Ogombo v World Wide Fund for Nature Kenya (Employment and Labour Relations Cause 2305 of 2017) [2023] KEELRC 2687 (KLR) (27 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2687 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

EMPLOYMENT AND LABOUR RELATIONS CAUSE 2305 OF 2017

AN MWAURE, J

OCTOBER 27, 2023

BETWEEN

EMMANUEL OGOMBO ..... CLAIMANT

AND

WORLD WIDE FUND FOR NATURE KENYA ..... RESPONDENT

JUDGMENT

1. The Claimant filed a memorandum of claim dated 16th November 2017.

Claimant's Case

2. The claimant avers that vide a contract of employment dated 05/01/2016, he was employed by the respondent as an administration and operations manager with effect from 11/01/2016 with a consolidated annual salary of Kshs 3,600,000 paid in equal instalments of Kshs 300,000/- per month.

3. The claimant avers that the contract of employment incorporated the WWF International Human Resources Policy and Procedures Manual for Program Officers ('the human resource policy').

4. The claimant avers that by a letter dated 15th March 2017, his position was declared redundant and under the human resource policy any employee declared redundant is entitled to receive payment up to the end of their contract; pension and 15 days for every year worked.

5. The claimant avers that in breach of the human resource policy, the respondent computed his severance pay exclusive of the salary for the remainder of his employment contract.

6. The claimant avers that despite demand the respondent has failed, refused and/or ignored to pay salary for the remainder of the term of the claimant's contract aforementioned in the sum of Kshs. 7,095,000.

Respondent's Case

7. The respondent in opposition to the claim, filed its memorandum of response dated 19th January 2018.

8. The respondent denied the claimant's claim and avers the claimant was duly paid his dues as per his contract and the Employment Act that is:

    a. 3 months salary in lieu of notice including leave days.

    b. 15 days' pay for every year of service paid on pro-rata basis.

    c. Medical and pension up to the last date of work.

Evidence in Court

9. The claimant witness, Maryann Musungu (CW1), produced her witness statement dated 30/03/2022 and list of documents as her evidence in chief and exhibits respectively.

10. During cross examination, CW1 testified that she was employee of the respondent for 17 years and was paid up to the end of her term.

11. CW1 testified that her employment with the respondent was to end as redundancy but was withdrawn and she served upto June 2018 and she was terminated on 30/01/2022 and was not reviewed.

12. CW1 testified that in the past people were paid at the end of the contract not being employees of WWF Kenya and the HR manual was drafted in 2016 and anybody who worked in WWF was paid upto end of the contract and she doesn't know anybody paid under end of contract.

13. The claimant also testified as CW2 and adopted his witness statement dated 16/11/2017 and 29/03/2019 and list of documents as his evidence in chief and exhibits respectively.

14. During cross examination, CW2 testified that WWF Kenya was registered on 22/10/2016 and his contract of employment was subject to performance evaluation under the Kenyan office.

15. CW2 testified that dispute resolution clause provides any dispute shall be resolved by WWF International then the Kenyan Employment Act and that WWF International policies and procedure manual provides that termination on account of redundancy the applicable law is the country office law.

16. The claimant testified he was given a redundancy notice on 20/03/2017 and he signed and agreed to the terms therein.

17. The claimant testified that when he joined the respondent he was referred to the HR International Manual, however the WWF Kenya Policy amended his contract.

18. The claimant testified that the draft WWF Kenya Policy was approved by respondent's board in November 2017 but the resolution of the board was not produced in court.

19. The respondent's witness, Victor Komo, RW1, testified and adopted his witness statement and list of documents as his evidence in chief and exhibits.

20. During cross examination, RW1 testified that the HR manual is not indicated as a draft but on the face of it, it is a draft. He disputed the whole document and reiterated it is a draft document.

21. RW1 testified that Candy Nyangoya was a former HR assistant of the respondent but does not know what the email in page 1 of the claimant's list of documents stated.

22. RW1 testified that Isaac Awuondo is the chairman of the respondent's board and page 5 of the claimant's list of documents was signed by him and that the introduction letter was referring to the HR manual.

23. RW1 testified that he was not an employee of the respondent in March 2017.

Claimant's Submissions

24. The claimant submitted that vide its further witness statement dated 19/04/2019 he produced a copy of the duly signed policy manual with the exact terms as the draft in his original bundle together with an email sent from the respondent's human resource department on 30/03/2017 asking the employees to ensure that they had signed off acknowledgment form signifying the approval of the terms of the policy applying to their employment.

25. The claimant further submitted that he did not just rely on his words and the aforesaid email to demonstrate the policy came to force, he also had Maryann Musungu, a former colleague who worked with the respondent testify that indeed the policy had come to force.

26. The claimant submitted the court should not permit the respondent's approach that the correspondences be excluded on account of technicality that the emails should have been accompanied by certificates as prescribed by the Evidence Act.

27. The claimant submitted that the claimant executing the notice of redundancy dated 15/03/2017 is a mere acknowledgment of receipt of notice and the fact of redundancy and not a waiver of all claims the claimant made. The claimant had submitted it would have been easier for the respondent inserting express provisions grounding waiver and extinction of any other rights.

Respondent's Submissions

28. The respondent submitted that the employment contract dated 5/01/2023 provided under paragraph 17 that any disputes or inconsistencies in the contract shall be resolved in the following order (a) WWF International Human Resource Policies & Procedures Manuals for POs(b) Kenya Employment Act prevailing at the time of the dispute and (c) project as well as donor prevailing contractual obligation.

29. The respondent submitted the clause 11.2 of the WWF International Human Resource Policies & Procedures Manuals for POs provided that an employment contract of a staff member can be terminated due to redundancy as per the relevant laws of the PO country. If there are no such statutory obligations under the laws of the PO country, the POs must follow the guidelines as given for the staff employed at their office. Therefore, section 40 of the Employment Act applied.

30. The respondent submitted that the draft WWF- Kenya HR manuals cannot apply as

    a. there is no document that varied the terms of the claimant's employment and the terms of the claimant's employment.

    b. The claimant's employer was at all times WWF-KCO and not WWF-Kenya whose only role was to declare redundancies and issue out fresh contracts for new Kenyan employees.

    c. The HR manuals relied by the claimant were in draft form.

31. The respondent submitted that even if the draft HR manual was to apply it was shared on 30/03/2017 yet the claimant had already accepted the terms of the redundancy on 20/03/2017.

32. The respondent took issue with the claimant evidence for the following reasons:

a. The email dated 30/03/2017 is barely legible and was not addressed to the claimant and its authenticity would have been generated by cross examination anchored under section 106 B (4) of the Evidence Act.

b. The different HR manuals produced in court possess the signature of the respondent's chairperson and there was no explanation on how the claimant obtained the signature and affixed into the said documents.

c. Neither the sender nor the recipient of the said email were in court to produce the said emails.

33. The respondent submitted that when producing the electronic evidence, the claimant did not attach any certificate of electronic evidence and the issue was promptly raised when the witness was on the stand.

34. The respondent submitted that one had to comply with the law as in the evidence act on production of electronic certificate while adducing electronic evidence. Further, a new document cannot be brought at submission stage and the same ought to be struck out.

Analysis and Determination

35. The first issue for determination is whether the claimant's evidence produced vide its supplementary bundle of documents dated 30th April 2019 is admissible in court.

36. Section 106B of the Evidence Act sets out the conditions for admissibility of electronic evidence as follows:

> " Admissibility of electronic records.
>
> 1. Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electro-magnetic media produced by a computer (herein referred to as "computer output") shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original or of any fact stated therein where direct evidence would be admissible.
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> 2. The conditions mentioned in subsection (1), in respect of a computer output, are the following—
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> a. the computer output containing the information was produced by the computer during the period over which the computer was used to store or process information for any activities regularly carried out over that period by a person having lawful control over the use of the computer;
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> b. during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities;
>
> c. throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period

in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its content; and

d. the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

3. Where over any period, the function of storing or processing information for the purposes of any activities regularly carried on over that period as mentioned in paragraph (a) of subsection (2) was regularly performed by computers, whether—

a. by combination of computers operating in succession over that period; or

b. by different computers operating in succession over that period; or

c. in any manner involving the successive operation over that period, in whatever order, of one or more computers and one or more combinations of computers,then all computers used for that purpose during that period shall be treated for the purposes of this section to constitute a single computer and references in this sections to a computer shall be construed accordingly.

4. In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following—

a. identifying the electronic record containing the statement and describing the manner in which it was produced;

b. giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

c. dealing with any matters to which conditions mentioned in subsection (2) relate; and

d. purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate),shall be evidence of any matter stated in the certificate and for the purpose of this subsection it shall be sufficient for a matter to be stated to be the best of the knowledge of the person stating it.

5. For the purpose of this section, information is supplied to a computer if it is supplied thereto in any appropriate form and whether it is so supplied directly or (with or without human intervention) by means of an appropriate equipment, whether in the course of activities carried on by any official, information is supplied with a view to its being stored or processed for

the purpose of those activities, that information, if duly supplied to that computer, shall be taken to be supplied to it in the course of those activities.

37. In Republic v Barisa Wayu Matuguda (supra), the Court observing that in order to be admissible, the electronic evidence must be accompanied by a certificate in terms of section 106B(4) and which must be signed by a person holding a responsible position with respect to the management of the device and that in the absence of such a certificate, such electronic evidence is inadmissible as evidence.

38. In Republic v Mark Lloyd Steveson [2016] eKLR, the court held:

> "48. For completeness, it is important to refer to the provisions of sections 106B (1), (2) and (3) as well as section 106(I) of the Evidence Act even though neither parties brought them up. The former sections reinforce the admissibility of electronic records including computer print-outs and provide for a straightforward way of automatically authenticating them if certain conditions enumerated in section 106B(2) are met by producing a certificate of authenticity. That certificate needed must satisfy three conditions:
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> a. It must identify the electronic records and production process;
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> b. It must show the particulars of the producing device; and
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> c. It must be signed by the responsible person.

39. In the present case none of these conditions were met. In any event, for a computer output to be considered a document for admissibility under section 106B(1), it must satisfy the conditions in section 106B(2) namely that:

a. The output must have been produced during regular use;

b. It must be of a type expected in ordinary use;

c. The computer generating the output must be operating properly or it must be shown that the accuracy of the computer is not otherwise affected; and

d. Where multiple computers are involved, those operating in succession and considered as one."

40 "It should be fairly obvious that the Prosecution does not satisfy the conditions for section 106B (1) to apply. For one to come under this section, the computer output proposed as evidence must both certify the conditions in section 106B (2) and be accompanied by a Certificate under section 106(4). In this case, the accompanying certificate serves the authenticating purpose."

41. Finally, neither does the presumption in section 106(I) of the Evidence Act come to the rescue of the State in this case. Section 106(I) of the Evidence Act provides that:

> "A court may presume that an electronic message forwarded by the originator through an electronic mail server to the addressee to whom the message purports to be addressed corresponds with the message as fed into his computer for transmission, but the court shall not make any presumption as to the person by whom such a message was sent."

42. This section applies when an electronic message (such as an email) has been received by an addressee who wishes to produce it as such. The presumption afforded to the message is that it is the same message that was fed into the computer by the sender. In other words, the Court is permitted to presume that the electronic message received by the receiver or addressee is the same one sent by the sender

or originator of the message. The presumption goes to the authenticity of the electronic message as produced by the addressee by permitting the Court to assume that there was no manipulation of the contents of the message between the sending and the reception of the message.

43. It is important to note that this section applies to situations where the addressee produces the electronic message and seeks its admission as proof that it was the same message sent to him or her. The section is categorical on two things: First, it is expressly categorical that the presumption does not extend to the identity of the author of the message. Hence, a proponent of such evidence would have to introduce some other evidence to link the message with its alleged author. Second, the section does not obviate the need for authenticating the proposed evidence (electronic message). Indeed, the section is a substantive instruction to the trial court on what to do with an admitted piece of evidence. It does give no guidance whatsoever to the process of admission of such a piece of evidence. Differently put, such a piece of proposed evidence must, first, be admitted in the usual way described above."

44. In view of the foregoing, the court holds the email dated 30/03/2017 and a copy of the human resource policy circulated in the email from Ms Candy Nyangoya is inadmissible as the claimant was not part of the email thread and no certificate was filed in court to authenticate the evidence and the same is struck out.

45. The second issue is whether the claimant is entitled to the payment of salary for the remainder of the term of the claimant's contract in the sum of Kshs. 7,095,000.

46. During cross examination, CW2 testified that his contract provided in the dispute resolution clause provided any dispute shall be resolved by WWF International Human Resource Policies & Procedures Manuals for POs. Then the Kenyan Employment Act prevailing at the time of the dispute would apply and clause 11.2 of the WWF International Human Resource Policies & Procedures Manuals for POs provided that the applicable law for termination on account of redundancy is the country office law. In this case section 40 of the Employment Act applied. The respondent followed the said procedure as closely as possible.

47. Claimant testified that when he joined the respondent he was referred to the HR International Manual, however the WWF Kenya Human Resource Policy amended his contract.

48. Section 10 of the Employment Act clearly states that when the terms of an employment contract changes, the employer shall, in consultation with the employee, revise the contract to reflect the change and notify the employee of the change in writing.

49. This court takes note that the claimant did not produce any document before this court to show that the respondent indeed amended his contract to read that WWF Kenya Human Resource Policy applied to his employment.

50. Further, the documents produced before this court were denied by the respondent who reiterated that the same were mere drafts and the purported signature on the struck-out copy of the human resource policy was an electronic signature of the respondent's chairman whose authenticity cannot be confirmed.

51. There is no evidence that the claimant's contact of employment was ever amended to provide that the claimant was now covered by the Kenya HR manual and not their HR international manual. It is trite law that courts cannot rewrite contracts between the parties but the court's role is to only enforce them. The claimant contract of employment was executed by the respective parties and he is bound by it.

52. The claimant produced several HR draft manuals by Kenya offices but claimant was covered by international HR manual and there was no evidence that his contract was changed so that the Kenyan

HR manual applied to him. The said manuals were in any event said to have been mere drafts as per the respondent's evidence.

53. There is also a grey area concerning the requirement for payment of unserved salary for a reminder of a contract. In the case of Gabriel Kariuki v Top Image Limited (2014) eKLR the court held "there is no law that provides for payment of unexpired/would be term of contract."

54. In view of the foregoing and considering the pleadings and submissions and evidence adduced the court is satisfied the claimant is not entitled to the payment of his unexpired term of his contact and so his claim is found to be without merit and is dismissed. He did not prove his termination was declared redundant unprocedurally. The claimant did not prove his case and as earlier said his claim is dismissed.

55. The court in its discretion orders the respective parties to meet their costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 27TH DAY OF OCTOBER, 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