



**Sava v Kitui Cottages And Guest House (Cause 1280 of 2017)
[2022] KEELRC 1499 (KLR) (23 June 2022) (Judgment)**

Neutral citation: [2022] KEELRC 1499 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE 1280 OF 2017
SC RUTTO, J
JUNE 23, 2022**

BETWEEN

EDWARD K. SAVA CLAIMANT

AND

KITUI COTTAGES AND GUEST HOUSE RESPONDENT

JUDGMENT

1. The claimant avers through his statement of claim dated July 6, 2017, that he was employed by the respondent as a resident manager with effect from February 18, 2010. He further avers that he was suspended without notice on November 16, 2013 for no reason at all. That the respondent refused to lift the suspension or provide the reasons for the same. It is on the foregoing basis that the claimant seeks against the respondent;
 - a. a declaration that the suspension is wrongful, unfair hence illegal and immediate lifting of the same.
 - b. unpaid salary for November, 2013 to date or until termination at Kshs 40,400 per month.
 - c. unpaid annual leave for 26 days per year for 3 years and 21 days for the extra 9 months at Kshs 40,400 per month being Kshs 153,834.
 - d. overtime of 5 hours every day duty for the 2 years 9 months at the rate of Kshs 173 per hour, being Kshs 658,080.
 - e. unpaid public holidays for 3 years, 9 months at 10 days per year, being Kshs 114,996.
 - f. all Sundays worked for a period of 2 years and 9 months.
 - g. costs and interest of the suit.



2. The respondent opposed the claim and denied that the claimant was its employee. Nonetheless, it admitted suspending him vide a letter dated November 16, 2013. The respondent further averred that the claimant was required to report back after one month following the suspension, but he failed to do so. That the claimant was suspended due to the fact that he was running an eatery, which was competing with its business. The respondent further denied owing any salary to the claimant and averred that he was an employee of Kiembeni Country Hotel with effect from December 1, 2013, and was therefore not interested in going back to its employment upon expiry of his suspension.
3. The matter proceeded for part hearing on November 1, 2021, when the claimant presented and closed his case. The defense hearing took off on March 7, 2022, whereupon trial closed.

Claimant's case

4. At the trial, the claimant testified as CW1 and sought to adopt his witness statement and bundle of documents filed together with his claim, to constitute part of his evidence in chief. He also produced the said documents as his exhibits before court.
5. The claimant testified that on November 16, 2013, he was called for a meeting by the respondent's directors, who were accompanied by the company secretary. That present at the meeting, were two accountants of the respondent. That he was informed at the meeting that his services were to be terminated on account that he running a parallel business, specifically a café. He denied this accusation and maintained that the same was never proven. That nonetheless he was suspended from duty and it was made clear by the respondent's directors, that the same was a termination of employment.
6. The claimant informed court in further testimony that following his suspension, he was required to vacate the hotel, as he was a Resident Manager hence had not rented a house within the town.
7. He further testified that from November 16, 2016 until November 30, 2016, he was in communication with one of the directors as he wanted to know the terms of his suspension and payment of his dues. That the respondent's director thereafter went quiet and there was no communication from his end. He further testified that it was then that he moved the court claiming wrongful dismissal. In concluding his testimony in chief, the claimant asked the court to allow his claim as prayed.
8. Upon cross examination, the claimant told court that his services were terminated and stated that he was not issued with the letter of suspension dated November 16, 2013. He further denied running a parallel business to the respondent's and being employed at Kiembeni Country Hotel.
9. In re-examination, the claimant stated that it was in bad faith for the respondent to exhibit the certificate of employment from Kiembeni Country Hotel.

Respondent's case

10. The respondent presented oral evidence through its Director, Mr Simon Musyoka Kaingo, who testified as RW1. Mr Kaingo sought to rely on his witness statement dated 2nd August, 2017 as well as the bundle of documents filed on behalf of the respondent, which he asked the court to adopt to constitute his evidence in chief. The documents were also produced as the respondent's exhibits before court.
11. It was the respondent's case as presented by Mr. Kaingo, that the claimant was issued with a letter of suspension for running an eatery, parallel to the its business. That the claimant was informed of the reason for his suspension through the suspension letter dated November 16, 2013.



12. That the claimant was to report back to work after one month from the date of suspension, but he failed to do so and instead, absconded duty. That with effect from December 1, 2017, while still on suspension, the claimant secured employment at Kiembeni Country Hotel. That the claimant is therefore not entitled to any compensation as he absconded duty and sought employment elsewhere.

Submissions

13. The claimant submitted that he was an employee of the respondent. He further submitted that he was suspended without due regard to procedure and was not allowed to respond to the allegations before the suspension. That his suspension was indefinite hence he was condemned unheard. He placed reliance on articles 47 and 50 of the Constitution.
14. In further submission he stated that his suspension was by word of mouth and that the letter of suspension dated November 16, 2013, exhibited by the respondent was not issued to him. That his indefinite suspension amounted to constructive dismissal. On this issue, he invited the court was to consider the determination in the case of Humphrey vs Board of Management Lenana School (2020) eKLR.
15. On the other hand, it was submitted on behalf of the respondent that the claimant breached his employment contract by running a competing business to the respondent's and for seeking employment at Kiembeni Country Hotel while still employed by the respondent. That as such, the claimant was attempting to seek refuge in equity with unclean hands. The case of Andymac Palace Limited vs Equity Bank (K) Limited (2018) eKLR, was cited in support of this argument.
16. In further submission, the respondent stated that the reason for the claimant's suspension was stated in the letter of suspension. It was further submitted that the respondent had reasonable cause to take disciplinary action against the claimant. The respondent further submitted that the claim was time barred having been instituted 3 years 7 months, after the date the claimant was suspended. The respondent therefore urged the Court to strike out the claim with costs.

Analysis and Determination

17. Flowing from the pleadings before Court, the evidence on record and the opposing submissions, the issues falling for the court's determination are: -
- i. Is the claim time barred?
 - ii. Whether there is a claim for wrongful termination?
 - iii. Whether the suspension of the claimant was wrongful, unreasonable and unfair?
 - iv. What reliefs if any, avail to the claimant?

Is the claim time barred?

18. This issue has been raised by the respondent in its submissions, hence I find it prudent to address the same from the onset, as it may ultimately determine the court's jurisdiction to entertain the suit as a whole.
19. The respondent avers that the claim was instituted 3 years, 7 months after the date of the claimant's suspension, hence was outside the period stipulated under section 90 of the Employment Act.



20. Section 90 of the *Employment Act*, which is key to the determination of this issue, is couched as follows:

“[90] Notwithstanding the provisions of section 4(1) of the Limitation of Actions Act (cap 22), no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained of or in the case of continuing injury or damage within twelve months next after the cessation thereof.”

21. The import of the above provision, is that a time bar of three (3) years has been placed on matters arising out of the *Employment Act* or on a contract of service, as the one herein. It is also apparent that the limitation period begins to run from the date the cause of action arises.

22. The question thus is, when did the cause of action arise in the instant case. The answer to this question can be found in the determination by the Court of Appeal (Waki JA, as he then was), in *Attorney General & another vs Andrew Maina Gitbinji & another* [2016] eKLR, where the learned Judge reckoned as follows: -

“The critical question to ask, which I will endeavor to answer, is this: What is a cause of action and when does it arise in a claim for unfair /wrongful termination?...”

“A cause of action is an act on the part of the defendant, which gives the plaintiff his cause of complaint.”

That definition was given by Pearson J in the case of *Drummond Jackson v Britain Medical Association* (1970) 2 WLR 688 at pg 616. In an earlier case, *Read v Brown* (1889), 22 QBD 128, Lord Esher, MR had defined it as: -

“Every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court”.

Lord Diplock, for his part in *Letang v Cooper* [1964] 2 All ER 929 at 934 rendered the following definition: -

“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”

I am sufficiently persuaded by those definitions and I adopt them.”

23. Applying the determination in the above authorities, it is evident that a cause of action is defined as the existence of a fact that gives the claimant a right to complain.

24. According to the respondent, that date was the day the claimant was issued with the letter of suspension. I beg to disagree. The letter of suspension exhibited by the respondent clearly indicates that he was to report back to work after one month. This meant that a disciplinary process was ongoing and no determination had been made concerning his continuance of employment with the respondent.

25. Ordinarily, the claimant would not have been expected to have a cause to complain, right from the time he was placed on suspension, whether in writing or verbally, as his employment had not been terminated by then.

26. In the circumstances, the claim herein cannot be deemed as having been time barred by the time it was instituted in Court, as the cause of action was yet to arise.



Whether there is a claim for wrongful termination?

27. The claimant has submitted that his suspension by the respondent, was for an indefinite period hence amounted to constructive dismissal and therefore amounted to unfair termination. This position has been disputed by the respondent which avers that the suspension was only for a month whereafter the claimant was to report back to work.
28. It bears to note that this line of argument is new and that the issue of wrongful termination by way of constructive dismissal only came up subtly during the hearing and in the claimant's submissions. It is trite law that parties are bound by their pleadings. The Court of Appeal in the case of *Independent Electoral and Boundaries Commission & another vs Stephen Mutinda Mule & 3 others* [2014] eKLR, held as follows:-

“As the authorities do accord with our own way of thinking, we hold them to be representative of the proper legal position that parties are bound by their pleadings which in turn limits the issues upon which a trial court may pronounce.”
29. The claimant's case is anchored on the statement of claim filed in court on July 7, 2017 and it is notable that the same is centered on his suspension with no reference whatsoever to unfair termination or constructive dismissal.
30. In a nutshell, unfair termination and constructive dismissal were never pleaded at all. As such, the same cannot arise at this juncture. I must also add that the submissions by the claimant to that effect, does not constitute evidence and cannot form a basis through which a claim for wrongful termination is pleaded and considered by court.
31. To this end, I reject that line of argument and find that there is no claim for wrongful termination before court.

Whether the claimant's suspension was wrongful, unreasonable and unfair?

32. The claimant has termed his suspension as wrongful, unreasonable and unfair, in that he was not given reasons for the suspension and that the same was without notice. To add onto that, he has denied being issued with the letter of suspension dated November 16, 2013, exhibited by the respondent.
33. On its part, the respondent states that the claimant was issued with the letter of suspension dated November 16, 2013, which it adds, provided the reason for the suspension.
34. Notwithstanding the contest as to whether the suspension was in writing or not, it is common ground that the claimant was placed on suspension with effect from November 16, 2013.
35. According to the claimant, the suspension was still in place at the time of filing the suit. The respondent avers that the claimant was only suspended for one month hence he was to report to work on December 16, 2013.
36. The claimant's contract of employment is silent as regards the issue of suspension. Similarly, the *Employment Act* makes no provision of the same hence there are no legal and/or contractual parameters to apply against the case herein in order to ascertain if the claimant's suspension was within the law or not.
37. Nonetheless, a suspension is not a strange phenomenon in employment, hence it is usual for an employer to suspend an employee from work, pending further disciplinary action. Such was the



determination by the Court of Appeal in the case of *Charles Muturi Mwangi vs Invesco Assurance Co Ltd* [2019] eKLR where it was held as follows: -

“On the second issue for determination indicated above, the appellant seems to be saying that there was no provision for his suspension in the contract of employment and so his suspension was unlawful. Without overstressing that argument, we can only say that we find that line of argument preposterous. We say so because, even in cases where employees are employed under permanent and pensionable terms, suspension and interdiction pending investigations for alleged misconduct is ordinarily part of the disciplinary process. Whether such suspension or termination was unfair is another issue altogether.”

38. The court held similarly in the case of case of *Mary Chemweno Kiptui v Kenya Pipeline Company Limited* [2014] eKLR, as follows: -

“A suspension therefore is ultimately a right due to an employer who on reasonable grounds suspects an employee to have been involved in misconduct, of poor performance or physical incapacity and wishes to remove such an employee from the work place to enable further investigation without subjecting the employee to further commission of more acts of misconduct, underperformance or the conditions leading to incapacity. The suspension period is a time available to an employer to control as the employee can be summoned back to work any time to undertake disciplinary proceedings or upon terms and given by an employer.”

39. I fully adopt and associate myself with the findings in the foregoing authorities and find that a suspension is part of a disciplinary process and is a right due to an employer. As a consequence, a mere act of suspension by an employer cannot be deemed as wrongful and unfair per se.

40. The claimant further averred that his suspension was without notice and that he was not given an opportunity to be heard prior to the suspension. With due respect, that is not the correct position. Under the *Employment Act*, there is no requirement for fair hearing prior to suspension being effected by an employer.

41. In the case of *Luka Korir vs Moi Teaching and Referral Hospital* [2022] eKLR, the Court held as follows regarding the issue: -

“(21) Section 41 of the *Employment Act* provides that before terminating the employment of an employee an employer is required to 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 shop floor union representative of his choice present during explanation.

[22]. This section does not seem to apply to the case of suspension. A suspension from employment is not a termination. It is in essence a temporary separation from day-to-day duties of an employee suspected of committing a disciplinary offence...To require an employer to hear an employee in such a preliminary stage before handing the suspension does not sound practical.”

42. To this end, the respondent did not have an obligation to subject the claimant to a fair hearing as contemplated under section 41 of the *Employment Act*, prior to suspending him. Further, it is



noteworthy that the provisions of article 50 of the Constitution are only in respect to claims before court hence is not applicable to disciplinary cases.

43. It was the claimant's case that his suspension was still subsisting at time of filing the suit. On the other hand, the respondent avers that the claimant secured employment in another establishment namely, Kiembeni Country Hotel with effect from December 1, 2013. That at the time, the claimant was still on suspension.
44. It is notable that the claimant did not object to the production of the "certificate of service" issued to him by Kiembeni Country Hotel and to his letter of resignation from Kiembeni Country Hotel, both dated May 31, 2017. Accordingly, the two documents formed part of the respondent's exhibits and evidence before court.
45. From the certificate of service exhibited by the respondent, the claimant was working at Kiembeni Country Hotel, with effect from December 1, 2013. It would thus seem that he entered into a new contract of employment close to two (2) weeks into his suspension.
46. By all means, it is not unlawful to move on and look for greener pastures. In the event, he felt that his suspension was verbal and indefinite as he terms it, nothing stopped him from moving Court as appropriate and citing constructive dismissal.
47. If anything, the claimant moved the Court to challenge the suspension more than three (3) years after the fact. In fact, going by the record, this was after his resignation from Kiembeni Country Hotel. In all fairness, that is not the conduct of an employee who is on an indefinite suspension.
48. In light of the foregoing, it is my finding that the suspension of the claimant cannot be termed as wrongful, unreasonable and unfair.

Reliefs

49. It is not disputed that the claimant worked upto November 16, 2013 when he was placed on suspension. The respondent has not proved let alone suggest that it paid the claimant's salary for the duration worked. As such he is entitled to the same.
50. The claimant has also prayed for accrued annual leave, overtime, unpaid public holidays and Sundays worked. However, he has not particularized this claim by stating the specific days worked hence a justification for the same. Being a specific claim, the same ought to have been particularized.
51. I gather support from the determination in Rogoli Ole Manadiegi vs General Cargo Services Limited (2016) eKLR where the court expressed itself as follows;

“It is true the employer is the custodian of employment records. The employee, in claiming overtime pay however, is not deemed to establish the claim for overtime pay by default of the employer bringing to court such employment records. The burden of establishing hours or days served in excess of the legal maximum, rests with the employee. The claimant did not show in the trial court when he put in excess hours, when he served on public holidays or even rest days... he did not justify the global figure claimed in overtime, showing specifically how it was arrived at...”
52. In the circumstances, the claim for overtime, public holidays, Sundays and annual leave cannot be sustained.



Orders

53. In the final analysis, I dismiss the claim substantially and only award salary for 16 days worked, for the month of November, 2013, being Kshs 12,266.60. This figure shall be subject to interest at court rates from the date of filing the suit until payment in full.
54. There will be order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 23rd day of June 2022.

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STELLA RUTTO

JUDGE

Appearance:

For the Claimant In person

For the Respondent Ms. Muhalia

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

