



Owiyo v Repelectric (K) Ltd (Employment and Labour Relations Cause 2400 of 2017) [2023] KEELRC 1636 (KLR) (6 July 2023) (Judgment)

Neutral citation: [2023] KEELRC 1636 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 2400 OF 2017**

AN MWAURE, J

JULY 6, 2023

BETWEEN

JOHNA OCHIENG OWIYO CLAIMANT

AND

REPELECTRIC (K) LTD RESPONDENT

JUDGMENT

1. The claimant filed a memorandum of claim dated December 4, 2017.
2. He asks for award of July 2017 salary, one month salary in lieu of notice and service pay as well as 12 months compensation for unfair termination.
3. He states he was employed on June 1, 2005 as a technician. He says while on his duty he was terminated on July 13, 2017 by the respondent without any just cause and he was told he was working for a competitor of the respondent.
4. He says he was maliciously and unlawfully terminated and so prays for compensation

Respondent claim

5. The respondent filed his response dated February 9, 2018. He says the claimant was passing trade secrets and confidential information to a third party who was their competitor. The respondent state that as a result of that gross misconduct respondent senior management asked the claimant to vacate the premises and only report on July 31, 2017 without deduction of leave days or wages. This was on July 12, 2017.
6. The claimant failed to report to work on July 31, 2017 as directed and he was served with notice to show cause. The claimant did not respond to the notice to show cause.



7. He says they conducted disciplinary hearing and found claimant was culpable of three acts of gross misconduct. claimant was informed of the same and yet never showed up for clearance interview.
8. The respondent admits claimant was entitled to July 2017 salary but was deducted for the days he absented himself.
9. Respondent says claimant NSSF deductions used to be remitted to NSSF and so he is not entitled to service pay. The respondent prays the memorandum of claim be dismissed with costs.

Claimant's evidence

10. The claimant gave his evidence in court on February 7, 2013. He says he was unceremoniously told to go home on July 13, 2017 and she tried to ask questions but was told not to ask any questions. He say he was told to go back on 31/7/2017 but when he attempted to go he was not allowed by the security. He says he was not given any termination letter but was told he owed the respondent kshs 5,490/.

Respondent's evidence

11. The respondent Rachel Wotton said she learnt claimant was giving trade secrets to a competitor and she sent claimant home in order to investigate the matter.
12. She says she then asked claimant to report back to work and he did not go back. She then sent him a notice to show cause and again he did not respond. He also refused to attend the disciplinary hearing.
13. The claimant's submissions dated March 1, 2023 were considered by the court as well as the respondent's submissions dated March 13, 2023.

Analysis and determination

14. The court having considered the pleadings and evidence adduced as well as the respective submissions find the issue for determination is:
 1. Singularly whether the claimant was unlawfully terminated from his employment with the respondent?
 2. Secondly is he entitled to the reliefs ought?
15. The respondent admits they sent the claimants on a paid leave from July 12, 2017 to July 31, 2017 to investigate allegations that he was giving out confidential information to third parties who were their competitors. She says the claimant was to report back to work on July 31, 2017 but he did not report back.
16. On his part the claimant says he was asked to go back but when he did so he was locked out of the gate.
17. There is no letter of termination of employment and even the claimant admitted as much that he never received a letter of termination. Hence the respondent claims she merely sent him on a paid leave to enable them to investigate allegations of leaking trade secrets to a competitor.
18. The claimant via his advocates Ireri & Company wrote a demand letter to the respondents on August 3, 2017. The advocate for the respondent responded to the demand letter dated August 21, 2017 and asked the claimant to go back to work and would be required to give reason for his absence from work from July 1, 2017.



19. Claimant was served with a notice to show cause on August 31, 2017 but there is no proof that he acknowledged the same. The respective lawyers kept in constant communication and on September 21, 2021 claimant was served with dismissal letter.
20. It is evident the respondent had reasons to terminate the claimant even though there are no witnesses who were called to testify about the leaking of trade secrets to a competitor. Only the proprietor testified in court but tangible evidence was not presented in court at that point. That may appear to have been in contravention of section 45(1) of the Employment act. The said Section 45(1) of the Employment Act states as follows:

“No employer shall terminate the employment of an employee unfairly.”
21. However the respondent endeavoured to conduct investigations on those allegations and gave the claimant some paid leave to conduct investigations.
22. In compliance with the mandatory section 41 of the Employment Act the respondent invited the claimant to show cause why disciplinary action should not be taken against him. The claimant left the respondents premises on 12th July 2017 and did not return there. Again he was invited several times via letters sent to him and through his advocate. He never turned up and hence he did not participate in the disciplinary hearing.
23. Under such circumstances there was no way that disciplinary hearing could be conducted strictly in accordance to section 41 of the Employment Act. The employer can only comply with provision of section 41 of the Employment Act but only as he employee would also co-operate. If employee fails to turn up for such a hearing there is no more that can be asked of the employer.
24. In the case of 43 of 2019 Esther Gachomo Vs Equity Bank Limited the court upheld the maxim that he who comes to equity must come with clean hands. The said was emphasized in Caliph Properties Limited vs Barbel Sharma & another (2015) eKLR where court stated:

“.... he who comes to equity must come with clean hand and must also do equity.”
25. The respondent recalled the claimant severally back to work and also invited him to respond to a notice to show cause but the claimant did not respond but instead rushed to his advocates to commence these proceedings. The background of these several cases against the respondent is that these employees joined a former employee and formed an organisation known as Spinetex Limited and all started working there.
26. That is a side observation but going by the evidence and pleadings and submissions in this case the court finds the respondent proved there was a valid reason to terminate the claimant and they attempted to follow the right procedure but it was not possible due to claimant’s failure to co-operate. The court finds the respondent has proved the claimant was lawfully terminated and so dismisses his case accordingly.
27. The court however orders the respondent to pay the claimant salary of 2017 July@ Kshs 25,950/- as they had sent him on a paid leave. The same will attract interest from date it was due till it is fully paid.
28. Service pay should have been paid if the same was not remitted to NSSF but there is no evidence to that effect and so the court will not allow such a prayer as in abstract.
29. Finally under the circumstances each party will meet their respective costs of the suit.
30. Orders accordingly.



DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 6TH DAY OF JULY 2023.

ANNA NGIBUINI MWAURE

JUDGE

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 has 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 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.

A signed copy will be availed to each party upon payment of Court fees.

ANNA NGIBUINI MWAURE

JUDGE

