



Onyonyi v Population Services Kenya (Employment and Labour Relations Cause 662 of 2018) [2023] KEELRC 2607 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEELRC 2607 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
EMPLOYMENT AND LABOUR RELATIONS CAUSE 662 OF 2018
BOM MANANI, J
OCTOBER 26, 2023**

BETWEEN

ISAAC ONYANGO ONYONYI CLAIMANT

AND

POPULATION SERVICES KENYA RESPONDENT

JUDGMENT

Background

1. The claim before me relates to alleged unlawful termination of a contract of service. Through it, the Claimant asserts that the Respondent unfairly terminated his contract of employment. Accordingly, he seeks compensation for unfair termination of his contract.
2. The Respondent has denied the claim. In the Respondent's view, there was a valid reason why the Claimant's employment was terminated. Further, the Respondent contends that the termination was done in accordance with due process. As such, it (the Respondent) prays that the claim be dismissed with costs.

Claimant's Case

3. The Claimant avers that he was first employed by the Respondent's predecessor in 2002. He served the said institution until the close of 2013 when it was taken over by the Respondent.
4. The Claimant avers that on 1st January 2014, the Respondent offered him employment in the position of Regional Sales Manager. The Claimant further avers that he accepted the position and the parties executed a contract of service.
5. The Claimant states that he served the Respondent diligently rising through the ranks until 15th May 2017 when his contract was terminated. According to the Claimant, his salary at the point of exit stood at Ksh. 292,195.00.



6. The Claimant states that on 28th April 2017, he received an email from the Respondent's management forwarding to him a letter of show cause. He states that this correspondence was sent to him whilst he was on leave. The letter required the Claimant to explain why disciplinary action should not be taken against him for actively participating in political activities in contravention of the Respondent's Human Resource Policy (HR Policy).
7. The Claimant states that since he was on his annual leave, he requested to respond to the letter by 2nd May 2017. However, as soon as he resumed duty and before he could respond to the aforesaid letter, the Respondent invited him to a disciplinary session on 4th May 2017, the following day. The Claimant contends that the notice convening the disciplinary session hardly gave him sufficient time to prepare for the session.
8. It is the Claimant's case that the Respondent pressed on with the disciplinary session notwithstanding that he had not been accorded sufficient time to prepare for it. The Claimant avers that eventually, the Respondent issued him with a letter terminating his employment.
9. The Claimant denies that he utilized the Respondent's time to engage in active politics. Further, it is his case that it was improper for the Respondent to have intruded into his private time during his leave to monitor what he was engaged in.
10. It is the Claimant's case that the Respondent's HR Policy did not bar him from exercising his political rights as protected under article 38 of the Constitution. As such, he was at liberty to participate in politics as a registered voter and do what appertains to the rights of a registered voter.
11. The Claimant accuses the Respondent of witch hunt. According to him, the Respondent was punishing him for refusing to present false evidence against employees who had taken it (the Respondent) to court.

Respondent's Case

12. On its part the Respondent admits having employed the Claimant in 2014. According to the Respondent, the Claimant signed a contract of service which barred him from engaging in other activities whilst serving as its employee.
13. The Respondent avers that due to the nature of its work, it is essential that it remains apolitical. As a consequence, it (the Respondent) requires its employees not to engage in active politics.
14. To ensure compliance with this requirement, the Respondent avers that it has promulgated a HR Policy which expressly bars its employees from engaging in partisan political activities during the currency of their contracts. The Respondent contends that Clause 13 of the policy provides for this bar. According to the Respondent, this policy was incorporated in the Claimant's contract of employment.
15. The Respondent avers that the Claimant asked for leave as from 19th April 2017 to go and sort out his personal matters relating to land. Prior to this, he had sought permission to be away for medical reasons.
16. The Respondent contends that whilst on the aforesaid break, the Claimant attempted to vie for the position of Member of County Assembly, Mfangano Ward. The Respondent asserts that it learned of this development through the Gazette Notices which listed the Claimant as one of the candidates who was seeking nomination from a political party for purposes of running for the aforesaid seat. In addition, the Respondent asserts that the Claimant printed and circulated posters with his image which depicted him as running for a political seat.



17. The Respondent asserts that the Claimant's conduct violated the bar on its employees participating in active partisan politics without first resigning. Having regard to the foregoing, the Respondent contends that it issued the Claimant with a show cause letter which was followed with a disciplinary hearing.
18. It is the Respondent's case that the Claimant was accorded a fair hearing before the decision to terminate his services was arrived at. Further, the Respondent avers that the Claimant was granted the right to call witnesses during the disciplinary session.
19. The Respondent avers that upon terminating the Claimant's service, it computed his terminal benefits in line with the applicable law. These benefits were subsequently released to the Claimant. In the premises, it is the Respondent's case that the case against it is baseless and ought to be dismissed with costs.

Issues for Determination

20. Having regard to the pleadings and evidence on record, I find the following as the issues that present for determination in the cause:-
 - a. Whether the Claimant's contract of service was unfairly terminated.
 - b. Whether the parties are entitled to the reliefs that they seek through their respective pleadings.

Analysis

21. The record shows that the Claimant executed a contract of employment with the Respondent on 11th December 2013 whose date of commencement was 1st January 2014. In the introductory part to the contract, it provided that the offer of employment to the Claimant was subject to him "agreeing to abide by the rules, regulations, instructions, personnel practices and policies of the Organization and any changes therein which may be adopted from time to time....".
22. At the bottom of the contractual instrument, the Claimant is indicated as having signed it to signify his acceptance of the terms and conditions therein. Therefore and by virtue of the introductory remarks in the contract aforesaid, the Claimant agreed to be bound by the Respondent's HR Policy as part of the terms and conditions of engagement between the parties.
23. Clause 13 of the HR Policy underscores political neutrality as one of the Respondent's core values. The clause further required members of staff of the Respondent to avoid engaging in political activities during the currency of their contracts of employment. However and in order to protect the employees' right to participate in political activities, the HR Policy permitted any employee with political ambitions to first resign from employment before engaging in active politics.
24. Through this clause, the Respondent tried to strike a balance between its desire to remain apolitical and its obligation to protect the employees' right to participate in partisan political activities. It did this by requiring employees to remain politically neutral whilst in service but permitting those who wished to get into active politics to exercise this right after resigning from employment.
25. The Claimant is assumed to have read, understood and internalized this requirement at the time of signing the letter of appointment. He was bound by this requirement.
26. The Respondent provided evidence to show that the Claimant participated in party primaries for the Orange Democratic Movement in April 2017. The Respondent produced Gazette Notice number 3797 which bears the name of the Claimant as one of the participants in the party primaries that were



scheduled for 26th April 2017. During the disciplinary hearing, the Claimant conceded that his name and Identity Card number were in the said Gazette Notice.

27. The Respondent further produced a poster bearing the Claimant's name. The poster had the following inscriptions on it:-
- “Isaack Onyonyi
Mca Mfangano Ward
Odm
Vote
Onyonyi Tibim”
28. Further, the Respondent produced a print out of a Gazette Notice published by the Independent Electoral and Boundaries Commission which bore the Claimant's name as one of the individuals who was seeking party nomination from the Orange Democratic Movement. The authenticity of this notice was not contested by the Claimant
29. In his response to the notice to show cause, the Claimant initially denied having participated in the party nominations. This is despite the overwhelming evidence that suggests the contrary.
30. During the disciplinary hearing, the Claimant declined to offer any further evidence to support the position expressed in his response to the notice to show cause. However, he admitted that the names in the Gazette Notice were his.
31. Evidently, the Claimant was being less than candid with the Disciplinary Panel regarding his involvement in active party politics in contravention of clause 13 of the HR Policy. His attempt to suggest that publication of his name in the Gazette Notice did not mean that he participated in the party primaries was, to say the least, escapist.
32. There is no evidence that the Claimant resigned from his position with the Respondent before he offered himself for nomination as the Orange Democratic Movement candidate for Mfangano Member of County Assembly seat. His decision to participate in the said political party primaries before he resigned from employment flew in the face of clause 13 of the Respondent's HR Policy which had been incorporated in his (the Claimant's) letter of appointment.
33. In the evidence that he tendered before me, the Claimant asserted that although his name had been included in the Gazette Notice, he opted out of the race. Therefore, he did not participate in the party primaries in contravention of the Respondent's HR Policy. It is however noteworthy that this was not his case before the Disciplinary Panel.
34. In any event, this belated defense does not assist the Claimant's case. The fact that he had offered his name for party nominations before he resigned from his position at the Respondent institution is sufficient evidence of contravention of the Respondent's HR Policy.
35. Although participation in partisan political activities in contravention of the bar by the Respondent is not expressly mentioned as an act of gross misconduct, nothing stops this behavior from being characterized as such if it had the effect of fundamentally undermining the employment relation between the parties. It ought to be noted that the list of what constitutes gross misconduct under section 44 of the *Employment Act* is not a closed one. It is merely indicative (see *Wangereka v Rupra* (Cause 2473 of 2017) [2023] KEELRC 625 (KLR)).



36. The Claimant's decision to participate in active party politics in contravention of an express provision in the Respondent's HR Policy proclaiming its apolitical character undermined the relationship between the parties. The Claimant's conduct was likely to bring the Respondent's name into disrepute. The Claimant's conduct could be misconstrued to associate the Respondent with certain political persuasions notwithstanding its desire to remain apolitical. I agree with the Respondent that such conduct constituted gross misconduct by the Claimant. What is more is that despite this transgression, the Claimant showed no remorse.
37. Having regard to the foregoing, it is my finding that the Respondent had a valid reason to terminate the Claimant's employment. The Respondent has been able to demonstrate that there was a substantive ground to justify its decision to sever the employment relation with the Claimant.
38. Counsel for the Claimant has relied on the case of *John Willice Opot v Starebe Boys Centre* [2013] eKLR to ask the court to find that by engaging in political activities, the Claimant committed no infraction under section 44 of the *Employment Act*. However, the case of John Willice is distinguishable from the instant case.
39. Unlike in the instant case, the employer in the John Willice case did not provide evidence to show that it had a policy that barred the Claimant from participating in active politics during the currency of his contract. Further, the employer did not demonstrate that it had incorporated provisions on political neutrality in the Code of Conduct for teachers or such other policy into the Claimant's contract of service.
40. With regard to due process, the record shows that immediately the Respondent got wind of the Claimant's activities, it issued him with a notice requiring him to explain why he had acted in contravention of its HR Policy. The record also shows that the Claimant responded to the notice to show cause denying involvement in politics.
41. Dissatisfied with the explanation, the Respondent convened a disciplinary session for the Claimant. Although the Claimant argues that the notice for the session was short, there is no indication in the minutes of the session that he raised this concern before the Disciplinary Panel. On the contrary, he is recorded as telling the panel that his response to the notice to show cause was sufficient and that he had nothing else to add to it. How can he then turn around to suggest that he was not afforded sufficient time to prepare his defense? Such suggestion is at cross purposes with the record of the proceedings before the Disciplinary Panel.
42. The letter that invited the Claimant for the disciplinary session advised him of his right to call witnesses of his choice. At the same time, the minutes of the disciplinary session demonstrate that the Claimant was given time to ventilate his case.
43. As a matter of fact, at the tail end of the minutes, the record shows that the panel asked the Claimant if he had anything that he wished to add to his initial presentation. The Claimant is recorded as stating that he had nothing to add. It is therefore surprising that he can now contend that he was denied an opportunity to fully present his case.
44. Having regard to all these factors, I am satisfied that the Respondent substantially complied with the procedural requirements to accord the Claimant due process before he was eventually released from employment. I so declare.
45. The Claimant has urged the court to nullify the decision to terminate his contract of service on the grounds that the charges in the notice to show cause that was issued to him are allegedly different from the ones that are enumerated in the letter of termination. I have looked at the two documents. It is true



- that in the notice to show cause, the Claimant was only accused of participating in party nominations. It is also true that in the letter of dismissal, the Respondent alluded to other matters as grounds for terminating the Claimant's contract. These include the fact that the Claimant lied and was impolite to the Disciplinary Panel.
46. However, the court notes that the latter two issues arose from the Claimant's conduct during the disciplinary session. Therefore, they could not have formed part of the notice to show cause which predated the disciplinary session.
 47. Importantly, the issue of the Claimant's involvement in partisan politics features both in the notice to show cause and in the letter terminating his contract. This was the primary ground for the decision to terminate the contract of service between the parties. For this reason, I find no merit in the Claimant's submissions in this respect.
 48. In his closing submissions, the Claimant has also faulted the Disciplinary Panel on account of its composition. It is alleged that the panel was improperly constituted with the Claimant's juniors sitting as its members. It is also alleged that the panel was not constituted in accordance with the Respondent's HR Policy.
 49. The Claimant also asserts that his accuser sat on the panel. Further, he asserts that the panel's umpire also acted as the prosecutor thus rendering the disciplinary process a sham.
 50. The Claimant's pleadings do not show that he questioned the composition of the Disciplinary Panel. Neither do they show that he took issue with his accuser sitting on the panel or the panel's umpire acting as prosecutor.
 51. The issues that the Claimant flagged in the pleadings regarding due process relate to: whether he was afforded sufficient time to be heard; whether the Respondent disclosed the charges that he (the Claimant) was to face; and whether he (the Claimant) was convicted on the charges that were outside the infractions that had been listed in the notice to show cause.
 52. Similarly, in his written witness statement, the Claimant did not speak to the improper constitution of the Disciplinary Panel. As well, he did not make mention of the Disciplinary Panel's umpire having acted as prosecutor during the session. The only time that the Claimant's counsel raised these matters was during cross examination of the Respondent's witness.
 53. A cardinal rule in litigation is that parties are bound by their pleadings. One cannot advance a case that he has not pleaded (*Mellen Mbera v James Theuri Wambugu* [2020] eKLR). And neither is it permissible for one to re-characterize his case during the trial in a manner that creates a disconnect between the pleadings and the evidence that is tendered.
 54. The Claimant's case aforesaid offends these principles of law. This was a clear attempt at having the court determine the dispute on matters which were not pleaded. The court is not entitled to do so. As a result, I decline to pronounce myself on whether the Disciplinary Panel was improperly constituted or whether some of its members acted as accusers and prosecutors in their own cause.

Determination

55. Having regard to the evidence on record, I am satisfied that the Respondent substantially complied with the requirement of sections 41, 43 and 45 of the *Employment Act* before terminating the employment relation between the parties.
56. The Respondent has demonstrated that it had valid reasons to terminate the Claimant's contract.



57. Further, the Respondent has demonstrated that it followed the laid down procedure in releasing the Claimant from employment.
58. As a result, I find that the Claimant's case against the Respondent is devoid of merit.
59. It is dismissed.
60. Costs of the action are granted to the Respondent.

DATED, SIGNED AND DELIVERED ON THE 26TH DAY OF OCTOBER, 2023

B. O. M. MANANI

JUDGE

ORDER

In light of the directions issued on 12th 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

