Ng'ang'a v Safigen Kenya Limited (Cause 30 of 2019)
[2023] KEELRC 1777 (KLR) (14 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1777 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 30 OF 2019

SC RUTTO, J

JULY 14, 2023

BETWEEN

KENNEDY WAWERU NG'ANG'A ..... CLAIMANT

AND

SAFIGEN KENYA LIMITED ..... RESPONDENT

JUDGMENT

1. The claimant avers that he worked for the respondent as a cofounder with effect from 21st September, 2017. He further avers that he worked with two cofounders of American citizenship who were mostly based in the United States of America. It is the claimant's case that between August, 2017 and February, 2018, he built prototypes which were installed at several sites within Nairobi.

2. The claimant further states that they had a vesting schedule of four years with a one year cliff ending on 31st August, 2018 in that the partnership was to last for four years during the vesting period of the shares. He continued to serve with loyalty and diligence between 23rd July, 2018 and 3rd August, 2018 when he was summoned and confirmed that he is not a good "fit" for the company. He was issued with a letter of summary dismissal on 31st August, 2018. According to the claimant, his termination was irregular, unlawful and unfair as he was not given a hearing. It is against this background that he seeks the following reliefs against the respondent:-

    a) interim orders compelling the respondent to produce transcripts of email communication and SLACK transcripts for all channels between him and the respondent commencing from 21st September, 2017 to 31st August, 2018.

    b) a declaration that the claimant's employment with the respondent was terminated wrongfully and unfairly.

    c) a declaration that the respondent cannot deny the claimant the right to use, adopt and develop his technology and technological ideas.

d) a declaration that the respondent buys out the claimant from the company commensurate to the time spent in setting up the company and loss of opportunity to grow and develop the company.

e) a declaration that the respondent allocates 75% of the unvested shares to the claimant.

f) a declaration that the shares, both vested and unvested be allocated to the claimant.

g) damages for defamation, discrimination, mental distress, humiliation and wrongful and illegal termination.

h) loss of earnings @ US $70,000 per annum for 4 years totalling to US $ 280,000 (Kshs 28 Million).

i) costs of the claim.

j) any other relief that the Honourable Court may deem fit and just to grant.

3. The Claim was opposed with the respondent stating that the claimant was assigned the title "cofounder" with specific description of the duties in that position and that there were no additional roles, responsibilities or benefits. The respondent denies that the claimant worked diligently to its satisfaction. It further denies that the claimant developed any software. That the software used by the respondent's customers was built by other members of the team. It avers that the claimant was absent from his place of work from 14th to 28th August, 2018. That he deserved to be summarily dismissed given the several employment offences he committed. The respondent further contends that the Court has no jurisdiction to order it to allocate shares to the claimant. Consequently, the respondent prays that the suit be dismissed with costs.

4. The matter proceeded for hearing on 24th November, 2022 and 9th February, 2023 during which both sides called oral evidence.

Claimant's Case

5. The claimant testified as CW1 and at the start of the hearing, sought to adopt his witness statement to constitute his evidence in chief. He proceeded to produce the documents filed together with his claim as exhibits before Court.

6. It was the claimant's testimony that prior to working with the respondent, he was a professional in his field and was working as a researcher with International Centre for Tropical Agriculture (CIAT), an international research centre based in Columbia but has an office at ICIPE Kasarani and had an invention to his name in data collection and decision support in the field of IOT (Internet of Things). It is due to this expertise that the respondent confidently pursued him to partner with them after calling various referrals confirming his skills.

7. Prior to signing the employment contract in 21st September, 2017, he had been working with the respondent's representative, Ms Lauren Dunford for two months already. He was initially working with her under an arrangement where he was an advisor to the company. When they first met in July, 2017 and agreed to work together, Ms Lauren had explained the advisor agreement as a way for them to test how they will work together before committing to a long term partnership as co-founders. He further stated that he was actively working with the respondent since July, 2017.

8. In February, 2018, the respondent agreed to pay him a salary of US$70,000 per annum for the first year, which would grow in the subsequent four years after more fund raising. With this promise in mind, he worked seven days a week and never had a single free weekend since they were installing equipment on

industrial machines, many which would only stop running over the weekend. Being the only person with technological knowhow and the only one on the ground, he was tasked with building both the hardware and software and deploying and managing pilot trials in different factories, which he would build during the weekdays and deploy them on weekends and spend the subsequent weekends testing and upgrading them.

9. It was his further testimony that being the only company representative in Kenya, he was charged with meeting prospective clients and managing customer relationships. That he was never paid overtime and his leave days were not commuted. His physical and psychological health took a hit as he was working non-stop.

10. Between March, 2018 and June, 2018 together with the respondent, they conducted a successful fund raising for the company where he was to take a salary of US$70,000 per annum for the first year, which would grow in subsequent years after more successful fund raising. After the fund raising and his legitimate expectation being that his salary would rise to the said US $70,000 per annum, is when the relationship between him and the respondent broke down. The other co-founders started treating him with contempt and hostility to an extent of excluding him from company meetings and decision making yet he was a co-founder.

11. It was his evidence that he continued to serve the respondent with loyalty and diligence until between 23rd July and 3rd August, 2018 when he was summoned and informed that he was not a "good fit" for the company as he was allegedly not meeting its expectations. This was just another way of informing him that he was not "white enough" to fit the profile of the company, racially discriminating against him. He was then coerced and threatened to resign, of which he flatly refused as he was a co-founder and would not accept to be disenfranchised from a company he actually built.

12. On 28th and 29th August, 2018, suspiciously coincidentally just before the end of the 1 year cliff (31st August, 2018), Ms. Lauren gave him a Separation Letter Offer where he was to resign. He rejected the said letter on the basis that it was irregular and highly suspicious as it had occurred just before his first quarter of allotted shares officially vested. Ms. Lauren grew hysterical upon his rejection and publicly humiliated him. It is shortly after these meetings that the respondent issued him with a notice to show cause and a termination letter in quick succession.

13. Soon after sending the notice to show cause, the respondent on 31st August, 2018 sent him a letter of summary dismissal via email marking the end of communication between them and denying him a right of reply.

Respondent's case

14. The respondent called oral evidence through Ms. Lauren Dunford who testified as RW1. She identified herself as a Director and Chief Executive of the respondent. At the outset, she sought to adopt her witness statement to constitute her evidence in chief. She further produced the documents filed on behalf of the respondent as exhibits before Court.

15. It was RW1's testimony that by an Agreement executed by the claimant on 7th December, 2017 and by the respondent on 8th December, 2017, the respondent agreed to employ the claimant as one of its first employees with effect from 21st September, 2017 to help the respondent start its business of software development in Kenya. The respondent gave the claimant the title of co-founder which simply meant that he was employed soon after it was founded. Apart from that reason, there was no additional meaning or benefit attached to the title.

16. The claimant paid no shares contribution or any other monetary contribution towards registering and/or running the respondent. He was also not a director in the Company but had his job description set out in his letter of appointment. Prior to the issuance of the letter of appointment, the claimant had no prior contractual relationship with the respondent.

17. It was RW1's evidence that the respondent soon came to realize that the claimant had difficulties in performing his work to its expectations. He could not develop any hardware or software platform which could be sold to customers as the few hardware prototypes he built, proved unreliable. The respondent had to rely on other members of the team.

18. She stated that as the Chief Executive, she took the initiative to counsel the claimant on how best to perform his work but there was little improvement on his part. She was surprised while reading through the Memorandum of Claim that the claimant considered his being coached and counseled to make him a better employee, to amount to him being discriminated against on account of not being not "white enough". She denied discriminating the claimant on the basis of his racial origin or the colour of his skin.

19. It was her testimony that between June and August 2018 the claimant took an increasingly lesser interest in his work by failing to meet targets and to report on duty. On 13th August, 2018 he did not report on duty claiming that he was sick, a fact which he later retracted. Between 15th and 28th August, 2018, the claimant again remained absent from his work place and offered no excuse or justification for failure to do so.

20. On 28th August, 2018, the claimant agreed to meet him to discuss his performance and future relationship with the respondent. At the onset of the meeting, he became agitated and started insulting him by calling him a racist. He vowed to campaign against the respondent and discredit it in the entire startup ecosystem. He further swore to start a company to compete with the respondent.

21. It was her evidence that on 29th August, 2018, the claimant followed his threats with action. He posted in the internet a publication titled "Why African techies are becoming disillusioned with "Silicon Savanah narrative". He signed as "Social Justice Warrior-Cofounder Safi Analytics"

22. On 29th August, 2018, she wrote a show cause letter to the claimant asking him to explain why disciplinary action should not be taken against him. She invited him to go to the office the same day at 4 p.m. with an intention of handing him the show cause letter. The claimant reported to the office but efforts to hand him the show cause letter became futile as he reacted violently by shoving away the letter before reading it. He then dashed to the main office door and left in a huff.

23. It was RW1's evidence that the claimant frustrated his efforts to give him a fair hearing before disciplinary action could be taken against him. She made a final attempt on the evening of 29th August, 2018 by sending the show cause letter to the claimant through his email address but the response from the address read that he could not access his email as he had proceeded on vacation until October 2018. She stated that the claimant had not applied for nor had he been granted permission to proceed on leave.

24. She further stated that in light of the fact that the claimant had declined to be served with the show cause letter, had become unreachable and therefore no disciplinary hearing could be conducted, she made a decision to summarily dismiss him from service. The respondent posted the letter to the claimant's last known address.

25. She further stated that earlier after it had become apparent that the claimant was no longer interested in his work and had remained absent from his place of work from 14th to 28th August 2018, the respondent

had proposed to have an amicable separation with the claimant but he turned down the offer and instead insulted her in person and the leadership of the company by publishing an article attacking the company and its directors on the internet. The offer stood withdrawn.

26. It was her view, that the claimant deserved to be summarily dismissed given the several employment offences he committed as tabulated in the letter of dismissal. To date, despite filing this suit and during the pendency of its hearing, the claimant has continued to attack the respondent through social media contrary to the sub judice rule.

27. On 21st January, 2020 the respondent became aware of a video on Twitter titled "Kenya Tech Start-up Ecosystem Titled Towards Foreigners #SemaUkweli." The video had been posted the day before by Boniface Mwangi a renowned social activist, on his personal handle (@BonifaceMwangi), as well as his Sema Ukweli (say the truth) @SemaUkweliKenya page on the same platform. The source on information was stated to be the claimant.

28. She further denied that the respondent caused the claimant to lose 4 Million shares in the company. Based on the terms of the agreement between the respondent and the claimant, there was no obligation placed on the respondent to grant him any shares.

29. She further stated that the respondent has not denied the claimant the right to use, adopt and develop his technology and technological ideas and an insinuation to that effect in the Memorandum of Claim is unfounded.

30. She further averred that the claimant has no investment stake in the company and has no proprietary rights over assets of the company and the prayer for an order to the effect that the respondent buys the claimant out is misconceived and lacks merit.

Submissions

31. On the claimant's part, it was submitted that the respondent did not prove that he was informed of his right to have a representative of his choice present at the time of explaining the reasons for termination. It was further argued that the respondent did not give him a chance to respond to the notice to show cause. It was the claimant's further submission that the respondent terminated his employment on an innuendo and as such, must be held accountable.

32. On the other hand, the respondent submitted that the claimant was employed as an ordinary employee with specific duties assigned to him. That his title was given as co-founder without any further benefit of being a co-director or a shareholder. It was therefore argued that the Court cannot interrogate what the parties intended to achieve with the Stock Grant Agreement unless Safigen PBC was made a party to this suit.

33. The respondent further stated that the summary dismissal of the claimant is justifiable under Clause 20 of the Employment contract and as such, the alleged offences he committed should be understood within that legal regime. It was the respondent's further submission that the claimant deliberately frustrated its efforts to give him a fair hearing before his services were terminated.

Analysis and determination

34. I have considered the pleadings on record, the documentary evidence, oral testimonies rendered before Court, together with the rival submissions and the following issues stand out for determination: -

    i Whether the respondent had a fair and valid reason to terminate the employment of the claimant;

ii Was the claimant accorded procedural fairness prior to being terminated from employment?

iii Whether the Court has jurisdiction to hear and determine the dispute with regards to the vesting of shares;

iv Is the claimant entitled to the reliefs sought?

Valid and fair reason?

35. Before I delve into this issue, I find it imperative to address an issue with regards to the relationship between the parties. The claimant contends that he was no ordinary employee in the respondent company and that he was a co-founder. Worthy to note is that the claimant executed two separate agreements; one being an Employment Contract and the other being a Stock Grant Agreement. Notably, both agreements were executed with two different entities, with the Employment Contract being executed with the respondent while the Stock Grant Agreement was executed with Safigen PBC.

36. In the Employment Contract, the claimant is described as an Employee while the respondent is described as the Employer. Indeed, the terms set out in the employment contract bear the hallmarks of an ordinary employment contract that is to say, duration, reporting, probation, performance review, working hours, leave, remuneration, retirement age and termination.

37. In light of the foregoing, it is evident that the claimant and the respondent were in an employment relationship notwithstanding the reference made to him as co-founder at clause 3 of the Employment Contract.

38. That said, it is my considered view that the issue with regards to his role in setting up the company and entitlement to shares, is to be governed within the framework of the Stock Grant Agreement. Indeed, this may be the very reason why the parties deemed it fit to execute two separate agreements as opposed to one.

39. Having stated as much, I now move to consider whether the respondent has proved that it had a valid and fair reason to terminate the claimant's employment.

40. The starting point in determining this question is Section 43(1) of the *Employment Act* (Act) which requires an employer to prove the reasons for termination 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; ...

41. What this means is that it is not enough for an employer to spell out the reasons for termination. The said reasons ought to be fair and valid and the burden rests on the employer to prove as much.

42. In the case herein, the reasons for the claimant's termination can be discerned from his letter of summary dismissal which is partly couched: -

> " It is noted that you remained absent from work on 13th August, 2018 ostensibly on account of your sickness even though later that week you verbally informed me that you were actually not sick.

Thereafter on 15th, 16th, 17th, 18th, 20th, 21st, 23rd, 24th, 25th, 27th, and 28th August, 2018 you continuously failed to report to work. For many days at a time during that period, efforts to reach you both by phone and email proved fruitless...

In the (sic) light of the foregoing, the engagement has come to the conclusion that:-

a) You have carelessly and improperly performed your work which was form the nature of your duty under your contract was your obligation to perform;

b) You have without any lawful cause, remained absent from work;

c) You have used abusive and insulting language and further behaved in a manner insulting to me yet I was the person in authority over you by the company;

d) You have by your conduct committed a fundamental breach of your contact of employment as you intend to set up a business in competition with the company while you are still an employee of the company;..."

43. From the letter of dismissal, it is apparent that the claimant was alleged to have been absent from work on 13th, 15th, 16th, 17th 18th, 20th, 21st ,23rd, 24th ,25th,27th and 28th August, 2018. Notably, the claimant did not deny this assertion. Testifying under cross examination, the claimant admitted his absence from work from 15th to 28th August, 2018, adding that he had been asked to keep away from the office. Be that as it may, he did not state who asked him to keep away from the office and for what reason.

44. The claimant's absence from work is further confirmed by his email of 29th August, 2018 in which he replies as follows: "I am away on vacation. Will be back in October".

45. In as much as the claimant stated that the email response was autogenerated, it remains a confirmation that he was away from work and if at all he had leave or authority to be away, his employer would have been in the know at the time. From the record, the respondent was not aware of the claimant's vacation.

46. Pursuant to Section 44(4) (a) of the Act, absence from work without leave or lawful cause is one of the grounds for summary dismissal.

47. Therefore, the mere fact that the claimant was absent from work with no leave or lawful authority, availed the respondent a fair and valid reason to take disciplinary action against him. I must point out that that reason alone was sufficient to trigger the disciplinary process.

Procedural fairness?

48. The requirement of fair procedure is generally provided for under Section 45 (2) (c) of the Act. The specific requirements encompassing a fair hearing are provided for under Section 41(1) of the Act. In this case, an employer is required 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 the instant case, the process was commenced through the notice to show cause dated 29th August, 2018. From the record, the claimant did not respond to the letter to show cause despite being advised to respond to the same by 31st August, 2018. Further, he did not explain the reason for his failure to respond to the show cause letter. In the event he was of the view that the period given was insufficient, nothing stopped him from notifying the respondent as much and asking for more time.

50. It is also notable that the respondent dispatched the notice to show cause through the claimant's email address and his response was that he was away on vacation. Will be back in October. During cross

examination, the claimant stated that he did not receive the email transmitting the show cause letter and that the email automation had been set up hence the response. He further stated that he had switched off all work emails while on vacation. How then was the employer to reach him?

51. From the way I see it, the claimant was not ready to engage in the process and seemed to have left the respondent with almost no option but to terminate his employment contract.

52. In light of the foregoing, I am led to conclude that the claimant squandered the opportunity given to him to present his defence and to be afforded a hearing in terms of Section 41 of the Act.

53. On this score, I will apply the determination in the case of *Jackson Butiya v Eastern Produce Limited* (Industrial Court Cause No. 335 of 2011) where the Court held that: -

> " An employee who squanders the internal grievance handling mechanisms provided by an employer cannot come to Court and say "I refused to talk with those people and therefore I was not heard, order them to pay me." It is not the role of the Court to supervise the internal grievance handling processes between employers and employees. The role of the Court is to ensure that such processes are undertaken within the law."

54. That said and all things considered, I find that the claimant's dismissal was not unfair and unlawful.

Vesting of shares

55. On this issue, it is notable that the claimant executed a separate agreement with Safigen PBC which is described in the agreement as a Delaware public benefit corporation. Indeed, clause 9 of the Employment Contract provides that the claimant was to receive a stock grant from the said Safigen PBC and to this end, reference was made to the Stock Grant Agreement. Therefore, the dispute with regards to the stock grant is more of a commercial agreement hence falls outside the jurisdiction of this Court in light of the provisions of Section 12 of the *Employment and Labour Relations Court Act*. On this issue, I cannot help but find that the claimant has filed his claim in the wrong forum.

56. What's more, the said Safigen PBC is not party to the instant suit. That being the case, it follows that no order can issue against it.

57. Having determined as much, the reliefs with regards to the vested and unvested shares cannot be sustained.

58. With regards to the claim for damages for defamation, discrimination, mental distress and humiliation, the Court declines to award the same as the claimant has failed to substantiate and prove his claim to that effect as required under law.

59. Having found that the claimant was not unfairly and unlawfully dismissed, the claim for damages for wrongful termination collapse.

Orders

60. In the final analysis, I dismiss the claim in its entirety with an order that each party bears its own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JULY, 2023.

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STELLA RUTTO

JUDGE

Appearance:

Ms. Luchemo for the Claimant

Mr. Obura for the Respondent

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

9