



**Mbunza v Sunbird Business Services (K) Ltd (Employment and Labour Relations Cause 277 of 2019) [2023] KEELRC 2226 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2226 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
EMPLOYMENT AND LABOUR RELATIONS CAUSE 277 OF 2019  
BOM MANANI, J  
SEPTEMBER 28, 2023**

**BETWEEN**

**PATRICK MULI MBUNZA ..... CLAIMANT**

**AND**

**SUNBIRD BUSINESS SERVICES (K) LTD ..... RESPONDENT**

**JUDGMENT**

**Background**

1. The parties to this dispute had an employment relation until 4<sup>th</sup> December 2018 when it was terminated. The Respondent had engaged the services of the Claimant as its Financial Controller.
2. On 21<sup>st</sup> November 2018, the Claimant sent a series of electronic images to one [particulars withheld] (the victim), a co employee. The images were tendered in evidence.
3. According to the victim, the images were sexually explicit and unsolicited. The victim immediately contacted the Claimant and asked him whether the images were meant for her. The conversation between the two was as follows: -

Victim: "Are these meant for me????"

Claimant: "I don't think so but they can't hurt."

Victim: "Please don't [send] such to me."

Claimant: "Okay I am sorry."

4. It would appear that the victim was not satisfied with the Claimant's response. As a result, she escalated the matter to the Respondent on the same day by lodging a formal sexual harassment complaint. This was by email. The victim then lodged a grievance form in accordance with the Respondent's Human Resource policy.



5. On 22<sup>nd</sup> November 2018, the Claimant was invited to react to the complaint. He was subsequently suspended from duty for a period of seven (7) days pending further investigations into the matter.
6. The Claimant maintains that he did not share the images with the victim intentionally. It is his case that he intended to share the images with a third party who shares a name with the victim. The Claimant states that instead of forwarding the images to the intended recipient, he inadvertently dispatched them to the victim.
7. On her part, the victim believes that the Claimant intentionally forwarded the images to her. It is the victim's case that the tone of the Claimant's text in response to her inquiry about the images confirms this fact.
8. The victim asserts that the Claimant was not unequivocal in his response to her. Further, it is the victim's case that the Claimant's assertion that the images would not in any event "hurt" proves that his action was intentional.
9. The record shows that after the Claimant was suspended from duty on 22<sup>nd</sup> November 2018, he was invited for a "dispute hearing" on 27<sup>th</sup> November 2018. This was through the Respondent's letter dated 26<sup>th</sup> November 2018.
10. On 27<sup>th</sup> November 2018, the record shows that the Respondent's Human Resource manager by the name [particulars withheld] sent the Claimant an email at 9.03 AM confirming the meeting scheduled for that day.
11. The record shows that the Claimant responded to [particulars withheld] through email on the same day at 1.31 PM. In his email, the Claimant appears to have declined the invite for the "dispute hearing" session.
12. On 4<sup>th</sup> December 2018, the Respondent wrote to the Claimant terminating his contract of service on account of gross misconduct. Apparently, the Respondent had arrived at the conclusion that the Claimant's conduct on 21<sup>st</sup> November 2018 amounted to sexual harassment of a co-employee, a matter that offended not just the Respondent's Human Resource policy but also the law.
13. The record shows that the Claimant lodged an appeal to challenge the Respondent's decision. He lost the appeal and the decision was communicated to him through the Respondent's letter dated 29<sup>th</sup> December 2018.
14. The Claimant has now challenged the decision to terminate his contract of service. He has raised a number of matters in this respect. First, he argues that the decision was not founded on valid reason. Second, he argues that the Respondent did not afford him a hearing. Third, he argues that the panel that handled his matter was conflicted. Fourth, he avers that the Respondent did not pay him his terminal dues.
15. On its part, the Respondent posits that the decision to terminate the Claimant's contract of service was valid. According to the Respondent, the Claimant's conduct constituted gross misconduct for which the Respondent was entitled to terminate his employment summarily. Second, the Respondent states that the Claimant was afforded a chance to be heard. Finally, it is the Respondent's case that the Claimant was paid his exit dues.

### **Issues for Determination**

16. Having regard to the pleadings and evidence on record, I am of the view that the following are the issues for determination:-



- a. Whether the Claimant's contract of service was lawfully terminated.
- b. Whether the parties are entitled to the reliefs that they seek through their respective pleadings.

### **Analysis**

17. On the first issue, there is evidence that the Claimant indeed shared with the victim the impugned images through his Whats-App platform. The images were tendered in evidence.
18. I have looked at the images together with the captions accompanying them. There is no doubt that most of them contain sexually explicit literature. Although the Claimant initially denied that this was the case, he eventually conceded during cross examination that the images and captions were sexually explicit.
19. There is evidence that the Claimant's text was directed at [particulars withheld], one of the Respondent's employees. This fact is clear from the evidence by both parties. The only point of divergence was whether sharing of the images was intentional or inadvertent.
20. Chapter 8 of the Respondent's Staff Handbook which was tendered in evidence by the Claimant provides for disciplinary procedures at the Respondent's workplace. Chapter 8.6.1 and 8.6.2 of the Handbook contains the Respondent's sexual harassment policy. These provisions proscribe sexual harassment of members of staff at the workplace.
21. The Handbook identifies various acts that constitute sexual harassment. These include sharing of unsolicited images and words of a sexual nature. Undoubtedly therefore, the Claimant's act of sending the victim material with sexual content, if intentional, amounted to sexual harassment of the victim.
22. After the Claimant dispatched the offending material to the victim, she sent him a text to inquire whether the images were meant for her. In his response, the Claimant said  

"I don't think so."
23. This expression has a measure of ambivalence regarding whether the Claimant intended to unequivocally state that the images were not intended for the victim. Coming from the originator of the text, one is left to wonder why the Claimant would elect to use such ambivalent language if indeed it was his intention to indicate to the victim that the text had been sent by error. If the Claimant was clear minded that he had inadvertently sent the text to the victim, nothing would have stopped him from expressly stating that the images were sent in error.
24. Second, the use of the phrase  

"but they [images] can't hurt:

speaks volumes about the Claimant's state of mind at the time he responded to the victim's inquiry about the impugned images. The phrase paints an image of an individual who took the whole episode quite lightly and perhaps casually. There is a sense in which one is left with a feeling that the Claimant was perhaps gleeful about the episode. The phrase betrays the Claimant's intention as suspect. Having regard to the phraseology that the Claimant deployed in his response to the inquiry by the victim, I am convinced that he sent the images with ulterior intent.
25. The victim did not solicit for the images. The images were sent to her without her consent. Indeed, this is clear from the email exchanges between the victim and the Claimant and the subsequent steps that



the victim took to address the matter. In the premises, I have no doubt in my mind that the Claimant's conduct amounted to sexual harassment of a co-employee.

26. Having regard to the foregoing, I agree with the Respondent's position that the Claimant's behavior violated not just the Respondent's Staff Handbook but also section 6 of the *Employment Act*. This conduct amounted to gross misconduct for which the Respondent was entitled to terminate the Claimant's contract of service.
27. With respect to observance of due process, the record shows that after the victim lodged her complaint, the Claimant was invited to respond to the complaint. This is evident from the employee (read Claimant) grievance report dated 22<sup>nd</sup> November 2018. As a matter of fact, the record shows that the Claimant requested to be given an opportunity to apologize to the victim.
28. The evidence on record also shows that on 26<sup>th</sup> November 2018, the Claimant was invited to a "dispute hearing" on 27<sup>th</sup> November 2018. The Claimant's email of 27<sup>th</sup> November 2018 suggests that he initially expressed reluctance to attend the session. However, it is apparent that he turned up for the session. This is confirmed by the oral testimony of the victim in court which indicates that the Claimant attended the session. The Claimant's attendance of the session is also confirmed by his grounds of appeal appearing in his email of 10<sup>th</sup> December 2018. For instance, in ground number two (2), the Claimant is quoted as stating as follows: -

"While I explained to the complainant that the chat was not meant for her and that I had send it by mistake and went to the extent of apologizing to her, I was shocked to be called to a ill constituted panel. During the session, I also explained that it was not my intention to send that chat to [particulars withheld]." Emphasis added by underlining.
29. The Claimant has asserted that he did not regard the "dispute hearing" panel as properly constituted because it was presided over by his juniors. Further, the Claimant alleges that one of the persons in attendance was conflicted as she was a relative of the victim. In the Claimant's view, his line manager and the Respondent's Chief Executive Officer (CEO) should have been part of the panel.
30. It is true that the regulations require the Respondent's CEO and line managers to sit during employee disciplinary hearings. However, the Claimant does not point to the prejudice that he suffered as a result of the absence of the CEO and his line manager from the panel.
31. Further, the record shows that [particulars withheld] who is said to have been a relative of the victim was the Respondent's Human Resource manager. This is evident from the letters that she dispatched to the Claimant. Under clause 8.3.6 of the Handbook, she was entitled to sit on the "dispute hearing" panel. Absent evidence of bias by her, the court cannot upset the Respondent's impugned decision merely on the basis of the assertion that she was related to the victim.
32. The record shows that the Respondent was cognizant of the right of the Claimant to be presumed innocent on the accusations against him. The record shows that the Respondent was keen to afford the Claimant the opportunity to clear his name. This is evident from the employee grievance report filed on 22<sup>nd</sup> November 2018 and produced in evidence. In the instrument, the Claimant's innocence was underscored. Further, in the Respondent's letter dated 26<sup>th</sup> November 2018 inviting the Claimant for the "dispute hearing", the Respondent reiterated the Claimant's right to defend himself and call his witnesses.
33. The Claimant alleges that he was not heard on the dispute. However, the record demonstrates otherwise. There is evidence of a hearing having taken place. Indeed, the grounds of appeal by the Claimant confirm this fact.



34. The record shows that after the Respondent passed its verdict on the matter, it notified the Claimant of the results through its letter of 4<sup>th</sup> December 2018. The Respondent's decision was to terminate the Claimant's employment for gross misconduct.
35. The record shows that the Claimant was notified of his right to challenge the decision on appeal. This was done through the Respondent's letter to the Claimant dated 4<sup>th</sup> December 2018.
36. The record shows that the Claimant exercised this right by appealing the Respondent's decision through his email of 10<sup>th</sup> December 2018. Further, the record shows that the appeal was considered and a decision rendered on 29<sup>th</sup> December 2018. From the record, it is clear that the Respondent forwarded to the Claimant the appeal results through email on 29<sup>th</sup> December 2018.
37. The Respondent's letter of 29<sup>th</sup> December 2018 sets out a detailed response to the Claimant's grounds of appeal. Regarding the presence of the allegedly conflicted members of the "dispute hearing" panel, the Respondent emphasized that some of them were present as witnesses. Further, the record shows that [particulars withheld] attended the session as the Respondent's Human Resource Manager. Regarding whether the Claimant had inadvertently dispatched the impugned images to the victim, the appeal's committee held that the Claimant's response to the victim's inquiry on the matter suggested otherwise.
38. The totality of the foregoing demonstrates that the Respondent processed the Claimant's release from employment substantially in line with due process. If there were any deviations, they have not been shown to have been of a magnitude that would have occasioned injustice to the Claimant.
39. Finally, there is evidence that the Claimant was paid his exit dues. The defense produced a clearance form and computation of the Claimant's dues of Ksh. 521,403.00. During his oral testimony in court, the Claimant did not suggest that these amounts were not paid to him.
40. Before I pen off, it is appropriate to address some concerns that have been raised by the Claimant's counsel through his final submissions. First, counsel suggests that the Statement of Defense does not allude to the defense of sexual harassment of the victim. It is true that the defense does not expressly use the phrase "sexual harassment". However, this does not mean that this defense was not raised. On the contrary, the defense is alluded to in paragraphs one (1) and six (6) of the Statement of Defense. The statement of defense indicates that the Claimant's action of sharing unwelcome explicit sexual material with the victim constituted a gross and indecent act which amounted to gross misconduct. This statement anchors the defense of sexual harassment.
41. The Claimant's counsel further suggests that merely because the statement of defense does not set out the particulars of the impugned sexually explicit texts and the damage they inflicted on the victim, this should render the defense inadequate for want of particulars. With respect, I do not agree. In my estimation, the statement of defense was sufficiently elaborate to draw the Claimant's attention to the nature of the Respondent's response to his case.
42. The Claimant's counsel also argues that since the Respondent's witness was the victim of the alleged sexual harassment, her evidence ought to have been corroborated by some other evidence by the Respondent. I do not agree. There is no rule of evidence that supports this argument.
43. It is noteworthy that the Respondent's witness was not just the victim of the unwelcome sexually explicit images. She was also an employee of the Respondent. In this context, she was in a position to testify both as the victim of the assault and as a witness of the Respondent on the requirements of its sexual harassment policy.



44. In any event, the question whether the Respondent has a sexual harassment policy was not in dispute. As a matter of fact, it is the Claimant who produced in evidence the Respondent's Handbook which contains the sexual harassment policy. It is therefore baffling that counsel for the Claimant should suggest that by the Respondent not calling other witnesses to corroborate the evidence of the victim, the issue regarding existence of the Respondent's sexual harassment policy was left hanging.
45. Counsel also suggests that the Claimant was entitled to a written warning before he could be dismissed from employment. I have looked at the Handbook that was produced in evidence. It has three categories of infractions: minor offenses; major offenses; and gross misconduct. The first two sets of offenses are subject to the warning system as a matter of course. However, whilst the offense of gross misconduct may attract one warning, it can attract the sanction of immediate separation under clause 8.3.7 of the Handbook.

#### **Determination**

46. The upshot is that the court arrives at the conclusion that the Respondent's decision to terminate the Claimant's employment was informed by valid reasons and was substantially in accordance with due process.
47. Accordingly, the Claimant's case is dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED ON THE 28<sup>TH</sup> DAY OF SEPTEMBER, 2023**

**B. O. M. MANANI**

**JUDGE**

In the presence of:

..... for the Claimant

..... for the Respondent

#### **Order**

In light of the directions issued on 12<sup>th</sup> July 2022 by her Ladyship, the Chief Justice with respect to online court proceedings, this decision has been delivered to the parties online with their consent, the parties having waived compliance with rule 28 (3) of the *ELRC Procedure Rules* which requires that all judgments and rulings shall be dated, signed and delivered in the open court.

**B. O. M MANANI**

