



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO 1508 OF 2017

JOSHUA MOTARI MONGARE.....CLAIMANT

VERSUS

MADISON INSURANCE CO. LTD.....1ST RESPONDENT

RAPID INVESTIGATIONS LTD.....2ND RESPONDENT

JUDGEMENT

1. The claimant instituted the matter herein vide a claim which was filed on 2nd August, 2017. The claimant later filed an amended memorandum of claim dated 5th September, 2021 and through which he avers that he was unfairly terminated from employment in that he was not given an opportunity to defend himself. He also alleges that the respondents violated his constitutional rights. As a result, he has sought various reliefs including compensatory damages, exemplary damages for violation of his constitutional rights and service pay.

2. The 1st respondent filed a response to the claim and later, an amended response to the claim dated 14th December, 2020. The 1st respondent denied the averments set out in the amended claim and contended that the claimant was dismissed from employment on grounds of receiving “monetary kickbacks” from its service providers and that he consciously and ignorantly failed to appear for scheduled hearings, which would have afforded him an opportunity to be heard.

3. The 2nd respondent also filed a defence in answer to the claim. It averred that it was contracted by the 1st respondent to investigate allegations raised against the claimant in regards to soliciting for bribes and kickbacks from its service providers. It further stated that it had no duty towards the claimant as regards disclosure of the details in respect of the allegations levelled against him.

4. The matter proceeded for hearing on 5th August, 2021 when the claimant testified in support of his case. The 1st respondent also called one witness. The 2nd respondent elected not to call a witness despite its earlier indication to do so.

Claimant’s case

5. The claimant sought to rely on his witness statement together with the bundle of documents which were filed together with the initial claim. He asked the court to adopt the same as part of his evidence in chief. The documents were also produced as exhibits before court.

6. He informed court that he was employed by the 1st respondent with effect from 30th October, 2013 as a claims analyst and that he performed his duties diligently. He stated that he was suspended from duty with effect from 7th February, 2017 on grounds that he had solicited for kickbacks from the 1st respondent’s service providers. He averred that initially, the human resource manager asked him to write a confession accepting the allegations but he declined to do so and maintained his innocence. It was also his testimony that he was later asked to resign or face dismissal but he refused to do so.

7. The claimant further stated that upon his suspension, he was advised that he would be called in for a disciplinary hearing on 8th March, 2017, but the same never came to pass. That shortly, thereafter, he received a phone call from someone who identified himself as an investigator from the 2nd respondent. That at first, he was hesitant and apprehensive to appear before the said investigator as he had not been given their names, contacts nor location. He averred that he was never given details of the persons who he had solicited money from. He further told court that the investigator, Mr. Mukigi harassed and intimidated him and forced him to sign the investigation report, which he didn’t have the opportunity of reading. He prayed that his claim be allowed as prayed.

8. During cross examination, he stated that he was advised that investigations would be undertaken during his suspension. He also maintained that he co-operated with the investigator despite his initial hesitation. He further admitted to receiving his benefits from the 1st respondent’s provident fund.

1st Respondent's case

9. On its part, the 1st respondent called Ms. Serafina Janet Wairimu, who testified as RW1. She identified himself as the 1st respondent's Human Resource Manager.

10. At the outset, she sought to rely on her witness statement as well as the bundle of documents filed on behalf of the 1st respondent and which she asked the court to adopt as part of her evidence in chief. She also produced the said documents as exhibits before court.

11. Ms. Serafina stated that the 1st respondent received complaints from certain service providers to the effect that the claimant was soliciting for kickbacks hence the reason for his suspension and which was followed by investigations. It was her testimony that the suspension of the claimant was to take one month initially but the same was extended as he delayed in meeting with the investigator. She further told court that the investigations revealed that indeed, the claimant had received kickbacks from some service providers, hence the decision by the 1st respondent to terminate his employment.

12. RW1 admitted during cross examination that the claimant was not given the details and breakdown of the service providers who he was alleged of soliciting kickbacks from. She further admitted that the claimant was not taken through a disciplinary hearing and that the decision to terminate his employment was not based on the findings of the 1st respondent.

13. As stated herein, the 2nd respondent elected not to call any witness despite its initial indication to do so.

Submissions

14. The claimant submitted that his termination was not fair as it did not meet the stipulated legal parameters. He sought reliance on the case of **Postal Corporation of Kenya vs Andrew K. Tanui (2019) eKLR**. He further submitted that the witness statement filed by the 2nd respondent's intended witness ought to be disregarded on account that he never appeared to testify. He relied on several authorities including **R vs Inland Revenue Commissioners, Ex P TC Coombs & Co. (1991) 2 AC 283, 300, Prest vs Petrodell Resources Limited and others (2013) UKSC 34** and **Kenya Akiba Microfinancing Limited vs Ezekiel Chebii & 14 others (2012) eKLR**. The claimant further submitted that it had proved that his rights to privacy, fair trial, administrative action and dignity were violated by the respondents. On this issue, he invited the court to consider the case of **RC vs KKR (2021) eKLR** amongst others.

15. The respondents failed to tender any submissions despite being granted an opportunity to do so and as such, the court did not have the benefit of considering the same.

Analysis and determination

16. Upon consideration of the issues arising from the pleadings, the testimonies before court and the submissions on record, this court is being called upon to determine the following questions;

- a) **Whether the claimant's termination was unfair and unlawful?**
- b) **Whether the claimant's right to privacy and dignity were violated by the respondents?**
- c) **Is the claimant entitled to the reliefs sought?**

Whether the claimant's termination was unfair and unlawful?

17. The claimant has alleged that his termination was unfair and unlawful and that the same did not meet the requirements stipulated under the Constitution and the Employment Act. He avers that he was not given the identity of his accusers, the service providers he allegedly solicited kickbacks from and that he was not subjected to a fair hearing prior to termination.

18. In order to prove fair termination under the Employment Act (Act), an employer must satisfy that there was substantive justification to warrant termination of an employee and that it observed the requirements of procedural fairness in so doing. These constitute the parameters which govern fair termination.

(i) Substantive justification

19. The Act addresses substantive justification under **Section 43(1)**, which requires an employer to prove reasons for termination, and in absence thereof, such termination is deemed to be unfair. Further, **section 45 (2)** of the Act provides that a termination of employment is unfair if the employer fails to prove that the reason for the termination is valid, fair and is related to the employee's conduct, capacity or compatibility; or based on the operational requirements of the employer. The burden of proof in this instance, lies with the employer.

20. The afore stated legal position has been reiterated through case law over and over. For instance, the Court of Appeal in the case of **Chairman Board of Directors (National Water Conservation and Pipeline Corporation) vs Meshack M. Saboke & 2 others, Nairobi Civil Appeal No. 241 of 2015**, held thus;

“In light of the above provision, termination of employment will be unfair if the court finds that in all the circumstances of

the case, it is based on invalid reasons or if the reason itself or the procedure of termination are themselves not fair. Section 43 of the Employment Act deals with proof of reasons for termination placing the burden on the employer to prove the reasons for termination failure to which termination is deemed unfair within the meaning of section 45.”

21. It is not in contest that the claimant was dismissed on grounds of soliciting money from the 1st respondent’s service providers. The reason is aptly captured in the claimant’s letter of termination in the following terms;

“Prior statements from some of our customers and the findings of the investigator have confirmed that indeed, you solicit for money from our customers. The aforesaid actions go against the Human Resources guidelines, your letter of engagement and the Employment Act.”

22. The foregoing reasons also flow from the claimant’s letter of suspension dated 7th February, 2017 which reads in part as follows;

“It has been brought to Management’s attention that you have on a number of occasions solicited or attempted to solicit for money from service providers within the course of your duties. Your actions are against company policy.”

23. The claimant denied soliciting kickbacks from any of the 1st respondent’s service providers. In order to arrive at a reasoned decision, it is imperative to analyse the reasons advanced by the 1st respondent and apply the same against the evidence on record vis a vis the applicable law.

24. To prove substantive justification, the 1st respondent was required to prove the substance of the allegations against the claimant. In this respect, it was required to prove that indeed, the claimant committed the acts of solicitation against the specified service providers. This would have been proved by way of documentary and oral evidence by the said service providers. It is notable that there were no statements from the “service providers” confirming the act of solicitation by the claimant. Similarly, none was called to testify in court to prove or disprove the fact of solicitation by the claimant. In as much as the investigation report provided details of the allegations against the claimant, the investigator who was tasked with ascertaining the veracity of the allegations levelled against him, did not testify before court hence the findings thereof could not be justified.

25. Similarly, there was no indication or evidence to prove that the investigation report was availed to the claimant so as to allow him grasp the extent of allegations he was facing.

26. In addition, the 1st respondent did not provide further details as to how the allegations against the claimant came to its knowledge. RW1 in her testimony before court, stated that a service provider had lodged a complaint against the claimant. No further details were provided beyond that. No names, no details, nothing. Therefore, the allegations against the claimant were not corroborated either through documentary or oral evidence. It was incumbent upon the 1st respondent to provide further evidence to support the allegations against the claimant and by failing to do so, the accusations against the him were not substantiated.

27. Further, the claimant contended that he was never informed who his accusers were and nor was he given the identity and particulars of the persons he had allegedly solicited for kickbacks from. By dint of section 45(2) of the Act, an employer is required to prove that the reasons leading to an employee’s termination were fair and valid. To prove fairness and validity, it is crucial that the employer sufficiently brings out the allegations against the employee so as to confirm that indeed the same are justifiable. It is not enough to spell out the allegation without specifying particulars thereof. Simply put, the charges against an employee ought to be substantiated.

28. In the instant case, the allegations against the claimant were very vague and general as the same were not accompanied by further or better particulars. There is only reference to “service providers”. No further details were provided to the claimant.

29. For the 1st respondent to level the allegations against the claimant, it must have had all the details and particulars in that regard. It is not clear why the same were not availed to the claimant from the onset so as to enable him fully comprehend the charges against him.

30. The Court of Appeal in the case of **OI Pejeta Ranching Limited v David Wanjau Muhoro [2017] eKLR**, found that the allegations against the respondent were too general hence termed his termination as unfair. The learned Judges rendered themselves thus;

“As also rightly found by the learned trial Judge, no evidence was placed before court to show that the respondent had been issued with a charge (s) of the specific allegations that he was required to answer during the hearing. Going in for the hearing, it is discernable from the record that the respondent only knew in general terms, the allegations he was to face and counter. That coupled with the fact that he had no knowledge of the audit findings, he had no fair chance to advance his defence. In the circumstances, therefore it cannot be said that the termination process was fair.”

31. I fully adopt this position espoused by the learned Judges of the Court of Appeal. Nothing would have been easier than for the 1st respondent to avail more particulars as regards the allegations against the claimant and more specifically, the identities and particulars of the “service providers” who were central to the disciplinary process commenced against him.

32. Against this background, I find that the 1st respondent did not satisfy the requirements of section 43(1) read together with section 45(2) (c) of the Act and as such, it has not proved that there was substantive justification to warrant termination of the claimant’s employment.

(ii) Procedural fairness

33. **Section 45(2) (c)** of the Act provides that for termination to be fair, it ought to be in line with fair procedure. In this respect, **section 41(1)** of the Act requires an employer to accord an employee a hearing prior to termination. This procedure entails notifying the employee of the allegations he or she is required to respond to, and thereafter granting him or her the opportunity to make representations in response to the said allegations.

34. The letter dated 7th February, 2017 through which the claimant was suspended from duty also advised him to appear before a disciplinary committee on 8th March, 2017. RW1 confirmed in her testimony that this never came to pass. Instead, the claimant was required to present himself before an investigator of the 2nd respondent.

35. The 1st respondent seemingly assumed that the investigation process undertaken by the 2nd respondent entailed fair hearing. This is a wrong assumption. The 2nd respondent's role ought to have been limited to unearthing the veracity of the allegations levelled against the claimant. The findings of that investigation process is what would have informed further disciplinary action against the claimant in which case, he would have been required to respond to the allegations levelled against him. In essence, the 1st respondent ought to have taken over the process upon conclusion of the investigations by the 2nd respondent.

36. Ideally, the investigation ought to have been shared with the claimant, who would then have been required to respond to the same. In this case, the 1st respondent appeared to have adopted the report by the 2nd respondent hook, line and sinker without further recourse to the claimant. It ought to have undertaken its own internal disciplinary process against the claimant, based on the findings of the investigation report.

37. Indeed, section 41 places the duty of notification and hearing on an "employer". This role cannot be taken over by an outsider. In my view, it is not unlawful for an employer to engage the services of an investigator where it lacks the capacity to undertake such investigations. However, such an investigation process cannot replace and most certainly, supplant the process envisaged under section 41 of the Act. Otherwise, this would be tantamount to an employer abdicating its statutory role.

38. By the 1st respondent failing to afford the claimant an opportunity to be heard, it flouted the provisions of section 41 hence the ensuing disciplinary action can be faulted.

39. The upshot of the foregoing is that the 1st respondent has failed to prove that there was substantive justification to warrant the claimant's termination, and that it accorded him procedural fairness. This fell short of the requirements stipulated under section 45 of the Act, hence his termination was unfair and unlawful.

Whether the claimant's right to privacy and dignity were violated by the respondents?

40. The claimant has alleged that his constitutional right to privacy and dignity was infringed by the respondents. He claims that the 1st respondent contacted his wife and asked her to advise him to resign from employment. He also accused the respondents of accessing his Mpesa statements without his authorization.

41. RW1 informed court that the investigation by the 2nd respondent revealed financial dealings between the claimant and various service providers. To support this assertion, she produced the claimant's Mpesa statements in respect of transactions undertaken through his mobile phone number over certain periods namely, 1st January, 2017 to 28th February, 2017, 1st December, 2016 to 30th December, 2016 and 1st January, 2017 to 28th February, 2017.

42. During cross examination by the 2nd respondent's counsel, the claimant actually confirmed that the mobile phone number appearing on the Mpesa statements was his.

43. It was therefore not in doubt that the 1st Respondent had in its possession the claimant's Mpesa statements and indeed produced the same as part of its exhibits before court. It did not demonstrate how it gained access to the same.

44. It is also apparent that the Mpesa statements originated from the 2nd respondent in the course of its investigations. On its part, the 2nd respondent did not indicate how it came to obtain the MPesa statements belonging to the claimant and did not adduce any evidence to demonstrate that it had authority to access the same.

45. Article 31 of the Constitution guarantees every person the right to privacy. In particular, clause (c) protects a person's "*right not to have information relating to their family or private affairs unnecessarily required or revealed.*"

46. Without a doubt, the details of a person's Mpesa transactions are private and confidential in nature hence ought to be accessed only upon express permission and consent by the owner. In this case there is no evidence that such permission or consent was granted by the claimant to the respondents.

47. In the case of **RC vs KKR [2021] eKLR**, the court observed as follows:

"If police officers, while investigating crimes, must either obtain the consent of the person who is under investigation or obtain orders of the Court to access the suspect's private information, what of private investigators?"

48. Needless to say, the respondents were under an obligation to obtain express consent from the claimant before accessing his private

information and in absence thereof, such access amounted to violation of his right to privacy.

49. The claimant has also alleged that his constitutional right to dignity was violated by the respondents. This assertion was not backed by any evidence by the claimant hence the court finds that the same was not proved.

Reliefs

50. Having found that the claimant's termination was unfair, I will award him six (6) month's salary as compensatory damages. This award has been informed by the fact that the 1st respondent failed to accord the claimant substantive and procedural fairness.

51. The court having find that the claimant's constitutional right to privacy was violated, awards him general damages in the sum of Kshs 300,000/=.

Orders

52. Accordingly, I enter Judgment in favour of the claimant as follows;

(a) A declaration that the claimant's termination by the 1st respondent was unfair and unlawful.

(b) A declaration that the respondents violated the claimant's constitutional right to privacy.

(c) The claimant is awarded compensatory damages in the sum of Kshs 192,000/= which sum is equivalent to 6 months gross salary.

(d) The claimant is awarded Kshs 300,000/= for violation of his constitutional right to privacy and which amount is equally apportioned against the respondents.

(e) The claimant shall have the costs of the suit.

(f) Interest on the amount in (b) and (d) at court rates from the date of Judgement till payment in full.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 21ST DAY OF JANUARY, 2022.

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STELLA RUTTO

JUDGE

APPEARANCE:

FOR THE CLAIMANT MR. ONDERI

FOR THE 1ST RESPONDENT MR. OKEYO

FOR THE 2ND RESPONDENT MR. KIBIKU

COURT ASSISTANT BARILLE SORA

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 had 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 Civil 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.

STELLA RUTTO

JUDGE