was terminated through a letter dated 17th June, 2022. The reasons leading to his termination as can be discerned from the said letter of termination is that on 16th June, 2022, he handled one of the Respondent's major clients in an unacceptable and unprofessional manner.

43. Attached to the letter of termination, was the communication between the Claimant and a client of the Respondent. The communication goes as follows:

> "What if I do not have the document in this case, she is admitted. Sick sheet will be shared once she is released from the hospital. Advice"
>
> "Take the picture"
>
> "Of what"
>
> "Of yourself, it's required for the data to be uploaded"
>
> "Myself?"
>
> "Yes"
>
> "My picture to act as a sick sheet for an employee? Am in a meeting at the moment"

"Do as asked"

"Am not a sick sheet boss. Sick sheet is a document. There is a big difference between what that app is requesting and what you are telling me."

"Check language. Call after meeting"

44. According to the Claimant, the communication was incomplete and edited as some of his responses were redacted by the Respondent. Despite this assertion, the Claimant did not provide the entire communication from his perspective and more importantly, if at all the communication was not within his possession, he did not take any step to require the Court's assistance to compel the Respondent to produce the entire communication, for instance, through a Notice to Produce. As he did not do either of this, I am enjoined to consider the communication as is.

45. It is common ground that the Claimant was working with the Respondent in the capacity of a Sales Support Coordinator. Therefore, considering the context in which the Claimant was communicating with the Respondent's client, it is not in doubt that the language he used and his manner of communication, is anything but courteous, respectful, polite or professional. By all means, that was not the appropriate manner to engage with his employer's clients. It is not in doubt that such communication had the potential of wrecking the Respondent's business.

46. From the record, it was common ground that at the time, the Respondent was a startup and only had three clients hence, it is logical in the commercial sense, that it was in its best interest to retain the said clients as opposed to loosing them. However, judging by the Claimant's engagement with the Respondent's clients, the probability was that business would be lost as opposed to being retained.

47. In light of the foregoing, I am led to conclude that the Claimant's own conduct availed the Respondent a valid and fair reason to terminate his services. As such, the Respondent satisfied the element of substantive justification.

ii. Procedural Fairness

48. Turning to the question of procedural fairness, Section 41(1) of the *Act* requires an employer to notify an employee of the intended termination in a language he or she understands. The employee should also be given an opportunity to present his or her defence in response to the allegations levelled against him or her.

49. In this case, the Respondent has maintained that since the Claimant was not an employee, the provisions of Section 41 did not apply. As I have found otherwise, the Respondent was required to notify the Claimant of the reasons for which it was considering terminating his employment and invite him to explain his alleged misconduct. Evidently, this was not done hence the manner in which the Claimant was terminated was not in accordance with the spirit of Section 41 of the *Act*.

50. Therefore, his termination was procedurally unfair hence unlawful.

51. In total sum, it is this Court's finding that in as much as the Respondent had a fair and valid reason to take disciplinary action against the Claimant, the ensuing termination was not in consonance with the provisions of Section 41 of the *Act* hence was unlawful.

Reliefs

52. As the Court has found that the Claimant's termination although with valid and fair reason was procedurally unfair, he is awarded compensation equivalent to one month of his net salary. This award

has been informed by the fact that the contract was only for six months and the fact that the Claimant had only worked for one month and 13 days.

Orders

53. In the final analysis, the claim is allowed and the Claimant is awarded the sum of Kshs 40,000/= which is equivalent to one month of his net salary. This figure shall be subject to interest at court rates from the date of Judgment until payment in full.

54. As it is trite that costs follow the event, the Claimant shall also have the costs of the suit.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JULY,2023.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant Mr. Asitiba

For the Respondent Ms. Muthee

Court Assistant Abdimalik Hussein

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.

STELLA RUTTO

JUDGE