Nyarigu v Multichoice Kenya Limited (Cause 1552 of 2018)
[2023] KEELRC 2898 (KLR) (15 November 2023) (Judgment)

Neutral citation: [2023] KEELRC 2898 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE 1552 OF 2018

NZIOKI WA MAKAU, J

NOVEMBER 15, 2023

BETWEEN

NOAH NYARIGU ..... CLAIMANT

AND

MULTICHOICE KENYA LIMITED ..... RESPONDENT

JUDGMENT

1. The Claimant instituted this suit against the Respondent Corporation claiming wrongful, unlawful and malicious termination of employment. He averred that the Respondent engaged him on 6th November 2012 as a Customer Service Representative on secondment through Career Directions Limited. That thereafter on 27th March 2014, the Respondent employed him in the same position and later confirmed him on 10th July 2014 and that he was earning Kshs. 42,000/-. He further averred that the Respondent promoted him to the position of Quality Assurance Representative on 15th May 2017, earning a gross salary of Kshs. 79,600/- that was later increased to Kshs. 87,217/- with effect from 1st April 2018.

2. The Claimant's case was that on 9th April 2018, he was served with a Show Cause Notice requiring him to respond within three (3) days, why disciplinary action should not be taken against him for misconduct. The letter indicated that he had received a total of Kshs. 22,240/- from a customer of the Respondent between August 2016 and October 2016. That within the said period he also sent Kshs. 14,400/- to Farouk Athman, who posted manual credit notes in the said customer's account for Kshs. 16,643.76 and that as a result of the adjustments, the company lost Kshs. 16,760/-. According to the Claimant, the Show Cause Notice was issued immediately after his promotion and no proper particulars were given to enable him adequately respond within three days for alleged issues that occurred in 2016, which was two years prior. He contended that his response was neither considered during the disciplinary proceedings held on 4th May 2018 nor was he furnished with better particulars. He averred that he was dismissed through a Termination Letter dated 14th June 2018 based on the

grounds raised in the Show Cause Letter and the disciplinary proceedings but that the termination was unfair and unlawful. He argued that new issues arose during the disciplinary proceedings and he was not given adequate time to respond to them. In particularising the unlawful termination and malice on the part of the Respondent, the Claimant further averred that the reasons for termination of his employment were not based on the operational requirement of the Respondent. Further, that the Respondent did not act in accordance with justice and equity and failed to consider the Claimant's conduct from the onset of his employment. The Claimant also noted that the Respondent failed to issue him with the mandatory certificate of service and it also did not respond to his request for clarification on why he was appearing before the Disciplinary Committee.

3. The Claimant thus sought payment of his dues being: one month's salary in lieu of notice, 12 months' salary as compensation for unlawful termination, unpaid housing allowance for all years worked, unpaid leave days and overtime, severance pay and pro-rata bonus, costs of this Claim plus interest from the date of filing, and a certificate of service. He prayed that judgment be entered against the Respondent for a finding that his dismissal was unlawful and to reinstate him back to his position as at the date of his dismissal, with all outstanding salary/allowances being paid. In the alternative and without prejudice to the foregoing, that the Respondent do immediately pay him his entitlements as specified in the Claim and any other relief this Court may deem fit to grant in the circumstance.

4. In reply, the Respondent filed a Statement of Response on 18th February 2019 averring that the Show Cause Notice was issued to the Claimant over nine months after his appointment and was not in any way related to his promotion. The Respondent filed a Witness Statement made on 14th February 2019 by Mr. Raphael Okeyo, who asserted that he was involved in the investigations relating to the subject matter of this suit and also attended the Claimant's disciplinary hearing on 4th May 2018. He stated that the Claimant confirmed at the disciplinary meeting that he was aware of his right to be accompanied by a fellow employee, which he waived, and that he would not be calling any witness in support of his case. That the Claimant also confirmed that he had sufficient time to prepare his defence and was ready for the said disciplinary proceedings. Mr. Okeyo further stated that upon the foregoing confirmation, he read the charges to the Claimant who was thereafter allowed to respond and give his defence. That the findings of the disciplinary hearing by the presiding officer recommended the Claimant's separation from the Respondent by way of summary dismissal. Mr. Okeyo asserted that the Disciplinary Committee established various issues including the Claimant's admission to having received Mpesa from his cousin, Emmanuel Sagada, of various amounts of money on three different days in August and October 2016. Further, the Claimant did not deny that he sent money to Farouk Athman and could not explain why he received money from Emmanuel Sagada and sent money to Farouk Athman. He explained that the manual adjustment on Emmanuel Sagada's account with the Respondent meant that the said customer's bill had been cancelled and the system indicated that the bill had been fully settled. That as a result of that conspiracy between the Claimant and Farouk Athman, the Respondent was deprived of revenue. He further asserted that the Respondent contracted Deloitte to conduct investigations prior to the Claimant's disciplinary hearing and they interviewed the Claimant three times and analysed his Mpesa Statements for August and October 2016. He reported that the findings by Deloitte on the Mpesa transactions mirrored the findings from the disciplinary hearing and that the Claimant had essentially not been straight forward on what the transactions between him and Farouk Athman related to.

5. The Respondent also filed a Witness Statement made on 20th May 2022 by Ms. Diana M'mboga who stated that upon employment, the Claimant was issued with his appointment letter and a copy of the Respondent's HR Policy, which terms he duly accepted by signing the same on 28th March 2014. She further stated that the Respondent accorded the Claimant due procedure before terminating his employment, in accordance with the HR Policy and he was subsequently dismissed pursuant to clause

15.3 of the HR policy and the provisions of section 44(4)(g) of the *Employment Act*. That in the circumstances, the Claimant's termination of employment was for valid and fair reasons as disclosed in his Summary Dismissal Letter and was preceded by a procedurally fair hearing. That as indicated in his termination letter, the Claimant was to be issued with the certificate of service upon clearing with the Respondent.

6. The Claimant's rejoinder in his Response to the Memorandum of Response dated 20th March 2019 was that the Respondent's investigations were about Mr. Farouk Athman and not him and that it was Farouk Athman who created and manipulated the system. That this Court should disregard the issue of Mpesa transactions for being an afterthought that never arose at the time of the investigations. The Claimant averred that his transactions with Mr. Emmanuel Sagada were private because he was his cousin and that it was Farouk Athman who did adjustments to Emmanuel Sagada's account and not him. He contended that there was no record of any statements from Emmanuel Sagada stating that the money he sent to the Claimant was to be used in the manner alleged by the Respondent. According to the Claimant, the Respondent's Response raised no reasonable defence/issues but bare denials and prayed that the same be dismissed.

Evidence

7. The Claimant testified under cross-examination that the transactions between him and Farouk were personal as they related to Sacco payments and farming business. He confirmed that he signed the Minutes of 25th September 2017 on 29th September 2017. He further asserted that he did not raise any objection to the composition of the Disciplinary Committee and that he confirmed having had sufficient time to prepare for the meeting.

8. The Respondent's witness, Mr. Raphael Okeyo (RW1) testified that MR. Farouk Athman was investigated, found guilty and he resigned before conclusion of investigations. He confirmed that they reported the incident to the Police at Karen at that time as Farouk was on the run, being the main culprit. That the evidence from the investigations showed that the Respondent's customers had sent money to Farouk while the Claimant had received money from one of their customer, Mr. Sagada, and had also sent money to Farouk who credited the said customer's account. That this was because Farouk had system access to pay credit of up to Kshs. 20,000/-. Ms. Diana M'mboga (RW2), relied on her Witness Statement as her testimony before Court.

Claimant's Submissions

9. According to the Claimant, he only appended his signature on the Interview Notes by Deloitte dated 25th September 2017 and 16th October 2017 but was never given copies thereof and that such interviews were not an investigation against him but general work related consultations. That if at all there were direct investigations going on against him as alleged, the Respondent would not have promoted and adjusted his salary upwards. Furthermore, RW2 confirmed in her testimony that investigations in the matter were completed a year before they notified the Claimant of the alleged offence through the show cause. That this was contrary to clause 14.1.6 of the Respondent's HR Policy Manual which provides that employee be notified of alleged offence within 72 hours of completion of preliminary investigations. That the only conclusion one would thus make is that the disciplinary action was actuated by malice and was unlawful and improper under the circumstances and any proceedings flowing from the Show Cause Letter were null and void, contrary to section 45 of the *Employment Act*. Furthermore, that the testimony by RW1 alluded to the fact that the alleged fraudulent acts were actually done by one Farouk, against whom the investigation report recommended criminal proceedings having exonerated the Claimant. That the same was evidence that the Claimant was a

sacrificial lamb and would have been a witness in the criminal case if at all the said Farouk was charged. It was the Claimant's submission that the Respondent's acts and omissions during the entire disciplinary process were marred with abuse of due process and procedural illegalities, to achieve an ulterior motive that should not be entertained by this Court. That he had demonstrated that the Respondent failed to adhere to the provisions of sections 41, 43 and 45 of the *Employment Act* and his rights in law were therefore not protected, hence unlawful and unfair under the circumstances.

10. The Claimant submitted that following the foregoing submissions, his Claim should be allowed as prayed. That he was entitled to one month's notice pay pursuant to clause 2 of the Appointment Letter dated 27th March 2014 and which written notice was also provided for in the Respondent's HR Handbook. That having worked for the Respondent for 4 years without earning housing allowance as it was not part of the salary paid to him and the Respondent having not provided proof of a consolidated salary, he was entitled to the claim for unpaid housing allowance as prayed. That since the Respondent did not also deny his claims for unpaid leave days and overtime and for pro-rata bonus, the same are payable to him as sought and that he should be granted his pension dues as provided in his appointment letter. The Claimant further submitted that costs should be granted as they follow the event and that a certificate of service should be issued unconditionally based on the *Employment Act* and the Respondent's HR Manual. As regards the claim for compensation, he cited section 49 of the *Employment Act* which provides for a maximum compensation of 12 months' gross salary as damages for unfair termination. That in granting him maximum compensation, the Court should consider the period of service, his conduct during his employ, the procedural unfairness of his termination, and the lack of a record of indiscipline from April 2014 to August 2018. In support of the procedural unfairness and grant of the maximum compensatory damages provided in law, the Claimant relied on the cases of Elinathan G Kairu v Nakumatt Holdings Limited [2017] eKLR and Wilson Nderitu v Nakumatt Holdings Limited [2017] eKLR.

Respondent's Submissions

11. As to whether the Claimant's employment was procedurally fair, the Respondent submitted that it is trite law that parties are bound by their pleadings. That as was affirmed in the case of Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR, "...any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded." That for this reason, this Court should disregard the allegations raised in the Claimant's Submissions that: the Disciplinary Committee consisted of fellow colleagues in the department who were biased and not objective; the Claimant was never informed of his right to be accompanied by a colleague from work during the disciplinary hearing; and the disciplinary action was allegedly malicious, unlawful and improper since the disciplinary proceedings came immediately after an increment of the Claimant's salary.

12. The Respondent further submitted that the verbatim recording of the disciplinary proceedings and the Respondent's documents support a fair disciplinary hearing as conducted on 4th May 2018. That the three (3) days accorded to the Claimant to respond to the show cause letter was pursuant to provisions of clause 14.1.6 of the Respondent's HR Policy, which provides that an employee issued with a show cause letter shall respond thereto within 72 hours. That the Claimant further confirmed at the disciplinary hearing and at the hearing before Court that he had had sufficient time to respond to the show cause letter and to prepare for the disciplinary hearing. That contrary to the Claimant's allegations that he was not given the reason or purpose of the disciplinary hearing, the presiding officer to the disciplinary hearing clearly explained to him clearly and the Claimant confirmed that he understood why he was before the disciplinary committee. Further, the Claimant signed a note on 2nd

May 2018 confirming that he understood his rights in relation to the disciplinary hearing. It was the Respondent's submission that, without prejudice to its submissions on unpleaded issues, the verbatim record of the disciplinary hearing showed that the Claimant was aware of his right to be accompanied by a fellow employee at the disciplinary hearing, whose chairperson was an external chair appointed under clauses 14.1.7 and 14.1.8 of the Respondent's HR Policy.

13. As regards whether the termination of the Claimant's employment was substantively fair, the Respondent submitted that section 45(2)(b)(ii) of the *Employment Act* requires an employer to prove that that the reason for the termination is a valid and fair reason. The reason would be fair if it is related to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer. It submitted that termination of the Claimant's employment was based on a valid and fair reasons that were disclosed in his termination letter. That the Respondent was deprived of revenue through the collusion or conspiracy between the Claimant and Farouk Athman. That even though the Claimant alleged it was Farouk Athman who made the manual adjustments to the said customer's account, the Claimant did not deny that he himself initiated the process by possibly soliciting and receiving money from the customer, then facilitated and propagated the fraud by sending money to Farouk Athman to make the manual adjustments. That RW1 also testified that on the one occasion the Claimant received some money from the customer but did not send any to Farouk, there was no corresponding manual adjustment or credit to the said customer's account. The Respondent argued that in the absence of any valid or satisfactory explanation as to why the Claimant was sending money to Farouk Athman, the reason for his termination therefore related to his conduct i.e. initiating the fraudulent actions that led to the Respondent's loss of revenue. That the said fraudulent actions amounted to gross misconduct punishable by summary dismissal under section 44(4)(g) of the *Employment Act*.

14. It was the Respondent's submission that save for the certificate of service and leave pay to the extent it concedes hereinafter, the Claimant is not entitled to the reliefs sought. That since the termination was a summary dismissal under section 44 of the *Employment Act*, no notice was required or was necessary to warrant payment of notice pay. For the 12 months' compensation sought, the Respondent submitted that the Claimant's dismissal was preceded by a fair hearing whereat he was accorded an opportunity to defend himself. Further, the dismissal was based on valid and fair reasons. The Respondent further submitted that the claim for severance pay was not merited as the Claimant was not dismissed on account of redundancy and as per section 40(1)(g) of the *Employment Act*, severance pay is only payable as a remedy for termination of employment on account of redundancy. That the claim for pro-rata bonus was also not payable pursuant to clause 1.2 of the Claimant's Contract of Employment which provided that the same is not payable if he was dismissed or he gave or received notice of termination of employment before the month of November. The Claimant having been dismissed effective 14th June 2018 meant he was not entitled to any bonus.

15. It submitted that the claim for house allowance was not merited because firstly, the Claimant was paid a consolidated salary as shown in clause 1.2 of the Contract of Employment dated 27th March 2014 (Claimant Exh. 2), the Respondent's letter dated 15th May 2017 (Claimant Exh. 3) and the Respondent's letter dated 1st April 2018 (Claimant Exh. 5). Secondly, that even assuming the Claimant's pay was not consolidated, the claim for house allowance is barred by the provisions of section 90 of the *Employment Act* to the extent that it is a "continuing injury" that ought to have been filed within twelve months after the cessation thereof. That this position was affirmed in the case of Trevar Marambe v For You Chinese Restaurant [2021] eKLR in which Baari J. held that non-payment of house allowance that accrues at the end of every month amounts to a continuing injury and compensation thereon ought to be claimed within 12 months. The Court went on to find that since the claimant was terminated in November 2016 and the suit lodged on 19th June 2017, the claims for

accrued house allowances prior to June 2016 were statute barred and thus dismissed, and the claimant was awarded accrued house allowance for June to November 2016. The Respondent urged this Court to follow the decision of Trevar Marambe (supra) and hold that the Claimant's prayer for accrued house allowance is statute barred.

16. On unpaid leave, the Respondent submitted that it was willing to pay for any accrued leave days subject to clearance by the Claimant but disputed the leave pay of Kshs. 82,217/- as computed and claimed by the Claimant in his submissions before the court. That firstly, pursuant to clause 7 of the Claimant's Contract of Employment, the Claimant was entitled to only 21 days of annual leave for every completed year of service. Having been terminated effective 14th June 2018, he had not served the entirety of the year 2018 and the pay in lieu thereof cannot be equivalent of one month's salary as claimed. That if at all the Claimant was entitled to any leave pay, the calculation thereon should be pro-rated considering three factors: (i) entitlement of 21 days for any year of completed service (ii) any leave days already taken (iii) the fact that the Claimant had not completed service for the year 2018 as to be entitled to leave pay for the full year. Regarding the claim for overtime, the Respondent submitted that the same should be disallowed because being a special damage, the Claimant did not lead any evidence to demonstrate that it was merited.

17. The Respondent submitted that its insistence on the Claimant's clearance first before it issues him with a certificate of service was not an unfair labour practice. That in the case of Nathan Mukewa v Alupe University College [2022] eKLR, the Court held that the respondent/ employer was justified to withhold last salary pending clearance by the retiring officer and that the act was not unfair labour practice. That contrary to the Claimant's argument, clause 15.6.1 of the Respondent's HR Policy is not about a certificate of service but a testimonial/recommendation that can only be issued upon request by the Claimant. As such, the clause does not support unconditional issuance of a certificate of service or does away with the requirement of clearance as claimed by the Claimant, or at all. It was the Respondent's submission that since the Claimant's Claim was not merited, he was therefore not entitled to any costs.

18. The Claimant was terminated after alleged manipulation of customer accounts. The Claimant was accused of forwarding payments to a Mr. Farouk who adjusted the system manually to reflect payment when none had been received by the Respondent. This charge was principally what led to his termination as the Claimant received money from a Mr. Sagada, a relative and immediately forwarded the same to Farouk who manipulated the system to show that Sagada had settled his dues to the Respondent. This was definitely not proper conduct of an employee and nothing barred the Respondent from initiating disciplinary action even if the Claimant had recently been promoted. The Claimant's salary was consolidated in terms of Clause 1.2 of the Claimant's contract. The Claimant received gross pay which pay is inclusive of allowances. Though the Respondent did not expressly indicate the salary as consolidated, it was the intention of parties that the agreed salary was inclusive of allowances. No claim was made by the Claimant during the subsistence of his service that his house allowance was unpaid. He never demanded it and to do so in the claim is an afterthought. The Claimant attended the disciplinary hearing and at the hearing confirmed he was ready to proceed. He did not go along with an employee of his choice neither did he protest about the composition of the disciplinary panel. The Claimant was heard, his representations considered and his termination ensued. As such, having been granted the section 41 rights to hearing, the Claimant's dismissal was in order and therefore not capable of reversal. He thus is unsuccessful in his claim which I hereby dismiss albeit with no order as to costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF NOVEMBER, 2023.

NZIOKI WA MAKAU

JUDGE