



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI

CAUSE NO.2416 OF 2017

(Before Hon. Lady Justice Anna Ngibuini Mwaure)

ISAIAH MEKO MWANZIA.....CLAIMANT

VERSUS

KUEHNE NAGEL LIMITED.....RESPONDENT

JUDGEMENT

FACTS

1. The Claimant filed a memorandum of claim dated 9th November, 2017. He states that he was employed by the Respondent on 21st July, 2008 as an IT Assistant at a salary of Kshs.31,413/= as per attached payslip (IMM-1)

2. He says his work was good and was appreciated by his employer and was given increment. He says he worked from 8.00a.m to 7.00p.m and worked from 9.00a.m to 5.00p.m on weekends.

His salary was increased to Kshs.50,551/= by 2017.

3. On 3rd May, 2017 he was served with a letter of suspension and was accused of sharing company information.

He was served with another letter to show cause on 15th August, 2017 as to why he shared company information.

He says he responded to the show cause letter and denied those accusation.

4. He says he was then called for a disciplinary meeting on 23rd May, 2017 in which three representatives of the Respondent were present but he was alone as none of his fellow employees were willing to join him.

5. He says the Respondent's representatives refused to disclose the names of the staff who made allegations against him and refused to divulge the allegations of the information he was accused of having shared.

6. On 25th May, 2017 his employment was terminated over unproved allegations of sharing unknown company information with other members of staff.

7. The Claimant now seeks the following remedies: -

(1) Pay time for overtime worked 2 hours extra per day less 21 leave days Kshs.1,574,834.40/=.

(2) Weekends and Saturdays 3 extra hours Kshs.682,428.21/=

(3) Damages for unfair termination for 12 months

@ Kshs.606,876.20/=

Total amount claimed Kshs.2,863,876.20/=

8. He also prays for costs and interest.

RESPONDENT'S EVIDENCE

9. The Respondent states that the Claimant was its employee from 21st July, 2008 until, 2017. In 2017 a complaint was brought to the Respondent's attention that Claimant was sharing confidential information with staff members contrary to terms of employment. Claimant was sent on two weeks suspension in order to carry out investigation.

10. On 15th May, 2017 Respondent was served with a show cause letter with a show cause letter and he responded. His response was found to be evasive and was summonsed for a disciplinary hearing on 23rd May, 2017 at 2.00p.m.

He was advised he had a right to have a representative being a fellow employee of his choice.

11. The Claimant attended the hearing but did not invite a witness of his choice. The IT Manager said he had checked the Claimant's laptop and found it had no data. The Claimant was unable to controvert that fact.

12. The Respondent deliberated on the Claimant's case and conclude he had shared confidential information with other staff member and was tantamount to gross misconduct.

He was served with a termination letter dated 25th May, 2017.

He was presented a cheque of Kshs.165,215/42 being his terminal dues which he acknowledged receipt. He was also issued with a further cheque of Kshs.42,885 on 18/9/2017.

The Respondent therefore claims the Claimant was lawfully terminated and had no claim against the Respondent.

ISSUES FOR DETERMINATION

13. (1) Did the Respondent establish a valid reason to terminate the Claimant's employment.

(2) Is the Claimant entitled to the remedies prayed.

14. Did the Respondent establish a valid reason to terminate the Claimant's employment.

DETERMINATION

The reason the Respondent gave for terminating the Claimant's employment was that he shared confidential information he came across in the course of his employment.

During the disciplinary meeting held on 23rd May, 2017 the Respondent once again presented the allegations against the Claimant in generality and vaguely and talked of the need to protect information. He also said he found the Claimant's laptop clean.

15. The Claimant who claimed he could not get a witness among his fellow employees was without a witness in the hearing.

He asked for disclosure of the names of staff who reported the matter and the particular information he is alleged to have shared.

The management declined to release such information as they claimed they had to protect their staff.

16. The need to know what accusations are brought against a person in any case is always crucial. Article 50 of the Kenya Constitution 2010 provide that one should be subjected to a fair trial and be informed of the charge with sufficient detail to answer it.

Even in a civil matter it follows the same requirement. In the case of **REPUBLIC VS NATIONAL LAND COMMISSION AND 2 OTHERS ex parte ARCHDIOCES OF NAIROBI KENYA REGISTERED TRUSTEES (ST. JOSEPH MUKASA CATHOLIC CHURCH KAHAWA WEST (2018) eKLR** the court held "before an administrative hearing is said to meet the Article 50 Constitutional threshold where the natural justice role states that no one should be condemned unheard and states "the particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases.

17. In the case before me, the Claimant was not given a clear reason or the exact charges against him. He was just told there was some information from some members of staff that the Claimant had released some.

So similarly, the Claimant could not sufficiently prepare to defend himself on some obscure accusations.

18. He was hurriedly invited to a disciplinary hearing by a letter dated 17th May, 2017 and was to appear on 23rd May, 2017 at 2.00p.m.

It is correct the time given may not have been sufficient but without clear information all the more why the process by the Respondent was flawed and did not meet the threshold of the fairness test and the mandatory requirement provided in Section 41 of the Employment Act 2007.

Section 41 of the said Act provides “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 the explanation.

19. The Claimant testified that he could not even get an employee to be his witness for reasons that they may also fear victimization.

20. In the case of **GATHIGIA VS KENYATTA UNIVERSITY OF NAIROBI HCMA NO.1029 OF 2007 eKLR 587** it was observed that where administrative action is being conducted the person accused must know the nature of accusation made and also a fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view.

21. I need not say more. After considering all the evidence and pleadings presented to the court as well as the submissions and the evidence adduced in court, I find that the Respondent did not give a valid reason which can be well substantiated to enable an accused person to respond or defend himself appropriately.

22. At the same time, the procedure used was rushed and rather intimidating and the Claimant had no fair opportunity to invite a witness of his choice to the hearing as required in Section 41 of the Employment Act 2007.

23. Finally the court considered the submissions of both parties in details.

The Respondent averment is that the Claimant signed a discharge voucher and undertook not to follow any other claim hereto.

The Respondent therefore contends that the Claimant is estopped from claiming any further compensation from the Respondent.

24. However it is trite law that signing a discharge voucher by an employee does not preclude the Claimant from pursuing a matter of unfair termination and each case depends on its own circumstances.

It is well known the employees will usually sign a discharge voucher as they require their money at that point and will not be paid unless they sign the discharge voucher.

25. The court of appeal in **CASE OF THOMAS DE LA RUE K LIMITED VS DAVID OPONDO ONUYELEMA (2013) eKLR** held that discharge voucher does not absolve an employer from statutory obligations or bar this court from investigating into alleged unfair termination but must consider whether the discharge voucher was freely and willingly executed.

The findings of the court on the discharge voucher depend on each case. The case before me the Claimant signed a discharge voucher for his salary but he already said during the evidence in chief and cross examination that he was already intimidated during the disciplinary hearing. I would not find it just to dismiss his case because he signed the discharge voucher.

26. Having found the Respondent did not substantiate the reason for terminating the Claimant’s employment and having not followed fairness test in dismissing the Claimant, I find the Respondent’s actions did not meet the tenets of fair administrative action.

I therefore pass judgement in favour of the Claimant.

REMEDIES

27 (a) Payment of overtime worked and not paid for years worked. I would be hesitant to grant this prayer as is hard to believe the Claimant worked all those days and never raised issue of extra hours. I am persuaded to agree with the Respondent in his submissions that no particular overtime or days worked have been specifically established. I decline that prayer.

I am supported by the case of **ROGOLI OLE MANADIEGI VS GENERAL CARGO SERVICES LIMITED (2016) eKLR** that burden of establishing hours or days served in excess of legal maximum rests with the employee.

Special damages must not only be pleaded but must be proved.

(b) Weekends (Saturdays and 3 extra hours worked). Once again, I decline this prayer for the exact reasons given herein above.

(c) Damages for unfair termination. Having held the Claimant’s termination was unlawful and having noted the Claimant worked for a fairly long period for the Respondent, I grant him equivalent to 9 months for compensation. Kshs.454,960.17.

Total award is therefore Kshs.454,960/17.

Costs are also awarded to the Claimant and interest at court rates from date of Judgement till full payment.

Ordered accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 11TH DAY OF FEBRUARY 2022.

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