



REPUBLIC OF KENYA



KENYA LAW
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**Ouma v Dominion Outdoor Advertising (2006) Ltd (Cause 1052 of 2018)
[2023] KEELRC 2202 (KLR) (22 September 2023) (Judgment)**

Neutral citation: [2023] KEELRC 2202 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1052 OF 2018
AN MWAURE, J
SEPTEMBER 22, 2023**

BETWEEN

JOHN JUMA OUMA CLAIMANT

AND

DOMINION OUTDOOR ADVERTISING (2006) LTD RESPONDENT

JUDGMENT

Introduction

1. The Claimant filed a Memorandum of Claim dated 21st June 2018 on grounds that the Respondent constructively dismissed his employment and refused to pay his terminal dues.

Claimant's Case

2. The Claimant was employed by the Respondent on 20th June 2012 as a graphic designer and at the time of termination he was earning a monthly salary of Kshs. 22,000/-.
3. The Claimant says he worked for the Respondent diligently until 30th July 2014 when the Claimant was accused by the claimant of using the company logo on his personal works and placed him on suspension.
4. On 11th August 2014, the Claimant reported back at work as instructed and was issued a show cause letter by the Respondent. The Claimant responded to the show cause and the Respondent requested that he remains on suspension until the case is decided. Since then, the Claimant has never been informed the outcome of the case and/or called for a disciplinary hearing to present his case against the allegations levelled against him.
5. The Claimant says he has never received any warning letters at the work place and even though he has been on unfair suspension since 11th July 2014, the Claimant has never received a notice of termination



either verbally or in writing despite the fact that the Respondent has a file with his contacts which could be used to reach out to him.

6. The Claimant avers the Respondent by its conduct terminated his employment without any notice and refused to pay his terminal dues. Pursuant to the Respondent's action, the Claimant instructed advocates who wrote demand letters to the Respondent seeking payment of his terminal dues and the Respondent's response to the letters vide a letter dated 19th October 2015 stated the Claimant was duly terminated from his employment.

Respondent's Case

7. The Respondent admitted that it employed the Claimant on 1st September 2013 as a graphic designer/plotter operator and that the Claimant worked with the Respondent upto 30th July 2014 before his termination on 20th August 2014.
8. The Respondent avers in the course of the Claimant's employment he failed to satisfy needs of his job description on grounds of his poor work ethic, poor execution of duties and negligence which led to the Respondent's loss of money and time. Further, the Respondent discovered the Claimant was posting its works on his website without the knowledge and consent of the Respondent and passing the same as his own.
9. Against this background, the Respondent suspended the Claimant from 31st July 2014 to 8th August 2014 vide a suspension letter dated even date. Upon completion of the suspension, the Respondent served the Claimant with a Notice to show cause on grounds of passing off and being in direct competition with the Respondent.
10. That the Claimant responded to the Notice to show cause vide two letters explaining his actions, however, the Respondent deemed the explanation insufficient and terminated the Claimant on grounds of breach of the Claimant's terms of employment

Submissions

11. It was submitted for the Claimant that the Respondent's defence remains as a mere allegation as it did not call any evidence to prove its defence. The Claimant relied on the case of North End Trading Company Limited (Carrying on the Business under the registered name of Kenya Refuse Handlers Limited) v City Council of Nairobi [2019] eKLR thus: -

“In Edward Muriga through Stanley Muriga v Nathaniel D. Schulter Civil Appeal No.23 of 1997, it was held that where a defendant does not adduce evidence the plaintiff's evidence is to be believed, as allegations by the defence is not evidence.

In the case of Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No.834 of 2002, Lesiit, J. citing the case of Autar Singh Bahra and Another vs. Raju Govindji, HCCC No.548 of 1998 appreciated that:

“Although the Defendant has denied liability in an amended Defence and counterclaim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff's case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”



12. The Claimant submitted that he was placed on suspension to resume work on 11th August 2014, and upon returning to work he was placed on suspension until his case was decided. Further, the Claimant responded to the show cause letter, however, no summons was issued calling him for a disciplinary hearing and the Respondent never communicated lifting the suspension despite several correspondences by the Claimant until 19th October 2015 when the Respondent through its advocates responded stating the Claimant had been duly terminated.
13. The Claimant submitted this suit is not time barred as it was filed on 25th June 2018 within the 3-year limit.
14. It was further submitted for the Claimant that placing the Claimant on indefinite suspension and failing to pay his salary amounts to constructive and/or unfair dismissal.
15. The Claimant submitted that the Respondent's action of terminating his employment violated Sections 41, 43 and 45 (1) (2) (a) & (c) of the employment act and is therefore entitled to the prayers sought in the statement of claim.
16. The respondent did not show up in court to give evidence and neither did he file submissions to support his case.

Analysis and Determination

17. The main issue for determination is whether the Claimant was wrongfully, unfairly and unlawfully dismissed from his employment.
18. The Claimant vide the order of the court on 14th March 2023 adopted his witness statement and affidavit of service dated 28th March 2020 as his evidence. However, the Respondent despite being served on diverse dates failed to call its evidence, the court only has its response to the claim on record.
19. In *Alex Lutungu Matange v Kanini Haraka Enterprises Ltd* [2021] eKLR the Court held that:

“The respondent filed a defence but failed to call any witness during the hearing. In essence, the respondents failed to call any evidence to counter the claimant's case. As per the ruling the Madan J in *CMC Aviation Ltd vs Cruise Ain (1)* (1978) KLR 103 pleadings are not evidence.

The learned Madan J (as he then was) rendered himself as follows;

“Pleadings contain averments of the three concerned until they are approved or disapproved or there is admission of them or any of them by the parties, they are not evidence and no decision could be founded upon them. Proof is the foundation of evidence.”

The respondents having failed to call evidence by simply relying on their pleadings, the claimants case remained uncontroverted.”

20. In *Peyiai Nkoitoi v Aruba Mara Camp Safaris Ltd* [2021] eKLR the court held: -

“the claimant indicated that she was terminated verbally without any reason and without any notice. The respondents on their part failed to call any evidence but filed submissions.

The respondent having failed to call any evidence is an indication that the claimant's case was uncontroverted.



Despite the respondent filing submissions, they didn't submit any evidence before this court. Section 35 (1) of the [Evidence Act](#) provides as follows;

Admissibility of documentary evidence as to facts in issue

- (1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on production of the original document, be admissible as evidence of that fact if the following conditions are satisfied, that is to say—
 - (a) if the maker of the statement either—
 - (i) had personal knowledge of the matters dealt with by the statement; or
 - (ii) where the document in question is or forms part of a record purporting to be a continuous record, made the statement (in so far as the matters dealt with thereby are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had, or might reasonably be supposed to have, personal knowledge of those matters; and
 - (b) if the maker of the statement is called as a witness in the proceedings: Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied if he is dead, or cannot be found, or is incapable of giving evidence, or if his attendance cannot be procured without an amount of delay or expense which in the circumstances of the case appears to the court unreasonable.

21 The import of this provision is that even if parties file documents as the respondents herein filed a defence and submissions, these documents remain pleadings unless allowed by consent or a witness addresses court on their intention to rely on them.”

In *North End Trading Company Limited (Carrying on the Business under the registered name of Kenya Refuse Handlers Limited v City Council of Nairobi* [2019] eKLR the court pronounced itself as follows:-

“I am alive to the fact that the defendant apart from filing a defence failed for no apparent reason to appear and defend itself. No single witness was called on behalf of the defendant. The issue arising therefore is what are the consequences of the defendant failing to adduce evidence having filed a defence to the plaintiff's claim.

16. Section 107 of the [Evidence Act](#) (Cap 80) Laws of Kenya provides:-

“Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.”

17. It is settled law in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts,



that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue.)

.....

21. It is my view, that a party to a case having filed his pleadings should call evidence where the matter is considered to proceed by way of evidence. It is trite law that where a party fails to call evidence in support of its case, the party's pleading are not to be taken as evidence, but the same remain mere statements of fact which are of no probative value since the same remain unsubstantiated pleading which have not been subjected to the required test of cross-examination. A defence in which no evidence is adduced to support it cannot be used to challenge the plaintiff's case. The failure to call evidence means that the evidence adduced by the plaintiff remain uncontroverted and therefore unchallenged. In such a situation the plaintiff is taken to have proved its case on balance of probability in absence of the defendant's evidence. In the instant case the plaintiff gave evidence which was not challenged, proved documents in support of her claim. I find the plaintiff's evidence to be credible and I am satisfied the plaintiff pleaded and proved her claim for special damages."
22. In view of the foregoing, the Respondents tendered no evidence in court and the Claimant's case stands undisputed.
23. This court finds that the Claimant was unfairly terminated as the Respondent failed to provide this court a substantive justification of the termination and prove that the termination was decided on procedural fairness as set out under Section 41 and 45 (2) of the Employment Act 2007 which states as follows;-

Section 45 (2)

- 2) A termination of employment by an employer 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; and
 - (c) that the employment was terminated in accordance with fair procedure.

Section 41 states that:

- “(1) Subject to section 42(1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering



termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

- (2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44(3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make.”

24. Indeed, the respondent in his response claims they terminated the claimant’s employment lawfully on 20th August 2014 for operating a parallel business as their business. They further claim that the claimant failed to pick his termination letter.
25. The correct position as seen from the documents in court is that there is no evidence that the claimant was served with termination notice. And even if he was served with one there is no evidence that he was taken through mandatory process of discipline as provided in section 41 of the *employment act*.
26. Furthermore, the court did not find justification that the suit was time barred as there was no definite termination date of the claimant’s contract. In any case the respondent did not render evidence to prove the case was filed out of time.
27. Having concluded that the Claimant was unfairly dismissed from his employment, the final issue for determination is whether the Claimant is entitled to the reliefs sought. The claimant is entitled and so is awarded the following reliefs.

28. Remedies

- i. One month’s salary in lieu of notice Kshs 22,000/-.
- ii. Salary for the 45 months in suspension is not proved how it is arrived at and so is declined.
- iii. Gratuity for 2 years is not provided in the contract of appointment and so is not proved. it is declined.
- iv. Leave days- respondent did not prove he gave claimant leave so is granted as prayed Kshs 35,538/-.
- v. Compensation for unlawful termination will be awarded @ 4 months equivalent 88,000/-.
- vi. Certificate of service to be issued within 30 days.
- vii. Costs are awarded to the claimant.
- viii. Interest is also awarded from the date of judgment till full payment at court rates.

Total award is kshs 145,538/-

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 22ND DAY OF SEPTEMBER, 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

